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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 2469/2023

In the matter between:

PHINDIWE PATIENCE NTSHIBA

Applicant

And

TSIDISO TRUTH MOSHOESHOE

1st Respondent

TOKA JOSEPH RAMOTSO MOSHOESHOE

2nd Respondent

**KARABO TEBHOH ISIAH RAMOTSO
MOSHOESHOE**

3rd Respondent

VIVIAN THABANG PALESA MOSHOESHOE

4th Respondent

MINISTER OF HOME AFFAIRS

5th Respondent

JUDGMENT

KUNJU AJ:

A. Introduction

[1] Sometimes the death of a person does not only bring about sorrow, agony and grief. It also brings about disputes and acrimony. The latter features are dominant in this case.

[2] The applicant alleges that on 10 January 2015 at Tyeni Administrative Area, Tsolo (Tyeni), she got married in accordance with the customary rites observed and applied by the Bhele Clan based in Tyeni.

[3] Due to a dispute mounted by the respondents about the existence of such customary marriage, the applicant relying on the provisions of the Recognition of Customary Marriages Act No. 120 of 1998 (the Act) has resorted to this Court, seeking in essence, a declarator that a marriage between her and the deceased Mr Hlalefo Samuel Peka Romotso Moshoeshoe (the deceased) existed. She also seeks for an order directing the Department of Home Affairs to register such marriage, if found to exist.

[4] All the respondents have opposed the application. The first to the fourth to respondents have delivered opposing affidavits in support of their opposition. Though the fifth respondent has filed a notice to oppose, no opposing affidavit was delivered on his behalf. There was equally no appearance on his behalf when the matter was argued before me. For full appreciation of the dispute between the parties and in order to identify the areas where the horns are locked, the background facts are necessary. It is where I now turn.

B. Background facts

[5] The applicant is a South African citizen currently residing at Tyeni Administrative Area, Tsolo. She met the deceased who was a Sotho National. From

the papers, it does not appear when exactly did the applicant and the deceased meet. What is alleged and not disputed is that during year 2010, the deceased and the applicant fell in love. They stayed at Bhongweni location in Mthatha until separated by death on 3 July 2021.

[6] The focal point of the dispute now that the deceased is no more is whether they were married or not before his demise. Given the minimal facts in dispute one would crystallise the question requiring resolution as follows: it is whether or not on 10 January 2015 the applicant and the deceased got married within the meaning of the Act.

[7] The respondents who have answered the question in the negative are all the children of the deceased. Ironically and paradoxically Ms Caroline Ramatos, Rampetsi Ramotso and Harris Silikane Ramotso – all being the siblings of the deceased have raised their hands and answered the question of the existence of the marriage in favour of the applicant. In support of the application and harmonious voice they have confirmed that the marriage was: (i) a customary marriage; (ii) concluded in Tyeni Administrative Area, Tsolo, (iii) it was concluded during year 2015 and (iv) it was between the applicant and the deceased. The respondents do not agree.

[8] It is these divergent and opposing views which have culminated in the applicant seeking for an order summarised in paragraph 3 above. It is necessary to set out the versions of both the applicant and the respondents. I hasten to do so.

C. The applicant's version and contentions

[9] The applicant in pertinent parts at paragraphs 1, 2 and 6 of the founding affidavit has made the following allegations to which there was no response by the respondents, namely:

“(i) *I am an adult female person and the surviving spouse of the late Hlalefo Samuel Peka Ramotso Moshoeshe...*

(ii) *I am the applicant in these proceedings and suing the respondents in my capacity as the customary surviving spouse of the late Hlalefo Samuel Peka Ramotso Moshoeshoe with ID No. 5[...] who died intestate on the 3rd day of July 2021*" (underlining is mine)

[10] I have underlined certain areas in the quotation made above to underscore a point that on numerous occasions the applicant in her founding affidavit has made allegations that she is the surviving spouse of the deceased in a marriage that was consummated in accordance with customary laws. The quoted paragraphs as said above are simply not disputed by the respondents.

[11] The applicant contends that after they fell in love with the deceased, more particularly during December 2014, the deceased and a certain Mr Mziwabantu Mbana (Mr Mbana) had visited her homestead situated in Tyeni to meet up with her family so as to set up a lobola negotiation date. There in Tyeni they met up with Mr Farrington Ntsikelelo Ntshiba, the elder brother of the applicant. On this very same day after the intention was conveyed to the applicant, she alleges that she agreed to marry the deceased.

