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**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1)	REPORTABLE: Yes ☐ / No ☒
(2)	OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3)	REVISED: Yes ☐ / No ☒
Date: 04 October 2024 WJ du Plessis	

In the matter between:

Z[...] M[...] M[...]

Applicant

and

P[...] N[...] M[...] M[...]

First Respondent

PRESHNEE GOVENDER ATTORNEYS INCORPORATED

Second Respondent

THE MASTER OF THE HIGH COURT JOHANNESBURG

Third Respondent

DIRECTOR GENERAL OF HOME AFFAIRS

Fourth Respondent

Coram: Du Plessis AJ

Heard on: 28 August 2024

Decided on: 4 October 2024

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by e-mail to the attorneys of record of the parties. The delivery date and time is 10H00 on 4 October 2024.

JUDGMENT

DU PLESSIS AJ

Introduction

[1] This is an application to declare the customary marriage between the deceased and the first respondent void, remove the first respondent as executrix from S[...] Z[...] M[...], and appoint Marina Naydenova Attorneys as the executors of the S[...] Z[...] M[...].

[2] While the first respondent filed an answering affidavit, the second respondent did not. No practice notes or heads of argument were filed before the hearing. On the hearing date, counsel for the second respondent appeared and sought to argue the first respondent's case. The reason for this is that the first respondent has gone missing, and an application for an order to presume her death has been filed. There was an argument about whether the second applicant was properly before me since no answering affidavit was filed. I allowed counsel for the first and/or second respondent to address me since there was an answering affidavit from the first respondent due to the case's unique circumstances. I have, however, restricted my considerations to the papers before me.

Facts

[3] The applicant, Ms M[...], initially stated that she brings this application as the last spouse of the deceased, Mr S[...] Z[...] M[...], who passed away intestate on 23

December 2020. However, through the course of the litigation, it became evident that the settlement agreement she signed was made an order of the court on 15 January 2019 that she was not aware of. This is common cause.

[4] The applicant is also the mother and legal guardian of two minor children born from her relationship with the deceased. Her children attended the funeral, but she did not. After the funeral, the deceased's family members took control of his immovable property in Glenvista and his vehicles. She had no access to it since his death.

[5] After consulting with her attorneys, they advised her to verify her marital status at Home Affairs. Home Affairs confirmed that at the time of the passing of the deceased, no divorce order was registered and that, according to their systems, she was still married to the deceased. The deceased's death certificate also indicates that he was married at the time of his passing, which the applicant claims refers to *their* marriage. She then applied for a letter of executorship under the false impression that there was no divorce order.

[6] She applied for appointment as an executrix on 19 January 2021 and was appointed executrix of the Estate Late S[...] Z[...] M[...]. A letter of executorship was issued by the Master of the High Court of Johannesburg on 25 January 2021. She started to administer the estate since she and her daughters do not have any other financial support than the support her deceased husband provided.

[7] During the administration of the estate, the first respondent, P[...] N[...] M[...] M[...], contacted the applicant's attorneys to inform them that *she* was married to the deceased. The applicant also eventually learned that a letter of executorship was issued by the Master to the first respondent, also on 25 January 2021.

[8] The applicant states that she does not know the first respondent and thinks she is colluding with the deceased's other family members to defraud her and her children by taking possession of the deceased's estate and depriving them of their rights to the inheritance.

[9] The applicant's attorneys then tried to correspond with the first respondent's attorneys, the second respondent, Preshnee Govender Attorneys. Despite numerous attempts, they never returned the calls or emails. The applicant's attorneys were trying to understand how the second letter of executorship could be cancelled without the Master informing the applicant that her letter of executorship was cancelled. When the applicant followed up about payments into the estate late account they opened, she was informed that the bank could not do so as the system showed that two letters of executorship were issued.

[10] In the meantime, the first respondent opened another estate late account with a different bank. Again, the applicant tried to get clarity from the second respondent, but the second respondent did not reply to emails.

[11] The attorneys then attended to the Master's office to understand what was going on. When she perused the documents on the system, none of the documents they submitted when they applied for the Letter of Executorship were scanned under the electronic estate file. Instead, a marriage certificate of an alleged marriage between the deceased, dated 21 December 2019 and the first respondent was issued on 8 July 2020. They suspected this document to be fake. When she approached the home affairs office in Lady Smith, they told her that the document was fraudulent and did not exist in their system. The attorneys also conducted a marital status verification of both the deceased and the first respondent, which indicated that the first respondent is "single". The deceased's status showed as married to the applicant.

[12] The applicant's attorneys approached the Master with this information and were informed that a family meeting would be convened to resolve the issue. The attorneys also attended the Master's office again, gained access to the hard copy file of the estate, and took pictures of all the documents, including a divorce order. The estate examiner then stated that she no longer needed to convene a family meeting as she was satisfied that the documents submitted to her entitled her to appoint the first respondent as executor. The examiner was not interested in the actual marital status on the Home Affairs database. The documents are prima facie proof; that is all she needs.

[13] There was no process followed in terms of s 54(1)(b) of the Administration of Estates Act¹ with the removal of the applicant, no reasons in writing were given, and no time period was provided for the applicant to present her case before her removal.

[14] When the attorneys approached Home Affairs to check the validity of the marriage certificate in the files, she was informed that the first respondent's marriage certificate was not on the system. The only marriage on the system was the marriage to the applicant. The marital status of the deceased, which showed "married" on his death certificate, is now reflected as "divorced". They were advised to open a criminal case against the first respondent as the marriage certificate produced to the Master was fraudulent. They did open a case on 10 May 2021.

[15] The applicant's attorney tried to resolve the matter by contacting the chief Master. The chief Master instructed Mr Aphane to conduct a family meeting. This did not happen, there was no correspondence from Mr Aphane.

[16] The applicant's attorneys then, for the first time, received communication from the second respondent. The office manager sent a second marriage certificate of a marriage that purportedly took place on 17 March 2018 to the applicant's attorneys, informing the applicant that they could not administer the estate as they were waiting for the marriage certificate.

[17] This contradicted the fact that a marriage certificate had already been submitted to the Master, after which he issued the letter of executorship two months earlier. However, when following up with Home Affairs, they confirmed to the applicant that the second certificate, issued on 13 May 2021 after the death of the deceased, was reflected in their system.

[18] The applicant still disputes that there was a valid marriage. The deceased could not get married in 2018, as he has not been divorced yet.

¹ 66 of 1965.

[19] After filing the founding affidavit, which indicated that there could be no valid marriage before the divorce, an alleged lobola letter dated 3 March 2019 appeared, along with a marriage certificate with the date of 3 March 2019. The applicant disputes whether the signature on the lobola letter is indeed the deceased's signature, as it differs from the one on the settlement agreement.

[20] The first respondent can explain everything: She and the deceased met around 2017 while she was studying/working. The first respondent attaches a letter dated 17 March 2018 in which the deceased requested her hand in marriage, but they could not finalise lobola because the deceased was still married at that time. A lobola agreement dated 3 March 2019 is also attached.

[21] The first respondent and deceased finally could get married, on her version, on 3 March 2019, at Delington, Limpopo. This being the date that they entered into a customary marriage. The celebrations took place on 21 December 2019 in Limpopo (the traditional wedding) and on 22 December 2019 in KwaZulu Natal (the so-called "white wedding"). The deceased's family attended the 22 December 2019 wedding. The first respondent attaches pictures to show the wedding celebrations.

[22] After the marriage, she contacted the pastor who married them to ask for the marriage certificate, and he indicated that it reflected that the deceased was still married and that she needed to submit the decree of divorce to Home Affairs before he could register the marriage. Due to the COVID-19 lockdown and the birth of her son on 1 June 2020, she could not attend to doing this. They eventually attended to this on 19 October 2020 and were told it could take up to three months for the divorce to show on the system. It was during this time that the deceased passed away. However, the marriage official is not registered as a marriage official with the Department of Home Affairs.

[23] After the funeral, she approached the second respondent to help her with the administration of the estate and to help her obtain the necessary documents from Home Affairs since she was aware that the divorce was not registered at Home Affairs, and she did not have a registered marriage certificate.

