



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

CASE NO: 023479/2022

Heard on: 14 June 2023

Judgment: 31 July 2023

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

IN THE MATTER BETWEEN:

MAHLASELE DOROCAS MOKWENA

APPLICANT

AND

ANNA REFILWE MOKWENA

FIRST RESPONDENT

THE MINISTER OF HOME AFFAIRS

SECOND RESPONDENT

THE MASTER OF THE HIGH COURT,

JOHANNESBURG

THIRD RESPONDENT

LATE ESTATE SERUWANE FRANK MOKWENA

FOURTH RESPONDENT

ESTATE NO: 01754/2021

JUDGMENT

STRIJDOM AJ

1. This is an application in which the applicant claims the following relief:
 - 1.1 Condonation of the late institution and registration of a customary marriage;
 - 1.2 A declaratory order that a marriage between the applicant and the deceased (Serwane Frank Mokwena) exist;
 - 1.3 To have such marriage registered in terms of section 4(4) of Act 120 of 1998;
 - 1.4 That a marriage certificate be issued thereof;
 - 1.5 That the marriage between the deceased and the first respondent be expunged;
 - 1.6 That the marriage between the deceased and the first respondent be declared null and void;

- 1.7 That the second respondent withdraw the letter of executorship granted to the first respondent;
 - 1.8 That the first respondent disclosed all funds collected and received by the first respondent on behalf of the deceased estate and to pay all such funds collected from the institution or individuals into the account of the applicant's attorney.
2. The core issue in this matter is whether there was a customary marriage between the deceased and the applicant and whether the subsequent civil marriage between the first respondent and the deceased is null and void.
3. The following facts are common cause between the parties:
 - 3.1 The alleged customary marriage between the applicant and the deceased was not registered;
 - 3.2 the deceased entered into a civil marriage with the first respondent on 17 August 1998;
 - 3.3 the first respondent was appointed as the nominated executrix of the deceased estate.
4. The applicant, a female pensioner aged 63, is currently residing at Stand No. 67, Sophia Section, Bothashoek Village, Burgersfort, Limpopo Province. A copy of her ID is attached as annexure 'MDM1' to her founding affidavit.¹

¹ Caselines: 03 -2

5. She states that she entered into a customary marriage with Serwane Frank Mokwena (hereinafter referred to as the deceased) on 28 May 1978.
Customary negotiations between the deceased's family and her family took place on 28 May 1978, wherein the amount of R 205 (two hundred and five rand) was received by her family for Lobola.²

6. She further states that due to the old age, both the witnesses of the customary marriage were unable to depose to any confirmatory affidavits.
However, she managed to obtain a confirmatory statement from another sister of the deceased, Mrs Mantosi Betty Nkosi.³ A letter from Chief Ramauke, K S, confirming the existence of the customary marriage between the applicant and the deceased is attached to the founding affidavit as annexure 'MDM5'.⁴

7. The applicant and the deceased had been living as husband and wife and 8 (eight) children were born out of the marriage. The children's names are:
Moses Mokwena, Ouma Mokwena, Mathilda Mokwena (pre-deceased), Bethuel Mokwena, Helen Mokwena, Salome Mokwena, Lawrence Mokwena and Tebogo Mokwena.⁵

8. The applicant states that during 2001 her daughter Ouma Mokwena went to the Department of Home Affairs for her identity document registration. She was asked if the first respondent is her mother and she told the official that

² Caselines: 03 -4; Annexure 'MDM3'

³ Caselines: 03 - 5

⁴ Caselines: 03 - 6

⁵ Caselines: 01 - 38 para 24: Founding Affidavit

she did not know the person. Her confirmatory affidavit is attached to the founding affidavit as annexure 'MDM6'.⁶ The applicant relayed this to the deceased and he stated that he did not know the first respondent. The marriage certificate is attached to the founding affidavit as annexure 'MDM7'.⁷

9. The applicant was not aware of her husband being in any other marriage, prior to the discovery that was made at the Department of Home Affairs in 2001.

10. The deceased, who passed away on 25 June 2021,⁸ was working as a bus driver at Putco Bus Services. He passed away due to illness at Freedom Park, House No. 4159, Volt Street, Devland, Soweto, which had been the common house of the applicant and the deceased. It is the same property that the deceased had shared with the first respondent, prior to his death.

