

REPUBLIC OF SOUTH AFRICA



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

CASE NO.:2021/48282

- (1) Reportable: Yes/No
- (2) Of Interest To Other Judges: Yes/No
- (3) Revised: Yes/No

28 June 2023

.....

.....

DATE

SIGNATURE

In the matter between:

NELISIWE PENELOPE GODLO

Applicant

And

MINISTER OF HOME AFFAIRS

First Respondent

**DIRECTOR-GENERAL FOR HOME AFFAIRS
Respondent**

Second

MASTER OF THE HIGH COURT, JOHANNESBURG

Third Respondent

NTOMBISE EUNICE MZAMO

Fourth Respondent

JUDGMENT

MAZIBUKO AJ

1 The applicant, the mother of two minor children with the late Bulelani Lawrence Mzamo

(the deceased), seeks an order declaring that; a customary marriage entered between her and the deceased exist and that such marriage be recognised as valid and the first and second respondents be ordered to register such marriage on their marriage register posthumously.

2. The first and second respondents are responsible for registering customary marriages and issuing certificates. The third respondent appointed the applicant as an executrix. The fourth respondent (herein referred to as "the respondent") is the deceased's mother, opposing the application. The first, second and third respondents have not participated in the litigation and filed a notice to abide by the court's decision.

Litigation history

3. The matter served in the opposed motion court before Francis J on 7 September 2022. The order was granted for the matter's referral to oral evidence for the following issues to be determined:

"1.1. whether the applicant and the deceased families met on 20 June 2009 to discuss lobola negotiations at the applicant's parental home at Lukholweni Location, Matatiele, Eastern Cape;

1.2. whether the delegation recorded on the lobola agreement who purportedly represented the deceased family were present at the applicant's parental home on 20 June 2009 at Lukholweni Location, Matatiele, Eastern Cape;

1.3. whether there was an agreement concluded between the Applicant's family and the deceased family with regards to lobola on 20 June 2009;

1.4. whether the Applicant was handed over to the deceased family on 27 June 2009 at the fourth respondent's place of residence at Jozana Location, Sterkspruit, Eastern Cape.

2. The Notice of Motion shall stand as a simple summons.

3. The founding affidavit shall stand as the declaration to the simple summons.

7. The evidence shall be that of any of the following witnesses for the applicant:

7.1 The applicant 7.2 Victoria Godlo 7.3 Ngwayibanjwa Sidwell Godlo 7.4 Euphenia Nokuhle Ngcukuva 7.5 Leonard Sphiwo Mzamo 7.6 Thulani Phineas Godlo 7.7 Sibongiseni Emmanuel Godlo and 7.8 Thatelo Makhethla.

8. The evidence shall be that of any of the following witnesses for the fourth respondent:

8.1 the fourth respondent 8.2 Nqweneka Mzamo, 8.3 Simon Mzamo, 8.4 Mlindeli Mzamo and 8.5 Phakamile Alfred Mzamo.”

4. At the onset of the trial, the respondent raised two points *in limine*; non-joinder of the executor and the beneficiaries, as well as that the confirmatory affidavits were defective as they were deposed to before the applicant's affidavit was deposed to and signed.
5. The court ruled that the executor's joinder is unnecessary as the applicant is the executrix. In her founding affidavit, she averred that she was approaching the court as the wife to the deceased and as an executrix. Though adding her is crucial, for the purpose the application was brought, her citation and joinder as an executrix will be that of convenience than necessity.
6. Regarding the defective affidavits, they were signed before the applicant was signed. The person who deposed to a confirmatory affidavit must indeed know what they are confirming, which logically will mean the deponent will conclude their affidavit and have the person confirming the averments familiarise themselves with the content of the affidavit before they deposed to confirmatory affidavits. On 7 September 2022, the court referred the matter for oral evidence for the witnesses mentioned in paragraph 3 above. The court accepted that the witnesses mentioned in the 7 September 2022 court order would adduce oral evidence in confirming the applicant's affidavit, which was now, according to the order, the declaration to the simple summons.
7. Accordingly, the points *in limine* raised by the respondent could not be upheld.

