

REPUBLIC OF SOUTH AFRICA

**IN THE REGIONAL DIVISION OF GAUTENG  
HELD AT MAMELODI**

**CASE NO. RC 161/2024**

In the matter between:

**ROSE NOKUTHULA MASANGO**

**Applicant**

**and**

**DEPARTMENT OF HOME AFFAIRS**

**First Respondent**

**THE MASTER OF THE HIGH COURT**

**Second Respondent**

**MTHIMUNYE NGANYANA DRUIWER**

**Third Respondent**

---

**JUDGMENT**

---

- [1] This is an application for a declaratory order to recognise the customary marriage entered into between the Applicant and the deceased Mr Zobane Petrus Mthimunywe (hereinafter referred to as “the deceased), alternatively for an order that the Applicant and deceased were partners in a permanent opposite-sex partnership in which both partners had undertaken reciprocal duties of support. The Department of Home Affairs is the First Respondent, the Master of the High Court the Second Respondent and Mr Nganyana Druwer Mthimunye the Third Respondent.
- [2] Adv. Mosiane appeared on behalf of the Applicant and Ms. Sidu on behalf of the Third Respondent.

- [3] The Applicant filed a Notice to Amend the prayers of the Notice of Motion in terms of Rule 55A on the 12<sup>th</sup> of August 2024. The Third Respondent filed a Notice of Objection to the proposed amendment on the 19<sup>th</sup> of August 2024.
- [4] The Third Respondent submitted to the court *in limine* that the application for an amendment stand to be dismissed for the following reasons:
- (a) On 14 August 2024 the matter was postponed to the 23<sup>rd</sup> of October 2024 for the Third Respondent to serve his Opposing papers;
  - (b) The Third Respondent filed a Notice of Objection on the 19<sup>th</sup> of August 2024;
  - (c) The Applicant did not proceed to lodge an application for leave to amend in terms of Rule 55A(4);
  - (d) The Applicant's Notice in terms of Rule 55A does not comply with the rules of court, as it afford the Respondent only 5 days to file a notice of Objection whilst the rules require a ten day period.

### **COMMON CAUSE FACTS**

- [5] The Applicant and the deceased are both from the Ndebele culture. The Applicant met the deceased during 2010 when she visited her older brother Mr Sameul Masango in Mamelodi East, Lusaka. The Applicant and the deceased stayed in contact when she returned to Limpopo and committed to an exclusive romantic relationship in early 2011.
- [6] The Applicant moved into the deceased's property situated at Erf Number 35517, Mamelodi Extension 22 during early 2011.
- [7] The Applicant and the deceased lived together as husband and wife until 2015. The deceased worked on odd jobs and saved money to pay lobola for the Applicant. The deceased lost his mother during 2011.

- [8] The Applicant and the deceased both contributed towards the common household during the existence of their relationship.
- [9] The Applicant and the deceased stayed together until his demise.
- [10] There were no children born from the relationship of the Applicant and the deceased. The Applicant have two children of her own born before she met the deceased.
- [11] The deceased passed away on the 8<sup>th</sup> of April 2021.
- [12] The Applicant signed the Burial Order of the deceased, as the spouse of the deceased.
- [13] The deceased was registered as a beneficiary on the funeral policy of the Applicant. The Applicant incurred the funeral costs of the deceased.
- [14] The last part of a Ndebele marriage, the 'hlabisa' was never celebrated by the Applicant and the deceased, as the Applicant's mother passed away in 2017.
- [15] The Third Respondent instituted a pending eviction application against the Applicant in the Mamelodi magistrate's Court.

### **FACTS IN DISPUTE**

- [16] The Third Respondent opposed the application on the following grounds:
- 16.1 There was never any lobola negotiations between their respective families. The Third Respondent deny that the witnesses, as stated by the Applicant form part of his family.
- 16.2 The authenticity of the lobola letter dated 3 October 2015, attached to the application of the Applicant is denied

- 16.3 The third Respondent deny that the lobola letter comply with the Ndebele culture.
- 16.4 The authenticity of the photos of the lobola celebrations, annexed to the application of the Applicant is denied by the Third Respondent, as is the sequence of events, as set out by the Applicant.
- 16.5 The vunula process that took place on the 7<sup>th</sup> of July 2016 is denied by the Third Respondent.
- 16.6 The bridal handover and celebration of the marriage are denied by the Third Respondent
- 16.7 There was no compliance with the customary rituals such as the slaughtering of cows and the celebration of the marriage. There was no exchange of gifts between the two families. There was no physical handing over of the bride, which is an integral part of the customary marriage in terms of custom.
- 16.8 There was no welcoming of the Applicant to his family and counselling by his family members.
- 16.9 There was no celebration as a result of the marriage and the Applicant was never integrated into his family.

