THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case no: 524/2004

In the matter between:

HUGH ARNOLD WORMALD N.O.	**First Appellant**
BURTON QUEENSTOWN CC	**Second Appellant**
NORAH KHUPELA BADUZA	**Third Appellant**

and

LUNGISWA SNOWY KAMBULE	**Respondent**

CORAM: MPATI DP, ZULMAN, NUGENT JJA et COMBRINCK, MAYA AJJA

HEARD: 23 AUGUST 2005

DELIVERED: 22 SEPTEMBER 2005

Summary: Application for eviction under Act 19 of 1998 (PIE) and declarator that customary marriage void *ab initio* – whether discretion conferred on court by PIE can be exercised to determine whether a customary law wife has a claim for a right to occupy a property against her deceased husband's estate – whether a customary marriage confers a right to occupy a specific property which is subject to a mortgage bond.

JUDGMENT

MAYA AJA

MAYA AJA

[1] This is an appeal against a judgment of Chetty J in the Eastern Cape Division, reported as *Wormald NO and Others v Kambule* [2004] 3 All SA 392 (E). The court *a quo* dismissed an application launched by the appellants seeking, firstly, to evict the respondent from certain residential property under the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') and, secondly, an order declaring a customary marriage the respondent is alleged to have contracted with one Mr Burton Baltimore Zitha Baduza ('the deceased'), from which she claims her right to occupy the property derives, null and void. The appeal is with the leave of this court.

[2] The second appellant, a close corporation which had the deceased as its sole member, is the registered owner of the property. The first appellant represents his co-appellants in these proceedings in his capacity as the executor, *nomine officio*, in the massed estate of the deceased and his surviving civil law spouse, the third appellant, and consequently, the sole member of the second appellant in terms of s 29 of the Close Corporations Act 69 of 1984.

[3] The background facts may be stated briefly. The respondent has occupied the property since September 2001, shortly after its purchase by the second appellant. She does not hold a lease in respect of the property and does not therefore pay any

rental. The property is subject to two mortgage bonds with ABSA bank which are serviced by the estate on a monthly basis in the sum of R9 451,86. After the deceased's death in June 2002, the first appellant attempted to collect rental from the respondent. When she refused to accede to this demand the first appellant informed her that the mortgage bonds, which exceeded the property's current market value, were burdensome on the estate and that, consequently, the property had been put up for sale. She was requested to grant an estate agent and potential purchasers access to, and to vacate the property against an offer of alternative accommodation at a local hotel owned by the estate. In response, the respondent conceded that she could not occupy the property indefinitely but demanded that the first appellant (i) recognize her customary marriage to the deceased, (ii) provide her with suitable and reasonable accommodation having regard to her station in life and the ability of the estate to pay for such accommodation and (iii) recognize her contemplated claim for maintenance from the estate. The appellants countered these demands by launching the eviction proceedings.

[4] The appellants claim that the respondent is in unlawful occupation of the property because it is owned by an entity with a separate and distinct legal personality from the deceased and that any right she might have had to occupy it was as the deceased's 'housekeeper' and terminated upon his death. The respondent's contention is that she occupies the property with the express or tacit

consent of the second appellant through which it was purchased by the deceased to provide her with accommodation in recognition of his obligation to do so as her husband, flowing from their customary marriage entered into in 1985. She denies that she was the deceased's 'housekeeper'.

[5] Much of the respondent's version was not disputed except for the very basis of her alleged entitlement to occupy the property, the alleged customary marriage. There having been no request for a referral of such dispute for the hearing of oral evidence and these being motion proceedings, the final relief which is sought by the appellants should be granted if the facts alleged by the appellant that are not denied by the respondent, together with facts asserted by the respondent, justify such an order. *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E- 635C.

[6] On an application of this test to the facts of the case it must be accepted that-

6.1 In 1985 the deceased proposed marriage to the respondent which she accepted.

6.2 Subsequent thereto the deceased approached the respondent's father to ask for her hand in marriage and, consequent to those negotiations, agreed to pay lobola in the sum of R5 000,00.

6.3 Pursuant to the agreement, the deceased paid a sum of R1 000,00 to the respondent's father. The balance was later paid to the respondent's mother because her parents had, in the meantime separated and were divorcing each other and her father had left the common home.

