



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

CASE NUMBER: 2021/31483

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES.
DATE: 02 June 2023

In the matter between: -

MOLEBATSU, MAMOKATI MURIEL

Applicant

and

**THE MINISTER OF HOME AFFAIRS
MAOBA, DIBUSENG**

First respondent
Second respondent

In re: -

THE ESTATE LATE **MONAMI BENEDICT MAOBA**

Neutral citation: *Molebatsi, Mamokati Muriel v The Minister of Home Affairs & Another* (Case No. 2021/31483) [2023] ZAGPJHC 622 (02 June 2023)

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 02 June 2023.

Customary law- Application- Late Registration- Condonation- Dispute of fact

The applicant brought an application to court for the late registration of an alleged customary marriage between her and the deceased, including an application to condone the application to register the said customary marriage. The second respondent, a biological daughter of the deceased opposed the application and disputed the existed of a marriage between her late father and the applicant.

The court held that in the Customary Marriages Act there is no section that deals with condonation of late registration of customary marriages. Neither the registering officer nor the court has the power or discretion to grant condonation, lateness of registration could only be considered with all other factors in deciding whether the application for registration of a customary marriage was bona fide. Section 4(3) is peremptory that customary marriages must be registered within 3 months of conclusion. However, section 4(9) is also clear that customary marriages are not invalidated by lack of registration. The court noted that these two sections were at odds with each other.

Further held that, section 4(7) of the Act clearly envisages an investigative process that is to be embarked upon by both the registering officer and the court when an application for the late registration of the customary marriage is made.

The Act clearly envisages that the registering officer, and so also the Court, may ask for additional information in order to satisfy herself as to the existence of the marriage.

Having considered the papers and hearing counsel, the court was convinced that the severity of the allegations made by both the second respondent, the applicant and those who deposed to confirmatory affidavits constitute factual disputes that could not be resolved on paper and accordingly the interests of justice demanded for this matter to be referred to trial.

In the circumstances the matter was referred to trial.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] This application is essentially for an order declaring that a valid customary marriage was concluded between the applicant and the deceased, Monami Benedict Maoba, who died on the 16th of January 2021. The applicant also applies for condonation for the late registration of the customary marriage.
- [2] The second respondent is the biological daughter of the deceased who was born from a previous relationship and who opposes the application. The second respondent is also the executrix of her father's estate.
- [3] The second respondent raised a point *in limine* that a genuine and *bona fide* factual dispute exists between the parties and that the applicant should never have sought an order for the registration on application.

- [4] During argument the Court also raised with counsel whether it was necessary and appropriate for an applicant to apply for the condonation of the registration of customary marriages after the statutory three-month period.
- [5] The first respondent, namely the Minister of Home Affairs, served a notice to abide by the decision of this court.

THE APPLICANT'S CASE

- [6] It is the applicant's version that she was involved in a romantic relationship with the deceased from 2005. In early 2017 the deceased bought two necklaces for the applicant and himself which, according to the applicant, signified a marriage proposal which the applicant accepted. No children were born from their relationship.
- [7] The applicant asserts that on the 9th of December 2017 the deceased sent a delegation to the applicant's parents' home to pay lobolo. During such negotiations an amount of R20 000.00 towards lobolo was agreed upon. The applicant states that the deceased paid the full amount on the same day.
- [8] The applicant was represented by her father (who is now deceased) and her mother. She alleges that the parties to the negotiations all signed the lobolo letter, which was handwritten in Sesotho. The applicant attached to her founding papers an untranslated lobolo letter and confirmatory affidavits by delegates which contain identical allegations.
- [9] After the payment of lobolo, the applicant alleges that the families

exchanged gifts which signified the acceptance of the lobolo and the deceased as the groom.

