

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: HCAA14/18

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE <u>29/10/2019</u> SIGNATURE <u>Ms. M. M. M.</u>	

In the matter between:

NKHANGWENI GLADYS LEBESE

APPELLANT

And -

SHILAVI MICHAEL LEBESE & 02 OTHERS

RESPONDENT

JUDGEMENT

CORAM: MG PHATUDI J (KGANYAGO J et MADAVHA AJ)

[1] This appeal is directed against a judgment of Semenya J sitting as a court of first instance, Limpopo Local Division, Thohoyandou, in terms of which the learned Judge dismissed the appellant's application to declare the marriage between the first and second respondents null and void and furthermore dismissing with costs (03.05.2016 and 05.09.2017) application for the expunging of the record of the marriage between them from the official records of the third respondent. I deem it convenient to refer to the parties as cited in the court below. Leave to appeal was granted at the instance of the *court a quo*.

[2] On or about 19 March 1983, the appellant and the First respondent allegedly entered into a civil marriage the existence of which was evinced by a document annexed to her founding affidavit (FA") marked "NGL"¹

I shall revert later in this judgment to deal with the evidential value and authenticity of this document which is the hard core of the subject matter in this appeal.

¹ Record, ap11

- [3] It appears that prior to their civil marriage referred to, the parties were previously partners in a customary marriage out of which union two (2) children were born, and having deserted the parties' common home the appellants alleged that three (3) more children were born during the subsistence of the parties' civil marriage all of whom assumed the first respondent's surname.
- [4] According to the appellant she was expelled by the first respondent from their common home in 1991 in what appears to be a constructive desertion. The demand by the first respondent to have restoration of "Lumalo" (bride price in Tshivenda) or "Lobola" was indicative of alleged expulsion. While *in Limbo* having deserted the common home, she heard through the *grapevine* that her husband, (first respondent) was cohabiting with another woman, the second respondent, but did not bear personal knowledge if they formally got married to each other or not.
- [5] In order to ascertain the legal status between the first respondent and herself, the appellant on or about 08 June 2015 approached the local mobile office located at Ha-Mulima Traditional Council to obtain a printout copy of the parties' marriage certificate, but was however informed by one of the officials that her husband, first respondent, had already concluded a civil marriage with the Second

Respondent. Subsequent thereto she approached Makhado's Home Affairs department office to apply for a printout copy of her marriage certificate and upon uplifting the same, she consulted her attorneys of record Mr S.O Ravele ("Ravele") for legal advice.

It was against the foregoing backdrop that the applicant launched the application in the court below which was opposed by both the first and second respondents only. The third respondent chose to abide the Court's decision.

IN THE COURT A QUO:

- [6] In the court below it was submitted on behalf of the appellant that there exists a civil marriage between herself and the first respondent which marriage was solemnized on 19 March 1983, upon which their earlier customary marriage dissolved.
- [7] The first respondent, conversely, denied ever entering into a civil marriage with the appellant as alleged or at all and, furthermore, disavowed the validity of or existence of the marriage certificate between them. (annexure "NGL") as being fraudulently obtained.
- [8] The first respondent, in particular, raised in his answering affidavit ("AA") point that their existed material disputes of fact that could not be adjudicated on paper (on affidavit) which the appellant should

have foreseen could arise. The disputes in the main, related to the parties alleged civil marriage and that the other three (3) children who were procreated while they were estranged from each other, where not his children. What however, remain common cause facts ultimately was that the parties had separated from each other extrajudicially during 1991.

- [9] It is further common cause as the first respondent conceded in his "AA" in paragraph 9² that he married the second respondent by civil rights during the year 2000.

(I must point out that annexure "NGL"²) relied on in his "AA" is badly illegible with no date visible.)

- [10] Furthermore, it was submitted on behalf of the first responded that as a signification of the breakdown of their marriage relationship that in any event, the lobola he had paid in respect of the appellant was returned to her family. It was for that reason that he proceeded to marry civilly, the second responded.

Of significance was an extract in paragraph 10 of his answering affidavit that: -

² Ibid p15 "AA" Record.

"It is not in dispute that lobola in full has been returned. From the date which lobola was returned our customary marriage came to an end. I did not have to institute divorce proceedings. The traditional council declared our marriage to be dissolved."

Furthermore, the first respondent submitted in paragraph 15 that:

"I admit that civil marriage is monogamous. I entered into the marriage with the second respondent while I divorced the applicant and the circumstances under which we divorced are set out above" (Para:10).

[11] I shall revert to the implications of these submissions when I evaluate the evidence as it appears on record.

[12] In reply to these submissions, the applicant reiterated the validity of her civil rights matrimony to first respondent. In support thereto, she annexed "NGL²" being an extract of her identity document issued to her by the then independent Republic of Venda Government purporting to record her date of marriage on 19 March 1983. This document appears to be issued during 1983 by the Department of Home Affairs, District Representative, Mulima. I shall deal with the legal status of this annexure shortly hereunder.

[13] The applicant furthermore submitted that to her knowledge, their marriage bond and to the present juncture has not been dissolved by a decree of divorce by competent court of law, and consequently, the Second respondent could not have validly entered into another

civil marriage, retorted the Applicant that such subsequent marriage is a nullity from origin.

[14] From the foregoing submissions and the extent to which the parties provided varied documentary evidence indicated above, it follows that the learned Judge was faced with two mutually destructive versions. Found herself constrained in this situation, the court below in an abridged judgment delivered on 06 May 2016 Semenya AJ (As she then was) held:

“It is evident that there is a dispute of fact between applicant and 1st respondent with regard to the validity of the alleged civil marriage and marriage certificate attached to the founding affidavit.

“In the premise I make the following order:

1. *An authorised and relevant official of 3rd respondent is ordered to appear in court on a date to be determined by the Registrar to come and give oral evidence on the following aspects:*
 - 1.1 *The validity of any of the two marriage certificates*
 - 1.2 *The absence of the identity number of 1st respondent on the Marriage certificate that purports to prove marriage between applicant and 1st respondent,*
 - 1.3 *The relevancy of the date of issue of the certificate referred to in 1.2 above”*

[15] From a closer reading of the record it seems plain that neither counsel for either side ever sought to have an official from the Third respondent to be called as a witness for the parties in the event the learned Judge found that there existed disputes of fact as she had specified. From the record, no doubt, none of the parties applied for the calling of such a witness. As a general rule, in civil cases, the court has no power to call a witness without express consent of the parties. The issue must have been sufficiently canvassed with counsel before doing so, to gauge their views or objections, if any.

This was not done by the learned Judge, which was what as counsel for the Appellant submitted, an irregularity. I agree entirely with this submission. The reasons will become more apparent in the course of this judgment.

JUDGMENT IN THE COURT BELOW:

[16] The *court a quo* after having heard the testimony of the witness she *meru muto* called from the office of the third respondent remarked in her judgment [paragraph 15] that: -

“[15] In view of the existence of the two marriage certificates, the court ordered that an official of the third respondent should be summoned to come and explain the absence of the first respondent’s identity number on “NGL”. I need to state that it

appeared that the official came to court ill-prepared in that she conceded that she did not have insight into registers to determine whether “NLG1” exists or not”.

[17] Notwithstanding the sentiments the learned Judge expressed in paragraph 16 above, she nonetheless proceeded to hold in paragraph [19] that: -

“[19] The production of a marriage certificate print-out by the applicant tends to provide evidence that a marriage ceremony between her and the first respondent was performed. The applicant’s contention that the first respondent bears the onus to prove that the marriage is invalid, is correct.”

[18] Flowing from this factual finding one remain perplexed as to how at the end, the learned Judge without any sound basis dismissed the application as it did.

My view finds refuge in the fact that the court below erroneously based its findings or conclusion upon a statutory rebuttable presumption of law created in terms of section 237 (1) of the Criminal Procedure Act, 1977, as amended,³ which in my view, finds no application in civil proceedings. In *casu* the matter had no connection with any criminal proceedings for the court to have held that; -

³ Act 51 of 1977, as amended

“the presumption is therefore applicable in both criminal and civil matters”.⁴ Moreover, there was no factual basis for the learned Judge to have found in [22] that:

“[22] The only logical inference that can be drawn from the evidence of applicant, together with her conduct, is that there was no record of her civil marriage with the first respondent in the records of the third respondent as at 8 September 2015.”

[19] The “logical inference” the learned Judge referred to is, with respect, not supported by the objective facts.

If the *court a quo* had indeed taken into account, the appellants’ replying affidavit in its judgment, it should have been impelled to recognise an extract of her identity document issued around 1988 *prima facie* indicating 19 March 1983 as date of her civil marriage.

Nowhere in the judgment of the *court a quo* is there a glimpse that the learned Judge made an attempt to have had regard to the evidential value of this document and what it purports to convey and failure to have done so was a misdirection.

THE LEGAL ISSUES IN THIS COURT

[20] The appellant raised the following issues for determination on appeal.

⁴ Ibid, P70, Record

- 20.1 Whether or not there existed a valid civil marriage between the appellant and the first respondents;
- 20.2 Whether the *court a quo* had adopted the proper approach when it *mero muto* called a witness without request of counsel;
- 20.3 Whether the *court a quo* had adopted the proper approach when faced with two diametrically opposed destructive versions; and
- 20.4 Whether the *court a quo* was correct in having found the existence of fraud absent objective evidence in support of that adverse finding.

[21] I now shall proceed to examine each submission seriatim follows:

Whether or not there existed a valid civil marriage between the appellant and first respondent.