[12] In order to actualise, conclude and perfect the agreement and in keeping with the rituals and customs of the Bhele clan, a date was set for lobola and customary marriage negotiations. The date agreed upon was 10 January 2015.

[13] The applicant states in paragraph 25 of the founding affidavit that on 15 January 2015 (the marriage date) she married the deceased in terms of the customary rites and that their marriage was negotiated, entered into and celebrated in terms of the customs and traditions of the Ntshiba family, the amaBhele Clan.

[14] She narrates the events and steps which led to the conclusion of the marriage on the date as follows :

[14.1] The emissaries (Oonozakuzaku) of both families had met. The emissaries for the prospective groom were:

(i) the deceased; and

(ii) Mr Mbana.

[14.2] For the prospective bride, the emissaries were:

(i) Mr Ntsikelelo Ntshiba;

(ii) Mr Phakamisa Ntshiba;

(iii) Mr Mcekeleli Ntshiba;

(iv) Mr Mthunzi Ntshiba;

(v) Mr Mayenzeke Ntshiba; and

(vi) Mr Mawethu Ntshiba.

[14.2] The lobola payment agreed upon comprised the following:

(i) isazimzi;

(ii) uswazi;

(iii) ihambidlani; and

(iv) ikhazi.

[14.3] The lobola payments made towards the above aspects were agreed as follows:

(i) isazimzi : bottle of brandy

(ii) uswazi : bottle of brandy

(iii) ihambidlani : bottle of brandy

(iv) ikhazi : 10 beasts

[14.4] There were further payments discussed and effected in respect of other aspects of lobola, namely:

(i) Icuba lomama – R500,00

(ii) Icuba loodad'bawo – R500,00

(iii) Iswiti zeentombi – R400,00

(iv) Iswiti zabantwana – R200,00

(v) Iswiti zoomakoti – R500,00

[14.5] A sheep was also slaughtered in so doing acknowledging and symbolising the conclusion of lobola agreement and ukwendiselana. She says it also symbolised integration between the two families. Her brother Ntsikelelo officially released her to the groom's family and it turn the groom's family welcomed her.

[14.6] As a token of appreciation and acceptance of the marriage relationship between the two families, her family handed over the portion of the slaughtered sheep to the groom's family. She alleges the above constituted a conclusion of a customary marriage in their clan.

[15] The applicant's version has also the following features which will be mentioned below in an adumbrated way, namely:

[15.1] during 2016 her and the deceased had visited his rural homestead, Mathokoane Village, Leribe district in Lesotho. There she was welcomed by the deceased siblings including those mentioned in paragraph 7 above.

[15.2] She is the one who looked after the deceased when his health had started failing him during year 2021. She mentioned that the deceased was diagnosed with a liver cancer. She would accompany him to and from the Doctors in Mthatha during the period his health was failing him until his demise.

[15.3] On 16 June 2021 she states that the deceased liver cancer complicated and she took him to a Doctor who decided to admit him on 17 June 2021. He got admitted at Nelson Mandela Academic Hospital until he succumbed to death on 3 July 2021.

[15.4] She attended to report his death at the offices of the Department of Home Affairs and ultimately a death certificate was issued. She states that the first respondent tricked her in handing over the death certificate to him with the result that he ran away with some documents of the deceased. Some of those documents included his identity document, death certificate and bank cards. He further surreptitiously and nicodemously transported away the mortal remains of the deceased to Lesotho.

[15.5] She nonetheless forged ahead with funeral preparations. As a result on 17 July 2021 the deceased mortal remains were buried at his home village and she was also present at the funeral service.

[15.6] She states that in the obituary of the deceased that was prepared by the deceased family she was acknowledged and identified as the wife of the deceased. Indeed the last paragraph of the obituary attached to the founding affidavit marked “**NP5**” reads in relevant parts :

*“He married to **Phindiwe Ntshiba** with whom he spent his remaining days. He is leaving behind **his loving wife, children and grandchildren**”*

[15.7] As adverted to above in fortifying her contentions that she was married to the deceased she attached some affidavits prepared by the siblings of the deceased, the affidavit of a local headman Mr Ntuli and that of Mr Mbana, one of the emissaries.