6.4 The third appellant was aware of, and did not approve of the marriage. As a result the deceased made arrangements for the respondent to relocate from Sterkspruit, where they lived at the time and where the third appellant still lives, to Queenstown, where the property is situate.

6.5 The deceased provided the respondent with accommodation in three different houses from 1987 until his death. The first of these properties was registered in her name and the other two (including the property in issue) were purchased in the name of the second appellant and were used by her. The deceased had also made a motor vehicle registered in his name available for her exclusive use.

6.6 The deceased made no provision for the respondent in his will.

[7] After considering these facts and the relevant law, Chetty J held that the deceased and the respondent had concluded a customary marriage and complied with all the requirements for the recognition of such a marriage; that the deceased purchased the property acting in his capacity as the second appellant's sole

member and as its '… embodiment [and thus bound it] to provide the respondent with a home during the subsistence of their customary marriage'; that the customary marriage vested the respondent, as the deceased's widow, with a personal servitude of *usus* or *habitatio* in respect of the residential property with which her deceased spouse had provided her and that the customary marriage was not rendered invalid by the fact of its non-registration in accordance with the Transkei Marriage Act 21 of 1978. He concluded that the respondent was not an unlawful occupier as envisaged in s 1 of PIE. It is these findings that the appellants contest.

[8] It is common cause between the parties that the provisions of PIE are applicable. Section 4 thereof governs eviction proceedings brought by 'the owner or person in charge' of the land in issue and contains both procedural and substantive provisions. Subsections (2), (3), (4) and (5) set out the procedural requirements which, it is common cause, the appellants duly complied with.

[9] Subsections (6), (7) and (8) contain the substantive provisions and read as follows:

'(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances,

including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).'

[10] An 'unlawful occupier' is defined in s1 of PIE as follows:

'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).'

[11] An owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract or on some or other legal basis. *Brisley v Drotsky* 2002 (4) SA 1 (SCA). In terms of Section 26 (3) of the Constitution, from which PIE partly derives, (*Cape Killarney Property Investments (Pty) Ltd v Mahamba and others* 2001 (4) SA 1222 (SCA) at 1229E), 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'. PIE therefore requires a party seeking to evict another from land to prove not only that he or she owns such land and that the other party occupies it unlawfully, but also that he or she has complied with the procedural provisions and that on a consideration of all the relevant circumstances [and, according to the *Brisley* case, to qualify as relevant the circumstances must be legally relevant], an eviction order is 'just and equitable'.

[12] As previously indicated, the essential basis for the respondent's opposition to the eviction proceedings is the alleged customary marriage and the deceased's alleged intention to bind the second appellant to provide her with lifelong use of the property and that, furthermore, it would not be just and equitable to evict her.

[13] Assuming but without deciding whether in fact that there was such a marriage in the instant case, it must be considered that whilst it is so that in customary law a husband and, upon his death, his heir, has a duty to maintain his wife or widow, as the case may be, and provide her with residential and agricultural land, she does not, at any stage, acquire real rights in such land. The *dominium* vests in the husband's or his heir's estate. TW Bennett *Customary Law in South Africa* (2004) p 347; *Xulu v Xulu* 1938 NAC (N & T) 46. The wife does not, therefore, have a right to demand to occupy any land of her choice, even to the detriment of the estate, as the respondent seeks to do in the present matter.

[14] Furthermore, customary law, significantly a legal system to which the concept of a mortgage bond is alien, makes no provision for a situation such as the present, where a 'widow' is laying claim to property belonging to a third party which is also bonded. It would clearly be untenable in law to extend the right of a customary law wife or widow to maintenance to confer real rights in respect of such property, particularly against the wishes of the bondholder. It is also significant that there is not the slightest indication in the papers that the second appellant was established for the purpose of providing support to the respondent. All that its founding statement reflects is that it was formed with the objective of 'purchasing and investing in immovable property'. Apart from the respondent's

bare assertion that the deceased bought the property for her (which is difficult to reconcile with the deceased's omission to either register the property in her name or to grant her membership in the second appellant or even to provide for her in his will), there are no allegations of an intention to donate the property to her or grant her lifelong use thereof or transfer any rights whatsoever in relation to the property to her. In the absence of such evidence the court *a quo* erred, in my view, in finding that the deceased 'bound [the second appellant] to provide the respondent with a home during the subsistence of their customary marriage' and that the second appellant consequently granted her a right of *'usus'* or *'habitatio'* to endure for her lifetime.

