



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NO: 259/2018

**Heard on: 18 May 2018
Delivered on: 17 August 2018**

- REPORTABLE: NO - CIRCULATE TO JUDGES: YES - CIRCULATE TO MAGISTRATES: NO - CIRCULATE TO REGIONAL MAGISTRATES: NO <u>17 August 2018</u> DATE	 SIGNATURE
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In the matter between:

**ELLEN NOMANGOMA PECIREP
KAMOGELO GAABATLHOLE
VILENCIA SETLHAMO**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT**

and

**LERATO VENETTA PHAKISA
MINISTER OF HOME AFFAIRS**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] This is an opposed application in terms of which the applicants seek the following order:

- 1) That the registration of the customary marriage between the first respondent and Moses Gobusamang Mojatau ("the parties") be cancelled;
- 2) That the second respondent be ordered to expunge the marriage of the parties from the marriage register;
- 3) That it be declared that the parties were not married to each other in terms of a customary union; and
- 4) That the first respondent be ordered to pay the costs of this application; alternatively, the first and second respondent, jointly and severally, be ordered to pay the costs of this application in the event the second respondent opposes same.

[2] On 13 November 2017 the second respondent issued a marriage certificate after registering a customary marriage between the first respondent and the late Moses Gobusamang Mojatau (hereinafter "the Deceased"), at the request of the first respondent. Both the application for and registration of the customary marriage were initiated and concluded after the Deceased had already passed away. The second respondent has given notice that it will abide by the Court's ruling.

[3] The applicants dispute the existence of the customary marriage on the basis that, *inter alia*, the Deceased never informed them of same.

[4] Both the first respondent and the applicants raised points *in limine* in terms of Rule 63 which they subsequently withdrew.

BACKGROUND FACTS

[5] The first respondent and the Deceased were involved in a relationship and stayed together from about 2010 or 2012 until the date of the Deceased's passing.

[6] The applicants are the only children of the Deceased who passed away on 8 June 2017 following what has been described as a short illness.

[7] During May 2017 the Deceased fell ill from suspected liver cirrhosis and was subsequently admitted at the Gariep Mediclinic in Kimberley for treatment. He was discharged from the hospital on or about 22 May and was driven home by the first respondent who was in the company of Mr Martin Mojatau, the Deceased's cousin.

[8] On 25 May 2017 the first applicant, who had returned to the Republic of South Africa a day before to visit the Deceased, obtained an Interim Protection Order ("IPO") against the first respondent from the Kimberley Magistrate's Court to take the Deceased back to the Gariep Mediclinic. The reason for the application for the IPO was firstly, the allegation that the first respondent was not willing to take the Deceased, whose condition was described as critical, back to the hospital and secondly that the first respondent was also

refusing the applicants access to the Deceased. The Deceased's condition deteriorated and on 7 June 2017 he passed.

[9] Following the Deceased's passing, the first respondent launched an urgent application with the Kimberley High Court under case number 1368/2017 wherein by agreement it was ordered that the first respondent bury the Deceased.

[10] It is in this application that the first respondent alleges that on 25 May 2017 she attended to the second respondent's offices to confirm her status as the Deceased's customary wife. This visit was prompted by the difficulties she was experiencing to visit the Deceased at the hospital since the applicants were denying her access to the former. Upon visiting the Kimberley Magistrate's Court, a clerk thereat advised her to approach the second respondent's offices to have her customary marriage registered with the second respondent.

[11] The first respondent acted upon the said advice which thus culminated in the second respondent registering the said customary marriage now being at the center of dispute. She appeared before the latter's registering officer in the company of the Deceased's cousin brother, Mr Mothobie and her mother since these two were also present during the *magadi* negotiations.

SUBMISSIONS BY APPLICANTS

[12] The applicants dispute that the first respondent and the Deceased concluded a valid customarily marriage in December 2014 which led to its subsequent registration in November 2017 by the second respondent. They submit that despite their admission that

failure to register a customary marriage does not *per se* necessarily render it invalid in terms of the Customary Marriages Act 120 of 1998 (“the Act”), the fact remains that *in casu*, the parties failed to comply with customary law. They further submit that the Deceased would have informed them of the existence of such a marriage in the event there was one, given the fact that they were in a good relationship with him. They however admit that there was an instance in 2014 when the Deceased informed them that he had considered marrying the first respondent in terms of custom, but then decided against it.

