



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

30/5/2016

Case Number: 49613/14

In the matter between:

SESANA JOSEPHINE MAVIMBELA

Applicant

and

MINISTER OF HOME AFFAIRS

1st Respondent

DIRECTOR-GENERAL: DEPARTMENT

OF HOME AFFAIRS

2nd Respondent

PETER DHLADHLA

3rd Respondent

REASONS FOR ORDER GRANTED ON 30 MAY 2016

MNGQIBISA-THUSI, J

[1] The applicant seeks the following relief:

- 1.1 that the second respondent, the Director-General of the Department of Home Affairs (“Director-General”) that that be or ordered to register the customary marriage of the applicant and the third respondent, Mr Peter Dhladhla (“Mr Dhladhla”) in terms of the

Recognition of Customary Marriages Act¹ (“the Act”), within 14 days of the order;

- 1.2 that the Director-General be ordered to issue a certificate of marriage in respect of the customary marriage registered in terms of the Act; and
- 1.3 that the respondent(s) pay the costs of the application on the scale of attorney and client scale.

[2] It is not in dispute:

- 3.1 that on 31 March 1996 the Dhladhla family negotiated lobolo payment with the Mavimbela family and that lobolo was set at R4 800 and two cows;
- 3.2 that on the day of the negotiations, the Dhladhla family paid an amount of R2 000 as part payment towards the lobolo; and
- 3.3 that on 5 October 1996, the Dhladhla family paid an additional amount of R1 000.00 and delivered two cows, with an outstanding balance of R1 800.

[3] What is in dispute is whether Ms Mavimbela and Mr Dhladhla entered into a valid customary marriage.

[4] Section 3(1) of the Act provides that:

“For a customary marriage entered into after the commencement of this Act to be valid—

- (a) the prospective spouses-
 - (i) must both be above the age of 18 years; and

¹ Act 120 of 1998.

- (ii) must both consent to be married to each under customary law; and
- (iii) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”

[5] The applicant bears the *onus* of proving, on a balance of probabilities that she and Mr Dhladhla entered into a valid customary marriage. See *Baadjies v Mathebula*². In this regard the applicant must prove, in my view, not only that the customary marriage was negotiated but also entered into or celebrated in accordance with customary law.

[6] Mr Dhladhla contends that Ms Mothibe was never formally handed over to his family, as customarily required. In this regard, Ms Mothibe in her replying affidavit conceded that she was not formally handed over to the third respondent's family. However, Ms Mothibe contends that the mere fact that he lived with Mr Dhladhla from 1994 to 2014, is sufficient proof that a customary marriage was concluded. However, Mr Dhladhla contends that in terms of the isiSwati custom, for a couple to be considered married, the lobolo has to have been paid in full.

[7] In *Motsoatso v Roro and another*³ the court stated that:

"As described by the authors Maithufi IP and Bekker CJ, 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 the 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 man and woman have agreed to marry each other); a meeting of the parties' relatives will be

² 2002 (3) SA 427 (WLD) at para [15]-[22].

³ [2011] 2 All SA 324 (GSJ) at [17] and [18].

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 then 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).

... Although the handing over of lobolo is in terms of the Act not listed as a requirement for the coming into existence of a customary marriage, it is intrinsically linked with its existence. It is one of the pillars and an important one in the concatenations of processes leading to a marriage. ... However, the mere fact that lobolo was handed over to the applicant's family, significant as it is, is not conclusive proof of the existence of a valid customary marriage.

One of the crucial elements of a customary marriage is the handing over of the bride by her family to her new family namely that of the groom. ... This is the most important and final step in the chain of events happens in the presence of both the bride and the groom's families. One can even describe it as the official seal in the African context, of the customary marriage."

[8] Furthermore, in *Molaba v Dube*⁴ the court held that:

"It is trite that in African customary law, there is no rigid custom governing time stipulation within which lobola has to be paid. What is sacrosanct is the undertaking to pay the agreed lobola. Consequently the non-payment of lobola balance as alleged by the applicant is not decisive of the ultimate question which is whether was a valid customary marriage negotiated or concluded and that in pursuant of such negotiations lobola was fixed."

[9] It is the applicant's contention that on the day the initial lobolo negotiations were also alleges that the marriage was celebrated and she was handed over to the Mr Dhladhla's family.

[10] The fact that the lobolo was not paid in full is of no moment. If all the requirements are met, then a valid customary marriage exists. The applicant has admitted that she was not handed over to the respondent's family. This is an essential requirement in a valid customary marriage.

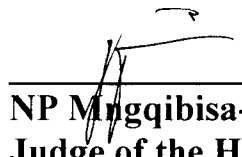
⁴ (2008)ZAGHPHC 434 at para [24].

The fact that Ms Mothibe and Mr Dhladhla lived together for a long period, does not validate the relationship between them as a valid customary marriage. At most the applicant and the third respondent were cohabitees.

[11] I am satisfied that the applicant has not, on the evidence before me, shown that a valid customary marriage was entered into between herself and the third respondent.

[12] Accordingly, the following order is made:

'The application is dismissed with costs.'



NP Mngqibisa-Thusi
Judge of the High Court

Appearances:

For the Applicant:

Instructed by:

For the Third Respondent:

Instructed by: