IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG

CASE NO 5639/2014

In the matter between:

NOZIPHO SITHOLE Applicant

and

LINDA BRADFORD GUMEDE First Respondent

MSUNDUZI MUNICIPALITY Second Respondent

JUDGMENT

NTSHANGASE J

Introduction

[1] In an application brought under the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, Act 19 of 1998 (the PIE Act) the applicant seeks an order declaring the first respondent and all others who, under or through the first respondent occupy immovable property situate at 739 Imbali, Unit 15 fully described as Erf 739 Edendale Q, Registration Division FT Province of KwaZulu-Natal (the property) be declared to be in unlawful occupation of the property, and for an order directing the eviction of the first respondent and all who occupy under or through him from such property.

[2] In opposition to the application the first respondent sets out the grounds for upon which his entitlement to occupy the property is based as follows:

(a) 'Applicant and I were previously in a romantic relationship, pursuant to which we commenced procedures with a view to concluding a marriage in terms of customary law.'

(b) 'There is a dispute as to the effect of the procedures that were followed. I am advised and I respectfully submit that the procedures were completed to such an extent that our marriage in customary law was in fact concluded. This is disputed by the applicant.'

(c) 'Be that as it may, the property in question, i.e. the property at 739 Imbali, Unit 15, was acquired by us jointly with the intention that this would become a joint asset that we would own together as man and wife.'

[3] It appears from the foregoing that the first respondent's grounds for entitlement to remain in occupation of the property are twofold, namely that the property is owned jointly by the applicant and himself (the parties) by virtue of their customary marriage and their joint acquisition of the property.

Background

[4] It is common cause that the applicant is the registered owner of the property. It is also common cause that the parties engaged in a romantic relationship from about 1997. The parties cohabited at 915 Mkhoba Road. The parties' relationship ceased during 2009. It is common cause that subsequent to the cessation of that relationship they entered into a lease agreement for his further occupation of the property in terms whereof the he was to pay R2000.00 per month. (Later increased to R3000.00 per month).

The Issues

[5] I turn now to deal with the question whether the parties contracted a customary marriage subsequent to the commencement of their romantic relationship in 1997, or not. It

is not in dispute that the parties had, in their relationship contemplated being united in marriage. Various customary preliminary rituals were performed. There was part payment of lobolo as well. According to the applicant no marriage was contracted because not all the rituals, ceremonies and requirements for the coming into existence of a customary marriage were completed and, as a result thereof, they did not register a customary marriage. The first respondent avers that in the process the parties performed the most important ritual that is central to a customary marriage, whereby the two families each contributed one goat for slaughter' for the ancestors of each family to signify the bringing together of these ancestors to enable the bride (in this case the applicant) to be accepted into the family of the bridegroom and to legitimise their child.

[6] What is central in the creation of a customary marriage lies in the fulfilment of the requirements for a valid customary marriage to as set out in s 3(1) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) as follows:

'(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.'

[7] Counsel for the applicant laments the vagueness of paragraph (b) above which does not specify the actual requirements for a valid customary marriage. It appears to me that the provision in question in fact left open the mode of negotiating, entering into and celebration of the customary marriage because of the diversity of customary law as applies to various tribes.

[8] It appears from the papers that the parties were domiciled in the province of KwaZulu-Natal. The emissaries sent to negotiate with the prospective bride's family did so in "Bethlehem, near Bulwer" in this province. The contemplated marriage fell to be 'negotiated and entered into or celebrated in accordance with customary law' as applies to KwaZulu-Natal the territory of their domicile. A long line of proclamations codified the customary law in terms whereof the customary marriage should be negotiated and entered into or celebrated in this, the parties' province of domicile. I refer to a few codifications of the applicable Customary Law.

Section 148 of Law No 19 of 1891: The Natal Code of Native Law sets out the custom to be followed in contracting a valid customary marriage as requiring -

(a) the consent of the father or guardian of the intended wife. Such consent may not be withheld unreasonably;
(b) the consent of the father or the Kraalhead of the intended husband should such be legally necessary;
(c) the declaration in public by the intended wife to the Official Witness on the marriage day that the proposed marriage is with her free will and consent.

Section 59(1)(c) of Proclamation R168 of 1932: The Natal Code of Native Law and s 59(1)of Proclamation R195 of 1967: The Natal Code of Bantu Law, and the KwaZulu Act 6 of 1981 : The KwaZulu Act on the Code of Zulu Law 1981 have provisions similar to those of Law No 19 of 1891 except that the requirement "(c)"reads –

'(c) a declaration in public by the intended wife to the Official Witness at the celebration of the union that the union is with her own free will and consent'

[9] 'The Official Witness is a standing appointment made by a Chief or headman, and when a customary union has been arranged, the guardian of the bride, or the intending spouses themselves, are obliged to report the proposed customary marriage and the date and

place fixed for its celebration to the Chief or his deputy or to the headman as the case may be, who thereupon directs the Official Witness to attend at the time and place fixed.' Thus *Seymour's Customary Law in Southern Africa* 5ed by J C Bekker (Cape Town, 1989) at p 118.

In regard to the officiating function of the Official Witness T W Bennett with N S Peart in a *Source Book of African Customary Law for Southern Africa* (Cape Town, Juta 1991) state:

> *'In Natal under the code an official witness who was obliged to attend all customary weddings, had to ask the wife publicly at the ceremony whether she was marrying of her own free will. If she were silent or demurred, he would be obliged to stop the wedding immediately.'*

The Customary Law has, for over a century, as indicated above, regulated the manner in which customary marriages are here to be entered into or celebrated.

