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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO:10756/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

Signature:

Date: 08th AUGUST 2024

In the matter between:

SEDINYANE MPONI HILDA

APPLICANT

And

ANARE MMATEKHE MALATJI

1ST RESPONDENT

ANARE MMATEKHE MALATJI N.O

2ND RESPONDENT

MINISTER OF HOME AFFAIRS.

3RD RESPONDENT

MASTER OF THE HIGH COURT.

4TH RESPONDENT

JUDGMENT

MONENE AJ

[1] “...But the biggest weapon wielded and actually daily unleashed by imperialism against that collective defiance is the cultural bomb. The effect of a cultural bomb is to annihilate a people’s belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves. It makes them see their past as one wasteland of non-achievement and it makes them want to distance themselves from that wasteland.”

[2] These words from the sniper pen of Ngugi wa Thiongo in his 1986 literary masterpiece “Decolonising the Mind”, ring incessantly in this court’s mind as it traverses the papers and arguments made before me in this matter where yet another African man married a wife customarily and whilst that marriage subsisted sought to sidestep that marriage of his cultural wasteland by concluding another marriage, the so-called “civil” marriage, only to escape witnessing the acrimonious wrangling over the administration of his estate visited upon his “wives” by his cultural bomb victimhood in the wake of his intestate demise through death.

[3] As a customary wife, referred to in the Sepedi as *Mosadi wa dikgomo*, the applicant in *casu*, brings this application, in the main, against the first respondent being the “civil” marriage “wife”, often referred to in Zulu as *Umfazi we phepha* seeking the following relief in sum:

[3.1] The post-humous nullification of the “civil” marriage of the first respondent and the deceased.

[3.2] The post-humous recognition and registration of her customary marriage to the deceased and issuance of a certificate in that regard.

[3.3] A declarator that she is the only wife of the deceased.

[3.4] An order withdrawing the letters of executorship issued in the name of the first respondent in respect of the deceased's estate.

[3.5] A declarator that she is authorized to administer the estate of the deceased.

[3.6] An order directing the fourth respondent, The Master of the High Court, to issue her with Letters of Executorship in respect of the deceased's estate.

[3.7] An order mulcting the first respondent with costs as she is the only respondent who opposed this application.

[4] In opposing this application in both her personal and representative capacity as the currently appointed *executrix* of the deceased's estate hoists up her "civil" marriage as the only valid marriage and states, albeit inelegantly, that although there was a customary marriage between the deceased and the applicant, it was dissolved and/or cannot enjoy recognition under the Recognition of Customary Marriages Act, 120 of 1998 ("the Act") which came into effect on 15 November 2000 owing to having predated the Act by eight years.

[5] The law on this kind of disputes is settled and need no prolonged belabouring.

[6] Section 2(1) of the Act provides that all marriages which at the commencement of the Act were valid at customary law are recognised.

[7] The definition clause of the Act at section 1 defines a customary marriage as a marriage concluded in accordance with customary law; with customary law defined further as customs, usages and practices traditionally observed by and amongst the indigenous people of this country and which form part of indigenous African culture.

[8] The Supreme Court of Appeal in **Netshituka v Netshituka and Others 2011 (5) SA 453(SCA)** at para 15 in dealing with earlier attempts at undermining our cultures as wastelands worth abhorring, unequivocally stated the law as follows:

“...In Thembisile v Thembisile (2002(2) SA 209) Bertelsmann J held that a civil marriage contracted while the man was a partner in an existing customary union with another woman was a nullity. It was not argued in this court that Thembisile was wrongly decided. It follows that the civil marriage between the deceased and the first respondent, having been contracted while the deceased was a partner in existing customary unions with Tshinakaho and Diana, was a nullity.” civil marriage between A and B that was entered into while A was married in terms of customary law to C was a nullity.”

[9] The same court later in **Monyepao v Ledwaba and Others (1368/2018) [2020] ZASCA** held as follows at paragraph 19:

“In the papers, an argument was made that when Ms Ledwaba married Mr Kwele civilly, that had the effect of nullifying her existing customary marriage to Mr Phago. That argument runs contrary to authority in this court. In Netshituka v Netshituka and Others, Petse JA held, on facts strikingly similar to those in this case, that a civil marriage between A and B that was entered into while A was married in terms of customary law to C was a nullity.”

The facts

[10] On 13 August 1988 the applicant and Seabela Thizer Malatji, the now deceased concluded a customary marriage as evidenced by a lobola certificate or letter attached to the applicant’s founding affidavit as well as by several confirmatory affidavits also attached thereto.

[11] Four children having been born out of that marriage, the couple drifted apart resulting in the applicant leaving the matrimonial home at Machidi, Mashishimale Village in Phalaborwa in around late 1992.

