REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2019/42772

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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K.E. MATOJANE **04 NOVEMBER 2021**

In the matter between:

PEARL NOSIPHO TAFU MODISE	Applicant
and	
THE MASTER OF THE HIGH COURT OF SOUTH AFRICA	First Respondent
IZAK JOHANNES DE VILLIERS N.O.	Second Respondent
ABRAHAM MARTHINUS SPIES N.O.	Third Respondent
THE INTERNATIONAL PENTECOST HOLINESS CHURCH	Fourth Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
MIRRIAM NKONE MODISE	Sixth Respondent
JULIA WINNIFRED MODISE	Seventh Respondent
JENETTE KHUMALO	Eighth Respondent
TSHEPISO MODISE	Ninth Respondent
SEBITSE BERTHA LUCIA MABASELA	Tenth Respondent

FREDERICK LEONARD GOITSIMANG MODISE Eleventh Respondent

***Delivered**: This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email and uploading it onto CaseLines. The date and time for hand-down is deemed to be have been on 04 November 2021.*

JUDGMENT

MATOJANE J:

[1] The Applicant seeks to challenge the constitutional validity of section 1(4)(f) of the Intestate Succession Act 81 of 1987 ("the Act") in so far as it excludes the widows in a polygamous marriage from the Maintenance of Surviving Spouses Act 27 of 1990 ("the MSSA").

[2] The Applicant's case is that as a surviving spouse of a polygamous marriage contracted in accordance with the International Pentecost Holiness Church ("IPHC") religious rights, she is entitled to the benefits envisioned by the Act, in particular, the effect it has on a window's portion on intestacy and MSSA.

[3] She alleges that on 26 February 2012, she entered into a polygamous religious marriage with the late M.G. Modise following the religious rites of the International Pentecost Holiness Church ("IPHC"). The IPHC is an orthodox Christian church founded in 1962, consisting of more than 300 branches and approximately four million followers across the Southern African Development Community region. She alleges polygamy is a foundational value of the IPHC doctrine in terms of which men are permitted to wed more than one wife, although women are not afforded the same choice.

[4] The Applicant submits that excluding spouses in polygamous IPHC religious marriages from the Act violates section 9(3) of the Constitution. It is convenient at this state to restate the relevant provision of the Constitution. Section 9 bears the heading "Equality", and subparagraph 3 reads:

"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

[5] The Applicant argues that the Maintenance of Surviving Spouses Act discriminated unfairly on the basis of equality and human dignity against:

(a) Widows married in terms of the Marriages Act and those in polygamous IPHC marriages;

(b) Widows of monogamous IPHC marriages and those in polygamous IPHC marriages;

(c) Widows in polygamous customary marriages (in terms of the Recognition of Customary Marriages Act 120 of 1998) and those in polygamous IPHC marriages; and

(d) Widows in polygamous Muslim marriages and those in polygamous IPHC marriages. married in terms of the Marriages Act and those in polygamous1 IPHC marriages;

(e) Widows of monogamous IPHC marriages and those in polygamous IPHC marriages;

(f) Widows in polygamous customary marriages (in terms of the Recognition of Customary Marriages Act 120 of 1998) and those in polygamous IPHC marriages; and

(g) Widows in polygamous Muslim marriages and those in polygamous IPHC marriages.

[6] The Applicant seeks the following relief:

(1) declaring section 1 of the Act as inconsistent with the Constitution and invalid to the extent that it does not include and or recognize more than one spouse in polygamous marriages solemnized by the fourth respondent in the protection that it offers to "a spouse", alternatively declaring that the protection afforded to "a spouse" as referred to in section 1 of the Act includes both and or all of the wives married to a deceased husband in terms of a polygamous marriage solemnized by the fourth respondent;

(2) deeming the applicant "a spouse" of Mr M.G. Modise ("the deceased") for the purposes of section 1 of the Act and therefore entitled to inherit a child's portion of the deceased estate;

(3) declaring section 1 of the MSSA inconsistent with the Constitution and invalid to the extent that it does not include more than one spouse in polygamous marriages, solemnized by the fourth respondent, in the protection that it offers to "a spouse" or "survivor"; alternatively,

(4) declaring protection offered to "a spouse" or "survivor", as referred to in section 1 of the MSSA, includes both and or all the wives married to a deceased husband in terms of a polygamous marriage solemnized by the fourth respondent;

(5) Deeming the applicant "a spouse" of the deceased, the late Mr M.G. Modise and or "survivor" for the purposes of section1 of the MSSA and is entitled to receive maintenance from the deceased's estate.

