

**THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO. 2612/2015

In the matter between:

B. M. **Applicant**

and

B. V. N. **First Respondent**

**THE ADMINISTRATOR GOVERNMENT
EMPLOYEES PENSION FUND** **Second Respondent**

JUDGEMENT

MBENENGE J:

[1] The applicant (otherwise hereinafter referred to as B.) and the late T. I. S. (the deceased) got married to each other by customary rites at Palmitfontein Locality, Sterkspruit during the year 2002. All the formalities preceding the

consummation of a customary marriage were complied with. The marriage produced an offspring, a boy born on [.....2004], who unfortunately expired on 16 February 2005.

[2] In no time thereafter, the couple became estranged. They even sold their house, and shared the proceeds of the sale equally amongst themselves.

[3] It is not in dispute that during February 2007 the deceased fell in love with the first respondent (otherwise hereinafter referred to as B.). Without first seeking and obtaining the consent of B. or obtaining a divorce decree terminating the marital bonds between himself and B., the deceased contracted a purported customary marriage with B. during February 2007. The deceased lived with B. until he met his demise in June 2011.

[4] Upon the deceased's death, a scramble for payment of the deceased's pension benefits, involving B. and B., ensued. The Government Employees Pension Fund (the Fund)¹ conducted certain investigations and reported, on 19 August 2015, as follows:

“2.1 GPAA have (sic) advised that the investigation regarding who is the surviving spouse of the late T. I. S. has been concluded.

2.2 The investigation from GPAA has revealed that the deceased member initially entered into a customary marriage with B. M. on August 2002. The customary marriage was dissolved around 2006 due to irreconcilable differences after both families attempted to mediate. The parties divided their joint estate including the proceeds of their immovable property. On 6 September 2009 the deceased entered into a customary marriage with B. V. M. and the parties have one child together. They stayed together as husband and wife until the deceased's death.

¹ The fund is created by the Government Employees Pension Law, 1996 (Proc 21 in GG 17135 of 19 April 1996). This Law *inter alia* makes provision for the payment of pensions and certain other benefits to *inter alia* the dependants of persons who were in the employer of the government.

2.3 following the completion of the investigation, the file was referred to the legal section of GPAA for a legal opinion on the findings of the investigation. The legal opinion recommended that Ms B. V. M. be recognised as the deceased's surviving spouse. The deceased's benefits will, therefore, be distributed between the surviving spouse and the minor child."

[5] In the wake of the stance of the Fund, B. resorted to the instant proceedings seeking, by way of urgency, orders of a declaratory nature and also an interdict restraining the Fund from paying the pension benefits to B. and her minor child pending the outcome of the application. The interim interdict was granted. B. seeks an order declaring that she is the sole surviving spouse of the deceased and, secondly, that the marriage between B. and the deceased is *void ab-initio*.

[6] The application is predicated on two grounds namely, that B. and the deceased had never divorced and that the deceased had never sought and obtained B.'s consent prior to contracting the purported customary marriage with B..

[7] In pursuit of her opposition to the application B. contends that B. and the deceased had consented to dissolving their marriage, in as much as they had sold their house and shared the proceeds of the sale equally amongst themselves prior to the deceased and B. marrying one another.

[8] Prior to the coming into operation of the Recognition of Customary Marriages Act 120 of 1998 (the Act) on 15 November 2000, customary marriages, having been entered into informally could be terminated informally. If the husband, the wife and the wife's father agreed on dissolution, dissolution took place.²

² J C Bekker, *Seymour Customary Law in Southern Africa* (5 ed) Juta 1989)

[9] A major change brought about by the Act is the rule that customary marriages “*may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage*”³ Before it grants such a decree the court has to be “*satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them*”.⁴

[10] All indications point to the marriage between B. and the deceased as having disintegrated. The question, however, is whether the marital bonds between B. and the deceased were terminated in the appropriate manner.

[11] Section 8(1) of the Act brooks of no other interpretation than that, except in the case of death, customary marriages are terminable only by a court and only on one ground. The term “*may*” used in the section simply signifies that the parties are permitted, if they so wish, to obtain a decree of divorce in order to terminate their customary marriage; nothing more, nothing less. It is the term “*only*” that is dominant pointing to the fact that there is no other dispensation available to the parties if they wish to terminate their marriage, except obtaining a decree of divorce.

[12] In all these circumstances, the applicant ought to succeed in her quest for the declaratory orders she is seeking.

[13] This litigation was triggered by the view of the Fund that B., and not B., is the surviving spouse of the deceased. This view was ill-informed, and flies in the face of the trite legal position provided for in the Act. The deceased had long been staying with B. when he died. She took charge of his burial. B. must have relied on the deceased’s *ipse dixit* that he had terminated the marital bonds

³ Section 8(1) of the Act

⁴ Section 8(2)

with B.. Lack of stewardship on the part of the deceased is the cause of this litigation. In my view, it would be fair and equitable for the costs to be paid out of the estate of the deceased.

[14] The order that I grant is the following:

1. The applicant is declared to be the only surviving spouse of the late T. I. S. (the deceased).
2. The customary marriage between the deceased and the first respondent is declared to have been unlawful, invalid and of no force or effect.
3. The costs of this application shall be borne by the estate of the deceased.

S M MBENENGE

JUDGE OF THE HIGH COURT

Attorney for the Applicants : Mr V. V. Msindo

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Date Heard

: 24 March 2016

Judgment delivered

: 29 March 2016