[24] She then went to Home Affairs, which told her that the divorce was registered, and she was advised to register the customary marriage first. She states that she brought two witnesses from the deceased's side of the family with her to an interview at Home Affairs. (There are no confirmatory affidavits to this effect.) They issued a certificate with a marriage date of 17 March 2018. When she received the certificate, she saw that they captured the date of the request for a meeting between families, not the date lobola negotiations were entered into and concluded. Because it takes a long time to change the certificate, she was advised to submit this incorrect certificate to the Master. She requested that Home Affairs provide her with a letter confirming the customary marriage because she anticipated the applicant would not believe her. Before these certificates and the letter were issued, the Master appointed her an executrix. She does not know where the first marriage certificate in the Master's file came from.

[25] To complicate matters further, the Title Deed to the disputed property, executed on 29 November 2019 after the alleged divorce and customary law marriage, indicates the deceased as "unmarried", instead of "married in community of property" as it would be if he were married to in terms of customary law on 17 March 2018.

[26] When the second marriage certificate appeared, Mr Aphane from the Master's office called the applicant for a family meeting, which they attended together with an estate administrator from the second respondent. The first respondent only handed over the second marriage certificate, and not the first, despite the applicant's attorneys asking her to do so. She also did not answer questions pertaining to the alleged marriage ceremony. Mr Aphane allegedly also refused to answer questions regarding the two letters of executorship, other than saying mistakes happen. He did not account for the missing documents that the applicant submitted.

[27] Thus, at the launch of the application, there were:

- a. A marriage certificate of a civil marriage that took place on 21 December 2019;

- b. A marriage certificate for a customary marriage that took place on 17 March 2018, issued on 13 May 2021, where the deceased was indicated as “divorced” even if the divorce was not finalised at the time;
- c. A marriage certificate for a customary marriage that took place on 3 March 2019 was issued on 28 June 2021. A lobola letter was attached.

[28] In part A of this application, the applicant asked for the documents to be verified. After the order granted in part A, the certificate in (a) was declared false by the director of Home Affairs. This certificate was used to support the first respondent’s appointment as executrix of the deceased estate.

[29] Certificate (b) indicated that the marriage occurred while the deceased was still married. The Department issued this. Certificate (c) is the amended certificate (b) that the Director of Home Affairs regards as the correct one.

[30] The applicant claims that two lobola letters were submitted—one signed on 17 March 2018 and another on 3 March 2019. There is no other evidence in the form of photos or about the bride’s handing over, so she disputes whether there is indeed a valid customary marriage.

[31] In the applicant’s supplementary papers, her attorney points out the handwriting expert’s report that indicates that the signatures on the lobola letters (and the disputed will that is the subject of another application) do not resemble the specimen signatures taken from the official documents the deceased signed during his lifetime, raising doubt whether they were indeed signed by the deceased.

[32] The report sets out the inconsistencies in the documents and the likelihood that the signature on the marriage certificate signed at the “white wedding” in December 2019 and the lobola letters are not those of the deceased. The problem that the court faced was, on the submissions made by counsel for the second respondent, the first respondent could not engage with the report because she went missing on 18 April 2023. She could thus not instruct the attorneys. On 14 November 2023, an interim court order was granted in which the first respondent was to be declared dead on the date of the court order, and her mother should be appointed as

the executor of both her and the deceased's estate. Should that application be successful, the first respondent could not engage with the report. I am furthermore satisfied that the expert opinion is logically supported by reasoning from a suitably qualified person.

[33] The court was also informed about an application brought by the first respondent where she seeks the removal of the applicant as an executrix and for the last will and testament of the deceased to be declared a valid will. No will was attached. The first respondent also did not report the estate in January 2021. No mention of the will is made in this application's answering affidavit. The issue of the will is not before this court other than what is stated in the supplementary affidavit: The second application is opposed by the deceased's oldest child, as well as a child born out of wedlock, as they do not benefit from that will, and were not cited as parties in the application. The pleadings closed, but the attorneys did not enrol the matter in court as the first applicant went missing a month after the pleadings closed.