[13] They argue that the registering officer did not have the authority to register the said marriage given the lengthy period that had elapsed after the alleged conclusion of same. They argue further that the registering officer did not have the relevant facts to satisfy himself of the existence of the said alleged valid marriage, especially in the absence of their confirmatory affidavits regarding same. They argue that the consequences of the marriage certificate issued by the second respondent are dire considering the fact that the first respondent will be deemed as having been married to the Deceased in community of property, thus entitling her to half the joint estate of the parties. They submit that this application must be viewed in light of the above fact.

SUBMISSIONS BY THE 1ST RESPONDENT

[14] The first respondent submits that she and the Deceased concluded a valid customary marriage which was subsequently registered by the second respondent. She submits that the applicants were aware of the fact that the Deceased had paid *magadi* for her since when she made this allegation in her urgent High Court application, they never

disputed it. She submits that the fact that the applicants were not involved in the *magadi* negotiations is in terms of the customary traditions. She further submits that from the Deceased's family side it was Mr Mothobie who is the Deceased's cousin brother who was present, and her mother from her family side and her uncle.

[15] She further submits that during the *magadi* negotiations, the Deceased's family had agreed to pay R40 000-00 in cash, R20 000-00 of which was paid on 6 December 2014 when the traditional ceremony took place. The balance of R20 00-00, she submits, was paid electronically on 1 March 2015. She was then handed over to the Deceased's family on 7 March 2015.

[16] It was submitted on behalf of the first respondent that the reason why the parties did not register their marriage in terms of the law is due to the fact that they did not obtain any legal advice in respect of the registration of their customary marriage. It was further submitted that the parties had also intended to get married in terms of civil law in November 2017.

ISSUES FOR DETERMINATION

[17] Based on the above, the issues for determination are the following:

1. Whether on the balance of probabilities, the first respondent and the Deceased concluded a valid customary marriage on 6 December 2014; and

2. Whether the second respondent's registering officer, before registering and issuing the customary marriage certificate between the parties, had considered and satisfied himself of all the relevant facts.

THE LAW

[18] Sections 3 and 4 of the Customary Marriages Act 120 of 1998 ("the Act") provides the following:

"3. Requirements for validity of customary marriages.-

(1) For a customary marriage entered into after the commencement of this Act to be valid-

(a) The prospective spouses-

(i) Must both be above the age of 18 years; and

(ii) Must both consent to be married to each under customary law; and

(b) The marriage must be negotiated and entered into or celebrated in accordance with customary law..."

4. Registration of customary marriages.-

(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering

officer may require in order to satisfy himself or herself as to the existence of the marriage.

(3) A customary marriage-

(a)

(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(4) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage , any lobola agreed to and any other particulars prescribed.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5) (a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.

(b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(6).....

(7) *A court may, upon application made to that court and upon investigation instituted by that court, order-*

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

(8) *A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.*

(9) *Failure to register a customary marriage does not affect the validity of that marriage*".

ANALYSIS

[19] As a starting point I must point out that I do not fully agree with the submission by the first respondent's counsel that section 4(5)(a) of the Act entitled the first respondent to apply to the registering officer as she did by enquiring into the existence of her marriage. It is my considered view that section 4(5)(a) provisions are intended for third parties whereas spouses *per se* can avail to themselves the provisions of section 4(2) of the Act instead.

[20] The issues this application raise are to be considered in light of the relevant provisions of the Act and the facts made by the parties *in casu*. This therefore raises a

further question as to which version between the parties' is more probable. The nub of the applicants' argument is centered around what the first respondent stand to gain patrimonially in the event this application is dismissed since the latter will invariably be entitled to half the parties' joint estate.

[21] Regarding the question whether the parties did hold a traditional ceremony on 6 December 2014 at the instance during which the question of *magadi* were being negotiated, I am persuaded that the first respondent's version is the more probable one. I find the applicants' contrary argument assailable given their concession that in terms of tradition, as children of one the spouses involved, they are barred from attending the negotiations. This finding finds further traction in the fact that the Deceased's family was also represented by his cousin brother, Mr Mothobie and further that their counsel could not provide the court with one reason why Mr Mothobie would avow the conclusion of the parties' customary marriage if it did not exist.

