

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No:2845/2012

In the matter between:

SELINAH NKGAILANE SEHLOHO

Applicant

and

MINISTER OF HOME AFFAIRS
MASTER OF THE HIGH COURT, BLOEMFONTEIN
MOTEBANG PHILLIP RAMORENA

1st Respondent
2nd Respondent
3rd Respondent

JUDGMENT:

SEPATO, AJ

HEARD ON: 1 AUGUST 2013

DELIVERED ON: 22 AUGUST 2013

INTRODUCTION AND BACKGROUND

- [1] This is an application for an order declaring that the applicant, Selina Nkgailane Sehloho, had on the 25th March 2005, entered into a valid customary marriage as envisaged in Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998, the Recognition Act, with one Kefiloe Michael Ramorena, who later died on the 27th May 2011. Further, that in terms of Section 4(7) of the Act, the court should order the first respondent, the Minister of Home Affairs to register such marriage. The first and second respondents have not opposed the matter, the latter filed notice to abide by the court's ruling. Only the third respondent has opposed the application. He is the son of the deceased Kefiloe Michael Ramorena, but not the

applicant's child. He has been appointed the executor of his deceased father's estate by the second respondent, the Master of the High Court, Bloemfontein.

- [2] In his opposing affidavit, the third respondent in disputing the validity of the applicant's marriage initially raised two points in *limine*. Firstly that, the deceased had failed to comply with the provisions of Section 7(6) of the Recognition Act in that at the time of the alleged marriage to the applicant, the deceased had long been customarily married to the 3rd respondent's mother, one Maleshoane Sara Khomari who also died in 2008. Secondly, that the applicant failed to provide proof of her alleged marriage to the deceased by producing what the third respondent claimed to be customarily termed, the letter of agreement or the lobola letter.
- [3] After I had raised it with both counsels during the opening address, it was agreed that the second point in *limine*, actually goes to the merits of the application as it relates to one of the specified requirements for a valid customary marriage in terms of section 3(1) of the Recognition Act, and that it should therefore be separated and left to be dealt with as one of the issues to be determined in the main application. The question of the deceased's non-compliance with section 7(6) of the Recognition Act was then argued.
- [4] For completeness of the picture, section 7 of the Recognition Act is titled: "Proprietary consequences of customary marriages and contractual capacity of spouses". Subsection 6 thereof specifically provides that:

“A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.”

- [5] After hearing arguments and having considered authority thereon, I dismissed the point in *limine*, relying on the interpretation of section 7(6) by the Supreme Court of Appeal in the case of **MN v MM and Another** 2012 (4) SA 527 (SCA). It should be noted that the SCA in the mentioned case had to settle the legal position regarding the interpretation of Section 7(6) because there were then, already two conflicting provincial decisions thereon. One was from the Gauteng South Court (Johannesburg) **MG v BM and Others** 2012 (2) SA 253 (GSJ) and the other was the appeal on hand, which was from the North Gauteng High Court (Pretoria) **MM v MN and Another** 2010(4) SA 286 (GNP).
- [6] The same issue as *in casu* arose in MM's case. The applicant sought to nullify her husband's second customary marriage on the ground that her husband had failed to comply with the provisions of section 7(6). The SCA in a unanimous decision, per Ndita AJA at page 536 paragraph 22, held that:

“The section of the Act dealing with the validity of a customary marriage s (3) is not by any means related or linked to s 7(6). In striking a balance between the text and the context of the Act, the preamble states the purpose the Act seeks to achieve, and specifically refers to the validity of customary marriages. ...Notwithstanding the absence of a sanction for non-compliance with s7(6), the scheme of the Act and the broader context of the statute compel a conclusion that the section could never

have been intended to have any impact on the validity of the second marriage. The scheme of the Act amply demonstrates that the main purpose of s7(6) is to determine and regulate proprietary consequences, and does not seek to invalidate an otherwise valid polygamous customary marriage which complies with s3.”

[7] Better put still, Ponnar JA in the same judgment at 541 para [36] stated:

“Viewing the scheme of the Recognition Act as a whole therefore, it is plain that s7(6) of the Act does not purport to regulate the validity of polygynous customary marriages. That is sought to be achieved by s 3... The Act itself does not contain an express provision to the effect that non-compliance with s 7(6) results, without more, in invalidity of the second customary marriage....There are strong indications and reasons why non-compliance with s 7(6) ought not to result in the second customary marriage being a nullity.”

On that note, the application as set out above in paragraph one, was then proceeded with.

THE CASE TO BE DECIDED

THE FACTS

[8] The applicant’s case as set out in her founding affidavit is that, she is an adult female person residing at 13002 Phase 6, Bloemfontein, Free State province. She met with the deceased Kefiloe Michael Ramorena in 2001 and started staying together in 2004 as husband and wife. In 2005 she and the deceased entered into a customary marriage. She was 25 years old and the deceased was 43 years old then. They had both consented to the marriage. The marriage was preceded by lobola negotiations,

starting in 2004, between her and the deceased's families. Her family was represented by her father, his grandfather and brother. The deceased family was represented by the deceased's grandfather, his uncle and brothers.

- [10] Ten thousand rand was paid over to her family as lobola, though not as a once off. The said marriage was negotiated and entered into and celebrated in accordance with customary law. She attached confirmatory affidavits to her founding affidavit, that of her father Mohlalefi Edward Sehloho F3, of the deceased's two brothers, Mokone Isaac Ramorena and Sello Jacob Ramorena as F4 and F5 respectively, lastly of their neighbour Liketso Simon Sebutso as F6.
- [11] The said marriage was celebrated in Botshabelo at the deceased's sister's place on the 25th March 2005 where applicant was welcomed into the family, and another welcoming ceremony was held on the following day at the deceased's home, also in Botshabelo, the 26th March 2005. There are no children born of their marriage. However, upon their meeting, the deceased had informed her that he had four children with two different women from previous relationships. The third respondent was one of them, but that the deceased was never married to his mother. Applicant stayed with the deceased in Bloemfontein whilst all these other persons resided in Botshabelo. According to her, the deceased's children never accepted her as their stepmother and neither did they enjoy any good relations with her.

[12] The third respondent's mother passed away in 2008 and applicant was the one who persuaded the deceased to bury her, which he did in Botshabelo. Subsequently, the deceased also passed away on the 27th May 2011. At that time, the applicant and the deceased had not yet registered their customary marriage with the Department of Home Affairs as they did not know that they were required to do so. Consequent to the deceased's death, the third respondent reported and got the deceased's estate registered with the second respondent who issued him with letters of executorship to wind up the estate. The applicant then discovered that she had not been named as the deceased's customary law surviving spouse in the estate file. She lodged an objection with the second respondent in this regard who required of her to bring proof of her marriage to the deceased. She unsuccessfully tried to register the marriage and obtain such proof at Home Affairs Department, hence this application.

[13] In response to the third respondent's opposing affidavit, the applicant filed a replying affidavit in which amongst others, she stated that actually, she and the deceased had intended to go and enter into a another marriage, by civil rights, in addition to the customary marriage already existing, at Home Affairs and that they did not intend to register the latter marriage. That however, the deceased fell ill and, eventually died before that could be accomplished. In paragraph 3.4 she added that had it not been of the problems regarding the deceased's estate, she would honestly have never thought of registering their customary marriage but maintaining that same had been validly concluded in

accordance with their customs. I will return to this statement later on.

[14] She further explained that they had unsuccessfully searched for the lobola letter from the outset, but could only find annexure SNS1 to her affidavit. This, according to her is proof of payment of the second instalment of the agreed amount of R10000. The said letter is dated the 10th January 2004 and is written in Sesotho with which I am familiar. Loosely translated it states that: "following the discussions between the parents on the tenth, a sum of R2000 has been handed over. They will return again." She actually argued that in as much as the third respondent was insisting that the deceased was married to his late mother but has not produced any lobola letter therefore, he could not be heard to be disputing applicant's marriage solely for want of same.

[15] Lastly, she maintained that their marriage was celebrated at the third respondent aunt's home and that the third respondent does carry knowledge of that fact as his own siblings were present there. She further responded to other issues that have been raised in the opposing affidavit which I will mention later on as they actually have no bearing on the question to be decided herein.

The third respondent is disputing the applicant's case, basically in its totality regarding the existence of a valid marriage. Firstly as stated above, the respondent denies that there were ever any negotiations of any nature in which a lobola agreement was reached, between the applicant's and the deceased families, at

any stage. He questioned why the signatories to the alleged lobola letter SNS1 are, except for the applicant's father, persons different from those initially named in the founding affidavit and further gave a number of reasons why such witnesses' purported confirmation of the applicant's version should not be believed but rather be dismissed as a fabrication. I will not detail those reasons out as it will appear hereunder that it is not necessary to do so. Further he denies that the alleged marriage was celebrated as alleged by the applicant, arguing that according to their custom, a customary marriage is a union of families not just the individuals, and that in the event of one taking place, it would be talked about in the family and everyone would know of it, and that it is therefore impossible that their father would have been married without he having heard of that.