11. The applicant was informed by the first respondent that arrangements had been made for the deceased's burial to be held at Freedom Park, Soweto on 3 July 2021, and that as a family of the deceased, they are not welcome at the funeral. This prompted the applicant to lodge an urgent application to this court for an order to remove the deceased's body from the mortuary of Chris Hani Bragwanah Hospital for the purpose of burial. An order was granted in favour of the applicant.⁹

⁶ Caselines: 03 - 8

⁷ Caselines: 03 - 9

⁸ Caselines: 03 - 3; Death Certificate: Annexure 'MDM2'

⁹ Caselines: 03 - 14 to 15 Court Order: Annexure 'MDM10'

12. The applicant also attached two confirmatory affidavits to her founding from her sons, Mmasane Moses Mokwena and Lawrence Mokwena, as annexures 'MDM8' and "MDM9'.¹⁰
13. The first respondent contended that a valid, legal marriage exists between the deceased and herself and that no customary marriage is in existence between the deceased and the applicant.¹¹
14. Determination of fact in motion proceedings are not made on the probabilities disclosed in the affidavits, unless this is done to enable the court to decide whether or not to reject either party's version.
15. The principles applicable to the determination of the relevant facts when final relief is sought, were set out in **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd**¹². However, in matters of status, the court cannot simply fall back on the Plascon-Evans rule.
16. 'A bare denial of the applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the court to conduct a preliminary investigation...and to ascertain whether the denials are not fictitious, intended merely to delay the hearing.'¹³

¹⁰ Caelines: 03 – 10 to 13

¹¹ Caselines: 01 -7 para 16: Answering Affidavit

¹² [1984] 2 ALL SA 366 (A) 367 – 368, 1984 (3) SA 623 (A) 634 E – 635 D

¹³ Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 [T] at 1165

17. The respondent's affidavit must at least disclose that there are material issues in which there is a *bona fide* dispute of fact, capable of being decided only after *viva voce* evidence has been heard.
18. It is necessary to make a robust, common-sense approach to a dispute on motion, as otherwise the effective functioning of the court can be hamstrung and circumvented by the simplest and blatant stratagem.
19. I have carefully perused the affidavits, and after considering the nature of the extent of the factual disputes arising from the affidavits, I have come to the conclusion that the applicant has proved on a balance of probabilities, that a valid customary marriage between the deceased and the applicant existed at the time the deceased contracted a civil marriage with the first respondent.
20. In order to establish the validity of the customary marriage, the following must be taken into account:
 - 20.1 There were lobola negotiations concluded on 28 May 1978;
 - 20.2 The applicant and the deceased cohabited as husband and wife, even though the deceased worked in Gauteng;
 - 20.3 Eight children were born out of the marriage;
 - 20.4 There is a confirmatory affidavit from the Tribal Chief confirming the existence of the marriage;

- 20.5 There is a confirmatory affidavit from the deceased's sister, confirming the existence of the marriage. The applicant and the children are using the deceased's surname.
21. It is trite that for a customary marriage to be valid, it must be negotiated, entered into, and celebrated.
22. In terms of section 4(3)(a) of The Recognition of Customary Marriages, Act 120 of 1998, a customary marriage entered into before the commencement of this Act, should be registered within a period of one year after the conclusion of the marriage. In this matter the applicant's marriage to the deceased should have been registered by November 1999.
23. As a lay person, the applicant was not aware that the marriage to the deceased needed to be registered within a specified period. She was only made aware that she had to be in possession of a marriage certificate when she consulted with her attorney in this matter. She was advised to register her customary marriage with the deceased, before the Master of the High Court could issue a letter of executorship.
24. I am of the view that the applicant will suffer irreparable harm if condonation is not granted to register her customary marriage. The applicant provided a reasonable explanation for her failure to register the said customary marriage.

Condonation is therefore granted for the late registration of the customary marriage.

25. Section 3(2) of the RCMA provides that no spouse in a customary marriage shall be competent to enter into a marriage under the Marriages Act 25 of 1961 during the subsistence of the customary marriage. Therefore, the civil marriage concluded between the deceased and the first respondent was concluded in contravention of this provision.

26. The Constitutional Court in **Mayelane v Ngweyama and another (Women's Legal Centre Trust and others as amici curiae)**¹⁴ held:

'[71] Are the first wife's rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not...

[72] Second where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual and reproductive health or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to either domestic life without her consent.'

¹⁴ 2013 (8) BCLR 918 CC

27. In reality, such as in this matter, men from rural areas leave their customary wives and go to the big cities for work purposes. Once they have settled in, they meet other woman and contract civil marriages, with complete disregard to their customary wives back home. Our laws are being used as a weapon to protect the customary wives who were left in the villages by their husbands.

28. A wife in a customary marriage has, on the basis of equality with her husband, and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.¹⁵

29. The deceased had equal status with the applicant and thus had no right to dispose of their matrimonial assets without the consent of the applicant.

30. I concluded that the marriage between the deceased and the first respondent is null and void, due to the fact that the deceased and the applicant had already contracted a customary marriage in 1978. The said customary marriage was never polygamous; the applicant and the deceased never divorced and the applicant never gave her consent to the civil marriage.

31. In the result the draft order marked 'X' is made an order of court.

¹⁵ Section 6 of RCMA

STRIJDOM JJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
JOHANNESBURG

Appearances:

For the Applicant: Adv L S Msiza

Instructed by: Twala Pindy Attorneys

Respondent: Adv C Makhabela

Instructed by: S W Nkala Attorneys