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

CASE NO: 1354/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

08 August 2022

In the matter between:

MABEO, MORATWE MARTHA

Applicant

and

MASTER OF THE HIGH COURT, SOUTH GAUTENG

RE: Estate Late: Phefeni Richard Ngwenya

1st Respondent

SHABANGU, NTOMBANA CECILIA

2nd Respondent

RAPITSI, NTOMBANA GERTRUDE

3rd Respondent

NGWENYA, LILIAN KHITI

4th Respondent

NGWENYA, BEKISIZWE

5th Respondent

NGWENYA, THUNZI SENDRA

6th Respondent

NGWENYA, LETIA MANKU (born Lekota)

**Obo The Minor Children: Phefeni Ngwenya, Philani Ngwenya
And Poki Ngwenya**

7th Respondent

**DIRECTOR GENERAL: DEPARTMENT OF
HOME AFFAIRS**

8th Respondent

JUDGMENT

Mdalana-Mayisela J

1. This is an application to declare the customary marriage entered into between the late Phefeni Richard Ngwenya (“the deceased”) and applicant on 8 December 2002 valid and recognised in terms of the Recognition of Customary Marriages Act, 120 of 1998 (“the Act”). Further, the applicant seeks an order directing the eighth respondent or its delegated functionary/personnel/official to register the marriage on the national register and issue a marriage certificate in accordance with the provisions of the Act and the published Regulations.

2. The second to seventh respondents are opposing the application. The second respondent is the mother of the deceased. The third to sixth respondents are the deceased’s siblings. The seventh respondent is the ex-wife of the deceased and the mother of deceased’s triplet minor children.

3. The second to sixth respondents are disputing that the customary marriage was entered into between the deceased and applicant on 8 December 2002. They contend that the deceased paid damages on 8 December 2002 for a child he has with the applicant. The seventh respondent is disputing the customary marriage between the applicant and deceased. She contends that the payment made to the applicant’s family by the deceased’s family on 8 December 2002 was for damages for a child born between the applicant and deceased. Further, she contends that she customarily married the deceased on 6 May 2001, and that she did not consent to the applicant and deceased’s customary marriage.

Background facts

4. The applicant and deceased met and commenced a love relationship in 1992. At that time the deceased was separated from his wife, T [...] C [...] K [...]. In 1993, the applicant and deceased rented an apartment located in Buccleuch, Gauteng Province and moved in together. In 1996, they purchased the immovable property situated at [...] M [...] street, Baccleuch through a close corporation in which they both hold equal membership. The applicant moved out of their home to another apartment due to their relationship issues. She was then assigned to a job in Hannover, Germany. She returned to South Africa in 2000. On her return, the applicant and deceased reconciled, because the deceased's divorce proceedings from T [...] were finalised.

5. On 19 October 2002, the family of deceased, represented by Paul Shabangu (the deceased's uncle), visited the family of applicant, located in Ikageng township, Potchefstroom, Northwest to make an appointment for negotiations. On 8 December 2002, the deceased sent a delegation represented by Paul Shabangu and Madiga for negotiations. The applicant's family was represented by Oliver Pelesane and his wife, applicant's brother and father. After the negotiations were concluded, an amount of R2000.00 was paid to the applicant's family. Both families' representatives shared lunch together. Thereafter, the deceased's family representatives were excused.

6. On 18 June 2004 the deceased and seventh respondent entered into a civil marriage. On 7 March 2005, the seventh respondent gave birth to deceased's triplets that were conceived through the in vitro fertilization (IVF) procedure. On 11 November 2015, the seventh respondent and deceased divorced. The deceased died on 1 April 2018. At the time of his death he was in a relationship and living with the applicant.

Legal principles

7. A customary marriage is a marriage which is concluded in terms of customary law and the Recognition of Customary Marriages Act 120 of 1998. In terms of section 3(1) of the Act, a customary marriage that is concluded after the coming into

operation of the Act, is valid if the bride and groom are over the age of 18 years, both of them consent to the marriage, and the marriage is negotiated and entered into or celebrated in accordance with customary law. Customary law refers to '*the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples (section 1 of the Act).*'

8. A customary marriage entered into after the coming into operation of the Act must be registered within three months of the wedding date or within such longer period as the Minister prescribes in the Government Gazette (*section 4(3)(b)*). Section 4(5)(b) enables a customary marriage to be registered after the death of one or both of the spouses.

9. It is trite and well-established that customary law is a dynamic, flexible system, which consistently and continuously evolves within the context of its values and norms, infused with the values of the Constitution, so as to meet and keep up with the changing needs of people who follow, adhere to, and live by the norms of customary law (*Shibi v Sithole and Others; South African Human Rights Commission and Another v President of South Africa and Another 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC); [2004] ZACC 17 at paras 81 and 86-87*).