[16] The above are aspects of his evidence that in my view carry more weight in her quest to show that her and the deceased were indeed married. I will not mention her other contentions which seek to show how strong their love relationship or bond was given that the application is less about it but more about the existence or otherwise of their marriage.

[17] The above constitutes important and significant features of her evidence.

D. Respondents' version and contentions

[18] The answering affidavit is deposed to by the first respondent. He states that he is the first born and the biological son of the deceased. He has noted or admitted paragraphs 6 to 13 of the founding affidavit. As sounded above, there is simply no proper response to paragraphs 1 to 5 of the founding affidavit.

[19] Paragraph 9 of the answering affidavit appears to contest the validity of the marriage. There in relevant parts it is said:

"...It is denied that there was ever a valid customary marriage between the applicant and the deceased, Hlalefo Samuel Peka Ramotso Moshoeshoe (hereinafter referred to as late Moshoeshoe) in accordance with Recognition of Customary Marriages Act 120 of 1998"

[20] Also, paragraph 11.1 of the answering affidavit appears to suggest that the marriage was concluded in Lesotho. There the deponent says:

"11.1 There was never any customary marriage at Lesotho where the late Moshoeshoe was domiciled".

[21] In essence, a benevolent reading suggests that the contestation is: the deceased would never have married customarily unless such marriage was consummated in accordance with Lesotho customs and traditions.

[22] In paragraph 18 of the answering, though not sharply raised as one would expect in motion proceedings, it appears that the contestation is that the family of the deceased was excluded in the marriage negotiations. Thus, one infers that the contention is that the marriage is invalid on that score as well. The paragraph simply reads:

“18 The contents of this paragraphs is denied. There could be no official customary negotiations excluding the deceased family”.

[23] In advancing their contention in paragraph 20 of the answering affidavit the deponent states:

“20 The purported marriage is null and void as it had nothing to do with our customary law, tradition and custom. And now the applicant wants a share in deceased estate which is not (sic) entitled to in law”.

[24] In paragraph 21.1 and in a more focused way he says:

“21.1 There were no representatives from the Moshoshoe family that were sent as Oonazakuzaku (“family representatives”) Mr Mziwabantu Mbana is not Moshoeshoe nor representative of Moshoeshoe and cannot say he was sent by the Moshoeshoe in accordance with our customs, rituals and customary rites”.

[25] To summarise the respondents’ version: according to them they were not represented during lobola negotiations when the rituals were performed or when the marriage was concluded. He contends that the rituals performed were not those of their family. They allege that marriage is invalid. In paragraph 24 of the answering affidavit he narrates steps and or rituals which would have been performed in terms of the Lesotho custom and which traditions or steps would have produced a valid

customary marriage. Given that such rituals and customs were not preformed and that the applicant does not rely on the improper performance of such rituals for the validity of her marriage, I will not enumerate the said rituals nor discuss them in any detail. It is common cause that the applicant got married in accordance with the customary laws applicable to the Bhele clan.

[26] Curiously, in paragraph 25.5, the deponent contends that:

“...the South African law informs that the domicile of the husband determines which law will be followed in such matters”.

[27] The above contention is confusing though – but having read the entire affidavit and attempted to make sense out of it, what is contended for is that for the Lesotho customary marriage to exist, the laws of the husbands are applied. That is probably the law in Lesotho. The applicant relies for the existence of her marriage on the South African laws. The deceased and the applicant married in accordance with the South African laws. Whether such marriage is valid or not is a matter for determination in this application.

[28] There are limited allegations which seek to refute or contest those of the applicant. For instance, he alleges that the applicant should instead attach marriage certificate not the photos depicting the applicant and the deceased in a cosy love relationship. She also states that the hospital did not release the mortal remains of the deceased to her because she could not produce proof that she was related to the deceased.

[29] Other than general statement that the marriage between the deceased and the applicant is invalid, the respondents in their affidavit have not pertinently answered the question, whether what was concluded on 10 January 2015 in Tyeni, Tsolo, amounted to a customary marriage or not. Nor have they explained who the wife of the deceased is, who has survived him – as reflected in the obituary.

[30] The upshot and the high-water mark of the Respondents' version is that:

[30.1] to the extent that the Sotho customary marriage rituals were not followed or observed there cannot be a valid customary marriage between the applicant and the deceased;

[20.2] secondly, to the extent that the family of the deceased was not represented by his close family members the marriage consummated cannot be a valid customary marriage between the deceased and applicant.

