



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

CASE NO: 8708/2018

In the matter between:

AYANDA MANDISA MKHONZA

Applicant

And

MINISTER OF HOME AFFAIRS

First Respondent

KUKWANYANE ELLEN MOKGOSI N.O.

Second Respondent

**(In her capacity as duly appointed executrix of the
Deceased Estate of Motseoatile Benjamin Makgosi)**

THE MASTER OF THE HIGH COURT PRETORIA

Third Respondent

JUDGMENT

NYATHI AJ

A. INTRODUCTION

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

1.1 That the Applicant be and is hereby declared the surviving spouse of the late MOTSEOATILE BENJAMIN MOKGOSI, Identity Number [...] who died on 09 August 2016.

1.2 That the marriage concluded in accordance with the customary law between the Applicant (MANDISA AYANDA MKHONZA) with identity number [...] and MOTSEOATILE BENJAMIN MOKGOSI (deceased) with identity number [...] be declared valid in law and that same be recognised as a marriage, as contemplated in section 2 of the Recognition of Customary Marriages Act 120 of 1998 as amended.

- 1.3 Condoning the late registration of the customary marriage entered into between the Applicant and the Deceased in terms of paragraph 1.2 above.
- 1.4 That the First Respondent be and is hereby directed to register the valid customary marriage entered into between the Applicant and the Deceased Recognition of Customary Marriages Act No. 120 of 1998 within 14 days after granting of this order.
- 1.5 That the First Respondent be and is hereby directed to issue out a marriage certificate to the Applicant as a result of the Applicant's customary marriage of the Applicant to the Deceased.
- 1.6 That the Third Respondent be and is hereby directed to remove the Second Respondent as executrix in the deceased estate of the late MOTSEOATILE BENJAMIN MOKGOSI appointed in terms of letter of Executorship No: 12418/2016 issued on 30th January 2017.
- 1.7 That the Second Respondent is directed forthwith to the Third Respondent (MASTER OF THE HIGH COURT, PRETORIA) the said letter of Executorship.
- 1.8 That the Third Respondent is directed to appoint the Applicant as Executrix of the late estate MOTSEOATILE BENJAMIN MOKGOSI, identity number 591107 5825 085 ad to issue the Applicant with the necessary letter of Executorship.

- 1.9 That the Second Respondent be ordered to be personally liable for all fees and/or disbursements incurred as a result of administering the Deceased Estate on her behalf.
- 1.10 That no order as to costs be made except in case of opposition by the Respondent/s in which case an order awarding costs against the Respondent/s on a scale of attorney and own client.
- 1.11 That such further and/or alternative relief is afforded is afforded to the Applicant as the Honourable Court may deem just and equitable.

B. THE FOUNDING AFFIDAVIT

[2] The Applicant and the Deceased first met at Port Elizabeth during the funeral of the Applicant's cousin in 2011. The cousin and the Deceased had been colleagues in the South African National Defence Force based in Pretoria.

[3] The Deceased and the Applicant fell in love and started visiting each other the same year.

[4] At the time of meeting the Deceased, the Applicant was residing and working in Jeffreys Bay in the Eastern Cape. The deceased asked the Applicant to resign from her job and come to stay with him in Pretoria. She obliged since at any rate the company she worked for was about to retrench several employees.

[5] She relocated to Pretoria in 2011 and she and the deceased cohabited as husband and wife.

[6] The Deceased introduced her to some of his family members as his future wife, particularly the Second Respondent being his mother.

[7] On or about January 2012, the Deceased proposed marriage to the Applicant and she accepted his proposal. He had indicated that he intended to marry Applicant in terms of customary law, and that he would announce his intention to his family (and his elders). They both agreed that they would get married in terms of the customary law.

[8] Pursuant to the Deceased's proposal, on the 14th February 2012, he bought her five pieces of engagement rings and asked her to be his wife. She gladly accepted his proposal. He also announced their intended marriage to his family members.

[9] On or about the 24 February 2012, the Deceased's family through representative Mr. MAJORO SEBIGI, (who is the uncle to the Deceased) addressed a letter to the Applicant's family requesting both families to meet to discuss the intended marriage. The letter was witnessed by certain Anna Raborife, Agnes Mokgosi and Magdeline Ncube.

[10] On the 03rd August 2012, the Deceased's family arrived at Port Elizabeth and they were given a warm welcome by my family. The following day (04th August 2012) both families met at the Applicant's parental home situated at [...] for the purposes of commencing lobola negotiations. The delegation included some elders such as Anna

Raborife being the uncle to Deceased and some elders whose names are unknown to the Applicant. Her family was represented by Mzamo Dyantyisi and Jeffery Tito Nazo.

[11] The Deceased's family representatives paid an amount of R50 which was regarded as a symbolic gesture for opening negotiations "*go bula molomo*".

[12] After intense negotiations both families agreed on the amount of R19 000.00 (Nineteen Thousand Rand) as lobola. The marriage was negotiated in terms of Xhosa custom. The Deceased's family paid the total amount of R19 000.00 and same was accepted and acknowledged. Documentary proof of this transaction is annexed to the affidavit. Paragraphs 1 and 2 thereof read as follows:

" We the family of Mokgosi from Pretoria came to ask for a hand-in marriage from Mkhonza family".

"We agreed for a lobola of R19000.00 two bottles of whisky and R50.00 starting lobola negotiations".