### **APPLICABLE LAW**

- [17] The new constitutional dispensation ushered in a system that affords everyone the protection of the law and further empowers the courts to interpret, apply and/or develop customary law.
- [18] **Section 3(1) of the Recognition of Customary Marriages Act, 120 of 1998** provides that:

*“For a customary marriage entered into after the commencement of the Act to be valid –*

*(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.”*

- [19] It is clear from the above section that these are the only three basic statutory requirements for the validity of a customary marriage, the so-called jurisdictional requirements.
- [20] The first and second requirements (age and consent) appear to be straightforward. The third requirement is not so clear, as the legislature did not consider it necessary to define it.
- [21] It is apparent that the Customary Marriages Act requires that all the requirements that are provided for in section 3(1) must be complied with to validate a customary marriage.
- [22] Customary law is a dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates. It is not a fixed body of classified rules. Customary law and its various institutions, including marriage is the subject of an evolutionary process and continues to be so, to which factors such as urbanisation, exposure to western culture and other religious practices contributed.
- [23] Lobola is one of the all-important requisites for a customary marriage, but on its own lobola negotiations do not conclude a customary marriage. The payment of lobola can be in full or in partial payment with both families agreeing on how the remaining payments will be concluded. The intent of lobola is to show love, respect and sacrifice. Lobola further shows that there is consent by the two parties to get married.

- [24] In *Moropane v Southon* [2014] JOL 32177 SCA the Supreme Court of Appeal held that by the virtue of both parties initiating and entering lobola negotiation, which is an integral part of a customary marriage, the parties have consented to being married in terms of customary law.
- [25] The Act does not state any style of celebration of customary marriage, not does it specify the process of the handing over of the bride (makoti) to the bridegroom's family. In *Mabuza v Mabatha* 2003 (4) SA 218 (C) it was found that the SiSwati custom of ukumekeza namely, the handing over of the bride was not done (the formal integration of the bride into the bridegroom's family). The court found that 'African customary law has evolved and was always flexible'. Therefore, non-compliance with the strict rules pertaining to rituals and ceremonies, cannot invalidate a customary marriage that has been negotiated, agreed or celebrated in accordance with customary law.
- [26] Noteworthy is that cohabitation precedes most customary marriages. This may attenuate the purpose for which bridal transfer or handing over or integration may be sought. The family of the bride may, during negotiations impose a fine on the groom's family to indicate displeasure against cohabitation. In *Mkabe v Minister of Home Affairs and Other (GP)* (unreported case no 2014/84704) the court dealt with a case where cohabitation preceded the customary marriage and there was neither a fine nor any agreement as to when a customary marriage will be deemed concluded. The court held that the parties can do away with the integration of the bride by agreement. In *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) the court found that the section 3(1)(b) requirements insofar as they relate to the conclusion of customary marriages, may be waived by agreement or conduct or even condoned.
- [27] Registration of a customary marriage is not a validity requirement for a customary marriage. Both spouses have a duty to register the marriage. In terms of section 4(1) of the Act, and either may do so in terms of section 4(2). The failure to comply with the duty only has the consequence of the spouse forfeiting the *prima*

*facie* proof of the marriage that the certificate would bring in terms of section 4(8). Registration was not a traditional custom or usage.

## ANALYSIS

- [28] The point *in limine* raised by the Third Respondent is hereby upheld. The Applicant did not follow the procedure prescribed in Rule 55A. The Applicant should have lodged a substantial Application to amend, 10 days after the Notice of Opposition was served on her. The Applicant served the amended Notice of Motion together with her Rule 55A Notice. No proper amendment was affected. The Applicant's application will be adjudicated on the first Notice of Motion.
- [29] It is not in dispute that the Applicant and the deceased were above the age of 18 years. The only two issues which are seriously contested are lack of consent by the deceased to marry by customary law (s 3(1)(a)(ii) and whether the marriage was negotiated entered into and celebrated in accordance with customary law (s 3(1)(b).
- [30] The Applicant is adamant that there was a customary marriage that was entered into between her and the deceased. On the contrary, the Third Respondent who is the elder brother of the deceased, is of the view that there was no customary marriage concluded between the deceased and the Applicant. It is clear that there is a factual dispute between the parties, as the court is faced with two mutually destructive versions. These versions cannot co-exist and therefore one version is more probable and must prevail.
- [31] The Third Respondent deny that the Applicant and his deceased brother were customarily married. If one look at the contents of his affidavit, most of the allegations in the Applicants affidavit are denied on the basis that the Third Respondent had no knowledge of the contents thereof.
- [32] The Third Respondent deny that the Ndebele customs were followed by the parties and go to great length to describe the correct procedure that should have

been followed. He avers that he is the eldest brother in the family and that he and his deceased brother were very close, he would therefore been aware of the customary marriage.