Relief sought

[34] Part B of the application requests the court to declare the customary marriage between the first respondent and the deceased, which allegedly took place on 17 March 2018 in Denilton, to be *null and void*. The applicant also wishes for the decision to have the applicant removed and the first respondent to be removed as the executrix of the estate. In an amended notice of motion, the applicant requests her attorneys to be appointed executors of the estate.

The law

Was there a valid customary law marriage?

[35] Section 3(1) of the Recognition of Customary Marriages Act² deals with the requirements for the validity of a customary marriage and provides that:

“For a customary marriage entered into after the commencement of this Act to be valid- (a) the prospective spouses-

² 120 of 1998.

- (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”

[36] Through case law, two core validity requirements for a customary marriage emerged: lobola and the integration of the wife into the husband's family.³ Of course, customary law is not inert, and there are instances of marriages that were considered valid despite not adhering to all the rituals. In the past, courts frequently prioritised the parties' intentions.⁴ That being said, the expectation is that at least some of the customs are adhered to, even if they are modified to fit the modern and urban environment, if one asserts that a valid marriage occurred under customary law.

[37] There is very little evidence other than her affidavit that the requirements have been complied with. There are two affidavits by two men with the surname “ M[...]”, who are alleged to be the deceased's brothers, stating that they witnessed the white wedding on 21 December 2019. However, neither the deceased's adult daughter nor the applicant knows the two gentlemen, who are also 30 years younger than the deceased. Be that as it may, the date of the conclusion of the alleged customary marriage is 3 March 2019, so the affidavits do not assist.

[38] The first respondent seems to rely on the lobola letter, wedding photos, and an affidavit from the pastor that he married them on 21 December 2019 at their “white wedding”. The argument seems to be that this is the celebration and the handing over of the bride. Again, the date provides some problems for the first respondent. However, the requirement of handing over the bride does not need to be interrogated for reasons that will become clear soon.

³ Himonga, C. (2015). *Reform of customary marriage, divorce and succession in South Africa*. 59.

⁴ Bennett *Customary law in South Africa* (2004) 216. See *Cele v Radebe* 1939 NAC (N&T); *Nyembe v Mafu* 1979 AC 186 (NE).

[39] In their founding affidavit, the applicant warns the first respondent that they may, in the future, engage a handwriting expert and file a supplementary founding affidavit. At that time, the first respondent was not yet missing. This they did. They filed an expert report, where the expert concluded that the signature on the lobola letter does not accord with the signature lifted from documents that the deceased signed during his lifetime. There is thus no proof that lobola was negotiated and paid.

[40] The fraudulent first marriage certificate and the whiff of deception with the signature on the lobola letters severely undermine the version of the first respondent. As the story progresses, the first respondent gets more tangled in her dishonesty. For instance, the sequence of the marriage certificates appearing raises further concern. After it is pointed out that the first certificate (21 December 2019 certificate) is possibly fraudulent, a customary law marriage certificate appears with a 2018 date. When it is pointed out that such a marriage is not competent since the deceased was still married, a corrected customary law certificate appears, together with a lobola letter where the signature of the deceased is, in the opinion of the handwriting expert, fake. All this cumulatively leads to a finding that, on a balance of probabilities, there is no valid customary law marriage.

Should the first respondent be removed as executor?

[41] In terms of s 54(1)(a) of the Administration of Estates Act

An executor may at any time be removed from his office—

(a) by the Court—

[...]

(v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned;

[...]

[42] My first concern is that the Master appointed the first respondent as executrix based on a marriage certificate that Home Affairs indicates is a falsified document.

That appointment thus seems to have been made on information we now know is fraudulent.

[43] I do not accept the first respondent's version that she does not know where that certificate comes from – it is evident from the other documents that she submitted with other entities (the provident fund, UIF and so forth) and the fact that the marriage certificate was certified by the same commissioners of oath on the exact dates. This leads to the inevitable conclusion that she knew very well about the document's existence and submitted it on various occasions to different entities.

[44] Secondly, in *Robinson v Randfontein Estates*⁵ the court made it clear that

“Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty.”

