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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case №: 40157/2017

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

Kooverjie
20/9/18

In the matter between:

MNISI, MANDLA VINCENT ZOLI First Applicant

MWANDLA, CLEMENTINE NOMPHELELO Second Applicant

and

MNISI, MOGALE CLHONWA First Respondent

MINISTER OF HOME AFFAIRS Second Respondent

JUDGMENT

KOOVERJIE AJ:

[1] The applicant seeks an order declaring that the first applicant and the first respondent were not legally married to each other in terms of the Swazi tradition in terms of a customary law and/or Swazi tradition on 5

July 2014 or at any time at all. Therefore any purported customary marriage between them be declared null and void. For the purposes of this judgment, the parties will be referred to as the applicant and respondent respectively.

[2] The respondent from the outset, contended that this matter cannot be resolved on the papers. There is a *bona fide* and real dispute of fact in this matter. On this basis, the court is unable to make a finding on the papers for reasons it set out in her papers. This matter should be therefore be referred to trial, particularly to demonstrate that the customary marriage between the applicant and respondent was in fact entered into.

RECOGNITION OF CUSTOMARY MARRIAGES ACT (RCMA):

[3] The law that governs customary marriages is the Recognition of Customary Marriages Act, 120 of 1998 ("*the RCMA*") which came into effect on 15 November 2000. The objective of the said legislation was to recognise customary marriages, to specify the requirements for a valid customary marriage and moreover to regulate the dissolution of customary marriages and matters connected therewith. Section 211(3) of the Constitution states that "***courts must apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law***".[1] Its enactment was inspired by the equality and dignity rights of women married by way of customary

[1] Bhe and Others v Magistrate, Khayelitsha and Others 2005(1) 580 CC

law.[2] Section 39(2) provides that when developing customary law a court "***must promote the spirit, purport and objects of the Bill of Rights***"

[4] In these papers the provisions and applicability of the RCMA are not disputed. The requirements for the validity of a customary marriage are set out in Section 3(1) of the RCMA. Certain conditions must be met before a customary marriage can be considered to be valid. Both parties must be over the age of 18, consent to be married to each other and specifically consent to be married under customary law. Such marriage must be negotiated and entered into and celebrated in accordance with the customary law.

[5] Furthermore for the marriage to be recognised as a customary marriage, certain formalities must be adhered to, namely that: there must be an agreement between the two families with regard to the marriage between the parties; there must be payment of lobola and that there must be a handing of the bride to the family of the groom.

[6] Most significantly, the parties must agree that they wish to be married and further agree that such marriage be in terms of customary law. For this there must be a meeting of the minds. Consequently the parties must therefore intend to marry in accordance with the terms agreed that they are bound thereto. More often than not a factual determination is required in order to come to a finding as to whether the aforesaid requirements have been complied with. Paramount to the

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[2] Modjadji Florah Mayelane v Mphephu Maria Ngwenyama and Others CCT 2013(4) SA 415 CC (MM v MN case)

aforesaid conditions and formalities, the intention of the parties is considered in accordance with their objective conduct.

[7] Section 6 of the RCMA recognises the equal status of a wife in the customary marriage, gives her full status and capacity including the capacity to acquire assets and to dispose of them, to enter into contract and to litigate and in addition to any rights and powers that she might have at customary law.

[8] Section 7 of the RCMA sets out the proprietary consequences of customary marriages in that Section 7(1) stipulates:

> "***The proprietary consequences of a customary marriage entered into before the commencement the Act, continue to be governed by customary law.***"

In terms of Section 7(2) of the RCMA the following is stated:

> "***A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante nuptial contract which regulates the matrimonial property system of their marriage.***"

Of importance is Section 7(6) of the RCMA which stipulates that:

> "***A husband in a customary marriage who wishes to enter into a***

further customary marriage with another woman after the commencement of this Act, must make an application to court to approve a written contract which will regulate the future matrimonial system of his marriages."