- 21.1 In support of her claim to be lawfully married to her estranged husband, the appellant submitted in evidence annexure “NGL1” purporting to be an extract of her marriage certificate.

This document was *ex facie* issued on 18 June 2015 by the officials of the District Manager Makhado under the aegis of the third respondent.

The appellant moreover also annexed “NGL²” to her replying affidavit to enhance the evidential value of the documents evincing her marital status.

21.2 The general rule is that a party who tenders a document must ordinarily adduce evidence to satisfy the court of its authenticity. This will, by and large, mean proving that the document was written, executed or made by the person who purported to have done so by way of *viva voce* evidence. However, to this rule there are exceptions as there are in law certain documents that are admissible on their mere production without proof of their authenticity, for instance copies of public documents signed by the officer in whose custody the original is entrusted⁵.

21.3 Section 3 of Act 45 of 1988⁶ has revolutionised our law of evidence regarding the rule against hearsay. This

⁵ D.T Zeffertt, A. Paizes – “Essential Evidence” (2010) 2019 reprinted edition. P265-266. See also, Section 231 of the Criminal Procedure Act, 1977.

⁶ The law of evidence amendment Act, 1988

section rids our law of the rigid rule-and-exception approach that created problematic interpretations at common law. The section bestows on the courts the power to admit hearsay evidence. In **McDonald**

Corporation v Joburgers Drive Inn (Pty) Ltd & Another⁷ it was held that the decision of the court on the admissibility of evidence is generally one of law as opposed to one of discretion.

In consequence, the learned Judge was obliged to make a decision to admit in evidence under section 3 of the said Act, an extract of both the appellant's marriage certificate and copy of her identity document that recorded the date of her marriage the more so that further evidence in this regard was adduced in her replying affidavit. This evidence was as the appellant Counsel correctly submitted, not accounted for by the *court a quo*.

2.4 For all these considerations the court *a quo* with respect should have found that there existed a valid civil marriage between the appellant and the first respondent.

⁷ 1997 (1) SA 1 (A)

This observation is particularly so in that there is no cogent evidence adduced that disproved on a balance of probabilities the existence of such a civil marriage, alternatively that such a marriage was dissolved by a decree of divorce.

2.5 Absent any credible evidence to the contrary, there was no sound legal basis for the court below to have found that annexure “NGL” (Extract of marriage certificate) was fraudulently obtained. What the first respondent had illustrated, conversely, by annexing “NGL²” to his answering affidavit (paginated page 20) at best was to show that his marriage “to the second respondent was concluded on or about 2000 (date/month not legible) being way after his civil marriage to the appellant on 19 March 1983, roughly 17 years after. In the premise I am of the view that counsel for the appellant was perfectly correct in his submission that the civil marriage between the appellant and the first respondent is extant and therefore remain valid.

Whether the court a quo had adopted a proper approach when it *mero motu* called a witness without counsel’s consent.

[21] Counsel for the appellant correctly submitted, in my view, that it was an irregularity for the learned Judge to have singularly invited an independent witness from the department of the third respondent to testify when none of the parties sought to do so.

As already shown in paragraph [15] *supra*, the decision by the court *a quo* to have called a witness *mero muto* in motion or in civil proceedings was irregular.

[22] **in Rowe v Assistant Magistrate, Pretoria⁸ the court held; -**

“In a civil action the parties lay before the court what evidence they think is necessary to support their respective cases, and if, on determining the case, a magistrate or Judge is unable on the evidence before him to come to a decision, or finds it difficult to decide where the truth lies, I do not think of calling a witness who had not been called by either of the parties in order to make his task easier, or in his views, to do justice between the parties,”

In *casu*, the learned Judge clearly went against this well-established hallowed principle of adjective law, and thus her decision was an irregularity.

⁸ 1925 TPD P3 61 at 369

[23] The foregoing observation was reaffirmed by the Supreme Court of Appeal in the case of **City of Johannesburg Metropolitan Council v Ngobeni** where Mhlantla JA writing for the Full Bench stated at paragraph [39] as follows:

“In my view, the manner in which the witness, Maseko, was called was inappropriate. The Judge did not explain the purpose of calling this witness.... The trial Judge erred when he rejected the objections of the defendant’s counsel to his calling Maseko. In my view, the calling of this witness was an irregularity. His evidence is accordingly inadmissible.”

Whether the Court a quo had adopted the proper approach when faced with two mutually destructive versions:

[24] It is common cause that the *court a quo* found itself faced with two diametrically opposed versions at the hearing of the application proceedings brought by the appellant. As it were, the court below found that it could not properly decide the matter on paper which were of course fraught with material disputes of fact. That said, it seems to me that the proper procedure open was for the learned Judge to have decided in terms of rule 6(5)(g) of the Uniform Rules

of Court either to have dismissed the application or direct, if called upon to do so, that oral evidence be heard on specified issues with a view to resolving the dispute of fact, or it could have referred the matter to trial with appropriate directions as to pleadings or definition of issues, as the case may be.

