

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: 67435/09

DATE: 24 JULY 2014

In the matter between:

S[...] S[...]

Plaintiff

and

M[...] P[...] T[...]

Defendant

JUDGMENT

LAKA AJ:

Introduction:

1.

In this matter S[...] S[...] "*S[...]*" the Plaintiff, approached this Court for an order declaring that she is legally married to M[...] P[...] T[...] "*M[...]*" Defendant, in terms of Customary law.

1.1 S[...] contends that she and M[...] got married on 19 October 1989.

1.2 M[...] denies that he is married to S[...]. He denies that he paid lobola to S[...] in terms of customary law and argues that they just stayed together for about 20 years unmarried.

2.

ISSUE FOR DETERMINATION

The issue which falls to be decided by this Court is whether there exists a legally valid customary union

between S[...] and M[...].

3.

EVIDENCE

S[...]’s evidence

3.1 S[...] and her father testified that on 19 October 1989 a delegation of three (3) emissaries namely, Mr. M[...], Mrs. Mo[...] and Mrs B[...] were sent by the M[...] family to the S[...] family to negotiate lobola and to pay part of same for S[...].

3.2 S[...] family was represented by Messrs M[...], Ma[...] and Mo[...] at the said lobolo negotiations.

3.3 Both S[...] and her father stated that an amount of R1000.00 was agreed upon as lobola and on the day R200.00 was paid. A piece of paper was signed as proof of receipt of money received and the amount agreed to as lobola.

3.4 Both testified that a goat was then slaughtered on the day to seal the lobola agreement.

3.5 Both testified that during the evening of the said day the (9 October 1989) M[...]’s mother met S[...]’s family to negotiate the handing over of S[...] to the M[...]’s family.

3.6 Both testified that S[...] and M[...] stayed together for about twenty years and both regarded S[...] and M[...] as husband and wife. S[...] thereafter went to M[...]’s home.

3.7 J[...] M[...] the Defendant’s younger brother also testified in these proceedings. He testified that as far as he knows S[...] and M[...] are married customarily and he personally contributed R200.00 to lobola to be paid.

3.8 J[...] testified that M[...] Senior told them (his children), that it is inappropriate for any person to stay with someone’s daughter without paying lobola.

3.9 J[...] testified that at some stage he saw what he referred to as *"bond papers"* which referred to S[...] and M[...] as husband and wife through which both applied for bank loan for their house. He testified that he stayed with both S[...] and M[...].

3.10 These documents could however not be found even though I ordered that a search be made through to the affected bank.

3.11 (I was informed that the affected bank was predecessor to the ABSA Bank - Perm Building Society/Bank).

4.

DEFENDANT'S CASE

M[...] testified personally and called no witness in support of his defence.

4.1 M[...] denied ever paying any lobola or entering into customary marriage with S[...].

4.2 M[...] disputed the authenticity of a documents handed in on behalf of the Plaintiff purporting to be a receipt of lobola paid;

4.3 M[...] argued that if the documents was authentic, it is supposed to look old and letters or writings thereon should be fading away as it was written in 1989.

4.4 M[...] testified that he stayed with S[...] for about twenty (20) years and four children were born out of this relationship.

5.

5.1 As I have earlier indicated, I ordered that the parties search for the bank loan document which J[...] talked about in his testimony.

5.2 Parties could not locate the bank loan documents J[...] referred to.

6.

SUBMISSIONS

6.1 Both Counsel for the parties submitted written closing arguments/submissions in these proceedings.

6.2 I found these very helpful and I express my appreciation to both Counsel.

7.

Mr. Jordt's argument briefly is that:

7.1 The Plaintiff must prove that the factual and legal requirements for a customary marriage were

met;

7.2 He then listed the requirements as:

7.2.1 Consent of the bride;

7.2.2 Consent of the bride's father /guardian;

7.2.3 Payment of lobolo, and

7.2.4 The handing over of the bride.

8.

Mr. Jordt then referred to **Mabuza v Mbatha 2003(4) SA 218 (C)** and **Fanti v Boto & Others 2008(5) SA 405 (CPD)** amongst others.

9.

Mr Jordt further submitted that the acceptance of Shibambo into the family of the Molobedzi family and incorporation therein had to be accompanied by well-known extensive rituals and ceremonies involving both families - an apparent reference to **Fanti v Boto case (supra)**.

10.

In contradiction, Mr. Ndebele submitted that:

10.1 Section 3(1) of the Act deals with the requirements of customary marriages and provides that:

" 3(1) for a customary marriage entered into after the commencement of this Act to be valid;

(a) The prospective spouses -

(i) Must be above the age of 18 years, and

(ii) Must both consent to be married to each other under customary law; and

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

11.

