



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO.: 28059/2021

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

.....
SIGNATURE

19 / 7 / 22

.....
DATE

In the matter between:

DIPUO ANDRONICA PHELE

First Applicant

LEAH SIBANYONI

Second Applicant

and

MARIA JOYCE SIBANYONI

First Respondent

MINISTER OF HOME AFFAIRS

Second Respondent

THE MASTER OF THE HIGH COURT, PRETORIA

Third Respondent

BJ MHLONGO ATTORNEYS INC.

Fourth Respondent

JUDGEMENT

Introduction

[1] This is an urgent application in terms of the provisions of Rule 6(12) (a) of the Uniform Rules of Court. The applicants obtained a Court order in terms of Part A of the application on 15 June 2021 to interdict or restrain the first and second respondents from dealing with the administration of the deceased estate of the late Steve Stefans Sibanyoni (“the deceased”) until Part B, the issue of the validity of the customary marriage between the first applicant and the deceased and the validity of the civil marriage of the first respondent and the deceased is finalized.

[2] This Judgment deals with Part B of the application in which the applicants seek an order in the following terms:

“2.1 That the customary marriage between the first applicant and the deceased, Steve Stefans Sibanyoni contracted on 29 September 1991 be declared valid;

2.2 That the civil marriage between the first respondent and the deceased, Steve Stefans Sibanyoni contracted on 8 February 2007 be declared null and void;

2.3 that the second respondent is directed to expunge the civil marriage between the first respondent and the deceased from the marriage register and to register the customary marriage between the first applicant and the deceased, Steve Stefans Sibanyoni;

2.4 The third respondent is directed to withdraw the letter of executorship issued in favour of the first respondent under case number 1348/2021 dated 29 February 2021, within (10) days of receiving this order;

2.5 The first respondent to disclose all funds collected and received by her as representative of the deceased, Steve Stefans Sibanyoni and to pay all such funds collected from any situation or individual into the trust account of the first applicant’s attorneys, Madlela Gwebu Mashamba Attorneys Incorporated, until the estate banking account has been opened for administration of the estate of the deceased, Steve Stefans Sibanyoni with (10) days of this order; and

2.6 The first respondent and/or any of the respondents to pay the costs in the event of

opposition, jointly and severally the one paying the others to be absolved.”¹

Background to the Application:

- [3] The first applicant alleges that she and the deceased were married to each other in a customary marriage concluded on 29 September 1991. The first applicant and the deceased had later separated and alleges that the customary marriage had never been dissolved.
- [4] The first respondent and the deceased entered into a civil marriage on 8 February 2007 in community of property.
- [5] On 26 December 2020 the deceased passed away and the applicants in early February 2021 approached the Master of the High Court (the third respondent), Pretoria to report the death of the deceased and his estate. The first applicant advised the third respondent that she was married to the deceased in terms of customary law.
- [6] The applicants were informed that the first respondent had reported the deceased's estate and by virtue of her civil marriage with the deceased and was appointed Executor of the deceased's estate.
- [7] The applicants were advised that as the customary marriage was not registered with the second respondent that confirmation from a traditional authority would be required. As a result, on 10 February 2021 the first applicant obtained confirmation from the Ndebele Kingdom Authorities.
- [8] On 26 April 2021 the second applicant received a call from an evaluator advising that he was instructed to assist in the evaluation and sale of the deceased's livestock. After a few meeting, on 6 May 2021 the second applicant also met with the fourth respondent and indicated her disapproval of the sale of the livestock. It was then decided that the second applicant would be afforded time to deliberate on the matter and revert by the

¹ *Applicant's heads of Argument Part B, page 2-3*

end of May 2021.

- [9] On 20 May 2021 the applicants consulted with an attorney who advised them to challenge the validity of the civil marriage and as such legal proceedings were instituted. However, instead of responding to the proceedings the first respondent launched an *ex parte* application for search and seizure of articles in terms of section 26(3) of Act 66 of 1965. The Rule Nisi was granted which allowed the first respondent to seize the livestock to be sold on 5 June 2021.
- [10] After prolonged discussions between the parties it was decided that would be suspended pending the return date for the *Rule Nisi* on 7 June 2021. In response thereto the applicants launched the urgent application interdicting and restraining the first and second respondents from any administration of the deceased's estate until the validity of both marriages was determined, which was obtained on 15 June 2021.
- [11] The only issue remaining to be determined before this Court is that of the validity of the marriages.
- [12] The first respondent opposed the application and denied the existence of the customary marriage between the first applicant and the deceased. The first respondent seeks an order declaring the customary marriage invalid and the civil marriage between herself and the deceased as valid.
- [13] The second and third respondents did not oppose the application.