[9] Section 8(1) of the RCMA stipulates that "***a customary marriage may only be dissolved by a court in terms of a decree of divorce and on the ground of irretrievable breakdown of the marriage***."

[10] I particularly take cognisance of Section 9 of the RCMA which stipulates that the "***failure to register a customary marriage does not affect the validity of the marriage***". The respondent however holds a different view on this aspect.

[11] As alluded to above, Section 3(2) of the RCMA entrenches an absolute bar to the conclusion of any subsequent civil marriages for those who are already in customary marriages. This very provision goes to the heart of the dispute between the parties of this matter. The intention behind this provision is to avoid the inherent, irreconcilable differences between the two institutions including, *inter alia*, bigamy, the binding of the family through lobola and the different methods of resolving disputes arising from adultery, separation and divorce.

[12] The pertinent issue which this court has to determine is whether it is able to on the papers before it above to do so, make a determination as requested by the applicant. If it can do so, then it must make a finding. If not, then it must identify if in fact there is a genuine dispute of fact

between the parties which necessitates a referral to trial.

[13] At all relevant times the respondent disputes that a customary marriage existed between the applicant when she married the applicant. The respondent requested this court to refer this matter to trial as a result of the aforesaid dispute of fact which exists in this matter. I highlight the salient disputes raised by the respondent:

[13.1] the respondent contests the fact that the applicants were married in terms of the customary law. The applicant alleges that he is and remains married to the second applicant. The respondents contests this and seeks of registration of the said marriage.

[13.2] the criticism levelled at the applicant is that although he attached a list of wedding gifts purportedly acquired by the second applicant's family, he furnishes no evidence to substantiate the authencity of the said list. In other words, it may have been fabricated. Moreover there is no independent corroboration from any of the second applicant's family that there had been a customary marriage entered into and formalised by the parties.

[13.3] the respondent alleged that the second applicant was aware that the applicant married her both in terms of customary law and civil law. If one has regard to an affidavit of the applicant in respect of exercising his parental obligations,

the applicant recognised the respondent as his wife and the second applicant as only being involved in "*love relationship*".

[13.4] On this basis the respondent argued that the subsequent civil union is valid as no customary union existed between the parties. A mere "*love relationship*" does not in any way constitute customary union.

THE FIRST MARRIAGE:

[14] To the contrary, the version of the applicant is that the marriage between the first and second applicants still exists and that a customary union had indeed been entered into between the parties. Since the first marriage is valid and remains in existence, the civil marriage concluded between the applicant and respondent on 15 November 2014 is void *ab initio*.

[15] Counsel for the applicant advanced further argument that consent of the first wife is required before the second marriage can be declared valid. However our courts have been cautious in accepting that the RCMA directly prescribes that the first wife must grant her consent to her husband's subsequent customary marriages in order for such marriages to be valid. This aspect is material and is set out in detail below.

[16] In paragraph 10 the applicant sets out in detail how the customary

marriage came into being. It was a marriage between a Swazi and a Zulu. Around 2 June 2008 the Applicant approached the second applicant's parents and elders of the family at her village. During this visit he was accompanied by his father and the elders of his family. His family members had entered into the necessary negotiations on his behalf where they met with second applicant's father, her uncle and her one brother. At this meeting his family members informed the second applicant's family members that they desire the hand of their daughter in marriage. The second applicant's family members agreed and consented thereto.

[17] The formality regarding the lobola had taken place and discussions ensued between the two families regarding the amount of lobola. In terms of the lobola he was required to deliver same to the value of a reasonable number of cattle and ultimately agreed that he would deliver same to the value of R33 000.00. At this first meeting the applicant had bestowed an amount of between R12 000.00 to R18 000.00 cash to the second applicant's father as a token of the agreement allowing him to enter into a marriage with his daughter. Subsequently the lobola was delivered, namely in the form of eight head of cattle to the second applicant's father's home. Further to this lobola he was also required to present certain wedding gifts to the second applicant's family members in accordance with a list they provided to the applicant. These gifts were then delivered on 27 June 2009.