- [10] The applicant mentions that there were further discussions regarding a welcoming ceremony and that it was planned to take place after the deceased had received his pension benefits. She explains that in terms of the deceased's culture, namely the Sesotho tribe, they welcome their bride by slaughtering a sheep for her, then feed her the meat (*kwayi*) and thereafter give her a name.
- [11] The applicant avers that after the lobolo negotiations had been completed, she met with the deceased. During the subsistence of their relationship, the applicant and the deceased did not cohabit and this was the case even after the lobolo negotiations. However, the applicant states that though they always spent most of their time together, the deceased's family wanted the applicant to move in with him officially after the welcome ceremony had been completed.
- [12] The applicant tells the court that the wedding ceremony never materialised because the deceased's health deteriorated due to a chronic illness. She does not state the nature of the chronic illness. There were also delays regarding the release of the deceased's pension benefits. Eventually the deceased passed away before the welcoming ceremony was held.
- [13] The applicant complains that the second respondent was never fond of her and took immediate control of her father's estate and did not allow the applicant to participate in the deceased's funeral as his spouse.

- [14] Before the second respondent was appointed as executrix, the applicant alleges that she made attempts to discuss the deceased's estate with her, but without success. On the 25th of February 2021 the applicant went to the Master's office in Johannesburg with the lobolo letter. She explained to the officials that she was excluded from participating in her late husband's estate and advised that she must either try to reach an amicable solution with the deceased's biological children or register a customary marriage in order to be issued with letters of executorship and to lodge a claim against the deceased estate. The Master gave the applicant a letter to "*check*" the deceased's bank account statements.
- [15] The applicant was thereafter contacted by the agent of the second respondent and a meeting was convened on the 3rd of March 2021. The applicant handed to the second respondent's attorney the lobolo letter and a copy was made.
- [16] Thereafter, a meeting was scheduled with the second respondent on the 12th of March 2021 with the view of reaching an amicable solution. The second respondent disputed the authenticity of the lobolo letter at the meeting. The applicant alleges that the second respondent accused her of submitting a fraudulent claim against the deceased's Metropolitan policy and that this action was under investigation. The applicant denies these accusations as she states that she has never made any claim.
- [17] Needless to say, the parties were unable to reach an amicable solution as the second respondent was not prepared to acknowledge the applicant as the deceased's spouse.

- [18] The applicant raises concerns that the second respondent has made attempts to hide, dissipate or alienate some of the deceased's assets. She attached a copy of the inventory list to her founding papers and states that the deceased's Government Employee Pension Fund interest, three motor vehicles and monies that were in his bank accounts were not listed.
- [19] The applicant seeks condonation for the late registration of the customary marriage. She explains that she is a layperson and was not aware that her marriage to the deceased needed to be registered. After she was told by the Master that her marriage had to be registered with the Department of Home Affairs, she approached the first respondent who advised her that she was required to apply for the registration of her marriage through this court.
- [20] The applicant alleges that she will suffer proprietary prejudice in the event that the marriage is not registered and condonation is refused. She tells the court that the deceased owned two immovable properties and movable properties, which included five motor vehicles, three of which were in his possession and two in the possession of the applicant. This is in addition to the furniture that he owned, the funds in his bank accounts and his pension interest.

THE SECOND RESPONDENT'S CASE

- [21] The second respondent is the duly appointed executrix in the estate of the deceased, her late father.
- [22] A point *in limine* that the factual disputes are incapable of resolution on motion was raised. The second respondent asserts that the applicant was

at all material times aware of the nature, veracity and extent of the dispute between them and hence argues that the applicant ought to have instituted action proceedings. Accordingly, the second respondent seeks the dismissal of the application with an appropriate order to costs, alternatively that the matter be referred to trial.

[23] On the facts, the second respondent disputes that the deceased and the applicant were involved in a romantic relationship going back as far as 2005. She states that she also has no knowledge of the exchange or purchase of any necklaces between them. She argues that if the deceased intended to marry the applicant, he would certainly have informed his children, who would have been introduced to her. The children's limited awareness of the applicant's existence arose from what they found on their father's cell phone. The second respondent alleges that the applicant was no more than a girlfriend.

