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

Case Number: 21/34140

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

18 July 2022

In the matter between:

MUNYADZIWA MUVHALI

Applicant

and

RICH LUKHELE

First Respondent

LINDIWE LUKHELE

Second Respondent

VICTOR LUBISI

Third Respondent

VICTORIA LUBISI

Fourth Respondent

SIPHAMANDLA LUBISI

Fifth Respondent

MBALI LUBISI

Sixth Respondent

RAND MERCHANT BANK PROVIDENT FUND	Seventh Respondent
FIRST RAND RETIREMENT FUND	Eighth Respondent
RAND MERCHANT BANK	Ninth Respondent
THE MASTER OF THE HIGH COURT JOHANNESBURG	Tenth Respondent
THE MINISTER OF HOME AFFAIRS DEPARTMENT	Eleventh Respondent

JUDGMENT

SIWENDU J

Introduction

[1] This application concerns a determination of the applicant's marital status following the death of Khethuhuthula Louie Khipho Lubisi (the deceased). The applicant resides at [...] B [...] 1 D [...] B [...] 2 , Johannesburg, Gauteng Province, a joint home she owned with the deceased.

[2] The applicant is employed by the National Institute for Occupational Health as a medical scientist. She is muVenda speaking and was raised in terms of the Venda customs and traditions.

[3] The applicant states that the first and second respondents are the half-siblings of the deceased. They share a biological mother. The first and second has deposed to the opposing affidavit on behalf of the second to the sixth respondents.

[4] The applicant claims that the Third to the Sixth Respondents are the full biological siblings of the deceased. They are the younger siblings of the deceased.

The deceased parents pre-deceased him and he was consequently survived by the First to the Sixth Respondents.

[5] There is a dispute on the papers about whether the first and second respondent are the biological siblings of the deceased. The first respondent denies that he is the deceased's half-brother. He claims they were born of the same biological parents but that he later changed my surname. He does not offer reasons or more than this. There is no version from the second respondent about her consanguinity. She merely confirms the contents of the opposing affidavit by the first respondent without much more.

[6] The Seventh and the Eighth Respondents are the administrators of the deceased pension and other death benefits by virtue of his employment with the Ninth Respondent. The Ninth Respondent was the deceased employer at the time of his death.

[7] The Tenth Respondent is responsible for the deceased administration of Estates in terms of the Act 66 of 1965 as amended. The Master does not oppose the application and has filed a notice to abide with the decision of the court.

[8] The Eleventh Respondent is the Cabinet Minister responsible inter alia for the registration of customary marriages in terms of the Recognition of the Customary Marriages Act 120 of 1998.

[9] There is no relief sought against the Seventh to Eleventh Respondent. They are cited merely for the interests that they might have in this matter.

[10] The applicant approached the court for an order declaring that:

- the customary marriage entered into between her and the deceased on 22 December 2018, is a valid customary marriage as envisaged in the provisions of section 3 of the Recognition of Customary Marriage Act, 120 of 1998.
- the Applicant is the customary wife of the deceased; and.

- she be granted leave to posthumously register her customary marriage with the Department of Home Affairs.

Background

[11] The applicant and the deceased started their romantic relationship in the 2009 at the University of Johannesburg where we were both students. The deceased was in his third year and the applicant in her my first year.

[12] They started living together in 2014, in rented accommodation in Buccleuch. That same year, the deceased purchased an apartment at Number [....] T [....] C [....] , H [....] D [....] , in N [....] . They moved into the apartment at the end of September 2014.

[13] The applicant claims that between 2014 to 2015, the deceased was the sole breadwinner because he was the only one employed. The applicant was serving her internship and finalizing her studies. She states that she commenced full time employment in 2016 and thereafter contributed towards their joint household expenses.

[14] The applicant claims that in September 2016, the deceased proposed that they should get married by customary law. She accepted his proposal. They got engaged to be married. The engagement was made known to their respective families. The Fifth Respondent was the first family member to be officially informed. The applicant says she showed him the engagement ring in the presence of the deceased.

