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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE:NO |
| (2) | OF INTEREST TO OTHER JUDGES:YES |
| (3) | REVISED: YES |

24/02/2021

.....
SIGNATURE

.....
DATE

CASE NO: 407/2020

In the matter between:

BEKAPHI KETSHU MAGAGULA

Applicant

and

MDUDUZI COMFORT NGUTSHANE

First Respondent

REGISTRAR OF DEEDS: MPUMALANGA

Second Respondent

MASTER OF THE HIGH COURT

Third Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

- [1] This application traces its origins from the death of Mr Makhalatshi Jackson Ngutshane (“the deceased”). The deceased died intestate and was survived by the Applicant, his putative customary wife, two biological children, one of whom is the Respondent. The deceased also had two step children. One of those children pre-deceased him while the second is still alive. Amongst assets left by the deceased is a property described as Stand No: [...](“the property”). Following the deceased’s demise in 2014, the Third Respondent appointed the First Respondent as the representative of the late estate of the deceased.
- [2] In consequence of the First Respondent’s appointment as the representative of the late estate of the deceased, he successfully, ostensibly to the detriment of the Applicant, registered transfer of ownership of the property belonging to the late estate of the deceased in his name. The Applicant and deceased had lived together on the property from 1981 until 2014. The Applicant continues to occupy the property to date. Having registered transfer of ownership in his name, in 2019, the First Respondent commenced eviction proceedings against the Applicant.
- [3] The Applicant successfully resisted the proceedings to evict her. To bolster her triumph, she has now launched this application seeking relief in the following terms:
- 3.1 Setting aside the appointment of the First Respondent as the Master’s Representative in the estate of the late MAKHALATSHI JACKSON NGUTSHANE that is registered with the Third Respondent under reference number 837/2015;

- 3.2 Reversal of the registration of ownership of the house at [...], MPUMALANGA into the name of the First Respondent as recorded on Deed of Transfer [...] so that the property is returned to the deceased estate to be dealt with by a newly appointed executor;
- 3.3 The First Respondent be ordered to pay the cost of this application on the scale as between attorney and client including the cost of transfer of the property.
- [4] The Application is opposed by the First Respondent. The Second and Third Respondents are not opposing it. It is evident from the tenor of the application that they are not the intended targets but that they have been cited merely because they may be affected or have interest in the outcome of this judgment. Accordingly, I will henceforth refer to the First Respondent as the Respondent instead of the First Respondent.

FACTUAL MATRIX

- [5] The facts from which this matter emanates are largely common cause. However, what the parties make of those facts constitutes the essence of their dispute. The Applicant and the deceased met while they were living in Mbombela Township during the 1970's. According to the Applicant, she and the deceased married at the old Home Affairs building in Barberton in 1971. Present at the time of the marriage was her sister. Matters pertaining to *lobola* payment were only concluded in 1987. The occurrence of the marriage of the Applicant and the deceased in 1971 is confirmed by her sister in an affidavit while the finalization of the *lobola* is substantiated by the affidavits of the deceased's siblings.
- [6] Mbombela Township ceased to exist in 1981. All residents were moved to [...] Consequently, the Applicant, deceased and their two daughters (deceased's step daughters) IDA and RIEKIE), were allocated the house situated at Stand

[....]. To that end, the family was issued with a certificate and a permit by the then *apartheid* 'Bantu Administration Board of Eastern Transvaal'. The family has been residing on the property since. In the interim, Ida and the deceased died in 1979 and 2014 respectively. In 1998, RIEKIE decided to move out of the house leaving the Applicant alone.

- [7] The Applicant avers that it was not until April 2019 that she became aware of the Respondent's ownership of the property that had been her home for decades. This was confirmed in June 2019 when she was served with notice of application of her eviction from the property along with her tenants dubbed 'illegal occupants' by the Respondent. As the proceedings unfolded and the papers scrutinized, it became clear that the Respondent had applied for a letter of authority to the Master of the High Court in Pretoria in 2015.
- [8] In his application, the Respondent either inadvertently or deliberately omitted to mention the Applicant as the surviving spouse of the deceased. This fact is borne out by the information contained in the next-of-kin affidavit wherein the Respondent does not cite her name. It is common cause that the deceased lived and died in [...] and that the First Respondent's letter of authority was issued by the Master of the High Court in Pretoria. This was aside from the fact that by then Mpumalanga had its own Master of the High Court office in Nelspruit now Mbombela.
- [9] Registration of transfer of ownership of the property was never in either party's name because their occupation has always been through the permit issued by the authorities. Notwithstanding that the Respondent had never resided on the property during all the years, he still managed to register transfer of ownership into his name. It is not seriously disputed that the municipality value of the property was above R300 000.00 when the Applicant verified it on the last occasion.

ASSERTIONS OF THE PARTIES

- [10] The Respondent contends that as one of two biological children of the deceased and since the deceased and the Applicant were cohabiting concubines, he was entitled to be appointed as the Master of the High Court's representative of the deceased's late estate. Moreover, his right to register transfer of ownership of the property into his name had been supported by his biological sister. While he admits concubinage for the years alleged by the Applicant, he attaches no significant legal consequences flowing therefrom.
- [11] The Respondent challenges, albeit not in so many words, the allegations that the Deceased and the Applicant concluded a marriage relationship in Barberton in 1971. His main objection is that the Applicant claims that they did so at the old Home affairs in Barberton but she attaches no proof from Home Affairs. Furthermore, although she would have this Court believe that the second leg of *lobola* was concluded in 1987, the document intended to serve as acknowledgment of receipt of *lobola* firstly, does not bear the names of messengers from both families, secondly, it does not show what the agreed amount on *lobola* was and thirdly, how much was initially paid towards *lobola*.
- [12] The Applicant has furnished names of her siblings and those of the deceased as witnesses to their marriage whereas custom prescribes that it is aunts and/or uncles who would be involved in matters concerning *lobola* negotiations. Besides, the application for the registration of the ostensible marriage was only made in 2019 after he had applied for the applicant's eviction from the property. The Respondent concludes from the above that there was therefore no marriage between the parties.
- [13] The Respondent is also adamant that he is entitled to inherit the intestate estate in terms of the provisions of section 1(1)(b) of the Intestate Succession Act No 81

of 1987 (“the Intestate Succession Act”). In essence, the provision is that where a deceased person is survived by a descendant and not a spouse, the descendant is entitled to inherit the deceased estate. Believing that the Applicant was not married either customarily or civilly, the Respondent, maintains that neither she nor her daughter is competent to inherit.

- [14] The Respondent contends that if this Court accepts that a marriage between the deceased and Applicant was in place as alleged, the court should find that the marriage was out of community of property as wives, in customary unions entered into before the commencement of the Recognition of Customary Marriages Act No 120 of 1998 (“Recognition Act”) had no joint ownership of property with their husbands. The provisions of section 7(1) of the Recognition Act are applicable to such marriages and the marriage claimed by the Applicant falls under this category.
- [15] Given the above, the Applicant would only be entitled to inherit a child’s share in terms of Section (1)(1)(c) of the Intestate Succession Act, which provides that a spouse in the position of the Applicant would be entitled to inherit the whole amount set by the Minister from time to time or if the deceased’s estate is larger than the amount so determined by the Minister from time to time, a person in the position of the Applicant shall inherit a child’s share of the amount in excess.
- [16] The Respondent asserts that there exist genuine disputes of fact that go to the heart of the alleged marriage. This is in the light of the Applicant conceding that the purported marriage was not registered and there being no proof of any payment of *lobola*. The court should accordingly find that no such marriage ever existed.
- [17] Conversely, the Applicant asserts that available evidence demonstrates that a customary marriage, albeit not registered, existed between the deceased and Applicant. The Applicant is specifically mentioned by name by the authorities in

the certificate concerning the deceased's property at [...] as the wife of the deceased. Furthermore, at no stage did the Respondent live in the property since allocation to the deceased and Applicant.