E. Issues for determination

[31] The issues which have fallen for determination in this application are:

[31.1] whether the application meets the requirements for the validity of a customary marriage as envisaged in section 3 of the Recognition of Customary Marriages Act 120 of 1998;

[31.2] whether the absence of the deceased close relatives during the negotiations and consummation of a customary marriage invalidates such a marriage; and

[31.3] whether the consummation of a customary marriage in accordance with the rituals of the bride's family renders such marriage invalid.

F. The legal framework and discussion

[32] Section 3 (1) of the Recognition of Customary Marriages Act provides:

“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.*

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

[33] In this case, it must be noted that the applicant and the deceased at the time the negotiations ensued, they were both old enough to consent to a marriage relationship. As at January 2015 the deceased was 60 years of age whereas the applicant was 52 years of age. Their ages in my view are important in the assessment of this application. That said, the requirements of the Act in so far as the age is concerned is not controversial in this application. In any event, I hold a view that the older the couple the lesser this requirement should detain this Court.

[34] There is no contestation that the applicant and the deceased consented to marry to each other under customary law.

[35] Section 3 (1) (b) of the Act requires that the marriage must be negotiated and entered into or celebrated in accordance with customary law.

[36] It would seem that the only provision of the Act targeted by the respondents is section 3 (1)(b). In broad terms, the issue that is raised by the respondents in this connection is whether a customary marriage concluded in accordance with the bride's customs and rituals is valid or not. It being their contention that the marriage in issue is invalid to the extent that it was not concluded in accordance with the groom's rituals and traditions.

[37] The work of Professor Bekker –**JC Bekker Seymour's customary law in Southern Africa Juta (1989) at 113 – 114** – argues that amongst the **Sotho – Tswana people**, the wedding is celebrated **at the bride's family home**, where the lobola negotiations take place. I find no fault with the observation made by Professor Bekker. I embrace it and informed by some judgments I have gone through which engage the provisions of Section 3 of the Act.

[38] A customary marriage is defined in Section 1 of the Recognition Act as a marriage concluded in accordance with *customary law*. In turn customary law is defined as *the custom and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people* (**Mayelane v Ngwenyama & Another 2013 (4) SA 415 CC – para 27**).

[39] As I understand it, the applicant and the deceased decided to follow the Bhele Clan customs and traditions in concluding their customary marriage. It is not the contention of the respondents that the rituals of the Bhele clan were not followed or complied with when the marriage took place. As stated in this judgment, the respondents' contention is that if the marriage was not concluded in accordance with the Sotho traditions, then to them it is not a marriage at all. I conclude that the marriage was negotiated, concluded or celebrated in accordance with customary law of the Bhele clan. I reach this conclusion because there is no countervailing evidence that it was not concluded in accordance with the rituals of the Bhele clan.

[40] The uncontested allegation of the applicant is that she met the deceased during year 2010, they fell in love and they stayed together since then at Bhongweni Location, Mthatha, Eastern Cape. This means that even before they got married on 10 January 2015, they had stayed for five years. The case of **Tsambo v Sengadi (244/19) (2020) ZASCA 46 (30 April 2020)** observed as follows regarding presumption of marriage in a long-term cohabitation:

*[27] ... I am fortified in this view by Professor Bennet's argument with regards to the handing over requirement. **He argued that the parties' intention could be inferred from cohabitation. According to him, where the parties were cohabiting, the gravamen of the enquiry was the attitude of the woman's guardian. If the guardian did not object to the relationship, a marriage would be presumed, irrespective of where the matrimonial home happened to be or how the 'spouses' came to be living there. Professor Bennett placed reliance on a case in which the Court had remarked that "long cohabitation raises a strong suspicion of marriage, especially when the woman's father has taken no steps indicating that***

he does not so regard it". In this matter, the respondent averred that her mother had not instituted any action for seduction or demanded payment of a fine, well knowing that the respondent cohabited with the deceased. She accepted that the respondent and the deceased had entered into a valid customary marriage".

[41] The applicant and the deceased chose for themselves the customs and rituals through which they wanted to conclude their marriage. I find the argument that negates that choice untenable. **Maya P** - as she then was in **Mbungela and Another v Mkabi and Others 2020 (1) SA 41 SCA** paragraph 27 – observed thus:

"[27] The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results".