[15] It must be borne in mind that the effect of PIE is not to expropriate the landowner and that it cannot be used to expropriate someone indirectly. The landowner retains the protection against arbitrary deprivation of property under s 25 of the Bill of Rights. PIE serves merely to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. *Ndlovu v Ngcobo*; *Bekker and another v Jika* 2003 (1) SA 113 (SCA) para 17. In the light of the aforegoing remarks, the court *a quo* erred in finding that a right to

occupy the property accrued as a result of the alleged customary marriage. The respondent's occupation of the property has no legal basis and is, thus, unlawful.

[16] As regards the declaratory order that was sought by the appellants concerning the validity of the customary marriage, it is well established that a court has a discretion to grant or to withhold declaratory relief and that it will not deal with abstract, hypothetical or academic questions in proceedings for declaratory relief. The declaratory order that was sought is superfluous to the appellant's claim for eviction and no proper reason has been advanced for us to consider granting it.

[17] It now remains to consider whether it would be just and equitable to grant an eviction order. Sachs J, dealing with the concept 'just and equitable' in the context of PIE in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), referred with approval to the comments of Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) stating in para 33:

'…[I]n matters brought under PIE, one is dealing with two diametrically opposed fundamental interests. On the one hand, there is the traditional real right inherent in ownership, reserving exclusive use and protection of property by the landowner. On the other hand, there is the genuine despair of people in dire need of adequate accommodation…It is the duty of the court, in applying the requirements of the Act, to balance these opposing interests and bring out a decision that is just and equitable…The use of the term 'just and equitable' relates to both interests, that

is, what is just and equitable not only to persons who occupied the land illegally but to the landowner as well.'

The learned judge continued at paras 36 and 37:

'[36] The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.

[37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu,* part of a deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'

See also *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) at 513C.

[18] The nature of the discretion which a court employs in this exercise is described in the *Bekker* case (supra) where Harms JA held at para 18:

'The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not narrow sense (cf *Media Workers Association of South Africa and others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800, *Knox D'Arcy Ltd and others v Jamieson and others* 1996 (4) SA 348 (A) at 360G-362G). [*Port Elizabeth Municipality v Various Occupiers* supra at para 31]. A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a Court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons.'

[19] Apart from relying on the alleged customary marriage, the only averment made by the respondent to counter the eviction is that she is a 59 year-old single woman. The appellants' allegation that she has no dependants was not placed in dispute. No suggestion was made that she is indigent. The contrary may, in fact, be inferred from her demand for 'suitable and reasonable alternative accommodation having regard to her station in life'. As indicated above, the appellants tendered, even before the eviction proceedings were launched, to provide her with a two bedroomed flat, in a local hotel owned by the estate. This offer was rejected on the

basis that the flat was in a dilapidated condition. A similar offer of a ‘renovated’ flat was repeated during the hearing in this court. It was also rejected, out of hand. Whilst the value and financial status of the estate (and the second appellant) and whether it can continue with the bond repayments is unknown, the respondent, except for a vague, unsubstantiated contention that the deceased was a wealthy man, bearing in mind that the entire purchase price of the property was financed by a bank, did not deny the appellants’ allegations that the debt exceeds the current market value of the property and that such repayments are prejudicing the estate. Her concession that she cannot occupy the property indefinitely seems to support these allegations.

[20] It is clear that she is not in dire need of accommodation and does not belong to the poor and vulnerable class of persons whose protection was obviously foremost in the Legislature’s mind when it enacted PIE. To my mind, her situation is essentially no different from that of the ‘affluent tenant’ occupying luxurious premises, who is holding over, discussed in the *Bekker* case (para 17), in respect of whom the court held that the ‘relevant circumstances’ prescribed in s 4(7) of PIE do not arise ‘save that the applicant is the owner, that the lease has come to an end and that the tenant is holding over’.