[10] In terms of s 7(2) of the Act the proprietary consequencies of a customary marriage entered into after commencement of the Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses unless such consequences are specifically excluded by the spouses in an antenuptual contract which regulates the matrimonial property system of their marriage.

[11] The respondent's claim to a half share in the property stems from his belief that he and the applicant contracted a customary marriage which bears the proprietary consequences pertaining to a marriage in community of property.

[12] A marriage which does not meet the requirements set out in s 3(1)(a) and (b) of the Act is null and void *ab initio.* In his own words the respondent indicates that no marriage was entered into or celebrated. He states:

> *"It is true that we did not proceed to have a formal celebration or wedding reception in respect of the marriage. This is because of the breakdown in our relationship.'*

He goes on to say –

> '*…that in customary law, as in western law, the celebration is not required for the conclusion of the marriage. To the contrary the purpose of the wedding reception is to celebrate a marriage that has already been concluded."*

This of course ignores that 'celebration' is a set prerequisite for a valid customary marriage. It cannot happen after the marriage has been concluded. The first respondent has no legitimate claim to a half share in the applicant's property; he is not, with the applicant, a partner in a customary marriage in community of property.

[13] I deal now with the claim that he contributed equally in the procurement of the property and the property at '915 Mkhoba Road.' The respondent avers that -

> *'(t)he monies that were used to pay off the bond (on the property) were monies from a business that applicant and I owned and operated jointly.'*

All of this is denied by the applicant who points to annexure "B" to her replying affidavit which reflects her as the sole purchaser in the offer to purchase the 915 Mkhoba Road property. She avers that after commencement of their relationship the respondent 'moved into (her) house situated at 915 Mkhoba Road and (they) began cohabiting.' In his response the respondent states that 'the property at 915 Mkhoba' (they) acquired jointly with the intention that (they) co. own this as man and wife'. The applicant avers that 'during 2009 (she) ended (her) relationship with the first respondent and first respondent moved out of (her) house situated at 915 Mkhoba Road.' The respondent does not dispute this. He instead says no more than –

'I admit that applicant terminated our arrangement in 2009'

The respondent's failure to prove co. ownership of '915 Mkhoba Road' property is evident.

[14] The respondent has fared no better in his endeavour to show that he co. owned the property at Imbali. He states that 'although the property was registered in the applicant's name (they) contributed equally to its acquisition.' He vaguely further states that '(he) paid roughly half the bond instalments." He re-iterates this claim in his specific answer to paragraph 9 of the applicant's founding affidavit as follows:

'*Applicant informed me that the bond instalments were in the region of R7 000.'*

[15] Significantly he provides no proof of contributions he made and he carefully, and without committing himself states:

Accordingly, she required a monthly contribution from me in the region of R3 500.'

He does not state that he in fact paid R3500 monthly.

[16] The applicant denies that the respondent contributed. She obtained a loan from Nedbank and bought the property in December 2007 for R275 000 and repaid it at R3600 per month. She also points to the fact that the Deed of Grant, annexure "NS I" to the founding affidavit reflects her as the sole owner. The sole ownership of the property to the exclusion of the first respondent is borne out by the fact that the respondent paid rental for his occupation of the property.

[17] The first respondent's averment that he and the applicant *'contributed equally towards the final payment of the bond'* and that '(t)he monies that were used to pay off the bond were monies from a business that applicant and (him) had owned and operated jointly' is not borne out by the lease agreement, annexure "A" to the founding affidavit which is

between the applicant only and the owner of the East Street Tavern, “Skinnies”, Rajhan Chetty.

The first respondent is untruthful in stating at paragraph 22 of his answering affidavit that he and applicant owned the “Skinnies” tavern. It was leased to the applicant. Annexure “A” shows that it was owned by Chetty and leased to the applicant alone.

[18] Any suggestion that there is, in this matter, a dispute of fact which cannot be resolved on the papers is without merit. The respondent has engaged in opposition which lacks *bona fides.* He is clearly in unlawful occupation of the property. He falls to be evicted. Upon eviction he will be in a position to acquire accommodation on a rental basis as he was able to do in respect of his occupation of the property.

The Order

[19] I make the following order:

(a) The first respondent and all other persons who occupy under and/or through the First Respondent, the immovable property situate at 739 Imbali, Unit 15 and more fully described as Erf 739 Edendale Q, Registration Division FT, Province of KwaZulu-Natal, in extent 352 square metres are declared to be in unlawful occupation of the property.

(b) It is directed that the First Respondent, and all other persons occupying under and/or through the First Respondent, be evicted from the property referred to in paragraph (a).

(c) It is directed that the First Respondent, and all other persons who unlawfully occupy the property referred to in paragraph (a), vacate such property with all their movable property on or before the 8th day of May 2015.

(d) In the event of the First Respondent, and all other persons who unlawfully occupy the immovable property referred to in paragraph (a) hereinabove failing to vacate the property by the 8th May 2015, the Sheriff of this court shall be and is hereby authorised to take all reasonable and necessary steps to evict the First Respondent and all other unlawful occupants from the immovable property referred to hereinabove after the 8th day of May 2015.

(e) The South African Police Service is directed to afford the Sheriff such assistance in the execution of this order as he/she may require.

(f) The First Respondent is ordered to pay the costs of this application together with any costs reasonably incurred by the Sheriff in enforcing these orders.

DATE OF HEARING:	7 April 2015
DATE OF JUDGMENT:	14 April 2015
FOR THE APPELLANT:	Mr T Manicum, instructed by Mastross Inc.
FOR THE RESPONDENT:	In person