[24] The second respondent alleges that the deceased assisted the applicant in financing a motor vehicle. The applicant paid the instalments after the deceased retired. She fell in arrears with her monthly instalments, damaged the motor vehicle in January 2020 and then requested a new vehicle from the deceased. The deceased informed her to find another benefactor.

[25] The second respondent objects to the fact that the applicant failed to provide any detail relating to her previous and/or existing spouses. In particular, it is denied by the second respondent that the applicant is divorced. According to a Deeds Registries search, the applicant appears to be still married in community of property to another man with whom she

jointly owns an immovable property.

- [26] The second respondent took issue with the delegates who were alleged to be present at the lobolo negotiations. She states that their father never had any relationship with John Mahoba, his cousin, after they had a fallout when John Mahoba's mother passed away. There was open animosity between them, which continued even beyond June 2019. According to the second respondent, the non-existence of a relationship between the deceased and John Mahoba supports her contention that the lobolo letter is not authentic.
- [27] The second respondent denies that the lobolo negotiations happened and that payment ensued. She alleges that the evidence of the witnesses who deposed to the confirmatory affidavits must be tested by *viva voce* evidence.
- [28] In addition, the second respondent denies that any customary marriage was concluded between the deceased and the applicant as, on the applicant's own version, the welcome ceremony never happened. She asserts that there would have been no reason for the deceased to wait for his pension pay-out before the ceremony occurred if in fact it was his intention to marry the applicant.
- [29] The second respondent denies that the deceased and the applicant attended family gatherings together as they never came to any of her family gatherings. She states that the family never saw them together and were never introduced to the applicant as a wife or a fiancé.
- [30] The second respondent alleges that the applicant did not know the

deceased at all for if she did, she would have taken him to a private hospital as she would have been aware of the fact that he had private medical aid. The deceased was diagnosed with diabetes in 2016, which was well-controlled throughout and which was a fact confirmed after his death. The second respondent states that the deceased died of a pulmonary heart attack.

- [31] Pertinently, the second respondent states that the applicant at all times lived with her husband/ex-husband and that the deceased lived with his youngest daughter, the second respondent's sister, Motsilisi, until his death. Not even Motsilisi was aware of the alleged marriage.
- [32] It is significant, so the second respondent argues, that the applicant has failed to provide any details of the alleged plans for the welcoming ceremony. She disputes the applicant's allegation that an animal cannot be slaughtered while there is a sick family member. Moreover, she disputes the allegation that it is a custom to slaughter an animal in their family, as alleged.
- [33] As far as attending the deceased's funeral is concerned, the second respondent asserts that the applicant arrived late and that she did not introduce herself as the wife of the deceased or even attempted to play any role.
- [34] The second respondent states that they became aware of the applicant's claim as a customary wife on 26 February 2021 when they received notification from Standard Bank that the applicant had made a death claim.

[35] The second respondent denies any allegations of maladministration or misconduct as far as the administration of her father's deceased estate is concerned. She states that the deceased's pension fund payments were paid directly to the beneficiaries, namely herself and her sister.

[36] It is admitted by the second respondent that her father divorced their mother. However, she alleges that the divorce was obtained without her mother's knowledge, who only learned of the divorce during April 2010 when she wanted to travel to Lesotho and the Department of Home Affairs informed her that she was divorced. She states that a rescission application was brought, but mentions nothing about the outcome.

THE APPLICANT'S REPLY

[37] In response, the applicant attaches to her replying papers a decree of divorce dated 24 July 2009, which confirms that she divorced from her husband. According to the decree of divorce, the defendant forfeited the benefits arising from the marriage in community of property, which included the immovable property in Steel Park, Vereeniging.

THE LEGAL POSITION

Is an application for condonation appropriate and necessary?

