

Reportable

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Dates : 5 February, 6 and 23 March, 20 April 09
REPORTABLE

Case no:2973/09
DATE: 20/4/2009

In the matter between:

MIHLOTI LYDIA NDLOVU

APPLICANT

and

VELAPHI NESLIE MOKOENA

FIRST RESPONDENT

DEPARTMENT OF EDUCATION

SECOND RESPONDENT

DEPARTMENT OF HOME AFFAIRS

THIRD RESPONDENT

Customary marriage – although lobolo was partly paid, no evidence that woman was delivered or that she lived with the deceased. Marriage accordingly not concluded.

Van Rooyen AJ

[1] This is an application in which the applicant (“Mihloti”) claims that she is the only customary wife of the deceased and applies for an order declaring the (alleged) customary marriage between the First Respondent (Velaphi”) and the deceased null and void.

[2] The deceased, who passed away from natural causes on the 18th January 2008, was an educator in the service of the Second Respondent. Pension benefits are payable to the wife of the deceased. If the first alleged customary marriage was validly concluded, the pension will be divided in half between the two wives. Velaphi does not question the validity of the customary marriage of the deceased with Mihloti.

[3] There are two customary marriage certificates before the court: the first is that of Velaphi and the deceased dated 25 May 1991 and the second is that of Mihloti and the deceased, dated 20 May 1998. Both certificates were issued after the death of the deceased and by the same marriage officer. At my request the Velaphi certificate (issued on the 11th February) was certified and explained under oath by the Home Affairs official involved. He states that he, *inter alia*, had reference to a one page lobolo negotiation document dated 25 May 1991 before he issued the marriage certificate. Velaphi states in her opposing affidavit that she and the deceased were married in 1991. A lobolo delegation was sent by the deceased's family to her home, where lobolo was negotiated. The deceased's family's delegation included, amongst others, Julius Mathebula, Martha Zitta and the late Rama Segodi. She attaches a page from a note book which contains the names of the deceased and hers, with the names of the delegation and the receiving party. It is obvious that the names of the deceased and Velaphi as well as the delegations were written by the same person. The three above mentioned names are included as the delegation. It would seem that Raina Segodi signed behind her name. Julius Mathebula also apparently signed his name. Someone clearly changed Silas to Julius in the document. Three names representing Velaphi's family are also set out in the one page document. Velaphi concedes that the deceased's family had only paid R1500 of the R8000 lobolo as promised. The balance of R6500 was yet to be paid and remained outstanding. Velaphi states that she knew of the deceased's second marriage and that it took place after a "mature" consultation with her. Confirmatory affidavits of Julius Mathebula (uncle of the deceased) and Martha Zitta (nephew of the deceased) are attached. They specifically state that the full amount was R8000 and that they managed to pay R1500.

[4] Mihloti states that she was shocked to hear from the Department of Education that a further wife was claiming pension. She concedes that the deceased had informed her about Velaphi when he proposed to her. She denies that the deceased had been married to Velaphi. He, however, was the father of two of Velaphi's children. Paternity was never disputed by the deceased. A court order, dated 14 October 1994, according to which he had to pay R200 per month maintenance, is attached. Velaphi, according to the officially stamped notes of the prosecutor, dated 3 September 1994, stated to the prosecutor that the deceased "has never sent his

people to come and pay lobola since they left this office on 26 November. He has again never maintained the children.” Mhloti states that the Velaphi certificate issued on 11 February 2008 is based on false facts. Mhloti also refers to a copy of a charge sheet concerning a charge against the deceased that he had failed to pay maintenance. The notes of the magistrate are attached and are dated 27 January 1998. The notes, *inter alia*, state that the deceased (accused in that case) said that he was twenty seven years old and that “I am not married”. A further document, apparently that of the prosecutor, dated 26 November 1993, reads as follows: “He has two children with the applicant and has planned to marry her. He is just about [to] send the lobola delegation to the applicant’s family. He asks to be given a chance to prove that he’s telling the truth. The applicant has no objection and [is] also prepared to enter into a marriage, relationship with the applicant. The two parties are advised to go home. The applicant’s family will be waiting for the delegation from respondent’s family.”

[5] Lorraine Zitha, a younger sister of the deceased’s mother (who has already passed away and whose husband passed away in 2003), confirms that she, Daniel Nyati, Alphina Nyathi, Alfred Sithole and the late headman Mathebula were sent to represent the deceased’s family in lobolo negotiations with Mhloti’s family. The negotiations were concluded and they were asked to pay R10,000 lobolo. The deceased and his family never sent any other delegation to negotiate a marriage on behalf of the deceased. She confirms that she participated in all her late sister’s family rituals and meetings. It is, accordingly, incorrect for Velaphi to claim that she was married to the deceased. The family only knew that the deceased was the father of two children of Velaphi and that he was repeatedly brought to court by the children’s mother for payment of maintenance of the children. Daniel Nyathi, whose family had lived next to that of the deceased since the early seventies and had, throughout the years, been family friends, confirms the affidavits of Mhloti and Lorraine Zitha – the affidavits were read to him and he signed his affidavit.

[6] An elderly member of the deceased’s family, Mateeleng Sila Molemi, states that she knew the deceased from his birth until his death, that important matters were reported to her and that to the best of her knowledge the deceased was married to two wives, namely Mhloti and Velaphi.

[7] Lastly, there is the affidavit of S Hary Khoza. He states that he is employed by the Department of Home Affairs as a marriage officer. I requested at the first hearing of this matter that an affidavit of the person who issued the certificate for Velaphi be provided to the Court. The matter was then postponed so that the affidavit could be provided. Mr Khoza states as follows:

"I hereby confirm that the marriage certificate between Rentweng Lesley Segodi (the deceased) and Velaphi Nelsie Mokoena was issued by me as the employee of the Department of Home Affairs with powers and duties to do so and I did so after I satisfied myself that the parties thereof were duly married in accordance [with] the customary law and/or Act. *The lobola negotiation letter was shown to me as but one of the requirements and proof that the deceased was customarily married to Velaphi Nelsie Mokoena during his life time.*" (emphasis added)

Evaluation

[8] As appears from the above, the statements from both sides are diametrically opposed to each other. The court notes of the magistrate and prosecutor indicate that the deceased was not married and there are supporting affidavits from family members of the deceased's family that Velaphi and the deceased were not married. On the other hand there is Mzamane Mathebula, who states that he was part of the 1991 delegation and that R1500 was paid and that it was agreed that the balance would be paid. Mateeleng Sila Molemi states that to the best of her knowledge they were customarily married and Martha Zitha confirms this. The marriage officer who issued the certificate to Velaphi in February 2008 states that he issued the certificate. The lobola negotiation was shown to him "as but one of the requirements and proof". The same officer also issued a customary marriage certificate to Mihloti.

[9] On the other hand the only "evidence" from the deceased is to be found in the court notes of the magistrate and the prosecutor. The magistrate's notes (27 January 1998) state that the deceased said that "I am not married" and the prosecutor's notes (dated 26 November 1993) states that he (the deceased) is just about to send a lobolo delegation to the applicant's family. He then notes that the applicant has no objection and is also prepared to enter into a marriage relationship with the applicant. The two parties are advised to go home. He then states : " The applicant's family will be waiting for the delegation from respondent's family." It is significant that

by 27 January 1998 the deceased still states to the magistrate that he is not married. Both court dates are well after the date of the Velaphi lobola document – 25 May 1991.

[10] That a Court cannot simply fall back on the *Plascon Evans* rule in matters of status was pointed out by Langa J (as he then was) in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) (2005 (1) BCLR 10) at para [13]. This being the case, I deemed it fit to even call two of the members of the delegation of the deceased to testify in Court. It was, in my view, important to do so since it was clear from their affidavits that they could not read and that the affidavits had to be read to them. To exclude any possibility that the affidavits were not conveyed to them correctly, these two crucial witnesses to the lobolo celebration in 1991 had to be heard personally. I am satisfied that, in spite of discrepancies in the testimony of the rather aged Mr Mathebula, they were indeed at the lobolo ceremony in 1991.

[11] The question is, however, how the notes of the prosecutor and magistrate can be reconciled with the lobolo transaction. A next-door neighbour of the deceased as well as a family member both aver that the deceased had not been married to more than one wife. This gives rise to the question whether the lobolo transaction indeed concluded the matter. The marriage officer states that the document was but one of the requirements he looked at. However, he does not state what the other factors were that influenced him to come to a conclusion that a customary marriage existed. In *Fanti v Boto and Others* 2008 (5) SA 405 (C) and *Mabena v Letsoalo* 1998 (2) SA 1068 (T) it was held that the lobolo transaction is but one of two requirements for the conclusion of a customary marriage. There must also be a delivery of the woman to the family of the man. That such delivery need not necessarily be *de manu in manum* appears from *Road Accident Fund v Mongalonkabinde v Road Accident Fund* 2003 (3) SA 119 (SCA) where it was held that R200 which was paid to a woman who was living with the man, was part-payment of lobolo and not maintenance and that the woman had been customarily married to the man.

[12] Lastly the question arises whether there are sufficient reasons for me to come to the conclusion that the marriage officer had issued the certificate to Velaphi on grounds which are reviewable by a Court. He was most certainly wrong in only referring to the lobolo document. He states that he also took other factors ("requirements") into consideration, but does not convey what these factors were. I have had the privilege of looking at the facts as a whole, including the statements of Mihloti and her supporters. The maintenance court documents were also brought to my attention. I have come to the conclusion that there are sufficient reasons for me to intervene: there is no evidence that there was a delivery of Velaphi or that they lived together and the court documents amount to supporting evidence that a marriage had not been concluded. I, accordingly, find that although there was no evidence of fraud, the marriage officer did not apply his mind properly to all the facts which were before this Court and that the certificate must be set aside.

[13] Since this is a dispute between women who were both involved in the life of the deceased, I do not regard it to be appropriate to make a costs order against Velaphi. I also have no reason to believe that Velaphi's claim was not *bona fide*.

ORDER

1. The application is acceded to and it is held that only the Applicant was validly married to the Deceased.
2. The marriage certificate issued as to the customary marriage between the First Respondent and the Deceased is set aside as invalid.
3. No order as to costs is made.



JCW van Rooyen
Acting Judge of the High Court

20 April 2009

For the Applicant: Mr Motloba from Motloba Attorneys, Pretoria.

For the First Respondent : Mr Shabangu from Shabangu Attorneys