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**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 943 / 2023

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

DATE 17 June 2025

SIGNATURE

In the matter between:

N[...] R[...] M[...]

APPLICANT

And

F[...] N[...]

FIRST RESPONDENT

**GOVERNMENT EMPLOYEES
PENSION FUND**

SECOND RESPONDENT

**MASTER OF THE HIGH COURT
NELSPRUIT**

THIRD RESPONDENT

MINISTER OF HOME AFFAIRS

FOURTH RESPONDENT

**DIRECTOR GENERAL
DEPARTMENT OF HOME AFFAIRS**

FIFTH RESPONDENT

J U D G M E N T

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 17 June 2025 at 08H00.

[1] Introduction.

Like sand through the hourglass, so are the days of our lives. With those words, a popular soap opera that graced our televisions' screens since 1965, would be introduced. The truth about the phrase is that each one of us lives under the shadows of this hourglass, not knowing how much sand remains in the upper bulb thereof. The characters of this soap opera are so focused in falling in and out of love, so much that they do not even take note when the sand from the upper bulb of the hourglass is exhausted. That could be where soap opera derived its name from. When these characters are hooked in the pleasure and satisfaction that comes with falling in and out of love, they become helpless, and taking care of the sand in the hourglass is the last concern on their preoccupied minds. It seems this soap opera is not far from the real-life drama that unfolded in this case.

[2] Once sand is exhausted from the upper bulb of the hourglass, it signals the end of time. Like the characters referred to above who find themselves caught off-guard when sand is finished in the hourglass, we often find ourselves least prepared for the inevitable. Equally, nothing could have prepared Mr. L[...] M[...] (the deceased), of the untimely death he met on 06 February 2023, at the age of 43, following a motor collision that took place in the early hours, moments earlier. Without noticing the ticking clock, he had gone about falling in and out of love not knowing that his fate, or that of his assets, would one day be decided based on his decisions to fall in or out of love. Like with all of us, that fate would be determined while we rest peacefully, with no voice to speak for us.

- [3] Six years prior to his death, i.e. on 28 January 2017, the deceased sent emissaries to the family of his sweetheart N[...] R[...] M[...] (the Applicant), to negotiate lobola for their marriage (the first marriage). The negotiations were conducted in terms of Bapedi and Swati custom, these being the tribes of the deceased and the Applicant. Lobola for the Applicant was finally agreed between the two families at R12 000.00 in cash and thirteen cattle. The cash part of lobola was paid there and then, leaving the cattle to be delivered in the future. The marriage was celebrated customarily, and the Applicant was handed over to the deceased to be his wife, and the two lived together as husband and a wife. A child was born out of this marriage being, TM. The marriage was however not registered with the Department of Home Affairs until the passing on of the deceased.
- [4] Two years after marrying the Applicant, i.e. in April 2019, the deceased met F[...] N[...] (the First Respondent) and the two fell in love. Like a man who fell out of love, he moved out of the home he shared with his wife, the Applicant, in order to stay with the First Respondent, in her house. He never went back to his wife. On 23 November 2020, the deceased and the First Respondent signed into a civil marriage that was solemnised at the Department of Home Affairs, Tonga (the second marriage).
- [5] On 16 December 2021, the deceased sent emissaries to the family of the First Respondent to ask her hand into a marriage and to negotiate lobola on his behalf. After the negotiations, lobola was set at R20 000.00, being ten cattle each valued at R2 000.00, which was paid right away. Thus, the deceased's second marriage was celebrated as both the civil and customary union. All these took place out of the view of the Applicant as the deceased left her and did not return to her. As a result, it cannot be gainsaid that the Applicant did not consent to the second marriage of the deceased. The deceased's marriage to the Applicant was also not dissolved through a divorce decree. Based on these, the Applicant submits that the deceased's marriage to the First Respondent is unlawful and should be declared void *ab initio*.
- [6] Although the Applicant attended the deceased's funeral, she played no role therein, watching from the distance as his family accorded the widow' status to the First

Respondent, who ascended to the seat of being a chief mourner. It goes without saying that even the obituary reflected the First Respondent as the deceased's surviving spouse. The only relevance of this is that the First Respondent submits that the Court should consider these, as reasons enough to recognise her as the only lawful wife of the deceased.

[7] The First Respondent submits that the application should be dismissed for the reasons stated above. She further submits that although she did not know of the deceased's marriage to the Applicant, the court should consider it to have been irretrievably broken down. According to her, this is evident from the fact that he moved out of the common residence he shared with the Applicant, and that at the time of his death, he was paying for maintenance of the child he had with the Applicant through a court order. In the alternative, she submits that the deceased's two marriages, one to her and the other to the Applicant, should all be recognised as customary marriages entered in terms of the Recognition of Customary Marriages Act, no. 120 of 1998 (the Act), in particular, section 7(6) thereof.