[38] It invariably happens that parties have no alternative but to approach the court to have a customary marriage registered under circumstances where the Department of Home Affairs simply advised them to apply to court for a registration of the customary marriage and more especially after the expiration of a three-month period after the customary marriages

was said to have been concluded.

[39] During the week that this application was heard, this court heard a number of unopposed applications for the registration of customary marriages. Without fail all these applications include a prayer for condonation for the late registration of the customary marriage. The Court accordingly asked counsel to address the specific issue relating to the need to apply for condonation and the Court's power, if any, to grant such an order with reference to the Act.

[40] Section 4(1) deals with the registration of customary marriages and provides that the spouses of the customary marriage have a duty to ensure that their marriage is registered. Pertinently, section 4(9) states unequivocally that the failure to register a customary marriage does not affect the validity of that marriage.

[41] While section 4(3) of the Act envisages a peremptory registration of the customary marriage within a period of three months after the conclusion of the marriage, section 4(9) provides that the failure to register the customary marriage does not affect its validity. If a failure to register a customary marriage does not invalidate such marriage, the strict time period imposed on the registration of the customary marriage makes no sense whatsoever. These two sections are clearly at odds in my view.

[42] The position is further exacerbated by the fact that the Act does not contain any provision empowering a registering officer or the court to extend the time period. This has the effect that if parties are forced to make application to the registering officer or the court after a period of

three months, neither the court, nor the registering officer has the power to extend the time period for registration or to condone non-compliance with the prescribed period for registration.

[43] The legislature clearly did not envisage that an applicant is required to apply for condonation for the late registration of a customary marriage for if it did, the Act would have explicitly allowed for a discretion exercised by either the Court or the registering officer, to extend the prescribed three-month time period. Moreover, non-compliance would have effected the validity of the customary marriage.

[44] Section 173 of the Constitution provides:-

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[45] The Constitution requires that judicial authority must vest in the courts which must be independent and subject only to the Constitution and the law. Therefore, courts derive their power from the Constitution itself. They do not enjoy original jurisdiction conferred by a source other than the Constitution. Moreover, in procedural matters, section 171 makes plain that *'(a)ll courts function in terms of national legislation and their rules and procedures must be provided for in national legislation'*.

[46] In *Parbhoo and Others v Getz NO and Another*¹ too, the Constitutional Court turned to its *'inherent power'* to meet an *'extraordinary'* procedural situation pending enactment of relevant legislation and promulgation of

¹ 1997 (4) SA 1095 (CC) (1997 (10) BCLR 1337) at paras [4] - [5]

rules of procedure. The point was made that ordinarily the power in section 173 to protect and regulate relates to the process of court and arises when there is a legislative *lacuna* in the process. However, the power must be exercised sparingly considering the interests of justice in a manner consistent with the Constitution.

[47] It therefore may be that Courts could legitimately claim inherent power of holding the scales of justice where the Act does not directly provide for condonation or where there is a need to supplement an otherwise limited statutory procedure such as the one in section 4 of the Act.

[48] Whether or not the legislative *lacuna* constitutes an extraordinary procedural situation may be neither here nor there when scrutinising the real purpose of an application to court for the registration of a customary marriage. In my view such applications, whether brought within or outside the three-month period, require judicial oversight to avoid a registration sought on less than *bona fide* grounds and especially where the registration may result in a monetary benefit to an unmeritorious applicant.

[49] In this regard, section 4(7) of the Act clearly envisages an investigative process that is to be embarked upon:

*“A court may, upon application made to that court **and upon investigation instituted by that court**, order –*

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.”