[18] The celebrations had indeed taken place. Eventually on 27 June 2009 and in celebration of the marriage between the applicants, a traditional wedding ceremony was held at the home of the second applicant's father. Many guests attended the home of the second applicant as well as the wedding. Gifts were exchanged between the respective families and between the applicants. A goat and a cow were slaughtered as a further token of the marriage between the applicants.

[19] There was then the handing over of the bride to the family. The second applicant and the father were invited to the applicant's father's home to have a celebratory lunch and this is where the second applicant was introduced to his family members and welcomed into the family. Thereafter the applicants continued to cohabitate as husband and wife. The couple then settled and resided in Heuweloord in Centurion. This demonstrated that a meeting of the minds and moreso they consented to being married by customary rights.

[20] Six years later the second applicant fell pregnant and a daughter was born on 11 February 2011. They planned to enter into a civil marriage but did not. A factor that prevented this from happening was an incident that occurred which left the applicant quadriplegic. The applicant was a victim of a crossfire where he was shot and injured. The applicant was hospitalised for a period of five months in Meulmed Hospital in Pretoria. Upon his discharge he rented accommodation which was in close proximity to the hospital as he was required to undergo regular rehabilitative treatment. During this time however, the applicants

remained in an intimate, loving and exclusive relationship with each other. During 2014 there was a discord between the parties and they decided to live apart, however the marriage was never annulled. During 2016 the parties started living with each other again and particularly due to their responsibilities towards the minor child.

[21] The respondent contended that a customary union neither took place nor existed between the applicants. In support of her allegations, this court was directed to the applicant's version set out in another affidavit. For the purposes of this judgment such affidavit will be referred to as the second affidavit.

[22] In such affidavit he placed the second applicant on a pedestal describing her as his customary wife whilst in the other affidavit (regarding his parental rights) he paints the opposite picture. Such affidavit was compiled when the applicant sought rights and access to his minor child. At the time the applicants were not on good terms.

[23] Counsel for the respondent challenged his version and specifically that no proof exists that the customary marriage was registered in terms of the RCMA. By attaching a list of the wedding gifts purportedly acquired from the second applicant's family remains unsubstantiated. No corroborating evidence was presented as to who compiled the list. Furthermore, no independent corroboration from any member of the family to this effect existed. Moreover, the second applicant was at all relevant times aware that the applicant married the respondent in terms

of the customary law as well as in terms of civil law.

[24] In the (second affidavit) under oath, the applicant recognised the respondent as his wife and referred to the second relationship with the second applicant as only a "***love relationship***".

[25] This court was reminded that it should be cautious to make a finding as there exists a clear dispute of fact in respect of whether a valid customary marriage exists between the applicants. It was submitted that the applicants have been *mala fide* in approaching this court knowing fully well that there was a dispute of fact. This constitutes an abuse of this court's time and process. The respondent has always been in good faith and had since the onset of these proceedings informed the court that the dispute of facts exist and this matter should be referred for evidence at a trial.

[26] The motive of the applicant is questionable in that he attempted to circumvent the appropriate civil proceedings where a court would be able to properly consider the status of the parties. In this way the applicants are preventing the respondent from issuing a summons for divorce against the first applicant.

[27] By virtue of these proceedings the respondent has gone to great lengths to illustrate the contrary versions of the applicant. Counsel for the respondent demonstrated how the applicant is not playing open cards with this court. The respondent maintains that the parties are married in community of property and that both the customary union

and the civil union had been entered into.

[28] Reference was made to this current application at paragraph 4 where the applicant refers to the second applicant as his wife. However in the "***other***" affidavit he alleges (in paragraphs 15 and 16) that the parties were merely involved in a "*love relationship*" from 2004 until late 2014 and that they have been separated since 2014.

