

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal Number: A69/2012

In the appeal between:-

MASEFAKO LYDIA RASELLO

Appellant

and

MATETENKI MARIA CHALI

1st Respondent

LEEPO MARIA CHALI

2nd Respondent

THABISO CHARLES CHALI

3rd Respondent

TISETSO JULIA CHALI

4th Respondent

YVONNE LERATO CHALI

5th Respondent

NICOLAS ESAIS JANSE VAN RENSBURG

6th Respondent

SUSANNA MARIA VAN COPPENHAGEN

7th Respondent

DIRECTOR GENERAL DEPARTMENT OF HOME AFFAIRS

8th Respondent

MASTER OF THE HIGH COURT, BLOEMFONTEIN

9th Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

10th Respondent

In Re:-

Case Number: 683/2011

MATETENKI MARIA CHALI

1st Applicant

LEEPO MARIA CHALI

2nd Applicant

THABISO CHARLES CHALI

3rd Applicant

YVONNE LERATO CHALI

4th Applicant

and

MASEFAKO LYDIA RASELLO

1st Respondent

<u>NICOLAS ESAIS JANSE VAN RENSBURG</u>	2 nd Respondent
<u>SUSANNA MARIA VAN COPPENHAGEN</u>	3 rd Respondent
<u>DIRECTOR GENERAL DEPARTMENT OF HOME AFFAIRS</u>	4 th Respondent
<u>MASTER OF THE HIGH COURT, BLOEMFONTEIN</u>	5 th Respondent
<u>REGISTRAR OF DEEDS, BLOEMFONTEIN</u>	6 th Respondent

CORAM: EBRAHIM, J *et* VAN ZYL, J *et* MOLEMELA, J

HEARD ON: 16 SEPTEMBER 2013

DELIVERED ON: 24 OCTOBER 2013

MOLEMELA, J

Introduction

[1] This is an appeal against the judgment of Rampai AJP. The appeal is with leave of the Supreme Court of Appeal.

[2] The first to fifth respondents (hereinafter referred to as “the respondents”) were applicants in the proceedings at the court *a quo*. They sought an order setting aside an alleged customary marriage entered into on the 19th March 2005 between the late David Masakale Chali, who died on the 23rd May 2005 (“the deceased”) and the appellant. They further sought an order for the removal of the 6th respondent as executor of the deceased estate. The first respondent is the mother of the deceased and the third, fourth and fifth respondents are the children of the deceased. The second respondent was previously married to the deceased, but they were divorced on the 20th May 2002. Her interest in the application relates to the unfinalised administration of the joint estate which subsisted between her and the deceased prior to their divorce. She is still residing at the house which formed part of that joint estate.

Background facts

[3] The appellant was the first respondent at the proceedings of the court *a quo*. She and the executrix of the estate (7th respondent) opposed the application on the basis that she and the deceased had entered into a valid customary union. In support of her version the appellant relied an undated lobola letter, which was allegedly signed at Orkney on 19 March 2005 by the first respondent and three other people.

[4] The respondents disputed the authenticity of the lobola letter. Although the respondents had acknowledged that the deceased had, during his lifetime, cohabited with the appellant, the respondent's case was that no customary marriage had been concluded because no lobola negotiations had been entered into. In particular the respondents averred that no lobola was paid and that there was no delivery of the bride (appellant) to the first respondent's family in accordance with the Sotho custom.

[5] The first respondent admitted that she and her husband had travelled to Orkney on the day in question. According to her, it was a mere social visit so as to meet the appellant's family. During that visit, the appellant's family proposed that the appellant should get married to the deceased. According to the first respondent, this proposal did not go down well with her husband and he openly stated that he was not in favour of such a marriage as the appellant had been married before and had two children from that marriage and the deceased also had his own children to take care of. According to the first respondent, the meeting ended on that note and no lobola negotiations took place. As an explanation for her signature on the lobola letter, she averred that shortly after the deceased's death and while the deceased's funeral arrangements were being made, the appellant's sister had approached her with a blank document and asked her to sign it on the pretext that same was going to be presented to the insurance company for payment of the burial expenses.