Applicant's case

Nelisiwe P Godlo

8. The applicant deposed to an affidavit and testified. She is also called Thathelo Makhethla, also known as Nosiphelo Mzamo. She stated she was bringing the application as a wife of the deceased and an executrix. She was born in 1978, and the deceased was born in 1975. She met the deceased in Johannesburg. In 2006 they got involved in a love relationship. In 2009, the deceased arranged with his father, the late Sindabantu Mzamo(Mr Mzamo), to go and ask for her hand in marriage.
9. On 20 June 2009, lobola negotiations were held between their families at Lukholweni location, Matatiele, Eastern Cape, led by the late Mr Mzamo. A goat was slaughtered, and they were welcomed to the Godlo ancestral home. This is a Xhosa custom called *bagcotywa inyongo*. The Mzamo delegates were given a portion of goat meat and traditional beer to signify the union between the two families. After the lobola and cultural ceremony, the late Mr Mzamo requested to leave with her as the Mzamo family had already arranged *utsiki*, the customary welcoming of the bride. Her family agreed to the arrangement and asked to see the deceased, who was somewhere around the village. She was handed over to the Mzamo family in terms of their custom.
10. On Friday, 26 June 2009, her aunt accompanied her to the Mzamo family. They slept over, awaiting the ceremony to be held the following day. They had gifts in their possession, which were exchanged during the ceremony at the Mzamo family. The gifts included blankets, hats, pots, cups, glasses and a traditional dress. Her mother-in-law had advised her to arrange the gifts according to the list provided. On 27 June 2009, she was dressed up as a newlywed (*umakoti*) by the in-laws, including, Simbongile and Nosiphelo.
11. The Mzamo family slaughtered two sheep and a goat. Her mother-in-law, the respondent, welcomed her as a bride and gave her the name Nosange. She was introduced to the old ladies in the family and the village; among others was her grandfather-in-law. There was a celebration at the Mzamo family. Her aunt left on 28 June 2009 for her home. The deceased also left for Johannesburg on 28 June 2009.

She remained with the Mzamo family, including the respondent, for a week and was introduced to the family and taught how to be the newlywed.

12. She left for Johannesburg to join the deceased. They moved in together to the deceased's place. They bought their house in 2010 and stayed together. She still resides in that house with her children. They agreed that instead of two medical aid covers, she would retain the deceased as a beneficiary in her Sizwe medical aid scheme. Further, the deceased's obituary reflected that he left behind his wife, Nelisiwe Nosange Godlo Mzamo, and five children.
13. The rest of the lobolo was paid on 24 May 2014 at the applicant's home.

Nosiphelo Mzamo

14. Nosiphelo Mzamo testified that she is married to the deceased's brother. She stated there was a customary marriage celebration at the deceased's home in June 2009. There was slaughtering, and traditional beer was brewed. On the day the newlywed was welcomed, she cooked outside with the big pots for the celebration and assisted with the dressing of the newlywed, the applicant. The applicant was dressed by Simbongile in a traditional dress and a shawl or small blanket on her shoulders, who is the deceased's sister. She does not know why the respondent disputes the applicant and the deceased's marriage.

Nokuhle Ngcukuma

15. She testified that she was the applicant's aunt. She and the applicant travelled to the Mzamo homestead at Sterkspruit. The Mzamo family welcomed the applicant as their bride. She was dressed as a newlywed. There was slaughtering, traditional beer and food in celebration of the welcoming of the applicant.

