

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED: ✓

20 March 2015

DATE

SIGNATURE

CASE NO: 59900/14

In the matter between

LINA SESI NHLAPO

APPLICANT

And

20/3/2015

LILLIAN MAHLANGU

MINISTER OF HOME AFFAIRS

MASTER OF THE NORTH GAUTENG

HIGH COURT, PRETORIA

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

JUDGMENT

MOLEFE J:

[1] This is an application for the following relief:

"1.1 That the customary marriage between the applicant and the deceased, Thomas Jack Mahlangu, contracted on 29 April 2000 be declared valid;

1.2 That the civil marriage between the first respondent and the deceased be declared null and void;

1.3 The second respondent is instructed to expunge the civil marriage of the first respondent and the deceased from the marriage register and to register the customary marriage between the applicant and the deceased;

1.4 The third respondent is instructed to withdraw any appointment granted to first respondent in respect of the Administration of Estates Act, 66 of 1965;

1.5 The first respondent is to disclose all funds collected and received by her as representative of the deceased, Thomas Jack Mahlangu and to pay all such funds collected from any institution or individual into the trust account of the applicant's attorney, Erna Grove' (until the estate banking account has been opened for the administration of the estate of the deceased, Thomas Jack Mahlangu) within 10 (ten) days of this order;

1.6 First respondent to pay the taxed costs in the event of opposition".

[2] The application is opposed by the first respondent. The second and third respondents did not oppose the application and played no active role in the proceedings.

[3] The applicant initially brought an urgent application to be heard on 9 September 2014. By agreement between the parties, the matter was removed from the urgent roll and the parties agreed to obtain reports from both parties' experts in the determination of the Ndebele customary union laws.

Background

Common cause facts

[4] The applicant and the first respondent allege that they were married to Thomas Jack Mahlangu ("the deceased") who passed away on 11 May 2014.

[5] Both the applicant and the first respondent were not aware of the deceased's respective marriages and this was discovered by both parties after the deceased had passed away. Neither the applicant nor the second respondent registered their customary marriages.

Applicant's version

[6] The applicant alleges that she is the legal customary spouse of the deceased. Customary marriage negotiations between the deceased's family and her family commenced during 1986. On 29 April 2000, the last payment of the *lobola* was made as per *lobola* agreement. Neither the deceased nor the applicant registered the customary marriage at the Department of Home Affairs. Four children were born of the customary marriage.

[7] The deceased was employed at Mike Buyskes Construction (Pty) Ltd situated in Gauteng and he resided in Nellmapius, Gauteng. Once a month and during holidays and weekends, the deceased would visit the applicant and their children and was financially maintaining his family.

[8] The applicant has known the deceased since they were young children and their relationship started in 1980. Their first child was born on 26 March 1985. The *lobola* was determined as 16 heads of cattle payable over a period of time. In April 1986, the two families had a big handing-over celebration; cows were slaughtered and the applicant's family handed her over to the deceased's family. This is confirmed in a number of confirmatory affidavits by the deceased's family, namely his mother, brother and nephew and by the applicant's family, namely her aunt and brothers.

[9] Applicant's counsel¹ submits that the applicant was not aware of the legal requirement that the customary marriage must be registered until after the deceased's death. She was however unable to register her customary marriage at the Home Affairs offices due to the existence on the records of the civil marriage between the deceased and the first respondent. The deceased's mother, Ms Felesakhe Maria Mahlangu and the applicant's aunt, Ms Lina Matibela, who were present at the handing-over ceremony, approached the Nunza Somphalali Traditional council. An enquiry was held and the traditional council, based on the enquiry, was satisfied that the customary union between the applicant and the deceased took place and accordingly issued the customary marriage certificate.

¹ Ms M Horn

[10] It is the applicant's submission that none of the deceased's family had met the first respondent prior to the deceased's death and that the family was not even aware of her existence. The first respondent did not even attend the deceased's funeral to pay her respects.

[11] The applicant further submitted that she never gave permission to the deceased that he may enter into another marriage and that he entered into a marriage with the first respondent without her knowledge, consent nor permission. Applicant stated that her consent is a requirement in accordance with the Ndebele culture.

First respondent's version

[12] The first respondent submits that on 5 May 2005, she entered into a civil marriage with the deceased. (See *civil marriage certificate*²) and on 12 November 2005, they entered into a Ndebele customary marriage. The first respondent's family requested *lobola* payment in the amount of R6000, 00 from the deceased. An amount of only R2000, 00 was paid by the deceased brother, Jacob Mahlangu, on behalf of the deceased to the first respondent's uncle.