[22] Regarding the question whether the parties' marriage satisfies all the customary law requirements for it to be deemed as a valid customary union, I am of the view that it does despite the applicants' contention that the agreed payment of the *magadi* in instalments was not in accordance with the law. My view is that like any other contract, to the extent that the requirements are not peremptory, the parties would be free to modify the said terms to meet their respective circumstances. It is my considered view that the fact that the parties agreed to a specified *magadi* payment plan suffices as meeting a customary law requirement regarding the *magadi* issue.

[23] Regarding the question why the first respondent would have waited to have the customary marriage registered only until the Deceased was critically ill, I am satisfied with the reason proffered by the first respondent that neither herself nor the Deceased knew that there was such a requirement. I am of the further view that since the Act did not prescribe the period after which such application for registration should not be entertained

by the registering officer, that such silence can be construed as a discretion being left entirely to the registering officer as to whether or not he is satisfied regarding the reasons for the delay.

[24] Regarding the question whether the second respondent's registering officer had satisfied himself with all the relevant facts which led him to register the parties' customary marriage, I am satisfied that he did. The fact that he did not seek the applicants' confirmatory affidavits is, in my considered view, immaterial since by their own admission, they did not even form part of the Deceased's family delegation regarding the *magadi* negotiations. It therefore goes without saying that the applicants would not have been of any assistance in the event they were approach for confirmation or clarity purposes. To the extent that the persons who were present during the *magadi* negotiations were also present when the registering officer was considering the registration application, *prima facie*, indicates that the former had complied with his statutory obligations in this regard.

[25] Taking into account all of the above, I am satisfied that on the balance of probabilities, the parties concluded a traditional ceremony on 6 December 2014 and that Mr Mothobie, the first respondent's mother and her uncle were part of the alleged *magadi* negotiations. This view is arrived at considering also the fact that a copy of a signed document alluding to the conclusion of such a ceremony between the parties, the agreed payable *magadi* and the advance payment of R20 000-00 formed part of the documentary proof adduced by the first respondent. The said document also bore a signature purporting to be that of, *inter alia*, the Deceased. It is important to note the applicants never placed in dispute the said signature as not being the Deceased's.

[26] I further find as assailable the submission on behalf of the applicants that unless the parties' marriage is declared invalid and subsequently expunged, that same will invariably lead to an injustice due to the fact that the first respondent will be unduly benefitted by inheriting half the joint estate of the parties. The reason is for this view is that the determination of whether a customary marriage was entered into and if so, its validity, can never be premised on the patrimonial consequences.

[27] Furthermore, even after the factoring in of, *inter alia*, the alleged disputed accounts regarding the first respondent's attitude towards the applicants in the weeks leading to the Deceased's passing, which has not been proven, same does not take the validity or otherwise of the parties' marriage any further. I am of the further view that the applicants' submission of the unlikelihood regarding the fact that neither the first respondent nor the Deceased, who was an intelligent and an educated professional person, would not have known that their alleged marriage had to be registered is equally meritless since the registering officer was satisfied with such an explanation.

[28] I am further satisfied that the applicants, on the other hand, have failed to place any evidence before me to refute the *prima facie* proof of the conclusion of a valid marriage between the parties.

[29] The above findings are arrived at despite the alleged contradictory allegations by the first respondent and Mr Mothobie regarding how much and when the *magadi* were paid

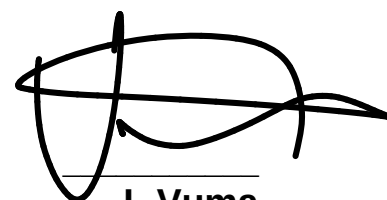
by the Deceased, which contradictions I find to be immaterial. As stated above, the fact that the parties had consented to the marriage and that in accordance with customary law, they had agreed, *inter alia*, with regard to the *magadi* payable, suffices to constitute a valid customary marriage.

[30] In the premises the application ought to be dismissed with costs.

[31] In the result I make the following order:

ORDER

1. The Application is dismissed with costs.



L Vuma
Acting Judge
Northern Cape High Court

Appearances

For Applicants: Adv. Rust
Instructed by: Haarhoffs Inc.

For 1st Respondent: Adv. A.S Sieberhagen
Instructed by: Duncan & Rothman Inc.

For 2nd Respondent: The State Attorney