[15] During the course of 2018, the deceased proposed to pay lobola and she consented to get married to him. Arrangements were made for their families to meet. The families met at her parental home on 22 December 2018, in Maungani village in Limpopo and commenced lobola negotiations.

[16] During the negotiations, the deceased family was represented by George Thabethe, Victoria Lubisi (Fourth Respondent), Rich Lukhele (First Respondent), Pat

Maluka, Rich and Lindiwe Lukhele's cousin whose name is unknown to the applicant, Bhelele Lubisi.) Lindiwe Lukhele (Second Respondent), Victor Lubisi (Third Respondent).

[17] The applicant's family was represented by Andries Muvhali, David Khangale, Gerson Ramunenyiwa, Norman Nematikanga (now deceased), Elisabeth Kone, and Muthavhini Mudau.

[18] It was agreed that the deceased would pay a total sum of R 90 000, 00 as lobola, R 23000, 00 of which was in cash. The deceased family undertook to return for the payment of the outstanding lobola as soon as they were ready. At the time of the passing of the deceased, this had not happened.

[19] Part of the dispute centres on the fact that the applicant claims that after the successful negotiations and part payment of lobola, the two families started celebrating their customary marriage on that same day. From thereon, the deceased's family referred to her as their *makoti* or bride.

[20] There is no dispute however that she and the deceased continued to live together in his apartment until they purchased a new property at number [...] B [...] 1 D [...] , B [...] 2 . They jointly took out a mortgage bond from First National Bank. The property was registered in their respective names in November 2019. It records that the applicant and the deceased are unmarried. After moving into their home, she and the deceased shared the household expenses although the deceased contributed slightly more

[21] The applicant says she and the deceased regarded their new property as their marital home. They have been living together until his death. During December 2020, she and the deceased discovered that she was 2 months pregnant with their first child.

[22] On 04 March 2021, the deceased fell ill and was admitted to hospital on the 5th day of March 2021. On 9 March 2021 at 18:00 while in hospital the deceased sent a Whats-App message and wrote:

"I khethuthula Louie Khipo Lubisi write this last will and testament without duress and of sound mind. I hereby beque[a]th me net assets including my life policies to my customarily married wife Munyadziwa Muvhali upon my death or any event that results in me being mentally incapacitated:

Regards"

[23] The deceased died on the 11 of March 2021 two days after the message. The applicant states that the deceased gave her the pass code to his phone. When she accessed his phone she retrieved the same message, noting that it was not only sent to her but to a number of other parties including some of the respondents. Even though not material to the current dispute before the court, the applicant accepts that the deceased died without a valid will.

[24] The applicant's account shows that the deceased's funeral arrangements were fraught with family conflict. She says the relationship between her and the deceased's family, (in particular) the first, third and fourth Respondents was strained because they were interested in details of the deceased finances in particular - (1) his salary, (2) the value of his life insurance policies and (3) pension fund. She states that she refused to disclose this information which contributed to the strained relations.

[25] The applicant claims to have initiated the funeral arrangements for the deceased at AVBOB, with the view to pay for his funeral expenses. However, due to the severe deterioration of the relations she decided to withdraw from the arrangements. She withheld her financial contribution and consequently allowed the respondents to bury the deceased as they wished. Ultimately, the deceased was buried in Nelspruit, Mpumalanga province. Due to the strained relations she did not attend the funeral in fear for her life and that of her unborn child.

[26] The applicant claims that her fears heightened because on the 18 March 2021, she saw the first respondent together with the third respondent through the CCTV cameras of her home taking the pictures of the house where she and the deceased lived. When she asked the first respondent for the reasons of taking

pictures, he replied by WhatsApp and said it was for "good memories of his brother." She viewed their conduct as an act of intimidation. The third respondent allegedly raised his middle finger at the camera.

[27] She claims her family sent Lufuno Chester Ndiitwani to travel to Nelspruit as her family representative to attend the funeral. On his return he reported that upon his arrival at the funeral, unknown members of the deceased's family threatened and chased him away. Lufuno Chester Ndiitwani filed a confirmatory affidavit to this effect.

[28] When the applicant approached the office of the Master of the High Court in Johannesburg to obtain the letter of the executorship, the officials declined to grant it to her because the customary marriage was not registered with the Department of Home Affairs.

Opposition

[29] As already alluded to above, the opposing affidavit was deposed to by the first respondent and confirmed by the second to sixth respondents. He raised a preliminary issue that the court lacks jurisdiction to entertain the application. The contention is that the respondents are domiciled in Mpumalanga and KwaZulu Natal. Furthermore, the sole cause of action arose in Limpopo where the lobola proceedings occurred.

[30] On the merits, the respondents point out that of the R23k paid during the lobola negotiations, R10 000,00 was in respect of the traditional "right to speak"¹ during the lobola negotiations or to win the ear of the representatives of the applicant's family. An amount of R13 000,00 was paid in respect of lobola. Other than to show that a breakdown of the payment made and that a lesser amount was paid in respect of lobola, nothing turns on this aspect.

[31] The respondents contend there is a factual dispute whether the marriage was entered into between the deceased and the applicant. They dispute there was a

¹ Also known as "imvula mlomo" in Nguni languages.

customary marriage. They say that although the applicant and the deceased resided together, their joint home was not a marital home. Even though they admit that the applicant was referred to a "*their makoti*" (the traditional wife) they say the use of the term was in "*a manner of speaking*". The reason for the use was because the applicant and the deceased were cohabiting and not because they were officially married.

[32] A material component of the opposition is based on the customs and traditions of the two families. Even though the applicant stated that the deceased was a Tsonga but spoke Zulu because he mostly grew up in Middelburg Mpumalanga, where the Zulu language was dominant, the respondents dispute this.

[33] They contend they are of Swati origin but speak isiZulu because of the proximity to KwaZulu-Natal. Therefore, marriage had to be celebrated according to Swati tradition. They claim that they, together with the deceased were brought up according to the siSwati customs and traditions. The applicant and the deceased were not engaged to be married during the period September 2016 until 2018 when the lobola negotiations took place.

[34] The purpose of the meeting on the 22 December 2018 was to negotiate the payment of lobola and not to celebrate a customary marriage. The meeting served as a formal introduction of the applicant to the delegates of the deceased. They claim that the representatives of the deceased met the representatives of the applicant for the first time. After that day, the family of the deceased never saw the family of the applicant again. The deceased's elders were not present at the time as it was merely lobola negotiations and not the celebration of a customary marriage.

[35] In terms of the Swati customs and traditions, a cow would be slaughtered by the family of the husband as a sign of acceptance of their new "*makoti*". This custom is known as "*imvume*"- an acceptance custom. The family of the groom would then pour cow bile on the head of their "*makoti*", known as the "*ukubikwa*" custom which represents that the new wife is introduced to the ancestors of the groom's family.

[36] The family of the bride must equally slaughter a cow and pour bile liquid on the head of the groom as a sign of recognising him as their lawfully wedded "*mkhwenyana*" or groom. Both families must exchange half of the cow slaughtered to complete the acceptance and integration of marriage bonds between the families. The family of the "*makoti*" must bring gifts to the family of the groom to lawfully recognize them as her in-laws also known as the "*umabo*" tradition.

[37] In order to conclude a customary marriage, a second meeting of the families was required during which meeting the elders would be present and the handing over of the bride would occur at the deceased's home. The applicant's family would be requested to slaughter cows, give the bride clothes and neighbours and relatives would sing and dance. Once the balance of the lobola is paid, the applicant and her family would be invited to the deceased's family home where the customary marriage would then be entered into and celebrated. This did not occur.