Discussion

10. There are two customary marriages that are alleged to be in existence in this matter. First, it is a customary marriage between the deceased and seventh respondent that was entered into on 6 May 2001. Second, it is the customary marriage entered into between the deceased and applicant on 8 December 2002. Both these customary marriages are in dispute. The civil union entered into between the deceased and seventh respondent on 18 June 2004 and dissolved on 11 November 2015 is common cause.

11. First, I have to determine the validity of the customary marriage entered into between the deceased and seventh respondent on 6 May 2001, should I find that it existed, then the second customary marriage without the seventh respondent's consent would be a nullity.

12. It is not in dispute that the seventh respondent met the deceased in 1996, and moved in with him at his house situated at [...] M [...] Avenue, Baccleuch, Gauteng Province in 1999. It is also not in dispute that a Sesotho cultural ceremony referred to as '*Mahlabiso*' was held on 13 June 2004 at the seventh respondent's home in Kroonstad. It is also not in dispute that the customary marriage between the deceased and seventh respondent was translated into a civil union on 18 June 2004. It is also not in dispute that the triplets were born between the deceased and seventh respondent on 7 March 2005. The applicant disputes that lobola was paid by the deceased to the family of the seventh respondent on 6 May 2001.

13. It is common cause that both the deceased and seventh respondent were above the age of 18 years on 6 May 2001. The seventh respondent in her answering affidavit states that the deceased proposed marriage to her in 2001 and she agreed to get married to him. Subsequent to the agreement, a letter was sent to her family in March 2001 commencing lobola negotiations. She states that it was their intention that they should first get married customarily and thereafter enter into a civil marriage.

14. On 6 May 2001 the deceased's family represented by his uncle, Westin Shabangu, second respondent, and sixth respondent visited the seventh's respondent's home in Kroonstad, Free State Province to negotiate lobola. Her family was represented by her now late mother, Dimakatso Lekota, her uncle, Tladi Lekota, eldest brother, Mosiuoa Lekota and cousin, Notshi Lekota. The families' representatives agreed that the lobola amount payable would be R12 000.00. The deceased's family paid R2000 on the same day and committed to pay the remaining R10 000.00 as soon as possible.

15. The seventh respondent states that the handover process commenced on the day of the lobola negotiations. During the lobola negotiations, in the presence of both families' representatives, she consented to becoming the deceased's customary and civil wife. The second respondent welcomed her into her family and explained that from that day onwards, as the deceased's wife, she should not wear pants in the presence of elders, and should always cover her head with a scarf at family

gatherings. After the lobola negotiations, both families' representatives shared a meal together prepared by her family members. Immediately thereafter, she and deceased's family representatives travelled in convoy to their house in Baccleuch. The second respondent stayed over at their house for few days, thereafter, she returned home. The deceased and seventh respondent continued to live in Buccleuch as a customarily married couple. In 2004, they moved to another house situated at [...] R [...] Street, Midrand.

16. Further, she states that for pure symbolic reasons, another hand-over occurred on Sunday, 13 June 2004. On that day the deceased's family representatives visited her home in Kroonstad to pay the remaining lobola amount of R10 000.00. The *Mahlabiso* ceremony, symbolising the coming together of the two families was also celebrated on that day. On the 18th of June 2004 the customary marriage was translated into a civil marriage at the Germiston Magistrate Court.

17. The second respondent in her answering affidavit corroborates the seventh respondent's version that she was part of the deceased's delegation to negotiate and pay lobola for her on the 6th of May 2001 and 13 June 2004.

18. The applicant's dispute of the seventh respondent's customary marriage entered into on 6 May 2001 is an unsubstantiated denial and falls to be rejected. She attached Vusi Radebe's affidavit to her replying affidavit trying to support her denial. However, Radebe was not part of the negotiations that took place on 6 May 2001. He has no personal knowledge of the events that occurred on that day. He also does not know who were the family representatives of the deceased on that day.

19. It makes sense to me why the second respondent was part of the deceased's delegation to negotiate lobola for the seventh respondent, because the handover process commenced on the same day. After the families' representatives agreed on lobola, and the seventh respondent consented to the customary marriage, the second respondent gave rules to the seventh respondent on how to conduct herself as deceased's wife.