First Applicant's Argument

- [14] The first applicant avers that it has established a *prima facie* right as the lawful heir of the deceased's estate and that she is the lawful spouse of the deceased in terms of customary law and section 3(1) of the Recognition of Customary Marriages Act No ("the Act") 120 of 1998. Further that the customary marriage was not dissolved in terms of section 8 of the Act and is therefore still valid and binding. She further submits that in terms of section 3(2) of the Act that the deceased was not permitted to enter into

a civil marriage with the first respondent and therefore the civil marriage is invalid as the marriage of the first respondent and the deceased was prohibited.

First Respondent's Argument

- [15] It is the first respondent's argument that only her marriage should be legally recognised as her marriage was solemnised in a public ceremony. She denies that the marriage between first applicant and the deceased ever existed and that they did not have any contact during her marriage with the deceased and neither was their marriage if it existed registered as required by the provisions of the Recognition of Customary Marriages Act 120 of 1998. She further submits that the first applicant knew of her marriage with the deceased and never objected to it in terms of section 23(1) of the Marriages Act 25 of 1961.

Recognition of Customary Marriages Act 120 of 1998

- [16] The application pertains to the provisions of the Recognition of Customary Marriages Act 120 of 1998 ("the Act"). The Act came into effect on 15 November 2000. The legislation gives full legal recognition to customary marriages. In terms of section 1 of the Act "*a customary marriage*" is defined to mean a marriage concluded in accordance with customary law.
- [17] Section 2(2) of the Act provides for the recognition of customary marriages entered into after the Act's commencement. Marital recognition is made subject to the condition that the relevant marriage complies with the Act's requirements.
- [18] The requirements for the conclusion of a valid customary marriage are set out in section 3 which states that:

"(1) For a customary marriage entered into after the commencement of this Act to be valid-

(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

(2) Save as provided in section 10 (1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.

(3) (a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.

(b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961, applies.

(4) (a) Despite subsection (1) (a) (i), the Minister or any officer in the public service authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question.

(b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid customary marriage.

(5) Subject to subsection (4), section 24A of the Marriage Act, 1961, applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(6) The prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.”

[19] The prerequisite that the marriage must be negotiated and entered into or celebrated in accordance with customary law gives rise to some legal complexities.² This requirement entails examining whether the customs, traditions, or rituals, that have to be observed in the negotiations and celebration of customary marriages, have been complied with.³ These include the negotiations leading to the agreement on *lobolo*, as well as any other tradition, custom or ritual associated with these. If a customary marriage has not been concluded in accordance with customary law, it cannot be regarded as valid even if all other requirements are met.⁴

[20] The requirements for a valid customary marriage are thus similar to those prescribed for a civil marriage except that a customary marriage has to be negotiated and entered into or celebrated in accordance with customary law. A clear distinction is still, however, maintained between these marital relationships. It was stated by the SCA (per Maya P) in *Mbungela*:⁵

“no hard and fast rules can be laid down, this is because ‘customary law is a flexible, dynamic system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms’ ... because of variations in the practice of rituals and customs in African society, the legislature left it open for the various communities to give content to section 3(1)(b) in accordance with their lived experiences” (See para17).

² *Ibid.*

³ *Morcpane v Southon* [2014] JOL 32172 (SCA).

⁴ *Rasello v Chali In re: Chali v Rasello* 2013 JOL 30965 (FB); *Fanti v Boto and Others* 2008 (5) SA 405(C).

⁵ *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) para 17.

[21] Section 4 of the Act deals with registration of customary marriages and states as follows:

“(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and 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.

(3) A customary marriage-

(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*; or

(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*.

(4) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5) (a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.

(b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(7) 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.

(8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.

(9) Failure to register a customary marriage does not affect the validity of that marriage.”

[22] Although the Act makes it obligatory to register a customary marriage, section 4(9) provides that a failure to do so does not affect the validity of that marriage. One consequence of failing to register a customary marriage would be that absent a marriage certificate it would be difficult for either spouse in their interactions with third parties to establish the subsistence of the marriage and his/her marital status. In contrast, possession of a marriage certificate constitutes *prima facie* proof of the marriage. Registration of the customary marriage thus provides for public certainty about the relevant spouses’ marital status.

[23] In terms of section 4(2) either spouse may register the marriage on behalf of both spouses. It appears that the purpose of this section is to ensure that a spouse who is reluctant to register the marriage does not frustrate or undermine the other spouse’s

wish to have their marriage registered. If either of the spouses fail to make the necessary application to register the marriage, the Act enables an interested party to apply for its registration.