[21] For all the above reasons, it seems to me that it would be just and equitable to grant the eviction order. Having said that, it must be emphasized that if the respondent is able to establish that she was indeed married to the deceased by customary law, that fact would be a valid basis for a maintenance claim against the estate. In that case, even if the estate, through the executor, has evinced a negative attitude towards her intended maintenance claim, nothing precludes her from pursuing this option in an appropriate forum. It seems proper, in all the circumstances, to allow her to remain on the property for a reasonable period whilst she pursues such a claim, should she so wish. It appears to me, due regard being had to the estate's tender to provide her with refurbished accommodation (for life if it was found that she was married to the deceased, or for six months to a year if it was found there was no marriage) and the expense that it would incur towards that end, that the estate would not be unduly prejudiced by such an order.

[22] As counsel correctly submitted, it seems fair in all the circumstances of the case that the estate should bear the costs of the proceedings. I am further satisfied, and counsel did not contend otherwise, that the employment of two counsel was warranted.

[23] In the result I make the following order:

23.1 The appeal against the court *a quo*'s refusal of the eviction order succeeds and the appeal against the refusal of the declaratory order sought is dismissed, with costs, such costs to include the costs of two counsel, to be borne by the estate of the late Burton Baltimore Zitha Baduza and his surviving spouse, Norah Khupela Baduza.

23.2 The order of the court *a quo* is set aside and the respondent is ordered to vacate Erf 2989 situate at 44 Longview Crescent, Queenstown within 12 months of the date of this order, failing which the Sheriff for the district of Albany is authorized to remove her and all persons under her control, together with their possessions, from the said property on 30 September 2006.

MML MAYA
ACTING JUDGE OF APPEAL

Concur: Mpati DP
Zulman JA
Nugent JA

COMBRINCK AJA:

[24] I agree that the appeal must succeed and that the eviction order in the form set out in the judgment of Maya AJA should issue. I have however followed a different route in coming to the same conclusion. Because of the approach I have adopted adjudication on the appeal against the refusal of the declaratory order contained in paragraph 3 of the Notice of Motion will of necessity result.

[25] In the Court *a quo* Chetty J came to the conclusion that the respondent was not an unlawful occupier. He based his conclusion on the following findings:

(a) that factually the respondent had entered into a customary marriage with the deceased;

(b) that that marriage had been concluded in accordance with customary law in that all the requirements for a union in accordance with that system of law had been complied with;

(c) that customary law had to be applied when determining the rights of the wife to matrimonial assets on the death of her husband;

(d) that in terms of customary law the widow enjoys a type of personal servitude of *usus* or *habitatio* in respect of the residence which her husband allowed her to occupy during the subsistence of the union;

(e) that the fact that the marriage was not registered in terms of the Transkei Marriage Act did not invalidate it.

[26] Accepting without deciding that the learned Judge was correct in his findings in respect of (a), (b), (c) and (d) above, if he was wrong in respect of (e) – the validity of the marriage despite non-registration – and the marriage was indeed invalid, then the source of the respondent's rights to occupation falls away and she must be regarded as an unlawful occupier.

[27] There are two conflicting decisions in the Transkei as to whether registration under the Transkei Marriage Act is a prerequisite to validity of a customary marriage. The one is *Kwitshane v Magalela* 1999 (4) SA 610 (Tk) and the other a judgment of Jafta AJP in *Shwalakhe Sokhewu and Another v Minister of Police* (unreported-Transkei Division case number 293/94). In the former case it was held that registration was essential to a valid customary marriage whereas the latter decided the contrary. The court *a quo* considered both judgments and concluded that *Kwitshane* had been wrongly decided and, that the *Sokhewu's* judgment was correct and should be followed.

[28] Because the sections of the Transkei Marriage Act (Act 21 of 1978) which I consider are decisive of the issue were not considered in the two cases referred to I

do not intend analyzing each of them and dealing with the reasons given by the learned Judges as to why they came to their respective conclusions.

[29] Section 33 of the Marriage Act is the section which requires that a customary marriage be registered. It reads thus:

'The parties to a customary marriage and the father or guardian of any such party who is under the age of twenty-one years shall as soon as possible after the consummation of such customary marriage appear before the magistrate of the district in which such customary marriage was consummated and furnish to such magistrate such information as may be required by him for the registration of such customary marriage.'

[30] A civil marriage is also required to be registered in terms of the aforesaid Act. The relevant sections are secs 25 and 26. Section 25 reads as follows:

'A marriage officer solemnizing any civil marriage in terms of the provisions of this Act, the parties to such civil marriage and at least two competent witnesses shall sign the civil marriage register and the duplicates referred to in section 24(b) before they leave the premises where the civil marriage was solemnized.'

