



IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, MTHATHA]

CASE NO.: 4693/2021

In the matter between:

TOMAKAZI QONGQO

APPLICANT

and

LUMKA NONJUZANA

1ST RESPONDENT

MZWANELE NONJUZANA

2ND RESPONDENT

JUDGMENT

NORMAN J:

Introduction

[1] It is becoming a regular occurrence that when a head of the household dies, family members fight amongst themselves. One of the parties would resort to court for resolution of the disputes. In certain instances the rifts are caused by the fact that when the head of the family passes on, leaving his wife and children, family members take it upon themselves to, in total disregard of the rights of the wife and children, allocate to themselves certain rights over the

deceased's assets. That conduct is unfortunate and does not afford families sufficient time to grieve the loss of their loved one, instead they find themselves moving in and out of court rooms.

Relevant facts

[2] The parties were referred to trial by way of an order issued by Griffiths J on 2 June 2022 which reads as follows:

"IT IS ORDERED THAT:

- 1. The matter be referred to oral evidence.*
- 2. The issue on which such viva voce evidence shall be led the existence of the customary marriage."*

[3] The court also made the usual orders relating to conduct of trial proceedings, namely, calling of witnesses, discovery of documents and rule 37 conference. The court further ordered that incidence of costs incurred up to the date of that order shall be costs in the cause.

[4] The applicant is Tomakazi Qongqo (Tomakazi) who alleged that she was married to Mr Xolile Nonjuzana (Xolile) by customary rights. Xolile had a twin brother Xolani who is also deceased. Xolile passed away on 17 October 2021. The first and second respondents are the siblings of Xolile. They are disputing the fact that the applicant was married to Xolile.

[5] After the death of the deceased the applicant approached court, seeking urgent relief, amongst others, an order that the respondents vacate the deceased's homestead at New Highbury , Mthatha .She also sought orders, *inter alia*, interdicting the respondents from intentionally excluding her from making funeral arrangements for the deceased; denying her access to the homestead

at New Highbury, interdicting them from selling livestock of the deceased ; ordering them to return the livestock they had removed from the deceased's homestead and directing them to return the identity document and death certificate of the deceased to the applicant.

[6] On 26 October 2021, Jolwana J, granted interim relief. The respondents were served with the court order. They opposed the application. They joined issue with the applicant's allegations that she was married to the deceased. That is what led to the referral of that issue to trial as indicated, above.

[7] Mr Madubela represented the applicant and Mr Mqokozo represented the respondents. I shall refer to the parties as they appear in the application proceedings.

The issues

[8] The substantive issue for determination is whether or not there was a customary marriage between the deceased, Xolile and the applicant, Tomakazi. Another issue is whether the rule nisi issued should be confirmed or discharged. The issue of who is to bear costs of the application and the trial will also be decided herein.

Applicant's case

Mr Dingiso Ntsokolo

[9] The first witness called by the applicant was Mr Dingiso Ntsokolo. He testified that: He is the father of Xolile and the respondents herein. He knows the applicant as his daughter -in- law. He was informed by Xolile that he had seen a lady from the Xaba family that he intended to wed. That was, according to

him, during 2007. He could not recall clearly the dates. After that Xolile sent him together with his family members to visit the home of the applicant at eNgqeleni.

[10] They indeed visited the home of the applicant where traditional talks were held relating to, for instance, *imvula mlomo*¹. They were informed that their *imvula mlomo* is a cow. They were given a piece of paper where items that were required by the Xaba family were recorded. Those were, *inter alia*, *ikhazi*² and *umothuko or umnyobo*, ten sheep, ten goats, one horse and a saddle.

[11] They left an amount of R1000 in the place of a cow as *imvula mlomo*. After receiving a list of those items they went home. They advised the Xaba family of a date when they would return to their home to pay lobola for the applicant as they had discussed. There was an amount R25 000 that was taken to the applicant's home which represented six cows, a horse and a saddle and ten sheep. He did not form part of the delegation that went back to the applicant's home. His late brother, Mfundelwa, was part of the delegation. He reported back to him that they were well received and accepted by the Xaba family.

[12] When they went to negotiate *lobola*, the applicant was at her marital home in Port St. Johns where her husband and her father in-law resided. He testified about the tradition of welcoming *umakoti*³, that a goat would be slaughtered for her, she would be dressed in clothes that showed that she was a wife. She would be given advice by elderly women on, amongst others, how to behave as a married woman. He regarded this process as isiXhosa wedding

¹ Imvula mlomo: something that they had to show before lobola negotiations began.

² Ikhazi: meaning the number of cows.

³ Umakoti: a young bride.

and it is known as *utsiki*⁴. His brother-in law Dzodzwana Nonjuzana was leading the process of *utsiki*. He indicated that he could not recall the applicant's name that she was given by the elderly women during the *utsiki* process because he himself called her *MaXaba*.

[13] During 2009 when he retired from work in Johannesburg, the deceased called him and asked him to go to Mthatha because he had a place that he wanted to show him in New Highbury. He took a taxi from home and they met at the taxi rank. The deceased was in the company of the applicant. They all went to look at the place at New Highbury. He was also shown the sheep' kraal by Xolile.

[14] After the death of the deceased he found MaXaba at her place, in New Highbury, when he arrived. According to him the applicant and Xolile were still married. He received a call from the first respondent, whose nickname is Nomalongwe who informed him that Xolile had passed away. He confirmed that during the burial of Xolile, the applicant was present. He also confirmed that the respondents did not attend the funeral. He was saddened by the fact that they did not attend their brother's funeral. His son never informed him that they were having marital problems with the applicant.

[15] Under cross - examination it transpired that this witness had two wives. The first wife was Ms MamThafa Dingiso who is now deceased. He regarded the mother of Xolile and the respondents as his wife. He stated that he fell in love with Ms Ceziwe Nonjuzana when she was still young. They were blessed with six children. He testified that in isiXhosa *ndandizekiwe nguye*⁵. He was

⁴ Utsiki: a traditional ceremony for welcoming a bride into the marital home.