20. Although it was according to traditional law impossible for the mother of the bride to be her daughter's guardian, there existed instances in practice where mothers negotiated for and received lobola and consented to the marriage of their daughters. That a woman who was head of her family could negotiate for and receive lobola was thus not repugnant to the customary law of marriage as actually practiced (*Mabena v Letsoalo 1998 (2) SA (T) at 1073I and 1074(F0G)*). Indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. It has throughout history evolved and developed to meet the changing needs of the community (*Alexkor Ltd and Another v Richtersveld Community and Others 2004 (5) SA 460 (CC) at para 53*).

21. I find that the deceased and seventh respondent entered into a customary marriage on 6 May 2001. The lobola amount payable was R12 000.00. R2000.00 was paid on the same day. The remaining R10 000.00 was paid on 13 June 2004. Their customary marriage was celebrated and the handover occurred on 6 May 2001. *Mahlabiso* ceremony occurred on 13 June 2004. Both the deceased and seventh respondent were above the age of 18 years when they entered into their customary marriage. They both consented to their customary marriage. I find that their customary marriage was concluded in terms of the customary law and section 3(1) of the Act. It was translated into a civil marriage on 18 June 2004 and dissolved on 11 November 2015.

22. I now deal with the customary marriage allegedly concluded between the deceased and applicant. The following facts are common cause: that on 19 October 2002, the family of deceased, represented by Paul Shabangu, visited the family of applicant, located in Ikageng township, Potchefstroom, Northwest to make an appointment for negotiations; that on 8 December 2002, the deceased sent a delegation represented by Paul Shabangu and Madiga for negotiations; that the applicant's family was represented by Oliver Pelesane and his wife, applicant's brother and father; that after the negotiations were concluded, an amount of R2000.00 was paid to the applicant's family; and that both families' representatives shared lunch together, and thereafter, the deceased family representatives were excused.

23. What I have to determine is whether the negotiations were for damages for the applicant's child born outside of wedlock or for lobola with the intention to enter into a customary marriage. The applicant alleges that it was lobola negotiations, and that the families' representatives agreed on R10 000.00 as the total amount of lobola payable. R2000.00 was paid on 8 December 2002, and the remaining R8 000.00 was to be paid in due course, but it was not paid. Further, she alleges that the customary marriage was celebrated on the same day. Both families' representatives shared a meal together and there was a celebration in the form of ululations. There was no formal handover.

24. The second respondent disputes that it was lobola negotiations. She states that the applicant was impregnated by the deceased, whilst the deceased was customarily married to seventh respondent. The deceased requested her to allow him to pay damages so that he could have access to the child. She blessed that arrangement. A delegation was sent to the applicant's family to negotiate damages for her being impregnated outside of wedlock. She did not form part of the delegation because it was for damages negotiations. She formed part of the delegations visiting the seventh respondent's and T [....]'s homes because the purpose was for lobola negotiations.

25. Further, she states that there was no handover of the applicant to the deceased's family, because it was damages negotiations. At the time of the deceased's death, the applicant was his girlfriend and cohabitee. Since the funeral date, the applicant never came back to the deceased's home in Nelspruit, even for the period which is observed as ten days, which is a date culturally used to map the way forward up until the finalisation of the mourning period, known as cleansing.

26. Paul Shabangu, in his confirmatory affidavit attached to the answering affidavit of seventh respondent, states that on the 15th of April 2018 he signed an affidavit attached as "**FA8**" to applicant's founding affidavit. The contents of "**FA8**" were not filled in by him. He was asked by the applicant to sign it without it being explained or read out to him. The "**FA8**" was written in English. He is not conversant in English. He cannot write English. He was 85 years old when he deposed to his

affidavit. He speaks Zulu. After signing “**FA8**”, he went home informed his wife that he signed a document, without the knowledge of its contents and/or the reason or purpose for signing it. His wife advised him to go to the police station to depose to another affidavit confirming what she told her.

27. On 19 April 2018, he went to the police station and deposed to another affidavit attached to his confirmatory affidavit as annexure “**PS1**”. He confirms that the contents of “**PS1**” are correct. He states that had he known what he was signing for in “**FA8**”, he would not have signed it. I accept his explanation regarding “**FA8**”, and I am disregarding the contents of “**FA8**”.

28. He states that after the deceased’s family became aware that the deceased impregnated applicant, the deceased and seventh respondent sent him and Madiga to the applicant’s home in Potchefstroom to pay damages for the child. The child was only few months old when damages were paid. They explained the purpose of the visit to the applicant’s family that it was damages for the child. The amount of R2000.00 was paid to the applicant’s family for damages. He contends that the deceased did not give him instructions to pay lobola for the applicant. The applicant was deceased’s girlfriend.

