IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 29212/12

DATE: 11 JULY 2014

in the matter between:

C[...] M[...] M[...]	APPLICANT
And	
E[...] B[...]	FIRST RESPONDENT
ESTATE LATE D[...] S[...] B[...]	SECOND RESPONDENT
GOVERNMENT EMPLOYEE PENSION FUND	THIRD RESPONDENT
MASTER OF HIGH COURT-TSWHANE	FOURTH RESPONDENT
MINISTER OF HOME AFFIARS	FIFTH RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] This is an opposed application, for an order in terms of which:

1.1 The civil marriage between the first respondent and the deceased D[...] S[...] B[...] concluded on the 25th June 2002 declared null and void *ab initio;*

1.2 That the fifth respondent be ordered to deregister from the marriage register the purported civil

marriage between the first respondent and the deceased, S[...] D[...] B[...];

1.3 That the third respondent be ordered to cancel the letter of authority issued in favour of the first respondent against the estate of late D[...] S[...] B[...] and issue a new letter of authority in favour of the applicant herein;

1.4 That the third respondent be ordered to administer the deceased pension funds in accordance with the applicant's status, as lawful wife to the deceased, entitled to half of the deceased's estate;

1.5 That the first respondent be interdicted from handling and or administer the deceased estate of the late D[...] S[...] B[...]

1.6 That the respondent, who is opposing the application, be ordered to pay costs of this application; and

1.7 That the applicant be granted such further and or alternative relief.

[2] Having read the papers submitted before me and heard the submissions on behalf of the respective parties, I am of the view that the application should be dismissed for the reasons set out herein below.

[3] According to the applicant, she and the deceased D[...] S[...] B[...] entered into a customary marriage on 16 March 1994. The prerequisites for a valid customary marriage are aptly summed up by Dlodldo J in the matter of *Fanti v Boto and Others*[1] as follows: ・(i) consent of the bride;(ii) consent of the bride痴 father or guardian; (iii) payment of lobolo; (iv) the handing over of the bride."

[4] The appellant attached annexure CMM1 as proof that lobola (bogadi) in the amount of R1800.00 was paid in accordance with the agreement concluded between the respective families. She further averred in her papers that the M[...] family immediately consented to the handing over of the bride to the bridegroom in compliance with requirements towards conclusion of a valid customary marriage.

[5] It is common cause that the aforesaid customary marriage was not registered in terms of s4 of the Recognition of Customary Marriages Act 120 OF 1998.[2] However, failure to register the customary marriage does not, in my view, invalidate it, if all other prerequisites have been met. On the evidence placed before me, I am satisfied that a customary marriage was concluded between the applicant and the deceased[3].

[6] According to the applicant, there are three minor children born to her and the deceased, namely a daughter E[...] L[...] B[...] born on the [...], a son T[...] J[...] B[...] born on the [...] and another son O[...] M[...] born on the [...].

[7] The first two children namely E[...] L[...] B[...], T[...] J[...] B[...], and the first respondent as well as the deceased痴 father M[...] J[...] B[...] were registered by the deceased as the nominated beneficiaries to his pension fund[4]. In my view, if the deceased recognised the applicant as his wife, he would have registered her as well as a beneficiary to his pension fund. The same applies with regard to the third child. The third respondent can only recognise those beneficiaries nominated by the deceased whilst he was still alive.

[8] It common cause that the first respondent entered into a civil marriage with the late D[...] S[...] B[...] on the 25th June 2002[5]. D[...] S[...] B[...] died on the 19th September 2011. This marriage was not dissolved at the time of the death of the deceased but was still in existence. In my view, the third respondent is obliged to recognise only the beneficiaries nominated by the deceased, as stated herein above.

[9] The first respondent disputes that the last mentioned child of the deceased and the applicant was that of the deceased. I deem it not necessary to decide the paternity of this child. It is noteworthy that the applicant chose to register this child not as a B[...] but as M[...]. This third child was born on […] , almost a year after the applicant was returned to her parents on 18th August 2001. As stated herein above, the deceased did not nominate this child as one of his beneficiaries to his pension. The probabilities are that the deceased did not recognise this child as his.

[10] It is also common cause that the deceased and the first respondent purchased a house situated at no [...] M[...] Street, W[...] Pretoria registered in their respective names under title deed number T[...] with a bond registered against it in favour of Nedbank for an amount of R450 700.[6]

[10] According to the applicant because s3 (2) of Act 120 of 1998 provides that “Save as provided in s10 (1), no spouse in a customary marriage shall be competent to enter into a marriage under Marriage Act 1961, during the subsistence of such customary marriage”, the deceased was in a customary marriage with her and as the result his civil marriage with the first responded was void *ab initio* and invalid.

[11] The first responded denied that her civil marriage was invalid. She further disputed that there was a valid customary marriage between the deceased and the applicant.

[12] On the applicant’s own admission, on the 18th August 2001 the deceased’s father, ordered her to pack her belongings and leave his compound. She returned to her parental home where she stayed with the children. The deceased did not support her and the children and as a result she had to obtain a maintenance court order against him.

[13] It is safe to assume that the applicant had at one stage or another been handed over to the the family of

the deceased. This could only have happened after lobolo (dowry) had been paid for the hand of the applicant by the deceased痴 family. It is therefore safe to accept that there was a customary marriage between the applicant and the deceased. The fact that this customary marriage has not been registered is of no great moment[7]. It is trite among Africans, that once the bride is returned by the family of her husband to her parents, this signifies the dissolution of the customary marriage[8]. *In casu*, the deceased痴 father, who is the head of the family, instructed the applicant to return to her family. The applicant痴 family did not return her to her in-laws, by implication, accepted the dissolution of the customary marriage. The deceased also did not fetch the applicant back from her home. By conduct the deceased acquiesced to the dissolution of the marriage. In any event, the father of the deceased would not have returned the applicant to her parents, without having discussed this aspect with the deceased and with his approval. I therefore conclude that the customary marriage between the applicant and the deceased was dissolved on the 18th August 2001.

[14] The civil marriage was concluded on the 25th June 2002, almost 10 months after the customary marriage of the applicant and the deceased was dissolved. I therefore conclude and find as such that at the time the marriage was concluded between the first respondent and the deceased, there was no legal impediment precluding the deceased from entering into a customary marriage and a civil marriage with the first respondent. I therefore find that the civil marriage between the first respondent and the deceased was valid, and not invalid as alleged by the applicant. Therefore the application stands to be dismissed.

[15] In the result the application is dismissed with costs.

N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 24 APRIL 2014

DATE OF JUDGMENT: 11 JULLY 2014

APPLICANTS ATT : HOFFAMN LESHILO ATTORNEYS.

APPLICANT 'S ADV : ADV. M. J. MOSOPA

RESPONDENTS'ATT: VFV ATTORNEYS .

RESPONDENTS' ADV: M.L. HASKINS

[1]2008 (5) SA 405 (CPD) at 413.

[2]Vide Baadjies v Matubela 2002 (3) SA 47 (WLD) at para [12]

[3]vide Motsoatsoa v Roro **2011 (2) ALL SA 324 (GSJ).**

[4] Vide paginated pages 77-78 of exhibit "EB5".

[5] Copy of the marriage certificate attached as annexure EB1 paginated page 61.

[6] Copy of the Title Deed annexed as annexure EB2 at paginated page s 62-63.

[7]Vide Motsoatsoa **v *Roro* 329 2011 (2) ALL SA 324 (GSJ).**

[8] Sati v Kitsile 1998 (3) SA 602 (ECD) at 603 E-G.