REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 181/2015

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

DATE **15/3/2019** SIGNATURE:……

In the matter between:

S M S **PLAINTIFF**

And

V R S **DEFENDANT**

JUDGMENT

SEMENYA J:

[1] The parties in this divorce action entered into a customary marriage and later changed the regime to a marriage in terms of the Marriage Act, 1961. The issues between the parties which this court should determine are the following:

i. Whether the customary marriage entered into by the parties on the 18 may 2002 is valid;

ii. Whether the parties are married in community of property or out of community of property with the exclusion of accrual system; and

iii. Whether the plaintiff is entitled to rehabilitative maintenance and if so the quantum and duration of such maintenance.

[2] The parties agree that their marriage relationship has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal relationship between them. The issue of maintenance of the children has already been disposed of in terms of rule 43 of the Uniform Rules of Court. The defendant is prepared to continue with his contribution in that regard post-divorce.

[3] The plaintiff alleges that she and the defendant have entered into a customary marriage in compliance with the requirements laid down in Recognition of Customary Marriages Act 120 of 1998 (the RCMA). The defendant on the other hand alleges that there was no handing over of the plaintiff to his family. The parties belong to different cultural groups,

the plaintiff is Pedi, the defendant is Tsonga, and, as it shall appear from the facts, it is this cultural difference that constitutes the crux of the parties' disputes.

[4] With regard to the regime that governs the marriage relationship between the parties, although the plaintiff conceded that both parties have agreed to marry out of community of property with the exclusion of accrual system, she nonetheless disputes the validity of the contract itself, which was drawn after their marriage. I shall for the sake of convenience refer to this contract as a postnuptial contract (the PNC). It is the defendant's version that he and the plaintiff informed the marriage officer at Home Affairs Department that they intend to marry out of community of property with the exclusion of accrual system. The marriage officer advised them to consult with an attorney who will assist them with the drawing of an antenuptial contract. It is on this basis that the defendant contends that the PNC is invalid but only in as far as it relates to third parties but binding between the parties.

[5] In as far as rehabilitative maintenance, the defendant's contention is that he is not liable to maintain the plaintive post-divorce by virtue of the nature of their marriage regime. Plaintiff on the other hand contended that she is entitled to rehabilitative maintenance from the date of divorce to the date of the division of the joint estate. The plaintiff conceded during cross-examination that the claim for maintenance stems from her belief that she and the defendant are married in community of property.

[6] It is common cause that on the 4 March 2000, the defendant's family sent emissaries to the plaintiff's family to ask for her hand in marriage. It is further common cause that the plaintiff's brother and aunt represented the family during negotiations. It is the plaintiff's brother and aunt's

testimony that the parties to the negotiations agreed that the emissaries would pay R1000.00 as security fund for the plaintiff (an indication that the plaintiff is now engaged to someone else), an amount which was ultimately paid. Plaintiff's family asked for *lobola* in the amount of R8000. 00. The defendant was required to bring along a coat, blanket and R40.00 *pula molomo* (a token for opening negotiations). The brother testified that the family of the defendant informed them that they are going to leave with the plaintiff on the date on which they will be coming to finalise the negotiations.

[7] On the 18 May 2002, the defendant's family again sent their emissaries to the plaintiff's family to finalise negotiations. It would appear from the minutes of that date that the plaintiff's family accepted an amount of R5000.00 instead of R8000.00 as initially agreed upon. There was a big celebration which included the blessing of the rings by a pastor. Members of the defendant's family, including his mother were in attendance. Plaintiff's aunt testified that a beast was slaughtered and part of it, cakes and drinks were taken to the defendant's family as *mohlabiso/umhlabelo*. A day after the celebration at the plaintiff's house, the plaintiff and the people who accompanied her were taken to the defendant's church where further celebration to welcome the plaintiff' into the defendant's church occurred.

[8] The plaintiff alleges that all required formalities of a customary marriage were complied with. She argued that she was formally handed over to the defendant's family. The process of handing over, so the argument goes, took place when her aunt accompanied her to the defendant's house, when the aunt counselled her on how she should conduct herself as a *makoti (go laya)*, the slaughtering of a beast, part of which was taken to the defendant's family and the performance of

traditional chores at the defendant's house. The defendant on the other hand contends that in his custom, the slaughtering of a beast must take place at his house and not at the plaintiff's house. The argument is that, since this ritual was not done in that way, there was therefore no proper handing over of *makoti*.

