

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2015/12381

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

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P.H. MALUNGANA

24 OCTOBER 2023

In the matter between:

MPHO PORTIA MOLOKANE

Applicant

and

ROSY WILLIAMS

Respondent

First

MAPULE MORAKE

Second Respondent

JACOB DIKGOBE

Third Respondent

JERRY BOKABE

Fourth Respondent

MIKE MOTLHALE

Respondent

Fifth

THE MINISTER OF HOME AFFAIRS

Sixth Respondent

**THE MASTER OF THE HIGH COURT
JOHANNESBURG**

Seventh Respondent

JUDGMENT

MALUNGANA AJ

Introduction

- [1] Customary marriage disputes have become more frequent in our courts since the enactment of the Recognition of Customary Marriages Act, 120 of 1998 (“the Act”). This is yet another case which concerns two competing claims by two widows in polygamous marriage relationship. After the death of Alfred Mohlale (“the deceased”) in January 2015, his surviving spouses brought two counter applications in terms of section 4(7) to have their customary marriage relationship with the deceased recognised and registered by the Department of Home Affairs, the sixth respondent in these proceedings.
- [2] The main application was brought by his second wife, Mpho Molokome, (the applicant) while the counter application was brought by the first wife, Rosy Williams (the first respondent). In their respective applications both parties contend that they were customarily married to the deceased during his life time. The matter first appeared in the motion court before Thobane AJ, who after considering the matter granted an order referring the matter for oral evidence on issues paraphrased as follows:
- 2.1 to determine the validity of the customary marriage between Rosy Williams and the late Alfred Mothlale allegedly concluded on 16 August 2003;
 - 2.2 if it is found that the alleged marriage was indeed concluded and valid, the court should determine whether the alleged marriage between the applicant (Mpho Molokome) the deceased concluded on 24 March 2012 is valid. If the marriage is found to be valid whether the matrimonial regime applicable is one out of community of property.
 - 2.3 if the marriage between the first respondent is valid, the court should determine what marital regime is applicable.
 - 2.4 the Court directs the third respondent to appoint as joint executors of the deceased’s estate both the applicant and the first respondent pending the finalization of the matter.
- [3] The matter before me is a sequel to the order issued by Thobane AJ *supra*. In these proceedings I shall refer to the applicant as “Miss Molokome”, and the first respondent as “Miss Williams”, and where necessary the parties will be referred to as cited in the main notice of motion.

- [4] For a proper understanding of the dispute between the parties, it is necessary to outline the factual background as set out in the founding papers.

Relevant Background

- [5] It is common cause that the Miss Molokome initially brought an application against the Miss Williams and other respondents in terms of section 4(7) of the Recognition of Customary Marriages Act, 120 of 1998 (“the RCM Act”) seeking an order set out paragraph 6 of the founding affidavit as follows:

- “6.1 Firstly, condoning the late registration of the customary marriage entered into between the deceased and I;
- 6.2 Secondly, directing the sixth respondent to register the customary marriage entered into between myself and the deceased, and
- 6.3 Finally, directing the sixth respondent to forthwith issue a marriage certificate to me.”

- [6] The applicant contended that after the burial of the deceased, she approached the Department of Home Affairs (“the Department”) to have her customary marriage to the deceased registered.¹ The marriage was registered and a marriage certificate was subsequently issued in favour. The document evidencing a marriage certificate is shown in annexure “FA-4” to the founding affidavit. Contemporaneously, the first respondent also approached the Department to have her customary marriage registered but the latter refused to register Miss Williams’ customary marriage citing the fact that it was countenanced by the relevant legislation without an order of this Court.

- [7] On 11 March 2015, the Department summoned the duo to a meeting with their respective legal representatives. The outcome of the meeting is delineated in annexure “FA5” to the founding affidavit.² The relevant portions thereof read:

- “2.1 On 25/02/2015, Mpho Portia Molokome (“Mpho”) approached the Department and applied for the registration of her customary marriage with her late husband, Alfred Mohlale (“the deceased”).

¹ Case Lines 001-17.

² Case Lines 001-30.