⁵ Ndandizekiwe nguye: meaning that he built a home with the mother of her children at her maiden home.

residing with both women in the two separate homesteads. He was maintaining both families financially. He was in good terms with all his children. Before his retirement he was working in Welkom. Initially he used to go home at the end of the year but then things changed and he was able to visit home whenever he got leave from work. He would stay for a month or three weeks at a time.

[16] He was born of the Amacotho clan and Amaqhwane was the clan name of Xolile's mother. He did not dispute the fact that because the deceased was born out of wedlock he was regarded as part of the Amaqhwane clan. He confirmed that Xolile's uncle was one of the people who were present during *lobola* negotiations. He confirmed that Xolile's mother was present when *utsiki* was done.

[17] He stayed in the house of the deceased in New Highbury for about two weeks when it was still under construction. He was staying there with the applicant and their young child at the time. He was attending training in Mthatha and Xolile left him with his wife and child. He testified that during that time and in particular in 2011 the second respondent was staying at uTsolo . He had been to the second respondent's home in 2011 when he visited a healer. He did not know the ages of his children. He recalled that when the second respondent was born there was draught and they had built another rondavel at his mother's home. He stated that during their time there were no celebrations or recognition of birthdays.

[18] He was asked about the deceased's house that is at Waterfall. He stated that he knew of the house where his son was staying and that was beyond the

Mthatha river. However, at the time when he went there he was sick. He did not know who owned the house. He disputed the version of the respondents that the applicant was not married to the deceased. He also disputed the version of the respondents that there was no ceremony performed to welcome the applicant to the family home. He disputed that there was no father and son relationship between him and the deceased. He stated that he and his twin sons Xolile and Xolani were doing things together.

[19] He was accused of not having been present during the upbringing of his children. It was suggested that he was a stranger to his children. He disputed that. It was also put to him that when he came back from work he would simply go back to the respondent's home only to visit their mother and not the children. He disputed that he was not involved in their schooling. He testified that he knew about the respondents going to stay with the deceased at some point as they were attending school because the deceased informed him about that. He was adamant that the respondents only went to New Highbury for the purposes of schooling and not as a permanent move from Port St. Johns. It was put to him that the respondents left Port St. Johns because they were being ill-treated by their uncle. His response was that their uncle was simply instilling discipline and did not like girl - children to wander around.

[20] He confirmed that there was some quarrel between his children and their uncle. He indicated that his attitude was that his children must remain at their home and their uncle should stay at his home. It was put to him that the first respondent's version was that, she, together with the deceased, acquired the property at New Highbury with the view to establish their own home. He disputed that version and stated that the deceased had a wife and children.

He disputed that they had to establish a home in New Highbury because their uncle had his own house which was far from them and their mother had her own homestead which was built by him together with their mother. He disputed the version put to him that the applicant never stayed at New Highbury. It was put to him that the applicant only visited the house of their brother during month end only. He disputed that and stated that he had been there during the week and not on weekends and had found the applicant there.

[21] It was put to him that the applicant and the deceased's relationship ended when the second child was born. He indicated that he was never informed of that. It was put to him that the reason for the breakdown of their relationship was because the deceased was disputing the paternity of the second child. This witness stated that the deceased never told him that instead he brought the child to their home. He was sitting next to the kraal when the deceased brought the child to his home, the great house. His view was that his daughter-in-law should stay in her house together with her children.

[22] He testified that after the death of Xolile, the first respondent, did not want him to be buried. She insisted that the deceased's body should be wrapped with a blanket and be put in the grave. He refused. He buried the deceased next to his twin brother, Xolani. He went to the Great Place where he gave the applicant, the deceased's identity book and the stock card for sheep. At the time the deceased had sixty sheep. He took three sheep and slaughtered them for the burial. He left fifty-seven sheep at New Highbury.

[23] It was put to him that all the sheep that belonged to Xolile were stolen. His response was that no one told him about that. It was also put to him that after the sheep were stolen they were recovered and the second respondent took all of them to Tsolo. His response was that he wanted nothing from the second respondent but all he wanted was that the applicant should return to her house with her children.

[24] In re-examination he stated that there was never a quarrel between him and the respondents in relation to the sheep or the ownership thereof. He last visited New Highbury when he was taking the deceased's body for burial.

Mr Bongani Mdwayimba

[25] The next witness was Mr Bongani Mdwayimba. He lives in Port St. Johns at Ndimakude Location. He is an uncle to Xolile and the respondents because their mother is his sister. He testified that during 2008 he was called by the mother of the deceased and informed him that the deceased had brought a lady home. He was tasked with the obligation to inform her family that they should not look for her as she was at the Maqhwane's homestead. He confirmed that *umendlaliso*⁶, was performed for the applicant. He testified that a goat was slaughtered, bile from the goat was smeared on the applicant. She was fed meat from *isiphanga*. The women dressed her in german prints, *isikhafu*, *ityali* and a doek on her head. After that she was welcomed and given a name. She was also given words of wisdom by the elderly women on how to conduct herself as a wife.

⁶ Umendlaliso: *is the same as utsiki* in isiXhosa.

[26] He was staying with the deceased's mother at their home. He confirmed that during *umendlaliso* the father of the deceased was not present. He mentioned that his wife, Nowongile was present. He confirmed that Mantusi or Lelethu, the wife of the other twin, Xolani, was also present. She is one of the people who played a role in dressing up the applicant. He recalled that the name that the applicant was given was Nolusizo. He was informed later on that *lobola* had been paid. That was in 2008. According to him there was never a stage where the marriage was dissolved. He never received complaints that the applicant was not doing what she was supposed to do as *umakoti* at that homestead.

[27] He submitted that if *lobola* had not been paid the family of the bride would have come to fetch her in terms of the *ukutholekwa*⁷ custom and that did not happen in this case. He stated that he is the one who attended to *umendlaliso* but thereafter he left for Johannesburg. His elder brother Silwangani Kutselo, Dodolo Mjikeneni and Zwelihlangene Jomose are all deceased but they attended the *lobola* negotiations. It was put to him that the respondents would say that no such ritual took place, his response was that they were children at the time they may not recall what happened. He denied that he and his sister were not on good terms.

[28] It was also put to him that he was ill-treating the respondents and their mother and as a result they sought and were granted a protection order against him. He denied that. He stated that the respondents accused his wife of witchcraft. He tried to mediate and called the respondents so as to resolve the issues but without success. He confirmed that the father of the deceased had contributed

⁷ Ukutholekwa: a custom where the family of the bride fetches her from the marital home because *lobola* had not been paid.

towards the *lobola* that was paid. He also corroborated his evidence that he was amongst the people that had attended the applicant's home for negotiations although he could not recall whether he went on the first or the second occasion. He confirmed that the applicant did attend ceremonies when at her marital home. He could not resolve the issue before this court because of the attitude of the respondents. He confirmed that he is commonly known as Dzodzwana.

Ms Nomalinge Sigijimi

[29] The next witness was Ms Nomalinge Sigijimi. She is the wife of the deceased's twin brother, Xolani. She resides at Elliotdale at Emandwaleni. In 2008 she was staying in Port St. Johns. She confirmed that in 2008 the applicant was a *makoti* for the Nonjuzana family. At the time this witness was already married to Xolani, and the applicant was going to marry Xolile. She confirmed that a goat was slaughtered for her then she was dressed like a *makoti* with *iqhiya*, german print and *ixakatho*. She was then given *isiphanga* to eat, which was cooked and eaten salt free. She was given a name, Nolusizo, by Nondi's mother. She described Nondi as one of the children of uncle, Mdwayimba. This witness was the one who was feeding applicant meat with a wooden stick.

[30] It was their mother-in-law who suggested that this witness should feed the applicant as she was marrying the twin to her husband. She testified that applicant was doing all the duties of a married woman. During their mother-in-law's funeral applicant arrived wearing a t-shirt with short sleeves. The first respondent gave her a long-sleeved t-shirt and she took the applicant's t-shirt

and wore it. The reason she gave her a long-sleeved top was that a wife cannot wear short sleeves at her marital home. She testified that at that time the first respondent was recognising the applicant as a wife. She testified that things changed after the death of Xolile because when she arrived at the Maiden Farm, where the first applicant was renting, she was given R2000. She went to New Highbury as she had been requested to bring some of the deceased's clothes. The respondents did not attend the funeral. Thereafter they stopped calling each other. She believed that the reason was that she was always going along with the applicant. She testified that the two respondents did not recognise the applicant as a wife.

[31] It was put to her under cross-examination that in her statement in support of the application she had stated that she is the one who gave applicant the name Nolusizo. She disputed that by stating '*umtshakazi akathiywa ngomnye umtshakazi*' meaning as a *makoti* she could not give a name to another *makoti*. She was directed to certain contradictions between her evidence contained in her written statement and that which she gave in court. Her response was that maybe she did not write correctly. She testified that it was her late husband who told her about the *lobola* negotiations in respect of the applicant because she was not present. She confirmed that when there were family gatherings or traditional ceremonies the applicant would attend and they would be there as sisters -in- law.

[32] In re-examination she stated that she visited the first defendant where she was a tenant, at Maiden Farm. She was asked to bring certain clothing of the deceased which she got from the deceased's home in New Highbury. Upon her arrival there she found the deceased's younger sister and Thandokazi.

When she enquired about the applicant she was advised that she had gone to attend to matters that related to her late husband's death. The applicant arrived later.

Ms Tomakazi Qongqo

[33] Applicant testified. She was staying at Elujacweni, her maiden home. Before she went to Elujacweni she was staying at New Highbury. She left during October 2021 after the death of her husband. She met the deceased Xolile in town in Mthatha during 2007. They fell in love and thereafter the deceased sent his family members to ask for her hand in marriage during June 2008. She was told that they left one cow, brandy and *umothuko*. She was present on that occasion. She recalled that her uncle, Mancane, and the deceased's father attended that first meeting.

[34] On the day of *utsiki*, she stayed in a hut with Noluvo. She was taken out and led to another house. She was made to sit behind the door on a grass mat. A goat was brought to the door of the house and shown to her. She was caused to eat meat with no salt. She was fed by Lelethu. She was given the name Nolusizo. She was made to wear german prints, a scarf on her waist, a black doek she called *ikhetshemiya* and something on her shoulders. She was then given advices by elderly women. The ladies told her that she was welcomed as a wife in the Amaqhwane family. She, together with the deceased have two children, a girl born on 24 August 2010 and a boy born on 6 October 2020. The house on New Highbury belongs to her husband. They both obtained a site in 2009 from Chief Maphanzela. They built the house in 2009. Before they got that site they were staying at Waterfall, in an RDP

house which belonged to Xolile. The house in New Highbury is a 5 roomed house. They first put on a roof over one room but by the time the deceased died the building was complete. The house consists of three bedrooms, a kitchen and a sitting room.

[35] Prior to the deceased's death the first respondent was staying at the Maiden Farm and the second respondent was staying at uTsolo. There was no bad blood between her and the respondents until after the passing of her husband. She corroborated the evidence of Nomalinge about the incident where she was wearing a short sleeve T- shirt and was made to take it off by the first respondent. When her mother in law passed on, she worked there as a makoti. [39] Upon the death of the deceased they had 60 sheep. She took one on the day of the funeral for welcoming the body of the deceased. The body of the deceased was taken to New Highbury and thereafter to Port St. Johns where he was laid to rest. She tried to go to the house in New Highbury with the police. The house was locked. The second respondent was phoned by the police and he arrived at the house. She told him that she was there to collect her children's documents. She also informed him that she wanted to take the sheep. There were old men that arrived and told her that she will not get the sheep. The first respondent left with the keys and refused to open for her. She could not take her child to the clinic because of the documents that were in the house. She persisted in her relief that the respondents must vacate the house.

[36] Under cross – examination she stated that she was scared of the respondents because she heard from the shepherd who was at New Highbury that he overheard the respondents saying they will pay tsotsis to kill her. She

confirmed that the first witness, Xolile's father was present when Xolile's family went to ask for her hand in marriage. She stated that she was already living with her husband when her in laws went for the second time to her home. Her husband used to visit her home whenever he wanted to. She recalled that when *utsiki* was conducted the first respondent was present and she had a baby boy and she saw the *utsiki* ritual. She stayed there for a few days because her husband did not want her to stay there because of family issues. They stayed at Waterfall and then moved to New Highbury after they built their house. It was put to her that during 2009 there was no structure at New Highbury. She disputed that. She disputed that she and her husband never stayed at Waterfall. She testified that after the death of her husband the first respondent broke into the Waterfall house. She called the street committees that called a meeting.

[37] The first respondent claimed that that house was given to her by her brother. She was evicted by the residents. She denied that she was not present when the deceased died. She denied that she went to New Highbury only to collect money for the children. She denied that the deceased and her were not married. She further denied that the site in New Highbury was sourced for the respondents' home as they were being ill treated by their uncle. It was put to her that the first respondent and Xolile built the house. She dismissed that as a lie. It was put to her that her husband had children from his first wife. She disputed that her husband had a first wife. She acknowledged that her husband had a girl child from another relationship. Applicant closed her case.

Respondents' case

Ms Lumka Nonjuzana

[38] The first respondent testified. She is 38 years old. During 2008 she was 23 years old and she was staying in the rural areas in Port St. Johns. She disputed that in 2008 her brother, Xolile, arrived at home with the applicant. She stated that her brother was selling cassettes. The applicant would come to Maiden Farm to visit her brother when she and her brother were staying at Maiden Farm in 2010.

[39] The home in New Highbury was acquired in 2010. She stayed there with her brother. It was built in 2010 but the whole structure was completed during 2017. During 2011 Mzwanele, that is the second respondent, was staying at New Highbury whilst her brother, the deceased was staying at Maiden Farm renting an RDP house there. During 2021 the deceased was staying in his house alone. The applicant was staying at her home. She saw her brother everyday because they were working together as she had a hair salon and her brother was selling cassettes in town.

[40] Her brother had a cold and had been to Ngangelizwe Clinic and was given medication. But around October he went back to the clinic and he was still not feeling well. She directed her sister Noluvo to go and visit their brother as he was not feeling well and she did. She went to visit her brother and she found that he was very ill. He went together with the second respondent.

[41] She found the deceased with her sister Noluvo. Upon their arrival the deceased called the second respondent and told him that he must please take care of the children. Later, she received a call that her brother had passed on.

Upon arrival at New Highbury, she found the applicant, applicant' s mother, Noluvo and Loli and the neighbours.

[42] She stated that her brother had told her that he was going to die and in the event of his death they must sell sheep because he did not have a funeral policy. They sold sheep and Mzwanele did have the stock card with him. After the body of the deceased was removed, the applicant and her mother left. The following morning, the applicant's mother arrived at New Highbury and informed her that all the things that were there belonged to her because she had given some of her things to the deceased for him to keep because she did not want her child to suffer.

[43] She wanted them to build flats on the site. This witness was shocked because she did not understand why such suggestions were made even before the burial of the deceased. She then refused to engage further with the applicant's mother and indicated to her that she must engage elderly people. Applicant's mother left and indicated that her child will not go back there. They remained and stayed there until the sheriff arrived to serve them with the court papers. She stated that she never expelled the applicant at New Highbury. She never asked her not to participate in the burial arrangements of the deceased. She was not in good terms with the applicant because after her brother's death they received papers that they must leave the house at New Highbury.

[44] She disputed that she ever threatened the applicant. She denied that the applicant ever attended any functions at her home as a wife. She denied that the applicant ever visited Port St. Johns. She testified that in 2021 on a Friday

the applicant arrived at Port St. Johns with the deceased and she enquired about her presence there. Her brother informed her that he came with the younger child because he was denying paternity of the child. When she got there the applicant was sitting with other people and she was holding the child. She asked her about the fact that she was not wearing a jersey.

[45] She then took off her t-shirt that had sleeves up to the elbows and gave it to her because she was wearing a sleeveless top. She never visited their home again. Her deceased brother did not have a relationship with the applicant because most of the time the applicant was staying at her home.

[46] During the Covid- 19 lockdown Xolile advised her that the applicant and her boyfriend had laid charges against him. Her brother then informed the police that the applicant was his wife. At that time her brother had taken the applicant's sewing machine and put it in the salon but he later returned it to one Makhosonke.

[47] Her brother disputed paternity of the younger child because he told her he was competing with another man over the applicant. Her brother had a relationship with one Andiswa. She believed that if her brother was still alive, he would have married Andiswa as his wife. Andiswa would cook for his brother and she played a huge role even at her brother's funeral because she paid R5000 towards the coffin.

[48] Under cross-examination when asked about the fact that during the arrest her brother had indicated the applicant was his wife, her response was that his brother was simply saying that because he wanted to be released by the police. She further stated that the tendency of males is to say people are their

wives even when they are not their wives. Later on, she said it was her brother who told her that he did not mean that applicant was his wife. She was taken to a statement where it was indicated that the applicant was the deceased's wife. That was in a statement prepared by the deceased on 28 September 2016 where he indicated that he is married in community of property to the applicant. That document had been signed by both parties. She disputed that her brother and the applicant were married.

[49] She confirmed that the first witness Mr Dingiso Ntsokolo was her father. She denied that the witness Nomalinge Sigijimi was married to her other brother, Xolani, but she only had a child with her brother, a boy. She confirmed that Mr Bongani Jwayimbi was indeed her uncle.

[50] She confirmed that *ukwendlalela umtshakazi* custom was practised in her area as a sign of welcoming a new bride. She agreed that once there are *lobola* negotiations a *makoti* is recognised. She confirmed that during *umendlaliso* tradition girls play no part in that tradition. She disputed the fact that the applicant was given *isiphanga* by the other sister-in-law because according to her a *makoti* can never feed another *makoti isiphanga*. On the other hand, she conceded that, she would not know what happened in that room because only the elderly people and *umakoti* were present.

[51] When asked whether or not his brother was divorced, her response was that Xolile gave her a stock card and a book from Waterfall and indicated to her that she must make sure that when he passed away the applicant's mother would not take his things.

- [52] Later, in her evidence, she stated that she made a mistake when she said that her brother had said she must take care of the children because that was directed at Mzwanele. She did not attend her brother's funeral because of the interdict.
- [53] It was explained to her that in terms of the order that was issued by the court no order interdicted her from attending her brother's funeral. She confirmed that she gave the instruction that the sheep be sold for the purposes of giving her brother a decent funeral. She stated that she had even organised transport to take the children to the funeral. She did not know the number of sheep that Mzwanele sold. Other sheep went missing as they were stolen from the kraal. She stated that there was no clothing for the applicant at New Highbury. She did not see any clinic card or clothing for the children at New Highbury.
- [54] When asked why they did not leave after they had been ordered by the court to do so, her response was that they were shocked because they did not know the applicant. She stated that she does not stay at New Highbury but does not want the applicant to get the house because she does not want her brother's children to suffer.
- [55] She testified that the applicant's mother used to go and sit next to her brother when her brother was selling music. Contrary to what she said earlier, she later confirmed that 15 sheep were sold. When asked about the incident where she gave the applicant her T- shirt, her response was that, she has two children from a certain man and when she goes to visit her man's home, she never enters that house without covering her arms.

Mr Mzwanele Nonjuzana

- [56] The second respondent, Mzwanele Nonjuzana testified. He is thirty-two years old. During 2008 he was sixteen years old. He was schooling in the rural areas at Qhakama. He knows the applicant as a lady who has a child with her elder brother.
- [57] His brother was not married before his death. During December 2010 he left the rural areas and came to Maiden Farm for holidays but never went back to the rural areas. His brother was staying there. He continued to study in Mthatha at Empindweni. During 2011 he stayed at New Highbury alone. His brother was staying at the Maiden Farm. He left New Highbury in 2017. Thereafter he would only go to New Highbury from time to time to visit his brother.
- [58] The applicant was staying at her home at Elujecweni in Ngqeleni. When he received the news of his brother's death he was at Ugie attending a soccer match. He corroborated the evidence of the first respondent that he received a call from her suggesting that he must go and visit their brother because he was not well. He visited him. His brother told him that he needed to talk to him but he must indicate when he would be coming back to visit. Before he could hear what is it exactly that he wanted to tell him, he heard that he had passed on.
- [59] He then went to New Highbury the following day and found her sisters, Lumka, Noluvo and Phelokazi, alone in the house. The applicant was not there. He reported the matter to the Chief's Great Place at Kwalindile and was given a letter to take to the mortuary. There were fifty-two sheep that

belonged to the deceased. They earmarked those that were going to be used for the burial. There was seven sheep for the burial. The deceased girlfriend assisted with paying R5000 for the coffin which cost R10 000 and they sold fifteen sheep and received R17 500. He gave Noluvo and Phelokazi R5000 for groceries and gave Phelokazi R1 500. He took R2000 for the shepherd. He got a truck which was going to take material to build the gravesite. He paid R7000 to the mortuary. When he was doing all this the applicant was not present.

[60] He saw the applicant when the sheriff came to serve them with papers. He denied that he prevented the applicant from coming to the house or from participating in the funeral preparations. He was staying at New Highbury together with her sister Phelokazi. He stated that he woke up one day and found that all sheep were stolen. He reported the matter to the police. The sheep were recovered but were taken to a pound in uQumbu. He later collected the sheep from uQumbu. He only found sixteen sheep. He left them under the care of one Lwazi Zweni , at uTsolo.

[61] On 15 June 2023 he was told that people came and stole all the stock including his sheep from Lwazi Zweni. Up to the time he was testifying the sheep had not been recovered. He denied that the deceased stayed with the applicant. He confirmed that after being served with the papers they did not leave the homestead because the papers were served three days after the death of their brother. They did not even know at that stage how they were going to bury him.

- [62] He confirmed the evidence of the first respondent that the applicant arrived in the company of the deceased's father and her mother. He disputed that the applicant was married to his brother. He also denied that his other twin brother had a wife.
- [63] He conceded that if his brother was married he had no right to stay in that homestead. At some stage when the applicant had gone with the police to the house when she wanted her clothing, this witness went to the house but had left the keys deliberately at his workplace because according to him he thought that they wanted to speak to him and did not want to enter the house. He also conceded that he had not complied with the court order. He sold the sheep to prepare for the funeral otherwise he would have complied with the order.
- [64] He took the livestock to Tsolo because it was not safe. The house at New Highbury has three bedrooms, a kitchen and the lounge. He described the items that were in each room as follows: that in the one room that he occupies there is a bed and a stand. Noluvo and Phelokazi occupy another room that has a bed, a dresser, a base and a mattress. In his late brother's room there is a bed, and two wardrobes. In the kitchen there are cupboards, iron, kettle, stove, microwave, table, dishes, crockery and a fridge; in the lounge there are couches, a TV, TV stand, a HiFi music system. His brother was using a laptop to load music and Phelokazi was using it but after some time the screen crashed.
- [65] He confirmed that he did not attend the funeral because he did not think the homestead would be safe if they left it. It was explained to him that there was

no order that said they must not go to the funeral and his response was that it must have been the person who gave them the papers who mentioned that. He said when they were doing these preparations of selling sheep there was an uncle whose name he did not know who was assisting them. He denied that he was squandering the deceased's assets. He confirmed that the applicant attended his mother's funeral. He conceded that he had no right not to leave that house.

[66] Under re-examination he stated that he knew of no reason why the applicant would not return to the house.

Mr Mzukisi Mbaxa

[67] The next witness was Mr Mzukisi Mbaxa. He is 43 years old. He resides at Port St. Johns at Ndimakude. He is an uncle to the respondents. Their home is not very far from his. He denied any knowledge of the applicant. He heard that Mr Dingiso Ntsokolo is the father of her sister's children. He was not present when *lobola* negotiations were undertaken in respect of the applicant. He knew Mr Bongani Jwayimbi as his elder brother. He was not present when *utsiki* was performed for the applicant. He stated that the deceased never told him that he was married. He never met the applicant at their village.

[68] He denied that he ever saw *umakoti* at her sister's place. He could not recall when the deceased passed on because he said since 2016 he had been staying in Port St Johns. He was never invited to any ceremony indicating that there was a ceremony relating to *umakoti* for the deceased. He said no one was sitting on the mattress as a wife when the deceased passed on.

[69] Under cross-examination he conceded that he did not really know much about the deceased. It also came out under cross-examination that he was not a sibling to the deceased mother. He confirmed that the deceased once brought to the rural area his daughter. The respondents closed their case.

[70] At the conclusion of the hearing both parties requested a period of two weeks each within which to submit written arguments. It was also agreed that it would not be necessary for the court to hold a sitting thereafter.

Applicant's legal submissions

[71] Mr Madubela submitted that the court should find in favour of the applicant because all the evidence demonstrates that the applicant was indeed married to the deceased. He submitted that the requirements for a valid customary marriage as envisaged in section 3 of the Recognition of Customary Marriages Act 120 of 1998 (the Act), were met. He further relied on **M.M v RAN**⁸, for the submission that if the validity of the customary marriage can be presumed based on cohabitation, this court must find that the applicant, in all probabilities, has proved that a customary marriage existed where there is, evidence of lobola negotiations, evidence of *umendlaliso* ceremony or *utsiki* and payment of lobola. In the **M.M** case at para 16 relied upon by the applicant the court stated:

"[16] Cohabitation naturally presumes the consent of the spouses. Proof of long cohabitation in itself raise a presumption that customary marriages exist. When existence of customary marriage is in dispute, the circumstances must be such that there no longer appears to be other evidence available of the further essential of the customary marriage or of the lack of such essentials, before the court will presume the existence of the customary marriage from cohabitation alone."

⁸ M.M v R.A.N, judgment of AML Phatudi J with Semanya J; Limpopo Local Division, Thohoyandou; delivered on 03 March 2023 (A07/2022) [2023] ZALMPHHC 2 (3 March 2023) para 16.

[72] He submitted that the respondents failed to comply with the order of this court where they were ordered to vacate the property at New Highbury and to return the sheep of the deceased. In this regard he submitted that there is no adequate remedy available to the applicant other than confirmation of the rule nisi. He further submitted that the respondents must be ordered to pay costs jointly and severally, the one paying the other to be absolved.

Respondents' legal submissions

[73] Mr Mqokozo on the other hand, submitted that the court must dismiss the application with costs because no customary marriage took place between the applicant and the deceased. He submitted that the applicant's alleged marriage did not meet any of the requirements provided for in the Act. He further submitted that all the witnesses that were led by the applicant were not truthful and had misled this court in their evidence. He regarded the application as an abuse of court process. He submitted that the deceased had other children who have a right to benefit from the deceased's estate as heirs and beneficiaries of his estate. He further submitted that the estate of the deceased ought to be reported to the Master of the High Court who will deal therewith in terms of the law.

[74] He criticised the fact that lobola negotiations were conducted in the absence of the applicant. He submitted that customarily before families start the lobola proceedings, the family would call its daughters and ask the groom's family to point out the prospective bride, thereafter the prospective bride would confirm

that she knows such family. In this case, he contended, none of that was done.

[75] He submitted that the mother of the applicant was not called to support her daughter as the person who received lobola. He further submitted that the applicant was not able to even produce a photo of her with the deceased and the children.

[76] He further submitted that the groom was never introduced to the applicant's family and that was the reason there was no member of the applicant's family who testified at the trial. He submitted that this court must find that the applicant was the girlfriend of the deceased. The applicant did not mourn the deceased by wearing dark clothes and no cleansing ceremony was done by the family.

[77] He urged the court to dismiss the application and discharge the *rule nisi* with costs.

Onus

[78] In resolving the factual dispute of whether or not there was a valid customary marriage between the applicant and the deceased, this court must adopt the measure of proof, being, a preponderance of probabilities. The applicant must convince the court that the evidence in support of her case outweighs the evidence offered by the respondents in opposing it.⁹ When the two competing versions intersect the question of credibility comes into play.

Analysis of the evidence

⁹ *Pillay v Krishna* 1946 AD 946 at 952-953.

[79] The applicant's witnesses corroborated one another. Mr Dingiso Ntsokolo , the father of the deceased, Xolile, gave very reliable evidence because his evidence was corroborated by the evidence of the deceased's uncle. He did not exaggerate and place himself at all times at the *lobola* negotiations and/or *umendlaliso* traditional ceremony. He was frank enough to state that he was only present on the first day when they went to ask for the applicant's hand in marriage. It appeared from the evidence of the second respondent that after the death of the deceased their father was in the company of the applicant when they arrived at New Highbury at some point. As the father of the deceased, he would be the first person to know if his son was married or not. The only thing he did not recall in his evidence were the real names of the first respondent, the name given to the applicant, the exact years and his children's birth dates. The explanation he gave for that was reasonable.

[80] He stated that he called the first respondent "Nomalongwe" and that was not disputed. He further explained that during their time they never celebrated birthdays. He explained that he called the applicant MaXaba and that was not refuted. His evidence was not challenged in so far as it related to , *inter alia*, the first meeting between the applicant's family and his family; the lobola amount and the delegation he sent to represent him; the *umendlaliso* tradition which was conducted by his brother – in law , Mr Mdwayimba; how he was shown the site at New Highbury by Xolile in the company of the applicant, his visits there and the decisions he took relating to the burial of his son and the fact that at all times he regarded the applicant as the deceased's wife. He was not shaken under cross – examination at all instead the respondents were determined to show him as an absent father who never supported them

financially. That, unfortunately, was not the purpose of the trial. I am satisfied that if I take into account all the evidence, he was a truthful witness and he gave reliable evidence. I accordingly accept his evidence.

[81] The evidence of the deceased's uncle, Mr Bongani Mdwayimba, corroborated that of the father of the deceased to a large extent. In the African culture the most important union, that is regarded as a marriage, because it links the bride with the ancestors, is *utsiki* or *umendlaliso* custom. This witness was in charge of that traditional custom. This witness was not swayed under cross-examination instead cross-examination was used by the respondents to deal with their own personal issues with this witness which had nothing to do with the issues before court. I found him to have been truthful in his evidence. I accordingly accept his evidence as reliable.

[82] The evidence of the wife to the deceased's twin brother, Xolani, Ms Nomalinge Sigijimi, was straightforward and related specifically to two issues, the one issue being what transpired at the home of the deceased when the applicant was brought to the deceased's home for the *umendlaliso* or *utsiki* and secondly, what happened after the death of the deceased. It is uncontested evidence that after the death of the deceased this is the witness that was asked to go and collect clothing of the deceased from New Highbury. Upon her arrival the applicant was not present because Noluvo advised her that the applicant had gone to attend to matters relating to her husband's death and the applicant arrived later. That evidence was not challenged. The other evidence related to what happened during *umendlaliso* traditional ceremony. This witness had given evidence that was not challenged that she is the one that was asked to feed the applicant with *isiphanga* on the

instruction of their mother-in-law because their husbands were twins. She dealt with the issue where in the affidavit it was stated that she gave her the name and she corrected that she could not have given her the name because she, too, was a *makoti* in the homestead.

[83] This witness's evidence that she was married to Xolani was not challenged. However, when the two respondents testified, they disputed that she was married to their brother. The discrepancy in her evidence and the statements was explained by this witness and I accept her explanation. In any event those discrepancies were immaterial. The evidence of who gave the applicant her marital name was confirmed by Mr Mdwayimba , who was in charge of the ceremony. I accordingly find that this witness was frank in her testimony. She corrected what was recorded in the statement where she was of the view that the information given in the statement was inaccurate. I accordingly accept her evidence.

[84] Coming to the applicant's evidence. In her evidence it is apparent that no one verbally told her to vacate her home. However, the respondents, by their conduct or actions instilled fear in her to such an extent that she did not feel safe in her home. Her evidence was consistent with the evidence of Ms Nomalinge Sgijimi, Mr Dingiso Ntsokolo and Mr Mdwayimba. There is documentary evidence such as an application for a housing subsidy where the deceased recorded that he was married to the applicant and furnished all their personal details in there including those of their one child at the time. Those documents were completed way back in 2016. The applicant did not embellish her evidence in any manner. The people that confirmed her customary marriage to the deceased are the elderly men of the deceased's

family from both his paternal and maternal side. I find that she gave reliable evidence.

[85] The evidence of the first respondent was contradictory. She vacillated in her evidence. She went to great lengths in trying to dispute the existence of the marriage by even disregarding the deceased's stance that the applicant was his wife. Towards the end of her evidence, it became evident that her motive was to prevent the applicant from benefitting anything from his brother's estate under the guise that she wanted her brother's children to benefit. Her evidence that the deceased asked the second respondent to look after the children was not even corroborated by the second respondent. She disputed the *utsiki* custom although she did not dispute the applicant's evidence that she had a baby boy at the time and was present. The evidence of the applicant was not only corroborated by her father-in-law and her uncle-in-law but it was also corroborated by the first respondent as well because, according to her, her brother at some point when they had a problem with the police who were trying to resolve a squabble between him and the applicant, told the police that the applicant was his wife .

[86] The first respondent had instructed Mr Mqokozo to put to the witnesses that she, together, with the deceased built the house in New Highbury. However, when she testified, she said nothing about that. It was clearly a falsehood. When pressed for the reason why they did not comply with the court order, she stated that they were shocked because they did not know the applicant. This was said by the same person who had acknowledged that the deceased and the applicant had a child. Looking at the evidence as a whole I find that the first respondent was an untruthful witness whose evidence was

misleading. I also find that she, together with the second respondent, made it difficult for the applicant to have access to her home.

[87] The second respondent, on his own version, moved into the deceased's home without permission from the applicant. He disposed of the livestock as he testified. The applicant had testified that she had received information from the shepherd that they were threatening to have her killed. When one has regard to all the evidence in the manner in which the two respondents testified and how they did things, it is clearly evident that they were intent on making sure that the applicant did not get a chance to play the role that she was supposed to play as a wife of the deceased. They sold sheep without her consent. The second respondent stated that he deliberately left the keys at work when he knew that the police and the applicant were at the house. He, despite the existence of a court order removed the sheep to uTsolo. Most importantly, on his version, he was not staying at New Highbury before the death of the deceased but did so with his siblings after his death. I find that the second respondent's denial of the customary marriage of the applicant was self-serving. I find that he was an untruthful witness.