[31] Crucial to the determination of the central issue of the effect of registration is to contrast the sections dealing with objections to a marriage in terms of civil law and objections in the case of customary marriage.

Section 12 deals with objections to a civil marriage. The section reads:

‘(1) Any person who objects to a proposed civil marriage shall lodge his objection with the marriage officer who is to solemnize such marriage.

(2) Upon receipt of such objection the marriage officer concerned shall enquire into the grounds of the objection and if he is satisfied that there is no lawful impediment to the proposed civil marriage, he may solemnize the civil marriage in accordance with the provisions of this Act.

(3) If he is not so satisfied, the marriage officer shall refuse to solemnize the civil marriage.’

Hence objections have first to be dealt with and disposed of before the ceremony or solemnization which brings about validity of the marriage.

[32] If one now looks at the corresponding section dealing with objections to a customary marriage one finds the following in section 36:

‘(1) Any person who objects to the registration of a customary marriage shall personally or through his legal representative lodge his objection with the magistrate who is to register such customary marriage.

(2) Upon receipt of such objection the magistrate shall enquire into the grounds of the objection and if he is satisfied that in terms of the customary law applicable to such customary marriage or any other law there is no lawful impediment to such customary marriage, he may register the customary marriage when the parties thereto report to him for the registration thereof in terms of section 33.

(3) If he is not so satisfied, he shall refuse to register the customary marriage when the parties report to him for the registration thereof in terms of section 33.’

Subsections 5 and 6 then provide for an appeal against the decision of the magistrate if he were to refuse to register a marriage. The appeal is to the Secretary for Interior and Social Services and his decision is to be regarded as final.

[33] The last mentioned section makes it in my view abundantly clear that there can be no valid marriage until registration takes place. It would make no sense for a marriage to be regarded as valid before registration and then upon registration being sought the magistrate finds that there was indeed a lawful impediment to the conclusion of the marriage. Must the parties now go through the procedure of having the marriage annulled or dissolved by a court? Assume by way of example that a customary marriage takes place between parties who are related within the prohibited degrees of consanguinity or one or both of them is (are) under age or one or both is (are) feeble-minded. If registration were not a prerequisite for validity it would matter not that objection is lodged because even if good the marriage remains valid until annulled. This can surely not be so. It seems to me to be clear that as in the case of civil marriages, objections must first be disposed of before registration which then brings about validity.

[34] It is perhaps because there is no marriage officer presiding at the conclusion of a customary marriage to whom objections can be made prior to such conclusion

that the Legislature deemed it expedient to require registration so that a magistrate may deal with any objections to the proposed marriage.

[35] Further support for the interpretation above is in my view to be found in sec 37 of the Act under the chapter dealing with 'Consequences of marriage'. The section reads thus:

'Notwithstanding anything to the contrary contained in any law, a woman married in terms of the provisions of this Act shall –

(a) in the case of a civil marriage, upon the solemnization thereof, and

(b) in the case of a customary marriage, upon the registration thereof in terms of the provisions of Part 2 of Chapter 3,

be under the guardianship of her husband, for the duration of such marriage.'

This seems to me to indicate that the legal consequences of a customary marriage will only flow after registration thereof.

[36] I conclude therefore that the respondent's marriage to the deceased was invalid in that it was not registered in accordance with the provisions of the Transkei Marriage Act. She is therefore an unlawful occupier. It further follows that the conclusion I have reached also resolves the issue of the declaratory order sought in para 3 of the Notice of Motion. For the reasons given above the declaratory order should have been granted by the Court *a quo*.

[37] In conclusion I need to mention that sec 4(9) of the Recognition of Customary Marriages Act (Act 120 of 1998) provides that registration of a customary marriage is not essential to its validity. Counsel were however (correctly in my view) agreed that the Act only applies to marriages concluded after the 15th November 2000 (the commencement date of the Act).

[38] In addition to the order proposed by Maya AJA I would allow the appeal against the refusal of the order sought in para 3 of the Notice of Motion and substitute an order granting the order sought.

P C COMBRINCK
ACTING JUDGE OF APPEAL