[42] I find that the marriage that was negotiated got to be entered into and celebrated on 10 January 2015 and at the instance of the deceased who was old enough to make decisions for himself.

[43] In the context of this case the observation by **Tokota J** in **Fezile Mlamla v Nomathamsanqa Rubushe** is apt. He said:

"[36] Where there is an agreement, at the lobola negotiation stage, for the acceptance of the proposed customary marriage, a contract of marriage relationship is entered into between the two families. In some communities this is signified by the slaughtering of lamb to welcome the new – in – laws (abakhozi) after a certain number of lobola cattle agreed upon have been delivered or in the case of money after a certain amount of money has been paid. The celebration thereof is

optional. In any event the slaughtering of utsiki lamb at the bridegroom's homestead is in itself a celebration of the marriage. In this way the requirements of section 3(1)(b) of the Act are satisfied".

[44] The deceased was present when his marriage was negotiated and entered into. He chose to be accompanied by Mr Mbana. Mr Mbana has indeed filed a confirmatory affidavit. I see no reason in principle why the Bhele traditions and customs would not be applicable in this matter. All that the Act requires is that the marriage must be negotiated and entered into or celebrated in accordance with customary law. If the Act intended to say that the customary law or rituals should be those of the prospective groom's family, the Act would have said so in no uncertain terms. The applicant's family could not and did not have any say on who was eligible or not eligible to represent the deceased family during the negotiations. In the eyes of the applicant's family, the deceased family was represented. Significantly, the deceased formed part of delegation during the entire process.

[45] I hold a view that in majority of communities – the rituals that would guide the negotiations and conclusions of customary marriage are likely to be those of the bride. I say so because the groom's family would ordinarily visit that family in order to ask for a prospective wife – they visit the bride's family with hat in hand. I am unable to think that they would dictate how that particular community or tribe should go about negotiating and concluding the marriage or lobola negotiations. It is for this reason it does not come as a surprise to me that during the lobola negotiations marriage comes into existence in certain circumstances. I observe that whatever else that takes place at the groom's home can sometimes amount to a celebration of a marriage concluded at the bride's family home.

[46] I have observed in this case that some of the siblings of the deceased have supported the case of the applicant that she was married to the deceased. Also, the obituary prepared by the family of the deceased confirms the case of the applicant. The denial of this marriage to me is simply a bare denial.

[47] I am satisfied that the applicant has made out a case for the principal relief that is sought in the notice of motion. I have no hesitation to issue the order as sought relative thereto.

G. Costs

[48] During argument when I engaged the legal representatives of the parties about the applicable scale of costs, they requested to file supplementary heads of argument. The parties appeared oblivious of the provisions of rule 67 A of the Uniform rules of Court, hence the application for the filing of the supplementary heads of argument. I agreed to the request.

[49] I subsequently received the heads of argument. I am of the view that the punitive costs order sought by the applicant is not appropriate. The points raised by the respondents appeared to be genuinely and honestly held though destitute of merit.

[50] I have also considered whether the matter involves complex issues. I do not think that the issues argued were complex. The opposing affidavit does not raise any serious or complex issue. As pointed out above, it is replete with bare denials.

[51] For the above reasons, I believe that scale A is appropriate.

H. Order

[52] In these circumstances, an order in the following terms shall issue:

(a) That the customary marriage consummated between the applicant with identity number **6[...]** and the late **Mr Hlalefo Samuel Peka Ramotso Moshoeshoe** with identity number **5[...]** on 10 January 2015 is valid.

(b) That the fifth respondent is directed to register and endorse in its records the customary marriage between the applicant and late **Mr Hlalefo**

Samuel Peka Ramotso Moshoshoe within ten (10) days from the date of service of this order.

(c) That the fifth respondent is directed to issue the applicant with a marriage registration certificate within five (5) days from the date of registration.

(d) With the exclusion of the fifth respondent, the rest of the respondents are liable for the costs of this application jointly and severally one paying the other to be absolved from liability and such costs shall be taxed under scale A.

V. KUNJU

ACTING JUDGE OF THE HIGH COURT

Appearances

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Heard : **23 May 2024**
Further heads of argument : **received on 3 October 2024**
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