[29] With reference to paragraph 5 of the main application he referred to the respondent as a Montessori teacher. However in the second affidavit (in paragraphs 9 and 10 thereof) he alleged that he was married to the respondent, namely Mogale Mnisi whom he married on 15 November 2014. Counsel of the respondent highlighted the aforesaid contradictory versions of the applicant and submitted that they are material to the dispute between the parties.

[30] It was further argued that it is absurd for the applicants to persist with a version that their customary union exists if one has regard to the fact that the second applicant was not there to support and take care of her husband when he was undergoing medical treatment after his incident. Furthermore, it is highly improbable that in 2014 they lived apart but wished to enter into a civil union.

[31] In the "***second***" affidavit, he recognises the respondent as his wife. Furthermore, an existing marriage relationship between the applicants ensued. It makes little sense as to why he then pursued a second relationship with the respondent. The only probable conclusion one

would adduce from these versions is that the applicants were never married to each other.

THE SECOND MARRIAGE:

[32] The respondent persists with her version that a marriage exists between applicant and the respondent, not only was a customary union entered into, but a civil marriage as well. In the papers the respondent sets out the circumstances under which the applicant and the respondent met, more particularly that they had received the blessings of the pastor of their Church in order to enter into a marriage and that the applicant was required to write a letter to the second applicant's family. The applicant's family had also forwarded a letter to the respondent's family in May 2014 indicating their intentions that they requested the blessings of the respondent's family for the marriage. Lobola negotiations were indeed made in June 2014 and finalised in August 2014. Subsequently a celebration occurred and the respondent was handed over to the applicant's family. Then in November 2014 the applicant and the respondent had entered into a civil marriage as well.

[33] Having considered the affidavits of both parties as well as the submissions of both counsel I make the following observations, namely:

[33.1] From the papers before me, it is my *prima facie* view that a customary marriage had been entered into between the applicants. In paragraph 10 of the founding affidavit he goes

into extensive detail as to how the customary union came into being. The prescribed formalities and requirements in terms of the RCMA have also been met; The respondent in her response was unable to deny the occurrence of the said customary union between the applicants and was unable to comment thereon. Applying the ***Plascon Evans principle*** such facts are deemed to be admitted. It may have strengthened the applicant's case if he had supporting affidavits from family members or community members. However in this instance the court is able to draw a conclusion on this aspect as the applicant's version remains unchallenged by the respondent.

[33.2] With regard to the second marriage with the first respondent, both parties confirm that a civil union was entered into. The applicant disputes that a customary marriage had taken place. However the respondent demonstrated on the papers that the formalities in respect of the customary union had indeed taken place during May to November 2014. The respondent sets out the events that led to both the civil and customary union in extensive detail. However this version had been disputed.

[33.3] It is common cause that the relationship between the applicants became strained and they had separated in 2014. Shortly thereafter the applicant met the respondent and they

forged a relationship which eventually led to them getting married.

[33.4] The parties part ways in respect of the following issues: whether the second applicant consented to the second marriage and the respondent? The applicant's version is that the second applicant had never been informed of the second marriage and consequently she could not have contested thereto. The respondent, on the other hand, alleged that the second applicant was aware of the second marriage and that both a civil and customary union existed.

[33.5] The second aspect is whether or not the first marriage had been annulled? The respondent submits that the parties had separated and no longer living together. Moreover it was highly improbable that they were married as he referred himself in the parental rights affidavit as an "*unmarried*" father. It was further highly unlikely that the parties were married if the applicant was litigating for contact rights in respect of his minor child.

[33.6] It appears from the papers, that in 2016 the Applicant and the first respondent separated and this is when the applicants rekindled their relationship.

[33.7] By virtue of Section 8 of the RCMA, a customary marriage may only be dissolved by a court by a decree of divorce.

There is no such evidence before this court. The respondent contends that such marriage no longer subsisted and therefore the second marriage remains valid.

[33.8] In the alternative, the respondent further alleged that the second applicant was aware of the second marriage and the only reasonable inference that can be drawn is that consent was indeed given for the applicant to marry the respondent.