[9] It is common cause that on the 9 January 2006, the parties attended to the Home Affairs Department offices with a view of entering into a civil marriage as alluded to in paragraph [4] above. The defendant testified that he and the plaintiff, on the advice of the marriage officer, consulted an attorney who assisted them with the drawing of a PNC. The said PNC was eventually registered at the Deeds office on the 9 February 2006, a month after entering into a marriage. The plaintiff testified that one of the reasons why she is alleging that the contract that she had entered into is not valid and binding is because her signature does not appear anywhere on the PNC. When asked as to whether she appeared before a lawyer to sign certain documents, plaintiff stated that what she remembers is that she once consulted with two people but cannot remember if it was for the purposes of signing a post-nuptial contract. It was put to her, correctly so, that her signature does not have to appear on this document.

[10] The plaintiff testified that she and the defendant discussed the issue of changing their marital regime and that she has agreed to marry out of community of property, with the exclusion of accrual system. She stated that this happened after the defendant explained to her the dangers of marrying in community of property when they are both business people. She further conceded that she has, for all intends and purposes, conducted herself as a person who is married out of community of property and that she regards the house she is staying in to be her sole

property. She stated that she is disputing validity of the PNC based on the advice she has received from her attorney.

[11] The requirements for a valid customary marriage are laid down in section 3 of the **Recognition of Customary Marriages Act 120 of 1998** as follows:

i. The prospective spouses must be above the age of 18 years;

ii. The prospective spouses must consent to be married to each other;

iii. The marriage must be negotiated and entered into in accordance with customary law.

[12] The events of the 4 March and the 18 May 2006 are largely common cause. The marriage between the parties in this matter was celebrated at the plaintiff's home. According to the plaintiff' brother and aunt, everything that was required to be done to conclude a valid customary marriage was complied with. In **D R M v D M K, a Limpopo Division case No:2017/2016 (ZALMPPHC) at par[29],** Makgoba JP said the following:

"The requirement of handing over a bride to the groom's family was explicitly set out in ***Motsotsoa v Roro & Another [2011] ALL SA 324 (GSJ)*** *where it was decided that one 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. The court held further that the mere fact that lobola was handed over to the bride's family, significant as it is, is not conclusive proof of the existence of a valid customary marriage.*

The handing over of the bride (go gorosa ngwetsi) is not only about celebration with feast and rituals. It also encompasses the most important

> *aspect associated with the married state, namely, "go laya" that is coaching or briefing which includes the education and counselling both the bride and the groom by the elders of their rights, duties and obligations which a married state imposes on them. The Court regarded this as the most important and final step in the chain of events. One can even describe this as the official seal in the African context, of the customary marriage."*

[13] In the instant matter, I am satisfied that all requirements laid down in section 3 of the RCMA have been met. I am further satisfied that the counselling (*go laya*) of the plaintiff and the defendant were properly done, both during the ceremony and at the defendant's place, by the aunt upon their arrival and in the morning when they woke up. The evidence of the plaintiff and her aunt that the defendant's mother and other members of the family took them to their church where further celebrations were held was not disputed. I am of the view that the defendant's mother would not have taken her to church if the handing over was not done. It is evident that she wanted to introduce her *makoti* to her church and to the community. The defendant came up with the version that his father was not pleased with what had transpired only during his evidence. The plaintiff was denied the opportunity to refute it. Overall, the evidence proves that all parties were satisfied with the formalities that took place during the conclusion of the customary marriage.

[14] The main issue raised by the defendant with regard to the validity of the customary marriage was that in his culture, being that of the vhaTsonga the beast which constitutes *mohlabiso* is slaughtered at the groom's house and not at the bride's as it was done in this case. He stated that it cannot be said that there was *mohlabiso* as this was not

done according to his culture. The plaintiff testified that as far as she knows, the defendant is of Pedi origin but did not deny that he was raised the VhaTsonga way. It was however never put to any of the plaintiff's witnesses, or to the plaintiff herself, that during the negotiations their family was informed that the beast will have to be slaughtered at the defendant's house. I find that there is no way that the plaintiff's family would have known that the beast will have to be slaughtered at the defendant's house when this requirement was not known to them. I find this aspect to be too trivial to invalidate the marriage between the parties in this matter, more so that another celebration was held at the defendant's church on Sunday.