- [33] The Third Respondent admit that the Applicant and the deceased lived together as husband and wife for a total period of ten years.
- [34] The obituary annexed to the Supporting Affidavit of the Applicant is denied by the Third Respondent as not being the obituary used when the deceased was buried. He aver that the obituary used was buried with the deceased, as per their custom. The Third Respondent fail to annex any documentary or other proof to his affidavit which should have been readily available to him.
- [35] The Third Respondent further fail to address the facts stated by the Applicant in her Founding Affidavit that she footed the bill for the costs of the funeral. He fails to provide the court with any proof that the Mthimunye family paid or contributed towards the funeral costs. As executor of the deceased's estate he should be in the position to admit or deny the Applicant's version that she was responsible for the payment of the funeral costs at a substantial prise.
- [36] The Applicant and the deceased co-habited as husband and wife for a period of approximately 10 years while the deceased assumed all the responsibilities of a husband and the parties' shared the duty to maintain each other and financial responsibilities of the household.
- [37] There is no evidence before court that any one of the families of the Applicant or Third Respondent ever questioned the union of the Applicant and the deceased, during the lifetime of the deceased or insisted on further rituals to be performed.
- [38] The Third Respondent deny the version of the Applicant mostly because he was not aware of the customary marriage or involved in the customary marriage negotiations. It is the Applicant's version that the elder brother of the deceased dealt with the rituals.



- [39] The Third Respondent rely mainly on conjecture and speculation when the version of the Applicant is denied. The Third Respondent's entire version is based on hearsay evidence and assumptions. The Third Respondent categorically deny facts stated by the Applicant that is within her knowledge, whilst he was not part of the lobola negotiations. In total the version of the Third Respondent reflects nothing else than a bare denial.
- [40] It cannot be permissible that a person can live with another in the context of this matter and enjoy all the benefits that accrue to spouses and thereafter make a U-turn and claim that the validity of the marriage was conditional on further negotiations, rituals or a formal handover.
- [41] It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent together with the facts alleged by the latter, justify such order.
- [42] *Mouton v Park 2000 Development 11 (Pty) Ltd 2019 (6) SA 105 (WCC)* summarised the above aptly: At the same time, it is equally well established that where a dispute of fact is not a 'real, genuine or bona fide' one, the Court will be justified in ignoring it and may proceed to find on the applicant's version thereof. So too, where the respondent's version is clearly or palpably far-fetched or untenable, the Court may take a robust approach and decide the matter on the basis of the applicant's version. As always, in evaluating the contents of the affidavits the Court must have due regard for the treatment which the respondent has given to the averments under reply. In this respect a respondent has a duty to engage with the facts which are put up by the applicant, and to deal with them fully and comprehensively. Any 'skimpiness' and improbabilities in his version may thus count against him.
- [43] In exercising my discretion, I am required to consider the alleged facts in dispute and see whether real disputes of fact exist which cannot be satisfactorily

determined without the aid of oral evidence. The law pertaining to how courts should approach matters where disputes of fact are raised has been settled by our authorities. I am mindful that vague and insubstantial allegations are insufficient to raise the kind of dispute that should be referred for oral evidence.

[44] In my view, oral evidence is one or other form envisaged by the rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned. In reaching the decision in this regard facts peculiarly within the knowledge of the applicant which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinized.

[45] The court find that the version of the Third Respondent in his Answering Affidavit, supported by the facts stated by the Applicant together with the facts admitted by the Third Respondent justify the Order. The version of the Applicant is clearly more probable than the version of the Third Respondent.

[46] In light of the above exposition, I am of the view that the Applicant has adduced evidence on a balance of probabilities that there exists a customary marriage between herself and the deceased.

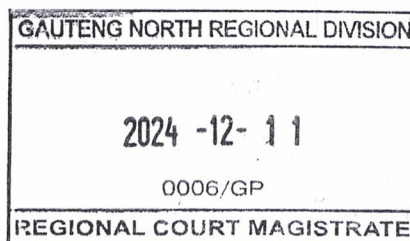
## ORDER

I therefore make the following order:

(a) Prayers 1 and 2 granted.

(b) Costs to the Applicant

*M. Erasmus*



M. ERASMUS  
(ACING REGIONAL MAGISTRATE -PRETORIA)

DATE  
11 December 2024