[13] The deceased never informed the first respondent that he was married to someone else in terms of a customary marriage. The relationship between the deceased and the first respondent continued from 2005 until 2007 when it ended due to the first respondent's inability to bear children.

² Bundle page 99 annexure "LMS"

[14] There are three material issues for determination, namely:

14.1 the validity of the customary marriage between the deceased and the applicant which took place on 29 April 2000;

14.2 the validity of the civil marriage between the deceased and the first respondent which took place on 13 May 2005;

14.3 the validity of the customary marriage between the deceased and the first respondent which took place on 12 November 2005.

[15] Both the applicant's and the respondent's expert witnesses, Professor Pieter Bakker and Professor Jan Christoffel Bekker respectively, are professors in the Department of Private Law at the University of Pretoria and both regard themselves as experts in customary family law on the basis of their qualifications and practical experiences. The written reports of the experts contributed much to the substance of this judgment and I express my gratitude to them.

[16] The recognition of customary marriages is governed by the **Recognition of Customary Marriages Act 120 of 1998** ("the Recognition Act").

The requirements for validity of customary marriages are provided in section 3 of the Recognition Act:

"(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 other under customary law; and*
- (iii) *the marriage must be negotiated and entered into or celebrated in accordance with customary law.*

(2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.

[18] With regard to section 3 (3) of the Recognition Act, the following requirements need to be present for a customary marriage to be valid:

- (1) consent of the fathers and the grooms;
- (2) *lobola* agreement; and
- (3) incorporation of the bride into the husband's family.

[19] The registration of customary marriages is provided in section 4 of the Recognition Act:

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

(2) Either spouse may apply to the registration 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) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or

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.

[20] I would first deal with the validity of the customary marriage of the applicant and the deceased. The applicant submitted that she was married to the deceased in terms of customary law since April 1986. *Lobola* agreement was entered into between the two families, celebration was held and the applicant was incorporated into the deceased's

family through the *ukuvunula* ritual. The applicant still lives with her mother-in-law. The customary marriage was not registered in terms of section 4 of the Recognition Act.

[21] Both parties' expert witnesses agree that the applicant's customary marriage complies with section 3 (1) of the Recognition Act. However, the first respondent's expert witness, Professor Bekker raised two questions, firstly the applicant's surname of "Nhlapo" instead of "Mahlangu" and secondly the matter of the traditional council issuing a customary marriage certificate on behalf of the applicant.

[22] Regarding the applicant's "Nhlapo" surname, an affidavit by Gladys Sphenge Mahlangu, the applicant's niece was presented explaining that the applicant's biological father was a Nhlapo and the applicant was raised by her mother and uncle, the Skhosanas. This explained the *lobola* agreement being between the Skhosanas and the Mahlangus. In my opinion, the applicant's surname has no bearings whatsoever on her marital status. It is a choice of every married woman to either use her maiden name or her married name. The applicant clearly chose to use her maiden name.

[23] In my view the customary marriage certificate issued by the traditional council also do not have any bearings on the validity of the applicant's customary marriage. Section 4 (9) of the Recognition Act, provides that failure to register a customary marriage does not affect the validity of that marriage. It is noteworthy that the applicant had, after the deceased's death, attempted to have her customary marriage registered at the Department of Home Affairs but due to the existence of the first respondent's civil marriage in the records, she was unable to register her customary marriage.

[24] I am satisfied that the customary marriage concluded between the applicant and the deceased complied with all the requirements and is a valid legal customary marriage by virtue of section 3 (1) of the Recognition Act. Applicant was a spouse in a valid customary marriage with the deceased. The marriage was negotiated, entered into and celebrated in accordance with the Ndebele customary law.

[25] I now turn to a consideration of the question whether, in the conclusion that the applicant's customary union is valid, the civil marriage of the first respondent contracted on 13 May 2005 is valid. It is clear that this civil marriage was concluded in contravention of section 3 (2) of the Recognition Act which clearly provides that no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961) during the subsistence of such customary marriage save as provided in section 10 (1). Section 10 (1) of the Recognition Act provides that:

“(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person”.