Respondent's case

16. The respondent deposed to an affidavit and testified and called no other witnesses. She testified that she was the deceased's mother. She contends the existence of the alleged marriage and the celebration thereof. According to her, the marriage was not negotiated, entered, or celebrated per customary law on 20 June 2009 and 27 June 2009 at the applicant's and deceased's residences, respectively. No negotiation was

held between the applicant and the deceased families on 20 June 2009. She further disputes those two emissaries, whom the applicant contends concluded the lobola negotiations on behalf of the deceased. She stated that she was separated from the late Mr Mzamo at that time. She was, therefore, the head of the family, and she would have sent out the emissaries to the Godlo homestead, but she did not.

Issue

17. Were lobolo negotiations at Godlo family and marriage celebrated at the Mzamo household? Was there a customary marriage between the applicant and the deceased?

Discussion

18. In *Plascon-Evans Paints Ltd V Van Riebeek Paints (Pty) Ltd*¹, it was held that “*the approach in motion proceedings is that the final relief may be granted only if those facts averred in the applicant's affidavit that have been admitted by the respondent together with the facts alleged by the respondent, justify such an order. Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted*”. However, *allegations or denials of the respondent that are far-fetched or clearly untenable may be rejected merely on the papers.*”

“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 the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.”

19. In casu some issues were referred for oral evidence. The affidavits and annexures thereof formed part of the pleadings. The evidence on the parties' papers and the oral evidence heard served before this court.

20. The Recognition Of Customary Marriages Act² (the Act) gives full regard to customary marriage by placing it in equilibrium with other unions, including "civil marriage". Customary marriage *means a marriage concluded in accordance with customary law. Customary law means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.* Section 3(1) of the Act provides that "*the customary marriage is valid where the prospective spouses are above the age of 18 years, both consent to be married to each other under customary law; and the marriage is negotiated and entered into or celebrated in accordance with customary law.*"

¹1984 (3) SA 623 A at 634 H-I and 635 (C)

²120 Of 1998

21. Lobolo means *the property in cash or kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.*
22. Indigenous Africans may differ in how prospective spouses convey their consent to marry each other. *They may differ in how they (a) conduct the lobolo negotiations, (b) exchange gifts, (c) hand over the bride and acceptance in their new family (d) conduct various rituals and ceremonies around the customary marriage. The core requirement must not be lost sight of, which is the fictional existence of the marriage. Others, although factually married, might be heard saying they are not married, meaning that the marriage has not yet been celebrated. The factual position trumps the dogmatic expectations. See Butters v Mncosa.*³
23. In the Bill of Rights, there are various rights and freedoms enshrined, such as freedom of association, freedom to pursue religion and culture of choice, equality before the law, and protection against direct or indirect unfair discrimination based on race, gender, sex, age, or social origin. Families resulting from any type of marriage recognised by the Constitution are legally protected. Persons may marry each other by either civil or customary marriage without publicly celebrating their marriage. Most

African people's traditional or civil marriages are usually preceded by lobolo. When a party in an intimate relationship accepts their partner's proposal and requests to send a lobolo delegation to negotiate lobolo with their family, that indicates that the parties consider marrying each other.

24. It is undisputed that the applicant and the deceased were respectively 31 and 34 years of age when the families negotiated lobola, and the customary marriage was concluded in June 2009. They both consented to the marriage under customary rites, and the deceased sent emissaries to the applicant's home, who were cordially welcomed by emissaries from the applicant's family in June 2009. The lobolo letter reflects an agreed amount of R10 00 for lobolo between the two families' emissaries.
25. According to the applicant, the marriage was not only negotiated and entered into by

³2012 (4) SA 1 (SCA) at 20

customary rites but celebrations were held on 27 June 2009 at the deceased's home. The applicant's family slaughtered a goat as part of the celebration. The applicant was handed over to the deceased's family as a bride, and two sheep and a goat were slaughtered to welcome the bride. The applicant was dressed in traditional bride attire and was introduced to the guests as their daughter-in-law and given the name "Nosange" by her mother-in-law.

