

## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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DATE  
SIGNATURE

Case no. **2020/29437**

In the matter between:

VANTO NIMROD MBONELELI

APPLICANT

And

BULELWA LONDA

RESPONDENT

Coram: Thupaatlase AJ

Date of hearing: 15 November 2021 – in a ‘virtual Hearing’ during a videoconference on Microsoft Teams digital platform.

Date of Judgment: 15 December 2021

This judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and uploaded onto caselines system.

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## JUDGMENT

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### THUPAATLASE AJ

#### INTRODUCTION

- [1] By notice of motion the applicant launched an application in this Court seeking an Order for ejectment of the respondent from the premises she is presently occupying. Respondent is opposing such an application. In addition, the respondent seeks condonation for the late filing of the replying affidavit.

#### CONDONATION

- [2] Before I deal with the main application it is apposite to dispose of the issue of condonation, being sought by the respondent. The applicant opposes such an application. The respondent filed an affidavit in support of her application. The reason for the late filling of the replying affidavit was due to lock-down regulations. Further that condonation will not prejudice the applicant as it was also in the interest applicant.
- [3] The factors that are considered when exercising discretion whether to grant condonation or not, include the degree of non-compliance with the rules, the explanation for it, the importance of the case, the respondent's interest in the finality of the judgment and avoidance of unnecessary delay in the administration of justice. See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA5; [2013] All SA 251 (SCA) *para 11*.
- [4] It is trite that 'condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to

enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the time, duration and extent of any obstacle on which reliance is placed must be spelled out'. See *Uitenhage Transitional Local v South African Service* 2004 (1) SA 292 (A) *para* 6.

- [5] It is also settled law that condonation must be applied for without delay whenever the defaulting party realises that there has been non-compliance with the rules. See *Darries v Sheriff, Magistrate's Court Wynberg & another* 1998 (3) SA 34 (34) at 40I-40E; *Commissioner South African Revenue Services v Van der Merwe* 2016 (1) SA 599 (SCA) *paras* 11 and 12.
- [6] The respondent clearly has an interest in the finalization of this matter. It is clear from the papers that proceedings are important to both parties. The respondent has stated that she was unable to deliver a replying affidavit to oppose the application because of impecuniosity, as result of the measures that were introduced by the government to curb the impact of Covid-19. She was unable to earn an income during this period of economic inactivity. I am also satisfied that the time period of non-compliance is not long.
- [7] I am satisfied that the matters raised in these proceedings are important to both parties and that it will be to their interest that condonation for the late filing of the replying affidavit be condone. This will also serve the interest of justice.
- [8] The issues for determination are whether the respondent is an 'unlawful occupier' as alleged and as defined in terms of Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE) or as contended by the respondent whether the parties married by customary law as per the provisions of Section 3 of Recognition of Customary Marriage Act.
- [9] In support of the relief sought the applicant submitted an affidavit. The essence of which is that the respondent is an unlawful occupier. He alleges that the reason for the respondent to stay with him was been they had a romantic relationship which has since terminated. As a result, the respondent is an unlawful occupier. Further, that he is the registered owner of the property.

- [10] The respondent states that her family and that of the applicant entered into lobola negotiation. Upon the successful conclusion of the lobola negotiations, a lobola agreement was concluded, reduced to writing and signed by delegates of the two families. It is stipulated that the lobola agreed upon was an amount R 50 000.00. The family of the applicant paid R 40 000.00. It was recorded that the remaining amount of R 10 000.00 will be paid at a later stage.
- [11] As a result of the successful negotiation the respondent moved to stay with the applicant as a married couple. The applicant arranged transport to move the respondent into his house.
- [12] In response the applicant filed an answering affidavit and confirmatory affidavits. In his answer the applicant admits to the fact that he paid part lobola. He, however disputes that a valid customary marriage was concluded. He asserts that other formalities dictated by custom still needed to be fulfilled. He makes reference to the fact the respondent still needed to be introduced to his family in the Eastern Cape and that gifts between the two families still needed to be exchange. The confirmatory affidavits are to the same effect. According to the respondent they started to live together as husband and wife until the breakdown in their relationship due to infidelity by the applicant. She contends that the marriage was lawful concluded and that she remains the wife of the applicant. She is therefore lawful staying in their house.
- [13] The issue for determination before the court is whether the applicant has made out a case to be entitled to the relief sought. A further issue is whether the respondent has disclosed a bona fide to the eviction application.
- [14] The applicant's case is that the respondent is occupying the property without his consent and or that such consent was withdrawn when their love/romantic relationship soured. That the respondent is therefore an 'unlawful occupier' as contemplated by PIE. Consequently, the applicant proceeded to set in motion these proceedings. As is evident from the replying affidavit, the respondent denies the assertions by the applicant. She alleges marriage.
- [15] In the case of *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) the court per Molemela JA reviewed cases dealing with formalities of customary marriage and in particular payment of lobola and stated as follows:

*“It is clear from the preceding discussion that historically, significance was paid to the conclusion of the lobola agreement, and not necessarily the full payment of lobola. Therefore, the appellant’s contention that a marriage could have not been concluded as it was agreed that part of the outstanding balance on the lobola would be paid ‘at the next meeting’ is devoid of any merit. In my view, it simply does not follow that the completion of the customary marriage process on the same day was precluded because it was pertinently discussed during the negotiations. As mentioned above, the crisp question in this matter is whether on the facts of this case a customary marriage came into existence”.*

