

REPUBLIC OF SOUTH AFRICA



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

CASE NO.:2022/23635

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED: YES/NO

30 June 2023

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DATE


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SIGNATURE

In the matter between:

SISTER SISKASI LINDENI

Applicant

And

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

First Respondent

LETHABO NTOKOZO KEKANA

Second Respondent

(In her capacity as the appointed executrix in the
Deceased Estate Refilwe Garven Kekana-
Estate number:003855/2021)

LETHABO NTOKOZO KEKANA

Third Respondent

(In her capacity)

KEABETSWE LETLHOGONO MOSUWE

Fourth Respondent

JUDGMENT

MAZIBUKO AJ

1. The applicant seeks an order declaring that she and the late Refilwe Garven Kekana (“the deceased”) were partners in a permanent life partnership in which they had undertaken reciprocal duties of support and that the winding up of the deceased estate number 003855/2021 be interdicted pending the lapsing of the suspension of the orders made by the Constitutional Court in *Bwanya v Master of the High Court, Cape Town and Others*¹, which orders were suspended for a period not exceeding 18 months from 31 December 2021.
2. The first respondent appointed the second respondent as an executrix. The third respondent is the first daughter of the deceased. The fourth respondent is the deceased's second daughter, per the applicant's affidavit. The first and the fourth respondents have not participated in the litigation.

Litigation history

3. In February 2021, two applications were instituted under case numbers 2021/8494 and 2021/9136. Under case numbers 2021/8494, it was an urgent application by the second respondent seeking the following relief: the applicant to disclose whether the deceased had left a will; be interdicted from damaging, disposing of, selling, using or concealing any property situated at the immovable property at Midstream Estate, the property the applicant and the deceased shared and that she be evicted from the immovable property.
4. The applicant approached the court on an urgent basis, under case number 2021/9136, seeking an order interdicting the respondent from executing the deceased's estate, she be declared the deceased's surviving spouse, and the respondent be removed as the executor and that a marriage between her and the deceased be registered in terms of

¹ (CCT 241/20) [2021] ZACC 51; 2022(4) BCLR 410 (CC); 2022(3) SA 250 (CC) (31 December 2021)

the Recognition of Customary Marriages Act 120 of 1998 and that she be appointed executor. The court removed the application from the urgent roll. Subsequently, the applicant withdrew the application.

Applicant's case

5. The applicant deposed to an affidavit. She stated that she and the deceased met in November 2017, and they got involved in a love relationship. They agreed that they wanted a committed relationship to grow old together and be separated by death. In March 2018, they started living together. The deceased initiated the lobolo process by his family sending a letter to the applicant's home. In May 2018, the deceased and his sister travelled to East London to meet her family and paid lobolo in the amount of R19 000, with an outstanding amount of R11 000. A celebration was held at the applicant's family home. Her mother wrote to the deceased's family, acknowledging the lobolo and expressing the family's gratitude for the lobolo.
6. In September 2018, there was a welcoming ceremony at the deceased's family home in Soshanguve and her mother and her friend travelled from East London to attend the celebration. Most of the deceased's family attended except for the respondent and the fourth respondent, who were not accepting of their relationship. After the lobolo payment, they regarded themselves as husband and wife. In December 2018, they went on a ship cruise to celebrate their love.
7. In January 2019, they attended a marriage preparation class conducted by Reverend Waqu of the Methodist Church, who had blessed their relationship in 2018. In May 2019, they acquired a family home in Midstream Meadows, financed by the deceased. The applicant contributed towards the upkeep thereof. In the estate access application, the applicant was listed as a resident. They brought into the property furniture from their previous homes.
8. Between July 2019 and August 2020, they bought items. They transferred monies into each other's accounts to purchase household items. In August 2020, the deceased performed a small ritual in the house to introduce the new home to their respective ancestors. The ritual involved slaughtering chickens, lighting candles and pouring liquor for the ancestors, burning incense, speaking over it and inviting both their ancestors to join and protect their new home. They transferred monies into each other's accounts to

mutually support each other. They took a funeral cover with Metropolitan Life Limited, in which the applicant was listed as a plan owner and the deceased as a life partner. In March 2020, the respondent's mother was granted a divorce from the deceased, to whom she had been married since 1 July 1994. In January 2021, the deceased died intestate.