[26] The **Marriage and Matrimonial Property Law Amendment Act 3 of 1988**, came into effect on 2 December 1988 and prevents any person who is a partner in a customary union from contracting a marriage with another person during the subsistence of that union³. The alleged civil marriage of the first respondent to the deceased contracted in or about 2005, whilst the deceased was in a customary

³ Section (1) (1)

marriage with the applicant cannot therefore be recognised as legal and is null and void. It was not legally competent for the deceased to contract a civil marriage with the first respondent during the subsistence of the customary marriage between the deceased and the applicant.

[27] Finally in consideration of the validity of the customary marriage between the first respondent and the deceased which took place on 12 November 2005, the first respondent submitted that the deceased's brother, Jacob Mahlangu and the first respondent's uncle were witnesses to the part payment of the *lobola*.

[28] The identity of Jacob Mahlangu is however disputed by the applicant and the deceased's family who submitted that the deceased had no brother named Jacob. The applicant stated that she never gave permission to the deceased to enter into a further marriage in accordance with their Ndebele culture and that the deceased entered into the marriage without her knowledge, consent nor permission.

[29] The first respondent's counsel⁴ argued that to claim nullity of the first respondent's customary marriage due to non-compliance with the Ndebele traditions constitutes violation of the right to dignity of every woman in a subsequent customary marriage who did not have the knowledge that her husband was already married. It was counsel's contention that the first respondent entered into the customary marriage in good faith and that she should not be punished for the deceased's failure to uphold the Ndebele traditions. Counsel further argued that the Recognition Act should extend

⁴ Advocate M K Steenekamp

its protection to subsequent spouses by recognising their customary marriages even if they do not comply with the Recognition Act. I do not agree with this argument.

[30] The Constitutional Court in **Mayelane v Ngwenyama and another (Women's Legal Centre Trust and Others as amici curiae) 2013 (8) BCLR 918 CC** held:

"[71] Are the first wife's rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. - - -

[72] Second, where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.

[74] Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent".

[31] In *casu*, the first respondent's customary marriage was not celebrated in accordance with the customary law and she was not handed over to the deceased's family through the *ukuvundula* (incorporation ritual). In my view, the customary

marriage does not comply with the requirements in section 3 (1) (b) of the Recognition Act.

[32] Customary marriage not only creates a bond between the two individuals but also creates a bond between the two families. The ritual of the *ukuvunula* creates a bond between the bride and the ancestors of her husband's family. The *ukuvunula* ritual is conducted by the first wife under the supervision of her mother-in-law if the husband concludes a second or further marriage and a valid Ndebele customary marriage cannot be concluded without the active participation of the first wife⁵.

[33] Both experts agree that when a man wants to enter into a second customary marriage he must have the first wife's approval. The applicant did not consent nor permit the deceased to enter into a second customary marriage with the first respondent. The applicant was not even aware of the existence of the first respondent until after the death of the deceased. It is very strange that the first respondent was not curious to meet the deceased's family during their marriage nor did she even attend the deceased's (her husband) funeral. The consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of section 3 (1) (b) of the Recognition Act. It is therefore clear that the first respondent's subsequent customary marriage did not comply with the consent requirement and cannot be recognised as valid and is null and void.

⁵ Professor Bakker's report, bundle page 133

[34] I therefore make the following order:

34.1 The customary marriage between the applicant and the deceased, Thomas Jack Mahlangu, contracted on 29 April 2000 is declared valid;

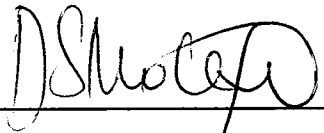
34.2 the civil marriage between the first respondent and the deceased be declared null and void;

34.3 the second respondent is instructed to expunge the civil marriage of the first respondent and the deceased from the marriage register and to register the customary marriage between the applicant and the deceased;

34.4 the third respondent is instructed to withdraw any appointment granted to first respondent in respect of the Administration of Estates Act, 66 of 1965;

34.5 the first respondent is to disclose all funds collected and received by her as representative of the deceased, Thomas Jack Mahlangu and to pay all such funds collected from any institution or individual into the trust account of the applicant's attorney, Erna Grove' (until the estate banking account has been opened for the administration of the estate of the deceased, Thomas Jack Mahlangu) within 10 (ten) days of this order;

34.6 First respondent is ordered to pay the costs of this application.


D S MOLEFE
Judge of the High Court

APPEARANCES:

Counsel on behalf of Appellant	:	Ms. M Horn
Instructed by	:	Michelle Horn Attorneys
Counsel on behalf of Respondent	:	Adv. M K Steenekamp
Instructed by	:	Pretoria Justice Centre
Date Heard	:	04 February 2015
Date Delivered	:	20 March 2015