(emphasis added)

- [50] And it is in this investigative process that the Court may very well consider the lateness of the registration, but as one of the factors when granting or refusing an order for the registration of the customary marriage.
- [51] The Court's investigative process appears to be similar to the one to be followed by the registering officer. Section 4(2) specifically states that a party applying to have the customary register *"must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage"*.
- [52] What the prescribed information is, is not clear from a reading of the Act. One is left to surmise that the prescribed information relates to the requirements for a valid customary marriage as set out in section 3 of the Act, namely: -
- [52.1] Proof that the parties are above the age of 18 years;
- [52.2] Proof that both consented to be married to each other under customary law; and
- [52.3] Proof that the marriage was negotiated and entered into or celebrated in accordance with customary law.
- [53] The first requirement would be proven by way of an identification document issued by the Department of Home Affairs. The second requirement can presumably be met by an affidavit deposed to by both

spouses confirming their consent. The third requirement would relate to the lobolo letter, proof of payment of lobolo and affidavits by the delegates who were parties to the lobolo negotiations and the wedding ceremony which followed immediately or shortly thereafter.

[54] The Act clearly envisages that the registering officer, and so also the Court, may ask for additional information in order to satisfy herself as to the existence of the marriage.

[55] Accordingly in my view, condonation cannot be sought or granted as the Act does not allow for it, but the lateness of the registration may play a role in considering whether the application is *bona fide*.

Dispute of fact

[56] In *Room Hire Co (Pty) Ltd*² the full court of this division found that it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits as opposed to *viva voce* evidence. This trite position was reiterated in the *National Director of Public Prosecutions v Zuma*³ where Harms JP found that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts and that unless the circumstances are special, motion proceedings cannot be used to resolve factual issues because they are not designed to determine probabilities.

[57] If a court is unable to decide an application on paper, it may dismiss the application or refer the matter for oral evidence or to trial. A court should adopt the process that is best calculated to ensure that justice is done

² *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.

³ 2009 (2) SA 277 (SCA).

with the least delay on the merits of the case.⁴

[58] It is trite that the dismissal of the application may follow if the dispute of fact should have been foreseen. The rule may however yield to the interests of justice and a costs order may compensate an aggrieved party who fell victim to negligent litigation or an abuse of process.

[59] Having considered the papers and hearing counsel, I am convinced that the severity of the allegations made by both the second respondent, the applicant and those who deposed to confirmatory affidavits constitute factual disputes that are irresolvable on paper and accordingly the interests of justice demand for this matter to be referred to trial.

COSTS

[60] The applicant persisted with her denial that any dispute of fact exists. However, on her own version, the applicant was fully aware of the second respondent's denial of the existence of the customary marriage as far back as March 2021 and notwithstanding, she proceeded with the present application.

[61] When considering the issue of costs, it is not entirely clear on the papers in what capacity the second respondent was cited. Although the papers refer to her executorship, she appears not to have been cited in her *nomino officio* capacity, but in her personal capacity. In the absence of clarity, the Court is concerned that an incorrect party may be compensated by a costs order and a correct party or deceased estate for that matter may be left out of pocket. I therefore similarly leave this issue

⁴ *Golden Peanut and Tree Nut SA (Pty) Ltd v Vermeulen NO 2019 JDR 2011 (FB)*, paragraph [5].

to the trial court to decide.

ORDER

In the circumstances I make the following order: -

- “1. The applicant’s application under case number 2021/31483 is referred to trial.*
- 2. The notice of motion in the application shall stand as the applicant’s simple summons.*
- 3. The second respondent’s answering affidavit shall stand as the first respondent’s notice of intention to defend.*
- 4. The applicant shall, as plaintiff in the action, within 20 days of date of this order deliver her declaration.*
- 5. The further exchange of pleadings and pre-trial procedures, including discovery and the request for and provision of trial particulars shall be regulated by the Uniform Rules of Court insofar as it relates to action proceedings.*
- 6. The costs occasioned by the application and referral to trial are reserved for determination at trial.”*

F BEZUIDENHOUT
ACTING JUDGE OF
THE HIGH COURT

DATE OF HEARING: 18 January 2023

DATE OF JUDGMENT: 02 June 2023

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