[33.9] The law is clear that for the first marriage to be annulled a court is required to issue such decree of divorce. These facts are disputed. The respondent maintains that the marriage had been annulled. However I have no validation thereof in the form of a court order.

[33.10] Moreover, Section 7(6) of the RCMA requires of the applicant if he wished to enter into a further customary marriage to make an application to court to approve a written contract which will regulate the future matrimonial system of his marriage. Section 7(8) further stipulates that both the existing and the prospective wife must be joined to the authorisation proceedings, as parties with an obvious and protectible interest. Section 7(6) stipulates "***A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this act must make an application to the court to approve a written contract which will regulate the***

future matrimonial property system of his marriages".

[34] In order to determine whether the affidavits disclose real, genuine and *bona fide* disputes of fact, this court is required to carefully scrutinize the affidavits. It is trite that a real, genuine and bona fide dispute of fact does exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts said to be disputed. There will be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him.[3]

The Plascon Evans matter[4] considered the approach set out at ***Stellenbosch Farmer's Winery v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234C at 234E-G*** where the court stated:

> ***"Where there is a dispute as to the fact of final interdict should only be granted ... if the facts as stated by the respondent together with the admitted facts. Applicants' affidavits justify such an order .... where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted".***

[35] However if the dispute of fact is genuine and is of such a nature that it cannot be satisfactorily determined without the advantage of a trial. In such an instance the matter can only be resolved by *viva voce* evidence. In this instance the respondent has not merely presented

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3 Wightman t/a JW Construction v Headfair (Pty) Ltd and Another 2008(3) SA 371 SCA

4 Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623A at 643E – 635E

bare denials but has a version which differs from the applicants. The respondent has denied the applicants' version and wish to present evidence to show that the applicant is untruthful.

[36] Counsel for the applicant submitted that a *bona fide* dispute does not exist in the following instances namely where the respondent either states that she cannot lead evidence herself to dispute the applicant's version and merely puts the respondent to the proof thereof or a *bona fide* when the respondent relies on a bare denial of the allegations contained in the applicant's founding affidavit.

[37] In ***Fakie NO v CCI Systems (Pty) Ltd 2016 (4) SA 326 SCA at par 55*** the court held that:

> "***... judge should not allow the respondent to raise fictitious disputes of fact to delay the hearing of the matter of to deny the applicant its order. There has to be a bona fide dispute of fact on a material matter. This means that an uncreditworthy denial, or a palpable implausible version can be rejected out, hand without recourse to oral evidence."***

[38] In these circumstances my *prima facie* view on the papers are that the applicant entered into a first customary marriage and then a second civil marriage and in all probably a customary marriage.

[39] The RCMA recognizes the consequences of customary marriages as alluded to above, Section 6 gives equal status and capacity to spouses. It stipulates "***A wife in a customary marriage has, on the basis of***

equality with her husband and subject to the matrimonial system governing the marriage, full status and capacity, including the capacity to acquire assets 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." The underlying motive for this application and the respondent's intention to finalise her divorce is based on the parties' proprietary issues. The status of these of both wives' marriages would have an impact on the proprietary consequences.

[40] From the papers, it is obvious that at the time the marriage were entered into, all the parties were ignorant of the law that governed their marriages and the legal implications thereto. It was only when this application was instituted had the applicant been advised of the limitations in respect of the said marriages. He contests the second marriage void on the premises that the second applicant did not consent to the second marriage with the first respondent.

[41] He relies on Section 3(2) which forbids a spouse in a customary marriage to enter into another marriage under the Marriages Act during the subsistence of the first customary marriage. Such customary marriage may only be dissolved by a court with a decree of divorce in terms of Section 8 of the RCMA.