[8] Upon foreseeing a possibility that there could be benefits accruing to a spouse from pension payout from the deceased's pension contribution as held by the Second Respondent, the Applicant launched Part A of the application under the same case number as the current application. In Part A of the application, which was not opposed by either of the Respondents, the Applicant sought an order that the Second Respondent should stop the payment of the deceased's pension benefits, pending the determination under Part B. The order under Part A was therefore granted unopposed. Part B of the application is as per paragraph 5 above. Part B is opposed by the First Respondent.

[9] Issues for determination.

The court must now determine if the deceased's first marriage to the Applicant was a valid marriage meeting all the requirements of a customary marriage in terms of the Act. It should also determine if the second marriage by the deceased invalidated the first one. If the deceased's first marriage remains valid, it should further be determined if his second marriage was valid, either in terms of the Marriages Act, no. 25 of 1961 or under the Act. In making this determination, the

court would as such make a finding on whether the two purported marriages can co-exist alongside each other in terms of any law and what their statuses should be.

[10] The applicable law.

Relevant parts of sections 3, 4, 7 & 8 of the Act provide as follows:

3. Requirements for validity of customary marriages.—

(1) 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.

(2) Save as provided in section 10 (1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No. 25 of 1961), during the subsistence of such customary marriage.

...

4. Registration of customary marriages.—

(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

...

(9) Failure to register a customary marriage does not affect the validity of that marriage.

...

7. Proprietary consequences of customary marriages and contractual capacity of spouses.—

...

(6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

8. Dissolution of customary marriages.—

(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

[11] It is common cause that the deceased, the Applicant and the First Respondent were adults who consented to their marriages. They were as such compliant with the provisions of section 3(1)(a) of the Act. The dispute is in respect of the provision of section 3(1)(b). It is further common cause that the first marriage was negotiated, celebrated and concluded in accordance with customary law and was thereby compliant with this section.

[12] The First Respondent claims that her marriage to the deceased was also celebrated in accordance with customary law. To the extent that the Applicant did not consent to this marriage, there is dispute regarding this requirement. The dispute is rather legal, as opposed to factual as both parties agree that the Applicant did not consent to the First Respondent being married by the deceased. The dispute lies in the legal consequences of the absence of such consent. The First Respondent avers that according to Swati and Ba-Pedi customs which were observed in lobola negotiations between her family and that of the deceased, the Applicant's consent was not required, for her to conclude a valid customary marriage with the deceased. I will deal with the consent aspect in details later in this judgment. It is imperative at this stage to first consider the impact of a first marriage having irretrievably broken down as alleged by the First Respondent.

[13] Nothing comes out of the argument to the effect that the deceased's marriage to the Applicant was irretrievably broken down. Even if this was a fact, it does not, on its own, validate the purported later act of marriage. The fact that a marriage could be irretrievably broken down only entitles the parties to that marriage to seek a divorce decree which can only be granted by a court.¹ If a party does not seek divorce upon realising that his/her marriage is irretrievably broken down, he/she

¹ See section 8 of the Act.

cannot claim and utilise the rights and benefits that accrue with being a divorcee, such as the right to enter into a new marriage.

[14] One of the obvious reason for this is that, until such time that a divorce decree is granted and an order is made regarding the division of joint estate, the assets in a customary marriage remain the joint property of both the husband and the wife.² Without such an order, the prospective new spouse inherits the conundrum of marrying a person whose assets comprise of a half portion of the undivided estate as the other half belongs to his yet to be divorced spouse. Divorce on the other hand, is not just the wishes of one party's or his/her interpretation of the challenges prevailing in a marriage at the time. It is an order made by the court after considering submissions made by all the spouses.

[15] The impact of lack of consent by the first wife.

Is the consent of a first wife a requirement for the validity of subsequent marriages that her husband may conclude? It is not the first time that this question begs the engagement of the courts. Over ten years ago, the Constitutional Court grappled with this aspect in a matter of *Mayelane v Ngwenyama and Others*³. In that matter, just like *in casu*, the question was over the validity of a second marriage concluded by a husband and another woman, without the consent of the first wife.

[16] As it's often the case, this question usually demands the courts' attention after the demise of the husband. The survivors were battling over the assets he left behind, when sand stops dropping, through the hourglass. There is therefore no need to restate the background regarding the customary practices by various tribes and clans regarding the role of a senior wife in the later marriages of her husband in this judgment. This was fully dealt with by the Constitutional Court, with the involvement of the experts and traditional leaders.

² See section 7(2) of the Act which provides that "a customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage."

³ 2013 (4) SA 415 (CC).

[17] In balancing the customary practices against the constitution and the human rights enshrined in it, the Constitutional Court asked, “[A]re the first wife’s rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not.”⁴ It went on to reason as follows in paragraphs 72-74 and 85 of that judgment:

“72. Second, where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife’s equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.