- 2.2 The Registering Officer registered the marriage on paper first after satisfying herself that the marriage complied with the requirements of a customary marriage and thereafter issued Mpho with a customary marriage certificate.
- 2.3 Sometime thereafter, Rosy Williams (“Rosy”) approached the Department claiming to be the first widow of the deceased.
- 2.4 In order to satisfy ourselves, the Department then decided to arrange and a meeting with Mpho and Rosy, together with their witnesses legal representatives on 11/03/2015, at Harrison Office.
- 2.5 After interviewing all the parties and listening to all the facts, a resolution was taken as follows:
- 2.5.1 Rosy was customarily married to the deceased in 2003 and had two children with him. The deceased left without her and went to stay with Mpho. He paid lobola for and she also had two children with her. This was confirmed by the deceased bother, Michael Mohlale who confirmed that indeed the deceased paid lobola for both women. Therefore, both Rosy and Mpho are recognised as the legal widows of the deceased and thus entitled to have both their marriages registered by the Department if they so wished.
- 2.5.2 Procedurally, Rosy as the first widow was supposed to have registered her marriage first. However, due to the fact that Mpho as the second widow has already registered her marriage, the National Population Register would no allow the second marriage to be registered without a court order issued in terms of section 7(6) of the Recognition of Customary Marriages Act, 1998 (Act No.120 of 1998) (“the Act”).”

[8] In response to the applicant’s application, the first respondent filed her counter application in which she sought the following order:³

- 8.1 that her late registration of her customary marriage to the deceased be condoned;
- 8.2 that her the Department be ordered to register her customary marriage in the customary marriage register;
- 8.3 that the customary marriage between the applicant and the deceased on 24 March 2012 be declared *void ab initio*;

³ Case Lines 008-6.

8.4 that the Master of the High Court in Gauteng be ordered to withdraw the appointment of the applicant as the executrix, alternatively to appoint the applicant as the co-executrix.

8.5 that the applicant be ordered to give account of her activities relating to the administration of the estate of the deceased until to-date.

[9] The first respondent also states in her counter-founding affidavit that after the death of the deceased she approached the offices of the seventh respondent who informed her that the applicant has already been appointed as an executrix of the estate of the deceased. She was advised to visit the offices of the Department to enquire on how the applicant acquired the marriage certificate.⁴ After failing to obtain a satisfactory answer from the Department, she instructed Amarine Estates and Trusts to assist her in dealing with the Department. On 11 March 2015 she lodged a complaint with the Master of the High Court. Following the complaint, they were called to a meeting at the offices of the Department as shown in annexure "FA5" by the Department.

[10] In paragraph 4 of the affidavit, she contends that the deceased paid an amount of R14 000.00 as lobola after his delegation entered into a lobola agreement with her family delegation. This amount was paid in two parts, R6000.00 as deposit and the balance of R8000.00 in 2004. The traditional ceremonies were held and the handing of the bride performed. She maintained that the marriage was not dissolved despite the fact that the deceased deserted her in 2007. The deceased would pay her visits while she lived in Flat 109, Alexandra. In 2019 she went to live with her mother and then heard that the deceased lived with four other women. She contends that according to Tswana culture and tradition, a man wishing to marry a second wife should obtain a consent of the first wife. Absent that consent the deceased's marriage to the applicant is *void ab initio*. In the alternative, and if the Court is not with her on the voidance of such marriage, then the Court should find that the marriage is out of community of property.

[11] At the start of the proceedings the parties were agreed that it would be convenient for the Court to hear the oral evidence appertaining to the first respondent's counter-application first, thereafter the applicant would lead her evidence. Accordingly, Miss Williams was the first witness to adduce oral evidence.

⁴ Case Lines 008-11.

The Evidence

Miss Williams' evidence

[12] The first respondent ascended to the witness' stand. Her testimony was to the effect that she met the deceased at Johannesburg boarding school while he was staying in Kew. They dated for a while and later the deceased became a taxi driver. She fell pregnant with their first son. In 2003 their relationship progressed to a point that the deceased asked for her hand in marriage. A date was set for the 16th August 2003 for lobola negotiation. Lobola negotiations between her delegation and that of the deceased culminated in the agreed amount of R14 000. The deceased's delegation paid a portion of R6000.00 as a deposit towards lobola, and thereafter paid the balance of R8000.00.⁵ Cultural and traditional celebrations were also held at her parental home. She did not know of the extra marital affair which the deceased had with the applicant.

