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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Signature

CASE NO: 23571/2020

In the matter between:

ROSINA NTOMBIZODWA MAHLANGU

Applicant

(ID NUMBER: [...])

And

LUCAS MFULATHELA NTULI

First Respondent

(ID NUMBER: [...])

THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS

Second Respondent

MALEBO PRECIOUS NTULI

Third Respondent

(ID NUMBER: [...])

JUDGMENT

NYATHI AJ

A. INTRODUCTION

[1] The Applicant is before court seeking a declaratory order in the following terms:

- 1.1 That the marriage between the First Respondent and the Third Respondent be declared null and void;
- 1.2 That the Second Respondent be ordered to deregister the marriage between the First Respondent and the Third Respondent registered on the 27th AUGUST 2019;
- 1.3 That the Second Respondent be ordered to register the customary marriage of the Applicant and the First Respondent which was concluded and entered into on the 23rd JUNE 2007, in terms of the Recognition of Customary Marriages Act No. 120 of 1998 within 14 days after granting of this order.

1.4 That the Second Respondent be ordered to issue a certificate of marriage to the Applicant in respect of customary marriage registered in terms of the provisions of paragraph 1.3 *supra*.

1.5 That in the event of any of the Respondents, particularly the First and Third Respondent opposing the application be ordered to pay the costs of this application on a scale as between attorney and client;

B. THE FOUNDING AFFIDAVIT

[2] The Applicant and the First Respondent met and fell in love during the year 2005. They each confirmed to the other that they were single.

[3] On the 23rd JUNE 2007, Applicant entered into a customary marriage with the First Respondent. The First Respondent's family came to her parental home and concluded lobola negotiations which culminated into the customary marriage between herself and the First Respondent. She attached a copy of the letter of the lobola agreement.

[4] It is submitted on behalf of the Applicant that the marriage was celebrated according to Nguni Cultural rites in that the families negotiated lobola for an amount of R 8 600.00 plus three live cattle. The First Respondent's family thereafter paid an amount of R 7 400, and the balance was to be paid in due course.

[5] Upon the conclusion of the negotiations, the Applicant was thereafter presented to the family of the First Respondent, and the Applicant was subsequently handed over to the family of the First Respondent. The parties were allowed to live as husband and wife.

[6] The customary marriage was never registered.

[7] Two children were born namely, Sibusiso Ntuli on 30 September 2007 and Siyabonga Ntuli on 08 September 2011.

[8] During the year 2011 the Applicant and First Respondent purchased a property [...] which was registered in both their names. Proof of registration and the mortgage loan agreement are attached.

[9] The Applicant initially avers that she left the communal home around 2018 but cannot recall the actual date save to say that it was late in the year due to abuse on the part of, and disagreements with the First Respondent. The First Respondent was drinking excessively and harassing her emotionally and physically. However, in the next paragraph she stated that she moved out of the common home on or around December 2018. Since that time communication between them broke down and she moved out of their common home.

[10] Whenever the First Respondent visited his parental home, he and the Applicant would discuss the possibility of reuniting, but the First Respondent kept on postponing such eventuality allegedly so as not to disrupt the children's school terms.

[11] Applicant alleges that First and Third Respondents concluded their civil marriage on the 27th August 2019 and that this came to her attention later when she went to the Home Affairs offices to make inquiries about her marital status. It is then that she discovered that the First Respondent is married to somebody else.

[12] Applicant alleges that the First Respondent married the Third Respondent in a civil marriage whilst still married to her in a customary marriage without having sought her consent. That is the reason why she approaches the court for the relief set out above.

[13] The First Respondent did not file any papers in this application.

[14] The Third Respondent opposes this application.

C. THIRD RESPONDENT'S ANSWERING AFFIDAVIT

[15] The First Respondent proposed marriage to the Third Respondent on or about November 2016 at [...]. She accepted and at that time she was expectant and was residing with the First Respondent at the property which later became their matrimonial home.

[16] In pursuit of his declared intention, on 5 February 2017, the First Respondent dispatched a letter written by his family representatives being Elliot Gababuse, Vusi Phakathi and Jonas Malatji to Third Respondent's family. First Respondent's uncle Naphtinle Mohale responded during May 2017 with his letter wherein the 17 June 2017

was stipulated as the date on which negotiations were to be held. Copies of the letters are annexed.

[17] On 17 June 2017 the First Respondent's family representatives went to Third Respondent's parental home to negotiate lobola. The families agreed on R28 000 as the amount for lobola. An amount of R7 000.00 was paid immediately and the balance of R21 000 was to be paid on a future date, together with the exchange of gifts. A copy of the lobola agreement is annexed.

[18] On 22 June 2019, the First Respondent's family representatives went to the Third Respondent's parental home with the intention of settling the outstanding lobola amount of R21 000, which amount was settled in full. The First Respondent's family were given 4 (four) blankets and 4 (four) headwraps by Third Respondent's family as gifts. The latter's family also accepted a jacket, 6 (six) blankets, 2 (two) headwraps, snuff and 2 (two) shirts as gifts from the First Respondent's family.

[19] Upon the conclusion of the lobola negotiations on the same date, the First Respondent's family took the Third Respondent to the First Respondent's house at [...] as a form of handing her over to the First Respondent's family. She was then introduced to all present as a customary daughter-in-law.

[20] The family also provided Third Respondent and the First Respondent with counselling and education in relation to their rights, duties, and obligations which a marriage imposes on us. This practise is called "*go laya/ukuyala/ukulaya*" in vernacular. This encounter was captured by way of a video recording and a picture which is annexed to the affidavit.

[21] After this ritual the couple then changed into wedding outfits. A white wedding was then held at the Third Respondent's parental home. Pictures of the event are annexed.