[6] The appellant failed to deal with the specific allegation that she was never delivered to the respondents' family as the customary wife of the deceased. She, however, made reference to a ceremony that allegedly took place in Lesotho in April 2002 at which she was "introduced" to the deceased's family during a ceremony she referred to as "ho jesa makoti". The first respondent acknowledged a visit in Lesotho at which the appellant was also present. She, however, contended that it was merely a trip undertaken by them for the purpose of visiting the deceased's ailing grandmother and was completely unrelated to any customary ceremony. She pointed out that no customary ceremony related to a customary marriage could have been held prior to the payment of lobola.

[7] The court *a quo* expressed some reservations about the fact that the lobola letter bore a date after the deceased's death but nevertheless found that the letter in question was authentic and that the two families in fact met to negotiate the marriage between the deceased and the appellant. The court *a quo* further found that the appellant was, at the time of the alleged conclusion of the customary union, incompetent to enter into a marriage with the deceased on account of the fact that she was, according to the respondents, still married to a certain Rasello at that time.

[8] The basis of the appeal, in a nutshell, is that since the respondent's allegations pertaining to the subsistence of a marriage between the appellant and Rasello were made for the first time in the replying affidavit and thus constituted new evidence, such allegations should have been struck out by the court *a quo*, instead of finding that such evidence was foreshadowed in the founding affidavit but was not refuted by the appellant. The appeal was also directed at the court *a quo*'s decision of the application on the papers, instead of referring it for oral evidence on account of the existence of factual disputes pertaining to some of the requirements of a valid customary union.

At the hearing of the appeal the appellant brought an application for leave to adduce further evidence on appeal as contemplated in section 22 of the Supreme Court Act 59 of 1959, such evidence being a deposition with a

certified copy of divorce decree, which was intended to serve as *prima facie* proof that the appellant was divorced from her former husband, Rasello, before the alleged conclusion of the customary marriage.

Point in limine

It was contended on behalf of the respondents that since the executrix of the deceased estate had concluded that there was no valid customary union between the appellant and the deceased and since such finding was never challenged in court or set aside, the executrix's decision remained valid and binding and on that ground alone the appeal had to be set aside. Reliance for this view was placed on the case of *Oudekraal Estate (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222. I am of the view that this contention is misplaced as it is clear from the correspondence attached to the papers that the executrix had not yet made a final decision on the matter. Whereas it was clear from earlier correspondence that she had accepted that there was no valid customary union between the deceased and the appellant, in later correspondence she had indicated that having been placed in possession of a marriage certificate, she was of the view that such certificate served as evidence of a valid customary union. She had indicated that she would make a final decision regarding the estate once she had been placed in possession of a certified copy of the certificate in question. It was on the basis of the having received information about the latter correspondence that the respondent decided to launch the application at the court a quo. As such, the respondents were the ones that asked for the executrix's decision to be set aside.

Statement of the law

[9] In terms of section 3 of the Recognition of Customary Marriages Act 120 of 1988, a customary marriage entered into after the commencement of the Act will be valid if (i) the prospective spouses are both above the age of 18 years; (ii) both consent to be married to each other under customary rule; and **(iii) the marriage must be negotiated and entered into or celebrated in accordance with the customary law.**

Customary law is defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”. Lobola is defined as “the property in cash or in kind which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.

[10] In **Fanti v Boto and Others** 2008 (5) SA 405 (C) it was held that in order to prove the existence of a valid customary marriage, essential requirements that inescapably must be alleged and proved are the following:

- (i) consent of the bride;
- (ii) consent of the bride's father or guardian;
- (iii) payment of lobola;
- (iv) handing over of the bride.

[11] The court clearly regarded the afore-mentioned requirements as customs traditionally observed by indigenous people in South Africa. The court *inter alia* stated as follows at 413I – 414C:

“Regard being had to the above requirements for the validity of a customary marriage, payment of lobolo remains merely one of the essential requirements. In other words, even if payment of lobolo is properly alleged and proved, that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements. See *Gidya v Yingwana* 1944 NAC (N&T) 4; *R v Mane* 1947 (2) PH H328 (GW); *Ziwande v Sibeko* 1948 NAC (C) 21; *Ngcongolo v Parkies* 1953 NAC (S) 103. These requirements have not vanished with the advent of constitutional democracy in this country. On the contrary, the Constitution of the Republic of South Africa, 1996, enjoins the courts to develop customary law and to marry it to the constitutional order of the day... The importance of these rituals and ceremonies is that they indeed indicate in a rather concretely visible way that a customary union is being contracted... I am in agreement with Van Tromp's views expressed in his work *Xhosa Law of Persons* at 78 that these ceremonies must be viewed as a ceremonial and ritual process in which the essential legal requirements have been incorporated... If such celebrations

took place and were not in conformity with the customs as demonstrated above then they indeed amounted to nothing but a party devoid of customary recognition.”

[12] The authors Maithufi I.P. and Bekker J.C., in an article entitled *Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa* CILSA 182 (2002) correctly submit that a customary marriage in true African tradition is not an event but a process that comprises a chain of events and involves not only the bride and the groom but also their families.

[13] T.W. Bennett in his work *Customary Law in South Africa 18th Edition* submits as follows at 217:

“Hence, when the Recognition of Customary Marriages Act provides that, in order to qualify as customary, a marriage must be ‘negotiated and entered into or celebrated in accordance with customary law’, the form of negotiations, the handing over of a bride and the wedding are all relevant to giving the union the character of a customary marriage. It may then be distinguished, on the one hand, from an informal partnership and, on the other, from a marriage according to other cultural or religious traditions.”

Analysis of arguments and application of the law to the issue

[14] Mr Pienaar contended on behalf of the appellant that since the court *a quo*’s dismissal of the application was exclusively based on the finding of the appellant’s incompetence to marry due to subsistence of an earlier marriage, logic dictated that once the divorce decree was admitted as evidence, the order of the court *a quo* pertaining to the invalidity of the customary marriage would have to be set aside.

[15] I disagree with Mr Pienaar’s submission that the court *a quo*’s decision was exclusively based on its finding of the appellant’s incompetence to marry. It is clear from the tenor of the whole judgment that while the court *a quo* was satisfied that the lobola negotiations did in fact take place, it was not

persuaded that the lobola was actually paid. Even if it is accepted in the appellant's favour that the court *a quo* in fact accepted that lobola was indeed paid, that would not justify a conclusion that the alleged customary marriage was valid, because the mere fact that lobolo was handed over to the applicant's family is not conclusive proof of the existence of a valid customary marriage.

[16] For a union to be regarded as a customary marriage, it must be concluded in accordance with custom. One of the important elements that distinguish a customary marriage from a common law marriage is that the former establishes marital bonds between the family of the bride and the family of the groom whereas the latter establishes bonds of marriage between the groom and the bride only. The ceremony referred to by the appellant, having taken place before payment of lobola and without the involvement of the appellant's family, is in my view not in conformity with custom and does not enjoy customary recognition. In **Fanti v Boto** (supra) the court found, correctly in my view, that "it is totally inconceivable and in fact impossible for only one side of the two families to be involved in these ceremonies".

[17] An undeniable fact is that the appellant made no averments whatsoever to counter the respondent's contention that there was no delivery of the bride as required by custom. In my view, the appeal could thus be dismissed on this basis alone. To the extent that the ceremony that allegedly took place in Lesotho may be regarded as some challenge to the respondent's averments pertaining to the delivery of the bride, then that challenge was on the basis of clearly untenable and far-fetched assertions that warranted rejection on the papers. This view is based on the fact that on the appellant's own version, the ceremony in question occurred in April 2002, approximately a year *before* lobola was allegedly paid. As lobola had not yet been paid, logic dictates that there could not have been any *makoti* (bride) to talk about at that stage, let alone to deliver or to "introduce". A ceremony held before payment of lobola thus cannot constitute delivery of the bride as this is not in conformity with custom.