[45] Furthermore, in *Knoop NO and Another v Gupta (Tayob as Intervening Party)*,⁶ in dealing with a business rescue practitioner, the court confirmed that it had the power to remove trustees, executors, and liquidators whose continuation in office would be prejudicial to the proper administration of an estate and to the detriment of its beneficiaries.

[46] I am satisfied that the possible fraudulent actions of the first respondent raise enough concern that her continuation in office will be prejudicial to the proper administration of an estate and be to the detriment of the beneficiaries of that estate. Because the first respondent has now gone missing and her lawyers applied to declare her presumed dead, it also means that she needs to be removed and replaced by somebody who can see that the estate is administered correctly to the benefit of the deceased's five children.

⁵ 1921 AD 168 at 177 – 178.

⁶ [2021] 1 All SA 726 (SCA).

Who should be appointed?

[47] S 18 of the Administration of Act empowers the Master to appoint an executor dative. The Master has the discretion to appoint a person they deem fit and proper. If there is competition for the office of the executor, the Master is guided by s 19 of the Act, which states:

19. Competition for office of executor.—If more than one person is nominated for recommendation to the Master, the Master shall, in making any appointment, give preference to—

- (a) the surviving spouse or his nominee; or
- (b) if no surviving spouse is so nominated or the surviving spouse has not nominated any person, an heir or his nominee; or
- (c) if no heir is so nominated or no heir has nominated any person, a creditor or his nominee; or
- (d) the tutor or curator of any heir or creditor so nominated who is a minor or a person under curatorship, in the place of such heir or creditor:

[48] I have considered referring the determination of who to appoint back to the Master. However, I am mindful of the fact that the administration of the estate has been put on hold since 2021 and that four minor children stand to benefit from the deceased estate. There is, thus, a need for finality in the matter. There is enough information before the court to make a decision.

[49] In exercising my inherent jurisdiction to appoint an executor and using the guidelines of s 19 in my decision as to whom should be appointed, as well as the affidavits from four of the heirs (or their representatives), I support the suggestion that the applicant's attorneys be appointed.

[50] As an officer of the court, the attorney is bound by her profession to act ethically and comply with the prescripts of the applicable legislation. In exercising her duties as executor, her duties are not towards the applicant but the beneficiaries. I am satisfied that there are enough mechanisms in the Administration of Estates Act to ensure oversight and accountability. She has also put up a bond of security. For

the sake of the minor children, I specifically request that the executors consider possible ways to safeguard their inheritance.

Order

[51] The following order is made:

1. The customary marriage of the first respondent and the deceased, S[...] Z[...] M[...], which allegedly took place on 3 March 2019, is declared null and void;
2. The fourth respondent must cancel Marriage Certificate H[...] and to make sure that this information is reflected on their systems;
3. The third respondent are to appoint Marina Naydenova Attorneys as executors of the Estate Late S[...] Z[...] M[...], Masters reference 001586/2021, upon provision of sufficient bond of security to the value of the estate;
4. The third respondent are to ensure that the appointment made in 3 is reflected on their systems;
5. The first and second respondents are to deliver, within five days of the court order, the entire estate late file of Estate Late S[...] Z[...] M[...], Masters reference 001586/2021, containing all relevant material documents, records, information, accounts and all other things and/or information kept in the file currently in their possession;
6. The first and second respondents are to immediately pay any monies received, held or paid to the first and second respondent in the course of their administration of the estate into the Estate Late account held with Standard Bank in the name of Estate Late S[...] Z[...] M[...], account number 2[...];
7. The first respondent must give the executor immediate access to the immovable property of the deceased, S[...] Z[...] M[...], Erf 3[...], G[...] Ext [...]6, held by Deed of Transfer no T44093/2019;
8. The first respondent is to immediately deliver the Mercedes-Benz, registration number D[...], 2008, to the executor;

9. The executor is authorised to involve the sheriff's service in 7 to gain access to the property for finalising the estate and to assist with the return of the motor vehicle in 8.
10. Cost against the first respondent or her estate.

WJ du Plessis

Acting Judge of the High Court

For the Applicants: A Vosloo-De Witt instructed by Marina Naydenova Attorneys

For the Respondents: S Mathiba instructed by PGA Inc