- [16] In the case of *Ngwenyama v Mayelane and Another* [2012] ZASCA 94; 2012 (4) SA 527 (SCA), at *para 23* made the following observation regarding the dynamism of customary law:

*“The Recognition Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when customary law celebrations are generally in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled; a customary marriage, whether monogamous or polygamous, comes into existence”.*

- [17] The approach in motion proceedings was set out as follows in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634E-635C:

*“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact”.*

- [18] The principle laid down in that seminal judgment is that an applicant who seeks final relief using motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.
- [19] The crisp issue is whether on the facts, and bearing in mind the Plascon-Evans rule, the applicant has proved that the respondent is an unlawful occupier or as averred by the respondent the parties are married.
- [20] An analysis of the facts shows that the applicant withheld crucial facts and information when he disposed to his founding affidavit. These are crucial facts which needed to be placed before court. He failed to inform the court that lobola had been paid. That the parties ill-advisedly concluded an ante nuptial contract in contemplation of their marriage after lobola was paid. He created an impression that the reason he accommodated the respondent at his home was because of the development in their romantic relationship. It is only when he was confronted with the replying affidavit that he conceded the fact that lobola was paid. He continued to dispute the validity of the marriage based on nonfulfillment of certain customary formalities. These facts were within his knowledge when he disposed to an affidavit. He failed to inform about them until he was prompted by the replying affidavit.
- [21] In *Mbungela and Another v Mkabi and Others* [2019] ZASCA 143; 2020 (1) SA 41(SCA); [2020] 1All SA 42 SCA at *para 29* the Court concluded that the handing over of the bride, though important, is not a key determinant of a valid customary marriage. It aptly stated as follows:

*“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 requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results”.*

- [22] The defence raised by the respondent has to be accepted. The facts stated in her affidavit are not disputed by the applicant except his feeble attempt to explain the away. He didn't take the court in his confidence and in fact lied to the court about his relationship with the respondent. If this court was to accept his version this will lead to untenable and gross unfairness to the respondent.
- [23] The submission by counsel that unlike in the cases quoted above there was not enough evidence to sustain the allegations of the respondent is rejected. The undisputed fact which is crucial before this court payment of lobola. Finally, the applicant was disingenuous and dishonest. He created a totally false state of affairs.
- [24] I am satisfied that on the available evidence the parties concluded a lawful marriage as envisaged by section of the Recognition Act. The next question is whether the applicant can, despite such finding still evict the respondent.
- [25] On the issue of whether PIE applies to the present case refer to the case of PPS v TLS [2020] ZAWCHC 90 where the court found that a spouse cannot become an 'unlawful occupier' in relation to the other spouse in terms of PIE, in the context of a marriage in community of property. The court reasoned that in a marriage of community 'the right to give and withdraw consent vests in the spouses jointly, so that one spouse cannot become an "unlawful occupier" simply because the other spouse does not want him or her to live there.'
- [26] H R Hahlo The South African Law of Husband and Wife 5 ed (1985) at 143-4 the learned author states that '[e]ven where the husband is the owner of the property occupied by the couple, he has no right, while the marriage is in existence, to eject his wife from it without providing her with suitable alternative accommodation'. Acting in accordance with these principles, the applicant can only seek the respondent's eviction from the matrimonial home against a tender of equally comparable living conditions.
- [27] In conclusion it suffices to further illustrate the principle by quoting the case of Cattle Breeders Farm (Pvt) Ltd v Veldman [1974] 1 All SA 289 (RA) where the court held at 291;-

*"The rights of a wife to remain in the matrimonial home, which this dwelling undoubtedly was, are well set out by Lord UPJOHN in the case of National Provincial Bank, Ltd. v. Ainsworth, (1965) 2 All E.R. 472 at p. 485: "A wife does*

*not remain lawfully in the matrimonial home by leave or licence of her husband as the owner of the property. She remains there because, as a result of the status of marriage, it is her right and duty so to do and, if her husband fails in his duty to remain there, that cannot affect her right to do so. She is not a trespasser, she is not a licensee of her husband, she is lawfully there as a wife, the situation is one sui generis”.*

- [28] Cattle Breeders recognizes that a spouse occupying the matrimonial home (the wife in this instance) may be ejected from the matrimonial home provided that she is offered ‘suitable alternative accommodation’ or ‘a means of acquiring such suitable accommodation’. The applicant is not tendering any such accommodation.
- [29] The provisions of PIE find no application in this matter. As correctly contended by the respondent it is evident that a spouse has a sui generis right to remain at the matrimonial home while the parties are married. The right arises from the marriage relationship, which means that it ceases to exist upon termination of the marriage.

In the circumstances, I therefore make the following order: -

- (i) Application is hereby dismissed;
- (ii) Applicant to pay costs.

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**THUPAATLASE AJ**

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Applicant: Adv. Fasser

Instructed: Yosef Shisher Attorneys

Respondent: SM Setsoalo (Attorneys)



Instructed by: Mohube Setsoalo Mabusela Incorporated

Date of hearing: 15 November 2021

Date of Judgment: 15 December 2021