

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: **2023-130586**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES.

DATE: 5 SEPTEMBER 2024

In the matter between: -

K[...] R[...] R[...]

First applicant

(IDENTITY NUMBER: 8[...])

NTOMBI VERNA TAKALANI MONYAI

Second applicant

and

K[...] R[...]

First respondent

(IDENTITY NUMBER: 8[...])

MINISTER OF HOME AFFAIRS

Second respondent

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

Third respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be 5 September 2024.

M VAN NIEUWENHUIZEN AJ:

INTRODUCTION

- [1] This is an application in terms of which the applicants seek a declaratory order *inter alia* to: -
- [1.1] declare that the relationship between the first and second applicants satisfies the requirements of a customary marriage and is declared to be a valid customary marriage;
- [1.2] declare the marriage between the first applicant and the first respondent to be *ab initio* null and void as the marriage was entered into whilst the first applicant was customarily married to the second applicant.

ISSUES IN DISPUTE

- [2] The first respondent raises two points *in limine* of *lis alibi pendens*, namely that: -
- [2.1] There are pending divorce proceedings between the applicants instituted out of the Regional Court of Pretoria and in which the first respondent instituted an application for intervention of that action and in which the first respondent alleges that the applicants were never legally married;
- [2.2] There are pending divorce proceedings between the first applicant and the first respondent in this court in which the first respondent raised a defence that the parties' marriage is null and void as he was already married customarily to the second applicant.
- [3] The first respondent has abandoned the third point *in limine*.
- [4] The first respondent raises a fourth point *in limine* of a material dispute of fact.

[5] On the merits I am called upon to determine whether or not:-

[5.1] the applicants are entitled to a declaratory order;

[5.2] the applicants' marriage is a valid marriage and whether the first applicant and first respondent's marriage is *ab initio* null and void.

COMMON CAUSE FACTS

[6] The following facts are common cause: -

[6.1] That the first respondent in this matter issued summons against the first applicant in this matter for *inter alia* a decree of divorce on the 17th of April 2023 under case number 2023/033724 out of this court;

[6.2] That a rule 43 court order had already been granted against the first applicant in favour of the first respondent, pending the outcome of the divorce proceedings and that this application was instituted after the rule 43 court order was granted;

[6.3] Similarly, on the 4th of May 2022 the first applicant instituted divorce proceedings against the second applicant out of the Pretoria Central Regional Court, wherein the first applicant *inter alia* claims a decree of divorce. The first respondent contends that the first applicant will have to prove that a valid marriage exists between them (the first and second applicants) for the Regional Court to grant a decree of divorce;

[6.4] That the first respondent on the 23rd of July 2023 filed an intervention application in the Regional Court proceedings between the applicants, as she alleges that she has a direct and substantial interest in that matter alleging that she is married to the first applicant.

[7] The validity of the first applicant and first respondent's marriage as well as whether or not there is a valid customary marriage between the applicants are exactly what will be determined by this court in the pending divorce and by the Regional Court in the other pending divorce action.

- [8] Both the divorce actions and intervention applications are still pending and have not been disposed of.
- [9] The first respondent claims that the current application attempts to circumvent the divorce proceedings in which substantial evidence would have to be led regarding the validity of the respective marriages.
- [10] The first respondent furthermore alleges that the current application is between the same parties and is based on the same cause of action as the divorce proceedings.

FIRST POINT IN LIMINE: LIS ALIBI PENDENS

- [11] In the Regional Court divorce the first applicant *inter alia* claims that a decree of divorce be granted. The first applicant will have to prove in that matter that a valid marriage exists between himself and the second applicant for the Regional Court to grant a decree of divorce.
- [12] In the intervention application in the same proceedings the first respondent claims that she has a direct and substantial interest in that matter, alleging that she is married to the first applicant.
- [13] The divorce action and intervention application are still pending and have not been disposed of.
- [14] In this application the applicants claim a declaratory order declaring the relationship between the applicants to be a valid customary marriage.
- [15] There is accordingly litigation pending between the parties on the same cause of action in respect of the same subject matter.

SECOND POINT IN LIMINE: LIS ALIBI PENDENS

- [16] On the 17th of April 2023 the first respondent instituted divorce proceedings against the first applicant out of this court under case number 2023/033724,

wherein the first respondent *inter alia* claims that a decree of divorce be granted.

- [17] The first applicant filed a plea in the aforementioned divorce action, *inter alia* raising the defence that the marriage between the first respondent and the first applicant is null and void as the marriage was allegedly entered into whilst the first applicant was customarily married to the second applicant. The first applicant *inter alia* states in the plea: -

“7(b) That punitive costs be awarded against the plaintiff as she was well aware, at all material times, that there is a customary marriage that was in the process of being dissolved and she proceeded with this current action.”¹

- [18] The aforementioned divorce action is still pending and has not been disposed of.

- [19] In this application the applicants claim a declaratory order declaring the marriage between the first respondent and the first applicant to be *ab initio* null and void.

- [20] There is accordingly litigation pending between the parties on the same cause of action and in respect of the same subject matter.