[13] Under cross examination, she testified that the balance of her lobola was paid during the wedding ceremony in May 2004. It was her testimony that the lobola letter was written by her uncle P. Pududu. When asked if she tried to claim the body of the deceased for burial, she replied that she went to the deceased's house where she collapsed, and later hospitalised. She later returned to find that the deceased's mother and the applicant, had already arranged the deceased's burial.

[14] The second witness was Mrs Dorothy Makeke, the deceased's auntie. She testified that she knew the deceased from his childhood stages. They are Tswana speaking family rooted in the Tswana tradition and culture. The deceased called her to be part of the delegation to negotiate lobola on his behalf. The deceased's mother also called her about the same arrangement. She travelled from Limpopo province to North West to join the delegation before they went to Kew. She was accompanied by her two brothers, Jacob and Isaak Dikobe. They were warmly welcomed by the Williams' family at Kew. Lobola was agreed at R14 000.00 of which R6000.00 was paid towards the deposit. The Williams told them that the white wedding was something to be arranged between the deceased and the first respondent. She further testified that Rosy was the first to be married to the deceased. She was, however, aware of the other customary marriage the deceased concluded with the applicant because she was also part of the delegation.

⁵ Case Lines 085 – 1. Lobola Letter

- [15] During cross examination she testified that the document evidencing lobola was written by Mr Pududu. She also testified that the 16th of August 2003 was not a wedding day. The wedding ceremony and festivity were in May the 1st, 2004 when they paid the lobola balance. It was received by Mr Pududu on behalf of the Williams. Afterwards a goat was slaughtered in observance of the rituals of Tswana custom and tradition. The first respondent wore traditional Swati outfit. In addition, gifts were exchanged between the two families.
- [16] It was put to her that the deceased's mother, Christina would testify that there was no marriage between Rosy and the deceased. Her response was that there was a traditional marriage, but not a civil marriage.
- [17] The third witness, Mr. Patrick Pududu took to the stand. He testified that he is the uncle to Miss Williams. On 16 August 2003 they converged at Rosy's residence after he was invited there to be part of the delegation that had to receive lobola on behalf of the Williams' family. The Mohlale family were asking for Rosy's hand in marriage. The discussion ensued which culminated into an agreement for an amount of R14000.00 to be paid as lobola. After a deposit was paid the parties were agreed that the balance would be paid in 2004. He further testified that he authored the lobola confirmation document appearing in the records. After the payment of the balance of lobola and as a final step of the process there was some festivity. They were singing and ululating.
- [18] Under cross examination the witness testified that the lobola letter was left in the care of the first respondent's mother. Rosy was not residing with her mother, but the lobola negotiations took place at her mother's house.
- [19] The fourth witness was Mr Isaak's Dekobe. He was an uncle to the deceased. He testified that the deceased was married to Rosy Tshabalala-Williams in 2003. He was part of the delegation with Jacob with whom he went to Alexander at Kew to negotiate lobola. They had in their possession an amount of R6000. After they were charged the amount of R14 000.00 they explained that they could pay only what they had in their possession. So, the parties were agreed to pay the remaining balance when the couple had their wedding, which took place the following year in 2004.
- [20] Under cross examination Mr. Dekobe testified that the deceased's mother was not present at the wedding ceremony because of conflict at the time. She wanted everything to be done at her place where she married another man. The deceased used to do everything at her grandfather's place, but his mother was unhappy and felt she had the right as a mother. On the

lobola letter, he testified that he was witness number one as appears on the face of the document.

[21] After the testimony of Isaak Dekobe, the first respondent closed her case.