Mr. Ndebele submitted that even though Section 3(1) of the Act, refers to marriages entered into after the commencement of the Act, the requirements set out therein equally apply to marriages entered into before its commencement when the validity of a customary marriage is in issue.

12.

Mr. Ndebele then referred to *Motsotsoa v Roro & Another* (2011) ALL SA 324 which stipulated what the requirements of customary marriages are.

12.1 Emissaries from the man's family to the woman's family;

12.2 Negotiations about lobola;

12.3 Payment or part -payment of lobola;

12.4 Handing over of the woman which may include but not necessarily be accompanied by ceremony celebration (wedding) or not.

See also : *Southon v Moropane* GSJ Case 14295/10.

13.

Mr. Ndebele argued in his submissions that the parties in this case were customarily married regard been had to the requirements for validity as stipulated by the Act and authorities in case law.

14.

Assessment of the evidence and submissions.

14.1 I have two versions before me, on the one hand S[...] testified that she is married customarily;

14.2 Her version was supported by her father and Defendant's younger brother;

14.3 On the other hand, M[...] (Defendant) denied that he is married to S[...] and called no witness. His version was not corroborated.

14.4 We are dealing here with family issue or family dispute. Surely, other family members should know the truth about this matter and could help, had they been called.

15.

15.1 Accepting the requirements mentioned in para. 12 above as the necessary basis for a customary union and accepting the fact that the Act under discussion here, came into effect in November 2000, we should accept that even before November 2000 Africans married in terms of customs.

15.2 We should also accept that the Act does not nullify marriages entered into before the Act came into effect, it only provided a frame-work to recognise the existing marriages for purposes of registration and not to nullify existing marriages.

16.

16.1 It will therefore be legally wrong to try to nullify a marriage that existed on the basis that such a marriage does not meet the requirement of this Act.

16.2 Marriages which existed before the enactment of this Act remain valid as long as they met the requirement as existed then or as custom regarded such as valid marriages.

17.

17.1 For a conclusion to be arrived at whether or not S[...] and M[...] were married in customary rites, a decision had to be taken to accept one of the two versions before Court.

The test to be applied in such a case was enunciated lucidly as follows in *National Empowers General Insurance v Jagers*:

“It seems to me, with respect, that in any civil case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus rests is obviously not as heavy as it is a criminal case, but nevertheless where it is a criminal case, on the Plaintiff as it is in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore accepted, and that the other version advanced by the defendant is therefore false or mistakes and falls to be rejected. In deciding whether that the evidence is true or not the court will weigh and test the plaintiff’s obligations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the defendant’s, the plaintiff can only succeed if the court nevertheless believe him and is satisfied that his evidence is true and that the defendant’s version is false”.

19.

The version of S[...] was corroborated in all material respects and she struck me as a simple, honest and open witness who was obviously hurt by the denial of the existence of the marriage by M[...] after such a long time living together.

20.

20.1 In contradistinction, I found M[...] unconvincing with his answers. He came across as very arrogant, callous, evasive, longwinded and very argumentative.

20.2 He showed very little feelings, if any, for his children, let alone S[...] herself.

20.3 He regarded their staying together as of no consequences and after twenty years or so, he has moved on.

21.

21.1 He admitted that they stayed together and four children were born of the relationship.

21.2 He boasted that S[...] has always failed to have a maintenance order against him granted by Courts he approached. What a heartless man!

22.

Comparing the two versions I have no problem accepting S[...]’s version as the more reasonable and probable and rejecting M[...]’s version as bare denial which was uncorroborated and in all probability false.

23.

23.1 S[...] and her father as well as M[...]’s brother all said S[...] was referred to all as M[...]’s wife.

23.2 M[...] could not explain why this was so or could not refute the assertion. His feeble assertion that she was referred to as his wife because they stayed together does not hold, and stands to be rejected.

24.

In any case section 3(1) of the Act provides that:

“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 customary law; and

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

25.

25.1 It must be remembered that this marriage took place in 1989. The opulence and extravagance which is associated with marriages these days had not taken root then.

25.2 Humble marriages ceremonies were not uncommon then. To the extent that a lavish ceremony should have accompanied the lobola negotiations is unreal taking the time this marriage is alleged to have taken place.

26.

I, in the circumstances hold that:

26.1 The Plaintiff was customarily married to the Defendant;

26.2 This customary marriage still subsists as no Court had set the said marriage aside;

ORDER

1. The application succeeds;
2. The Defendant is ordered to pay costs of this application.

A.P.LAKA J

04TH MAY 2014