[18] Apart from the fact that the Respondent had knowledge of the deceased and Applicant's concubinage for all those years, he would not mention her as a surviving spouse in the 'next of kin affidavit'. The Applicant submits that had the Master of the High Court been aware of her existence, the Respondent would not have been appointed as the Master's representative in the estate late of the deceased.

[19] The office of the Master of the High Court: Mpumalanga in Mbombela, opened its doors to the public in 2012. Thus, when the deceased died in 2014 it was in operation already. Given those facts, the Applicant finds it curious that instead of opening an estate late file of the deceased in Mbombela with the Master of the High Court, the Respondent deliberately chose to open it with the Master of the High Court in Pretoria.

[20] The person who repudiates the Applicant's inheritance (the Respondent) does not appear anywhere on the certificate in support of the deceased's occupation of the property. The Deceased was the holder of the Certificate but was not the owner of the property. The deceased became entitled to acquire ownership of the property through the introduction of the *Upgrading of Land Tenure Rights Act 112 of 1991*.

[21] Other than the above, the Applicant contends that since she has been in occupation of the property for more than 30 years, in terms of Section 1 of the Prescription Act No. 68 of 1969 ("the Prescription Act"), she has automatically acquired ownership. The Applicant has acquired 50% of the property because she has spent most of the period in excess of 30 years living in a marriage in community of property with the deceased.

ISSUES

[22] It is apparent from the above facts and arguments of the parties that this Court ought to decide on the following:

22.1 Were the deceased and Applicant customarily married?

22.2 Assuming that they were, what are the legal proprietary implications that flowed therefrom insofar as intestate succession is concerned?

22.3 Does Section 1 of the Prescription Act find application in this matter?

22.4 Are there issues that require referral to oral evidence caused by disputes of fact?

LEGAL FRAMEWORK

[23] Customary marriages are governed by the Recognition Act. As such, any discussion on this subject should begin with the preamble to the Recognition Act especially as it sets the tone in which the inequalities, inequities and indignities to which customary wives were subjected ought to be addressed. The relevant portions of the preamble provide as follows:

“... to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages;”

[24] Section 2 of the Recognition Act lays down that: *“A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.”*

[25] Section 4(9) states that failure to register a customary marriage does not affect the validity of that marriage. Section 6 provides:

“A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.”

[26] Section 7 is headed, Proprietary consequences of customary marriages and contractual capacity of spouses, and it states:

“(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.

(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.”

EVALUATION

EXISTENCE OF CUSTOMARY MARRIAGE

[27] The Respondent challenges the fact that the Applicant and deceased ever

concluded a marriage but admits that they had lived together for approximately 43 years before the demise of the deceased in 2014. It is common cause that thereafter the Applicant continued to live on the property to date. The existence of the customary marriage between the two parties should not occupy this Court for long because there are several pieces of evidence to which to turn to determine its existence.

- [28] Firstly, the certificate issued in terms of Proclamation 293/1962, Chapter 2, Regulation 8(1) in terms of the Native Trust and Land Act 18 of 1936 which provided for the establishment of the kind of township that [...] was during 1981 specifically cites the Applicant as the wife of the deceased. It must be right to infer that prior to issuing the certificate and populating it with information, the authorities would have taken the trouble of establishing the marital status of the Applicant and deceased because the system had entrusted them with such duty. They investigated and were satisfied that the Applicant and deceased were customarily married.
- [29] The fact of the existence of the customary marriage is supported even by people who would have ordinarily declined to side with the Applicant. These are the cousin of the deceased and his sister, Sambile Beauty Magagula. Why would they, as blood relations of the deceased, confirm that the deceased and Applicant were married when they were not. In the circumstances, it is reasonable to conclude that the deceased and Applicant were in fact customarily married.
- [30] It is inconceivable that the Applicant and deceased could have lived together for 43 years without a marriage. Even if they were not married, it is this Court's opinion that it will be in the interest of fairness and justice that the relationship between them be recognized and that certain proprietary consequences should flow therefrom. The reason for this is plain – the lives of people who had lived together for that long would be inextricably connected in so many ways. One

matter that comes to mind is ownership of their properties. The parties would have bought and sold properties together. As such, their lives would be intertwined and to undo it upon the death of the other would in this instance amount to total injustice.