The Applicant's evidence

[22] The applicant testified that she has no knowledge of the marriage relationship between the deceased and Miss Williams. About the deceased, she testified that she met the deceased in 2004. She used to visit him at Akasia, in Greenstone. In 2008 she permanently stayed with him. They first lived in Bushile Park and moved to Greenstone. They have two kids together. On 24 March 2012 she got married to the deceased. On the day of her wedding she was dressed in traditional attire, and a sheep was slaughtered to mark the event. After the lobola of R26 000 paid the envoy proceeded to Greenstone where the traditional ceremony was held. The ceremony was attended, amongst others, by Jacob Dekobe and his wife, Jerry the deceased's uncle and the deceased's mother. She knew the first respondent as someone who had kids with the deceased. She once met her when she went to Alexander. There she found Rosy packing the kids' clothes. The deceased also mentioned the fact that he stayed with Rosy before. It was only at the funeral of the deceased that she heard about Miss Williams claiming to have been married to the deceased. She also learned about Rosy's alleged marriage to the deceased from the Master's office after she applied to be appointed as executrix of the deceased's estate. Miss Williams also went to the Master's office and demanded that her letters of appointment be cancelled. The deceased's mother told her that Rosy was not married to the deceased. She testified that Rosy also came to the funeral of the deceased. Nobody informed her that the first respondent was married to the deceased from the latter's family. She also does not know Isaak who was called by Rosy to testify.

[23] When being cross examined by the first respondent's counsel the applicant testified that the lobola negotiations took place at Emfihlweni, at Tembisa Township, her mother's house. The celebration took place in Greenstone, at the deceased's house. The lobola and the celebration of their marriage took place on the same day, but different places. The lobola document shown in annexure "FA15" (Case Lines 012-10) is a correct reflection of the agreement between her delegation and that of the deceased's family. According to this agreement an amount of R26000.00 was paid by the deceased to her family as lobola. She maintained that she only learned about the Rosy's marriage to the deceased after the funeral.

- [24] When asked about her founding affidavit, (Case Lines 001-14) she testified that she had not read it before signing it. In particular she denied having told her legal representatives that Rosy was married to the deceased which married was dissolved by divorce (para 8 of the affidavit). She further testified that whilst at the Master's office the deceased's brother Michael mentioned the word "divorce." She also did not know anything about the letter from the Department attached to her affidavit regarding her meeting with the Home Affairs officials.
- [25] The second witness for the applicant was the deceased's mother, Mrs. Christina's Morake. She testified that she knew the first respondent. The latter had a love affair with her deceased son, Reggie. Her late son was married to the applicant. She could not recall the year in which they married. She testified that she sent a delegation to the deceased's house to negotiate lobola on behalf of her son. She said Dorothy Makeke lied about the deceased's marriage to Rosy. She used to live with the deceased and Rosy's children. The deceased chased Rosy away due to her problem with alcohol. She denied that she called Isaak Dekobe to assist in the lobola negotiation between her late son and the first respondent.
- [26] Under cross examination she testified that she lived with the deceased, Rosy and her children for a brief moment. At that time, she was not abusing alcohol. On Rosy's marriage to her late son, she testified that she only heard that her son was getting married to Rosy. She confirmed that she was informed about the marriage but was reluctant to attend the ceremony. On the marriage of the applicant, she testified that she could not remember how much was paid for Mpho as lobola. She gifted Mpho's family with blankets. As part of the wedding celebration a cow and a goat were slaughtered to mark the event.
- [27] The third witness, Tshepo Dikobe took to the stand. He testified that he is the deceased's cousin brother. He was very close to the deceased who had nurtured to be where he is in life today. He knew the first respondent from around 2006 which is the year they broke up. He attended the deceased's wedding with Mpho at Greenstone. He denied that the deceased ever got married to Rosy.
- [28] He further testified under cross examination that he was 21 years in 2007. In 2003 Rosy and the deceased were dating, and also lived together. According to Tshepo, the lobola negotiation in respect of Mpho took place in the morning, and the celebration of the customary marriage took place in the afternoon at Greenstone.