[15] Bosielo J in **Moropane v Southon (755/2012) [2014] ZASCA 76 (29 May 2014) at [39]** stated the following:

> *"[39] Except for minor and inconsequential differences on cultural rituals, both expects were agreed that the current customary requirements for a valid customary marriage among the Bapedi people include among others, negotiations between the families in respect of lobola; a token for opening the negotiations (go kokokta or pula molomo); followed by asking for the bride (go kopa seg sa metsi); an agreement on the number of beasts payable as lobola (in modern times this is replaced by money); the slaughtering of beasts; a feast and counselling (go laiwa) of the makoti followed by the formal handing over of the makoti to her in-laws by her elders. In* ***D R M v D M K*** *above at [33], it was stated that "the Supreme Court of Appeal, (referring to Moropane,) recognized the pluralistic nature of the South African society and pointed out that although Africans in general share the majority of customs,, rituals and cultures, there are some subtle differences which, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, Vha Venda and the Va Tsonga"*

I am therefore satisfied that the customary marriage entered into by the parties is valid. The difference as alluded to by the defendant is inconsequential. In any event, the parties have already proceeded to enter into a civil marriage which I shall deal with in the following paragraphs.

[16] With regard to the civil marriage entered into by the parties on the 9 January 2006, it was argued on behalf of the plaintiff that the marriage should be regarded as in community of property in view of the fact that the parties had no antenuptial contract when they married. It was contended that the dictionary meaning of the word ‘ante’ is before, and that a contract entered into after the marriage cannot change the regime from in to out of community of property. Counsel for the defendant argued that the contract is valid between the parties but is not on third parties. The defendant’s argument is founded on the plaintiff’s concession that there was a meeting of minds between her and the defendant. Their intention was to change their marital regime from that which was governed by RCMA to one of out of community of property with the exclusion of accrual system.

[17] Section 10 (1) of the RCMA provides that a man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961, if neither of them is a spouse in a subsisting customary marriage with another person. It appears from the wording of this section that this change can be done without the intervention of the court as envisaged in section 21 of the Matrimonial Property Act 88 of 1084. None of the parties in this matter was a partner in a customary marriage with another woman.

[18] Esselen J in **Ex Parte Spinazze and Another NNO 1983 (4) SA 751 (T) at 754C-E** (Spinazze) stated that:

> "According to Roman-Dutch law, an antenuptial contract requires no formalities in order to be effective as between the spouses so that, even where an antenupial contract has been informally entered into, it is effective as between the spouses and their universal successors. See Joubert The Law of South Africa vol 5 at 157. See also **Ex parte Andersson and Another 1964 (2) SA 75 (C) at 77B**; **Ex parte Jacobson et Uxor 1949 (4) SA 360 (C) at 364."**

> Hahlo in his book The South African Law of Husband and Wife 4th ed at 262-263 sets out the position as follows:

> *"Since an informal antenuptial contract, though not valid as against third parties, is binding between the parties, spouses who have before their marriage informally agreed that community should be excluded are married out of community of property as far as they themselves and their heirs are concerned. As far as creditors and other third parties are concerned, on the other hand, they are married in community of property unless the Court authorises the post-nuptial execution and registration of their informal ante-nuptial contract."*

[19] In the article Written by Magdaleen De klerk (attorney for the plaintiff in this matter) with a title "**The validity of a verbal antenuptial contract**" published in De Rebus on the 29 August 2016, the author, after referring to section 86, 87 and 88 of the Deeds Registries Act 47 of 1947, **Lagesse v Lagesse 1992 (1) SA 173 (D), Honey v Honey 1992 (3) SA 609 (W), Ex Parte Spinazze** (above), **Mathabatha v Mathabatha 1987 (3) SA 45** and other similar cases that dealt with

informal and/or verbal antenuptial contract came to the following conclusion:

> *"No particular formalities are required for an antenuptial contract to be valid and enforceable between the parties thereto. However, to also be effective against third parties it has to comply with the formalities required by section 87 of the Act.*
>
> *Consequently any antenuptial contract, which is proved to have been entered into between the intended spouses, no matter how informally, will be valid inter partes.*
>
> *The effect of registration is merely to give notice to the world of the existence of the antenuptial contract and thereby (in a certain way) to bind persons who are not parties thereto."*

[20] As already state above, the plaintiff conceded that she agreed to be married out of community of property and has always considered herself to be so married, until her lawyer advised her otherwise. It could not have been their intention to change their customary marriage, which is in community of property, in terms of RCMA, to a similar marriage according to the Marriage Act. This, in my view, would have been an unnecessary exercise. I find that their initial verbal agreement constitutes an informal ante-nuptial contract as referred to in the cases referred to in the above article.

