IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER 15078/12
DATE:08/04/2013

In the matter between:

MRL APPLICANT

AND

KMG RESPONDENT

JUDGMENT

THULARE AJ

[1] Love is blind, but divorce opens your eyes. This is what the respondent seeks the courts to accept as being a true experience of his love life. Having divorced before, he denies a second marriage at all and in particular a customary marriage, the nature of which is a marriage in community of property, to the applicant.

[2] The applicant alleges that she entered into a customary marriage with the respondent on 21 May 2011 at Pretoria and that the marriage still subsists. It is common cause that the respondent has on 27 March 2012 under case number 11255/12 launched an application against applicant wherein he seeks inter alia

that it be declared that he is not married to the applicant. It is also common cause that the applicant is instituting action against respondent wherein she claims a decree of divorce, a division of the joint estate, maintenance and costs.
The dispute between the parties is a matrimonial one.

[3] The applicant's claim before this court is for maintenance *pende lite* and a contribution towards the costs of the pending matrimonial action. The claim for maintenance includes the maintenance of her two minor children not born of the respondent.

LIABILITY OF RESPONDENT TO MAINTAIN APPLICANT

[4] Section 2 (2) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (hereinafter referred to as RCMA) provides that a customary marriage entered into after the commencement date, which is 15 November 2000, which complies with the requirements of that Act, is for all purposes recognized as a marriage.

[5] In Zaphiriou v Zaphiriou 1967(1) SA 342 (W) Trollip J said at page 345 E-H:
"There is, therefore, good authority that in common law, even though the validity of the marriage was being disputed, nevertheless the Court had jurisdiction in preliminary application proceedings to award maintenance and a contribution towards costs pending an action to determine that fundamental dispute. And I have no doubt that that applies equally, if not a fortiori where, although the validity of the marriage is admitted, its continued subsistence is disputed, as in the present case.
Rule 43 was merely designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under the common law in regard to maintenance and costs, and I think, therefore, that Rule 43 must be construed accordingly; in other words, that 'spouse' in sub-rule (1) must be interpreted as including not only a person admitted to be a spouse but also one who alleges that he or she is a spouse, and that allegation is denied. In other words, the Rule also applies where the validity of the marriage or its subsistence is disputed.
The application under Rule 43 in the present case can, therefore, be entertained by this Court."

[6] I am satisfied that the applicant has set out facts, which if proved, will sustain a finding that the parties were customarily married on 21 May 2011, and these includes:

(a) The applicant is 48 years of age, and the respondent 62 years of age. That is, both are above the age of 18 years.

(b) The applicant and the respondent agreed to be married to each other.

(c) The applicant and the respondent agreed to marry each other in a customary marriage.

(d)). The elders of the families of the two parties met and negotiated a customary marriage for the parties.

(e). There was an amount paid by the elders of the respondent to the elders of the applicant, which both parties agree it was lobola.

(f) The elders of applicant handed her over to the elders of the respondent.

(g) The negotiations and payment of lobola was followed by a celebration, which both parties acknowledge.

I am satisfied that all these facts, if proved, meets the requirements of section 3 of the RCMA, which are the requirements for validity of a customary marriage. Moreover, respondent gave applicant a ring and in communication with third parties referred to her as his wife.

[7] In my view, this case is distinguishable from Baadjies v Matubela [2002] 2 All SA 623 (Baadjies case). In my view, in the Baadjies case, the applicant did not set out facts which, if proved, would meet the requirements for the validity of a customary marriage as envisaged in section 3 of RCMA.

[8] In my view, a party to a disputed customary marriage must set out facts, with sufficient particularity as to the requirements for validity of the customary marriage, and specifically the negotiations and entering into or celebration in accordance with custom, of the alleged customary marriage; which facts if proved at trial, sustain the conclusion that such a marriage was indeed concluded. Once a party sets out those facts with sufficient particularity, such party is entitled to equal benefit and protection of the law, which includes that ‘spouse’ in sub-rule (1) of rule 43 must be interpreted as including such a party to a customary marriage. Applicant is a spouse as referred to in sub-rule (1) of Rule 43.

LIABILITY OF RESPONDENT TO MAINTAIN APPLICANT’S CHILD, KM

[9] Applicant relies on the concept "*O e gapa le namane*", as the basis for the liability of respondent towards her minor children, who are not the biological children of the respondent.

[10] By the whim and paradox of history, I am called upon to not only interpret, but also to be equal to the task of developing customary law.

[11] Africans generally allow themselves lessons from nature, which includes from land, animals, birds and plants. One of the observations of the Indigenous peoples, is that it is very difficult to lead a cow away from its herd or kraal in the absence of its calf. To avoid the emotional, psychological and other trauma of both the cow and the calf, which sometimes affects the whole herd and those involved or watching, it is better to lead the cow and allow the calf to automatically join in in the removal from one herd or kraal to the other. It is this experience that led the Sotho speaking nations which includes Batswana, Bapedi and Basotho to have this observation as an idiomatic expression, *"O e gapa le namane".* Loosely translated, it says, *"You lead it with its calf".* Applicant is a Motswana.