[22] On 27 August 2019, the First and the Third Respondent proceeded to conclude a civil marriage at the Department of Home Affairs, which marriage is in community of property and still subsists. A copy of the marriage certificate is annexed.

[23] The Third Respondent disputes that a customary marriage was concluded between the Applicant and the First Respondent. She avers that the conclusion of lobola negotiations, without more, does not culminate in a customary marriage. She accuses the Applicant of merely reciting the requirements laid out in the Recognition of Customary marriages Act, without providing concrete evidence of same in proof of her alleged marriage in her papers.

[24] The Third Respondent avers that while the Applicant is very specific when it comes to the identity numbers of her children, she demurs when it comes to the details of her alleged customary marriage. She does not provide the details of the family representatives that participated in the lobola negotiations.

[25] The Third Respondent then alleges that the application is disingenuous in that it was only brought because the First respondent is trying to circumvent his proprietary duties in his marriage to her. The First Respondent intended to divorce her and has told her that he does not want to share part of his pension or properties, seeing that they are married in community of property. He is colluding with the Applicant to bring this application to nullify their marriage so that there will be no division of the joint estate.

Third Respondent further alleges that the Applicant's attorneys were appointed by the First Respondent. The Third Respondent attaches copies of WhatsApp messages between First Respondent and the Applicant's attorney Mr Mabe. In these WhatsApp messages, the First Respondent was setting up an appointment with the attorney, on behalf of the Applicant. Through the WhatsApp message the Third Respondent also submits alleged proof of the First Respondent articulating his frustrations with Third Respondent and his intention to divorce her.

[26] The Third Respondent states that First Respondent had assured her all along that he and the Applicant were never married. They had started lobola negotiations, but these negotiations were never completed and the balance of the said lobola fees was never paid. He and Applicant only had children together.

[27] Third Respondent also avers that Applicant's children attended her wedding celebrations and used to visit her matrimonial home where the Applicant would come and collect them. The Third Respondent states that the Applicant only feigns ignorance of her marriage to the First Respondent.

D. THE APPLICANT'S REPLYING AFFIDAVIT

[28] The submission of the Applicant's replying affidavit in this matter was a contentious issue. It was filed out of time, and although the Third Respondent initially opposed it, such opposition was later withdrawn.

[29] In this affidavit, the Applicant merely counters the Third Respondent's testimony. As regards the filed WhatsApp evidence, the Applicant alleges that the evidence was illegally obtained.

E. EVALUATION OF THE EVIDENCE

[30] It is common cause that the Applicant and the First Respondent's customary marriage was never registered with the Department of Home Affairs. That much is stated by the Applicant herself. In a bid to explain how she came to know about the civil marriage of the First and Third Respondent, the Applicant ventures that she had gone to Home Affairs to make enquiries about her marital status. This begs the following questions: Firstly, why would she make such enquiries about her marital status knowing fully well that her customary marriage was never registered? Secondly, why make inquiries more than a decade later?

[31] Applicant brought this application some 6 years after she had left the marital home she shared with the First Respondent. The delay is not satisfactorily explained.

[32] The First Respondent is the common denominator in the two marriages, irrespective of their validity or otherwise. His version is noticeably absent in this litigation between the two women in his life. His reticence lends credence to the

averments made by the Third Respondent, that he is the protagonist behind this application, and is funding the application for his own selfish ends.

[33] The Applicant's affidavit does not set out a valid cause of action supported by the evidence necessary to prove the cause of action. On the contrary, the Third Respondent's affidavit does support her averments with proof and reference to dates, events and identities of role players involved.

[34] A myriad of disputes of facts on involved and complicated issues are apparent on a perusal of the papers.

[35] What Applicant prays for, should her application succeed, is twofold: Firstly, for this court to essentially grant a decree of divorce annulling the civil marriage between the First and Third Respondents. Secondly, for this court to compel the Second Respondent to register her marriage to the First Respondent formally, which she herself neglected to do all those years ago. Such conduct would be a flagrant breach of the rules in that a divorce would have been effected in motion proceedings, which is not permissible.

F. THE LEGAL PRINCIPLES

[36] In application proceedings a dispute of fact may arise "When the respondent denies all the material allegations made by the various deponents on the

applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary."¹ This is a simple case of two differing versions.

[37] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) (at 634E-635C) the court held that if disputes of fact become apparent on the affidavits, a final order (or relief with a final effect) may only be granted if the allegations in the applicant's affidavits which have been admitted by the respondent, considered together with the allegations made by the respondent, justify such an order.²

[38] *In casu* the facts put up by the Third Respondent in her answering affidavit defeat the applicant's version in many material respects. Based on the *Plascon-Evans* principle, the probabilities overwhelmingly favour the Third Respondent.

[39] If a real dispute of fact should have been foreseen by the applicant, the court may dismiss the application with costs.³

[40] In this case, the Applicant would have been well advised to launch action proceedings. On the other hand, if First Respondent seeks to disentangle himself from his marriage to the Third Respondent, rather than being coy as he was in this application, he ought to initiate divorce proceedings. Equally, he should be

¹ Murray AJP in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)

² Summary quoted from *Civil Procedure – A Practical Guide* 2nd Ed by Stephen Pete and Others P116.

³ *Room Hire Co* at 1162.

prepared to deal with the triad of interests in so far as the house and his pension benefits are concerned.

G. CONCLUSION

[41] That this application was launched in bad faith with connivance between the Applicant and the First Respondent is clear. It constitutes an egregious abuse of the court process.

[42] The court is compelled to show its displeasure as a result. The Third Respondent got caught up in this situation and should not be rendered out of pocket through no fault of her own.

The application is dismissed with costs on a scale as between attorney and client.

J.S. NYATHI
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Judgment: 07 September 2021

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