[38] The point of the contention is about the celebration of the customary union. The respondent's version is that delegates of the applicant stated that they wanted to serve food to the delegates of the deceased as successful negotiations took place. Although against the Swati custom, in the spirit of *ubuntu* so as not to offend the delegates of the applicant, the deceased's representatives agreed to eat dinner together. The applicant is referring to a dinner that took place and not the celebration of a customary marriage. It follows therefore that the Applicant in our customary laws, is not *umakoti*.

[39] In respect of the subsequent events, the first respondent admits that he asked the applicant about the deceased's finances and his funeral policy. The reason was to make the necessary funeral arrangements and to determine the costs associated therewith.

[40] The respondents claim that the cause of the strain was due to the applicant requiring an affidavit from the deceased's family members in which they were asked to declare under oath that the applicant was married to the deceased. They refused to provide the applicant with such an affidavit.

[41] The first respondent also admits that he took photos outside the applicant's house. He was with the funeral undertaker. The applicant refused to open the door after they rang the bell outside. In his culture it is tradition that if somebody passes away far from the family house and the family decided to burial elsewhere, before the deceased is moved to the burial site, the family would first take him to his home and request that his spirits go with them and protect them along the way. He took a picture to indicate that they were indeed there to honour his culture and traditions. Furthermore, he had good memories with my brother and wanted to honour those memories.

[42] In reply, the applicant states that in addition to the agreement by the family representatives that they would get married, the marriage was celebrated on the same day. She and the deceased lived together as husband and wife. She produced a receipt to show that her engagement ring was purchased in September 2016.

[43] She says the lobola negotiations started in the morning and finished in the afternoon thereafter the deceased's delegates had lunch and the left. The respondents came late around 18h00 for celebration. There would have been no need for them to come back other than for the celebration. There was never an arrangement or agreement to conclude and/or celebrate the customary marriage at the deceased family home at a later date. After the negotiation and payment of lobola and celebration, the deceased family recognized and addressed her as their *makoti*.

[44] She disputes that the families never interacted thereafter, and uses as an example the fact that the second respondent attended Norman Nematikanga's funeral her uncle. Furthermore, she says the sole reason for requesting an affidavit was to claim a funeral spousal benefit paid by her employer in addition to other funeral benefits she had to contribute towards the deceased's funeral.

Jurisdiction

[45] Ms Rourke (for the respondents) contends that the original jurisdiction of each division of the High Court is territorial. The domicile of the Plaintiff never determines

jurisdiction. The *dominus litis* must, in suing a person residing in the Republic, select the court in whose area such person resides. Respondents reside in Mpumalanga and KwaZulu-Natal. She also contends that the lobola negotiations and the celebration of the customary marriage took place at the applicant's place of residence in Limpopo Province and as such the sole cause of action did not arise within the jurisdiction of this Honourable Court.

[46] Ms Rourke (for the respondents) relies on the court's decision in *Gallo Africa Ltd v Sting Music (Pty) Ltd*² a matter involving an infringement of copy rights UK Copyright Act in South Africa and in other countries. The court points out that jurisdiction is territorial. It is also said as in *Softex Mattress v Trans Mattress furnishing Co*³ that for the court to exercise its common law jurisdiction, there must be a "cause arising" within the area over which it exercises jurisdiction. However, Ms Rourke fails to also consider that the court acknowledged that jurisdiction also depends on either the nature of the proceedings or the nature of the relief claimed or, in some cases, on both. The cases relied on are distinguishable.

[47] I agree with Mr Zakwe (for the applicant) that on a proper analysis of the application, the Applicant is essentially seeking a declaratory order regarding the status of her marriage with her deceased partner, from which certain future rights may arise. The application is cognisable in terms of Section 21 (1)(c) of the Superior Court's Act 10 of 2013 which states that:

"A division has a jurisdiction over all persons residing or being in, and in relation to all causes arising and all other matters of which it may according to law take cognisance, and has the power-

....