26. In *Mankayi v Minister of Home Affairs & Others*,⁴ it was held:
[32] *"the successful holding of the lobolo negotiations and part payment of the lobolo, although it is a very important step in the process, on its own alone, it would not be tantamount to a conclusion of a customary marriage.*
[30] *"the conclusion of a customary marriage is a process rather than an event. Once there has been an agreement on lobolo, and the bride is allowed to join their husband or their family, a customary marriage has been formed."*
27. The late Mr Mzamo deposed to an affidavit confirming that he led the emissaries sent by his late son, the deceased, to ask for a hand in marriage at Matatielle, the applicant's home. Nosiphelo Mzamo, married to the deceased's uncle, confirmed the customary marriage celebration at the deceased's home. In that, there was

slaughtering, and traditional beer was brewed. She was cooking outside with the big pots for the celebration and assisted with dressing the newlywed, the applicant. The applicant was dressed by the inlaws, including, Simbongile, in a traditional dress and a shawl or small blanket on her shoulders. Simbongile is one of the deceased's sisters in the Mzamo family.

28. The respondent baldly disputed the lobolo negotiations and handing over of the applicant as a bride. She stated she was the head of the family as they had separated from the deceased's father in 2007. She provided no countervailing evidence, nor did she meaningfully contend with the detailed version presented by the applicant. She cannot refute the evidence provided by the applicant. The respondent's bald denial of the handing over can be rejected as unsustainable. The court is persuaded that the applicant has illustrated that the customary marriage was negotiated, entered into and celebrated in accordance with the customary law.

⁴ (3146/2020P) (2021) ZAKZPHC at 32 & 30

29. No doubt exists that the applicant and the deceased lived as husband and wife. After the celebration in June 2009 at Sterkspruit, they stayed together. In 2010, they bought a property. According to the Windeed printout annexed to the applicant's founding affidavit, their names are reflected as the house's two owners. She attached a copy of the medical aid scheme where the deceased was medically covered and the applicant is the principal member.
30. I find that the applicant is the deceased's surviving spouse, and therefore, the customary marriage between the applicant and the deceased on 27 June 2009 is valid. This is despite the fact that it was not registered. Section 4(9) of the Act clearly states that failure to register a customary marriage will not affect the validity of the customary marriage. No ground is established for this court not to accept the applicant's version and evidence relating to the existence of the customary marriage. On the balance of probabilities, the applicant has proven that she is entitled to the relief as set out above.
31. Regarding the costs of the application, the applicant asked that the application be granted with costs. In matters of costs, the general rule is that the successful party

should be given their costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.

32. The respondent opposed the application denying the existence of the marriage. She was calm, confident and firm during her testimony. The court did not get the notion that she had chosen not to tell the truth about the non-existence of the applicant and the deceased's marriage. The court could also not ascertain whether she forgot about it. There was also no fault or misconduct on the applicant's part in bringing the application. This matter concerns the applicant, whom the court has found was customarily married to the respondent's deceased son. Considering the other issues involved in this matter though they were not before this court for determination, it is this court's respectful view that there is no justification to award costs in favour of the applicant against the respondent.
33. Accordingly, I intend to grant an order for costs against the estates of the deceased, estate number 004128/2021.
34. Consequently, the following order is granted.

Order:

1. The customary marriage between the applicant and the late Bulelani Lawrence Mzamo, contracted on 27 June 2009, is valid.
2. The first and second respondents are to register the customary marriage for 27 June 2009 between the applicant and Bulelani Lawrence Mzamo and issue the registration certificate as envisaged under Section 4(8) of the Recognition of Customary Marriages Act 120 of 1998.
3. The estate of the late Bulelani Lawrence Mzamo is to bear the application costs.

N. MAZIBUKO
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14:00 on 28 June 2023.

Date of hearing: 19-20 April 2023

Date of Judgment: 28 June 2023

Appearances:

Counsel for the plaintiff: Adv L. Mfazi

Counsel for the defendant: Mr V Mthunzi