[7] The application is opposed by the two co-executors of the estate and the son of the deceased.

[8] It is common cause that this marriage was not celebrated in accordance with the requirements set out in s 4(1) of the Recognition of Customary Marriages Act, 120 of 1998 ("the Customary Marriages Act"), neither was it solemnized by a marriage

officer appointed in terms of the Marriage Act, nor was such a marriage intended a customary marriage as contemplated by the Customary Marriages Act.

[9] At the time of the purported marriage between the Applicant and the deceased, the deceased had already entered into a civil marriage in community of property with the sixth respondent which marriage had not been annulled or dissolved by a decree of divorce. The sixth respondent has not opposed the application and has since passed on. The church also has not opposed the application.

[10] Before traversing the points *in limine* raised by the respondents, it bears mentioning that the Applicant did not file a rule 16A notice at all despite raising constitutional issues. Uniform Rule 16A requires a party raising a constitutional issue to prepare a notice containing a clear and succinct description of the constitutional issue raised. The Registrar must post the notice after being stamped on a dedicated notice-board in the relevant High Court. The primary purpose of the Rule 16A Notice is to inform those who may be interested in the constitutional challenge to seek consent to enter proceedings and assist the Court in determining the matter. The constitutional Court in *De Lange*[1] explained that the notice is an entry point for non-parties into public interest matters with constitutional ramifications. A court may waive the requirements of the rule.

[11] The Applicant has not taken any reasonable steps to ensure compliance with the rule. Unlike in *De Lange*, the door of the Court was shut on potential *amici* who may have wished to enrich this constitutional debate and assist the Court in arriving at a well-informed decision that is just and equitable[2]. For this reason, the constitutional challenge must fail.

[12] Rule 6(5)(g) of the uniform rules provides for cases that cannot be resolved on the papers; it states:

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[1] De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another (CCT223/14) [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) S.A. 1 (CC).
[2] Section 172(1)(b) of the Constitution provides that "when dealing with a constitutional matter within its power, a court may make an order that is just and equitable".

'Where an application cannot properly be decided on affidavit the Court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[13] In paragraph 68 of the replying affidavit, the Applicant states that:

"The disputes in this matter have a long history. The parties have been incredibly litigious and the disputes remain unresolved, I will not bore the above Honourable Court with all the other applications, however, some of these are evidenced in the annexures attached to my founding affidavit."

[14] The Applicant commenced proceedings by motion with full knowledge that the disputes remains unresolved and cannot be properly decided on the papers because of the admitted disputes of fact. In Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty)[3], the Court stated:

'It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated *infra*), the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the Applicant should have realized when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action.'

[15] In my view, this application is the subject of an ordinary trial action as the disputes of fact cannot be resolved on affidavits. It would not be appropriate to resort

[3] 1949(3) SA 1155

to the *Plascon-Evans* rule in the face of such pervasive disputes of facts. Accordingly, the application falls to be dismissed with costs on this ground alone.

[16] The relief sought by the Applicant in prayer 1 is unnecessary and is moot as the Constitutional Court in the confirmation hearing of *Hassam v Jacob*[4] has already found that the provisions of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act applies to the estate of a deceased person who is survived by more than one spouse.

[17] The argument that the applicant is discriminated against because under the Recognition of Customary Marriages Act, No 120 of 1998 (''RCMA") unregistered customary unions are afforded legal validity was correctly rejected in **Singh v Ramparsad**[5] where the court held that :

"The promulgation of the RCMA was premised on the need to give secular recognition to marriages which were a 'lived reality' for a large group of our society who come from a rural background and who have engaged in polygamous customary marriages as part of their religious tradition".