.....

² 2010 6 SA 329 SCA at 332D-E -

³ 1979 (1) SA 755 (D)

(c) in its discretion, and at the instance of an interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

As Mr Zakwe points out, in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*⁴ Jafta JA said:

"Indeed the balance of convenience has been regarded as a consideration in determining whether or not a court has jurisdiction"

[48] The preliminary point falls to be dismissed forthwith.

Was there a Customary Marriage?

[49] The primary question is whether there was a customary marriage between the applicant and the deceased.

In terms of section 3(1)" of the Recognition of Customary Marriages Act 120 of 1998 ("the act") for a customary marriage entered into after the commencement of the 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 the customary law;*

(b) *the marriage must be negotiated and entered into or celebrated in accordance with the customary law."*

[50] Ms Rourke argues that not all the elements in section 3(1) (b) were met. In this instance, only the first part of section 3(1)(b) of the act was met (the marriage must be negotiated), the latter part (entering into or celebrated in accordance with customary law) was not met. Whilst it is not in dispute that marriage negotiations

⁴ (237/2004) [2005] ZASCA 50, [2006] 1 ALL SA 103 (SCA) (30 May 2005) par 13

took place, it is however disputed that the marriage was entered into or celebrated in accordance with the customary law.

[51] She also contends that it is not common cause that after the payment of lobola, there was a celebration of the marriage. It is not common cause that the applicant was the spouse of the deceased. Ms Rourke placed reliance on the Court's decision in *Fanti v Boto and Others* where the court held that:

"regard being had to the above requirements for the validity of a customary marriage, payment of lobolo remains merely one of the essential requirements. In other words, even if payment of lobolo is properly alleged and proved, that alone would not render a relationship a valid customary marriage in the absence of other essential requirements."

And further that:

"The importance of the rituals and ceremonies performed for a customary marriage is that they indeed indicate in a rather concretely visible way that a customary marriage is being contracted and that lobo!o have been paid and/or the arrangements regarding the payment of lobolo has been made and that such arrangements are acceptable to the two families - particularly the bride's family. These ceremonies must be viewed as a ceremonial and ritual process in which the essential legal requirements have been incorporated. Where these rituals and ceremonies have not taken place or were not in conformity with custom the marriage is not valid."

[52] The assertion by the respondents that the events of 22 December 2018 were confined to lobola negotiations and not more is not uncommon in customary marriage disputes. I am duty bound to decry the often unwarranted attempts by parties to tabularise and dissect constituent components of an otherwise rich and generous system of law to meet legal exigencies. The unfortunate consequence is to denude customary law of its inherent feature and strength – namely the spirit of generosity and human dignity.

[53] The decision in *Fanti v Boto*⁵ relied on by Ms Rourke predates many of the decisions by the Supreme Court of Appeal (SCA) which seek to place the requirements of a valid customary law in proper context. Mr Zakwe argues in opposition that the SCA, stated that when dealing with customary law, it should always be borne in mind that it is a dynamic system of law.

[54] In this instance, the first to sixth respondents rely on a formal compliance with aspects of Swati customs. They contend that none of the rituals, traditions and ceremonies according to the custom were performed. A similar argument was raised in *Tsambo v Sengadi*⁶ where parties proffered a different interpretation to the celebrations that occurred after negotiations. As in this case, parties opposed to the marriage and relied on customs and traditions.

[55] I pause to mention that it is also not necessary that the lobola is paid in full. Nothing turns on how the amount paid or allocated in this case. In *Tsambo*, the court reveals that subject to the circumstances of the parties and each case, lobola negotiations can be followed by a celebration of a customary union. The customary law rituals relied on by the respondents are not cast in stone.

[56] The court in *Mbungela v Mkabi Mbungela and Another v Mkabi and Others*⁷ found that the ritual of the handing over of the bride was important but not a key determinant of a valid customary marriage. In this instance, the applicant and the deceased come from different customary lineages.

