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

REPORTABLE: YES/NO

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

(3) REVISED.

DATE 11/9/2024

CASE NO 3950/2021

In the matter between:

**MTSWENI TSHOPANA SARAH
(ID NO: 7[...])**

Applicant

And

**MATENCHI JULIA MABUNYE
(ID NO: 8[...])**

First Respondent

MASTER OF THE HIGH COURT, POLOKWANE

Second Respondent

MINISTER OF HOME AFFAIRS

Third Respondent

**DIRECTOR-GENERAL: DEPARTMENT OF
HOME AFFAIRS**

Fourth Respondent

JUDGMENT

GAISA AJ

INTRODUCTION

[1] This is an application in terms of section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 ("the Act") to declare a customary marriage valid and lawful. The Applicant, Ms Mtsweni Tshopana Sarah, seeks an order declaring that she entered into a valid customary marriage with the late Mr Samuel Matenchi ("the deceased") on 4 October 2005. She further seeks orders to have this marriage registered posthumously and to have the civil marriage between the deceased and the First Respondent, Ms Matenchi Julia Mabunye, declared null and void.

[2] The application is opposed by the First Respondent, who contends that no valid customary marriage existed between the Applicant and the deceased. The First Respondent maintains that she entered into a valid civil marriage with the deceased on 26 April 2013.

[3] The central issue for determination is whether a valid customary marriage was concluded between the Applicant and the deceased in accordance with the requirements of the Act. If such a marriage is found to have existed, the court must then consider the legal implications for the subsequent civil marriage between the deceased and the First Respondent.

FACTUAL BACKGROUND

[4] The Applicant avers that she entered into a customary marriage with the deceased on 4 October 2005 at her family homestead in Thabakgolo, Stoffberg, Mpumalanga Province. She states that on this date, the deceased sent emissaries to negotiate magadi (lobolo) for her. According to the applicant, an agreement was reached that the total magadi payment would be R13,200 plus a cow for the traditional wedding. The deceased's emissaries paid R3,200 on that day, with an undertaking to pay the balance later.

[5] The Applicant states that the magadi negotiations were reduced to writing and signed by both families' lead emissaries. The successful negotiations were apparently celebrated in accordance with Ndebele cultural norms by slaughtering a goat. The Applicant contends that she was then handed over to the deceased's family in accordance with customary law.

[6] On 1 September 2007, the deceased's emissaries allegedly paid the balance of R10,000 for the magadi. The only outstanding component was the cow for the traditional wedding, which was to be delivered on the day before the wedding.

[7] The Applicant states that her marriage to the deceased began experiencing challenges in 2008 when the First Respondent became romantically involved with the deceased. In 2009, the deceased left to cohabit with the First Respondent. The Applicant maintains that there were never any divorce proceedings initiated by either party.

[8] The deceased passed away on 13 January 2021.

[9] The First Respondent denies that a valid customary marriage ever existed between the Applicant and the deceased. She contends that the events described by the Applicant constituted only lobolo negotiations and not the conclusion of a valid customary marriage. The First Respondent maintains that she entered into a valid civil marriage with the deceased on 26 April 2013, as evidenced by their marriage certificate.

LEGAL FRAMEWORK

[10] Section 3(1) of the Act sets out the requirements for a valid customary marriage:

"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."*

[11] In **Mayelane v Ngwenyama and Another**¹ the Constitutional Court emphasized that the determination of customary law is a matter of law for the courts. The court must take steps to satisfy itself as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule.

[12] The Supreme Court of Appeal, in **Tsambo v Sengadi**,² held that while the payment of lobolo is an essential requirement for a customary marriage, it is not the only requirement. The court must consider whether all the essential elements for a valid customary marriage have been met according to the customs of the particular community.

[13] Section 4(7) of the Act provides that a court may, upon application and investigation, order the registration of any customary marriage.

[14] Section 10(1) of the Act states:

"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 No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person."

ANALYSIS

¹ 2013 (4) SA 415 (CC)

² [2020] ZASCA 46

[15] Validity of the Customary Marriage

15.1. The first question to be determined is whether a valid customary marriage was concluded between the Applicant and the deceased in October 2005. This requires an examination of whether the requirements set out in section 3(1) of the Act were met.

15.2. There is no dispute that both the Applicant and the deceased were above the age of 18 at the relevant time. The requirement in section 3(1)(a)(i) is therefore satisfied.

15.3. Regarding consent, the Applicant's evidence that both parties agreed to marry each other under customary law is not directly contradicted by the First Respondent. However, there is limited concrete evidence of the deceased's direct consent to enter into a customary marriage. The court notes the absence of any statement or affidavit from the deceased or anyone from his family confirming his intention to marry, or witnesses attesting to his expressed consent.

15.4. The crucial question is whether the marriage was "*negotiated and entered into or celebrated in accordance with customary law*" as required by section 3(1)(b). This necessitates an examination of the customs and practices of the relevant community.

