



IN THE HIGH COURT OF SOUTH AFRICA

~~DELETE WHICHEVER IS NOT APPLICABLE~~ **GAUTENG DIVISION, PRETORIA**

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

DATE 23.10.2014 PP


SIGNATURE

CASE NO: A844/2012

23/10/2014

In the matter between:

SINGANGA WELSH MXIKI

Appellant

and

VICTORIA NOMPUMELELO MBATA

Respondent

In re:

VICTORIA NOMPUMELELO MBATA

Applicant

and

DEPARTMENT OF HOME AFFAIRS

1st Respondent

**MASTER OF THE NORTH GAUTENG HIGH COURT,
PRETORIA**

2nd Respondent

SINGANGA WELSH MXIKI

3rd Respondent

JUDGMENT

MATOJANE J

[1] This is an appeal against a judgment of Teffo J in which she directed and ordered the Department of Home Affairs to register a customary marriage between the deceased and the appellant concluded on 3 November 2007 and issue to the appellant a Customary Marriage Certificate. The court *a quo* granted the father of the deceased leave to appeal to this Court.

[2] In her founding affidavit the appellant alleges that on 3 November 2007 she and the deceased entered into a customary union and have been staying together as husband and wife until the deceased met his untimely death on the 19 February 2009. A minor child was born out of this relationship. She and the deceased are registered owners of two immovable properties.

[3] In support of these allegations appellant has annexed to her founding affidavit a copy of an acknowledgment of receipt of the first installment of R10 000,00 towards her *lobola* of 11 beasts and 1 goat. It was agreed that the R10 000.00 was an equivalent of 5 beasts and there is a balance of six beasts and a goat. The deceased, however, died before the balance was paid. The appellant accordingly claims, on the strength of the affidavits filed in the papers, to be the deceased's widow.

[4] That an amount of R10 000,00 was paid towards the appellant's *lobola* is not in dispute, but the deceased is father denies that a customary union was ever entered into as alleged and states that certain essentials of a customary union were not finalized, in particular in that the appellant was never handed

over to the deceased's family as required by customary law so that certain rituals including a marriage ceremony could be conducted. The deceased's father contends that the negotiations and agreements reached on the 3 November 2007 did not constitute a customary marriage agreement.

[5] Appellant states that on 3 November 2007 emissaries from the deceased family met with her family to conduct marriage negotiations. Her family was represented by her uncles and aunt. A *lobola* amount was fixed and an agreement reached in terms of which a customary union came into existence between the deceased and herself. What remained to be finalized according to the appellant were the arrangement of the date of marriage ceremony and the exchange of gifts. Appellant states further that she and the deceased never registered their customary marriage as required in terms of the Recognition of Customary Marriage Act, 120 of 1998 ("the Act")

[6] The court *a quo* held that:

"The events of 3 November 2007 objectively taken indicates that the marriage was negotiated and entered into in terms of section 3(1)(b) of the Act. Once the amount of lobola has been agreed upon and there is an undertaking to pay there can never be any other negotiations. The argument by the Third Respondent that on that particular day it was the initial stage of negotiations and that the negotiations were still not complete is without merit. After lobola has been fixed what else could still be negotiated?"

[7] In terms of the Act a "*customary marriage*" means a marriage concluded in accordance with customary law. Section 3(1) sets out the requirements for the validity of a customary marriage as follows:

(1) For a customary marriage entered into after the commencement of this Act to be valid-

(a)...

(b)...

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

[8] The payment of *lobola* is not as a requirement for the validity of a customary marriage yet it is intrinsically linked with its existence. In customary law man or a woman is not regarded as married until *lobolo* is paid. *Lobolo* is defined in the Act to mean "*the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.*"

[9] The Act requires that "*the marriage must be negotiated and entered into or celebrated in accordance with customary law*" (my emphasis). The customary law of marriage, is in my view, correctly stated by Matlapeng AJ in **Motsoatso v Roro & Another** 2011(2) ALL SA 324 at para 17 as follows:


"As described by the authors Maithufi I.P. and Bekker J.C., **Recognition of Customary Marriages Act 1998** and its Impact on Family Law in South Africa CILSA 182 (2002) a customary marriage in true African tradition is not an event but a process that comprises a chain of events. Furthermore it is not about the bride and groom. It involves the two families. The basic formalities which lead to a customary marriage are: emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage (this of course presupposes that the two parties i.e. the man and the woman have agreed to marry each other); a meeting of the parties' relatives will be convened where lobolo is negotiated and the negotiated lobolo or part thereof is handed over to the woman's family and the two families will agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration (wedding)." (my emphasis)

[10] In the present matter it is common cause that part of the negotiated *lobolo* was paid over to appellant's family but the parties never agreed on the formalities and the date on which the appellant will be symbolically handed over to her in-laws. In her replying affidavit, appellant states that during December 2008 she and the deceased visited the deceased parental home and spend 3 days with the deceased's father and then later told appellant that she was his daughter in law. As a customary marriage is a union of two family groups a bride cannot hand herself over to her in-laws. Her family has to hand the bride over to her husband's family at his family's residence where the elders will counsel the bride and the bridegroom in the presence of their respective families. Accordingly, in my view, it is the handing over of the bride, even if the *lobolo* has not been paid in full, that constitute a valid customary marriage not the payment of *lobolo* as the court *a quo* found. There can therefore be no valid customary marriage until the bride has been formally and officially handed over to her husband's family. See T.W Bennet, **Customary Law in South Africa** 18th Edition at 217.

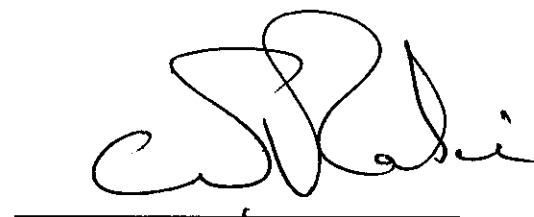
[11] In my view, the most essential requirement of a customary marriage, the handing over of appellant to her husband's family was never done. Accordingly a customary marriage though negotiated was never entered into or celebrated in accordance with customary law as required by the Act.

[12] In the result, I would allow the appeal and set aside the order of the court below and replace it with:


1. The application is dismissed with costs


K E MATOJANE
JUDGE OF THE HIGH COURT

I agree and it is so ordered.


C P RABIE
JUDGE OF THE HIGH COURT

I agree and it is so ordered.


L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT