



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:  
YES/NO  
Of Interest to other  
Judges: YES/NO  
Circulate to Magistrates:  
YES/NO

Case no. 3283/2020

In the matter between:

**MAHADI TRIPHINA MOTAUNG**

**APPLICANT**

and

**MMOKGO CATHERINE MOFOKENG**

**1<sup>ST</sup> RESPONDENT**

**DIRECTOR GENERAL DEPARTMENT OF  
HOME AFFAIRS**

**2<sup>ND</sup> RESPONDENT**

**THE MASTER OF THE HIGH COURT,  
BLOEMFONTEIN**

**3<sup>RD</sup> RESPONDENT**

**THE GOVERNMENT EMPLOYEES PENSION  
FUND**

**4<sup>TH</sup> RESPONDENT**

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**HEARD ON:**

**14 APRIL 2022**

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**JUDGMENT BY:**

**DE KOCK, AJ**

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**DELIVERED:**

**21 APRIL 2022**

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**INTRODUCTION:**

- [1] The Applicant brought an application seeking to have the marriage concluded between the late Litsakane Aaron Mofokeng (“the deceased”) and the First Respondent declared void *ab initio*. The Applicant also seeks that the Second Respondent withdraw and cancel the marriage certificate issued in consequence of the alleged void marriage and the Third and Fourth Respondents be ordered to recognize the Applicant as the lawful surviving spouse of the deceased for purposes of administering the estate of the deceased.
- [2] The relief sought by the Applicant is in the form of a final interdict.
- [3] The Third Respondent filed a Notice to Abide.

**FACTUAL MATRIX:**

- [4] The Applicant filed a founding affidavit together with annexures and the First Respondent (“the Respondent”) filed an answering affidavit together with a confirmatory affidavit. The Applicant did not file any replying affidavit.

**AVERMENTS CONTAINED IN THE APPLICANT’S FOUNDING AFFIDAVIT TOGETHER WITH ANNEXURES THERETO:**

- [5] The Applicant avers that the civil marriage was solemnized and celebrated between herself and the deceased at Reitz on 9 March 1982 and an abridged marriage certificate was issued by the Department of Home Affairs. A copy of the said marriage certificate is annexed to the founding affidavit.
- [6] It is further alleged that five (5) children were born out of the marriage between the Applicant and the deceased (“the children”).

- [7] It is also averred that the marriage between the Applicant and the deceased subsisted until he died on the 31<sup>st</sup> of March 2016.
- [8] It is stated that after the death of the deceased a second marriage certificate surfaced in which it is recorded that the deceased was married to the Respondent. The purported marriage between the deceased and Respondent was concluded on the 23<sup>rd</sup> of March 2003. A copy of the marriage certificate of the deceased and the Respondent is evenly annexed to the Applicant's founding affidavit.
- [9] The Applicant states that the deceased never mentioned to her that he was seeing any other woman, talk less of married to someone else while their marriage was never dissolved.
- [10] Upon becoming aware of the existence of a further marriage which was concluded by the deceased the Applicant approached the Department of Home Affairs for an explanation. A letter from the Department of Home Affairs is annexed to the Applicant's founding affidavit. The letter of the Department of Home Affairs determines that according to the available records of the Department of Home Affairs the deceased was legally married with a civil marriage to the Applicant. The latter marriage was however not captured on the national population register and the deceased apparently concluded a second civil marriage with the Respondent. The letter of the Department of Home Affairs states that documentation is forwarded to the head office to investigate the possibility of a bigamy marriage.
- [11] The Applicant states that the further marriage concluded between the Respondent and the deceased is not only irregular but also fraudulent and criminal and cannot be legally recognized and should be declared void *ab initio*.

**AVERMENTS CONTAINED IN THE FIRST RESPONDENT'S AFFIDAVIT AND ACCOMPANYING CONFIRMATORY AFFIDAVIT:**

- [12] The Respondent met the deceased during or about 1993.
- [13] The deceased never wore a ring and informed the Respondent that he was divorced.
- [14] A confirmatory affidavit of Mr Alfred Sikhosana is annexed to the Respondent's affidavit. In the affidavit Mr Sikhosana states that the deceased and the Respondent was well known to him since or about 2002. The deceased informed him that he was divorced and got married to the Respondent. The Respondent rented the property at 1 Du Toit Street from the Government and Mr Sikhosana resided there as a caretaker. He states that the Respondent and the deceased moved into the property in 2003 and continued to reside at the property. He further states that he knows that a daughter was born from the relationship between the Respondent and the deceased. It is further stated in the affidavit of Mr Sikhosana that he is willing to testify in Court and that he does not stand to benefit in any way from the Respondent or the estate of the deceased for deposing to the affidavit.
- [15] The Respondent states in her affidavit that there are other individuals who can testify to the issue that the deceased was divorced, but that they are afraid to depose to affidavits and that the only way she can present the evidence is by way of subpoena if the matter is heard on trial.
- [16] The Respondent states that she had no reason to disbelieve the deceased when he conveyed to her that he was divorced. The deceased cared for the children without any assistance or presence of the Applicant who claims to have been his spouse. The Respondent had and still have no reason to believe that the deceased was untruthful in conveying to her that he was divorced. In the thirteen (13) years of the marriage between the Respondent and the deceased no one claimed to have been the spouse of the deceased. The Applicant never featured in the life of the deceased. The eldest child was approximately seventeen (17) years old when the deceased and the Respondent were married. The Respondent avers that it is very hard to believe that the children did not inform the Applicant of the Respondent's existence and that the Respondent expected that the Applicant would have

taken steps to address the issue if the Applicant was indeed still married to the deceased. The Applicant never visited the deceased, the deceased never spoke of the Applicant and her inaction is telling.

- [17] Negotiations took place between the Respondent's family and the deceased's family for payment of lobola and all formalities were completed. The Respondent and the deceased were married on the 23<sup>rd</sup> of March 2003. A child was conceived between the deceased and the Respondent.
- [18] The Respondent avers that she never met the Applicant before her marriage to the deceased but for the first time at the deceased's funeral.
- [19] The consequence of the order that the Applicant seeks will be that Puleng Joyce Mofokeng who was born on the 2<sup>nd</sup> of November 1995 will be deemed to be an illegitimate child which is still frowned upon by the society in which the Respondent lives. This is so because the subsequent marriage, which the Applicant now states does not exist, did not legitimize Puleng. She is now 25 years of age, and this will have devastating effects on her.

#### **SUBMISSIONS ON BEHALF OF THE PARTIES:**

#### **SUBMISSIONS ON BEHALF OF THE APPLICANT:**

- [20] It is submitted on behalf of the Applicant that there does not exist a factual dispute and that it is facts that the two marriage exists. It is submitted that there is not a dispute of law before Court but a dispute of law. It is submitted that oral evidence will not resolve the matter. It is submitted that there does not exist a real factual dispute that can be determined by the aid of oral evidence.
- [21] It is submitted on behalf of the Applicant that it is incumbent upon the Respondent to prove the divorce. It is submitted that he who alleges must prove.
- [22] It is submitted on behalf of the Applicant that the averment contained in the

Respondent's affidavit as well as the confirmatory affidavit of Mr Sikhosana that the deceased informed them that he was a divorcee amounts to hearsay evidence and is impermissible.

[23] It was indicated by Counsel for the Applicant that on the 3<sup>rd</sup> of March 2022 the application was postponed to obtain the outcome of the investigation of the Department of Home Affairs.

[24] Further submissions was made to the Court on the consequences of the conclusion of a second marriage.

#### **SUBMISSIONS ON BEHALF OF THE FIRST RESPONDENT:**

[25] It was submitted on behalf of the Respondent that a real and genuine dispute of fact exists. It was submitted that the opposing affidavit as a whole must be considered, and that the affidavit does not constitute mere bare denials.

[26] It was submitted that it is not a fact that there was a divorce.

[27] It was submitted on behalf of the Respondent that motion proceedings is not appropriate to resolve probabilities and that according to the Applicant the Court must speculate and decide on probabilities.

[28] It was also submitted that the Respondent's version is not farfetched and untenable.

[29] It was further submitted that the final relief sought by the Applicant cannot be granted when the **Plascon-Evans**-test is applied and that motion proceedings is not suitable when a dispute of fact is foreseeable.

[30] It was submitted that the averment contained in the Respondent's affidavit as well as the confirmatory affidavit of Mr Sikhosana that the deceased informed the Respondent and Mr Sikhosana that he was divorced is permissible in terms of Section 3 of the Evidence Amendment Act. It was

further submitted that even if the hearsay averment that the deceased informed the Respondent and Mr Sikhosana that he was a divorcee is ignored that a *bona fide* dispute of fact is raised in the Respondent's affidavit.

[31] It was submitted that a factual dispute was foreseeable because the Applicant was already in possession of the marriage certificate of the Respondent when she brought the application and that on the 21<sup>st</sup> of April 2016 the Department of Home Affairs in their letter stated that they investigate the possibility of a bigamy marriage.

[32] It was submitted that the application stands to be dismissed with costs and that the Applicant did not ask for the referral of the matter for oral evidence.