THE ISSUE AND THE APPLICABLE LAW

[16] The issue to be determined herein is whether the applicant and the deceased had as a matter of fact entered into a valid customary marriage as envisaged in section 3 of the Recognition Act. If found so, the court should accordingly make an order in terms of section 4(7) thereof ordering the registration of the marriage. It is important to look at the express provisions of section 3. Section 3 is titled: Requirements for validity of customary marriages.

Section 3(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
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

[17] Once these three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence. (See **MN v MM and Another**, *supra* at 536 para[23].)

It is therefore beyond any question herein that with the use of the word “and”, at the end of each of the first two requirements, the applicant bears the burden of proving that all the three requirements of section 3(1) have been met, not one or two of them, but all three.

[18] It is however, crucial to first pay attention to the following: Section 1 of the Recognition Act defines a customary marriage as a marriage concluded in accordance with customary law. In turn, customary law is defined as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people.

The starting point herein is therefore clear and cut. Accepting that the applicant and the deceased were above the age of eighteen years at the time of the alleged marriage, section 3(1)(i), what remains of her to prove is that in accordance with section 3(1)(ii), she and the deceased had both consented to enter into a marriage under customary law, that is a marriage that is in accordance with the customs and usages traditionally observed among a particular group of the indigenous African peoples and

which form part of the culture of that group of people, and lastly, she must also prove that, in accordance with section 3(1)(iii), their marriage was negotiated and entered into or celebrated in accordance with customary law, once more, “in accordance with the customs and usages traditionally observed by the relevant group of the indigenous African peoples which form part of the culture of that group of people”.

See the case of **MF Mayelane v MM Ngwenyama and Another** CCT 57/12 [2013] ZACC 14, Per Zondo J at para [102] and footnote 85.

EVALUATION AND REASONS FOR FINDINGS

[19] In the case on hand, both the requirements in section 3(1)(a)(ii) and 3(1)(b) are placed in dispute. It is unfortunate that I will be quick to remark that the applicant's case herein is lacking in the most fundamental manner. Nowhere in her affidavits, both the founding and the replying, has she made mention or referred to any specific customary law of any indigenous African group of people. That is, in terms of whose customary law did they consent to marry, what is the content of the particular law or customary rule, where was it being practised, by whom? Above all, I am not informed of the parties social or ethnic origin, where they lived and practised or observed a particular culture, or at least aver that they married in accordance with a custom or usage that was observed by a relevant group to which they belonged. The only information on record is that the deceased's family seems to be or have been in Botshabelo, as for the applicant, I only know that she is residing in Rocklands township, Bloemfontein. It is in any

event difficult to even try to assume in favour of the parties that they had consented to a customary marriage because, from the applicant's own words, it is clear that, if she and the deceased were to bind each other with the cords of marriage, it would have been through a marriage by civil rights, and not a customary marriage. When a person consents to doing something, it means he is conscious of what the nature of the thing is or it entails and intends to be bound by it. So the parties could not have consented to a marriage they did not intend entering into, i.e. a customary marriage. It is correct that failure to register a customary marriage does not invalidate an otherwise valid customary marriage. But registration can only follow a validly concluded marriage; that is one according to a specific customary law.

- [20] Lastly and in the same way, nowhere has the applicant averred that her and the deceased's marriage was negotiated or celebrated in accordance with any particular customary rule, practice or usage observed and forming part of any specific group to which they belonged. The Recognition Act does not specify the requirements for the celebration of a customary marriage. Quite many arguments were raised and lengthily argued during the hearing, but as already indicated, it is not even necessary to unpack them except to mention that, neither did the third respondent too, aver any specific customary rule as reliance in his opposing the application. He merely argued in general terms that it was impossible for the marriage to have been concluded in the manner the applicant had alleged. Both parties have got elders as it is apparent from their cases, however none of such

elders positively swore that he knows for a fact that the deceased and applicant had concluded a marriage in accordance with a particular custom or practice and inform the court the court what their respective custom or practice was. They merely confirmed the vague and bold contents of the litigants' affidavits which was not helpful at all. The court was never engaged in the narratives of customary law. According to Zondo J in the **Mayelane** case above, if the requirement in section 3(1)(b) is not met, then there is no valid marriage.

- [21] I therefor find that the application is fatally flawed and cannot be cured by anything at all. I agree with the applicant's counsel that there is no material disputes raised herein that would necessitate the hearing of oral evidence. This is so because; "the fact that the court orders oral evidence does not enlarge the scope of the enquiry; the rule provides a method of deciding conflicts of fact that are raised in the affidavits."

See **The Civil Practice of the Superior Courts of South Africa**, Van Winsen *et al*, 4th edition p. 386.

ORDER

- [22] Consequently I order that, the application be and is hereby dismissed, each party to pay their own costs.

_____**R. M. SEPATO, AJ**

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On behalf the respondents: Adv. B. Moeti
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