[57] The Act does not specify the requirements for the celebration of a customary marriage. In *Ngwenyama v Mayelana and Another*⁸, the court points out that the legislature purposefully deferred the meaning to the living customary law. Put differently, this requirement is fulfilled when the customary law celebrations are generally in accordance with the customs applicable *in those particular circumstances*. Even though not specifically raised, the position by the respondents that *Swati custom* based on the progeny of the husband should determine the rituals

⁵ 2008(5) SA 405 (C)

⁶ 244/19) [2020] ZSCA 46 par 15.

⁷ [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA),

⁸ 2012 ZASCA (4) SA 527 par 23

and custom which would render the marriage valid is not without difficulty. The parties came from different customary lineages.

[58] The compelling argument made on behalf of the applicant is that it is permissible for the court to look at other features which constitute customary practices that are indicative of, or are compatible with an acceptance of the bride by the groom's family. In my view the reasoning serves a vital purpose, which is to bring an objective view of issues away from the subjective predilections of the protagonists.

[59] I consider the valuation certificate from Arthur Kaplan Jewellers dated 12 September 2016 which confirms that the deceased bought the engagement ring for the applicant approximately two years before the lobola negotiations significant. The claim that the applicant and the deceased were not engaged to be married during the period September 2016 until 2018 when the lobola negotiations took place is patently incorrect.

[60] The deceased's family referred to her as their *makoti* or traditional wife afterwards. One of them attended her uncle's funeral, and indication of a recognition of the extended relationship. She communicated with the first respondent and some of the deceased's family by means of WhatsApp. The manner and tone indicates that he clearly recognized her as their daughter in law and/or the deceased's wife. Even though the first respondent admits this but denies the basis for doing so as merely "a manner of speaking," the denial does not carry much weight when considered with other objective facts.

[61] Lastly, the court in *Mbungela*⁹, found that the referral to the couple as husband and wife by one family member and the registration by one spouse of the other as "husband" in an important document in which she informed the world her important next of kin, were not insignificant. The first respondents considered her as such. The change of heart only occurred after the death of the deceased.

⁹ par 23

[62] In this instance, regard must be had to the conduct of the deceased too. The respondents disregard his conduct in their opposition and do not address certain objective facts. When the applicant and the deceased first arrived at their new home, they joined a WhatsApp group made up of the other residents. The deceased introduced the applicant as “his wife.” The deceased took out an FNB Law on Call Personal Plan. He registered the applicant as “a spouse.” On the facts, the applicant and the deceased were consistent about the relationship from the time they met. They lived together throughout and bought a home together.

[63] Even though the WhatsApp messages may be considered a “dying declaration”, and their probative value questioned, the messages reliably and completely transmit the deceased’s last words on the issue. I admit these messages in the interests of justice. The deceased intended the applicant to be his wife married under customary law.

[64] When all of the above facts are considered in the context of the living, inherently flexible and pragmatic custom, a valid customary marriage existed between the applicant and the deceased from 22 December 2018 onwards.

[65] Accordingly, I make the following order:

- a. There was a valid customary marriage between the applicant and the deceased as envisaged in the provisions of section 3 of the Recognition of Customary Marriage Act, 120 of 1998.
- b. the Applicant is the customary wife of the deceased; and.
- c. Leave is granted to the applicant to register the customary marriage with the Department of Home Affairs, posthumously.
- d. The respondents are ordered to pay the costs of the application jointly and severally.

T SIWENDU
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 13 June 2022. The judgment was subsequently revised on 18 July 2022 to include a cost order omitted at the time of delivery.

Heard on: 11 May 2022

Delivered on: 13 June 2022

For the Applicant: Mr Zwake

Instructed by: Gumi Attorneys

For the first to sixth respondents: Ms Rourke

Instructed by: Cavanagh & Richards Attorneys