[31] I note the criticism of the Respondent that the court cannot 'turn a blind eye' to the absence of certain of the requirements necessary for the existence of a valid customary marriage. The Respondent points to lack of any form of proof from the Old Home Affairs in Barberton verifying the conclusion of the marriage between the parties. Furthermore, argues the Respondent, the Applicant mentions her siblings and those of the deceased as witnesses of the customary marriage when it is the uncles and aunts who would usually act as delegates in such matters.

[32] Rigorous adherence to all the requirements of a customary marriage may, in certain instances, result in absurdity. The Applicant and deceased have spent 43 years living, for all intents and purposes, as husband and wife yet upon one of them dying, the survivor is still expected to produce *lobola* receipts that were prepared approximately 50 years ago. As though that was not sufficiently farcical, the Applicant is expected to remember who negotiated *lobola* and how much was paid all those years back.

[33] All this, in the face of relatives of the deceased, his sister and cousin, confirming that the parties lived together as husband and wife. Why would they recognize the deceased's marriage to the Applicant if it did not happen? Confirmation of the marriage by the deceased's step daughter, Riekie, and the Applicant's sister although not independent witnesses, is significant.

[34] It cannot be treated insouciantly especially in circumstances where it corroborates what has already been verified by the deceased's own relatives. The requirements to which the Respondent refers and with which he expects

compliance pale into nihility when compared to the 43 years of the parties' life together. This Court's assessment of the facts and circumstances thus leads to the inexorable conclusion that the parties were customarily married.

PROPRIETARY LEGAL CONSEQUENCES OF A CUSTOMARY MARRIAGE

[35] Having quoted the preamble *supra*, I should immediately state that Section 7(1) of the Recognition Act has been declared unconstitutional. The current position is that subject to Parliament amending the legislation, the order of the Constitutional Court in **Gumede v President of the Republic of South Africa and others**¹ governs the legal position. The application of Section 7(1) in Gumede would have meant that the parties' customary marriage would have been subjected to the dictates of the discriminatory Zulu customary laws, which made a customary wife before the Recognition of Customary Marriages Act incompetent to lay a claim on the family property either during the subsistence thereof or upon dissolution. I must immediately add that the Zulu customary laws in this context are not distinctive as they are echoed almost throughout the South African legal systems regulating customary marriages.

[37] The applicant in the Gumede case approached court contending that Section 7(1) was unconstitutional insofar as it sought to distinguish between the patrimonial consequences of monogamous customary marriages depending on whether they were entered into prior or after the introduction of the Act. The basis of the argument was that the distinction amounted to unjust discrimination founded on gender and race against customary wives. The court proceeded to hold that these provisions discriminate on the basis of gender as only women in a customary marriage are subject to these unequal proprietary consequences. The provisions were as such, declared discriminatory and indefensible.

¹ 2009 (3) SA 152 (CC)

[38] The court also held that the subjection of a customary wife in KwaZulu-Natal to her husband's marital power, the husband's exclusive ownership and control of all family property unfairly discriminated against women on the ground of their gender. Customary wives were on the basis of those provisions subject to the unequal consequences of 'old' customary marriages as they were considered incapable of holding or controlling, or unfit to hold or control, property. In that manner, the customary wives are rendered vulnerable because they are stripped of their dignity, disadvantaged and dependent. Holding that all customary marriages would henceforth be in community of property regardless of the date of their conclusion, the court stated at Paragraph 51:

“For several good reasons, it would not be just and equitable to limit the retrospective effect of the declaration of invalidity. Suffice it to point to three reasons only. First, the Recognition Act has provided for customary marriages since 15 November 2000 to be in community of property. It would not be just and equitable to order that the declaration of invalidity should have a prospective effect only, when the equality challenge relates to pre-recognition marriages. In other words, a prospective order would not grant any, or effective, relief to wives in marriages concluded before the start of the Recognition Act. Second, whilst the Recognition Act is remedial in purpose, the provisions of so 7(1) and (2) of the Recognition Act are improperly under-inclusive. The discrimination they spawn is so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order we are to make, or even by suspending the order of invalidity to allow parliament to rectify the error. Third, the retrospective regime which the order would permit is properly aligned to the prospective regime created by parliament in the Recognition Act in relation to post-recognition marriages. The effect of the order we are to make is that all customary marriages would become marriages in community of property. The recognition of the equal worth and capacity of all partners in customary marriages is well overdue and no case has been made out as to why it should be delayed any further.”

[39] Counsel for the Respondent would, the decree of the court in Gumede at Paragraph 51 *supra* notwithstanding, have this Court believe that the unconstitutionality of Section 7(1) means that the old customary law position still pertains. I will for now assume that Counsel for the First Respondent was oblivious of the outcome of the Gumede judgment and its retrospectivity on all customary marriages being in community of property. The Gumede case was referred and confirmed in another Constitutional Court case of **Ramuhovhi and others v President of the Republic of South Africa and others**². Accordingly, I am bound to follow in the footsteps of the Constitutional Court and hold that the marriage between the parties was one in community of property it being immaterial whether it was registered or not.

ACQUISITION OF OWNERSHIP THROUGH PRESCRIPTION

[40] Section 1 of the Prescription Act provides that 'Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.' Section 20 of the same Act states that 'in so far as any right or obligation of any person against any other person is governed by Black law, the provisions of this Act shall not apply.'

[41] The Applicant argued that even if this Court were to rule that she was not customarily married to the deceased and that the deceased's estate could not devolve upon her, she would still be entitled to ownership of the property as she has been in occupation of it for more than 30 years. In view of this Court's decision on the existence of the customary marriage between the deceased and Applicant, this Court is not categorically required to express any opinions on the

² 2018 (2) SA 1 (CC)

subject. Perhaps it is best left to a more suitable moment in the future when another court becomes seized of the subject.

DISPUTES OF FACT

[42] It would appear that the Respondent thinks that disputes of fact would suddenly materialise by simply wishing them. That cannot be so and it is fallacious. Disputes of fact must be *bona fide*. I am reminded in this regard of what the Supreme Court of Appeal said at Paragraph 12 of **Wightman v Headfour (PTY) LTD**³

*“Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C**. See also the analysis by Davis J in **Ripoll-Dausa v Middleton NO 2005 (3) SA 141 (C) at 151A-153C** with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)”*

[43] The disputes of fact to which the Respondent refers is his contestation of the parties’ customary marriage. It has been demonstrated that contrary to the Respondent’s belief, the deceased and Applicant were married. The fact that the Respondent disagrees does not bring about genuine disputes of fact. Accordingly, there is no merit in the Respondent’s assertion concerning disputes of fact and it is rejected.

³ [2008] 2 All SA 512 (SCA)

[44] In consequence of the finding that there was a customary marriage between the Applicant and deceased and that there are proprietary consequences that flow therefrom, I see no need to deal with how the deceased's estate is to devolve upon his survivors. That is left to the relevant Master of the High Court to deal with. In the premises, I regard the order below as appropriate.

ORDER

- 1 The appointment of the Respondent as the Master's Representative in the estate of the deceased that is registered with the Third Respondent under reference number 837/2015 is set aside;
- 2 The registration of ownership of the house at [...] MPUMALANGA into the name of the First Respondent as recorded on Deed of Transfer [...] is reversed and the property is returned to the deceased estate to be dealt with by a newly appointed executor executrix;
- 3 The First Respondent is directed to pay the costs of this application.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 24 February 2021 at 10:00.

APPEARANCES:

**Counsel for the Applicant:
Instructed by:**

**Mr MG Boshoff
Tollig Attorneys**

**Counsel for Respondent:
Instructed by:**

**Adv K Shai
BV Mbungela Attorneys**

**Date of Hearing:
Date of Judgment:**

**10 December 2020
24 February 2021**