[12] It is worth noting at the outset that reference is to a calf, and not to every other heifer or cow, bullock or bull which may be part of the herd born of that specific mother cow.

[13] Africans have specific reference names, informed by the developmental stages of a person. Generally, everyone born of parents is a child of those parents, whatever the age of the person. In the Sotho speaking nations, child is "*ngwana*". In its generic sense, everyone is *"ngwana"* to his or her parents. However, specifically, a child most often refers to a person under the age of 14. This is because from the age of 14, a boy-child graduates from being *"ngwana"* to *"lesogana"* and a girl-child from being *"ngwana"* to *"lekgarebe".* In the Nguni speaking nations, the child is *"umtwana"* and from 14 years a boy-child is *"Isoka"* and a girl-child is *"Intombi". "Lesogana/Isoka",* loosely translated, is a suitor; and *"lekgarebe/intombi"* is a maiden. At 18 years, you then have *"Monna/Indoda"* loosely translated as "a man" or *"Mosadi/Umfazi"* loosely translated as "a woman".

[14] The concept of *"O e gapa le namane",* in the context of a customary marriage, is premised on the belief that the essence of motherhood is caring and nurturing

children. Amongst others, it is informed by the observation that *"ga e latswe namane e se ya yone",* which, loosely translated, means *"unless it gave birth to it, it does not lick off its amniotic fluid."* This is another observation from animals that it is only the mother, and none other, that licks off the amniotic fluid from the skin of a new-born calf. All these concepts are geared towards striving to understand the bond between a mother and a new-born child, and that especially in early childhood, a child needs and is not to be ordinarily separated from its mother. The concepts are meant to protect young children.

[15] In my view, reliance on the concept of *"O e gapa le namane",* applies to children in the context of indigenous customs, practices and traditions. In that sense, it means *"Go nyala mosadi ka ngwana yo o sa mo tsaleng ka madi".* Loosely translated, it says *"To take a child born of another man into your marriage with its mother".* For all intents and purposes, it is equal to the customary adoption of a child.

[16] A man who does not intend to take a child who is under the age of 14, born of another man into his marriage with the mother of that child, must express such intention during the negotiations and the entering into a customary marriage. The customary concept, *"O e gapa le namane"* is assumed, for a child under the age of 14, unless it is expressly excluded.

[17] I am satisfied that applicant has set out sufficient facts before me, which if proved at trial, sustains a conclusion that Respondent took the child, KM, who is 11 years of age, into his alleged customary marriage with the applicant. I am satisfied that K is *"ngwana"* as understood in African custom, practices and traditions, and therefore qualify as *"namane"* as intended in the concept. I am satisfied that applicant has shown the basis for the concept "*O e gapa le namane",* as the basis of the respondent's liability to maintain that child.

LIABILITY OF THE RESPONDENT TO MAINTAIN APPLICANT'S CHILD, LM

[18] Customs, practices and traditions deem a person older than 14 years no longer "*ngwana".* Such child is deemed of such age, maturity and stage of development as to be able to assume responsibilities within a homestead. Against the background of the Children's Act, 2005, (Act No. 38 of 2005), amongst others, such child, has the right to participate in an appropriate way and views expressed

by such child must be given due consideration, as regards his or her being taken into the marriage of his or her mother.

[19] Nothing precludes a man from expressly manifesting a desire, during the negotiations and the entering into a customary marriage, to take children above the age of 14 into his marriage with their mother, and to assume the role of fatherhood for these children. This is by agreement. Once there is such agreement, such children become the children of the spouse concerned, and the spouse concerned becomes the father of the children in full. This fatherhood, amongst others, attracts the reciprocal duty to maintain each other.

[20] It is common cause that the child L:
(a) Was disclosed to the respondent.
(b) Moved from her maternal home to the respondent's home
(c) Respondent assumed responsibility for providing her with shelter, subsistence and travel, educational and medical needs, and basically the whole of her maintenance.
I am satisfied that applicant has placed sufficient facts before me which, if proved, sustain the conclusion that the basis of the liability of the respondent for the maintenance of her child, L, a child not born of respondent, is by agreement contemporaneous with the conclusion of the customary marriage, if proved.

[21] In my view, the concept of *"Bo seka bo ja",* loosely translated as *"Whilst the issues are being ventilated at the courts, subsistence must be available"* applies, consequently, respondent is to continue to maintain that child whilst the nature and extent of his liability, if any, is being determined at trial.

THE NEED OF APPLICANT AND HER CHILDREN

[22] It is common cause that the applicant has given up her employment as Chief Executive Officer of the Telkom Foundation and gave her attention to her new home. The reasons for such giving up on her employment, where she earned R55 000 net per month, are in dispute. The fact is, applicant has no income of her own currently.