[21] Section 86 and 87 of the Deeds Registries Act 47 of 1937 provides as follows:

> ***"86. Antenuptial contracts to be registered***
>
> *An antenuptial contract executed before and not registered at the commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section*

eighty-seven, and unless so registered shall be of no force or effect as against any person who is not a party thereto.

87. Manner and time of registration of antenuptial contracts

(1) An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.

The contract entered into between the parties was registered within three months after the date of its execution in a deeds registry. It is therefore binding, not only between the parties, but against third parties as well. The matrimonial regime that governs the relationship between the parties in this matter is that of out of community of property with the exclusion of accrual system.

[22] On the issue of maintenance, section 7 (2) of the Divorce Act 70 of 1979 provides as follows:

"In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account , make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur."

[23] The plaintiff testified that she was working as a nurse when she met the defendant. She resigned and contributed her pension towards the

business of a funeral undertaker that she and the defendant jointly owned. It is common cause that the defendant at some stage withdrew himself from the business and left the plaintiff to run it alone. The said business has since been liquidated. The plaintiff thereafter joined Herbal Life and sold its products. She had to leave the job in order to transport her children to their different destinations and to take care of them. The parties' two children are still at school. One of the children is a weekly border. She is currently unemployed and without income. The house she and their children are staying is in need of maintenance. Plaintiff's application for maintenance *pendent lite* was dismissed. She is 44 years old. She testified that she is currently a full time driver for her children and has no time to sell Herbal Life products any more. She is busy with applications to be re-employed as a nurse.

[24] In **Kroon v Kroon 1986 (4) SA 616 (E) at 633,** financial needs and obligations of parties as referred to in section 7(2) of the Act has been defined as the amount of money each party needs for his/her day to day living and how much of the income or resources each has to spend for some obligatory purposes. The plaintiff in this matter requires money that will take her through her needs until she finds work. It might take long for her to find employment in the nursing profession as she will have to compete with younger people. She may have to downscale her standard of living and find a smaller house at a cheaper area where she will live in after the divorce.

[25] The defendant is a business man who owns two seven bedroomed houses in Pretoria and Cape Town. He earns a salary of R75 00.00 per month and an additional travelling allowance. The defendant married another woman during the subsistence of the marriage. The plaintiff learnt about the wedding celebration from the parties' mutual friend. The

photos and programme of the wedding show that it was a big celebration which was attended by government ministers David Mahlobo and celebrities such as Yvonne Chaka Chaka. This marriage is one other factor that I should take into consideration in deciding on the issue of maintenance. It has no doubt also contributed towards the break-down of the marriage. He is living with the said woman and their child. He is living affluently and will not struggle to pay rehabilitative maintenance for a period of 12 months.

[26] On the issue of costs, it was argued on behalf of the plaintiff that I should order the defendant to pay her costs. I was referred to a WhatsApp message in which the defendant was telling plaintiff to corporate and make the divorce process easy or else he will make things difficult for her. It was argued that the defendant has indeed made the process difficult and lengthy. I do not agree with this argument. The facts of this case clearly prove that the plaintiff was the most unreasonable person in this litigation. Firstly, it was not necessary to proceed with the issue whether the customary marriage was valid or not. The parties have already changed that marriage to a marriage by civil rites. Secondly, the plaintiff proceeded to challenge the validity of PNC despite the fact that she agreed to be married out of community of property and was happy with it. These issues were unnecessarily dealt with for a number of days when they could have been resolved with a day or two. It will be unjust to order the defendant to pay the plaintiff's cost under these circumstances.

[27] In the circumstances I make the following order:

i. The customary marriage entered into by the parties is valid;

ii. The parties are married to each other out of community of property with the exclusion of accrual system;

iii. A decree of divorce is granted;

iv. The defendant is ordered to pay rehabilitative maintenance for a period of twelve months in the amount of R5000.00 per month effective from the date of this order.

v. Each party is to pay his or her costs.

M.V SEMENYA
JUDGE OF THE HIGH COURT; LIMPOPO DIVISION.

RESERVED ON	**: 11 JANUARY 2019**
JUDGMENT DELIEVERED ON	**: 15 MARCH 2019**
ATTORNEYS FOR THE PLAINTIFF	**: DDKK INC.**
COUNSEL FOR THE PLAINTIFF	**: MRS. M DE KLERK**
ATTORNEY FOR THE DEFENDANT	**: DU DOIT SWANEPOEL STEYN & SPRUYT**
COUNSEL FOR THE DEFENDENTS	**: ADV M S SCHNEHAGE**