- [21] I find that the first respondent has met the requirements in successfully relying on the defences of *lis alibi pendens* in that there are: -

[21.1] pending litigation;

[21.2] between the same parties;

[21.3] based on the same cause of action;

[21.4] in respect of the same subject matter.²

[22] “*In respect of the same subject matter*” does not mean that the form of relief claimed must be identical, as suggested by the applicants.³ Whether the subject matter is the same must be determined by the issues as defined in the pleadings.⁴

[23] The matter is clearly distinguishable from the matter *P v R and Another*.⁵ In that matter the applicant *inter alia* sought a declaratory order that the customary marriage concluded between the applicant and the first respondent during August 2006 is valid. The first respondent in that matter opposed the relief sought and contended that the High Court has no jurisdiction as there are currently divorce proceedings pending in the Tembisa Regional Court.⁶ A defence of *lis alibi pendens* was not raised. In paragraph 6 of the judgment, Dippenaar J held as follows: -

“In my view, the jurisdiction point raised by the first respondent lacks merit and the court has the necessary jurisdiction and is the appropriate forum to determine the declaratory relief sought by the applicant.”

FOURTH POINT IN LIMINE: DISPUTE OF FACT

[24] The first respondent argued that since the inception of the application, the applicants were aware that there is a *bona fide* dispute of fact which could not be ventilated on the papers. What the applicants are essentially requesting this court to do, is to delve into the realm of probabilities and likelihoods,

² *RSA Factors Bpk v Bloemfontein Township Developers (Edms) Bpk* 1981 (2) SA 140; *Van As v Appollus* 1993 (3) All SA 402 (C); 1993 (1) SA 606 (C); *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* 2013 (4) All SA 509 (SCA); 2013 (6) SA 499 (SCA); *Nestle SA (Pty) Ltd v Mars Inc* 2001 (4) All SA 315 (A); 2001 (4) SA 542 (SCA).

³ *Williams v Shub* 1976 (4) All SA 449 (C); 1976 (4) SA 567 (C).

⁴ *Marks and Kantor v Van Diggelen* 1935 TPD 29.

⁵ Unreported judgment of Dippenaar J under case number 2021/48331 delivered on the 24th of August 2022, to which I was referred by the applicants' legal representative.

⁶ Paragraph 2 of the judgment.

which application proceedings are not meant for.⁷

[25] In the Supreme Court of Appeal matter of *Mashisane v Mhlauli*⁸ declaratory relief was sought on whether the parties were married according to customary law. The Supreme Court of Appeal held as follows: -

“[12] It is common cause that the appellant is Tsonga and the respondent is Xhosa. Although this point may not have been explicitly canvassed in the affidavits, there was no evidence as to whether their rules of customary law are the same, or indeed what those rules require. This Court needs to have regard to what was said in Mayelane v Ngwenyama and Another,⁹ where the Constitutional Court set out the precautions that a court should heed when dealing with customary law. That case concerned the requirement of consent of a customary wife for her husband to enter into a further customary marriage. The Constitutional Court held that:

‘ . . . The mere assertion by a party of the existence of a rule of customary law may not be enough to establish that rule as one of law. Determination of customary law is a question of law, as is determination of the common law. It was contended that because Ms Mayelane made a factual averment in her papers that Xitsonga customary law required her consent for the validity of her husband's marriage to Ms Ngwenyama, and because Ms Ngwenyama failed to rebut or reject that averment, Ms Mayelane's averment regarding Xitsonga customary law had been sufficiently proved...

. . . First, a Court is obliged to satisfy itself, as a matter of law, on the content of customary law . . . It is incumbent on our Courts to take steps to satisfy themselves as to the content of customary law and,

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A); *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd* 1949 (3) SA 1155 (T).

⁸ (903/2022) [2023] ZASCA 176 (14 December 2023).

⁹ *Mayelane v Ngwenyama and Another (Women's Legal Centre Trust and others as amici curiae)* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC).

where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule.

Second, Courts must understand concepts such as “consent” to further customary marriages within the framework of customary law and must be careful not to impose common-law or other understandings of that concept. Courts must also not assume that such a notion as “consent” will have a universal meaning across all sources of law.

. . .

*It should also be borne in mind that customary law is not uniform. A particular custom may have one of various acceptable manifestations of a consent requirement . . .*¹⁰

[13] Heeding the Constitutional Court’s warning, courts should be slow to decide matters of this nature on affidavits alone. In this case, expert evidence on the concept of ‘consent’ in both the Tsonga and Xhosa customary law should have been adduced by the respondent to establish her case that the parties had consented to, and were married under, customary law. This would have given the appellant the opportunity to adduce his own expert evidence, and, if necessary, a referral to trial or oral evidence to assist the court in deciding the issue. However, the manner in which the respondent elected to bring her case to court deprived the appellant, and the court, of the benefits of a thorough examination of this important issue.

...

[18] The respondent is a party who is interested in an ‘existing, future or contingent right’. The relief she sought was not academic or abstract. The declarator she sought was directly linked to her legal status. She wanted the court to determine that she was married, that

*the marriage was under customary law, and that it was a marriage in COP. Although the same question could have been determined in divorce proceedings, the respondent was entitled to seek declaratory relief to determine her status. This does not mean, however, that the respondent was necessarily entitled to the relief that was granted. This Court must consider the second stage of the inquiry, namely whether the high court, in granting such relief, properly and judicially exercised the discretion conferred on it.*¹¹

[26] I find that in this matter there are material factual disputes, which ought to be properly ventilated in the various pending divorce actions between the parties as referred to hereinabove.

ORDER

I accordingly grant an order in the following terms: -

1. The application is dismissed.
2. The costs of the application up to and including 11 April 2024 shall be on a party and party scale.
3. The costs of the application, from 12 April 2024 onwards shall be at scale A on a party and party scale.

M VAN NIEUWENHUIZEN

ACTING JUDGE OF
THE HIGH COURT

DATE OF HEARING:	23 JULY 2024
DATE OF JUDGMENT:	5 SEPTEMBER 2024

¹¹ Paragraphs [12], [13] and [18] of the judgment.

APPEARANCES:

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