[12] On 5 February 2014 the first respondent entered into a “civil” marriage with the now deceased Seabela Thizer Malatji as evidenced by a home affairs department issued marriage certificate also attached to the applicant’s founding affidavit.

[13] On 2 March 2021 Seabela Thizer Malatji passed away from natural causes as evinced by the death certificate attached to the founding affidavit.

[14] On 30 July 2021 the first respondent was appointed executrix of the deceased’s estate by the fourth respondent.

[15] Upon prevailing upon the office of the fourth respondent on 1 August 2023, the applicant was advised that the lobola certificate that she produced was not proof of marriage and further advised that the first respondent had, by virtue of her “civil” marriage, already been appointed executorship of the deceased’s estate.

[16] It is within that background that the applicant approached this court praying as reflected upon *supra*.

The issue

[17] What the first and second respondents appear to place at issue is not whether there was a valid customary marriage between the deceased and the applicant. They do not challenge the lobola certificate nor the confirmatory affidavits of the surviving members of the marriage delegations at all. They are not arguing that the customary marriage was not concluded for want of any further traditional ritual either, such that determinations made as to essentialia of a customary marriage in such matters as

Tsambo v Sengadi (244/19) [2020] ZASCA 46 (30 April 2020) are not worth reflecting upon in *casu*. Their case is best summoned as follows:

[17.1] At the time of the coming into operation of The Recognition of Customary Marriages Act, 120 of 1998 customary marriage between the applicant had ended with the separation of 1992 and is thus incapable of recognition.

[17.2] The dissolution of that customary marriage could not have been expected to be in terms of the Act as the dissolution happened prior to the Act coming into effect.

[17.3] The first respondent had stayed longer with the deceased after the applicant had walked out of the matrimonial home in 1992, married him “civilly” and stayed with him until his death.

[18] Try as I did from perusing the first respondent’s heads of argument or listening to submissions made before me on the first respondent’s behalf, I could not find any cogency to any of the purported grounds mounted in opposition of this application.

[19] In the first place the first and second respondents aver in a blunt, vacuous and flailing manner that the customary marriage between the applicant and the deceased had been dissolved in 1992 without indicating in what manner it came to end. We are left none the wiser as to where, when and how the dissolution of the customary marriage is alleged to have happened. One is left with an impression that the first respondent takes the inexplicable quantum leap in logic that the mere admitted walking out of the matrimonial home by the applicant in 1992 is conclusive proof of a divorce which happened eight years before the coming into effect of the Act. That in my view is misplaced reasoning more so in the absence of any attempt, by these respondents, at reasoning that that is how they perhaps, mistakenly of course, understand divorce to be constituted at customary law. Desertion for whatever period may in many jurisdictions and regarding customary and so, so-called “civil” marriages, be a ground of divorce but

it is not and cannot of itself constitute or prove divorce or marriage dissolution. In that regard my view gains traction from the counsel of the SCA in **Netshituka** where at paragraph 12 it was approvingly observed, inter alia, as follows:

“ In customary law, where a husband has deserted his wife his offence is not irreparable...It was held in Bobotyane v Jack 1944 NAC (C & O) 9 that customary law ‘does not recognize a dissolution of the union by mere desertion of the wife or husband, by abandonment, or even by bare repudiation, for these are all eventualities provided for by the lobola cattle; the husband can always “phuthuma” his wife after any length of absence; the wife can always return to her husband’s kraal and resume her former status.”

[20] Secondly, in the absence of a proven divorce or dissolution of that customary marriage recognisable at either by custom or by any statute predating the Act, the customary marriage between the applicant and the deceased subsisted up to and beyond the coming into operation of the Act which in terms of section 2(1) thereof recognised all customary marriages which preceded its promulgation as valid marriages, the patrimonial consequences of which are all in community of property and profit and loss unless consequences to the contrary were expressly stated somewhere. All such marriages are once recognised, terminable only by a court of law in terms of section 8 of the Act.

[21] Thirdly, having stayed with a person longer than a competing suitor or spouse or having the curious privilege of being present at their deathbed of the contested over spouse does not clothe one with a better marital standing than the other nor does it the nullity of a marriage cure.

[22] Taking a leaf thus from the SCA matters of **Netshituka and Monyepao** referred to *supra*, the question is what to make of the “civil marriage” of the first respondent to the deceased which, in my view, clearly superimposed itself, through the unfortunately conduct of culturally bombed persons like the deceased, onto a subsisting customary

marriage of the applicant and the deceased. It is clearly, as the law stands, nullity *ab initio* and should quite clearly be so declared. A consequence of that declaration of nullity means therefore that all benefits or rights which accrued from that marriage that never was, like the appointment of the first respondent as executrix of the estate of the deceased should fall victim to the same sword.

[23] In the same vein, there is no impediment on the way of the customary marriage of the applicant and the deceased being recognised and registered posthumously and the applicant being declared the lawful customary wife of the deceased. Hers is a valid customary marriage which under cover of the Minister of Home Affairs' notice in terms of section 4(3)(a) of the Act, was, at the time of the hearing of this matter, falling squarely within the prescribed period for the registration of customary marriages, which period was, up to then, 30 June 2024. That period would have now, in the light of the change of guard to a new government post the recent elections, reasonably have been extended already.

[24] Much as I am with the applicant almost the whole hog in this application, what I am disinclined to do is to needlessly usurp the powers of the fourth respondent and encroachingly order the fourth respondent to issue the applicant with letters of executorship authorizing the estate of her late husband. The fourth respondent, who did not enter the fray in this application, remains empowered to act as per his or her statutory mandate regarding appointment of executors post this judgement, factoring into his or her fresh decision, inter alia, the fact that the surviving marital spouse of the deceased is the applicant.

[25] I have at several points in this judgement put the words "civil" in civil marriage in inverted commas suggestive of perhaps having hiccups or misgivings about its employ. I indeed do have those discomforts about routinely, as has been the case even in authority I referred to approvingly, employing the word "civil" to describe a marriage in terms of our statutes governing marriages as derived from the Roman-Dutch law traditions. Perhaps, I need to, without digressing a lot, briefly explain the uncomfortable

gnawing the word, in context, does to this court's decolonized, perhaps injudiciously seditious (some may suggest), mind.

[26] As I understand the dictionary or ordinary meaning of the word "civil" from the English language it either means polite, courteous or as per its Latin root *civilis* it means "relating to citizens" or to people. It has, in my view, the hidden, colonially intended or maybe unintended meaning of negatively othering people such that, in the context of "civil" marriage, it suggests that customary marriages are not courteous, are impolite oddities or about, of, or relate to non-citizens or those surplus to the norm and perhaps such none civil practices are of savages who lack civility or the civil touch or are in need civilization. In that sense the word "civil" in civil marriage as distinguished from customary marriage offends my sense of what is just as it appears, in my view, to be part of Ngugi wa Thiong'o's lamented cultural bomb unleashed by colonialism and imperialism to annihilate practitioners of indigenous African customary law's belief in themselves leading them to see their Africanness as "a wasteland of non-achievement" from which they need to "civilly" distinguish or distance themselves.

Costs

[27] It being commonplace for costs to follow the event and the applicant, in my view, having attained substantial success against the first and second respondents, I see no reason to deviate from that practice.

[28] In her heads of argument, the applicant prayed for a punitive scale on attorney and client scale. It was however not indicated as to why the two respondents who opposed this application, the first and second, should be mulcted with a costs order beyond the ordinary.

[29] I am not persuaded that a punitive costs order is, on the facts of this matter, the poorly conceived and mounted opposition notwithstanding, called for.

[30] In all the above premises therefore, the application should succeed to the extent already indicated *supra* with costs on a party and party scale.

[31] Resultantly, I make the following order:

[31.1.] The application succeeds.

[31.2] The “civil” marriage entered into between the first respondent and the now deceased Seabela Thizer Malatji on 5 February 2014 is declared unlawful and void *ab initio*.

[31.3] The Letters of executorship bearing Estate Number 2[...] in respect of the deceased estate of Seabela Thizer Malatji issued to the first respondent by the fourth respondent on 30 July 2021 are set aside.

[31.4] The customary marriage entered into between the applicant and the now deceased Seabela Thizer Malatji (ID number 5[...]) entered into on 13 August 1988 is recognised as a customary marriage entered into validly in terms of the Recognition of Customary Marriages Act, 120 of 1998 and the Third Respondent is directed to duly register that customary marriage in terms of section 4(7)(a) of that Act.

[31.5] The third respondent is ordered and directed to issue the applicant with a marriage certificate.

[31.6] The first respondent is ordered to pay the costs of this application on a party and party scale inclusive of counsel’s fees computed on scale B.

MALOSE.S. MONENE

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 17 May 2024

Judgement delivered on : 08 August 2024

For the Applicant : Ms R H Chuene
: Instructed by Hope Chuene Attorneys Inc
: Tel: - 066 487 1650
: Email: justice@hopechueneattorneys.co.za

For the 1st and 2nd Respondents : Ms. M E Matloga-Maseko
: Instructed by Obi Matlaila Attorneys
: Tel: 015 268 3248
: Email: matlailaattorneys@gmail.com