[23] The respondent has been paying the mortgage bond instalments and levies on the Morningside property, medical aid premiums and any excess not covered

by the scheme, full comprehensive motor vehicle insurance, garden services, applicant's cellphone contract, applicant's gym and personal trainer fees as well as Redhill School fees. In my view, these are reasonable expenses and are easily ascertainable.

[24] As regards applicant's current liabilities, which includes amounts owed to the City of Johannesburg, Eskom, Redhill School fees, Nedbank overdraft, FNB overdraft and FNB credit card, in my view, it is only fair that those amounts that accrued from 21 May 2011, for household necessaries, be allowed as reasonable expenses. In my view, there is some work to be done to determine the exact amounts.

[25] With regard to the other current monthly expenses, it is my view that some are simply exaggerated. My point of departure is that the applicant and her children are entitled to have what they necessarily require, not their best selections. R12 000-00 for grocery for three people per month is simply too much, under the circumstances. I will allow R5000-00. In my view, around R700-00 for DsTV is reasonable. R2500 for both applicant and her two children for personal care is reasonable. R2800 for the domestic worker is reasonable. R3000-00 petrol per month is in my view reasonable. R2000-00 for both applicant and the two kids for entertainment in my view is reasonable, so is R1000 for both applicant and her children for clothing is reasonable, and a R1000-00 for both applicant and her children for holidays. My view is that R1200 airtime is reasonable. In my view, around R1000-00 for Telkom landline and Wi-fi is reasonable. It must be remembered that these expenses are monthly expenses. I am not satisfied that a proper case has been made out for a body guard and that amount is disallowed. The other expenses as set out in the amended paragraph 22 and 44 are allowed. In my view, under this heading, a reasonable appropriate amount is R40 000-00.

THE MEANS OF THE RESPONDENT

[26] I accept that the average monthly income of the respondent from his practice as an Advocate and Senior Counsel is about R395 775-00.

[27] In my view, R4616-00 per month as telephone expenses for his former wife

and children is simply too much, against the background of it being used as a reason why he could not avail more for the maintenance of the applicant and her children. So is an amount of R8917-00 explained as “Pat & Children other expenses”, against the background of Pat and the children receiving another deduction of R20 000 for maintenance. A monthly payment of R11016-00 for a motor mechanic is also too close for comfort, so is R3123 for DsTV. This court cannot allow a man to amass properties at the expense of his obligations to maintain his wife and children. Respondent does not need three properties, if that is at the expense of his obligations to maintain. A deduction for one property, in the context of a maintenance dispute is sufficient under the circumstances. He does not need to spend R11 248-00 on alcohol and entertainment, if that means he cannot maintain his family. Respondent cannot be allowed to spend R41 510-00 on his clothing, which includes travelling and restaurants. On that expense, only reasonable costs for clothing and grocery can be allowed. However, R7609-00 groceries for a single man, is simply too much, if that is the reason he cannot maintain his wife and children. Furniture and Interior Décor of R8862 per month is a lot for a man who claims poverty as an answer to a maintenance claim. So are donations to friends and family at R10199-00. The rest of the expenses which respondent set out in Annexure MK1 of his substituted answering affidavit are accepted as reasonable expenses. In my view, almost R100 000-00 are expenses that are not necessarily required by the respondent at least, or at most cannot be used to ward off maintenance obligations. I agree with the applicant that the lifestyle led by the respondent is extravagant. I accept that the respondent has sufficient means to meet the needs of the applicant and her two minor children.

REASONABLE AND APPROPRIATE AMOUNT

[28] I am not expected to make a meticulously mathematically correct sum of money for purposes of maintenance. I am expected to strive to the best of my ability to make a reasonable and appropriate amount as an order.

[29] In my view, the following represents a fair, just, informed, reasonable and appropriate order under the circumstances:

1. Respondent is ordered to pay the following monthly
a) The mortgage bond instalments of the Morningside property at R17400-00.
b) The levies of the Morningside property at R1000-00.

c) Rates, taxes, water and electricity bills of the Morningside property
d) Garden Services at the Morningside property.
e) The medical aid premiums for applicant and any excess medical expenses.
f) Full comprehensive motor insurance
g) Applicant's cellphone contract to the maximum of R1200-00.
h) Applicant's gym and personal trainer fees
i) The Redhill school fees for both minor children.

2. Respondent is further ordered to pay applicant's current liabilities, the indebtedness of which accrued from 21 May 2011 to date, on her accounts with:

a) City of Johannesburg
b) Eskom
c) Redhill School fees
d) Nedbank overdraft
e) FNB overdraft
f) FNB credit card

Applicant's attorney is directed to submit statements of such accounts to respondent's attorneys within 30 days of this order.

3. Respondent is further ordered to pay to applicant an amount of R40 000-00 per month from 1 May 2013 for the maintenance of herself and her two minor children. The amounts are payable on or before the 7th of each succeeding month.

4. Respondent is further ordered to contribute an amount of R30 000-00 towards the legal costs of the matrimonial dispute.

5. Costs of this application are to be costs in the main action.

DM THULARE
ACTING JUDGE OF THE HIGH COURT