73. Third, the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.⁵ However, a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent. Respect for human dignity requires that her husband be obliged to seek her consent and that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage.

74. Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner’s consent.

85. The finding that the consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of section 3(1)(b) of the Recognition Act means that, from now on, further customary marriages must comply with that consent requirement. A subsequent marriage will be invalid if consent from the first wife is not obtained.” [My emphasis].

⁴ *Mayelane (supra)* at paragraph 71.

⁵ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57.

[18] The First Respondent's reliance on the earlier ruling in which the Supreme Court of Appeal (the SCA) had declared a second marriage concluded without a consent of the first wife as valid, is not helpful to her cause. As the Constitutional Court pointed out, in making that declaration, the aspect of lack of consent by the first wife was not dealt with by the SCA.⁶ That declaration was based on section 7 of the Act which provides for the matrimonial regime of a marriage. The SCA correctly held that the failure to acquire a court order allowing a husband to marry a second wife, as required by section 7, does not affect the validity of a second customary marriage, but the matrimonial regime that would be applicable to it. The question of lack of consent by the first wife was therefore not dealt with by the SCA. It was for that reasons that the declaration by the SCA was set aside on appeal to the Constitutional Court.

[19] This Court was also referred to *Molokane v Williams and Others*⁷, a judgment by the Gauteng Division, where Malungana AJ declared a second marriage concluded by the deceased as valid, irrespective of the contestation by the first wife that she had not consented to it. I am of a view that *Molokane* was wrongly decided for the following reasons. The court did not deal with the aspect of lack of consent of the first wife, and the consequences thereof, even though the same was pleaded by the first wife. The only time that the lack of consent was ever mentioned in the judgment, was when the court was dealing with the summary of issues before it. It did not pronounce itself on those issues in the judgment. Lastly, it is not apparent from the judgment if the court was aware of the Constitutional Court judgment of *Mayelane* as it only referred to the earlier judgment by the SCA and on a different subject, which involved the matrimonial regime applicable in respect of the second marriage.

[20] The First Respondent also submitted in the alternative, that the second marriage should be accorded an equal status of a customary marriage, as the first one. In so doing, she relied on *Zwane v Zwane and Others*⁸, a judgement by this Division in which the court had to consider the status of the deceased's marriages to three

⁶ See paragraph 8.3.3 of the First Respondent's heads of argument.

⁷ [2023] ZAGPJHC 1210 (24 October 2023).

⁸ (2362/2021) [2024] ZAMPMBHC 25 (11 March 2024).

women. In *Zwane*, the deceased's marriage to his second wife was concluded in terms of the Marriages Act, no. 25 of 1961, whereas his first and third marriages were customary marriages. In that matter, the court declared that all the three marriages were customary marriages, thereby accorded them equal status in respect of their share from the deceased's estate.

[21]The *Zwane* judgment cannot afford any refuge to the First Respondent's predicament. Her plight is that she married the deceased without the Applicant's consent. In *Zwane*, the deceased's marriages to the two women married after his first marriage, were with the permission of the first wife, something that distinguishes her plight.⁹ Further submission to the effect that the obituary of the deceased read at his funeral mentioned the First Respondent as the only wife or that she was the chief mourner who was allowed to sit on a mattress by the family is irrelevant and a non-starter. The fact that the deceased and the First Respondent lived together as husband and a wife does not take the argument any further. Living like a married couple does not validate the second marriage in view of the deceased having not divorced the Applicant or acquired her consent into marrying another wife.

[22]It follows therefore that the deceased's marriage to the First Respondent is invalid and has to be declared as such.

[23]The Order:

For the aforesaid reasons, I make the following order:

23.1It is declared that the Applicant (N[...] R[...] M[...]) was married to the late L[...] D[...] M[...] (the deceased) with identity number 7[...], which marriage was concluded on 28 January 2017 in terms of customary law.

23.2It is declared that the marriage between the First Respondent and the deceased is invalid and unlawful.

23.3The Fourth and Fifth Respondents are hereby directed to register the Applicant's customary marriage to the deceased and to furnish her with the marriage certificate.

⁹ See *Zwane* (*supra*) at paragraph 7.

23.4 The Third Respondent is ordered to recognize the Applicant's customary marriage to the deceased.

23.5 The First Respondent is ordered to pay the costs of this application.

**TV RATSHIBVUMO
DEPUTY JUDGE PRESIDENT
MPUMALANGA DIVISION OF THE HIGH COURT**

APPEARANCES:

FOR THE APPLICANT:

ADV. MJ MACHABA

INSTRUCTED BY:

**MABOKU MANGENA ATTORNEYS
INC**

MBOMBELA

FOR THE FIRST RESPONDENT:

ADV. M MAGAGULA

INSTRUCTED BY:

**SIMELANE-MTHEMBU HJG INC
MBOMBELA**

DATE HEARD:

29 MAY 2025

JUDGMENT DELIVERED:

17 JUNE 2025