[18] I turn now to consider the first point *in limine* raised by the respondents, namely, ex *turpi causa non orator actio*. On the 16 February 2012, the sixth respondent issued an urgent application out of this Court seeking to interdict the planned marriage between the Applicant and the deceased, which was scheduled to take place on 26 February 2012. In response to the application, the deceased deposed to an answering affidavit stating:

> "I do not intend getting married to and celebrating a wedding with the Second Respondent on Saturday 26 February 2012." (sic)
>
> "I deny that I paid an amount of R100 000.00 towards lobola for the Second Respondent,"

[4] 2009 (5) SA 572 (CC).
[5] 2007 (3) SA 445 (D) (22 January 2007)

[19] The Applicant deposed to an answering affidavit in that matter confirming the statement made by the deceased. A court order was granted in terms of which no marriage or celebration was to be held on 26 February 2012.

[20] The Applicant's claim is inextricably linked with her criminal or illegal Act of knowingly entering into a bigamous marriage which has been prohibited by this Court. She now seeks the aid of the Court in condoning her illegal conduct so that she can benefit from the deceased estate. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract that is illegal.

[21] The purported marriage that the Applicant entered with the deceased was invalid and bigamous. Accordingly, the Applicant is not a "spouse" for the purposes of section 1 of the Intestate Succession Act and is not entitled to inherit a child's portion nor to maintenance from the estate of the late Mr M.G Modise. The Constitutional Court in *Volks v Robinson*[6] held that whilst there is a reciprocal duty of support between married persons, the law imposes no such duty upon unmarried persons. The Court stated that to extend the provisions of the Act to the estate of a deceased person who was not obliged during his lifetime to maintain his partner would amount to imposing a duty after death where none existed during his lifetime. The Court stated that the differentiation in relation to the provision of maintenance in terms of the Act does not amount to unfair discrimination; neither does it violate the dignity of surviving partners of life partnerships.

[22] The Constitutional Court drew a clear distinction between married and unmarried peoples and concluded that it is constitutional to accord benefits to married people which is denied to life partners.

[23] The second point *in limine* is - *Locus standi in judicio*. The Applicant seeks to challenge the constitutional validity of the Intestate Succession Act and the Maintenance of Surviving Spouses Act on the basis that they do not recognize widows of polygamous marriages solemnized by the Fourth Respondent.

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[6] 2005 (5) BCLR 446(CC).

[24] A civil marriage is monogamous in nature. It is a formally recognised union of two people as partners in a personal relationship. Sachs J in **Minister of Home Affairs v Fourie**[7] explained that:

"It is true that marriage, as presently constructed under common law, constitutes a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words "I do" bring the most intense private voluntary commitment into the most public, law governed and State-regulated domain"

[25] In terms of S29A of the Marriage Act, the solemnization of the marriage is done by a marriage officer designated in terms of the Marriage Act. The parties to the marriage together with the Marriage Officer and two witnesses are required to sign the Marriage Register immediately after such solemnization.

[26] The Applicant is not a "spouse" of the deceased Mr M.G Modise as he was already in a civil marriage during the alleged polygamous marriage. As such, the alleged marriage of the Applicant is invalid and bigamous. The Applicant is not entitled to inherit a child's portion of the deceased estate. She, therefore, has no *locus standi* to challenge the constitutional validity of the Act.

[27] The Applicant has failed to make out a case for the relief that she seeks.

[28] In the result, I made the following order:

1. The application is dismissed with costs.

K.E. MATOJANE
Judge of the High Court
Gauteng Local Division, Johannesburg

[7] 2006(3) BCLR 355

Heard:	01 September 2021
Judgment:	04 November 2021
For Applicant:	D.B. Ntsebeza SC (with B Mkhize)
Instructed by:	Tony Tshivhase Inc.
For Ninth Respondent:	Dickson
Instructed by:	Phosa Loots Inc.