29. The seventh respondent disputes that lobola was paid by the deceased’s family representatives to the applicant’s family on 8 December 2002. She contends that she was still customarily married to the deceased on the said date. The deceased or his family did not inform her that he was paying lobola for the applicant. She did not consent to the alleged customary marriage between the applicant and deceased. The applicant did not object to her *Mahlabiso* cultural ceremony held on 13 June 2004 and her civil marriage concluded on 18 June 2004. The applicant also never laid a claim to being married to the deceased whilst he was still married to the seventh respondent customarily and civilly, despite her many telephonic conversations with her over that period.

30. She states that in June 2002 and whilst at their house, an unknown visitor came to deliver a photo of a baby. The deceased was not at home at that time. The names of the deceased and the applicant as the parents of the child were engraved

on the back of the photo. When the deceased arrived, she confronted him about the photo. He then impressed on her that all he wanted was to become a father, and that he had lost hope that she would ever fall pregnant through IVF procedure. He assured her of his love for her.

31. As the time moved on, she accepted the applicant's child and encouraged the deceased to visit the child. The applicant refused the deceased access to the child. It was then that she and the deceased decided that he should pay damages for the child in order to have access to her. They then sent a delegation to the applicant's family home to pay damages for the child. Paul Shabangu informed them that R2000 was paid for damages.

32. In applying the Plascon Evans rule, which states that the applicant who seeks final relief on motion proceedings must, in the event of conflict accept the version set up by the respondent, unless the latter's version consisted of bald and uncreditworthy denials, or raised fictitious disputes of fact, or was palpably implausible, or are so far-fetched or clearly untenable that the court was justified in rejecting it merely on papers, I find that the seventh respondent's version that the deceased paid damages for the child and not lobola for the applicant, as corroborated by the second respondent and Paul Shabangu, is creditworthy and plausible. I accept the respondents' version in this regard.

33. The applicant admitted that the seventh respondent and deceased entered into a civil marriage on 18 June 2004, which was dissolved on 11 November 2015. The applicant does not explain in her papers that, if indeed she was customarily married to the deceased on 8 December 2002, did she give consent for the deceased to marry the seventh respondent as the second wife or was her customary marriage legally dissolved before the civil marriage was entered into. It is common cause that she did not object to the civil marriage when it was concluded. In my view she did not object to the civil marriage because she was not customarily married to the deceased. The applicant has failed to discharge the onus that she and the deceased concluded a customary marriage on 8 December 2002.

Conclusion

34. I conclude that the deceased and seventh respondent entered into a valid customary marriage on 6 May 2001 and it was still in existence on 8 December 2002. The applicant was impregnated by the deceased during the subsistence of the seventh respondent's customary marriage. Pursuant to the said pregnancy, the deceased's family paid R2000.00 to the applicant's family for damages for the child on 8 December 2002. Even if I were to find that the R2000.00 paid to the applicant's family was for lobola, the seventh respondent did not consent to the deceased and applicant's customary marriage and therefore it would be a nullity.

Supplementary affidavit

35. The seventh respondent filed a supplementary affidavit dated 25 January 2021, without the leave of court. This affidavit was filed almost a year after the pleadings were closed, and without the substantive condonation application. During the hearing of this matter, counsel for the seventh respondent did not make an application for the filing of the supplementary affidavit, which was somehow an indication that the seventh respondent was no longer pursuing it.

36. It was only at the end of the hearing, when the court *mero motu* enquired about the status of the supplementary affidavit, that counsel for the seventh respondent, from the bar applied for condonation of the late filing of this affidavit and leave of the court to file it. Counsel for applicant objected to that application on the grounds that it would be prejudicial to the applicant if this affidavit is allowed to be filed, because the applicant has not had an opportunity to deal with the contents thereof, as it was not properly before court.

37. I then made a ruling refusing leave to file a supplementary affidavit and the condonation application. The reasons for that ruling were that, first, once the condonation application was opposed, a substantive condonation application had to be filed, but it was not filed by the seventh respondent. The condonation application was made from the bar without the facts supporting it. Second, granting leave to file the supplementary affidavit at the end of the hearing of the matter would be

prejudicial to the applicant as she would not have an opportunity to deal with contents thereof.

38. As to costs, the respondents have asked for punitive costs because of the voluminous papers filed by the applicant. I am not persuaded that the papers are so voluminous as to warrant punitive costs. I find that costs should follow the event.

39. Accordingly, the following order is made:

1. The application is dismissed with costs.

MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(Digitally submitted by uploading on Caselines and emailing to the parties)

Date of delivery: 8 August 2022

Appearances:

On behalf of the Applicant: Adv M Morgan
Instructed by: Tyani Vukeya Inc

On behalf of the respondent: Adv M Panyane
Instructed by: Moshona Mabena- Mogane Inc