[88] In so far as the evidence of Mr Mbaxa is concerned, his concession that he did not know much about his nephew was well made. Nothing more needs to be said about his evidence as it did not add any value to the issue for determination by this court.

[89] Having taken the evidence in its totality, I reject the evidence of the first and second respondents as being improbable in the light of all the evidence tendered before this court. I also find that the applicant was justified in

approaching this court for interim relief. In fact, she did the right thing because she avoided confrontation and did not want to take the law into her hands. The conduct of the respondents of not complying with the interim relief calls for this court to confirm the rule nisi in favour of the applicant.

The Law

[90] The Act provides for the requirements for validity of customary marriages. It provides in section 3 (1) thereof as follows:

“3. (1) For a customary marriage entered into after the commencement of this 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.”

Those are the only requirements in terms of the law.

[91] Both the applicant and the deceased were above 18 years of age. They consented to the marriage because a request for the applicant’s hand in marriage was made and it was accepted. Lobola negotiations ensued and lobola was paid. *Umendlaliso* or *utsiki* ceremony was performed. On those facts the jurisdictional factors provided for in section 3 (1) (a) of the Act, were met.

[92] In **Fezile Mlamla v Nomathamsanqa Rubushe & others**¹⁰, Tokota J, writing for the Full Court, on appeal stated:

“[36] *Where there is an agreement at the lobola negotiation stage, for the acceptance of the proposed customary marriage, a contract of marriage relationship is entered into between the two families. In some communities this is signified by the slaughtering of lamb to welcome the new in-laws (abakhozi) after a certain number of lobola cattle*

¹⁰ Fezile Mlamla v Nomathamsanqa Rubushe & others, case no: CA 04/2020 and Case No. 6254/2018, at page 19 para 36.

agreed upon have been delivered or in the case of money after a certain amount of money has been paid. The celebration thereof is optional. In any event the slaughtering of utsiki lamb at the bridegroom's homestead is in itself a celebration of the marriage. In this way the requirements of section 3 (1)(b) of the Act are satisfied."

[93] Mr Mqokozo criticised the fact that lobola negotiations were conducted in the absence of the applicant. He submitted that: *"customarily before families start the lobola proceedings, the family would call its daughters and ask the groom's family to point the intended bride, thereafter the pointed bride would confirm that she knows such family. In this case, he contended, none of that was done."* This custom was only raised in argument and was not put to the witnesses.

[94] In ***Mbungela & another v Mkabi & Others***¹¹, writing for the Supreme Court of Appeal, Maya P (as she then was), at para 27 stated:

"[27] The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirement of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results."

[95] If the pointing out was crucial or was part of customs to this family, I have no doubt that, the respondents would have mentioned it and so would the deceased's father and uncle. There is no merit in that submission.

[96] I found that the respondents prevented the applicant from accessing her home. That finding is fortified by the provisions of section 6 of the Act which provides:

"Equal status and capacity of spouses

6. *A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into*

¹¹ *Mbungela & another v Mkabi & Others* (820/2018) [2019] ZASCA 134 (30 September 2019).

contracts and to litigate, in addition to any rights and powers that she might have at customary law."

[97] This is an answer to the submission by the respondents that the applicant has no right to the house and to deal with the deceased's estate. A customary marriage concluded after the commencement of the Act is a marriage in community of property and profit and loss between the spouses unless these consequences are excluded by the spouses in an antenuptial contract.¹²

[98] I accordingly find that a valid customary marriage existed between the deceased, Xolile Nonjuzana and the applicant, Tomokazi Qongqo as envisaged in section 3 (1) (a) of the Recognition of Customary Marriages Act 120 of 1998. It follows that the applicant must succeed.

Rule Nisi

[99] As indicated above, the applicant has established a clear right to the house which is being occupied by the respondents or through them. It is clear from the conduct of the respondents that this court cannot accept their say so that the applicant must return to her home in circumstances where they have failed to comply with an existing court order. She has also discharged the onus resting on her that she was in a valid customary marriage with the deceased. She has made out a case that this court must protect her rights by confirming the Rule Nisi.

[100] In evidence, when asked by the court how much time the respondents would require in the event that they were ordered to vacate the homestead of the deceased, the second respondent indicated that he and his sisters would require a period of a month within which to vacate the property. This court

¹² Gumede(born Shange) v President of the Republic of South Africa and Others (CCT 50/08) [2008]; ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (8 December 2008) at para 33.

finds that the respondents do have alternative accommodation, the first respondent testified that she rents a place at the Maiden Farm. The second respondent testified that he has a place at uTsolo. The father of the respondents testified that he had built a home for them in Port St. Johns. On these facts none of the respondents are homeless, therefore a period of a month is adequate to afford them an opportunity to vacate the homestead.

Costs

[101] I am satisfied that there is no reason to depart from the normal rule that costs should follow the result.

[102] **I accordingly issue the following Order:**

1. It is hereby declared that a valid customary marriage existed between Xolile Nonjuzana , who died on 17 October 2021, and the applicant ,Tomakazi Qongqo , as envisaged in section 3 (1) (a) of the Recognition of Customary Marriages Act 120 of 1998.

2. A Rule Nisi issued by Jolwana J on 26 October 2021, be and is hereby confirmed subject to the following amendment to paragraph 2.2 thereof to read as follows:

“2.2 Directing that the first and second respondents or any of their siblings or relatives or persons occupying the deceased’s homestead at New Highbury, through them or with their permission are directed to vacate the homestead within thirty (30) days hereof.”

3. The first and second respondents are directed to pay the applicant's costs of the application and the hearing of oral evidence, jointly and severally, the one paying the other to be absolved.

T.V. NORMAN

JUDGE OF THE HIGH COURT

Judgment Reserved on	:	22 June 2023
Written submission by the applicant	:	6 July 2023
Written submission by the respondents	:	4 August 2023
Judgment Delivered on	:	15 August 2023

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