[18] On the appellant's own version, there is no way that the ceremony alluded to by the appellant, having occurred before payment of lobola, could have equated to the ceremony of delivery of the bride. Significantly, the appellant made no reference whatsoever to her own family's involvement in the ceremony she referred to. Although the Recognition of Customary Marriages Act does not include transfer of the bride in the requirements for a valid customary marriage, I accept that this, being an old Sesotho custom that is still widely recognized, it is a custom contemplated in section 3(6) of that Act and is thus an essential requirement for validity of a customary marriage. It was so accepted by the court in the case of **Fanti v Boto** (*supra*) on the basis of many authorities. Delivery of the bride entails that the bride will be accompanied to the groom's family by her own delegation, which will then formally hand her over to the groom's family. Olivier, Bekker *et al* in their work *Indigenous Law* describe delivery of the bride as "the transfer of the bride by her family group to the family of the man". (my emphasis)

[19] Mr Pienaar further argued that the fact that the deceased and the bride were already cohabiting would, in any case, have obviated the need for delivery of the bride. He, however, conceded that it was not the appellant's case that delivery was obviated by cohabitation. He nevertheless argued that same could be inferred from the answering affidavit. In my view there is no room for such an inference, given that the appellant never denied the first respondent's averment that according to the Sesotho custom delivery of the bride is an important pre-requisite for conclusion of a valid customary marriage. If consideration is paid to the fact that the establishment of marital bonds between the respective families of the bridal couple is an important tenet of a customary marriage, it is clear that mere cohabitation of the appellant and the deceased could not have obviated the handing over of the appellant to the deceased's family.

[20] It is clear from the papers that the appellant's reference to what she termed as "a ceremony union" held in Lesotho in 2002 was a red herring intended to either obfuscate issues if attention was not paid to the date of its occurrence, alternatively to create a dispute of fact in order to frustrate the

respondents' application. As the appellant's reference to the Lesotho ceremony failed to raise a real, genuine or bona fide dispute of fact, the court *a quo* had no reason to refer the matter for oral evidence. See **Plascon Evans Paints v van Riebeeck Paints** 1984(3) SA 623 (A) at 634H-635C. I also echo the following sentiments, aptly expressed in the case of **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) par 55** "That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. 55 There had to be 'a bona fide dispute of fact on a material matter'. 56 This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 57 this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

[21] Another reason why I am not persuaded to agree that the court *a quo* dismissed the application exclusively on the basis of the finding of the appellant's incompetence to marry, is that the court *a quo* in its judgment specifically stated as follows:

"I found the first respondent's answering affidavit to be materially inconsistent with her previous sworn statement (annexure TTT). Moreover her own attorney's letter (annexure UUU) also strongly militates against her claim as set out in the answering affidavit that she is the late Chali's widow. In the light of all these **I have no hesitation to dismiss the first respondent's answering affidavit as false on this point wherever it is inconsistent with the founding affidavit and her previous sworn statement as well as her attorney's letter.**" (My emphasis).

It is clear from the extract above that the court *a quo*'s dismissal of the application was also in consideration of the fact that the appellant had deposed to inconsistent statements pertaining to the same issue. The court was well-entitled to take a dim view of that discrepancy. See **Baadjies v Matubela** 2002 (3) SA 427 at 431 par 19.

[22] I now turn to the appellant's application for the admission of her divorce decree as evidence in the appeal. The principles applicable to such an application are trite:

- (i) there should be some reasonable sufficient explanation, based on allegations which may be true, why the evidence which is sought to be led, was not led at the application;
- (ii) there should be a *prima facie* likelihood of the truth of the evidence;
- (iii) the evidence should be materially relevant to the outcome of the application.

[23] While admission of the divorce decree may clarify that the appellant was not incompetent to enter into a marriage at the time of the lobola negotiations, this does not detract from the fact that the appellant failed to refute the respondents' assertion that the result of non-compliance with the essential requirement of the handing over of the bride was that no valid customary marriage was entered into. Thus, the acceptance of such evidence cannot change the outcome of the application considered by the court *a quo*. I therefore agree with Mr Hlatswayo's submission that the application for admission of further evidence ought to succeed.

[24] It is clear that the court *a quo* committed no material misdirection that warrants the setting aside of its judgment.

[25] Having considered the matter, the following order is made:

ORDER:

1. The application for leave to hear further evidence at the hearing of the appeal is dismissed.
2. The appeal is dismissed with costs.

M.B. MOLEMELA, J

I concur.

S. EBRAHIM, J

I concur.

C. VAN ZYL, J

On behalf of appellant:

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Instructed by:

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