9. The applicant's brother and Mr Pota Siquntu deposed to an affidavit confirming the lobolo negotiations and celebration. The deceased's sister confirms the existence of the customary marriage between the applicant and the deceased. The deceased's mother stated in her affidavit that they see the applicant as their daughter-in-law. Reverend Waqu also confirmed the pre-marital classes attended by the applicant and the deceased.

Respondent's case

10. The respondent refuted that the applicant was a partner in a lifetime partnership with the deceased. She stated that the deceased never made mention of their lifetime partnership to her. The applicant was the deceased's girlfriend. Her mother was still married to the deceased when the lobolo negotiations were concluded. Therefore she cannot claim to be the deceased's surviving spouse.

Issue

11. Were the applicant and the deceased in a permanent life partnership at his demise? Whether the facts establish a legally enforceable duty of support arising from a relationship akin to marriage. Whether the winding up of the deceased's estate should be interdicted pending lapsing of the suspension orders on the Bwanya decision.

Discussion

Permanent life partnership

12. In the Bwanya case, the Constitutional court extended the definition of a survivor in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 to include the surviving partner of a permanent life partnership. That of a spouse in section 1 of the Intestate Succession Act, to include a partner of a permanent life partnership as a spouse. Further, marriage includes a permanent life partnership in which the partners undertake reciprocal support duties.

13. In *Bwanya*², the Constitutional court confirmed that the permanent life partnership is akin to marriage. It further held:
- “The factors developed by this Court towards establishing the existence of permanent life partnerships in National Coalition for Gay and Lesbian Equality are—*
- “the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep for the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another.”*
14. The applicant placed its reliance upon *Bwanya* and other relevant cases in that she was entitled to the deceased’s estate as, at the time of his demise, they were in a permanent life partnership and had undertaken the reciprocal duties of support. The factors presented to the court by the applicant in demonstrating the existence of the permanent life partnership can be summarised as follows; when the applicant and the deceased got involved in a love relationship in November 2017, they were 49 and 50 years of age, respectively. At the time of the deceased's demise, they had been together for about three years. They lived together from March 2018 until his demise in 2021 in the property they bought together financed by the deceased.
15. They shared responsibility for their financial support, living expenses and the upkeep of their shared home. In May 2018, the deceased paid lobolo and a celebration were attended by family and friends. In September 2018, the deceased’s family held a celebration ceremony at the deceased’s home, welcoming the applicant to the deceased’s family, attended by family and friends. The deceased’s mother, in her affidavit, averred that they accepted the applicant as their daughter-in-law. The applicant and the deceased presented themselves as husband and wife and were

² *Bwanya*, para 76

regarded as such. They shared a funeral cover wherein the deceased was listed as a life partner. However, the inquiry does not end here. The next question is whether the applicant and the deceased were competent to enter a marriage or a permanent life partnership.

16. All marriages, including permanent life partnerships, are now equal in the eyes of the law and enjoy recognition and acceptance by the public. Section 10(1) of the Customary Marriages Act provides that spouses to a customary marriage *“are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961) if neither of them is a spouse in a subsisting customary marriage with any other person”*.
17. In the case of *Monyepao v Ledwaba and Others*³, *the appellant (second wife) was married to the deceased in terms of customary law. During the subsistence of the marriage, the deceased was, however, still married to his first wife in terms of customary law. On marrying the second wife, the deceased and his first wife never got divorced but merely separated. The court found that the deceased’s first marriage was still valid, and the first wife can enjoy patrimonial benefits.”*
18. The evidence is that in July 1994, the deceased married his erstwhile wife. In 2019 his wife instituted divorce proceedings, and they divorced in March 2020. It was not the case of the applicant that she relied on the events after the deceased’s divorce in March 2020. What she, through her counsel, Mr Phambuka, argued is that their relationship had been in existence since November 2017. All the celebrations of the lobolo and the welcoming celebrations were between May 2018 and November 2018, not after March 2020, during which the divorce order was granted.
19. The divorce proceedings only commenced in 2019, whereas the applicant and the deceased were already attending pre-marital classes between 2018 and January 2019. Since their partnership began whilst, the valid marriage between the deceased and his erstwhile wife still subsisted. The fact that the public, friends and family regarded and accepted them as married or permanent life partners. Also, as partners in the love relationship, they regarded and conducted themselves as permanent life partners. However, that does not make their relationship equal to a *marriage* or a permanent life

³ (SCA) (unreported case no 1368/18, 27-5-2020)

partnership to be considered partners who had undertaken reciprocal duties of support.