Submissions

- [29] Counsel for the first respondent submitted that she had succeeded on the balance of probabilities in establishing that she was the first customary wife of the deceased. He further submitted that if the Court finds that there was a valid marriage relationship between the deceased and Miss Molokome, such marriage should be out of community of property as held in *Ngwenyana v Mayelane*.⁶
- [30] Counsel for the applicant submitted that the sole reason the applicant opposed the counter application was because she was of the bona fide belief that the first respondent was not a spouse to the deceased.⁷ He further submitted in paragraph 12, that in the absence of a court application by the deceased that his marriage to the applicant ought to have been out of community of property.

Applicable legal principles

- [31] The requirements for the conclusion of a valid customary marriage cannot be overstated. They are laid down in section 3 of the Act. *Firstly* the prospective spouses must be over the age of 18 years, *Secondly* they must both consent to be married to each other under customary law, and *Thirdly* the marriage must be negotiated and entered into (or celebrated) in accordance with the customary law.
- [32] In *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41 (30 November 2017), the Constitutional Court traversed the validity of section 7(1) of the RCM. The Court held in para 31 of the judgment as follows:

“[31] Before I deal with this question, I think it necessary to render a synopsis of the proprietary regimes applicable to customary marriages. This is it:

- (a) In the case of a new monogamous customary marriage, the default regime is that the marriage is in community of property and of profit and loss. The spouses may exclude these consequences by means of an antenuptial contract which will. Then regulate the matrimonial property system of their marriage.

⁶ *Ngwenyana v Mayelane* 2012 (4) SA 527 (SCA) “The consequences of a failure to comply with the provisions of the section therefore is that of matrimonial property system existing before the conclusion of the second customary marriage continues in existence and is terminated by the conclusion of the second marriage.”

⁷ Written Closing Argument. Case Lines 084-49, at para 13.

- (b) The effect of *Gumede* is that – as with new monogamous customary marriages – pre-Act monogamous customary marriages are automatically in a community of property and of profit and loss.
- (c) A husband in a customary marriage wishing to enter into a further customary marriage after the coming into effect of the Recognition Act must apply to court for the approval of a written contract that will govern the future matrimonial property system of the marriage. According to *Ngwenyama*, failure to do so does not nullify the further customary marriage. Here is why and what the principle regime is:

“I ...cannot endorse the conclusion of the court below that non-compliance with the requirements of section 7(6) results without more in the second customary marriage being *void ab initio*. I hold instead that the consequences of such non-compliance is that the subsequent marriage would be valid but that would be one out of community of property. It plainly cannot be a marriage in community of property as that would imply the existence of two joint estates, which it is clear cannot co-exist,”

This was confirmed on appeal by this Court.”

Assessment and conclusion

- [33] It is clear from the versions of the witnesses called by the first respondent that valid customary marriage between the deceased and Rosy Williams was concluded in accordance with the provisions of section 3 of the Act. The evidence establishes that a delegation from the deceased’s family was sent to Miss Rosy Williams’ family to negotiate lobola in the sum of R14 000.00, which was paid in two parts between 2003 and 2004. This was followed by celebration, and other custom ritual commonly known as “Matlhabiso” in accordance with the Tswana culture. The was dressed in Swazi traditional outfit. Importantly there is evidence in the form of lobola document reflecting the terms of the lobola negotiations and the agreement reached. After everything was performed she was handed over to the deceased’s family as his wife. The first respondent’s version was coherent and reliable, and I have no reason not to accept it. It was corroborated by all the witnesses she called to testify on her behalf.
- [34] The same cannot be said about the applicant’s version. It contained a series of improbabilities. For example. When being cross examined she sought to deny some of the contents of her own founding affidavit. She denied any

knowledge of the letter from Home Affairs Department attached to her founding affidavit. She further denied the allegation in her affidavit to the effect that the deceased had married and divorced the first respondent. It was her testimony that she knew the first respondent as the deceased girlfriend and that they had a child together. She met her at the funeral of the deceased and at the Home Affairs' offices. The deceased never told her that he was married to the first respondent. Quite clearly her oral testimony is not aligned to the allegations contained in her affidavit. On being asked who gave her legal representatives the information contained in her affidavit, she prevaricated and said she did not know who gave her legal representatives the information, perhaps it could have been Michael during the time they were at the Master's office. I find that she was not coherent and her evidence was unreliable.