#### **EVALUATION OF OPPOSED MOTIONS:**

[33] The principle ways in which a dispute of fact may arise are set out as follows in the *locus classicus* matter of **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163:**

*"When the respondent denies all material allegations made by the various deponents on the applicant's behalf and produces or will produce positive evidence by deponents or witnesses to the contrary. He or she may have witnesses who are not presently available or who though adverse to making an affidavit would give evidence viva voce if subpoenaed."*

[34] The principle announced in the **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 – 635** provides that notwithstanding factual disputes on papers, if the Court is satisfied that the Applicant is entitled to the relief in view of the facts stated by the Respondent together with the facts in the Applicant's affidavit which are admitted or have not been denied by the Respondent, it will grant the relief sought by the Applicant.

[35] In **Cullen v Haupt 1988 (4) SA 39 (C) at 40 F – H**, Conradie J said:

*“I have consulted some of the better-known decisions concerning the referral of applications to evidence or trial. The leading decision in this regard is of course Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162, where Murray AJP said that if a dispute cannot be properly be determined it may either be referred to evidence or to trial or it may be dismissed with costs, particularly when the applicant should have realized when launching the application that a serious dispute of fact was bound to develop. The next better-known case on this topic is that of Conradie v Kleingeld 1950 (2) SA 594 (O) at 597, where Howitz J said that the petition may be refused where the applicant at the commencement of the application should have realized that a serious dispute of fact would develop.”*

[36] In the decision of **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para [26]**, Harms DP said:

*“Motion proceedings unless considered with interim relief are all about resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well-established under the Plascon-Evans-rule that where in motion proceedings disputes of fact arise in the affidavits a final order can be granted only if the facts averred in the applicant (Mr Zuma’s) affidavit which have been admitted by the respondent (NDPP) together with the facts alleged by the latter, justify such an order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises factious disputes of fact, is palpably implausible, farfetched, or so clearly untenable that the Court is justified in rejecting them merely on the papers ...”*



### **EVALUATION OF THE APPLICATION BEFORE COURT:**

- [37] Firstly it bears mentioning that the Court disagrees with the submission that it is a fact that there exist two marriages.
- [38] The Court finds that the hearsay evidence pertaining to the averment that the deceased informed the Respondent and Mr Sikhosana that he was a divorcee is permissible in terms of Section 3(1)(c) of the Evidence Amendment Act 45 of 1988 with due regard to all the relevant factors listed in the section and in particular the self-evident reason why the evidence of the deceased cannot be placed before Court. The Respondent and Mr Sikhosana placed the best evidence in their possession before Court.
- [39] The Court is satisfied that there exists a real, genuine, and *bona fide* factual dispute before the Court in particular if regard is had to the allegations pertaining to the history of the marriage between the Respondent and the deceased.
- [40] Before a legal dispute can arise as to the consequences of two marriages it first needs to be established that there indeed exists two marriages. There is however a factual dispute before Court as to the question if there currently exists two marriages. Same is evenly clear from the content of the letter of the Department of Home Affairs. The letter of the Department of Home Affairs determines that an investigation is made regarding the possibility of a bigamy marriage. To date the outcome of the Department of Home Affairs has not been provided.
- [41] The Court finds that it cannot merely be accepted on the papers that the Applicant and the deceased were not divorced. The Respondent's affidavit does not constitute a bare denial of the Applicant's averments and does not set forth allegations that are farfetched and untenable. This is a matter that can only be resolved upon proper ventilation of all averments and evidence to be presented to Court.

- [42] Despite the fact that the affidavits reveal a dispute of fact the Applicant persisted in seeking a final interdict together with ancillary relief without resorting to oral evidence. The Applicant was in possession of the Respondent's marriage certificate as well as the letter of the Department of Home Affairs and still elected to proceed by way of motion proceedings.
- [43] The application stands to be dismissed on the basis that a foreseeable dispute of fact has arisen from the affidavits before Court. In applying the **Plascon-Evans**-test the application stands to be dismissed.
- [44] There are also serious averments by the Applicant that the marriage between the Respondent and the deceased was fraudulent and criminal. The latter averments are evenly disputed by the Respondent and cannot merely be decided on the papers before Court.
- [45] The Applicant chose this route well knowing that there were disputes of fact, therefore the application stands to be dismissed with costs. Applicant stands to pay the costs of the application because the Applicant brought motion proceedings when she should have foreseen that there was a material dispute of fact which could result in this Court not being able to resolve the dispute without the averments by the parties being cleared by way of *viva voce* evidence.

**ORDER:**

- [46] In the result I order as follows:

1. The Applicant's application is dismissed with costs.

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**DE KOCK, AJ**

APPEARANCES

Counsel on behalf of the Plaintiff  
Instructed by:

Adv NM Bahlekazi  
Ponoane Attorneys  
**Bloemfontein**

Counsel on behalf of the Plaintiff  
Instructed by:

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