- [24] In terms of section 4(7), a court may, upon application made to that court and upon investigation instituted by that court order registration or cancellation. The Act does not expressly state who may bring such an application but having regard to the fact that the Act enables both of the spouses, and also any person with a sufficient interest, to apply in the ordinary course for the registration of a customary marriage, it appears clear that both of the spouses and any person with sufficient interest, would have the necessary standing to bring an application under section 4(7).
- [25] In the present matter, the first applicant has provided this Court with confirmation from the Ndebele Kingdom Authorities of her customary marriage with the deceased “DP3” annexed to the founding affidavit and therefore has capacity in terms of section 4(2) of the Act to register the marriage. She would also have sufficient interest to apply to this court, under section 4(7)(a) of Act, for the relevant registration. It is also significant to note that the first applicant provided a copy of a life insurance policy underwritten by Avbob Mutual Assurance Policy under policy number AL0505378X9, annexed to the applicant’s supplementary affidavit as “DP4” taken out by the deceased, insuring himself and the first applicant as his spouse. The letter was addressed to the deceased on 22 June 2021 after his demise and is therefore still current.
- [26] The first respondent has contested the first applicant’s customary marriage in her answering affidavit and that the first applicant is the surviving spouse of the deceased as she submits that her marriage is valid as it was duly registered in terms of Marriages Act 25 of 1961 and was publicly solemnized. Further that the first applicant did not object to her civil marriage with the deceased as permitted in section 23(1) of the Marriages Act 25 of 1961 despite knowing about it. However, she is unable to refute the evidence provided by the first applicant to this Court that the customary marriage exists. In her answering affidavit the first respondent submits that the dispute of the alleged customary marriage cannot be resolved on papers and must be referred to oral evidence. She explained in the answering affidavit that the lobola negotiation letter annexed in founding affidavit as “DP2” together with the confirmation from the

Traditional Authority “DP3” are hearsay evidence and that she would file a supplementary affidavit if necessary to address them. This judgement deals with Part B of the application and this Court is mindful that the first respondent has not filed a supplementary affidavit or heads of argument addressing or elaborating on how the documents provided are in fact hearsay or anything relating to Part B of the application. Therefore, there is only the version of the first applicant before this Court.

[27] There is no doubt in my mind that the first applicant is the surviving spouse of the deceased and therefore the customary marriage entered into between the first applicant and the deceased on 29 September 1991 is valid. This despite the fact that it was not registered as section 4(9) of the Act clearly states that failure to register a customary marriage will not affect the validity of the customary marriage. In light of this finding, the civil marriage between the first respondent and the deceased is invalid in terms of section 3(2) of the Recognition of Customary Marriages Act as it is clear that the deceased was not competent to enter into the civil union with the first respondent under the Marriages Act on 8 February 2007 and therefore the civil marriage is null and void.

[28] I am satisfied with the first applicant’s version and evidence relating to the existence of the customary marriage. As a result, I do not see any need for the matter to be referred to oral evidence and as such the first applicant is entitled to the relief as set out above.

[29] **Accordingly, the following order is made:**

29.1 That the customary marriage between the first applicant and the deceased, Steve Stefans Sibanyoni contracted on 29 September 1991 is declared valid;

29.2 That the civil marriage between the first respondent and the deceased, Steve Stefans Sibanyoni contracted on 8 February 2007 is declared null and void;

29.3 That the second respondent is directed to expunge the civil marriage between the first respondent and the deceased from the marriage register and to register the customary marriage between the first applicant and the deceased, Steve Stefans Sibanyoni;

29.4 The third respondent is directed to withdraw the letter of executorship issued in favour of the first respondent under case number 1348/2021 dated 29 February 2021, within (10) days of receiving this order;

29.5 The first respondent to disclose all funds collected and received by her as representative of the deceased, Steve Stefans Sibanyoni and to pay all such funds collected from any situation or individual into the trust account of the first applicant's attorneys, Madlela Gwebu Mashamba Attorneys Incorporated, until the estate banking account has been opened for administration of the estate of the deceased, Steve Stefans Sibanyoni with (10) days of this order; and

29.6 No order as to costs.



SARDIWALLA J
JUDGE OF THE HIGH COURT

Date of Judgement: 19 July 2022

Appearances:

Counsel for the Applicant: Attorney J Gwebu

Instructed by: Madlela Gwebu Mashamba Inc.

Counsel for First Respondent: D Van Loggerenberg SC

Instructed by: BJ Mhlongo Attorneys Inc.