20. The regard the deceased's mother had towards the applicant, as she averred that they accepted her as their daughter-in-law, cannot assist the applicant either. The deceased's mother could not have two daughters-in-law under the circumstances unless the deceased had chosen to involve the two women (the erstwhile wife and the applicant) in a polygamous marriage and followed the appropriate steps and procedures as provided by the law.
21. The divorce decree in March 2020 also did not assist the partners in automatically validating their relationship, nor for the applicant in relying on that. In a period of ten months after the divorce, the deceased passed away intestate. What the deceased's divorce did was make him eligible and competent for any form of marriage. I find no reason why the provisions of Section 10(1) of the Customary Marriages Act and what the Supreme Court of Appeal held in *Monyepao v Ledwaba and others* should not find applicability to the partners in a permanent life partnership as same is akin to marriage. Accordingly, in November 2017, the deceased was not competent to conclude any marriage or familial relationship, including the permanent life partnership, as he was still married to his erstwhile wife, which marriage was only dissolved in March 2020.

The interdict

22. The applicant also seeks an interim order interdicting the winding up of the deceased's estate pending the lapsing of the suspension of the orders made in *Bwanya*. Her counsel correctly laid down the general grounds upon which the court may grant an interim interdict order. It is trite that one of the requirements for the interim interdict is that the applicant must establish a *prima facie* right even if same is open to some doubt. See *Setlogelo v Setlogelo*.⁴
23. I have already found that the applicant is not a surviving permanent life partner in a permanent life partnership in which she and the deceased undertook reciprocal support duties for the abovementioned reasons. I agree with counsel on behalf of the respondent, Mr Mudau, that the applicant would lose nothing in terms of the

⁴ 1914 AD 221, para 227

Maintenance of Surviving Spouses Act and the Intestate Succession Spouses Act, as she has not been able to establish any *prima facie* right in relation to the deceased's estate emanating from the familial relationship between herself and the deceased. The evidence is that when the applicant moved out of the residence she shared with the deceased, she removed some household goods. I, accordingly, find that the applicant has no claim against the estate of the deceased, nor has she any right to inherit.

Costs

24. Regarding the costs of the application, the applicant, as well as the respondent, asked that the application be granted or dismissed with costs. In matters of costs, the general rule is that the successful party should be given their costs, and this rule should not be departed from except where there are reasonable grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.
25. The applicant initially brought an application for the court to declare that her relationship with the respondent was a customary marriage. The same was withdrawn on legal advice. She then brought the present application. The court did not get the impression that she was vindictive or malicious in bringing the same. No fault or misconduct on the applicant's part in bringing the application could be established. This court's respectful view is that there is no justification to award costs in favour of the respondent against the applicant.
26. Accordingly, I intend to grant an order for costs against the estates of the deceased.
27. Consequently, the following order is granted.

Order:

1. The applicant's application declaring that she and the late Refilwe Garven Kekana ("the deceased") were partners in a permanent life partnership in which they had undertaken reciprocal support duties is hereby dismissed.
2. The applicant's application for an interim order interdicting the winding up of the deceased estate number 003855/2021 pending the lapsing of the suspension of the orders made by the Constitutional Court in *Bwanya v Master of the High Court, Cape*

Town and Others¹, which orders were suspended for a period not exceeding 18 months from 31 December 2021, is hereby dismissed.

3. The estate number 003855/2021 of the late Refilwe Garven Kekana is to bear the application costs.



N. MAZIBUKO

**Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14:00 on 30 June 2023.

Date of hearing:	20 April 2023
Date of Judgment:	30 June 2023

Appearances:

Counsel for the applicant:	Adv N. Phambuka
Attorneys for the applicant:	Mketsu Attorneys

Counsel for the respondent:	Mr RV Mudau
Attorneys for the Respondent:	Nkosi Nkosana Attorneys