- [35] The evidence of the deceased's mother revealed that she was informed about the first respondent's marriage but she refused to partake due to certain conflict with her deceased. In fact, it was Dorothy's evidence that she is the one who called her to be part of the envoy to negotiate her deceased' son's intention to marry the first respondent. It was further the evidence of Dorothy Makeke, the deceased auntie, that the deceased first married the first respondent then the applicant. Furthermore, she was also part of the delegation in the lobola negotiations of the applicant. Based on the objective evidence, the lobola document, I find that the deceased was married to both Miss Williams and Miss Molokome in terms of the customary law.

Conclusion

- [36] Having found that both the applicant and the first respondent's customary marriages complied with the provisions of section 3 of the Recognition of Customary Marriage Act, what remains for me to consider is the marital regime applicable on both marriages. The answer to this question lies in the Act and other previous court decisions.
- [37] It is trite that failure to comply with the provisions of section 7(6) of the Act does not invalidate the second marriage which has not been sanctioned by the court.⁸ The Supreme Court of Appeal in *Ngwenyama*, held in paragraphs 37 and 38 of the judgment as follows:

“[37] First, when determining an application in terms of section 7(6), a court is required by section 7 (7) to terminate the existing matrimonial property system if the earlier marriage was in community of property or subject to the accrual system and to effect a division of the

⁸ *Ngwenyama v Mayelane and another*[2012] 3 All SA 408 (SCA), para 36. “Viewing the scheme of the Recognition Act as whole therefore, it is plain that section 7(6) of the Act does not purport to regulate the validity of polygynous customary marriages. That is sought to be achieved by section 3. Section 7(6) appears on the face of it to regulate the proprietary consequences of such marriage. The Act itself does not contain an express provision to the effect that non-compliance with section 7(6) results, without more, in the invalidity of the second customary marriage.”

matrimonial property. The consequence of failure to comply with the provisions of the section therefore is that the matrimonial property system existing before the conclusion of the second customary marriage continues in existence and is not terminated by the conclusion of the second marriage....

[38] I, accordingly, cannot endorse the conclusion of the court below that non-compliance with the requirements of section 7(6) results without more in the second customary marriage being void *ab initio*. I hold instead that the consequence of such non-compliance is that the subsequent marriage would be valid but that it would be one out of community of property. It plainly cannot be a marriage in community of property as that would imply the existence of two joint estates, which it is clear cannot co-exist. That conclusion, it seems to me, would afford sufficient protection to the wife of the first customary marriage. It, moreover, would accord with the injunction of the Constitutional Court that all legislation be interpreted in accordance with the spirit and purport of the Constitution.”

[38] Reverting now to the issue of marital regime applicable in the present case. It is common cause that the second customary marriage between the deceased and the applicant was not sanctioned by the Court in compliance with section 7(6) of the Recognition Act. The effect of such non-compliance renders the marriage of the applicant to the deceased as being that of out of community of property. The default marital regime for monogamous customary marriage (first marriage) is that of a marriage in community of property and of profit and loss. I therefore conclude that the second customary marriage between the deceased and the applicant was out of community of property.

Order

[39] In the result the following order will ensue:

1. The customary marriage concluded between the applicant and Alfred Mohlale, is declared valid;
2. The customary marriage concluded between the first respondent and Alfred Mohlale, is declared valid.
3. The sixth respondent is authorised to register the customary marriage on application by either of the parties;
4. The second customary marriage between Mpho Portia Molokome and the deceased is declared to be out of community of property.

5. The Master of the High Court (seventh respondent) is directed to withdraw the appointment of the Mpho Portia Molokome as an executrix of the deceased estate.
6. The seventh respondent is directed to consider afresh the appointment of either one or both of the widows as executrix, and/or any other suitable person as the Master would deem fit to be an executor or executrix, of the estate of the late Alfred Mohlale.
7. No order as to costs.

P.H. MALUNGANA
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 31 May 2023
Judgment: 24 October 2023

Appearances:

For Applicant: Adv. Matlala
Instructed by: JK Malatji

For First Respondent: Adv. W Isaaks
Instructed by: Giyose Incorporated Attorneys