[42] Moreover, in my view if the applicant relies on the fact that consent was required then he was required to demonstrate that the customs of his community require that the consent of his first wife was necessary. This has not been shown. In the ***MM v MN*** matter the Constitutional

Court went into great detail in determining whether the RCMA makes provision for the consent requirement. In paragraph 34 the court's view was:

> "***Does the Recognition Act directly prescribe that a first wife must grant her consent to her husband's subsequent customary marriage in order for those marriages to be valid? We think not.***"

[43] The court was of the view that the consent requirement is unique to each community. A court is required to firstly ascertain whether consent from the first wife is required by virtue of its own specific customs. The RCMA does not make provision for this. I have noted that in this matter no corroborating evidence was provided in this regard. The Constitution acknowledged the originality and distinctiveness of indigenous law as an independent source of norms within the legal system such that customary law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.[5]

[44] The court went on to conclude that Sections 3(3) and 3(4) deals with consent required from third parties for the validity of the marriage namely the parties' parents and legal guardians. At paragraph 38 the following was stated:

> "***It can safely be concluded that the express requirements of validity stipulated in Section 3 of the Recognition Act do not directly prescribe***

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[5] MM v MN, paragraph 23
See also Alexkor Ltd and Another v Richtersveld Community and Others 2004(5) SA 460 CC

the first wife's consent to a subsequent marriage."

[45] Of further importance is paragraph 49 where the following is stated:

> ***"Second, the court must understand concepts such as consent to further customary marriages within the framework of customary law and must be careful not to impose common law or other understandings of that concept. Court must also not assume that such a motion as 'consent' will have a universal meaning across all sources of law."***

[46] In essence the court held that one must be alive to the particular customs and where there can be various acceptable manifestations of a consent requirement together with a wealth of custom based ancillary rules dealing with the effects of not requiring consent, including its property effects. The court therein therefore deemed it appropriate to invite representations in respect of the specific customs of such community.[6] Therefore customary law must be understood in its own terms, and not through common law.

[47] Customary law is a system of law that is practised in the community, has its own values and norms, is practised for generation to generation and excludes and develops to meet the changing needs of the community.[7] Therefore customary law must be understood on its own terms.

[48] The respondent certainly disputes the fact that no consent was given

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6 MMV MN supra at para 51
7 MM v MN supra para 24.

by the second applicant. She alleged that at all relevant times the first respondent was aware of the second marriage and had indeed consented thereto. The applicant on the other hand alleges that the first respondent was not aware of the second marriage and could thus not have consented to.

[49] The court in the said matter, from the outset stated that in order to determine if the consent of a first wife is necessary for the validity of her husband's subsequent customary marriage then the following enquiry should be made:

> ***"(i) Whether the Recognition Act directly prescribed the first wife's consent as a requirement for voluntary, and***
>
> ***(ii) Whether living Xitsonga custom makes such a prescription."***

[50] The RCMA was certainly introduced to protect spouses who had previously been humiliated and excluded in every aspect of their lives particularly their dignity and proprietary rights.[8]

[51] On the papers before me I am unable to determine the validity of the second marriage. It is incumbent for oral evidence and representations to be made in respect of the content of the local customs of the applicant's and respondents' community.

[52] These are circumstances where the court is required to examine the

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8 MM v MN supra paragraph 24

alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence.[9]

[53] Insofar as the various points in *limine* raised by the respondent particularly on the expert report of Dr Ndima these issues can be ventilated at the trial stage. Insofar as costs are concerned I deem it appropriate that the costs should be determined upon the final outcome of the matter. Hence costs should be in the cause.

The following order is made:

(1) This matter be referred to trial;

(2) The costs of this application will be costs in the cause.

KOOVERJIE A.J.
ACTING JUDGE FOR THE HIGH COURT

APPEARANCES:

For Applicant:	Adv A de Wet SC Adv D Hodge Steve Merchale Attorney (Pretoria)
For the Respondent:	Adv East: Wilcock Ndebele Attorneys (Kempton Park)

[9] Room Hire matter supra

Date heard: 3 September 2018

Date of judgment: 20 September 2018