- [25] On a semblance of the facts in this instance, it follows that the court below was faced with two mutually destructive versions.

The principle in instances such as these is that if neither party asks that the matter be referred for evidence or trial, the court will usually not do so on own accord.

- [26] Because the first respondent disputed the validity of his marriage to the appellant, it was he who carried the burden to rebut the presumption of its validity on a preponderance of probabilities. In *casu*, the court *a quo* held that “the applicant’s contention that the first respondent bears the onus to prove that the marriage is invalid, is correct.” (Paragraph 19).

It is quite intriguing that by the same token, the learned Judge found in paragraph [25] that the First Respondent has discharged the onus that rests on him to prove the presumption of the validity of his marriage to the appellant. This conclusion is, my view, paradoxical.

[27] Where therefore there are two conflicting versions, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It must accordingly be clear to the court of first instance that the version of the litigant upon whom the onus rests is a true version. In the instant case, the court below did not have the benefit to receive any credible evidence to support the first respondent's allegations denying his marriage to the appellant in which case the onus of rebuttal was thrust on him. The court a quo therefore did not follow the principles laid down by Eksteen JP in **National Employer's General⁹ v Jagers** where the learned Judge outlined the question of onus and the probabilities of the case to rebut the presumption of the validity of the marriage.

Whether the court a quo was correct in having found the existence of alleged fraud of the parties 'marriage:

[28] Counsel for the appellant submitted further that court below erred in having made a finding that annexure "NHL¹" being a copy of the

⁹ 1984 (4) SA 437 (E) at 440D

marriage certificate between the appellant and the first respondent was fraudulent, and therefore invalid.

I subscribe to this submission. Nowhere is it apparent from the record of the proceedings in the court below that the learned Judge ever had the benefit to hear any evidence in this regard, in particular, that the parties' marriage certificate was fraudulently obtained.

The official who was called by the court proffered a plausible explanation than the records of the former Venda Government were transferred to various offices of the present day department of Home Affairs whose public documents are these days electronically generated and one can therefore, imagine that previously no technology was in place to preserve public documents.

[29] It is trite law that a motion court should be loath to pronounce on disputed issues of fraud "without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth." Held Brand JA.¹⁰

There are in my view sound reasons why a motion court ought not to make findings of fraud on the basis of untested allegations on

¹⁰ See, *Prinsloo N.O and Others v Goldex (Pty) Ltd* (243/2011) [2012] ZASCA 28 (28.03.2012)

motion papers that were refuted on grounds that would not be described as far-fetched or untenable. The reasons indeed derive from many years of collective judicial experience and legal footprint left on the annals of legal history.

See also **Sewmungal and Another N.N.O v Regent Cinema**¹¹ where the court aptly dealt with the approach to be adopted when confronted with factual disputes arising from affidavit alleging fraud.

[30] In the premise I hold therefore that the court below misdirected itself when it found that the “evidence proves on a balance of probabilities that “NGL¹” is a fraudulent certificate, and is therefore invalid.” No evidence was adduced to bring to bear the finding of fraud in motion proceedings now appealed against. The first respondent, it appears from the record, failed to discharge the onus cast upon him to allege and show that not only was appellant’s marriage certificate fraudulent, but that even her identity document was similarly issued fraudulently.

[31] On a compendium of the facts in this matter, the appeal should succeed on the merits. In consequence If I may, I propose an order as follows:

¹¹ 1977 (1) SA 814 (N) at 819 A-C

ORDER:

The appeal is upheld to the extent that:

- (a) The decision of the *court a quo* in refusing to declare the marriage between the first and second respondents null and void is set aside and it is substituted with the following order;
- (b) “The civil marriage entered between the first and second respondents on 01 November 2000 is declared null and void as ab initio;
- (c) “The third respondent is ordered to expunge from its Register of marriages, the record of civil marriage between the first and second respondents.
- (d) The costs order made for 03.05.2016 and 05.09.2017 respectively are set aside.
- (e) Each party to pay its own costs.



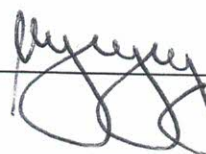
M.G Phatudi

Judge of the High Court

Limpopo Division

Polokwane

I agree



M.F Kganyago

Judge of the High Court

Limpopo Division

Polokwane

I agree



M.B Madavha

Judge of the High Court

Limpopo Division

Representations:

1. Attorneys for the Appellant : Mr S.O Ravele
Instructed by : S.O.Ravel Attorneys
2. No appearance : First, Second, Third Respondents
3. Date heard : 02 August 2019
4. Date delivered : 29 October 2019