15.5. The Applicant has provided evidence of several elements that are typically associated with the conclusion of a customary marriage:

15.5.1. Lobolo negotiations were conducted and an agreement was reached.

15.5.2. A substantial portion of the agreed lobolo was paid.

15.5.3. The negotiations were reduced to writing and signed by representatives of both families.

15.5.4. A celebratory feast involving the slaughter of a goat took place.

15.5.5. Although the Applicant states she was handed over to the emissaries at her homestead before being taken to the deceased's family, this raises concern whether a proper handover took place.

15.6. However, the court notes several significant gaps in the evidence presented by the Applicant:

15.6.1. There is no independent evidence corroborating the Applicant's claim of being handed over to the deceased's family.

15.6.2. There is no documentation of an official marriage ceremony or registration of the customary marriage at the time it allegedly occurred.

15.6.3. There are no affidavits or statements provided from the Applicant's parents, siblings, or other family members corroborating her version of events regarding the customary marriage ceremony, celebrations, or her being handed over to the deceased's family.

15.6.4. There is limited evidence of cohabitation between the Applicant and the deceased for an extended period following the alleged marriage.

15.6.5. The Applicant and deceased never acquired assets together, jointly or otherwise.

15.6.6. The Applicant did not attend the deceased's funeral or perform traditional spousal rituals.

15.7. The First Respondent argues that these events constituted only lobolo negotiations and not the conclusion of a valid marriage. The court notes from various caselaw (including Tsambo *supra*) that in many African cultures, the process of concluding a customary marriage is not a single event but a series of interconnected rituals and negotiations. In the present case, the lack of evidence for key elements of the customary marriage process beyond the lobolo negotiations is concerning.

15.8. The court is particularly troubled by the Applicant's delay in bringing this application. The Applicant waited over 13 years after separating from the deceased to file this application. During this time, she took no legal action to assert her claimed marital status while the deceased was alive, even after becoming aware of his civil marriage to the First Respondent.

15.9. The Applicant has not provided a satisfactory explanation for this significant delay. This inaction raises doubts about the Applicant's claim of a valid customary marriage and suggests that she may not have considered herself to be in such a marriage during this extended period.

15.10. The court must also consider the evidence presented by the First Respondent. She has provided a marriage certificate as prima facie proof of her civil marriage to the deceased. The existence of this civil marriage, which was not challenged by the Applicant for many years, casts further doubt on the existence of a prior valid customary marriage.

15.11. Furthermore, the First Respondent has provided evidence of her own customary marriage to the deceased prior to their civil marriage, including affidavits from family members of the deceased and witnesses to the customary and civil marriages.

[16] Application of the Plascon-Evans Rule

16.12. Given the material disputes of fact that have arisen on the papers, the court must consider the application of the Plascon- Evans rule. This rule, established in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**,³ provides that where there are disputes of fact in motion proceedings, a final order should only be granted if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

³ 1984 (3) SA 623 (A)

16.13. In this case, the Applicant has failed to file a replying affidavit to address points raised in the First Respondent's answering affidavit. This failure limits the Applicant's ability to dispute the claims made by the First Respondent.

16.14. Applying the Plascon-Evans rule, the court must accept the version set out by the First Respondent insofar as it is not inherently implausible, far-fetched or clearly untenable. The First Respondent's version, supported by documentary evidence and witness affidavits, presents a more coherent and credible account of events than that of the Applicant.

[17] Implications for the Civil Marriage

17.15. Having found that the Applicant has not discharged the burden of proving that a valid customary marriage existed between herself and the deceased, it is not necessary for the court to consider the implications for the subsequent civil marriage between the deceased and the First Respondent.

17.16. The court notes, however, that the existence of a valid civil marriage certificate creates a strong presumption in favour of the validity of that marriage. The Applicant has not provided any evidence to rebut this presumption.

CONCLUSION

[18] In light of these factors, the court finds that the Applicant has not discharged the burden of proving that a valid customary marriage existed between herself and the deceased. While there is evidence of lobolo negotiations, the Applicant has not provided sufficient proof that all the requirements for a valid customary marriage under the Act were met.

[19] The lack of supporting evidence from the Applicant's family members, the

absence of proof of key customary rituals beyond the lobolo negotiations, and the Applicant's long delay in asserting her claimed marital status all weigh against finding that a valid customary marriage existed.

[20] Given this finding, it is not necessary for the court to consider the implications for the subsequent civil marriage between the deceased and the First Respondent.

ORDER

In the result, the following order is made:

1. The application is dismissed.
2. The Applicant is ordered to pay the costs of this application.

N GAISA

Acting Judge High Court of South Africa
Limpopo Division, Polokwane

APPEARANCES

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DATE OF HEARING	: 9 September 2024	DATE OF JUDGEMENT
	: 11 September 2024	

This judgment is handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 11 SEPTEMBER 2024 at 17:00 PM.