[13] During the event of the day, a goat was slaughtered, and the meat was shared between the families, the remaining meat was cooked and served to the members of the community who attended the marriage ceremony. This was followed by dancing, ululating, and serving of drinks in celebration of the customary marriage.

[14] Later that day a meeting was held behind closed doors between the two families, the Deceased's family delegation requested from Applicant's family for a permission to be allowed to return back to Pretoria on the 05th August 2012, and in particular, they requested to take Applicant along as their *makoti* (bride). Applicant's family acceded to the request and allowed her to travel with some of Deceased's family members on the 05th August 2012 by air whilst other delegates used a bus to travel back to Pretoria.

[15] As part of the ritual, the Deceased's delegation and the Applicant's family elders gathered at *eBuhlanti*¹ (a ritual place or spot where traditional ceremonies are held). The Applicant was made to partake of *Utsiki*² which was provided by the deceased's family. Applicant was counselled regarding how to behave as a *makoti*.

[16] On or about the 5th August 2012, we arrived at the Deceased's parental home in Mabopane which is the address of the Second Respondent. A further celebration was held where food and drinks were served to the family members and members of the community who attended the event on the day.

[17] Applicant was then formally introduced as *makoti* to the family members of Mokgosi family and neighbours who were invited to welcome her. They spent the rest of the day before going to the Deceased's flat in Pretoria North where they lived as husband and wife.

¹ *eBuhlanti* means at a Kraal – Fundiswa A. Kobo - *Ebuhlanti Amandla ngawethu: Womanism and black theology of liberation*, in memory of Vuyani Shadrack Vellem

² *uTsiki* is the ritual where *umakoti* has to eat a goat meat and drink the sour milk of that particular family in which she is married to. – Author unknown – sourced from the internet site Studylib.net

[18] They both resided on that address as a matrimonial home. They later purchased another property described as [...] situated at Pretoria North and rented out the Flat. They resided together as husband and wife, even though the Deceased was abusive.

[19] On or about February 2014, due to the Deceased's abusive behaviour, Applicant went back home to the Eastern Cape. The Second Respondent is aware of this fact since Applicant has reported the abusive behaviour to her on several occasions. The Second Respondent aggravated the situation by failing to intervene.

[20] The lobola payment was never refunded to the Deceased's family. The Deceased's family never demanded such refund as they still considered her to be validly married to the Deceased. No divorce proceedings were instituted.

[21] On or about the 9th August 2016 the Deceased died intestate and subsequent to his death the Applicant assisted the Second Respondent to obtain money for the burial from the Deceased's workplace.

[22] The Applicant tried in vain to register the Estate of the Deceased as she did not have a marriage certificate since the customary marriage was never registered with the Department of Home Affairs. She later learnt that the Second Respondent had registered the Estate and had been appointed as Executrix of the Deceased Estate.

C. SECOND RESPONDENT'S ANSWERING AFFIDAVIT

[23] The Second Respondent KUKWANYANE ELLEN MOKGOSI with identity number [...] is the Deceased's mother. She is cited in this application in her capacity as the Executrix of the estate of her late son.

[24] The Second Respondent opposes the application. She raises a point in limine about the existence of a factual dispute in this application. She states that during 2017 she caused an interdict application to be issued and served on a number of Respondents including the Applicant in this application. The said interdict application was already in the unopposed Court months before the Applicant in this application issued and served this application.

[25] The issue in the said interdict application was essentially that the Second Applicant was contesting the validity of the customary marriage of the Applicant to the Deceased despite the payment of lobola that had taken place. So clearly as early as that time the Applicant was aware of the contestation.

[26] The Second Respondent goes on to deny that a marital ceremony took place at her home.

[27] The Second Respondent submits that there has been a very real factual dispute as early as then, but that the Applicant nonetheless went ahead and issued motion proceedings.

[28] As regards the merits, the application is replete with disputes as well, For example:

28.1 The issue of the handing over of the bride as averred by the applicant is disputed by the Second Respondent.

28.2 The allegations that the Deceased abused the Applicant is upended by the Second Respondent, who alleges that it was the Applicant who abused the Deceased.

28.3 Similarly, the circumstances of the Applicant's departure from the common home with the Deceased is put differently by the Second Respondent.

28.4 The Second Respondent makes far reaching allegations of infidelity against the Applicant, which Applicant will obviously not be amused by.

D. THE LEGAL PRINCIPLES

[29] In application proceedings a dispute of fact sometimes arises "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.”³ This is a simple case of two differing versions.

[30] 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.⁴

[31] If a real dispute of fact should have been foreseen by the applicant, the court may dismiss the application with costs.⁵ In this case the Applicant has been alerted of the intractable dispute of fact between her and her reluctant mother-in-law. Having been served with an interdict application on the same facts much earlier, by the Second Respondent of all people.

[32] The Applicant would have been ill-advised on taking the path of motion proceedings. There is way too much finger-pointing having regard to the evidence proffered in the affidavits of the two role players for the matter to be resolved on papers. A full trial with viva voce evidence and cross-examination would have done justice to the facts of this matter.

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

⁴ Summary quoted from *Civil Procedure – A Practical Guide* 2nd Ed by Stephen Pete and Others P116.

⁵ *Room Hire Co* at 1162.

E. CONCLUSION

[33] The point in limine that was taken at the inception of this hearing has merit and succeeds.

[34] In so far as punitive costs are called for, I am inclined to sound a firm warning for now.

The application is dismissed with costs

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

Date of Judgment: 15 September 2021

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