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

CASE NO: 2014/84704

9/6/2016

Not reportable

Not of interest to other judges

Revised

In the matter between:

MADALA PHILEMON MKABE

PLAINTIFF

and

THE MINISTER OF HOME AFFAIRS

1st DEFENDANT

PIET MBUNGELA

2nd DEFENDANT

TUBILE CAROL MKHONZA N.O

3rd DEFENDANT

MASEER OF THE HIGH COURT, NELSPRUIT

4th DEFENDANT

JUDGMENT

TWALA AJ

[1] The plaintiff is an adult unemployed male who sues the defendants and seeks an order declaring that he is the customary husband of the late Ntombi Eunice Mbungela with identity number [...] who died on the [...] April 2014.

[2] The first and fourth defendants did not file any papers to defend the action. The second and third defendants are defending the action. However, at the beginning of the trial, by agreement between the parties, the plaintiff withdrew its action against the second defendant with each party to pay its own costs. There remain issues to be determined between the plaintiff and the third defendant.

[3] It is common cause between the parties that there was a love relationship between the plaintiff and the deceased. In April 2010, plaintiff sent a delegation to the family of the deceased to engage in ilobolo negotiations. As a result of the negotiations, an agreement was concluded that the plaintiff would pay a sum of R12 000 for ilobolo. The plaintiff paid R9 000 for *ilobolo*, a living cow, a suit and pair of shoes for the bride's father, a two piece costume for the bride's mother, two boxes of snuff, liquor and a case of beers.

[4] The plaintiff testified that he met the deceased in 2007 at Kwa Nyamazane Clinic in Mpumalanga. They telephoned each other thereafter and went out for some time and a love relationship started. At the time the plaintiff was living at Pienaar. He then moved in into the place of the deceased until 2008. In 2008 they moved to Pienaar with the deceased leaving the deceased's daughter Thobile Carol Mkhonza, the third defendant, in the house of the deceased. The deceased moved in with him at his place in Pienaar. She took all her belongings with her and left Thobile and another granny to live in her house.

[5] On the 2 April 2010 plaintiff sent his family to the family of the deceased to negotiate the ilobolo because he did not want to cohabit with the deceased without paying ilobolo. An agreement was concluded with the family of the deceased that he pays ilobolo of R12 000. He then paid a sum of R9 000, a living cow, the suit, hat and shoes for the father in law, a blanket, two piece costume for the mother in law, snuff, liquor, beers and the drinks were handed to the family of the deceased. The deceased was also present at the home of Piet Mbungela where the negotiations were taking place. She was happy about what was taking place at the time.

[6] The plaintiff testified further that there were no plans for any celebration of the

marriage or handover ceremony of the bride to his family since he has been living with the deceased from 2007. The deceased remained behind on the 2 April 2016 and only returned home on the following Wednesday. She was now his wife because he had paid ilobolo for her. They considered themselves as a married couple after April 2010 and both families considered them as such.

[7] They had two (2) motor vehicles, a Corolla and a Fortuner, and both were registered in the name of the deceased. The plaintiff was driving the Corolla and the deceased was driving the Fortuner. He met the deceased who had the Corolla at the time and they bought the Fortuner together although it was registered in the name of the deceased. The deceased also assisted with household necessities for the house in Pienaar.

[8] Nobody informed him of any further ritual and/or custom that needed to be attended to after what happened on the 2 April 2010. He continued to live with the deceased as husband and wife until the deceased took ill in October 2013 immediately after the funeral of her mother. He took her to a traditional healer. She was taken in by the traditional healer for some time until the third defendant took her and put her in a hospital in Nelspruit. He visited his wife in hospital on three occasions and on the fourth occasion, which was on the 3 February 2014, he was harshly rebuked by the deceased's brother, the second defendant, who called him and told him in no uncertain terms that he should desist from visiting his wife in hospital. If there were any issues that he would like to address, he can do so after the discharge of the deceased from hospital.

[9] At the time when the deceased met her death, he was preparing to send a delegation again to the Mbungela family to settle the outstanding balance of R3 000 for the ilobolo. The Mbungela family never demanded the balance.

[10] He did not see his wife since the 3 February 2014 for he feared for his life if he was to be found visiting her in hospital. He only learnt of her death from a stranger a day after she died. He had no problems with the deceased or her family and does not know why he was treated in that manner. Before the death of the deceased, the deceased, her sisters and some of her family members attended the funeral of the plaintiff's

mother. When the deceased's mother died, the plaintiff and his family members attended the funeral of the deceased's mother.

[11] Under cross examination he conceded that a certain Jabu was also living with the deceased when he moved in. He did not mention Jabu in his evidence in chief because Jabu is not a child of the deceased and he did not have anything to do with him. He insisted that on the 2 April 2010 he married his wife by customary law. Nobody told him that there are still outstanding rituals and/or custom that needed to be attended to. He never discussed anything with Piet Mbungela on that day nor any day thereafter. He conceded that in 2007 - 2008 he did not live permanently at the house of the deceased because he had his own house in Pienaar.

[12] He is Swazi and did not know what the Tsonga's tradition is with regard to consummation of the customary marriage. In siSwazi, once he pays ilobolo, the marriage is concluded. Nobody advised him of any outstanding customs which were required to be observed before they could be regarded as married by custom. He did not know that the deceased did not include him as a beneficiary in her pension fund scheme nor that he was not listed as one of the dependants of the deceased in her medical aid scheme.

[13] He initially attended to the Amashangana Traditional Council together with his wife to obtain the letter confirming their marriage but the secretary was not in the office on that day. He then went there again after the death of his wife. He produced the agreement entered into between the parties and the proof of payment of the ilobolo - thus he was issued with the letter confirming that he was married by custom to the deceased. The Mbungela family members were not present when he obtained this letter because they fighting him at the time.

That was the case for the plaintiff.

[14] The defendant called Jabu Mbungela who testified that the deceased is his mother and they lived together at Kwa Nyamazane. He has been living in the deceased's house as long as he can remember. He knows the plaintiff as someone who had a love relationship with the deceased. He did not live with the deceased but they would

occasionally visit each other. He would come and sleep at the house for a day or two and the deceased would also visit him in like a manner.

[15] Under cross examination, he maintained that the plaintiff and the deceased did not live together permanently but would visit each other all the time. He heard about the payment of ilobolo but he did not know their intentions to marry. He stated that when a person pays ilobolo, it means the couple wants *"to take their relationship to another level"*. Payment of ilobolo joins the people who love each other and brings together or joins their two families. However the ilobolo must be paid in full.

[16] Mr Piet Mbungela, the second defendant, testified that he is the elder brother to the deceased. He knows the plaintiff who was introduced to him by the deceased, who told him that they wanted to get married. He met with the delegation from the plaintiff's family and started the negotiations for the ilobolo. It was then agreed that plaintiff pays a sum of R12 000 of which plaintiff paid R9 000, a living cow, his suit and a per shoes, his mother's two piece costume, liquor and beers. He further discussed with the delegation that plaintiff should pay the ilobolo amount in full before they can handover the bride to him. The plaintiff came in later that day and he advised him of what he told his delegation, that ilobolo must be paid in full before the bride can be handed over to him as a wife. Once the ilobolo is paid in full, they will then go to the Tribal Authority to obtain a letter confirming the marriage of the bride and the groom. Before paying the ilobolo in full, he is just a friend to the deceased and not a son in law to the Mbungela family.

[17] He testified further that he received a telephone call from the plaintiff complaining that Thobile was disrespectful to him. He promised to discuss this issue with him when he comes back from Johannesburg. Plaintiff never attended and/or assisted with the funeral of the deceased. He did not know why he did not partake in the funeral arrangements.

[18] Under cross examination, he confirmed that he made an affidavit in the motion proceedings which were instituted in this case. He denied that he met the plaintiff before the ilobolo negotiations. He only met him for the first time on the day of the negotiations. At the time of the negotiations between the two families, he was head of the Mbungela

family. He admitted that all the things as listed in annexure "MPM2" of the plaintiff's particulars of claim were delivered by the plaintiff as it was agreed upon in the negotiations. He denied that the plaintiff and the deceased had been living together as husband and wife since 2010. He was happy with the plaintiff marrying the deceased and has never stopped being happy for them. When the deceased died, he asked his brother in law to call the plaintiff and report to him that his (the plaintiff's) wife has died.

[19] He conceded that the delivery of the suit, per shoes, two piece costume, blanket, liquor and beers by the plaintiff to the Mbungela family as a result of the negotiations and the agreement concluded therefrom symbolises the joining and coming together of the bride and groom and the two families.

[20] The third defendant, Thobile Mkhonza, testified that she is the only child and daughter of the deceased. She knows the plaintiff as the husband to the deceased. She and her mother, the deceased were very close. They lived in Kwa Nyamazane in Nelspruit in the same house. She denied that the plaintiff ever lived permanently with the deceased. They only visited each other for a day or two. She did not have any relationship with the plaintiff except that he was someone living with her mother. The plaintiff and the deceased were never married. She took the deceased to hospital and the plaintiff never visited her in hospital. She heard the deceased telling her friends whilst in hospital that she does not want to see the plaintiff anymore.

[21] Under cross examination, she admitted that she is the Executrix of the estate of the deceased. She has not yet finalised the winding up of the estate because she is awaiting finalisation of this case. She admitted that she will be the sole heir should the plaintiff be found not to be married to the deceased. She heard that the plaintiff had paid ilobolo but she does not know how much and how because it is not in their culture for her to pry in such things. Deceased never left her home in Kwa Nyamazane to live with the plaintiff in Pienaar. She fetched the deceased from the traditional healer and took her hospital. She used the deceased vehicle which she took from the plaintiff at the time, to transport the deceased to hospital and never took it back to the plaintiff.

That was the case for the defendant.

[22] Section 3 of the Recognition of Customary Marriages Act, Act 120 of 1998 ("the Act") provides as follows:

"3. Requirements for validity of customary marriages

(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".

[23] In April 2010 the plaintiff proposed marriage to the deceased and she accepted. It is not in dispute that their marriage was to be by customary law. As already stated above, the plaintiff sent his emissaries to the family of the deceased to enter into negotiations for the purposes of marrying her. The dispute to be determined by this Court is whether a customary marriage was entered into by the deceased and the plaintiff on the 2nd April 2010.

[24] The plaintiff's testimony was clear and unambiguous and it did not change under cross examination. It was put to him that the second defendant will testify that he personally had discussions with him after having advised the emissaries that plaintiff need to pay ilobolo in full before he can be regarded as the son-in-law by the family. He denied having had such a conversation with the second defendant. He admitted that he did not pay the balance of ilobolo but stated that, that did not invalidate their marriage. Although he was prepared to pay the balance of ilobolo, the family of the deceased did not demand it and it is customary that the bridegroom does not finish paying ilobolo.

[25] It was my impression that the plaintiff was a reliable and honest witness. He was not evasive in answering questions and gave his testimony in an honest and truthful manner.

[26] The second defendant was not truthful with his answers. He admitted attesting to an affidavit which stated that he met the plaintiff before the 2 April 2010 and told him

what was expected of him before he could be recognised by the family as a son-in-law. However, he denied meeting the plaintiff before payment of ilobolo. He insisted that he only met the plaintiff for the first time on the day ilobolo was paid. He refused to answer the question regarding the meaning of the letter from the Amashagaan Traditional Council. At some point he was laughing when being cross examined. He however acknowledged at the end of his testimony that the exchange of gifts on the 2 April 2010 symbolised the joining and/or coming together of the bride and the groom and the two (2) families. But he denied that the deceased and the plaintiff were married by custom and that they were living together as husband and wife. Further, when asked how he conveyed the message to the plaintiff that the deceased has died, he said "*/ told him his wife has died*". But he later testified that he ask his brother in law to call the plaintiff and advise him that his (the plaintiff's) wife died.

[27] I therefore concluded that the second defendant was not a reliable witness. He tailored his evidence and answers to questions as the case was proceeding.

[28] The gist of the testimony of Jabu Mbungela and that of the third defendant was more on whether the plaintiff and the deceased lived together as husband and wife. They were not present on the 2 April 2010 when the ilobolo negotiations and agreement was concluded. Of importance is that when the third defendant was asked: how do you know the plaintiff? She replied that "*he is my mother's husband*". The third defendant conceded that she did not live with the deceased or at home for some time because she was working in Ermelo and in Witbank. She came home only on weekends.

[29] It is not in dispute that the plaintiff is the one who took the deceased to the traditional healer after she took ill in October 2013 and that both vehicles were in the possession of the plaintiff until the third defendant and a friend to the deceased came to collect the Fortuner and never returned it. It was not disputed that the deceased assisted with the household necessities of the Pienaar home of the plaintiff. This militates against the evidence of the defendants' that the plaintiff and the deceased did not live together as husband and wife.

[30] Counsel for the defendants contends that to show that the plaintiff and the deceased were not married to each other the deceased did not include the plaintiff in

her medical aid scheme as a dependant. She did not list him as a beneficiary in her pension fund scheme.

[31] As it appears *supra*, when the deceased took ill, the plaintiff did not use her medical aid and took her to a doctor and/or hospital. He took her to a traditional healer. That is indicative of the belief of the plaintiff in traditional healers and not the doctors who need medical aid. In my view, the plaintiff believes in traditional medicine and therefore being a member of a medical aid scheme is of no consequence to him. Further, it is the undisputed evidence of the plaintiff that he has been using the Corolla and the deceased was using the Fortuner although both vehicles were registered in the name of the deceased.

[32] I am of the view, therefore, that the plaintiff and the deceased were living together as husband and wife. Consequently, it is the plaintiff who was the first to know that the deceased is ill and took her to a traditional healer for help. The deceased left both vehicles registered in her name in the care and possession of the plaintiff.

[33] The second defendant has conceded that the delivery of the gifts by the plaintiff to the Mbungela family symbolised the coming together of the two families and of the bride and the bridegroom. He however, places emphasis that the plaintiff and the deceased were not married to each other because the plaintiff did not pay the ilobolo in full. This was also the evidence of Jabu that if the ilobolo is not paid in full, then there can be no marriage between the parties. However, it is the uncontested evidence of the plaintiff that customarily, the bridegroom does not finish paying ilobolo.

[34] In the case of **MABUZA vs MBATHA 2003 (4) SA 218 (C)**.the following was stated:

"African customary law has evolved and was always flexible in application. There is thus no doubt that the siSwati custom of ukumekeza (i.e. the formal integration of the bride into the family of the bridegroom, the custom being one of the three requirements for a valid marriage according in siSwati customary law), like so many other customs, has somehow evolved so much that it is probably practised differently from what it was centuries ago. It is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties

and/or their families in appropriate cases".

[35] I agree with Counsel for the plaintiff that Customary Law has evolved over the years and that payment of ilobolo in full cannot be such an essential requirement to invalidate a customary marriage. Suitable arrangements can be made for payment of ilobolo and if the other requirements of a customary marriage have been met, a valid customary marriage can be entered into by the parties. So ilobolo does not have to be paid in full as alleged by the defendants before a valid customary marriage can be entered into between the parties. In *casu* the plaintiff paid R9 000 of the R12 000 ilobolo asked by the bride's family and delivered certain gifts to the relevant people of the bride's family as required by custom to unify and/or bring together the two families and the bride and the bridegroom.

(See FANTI v BOTO AND OTHERS 2008 (5) SA 405 (C)).

[36] Counsel for the defendants contends further that there was no handing over of the bride to the bridegroom's family, therefore there was no customary marriage entered into by the parties since this essential requirement was not met.

[37] In the case of *Mabuza supra*, it was stated as follows:

"There is no reason why failure to observe some of the rituals or ceremonies cannot be waived or condoned by parties in terms of an agreement between them".

[38] The requirement of handing over of the bride to the bridegroom's family cannot be over emphasised than the other requirements to invalidate the conclusion of a customary marriage. Authorities agree that the handover of the bride to the bridegroom's family and her acceptance and incorporation into the bridegroom's family is ordinarily accompanied by well-known extensive ritual and ceremonies involving both families. These rituals and ceremonies come at a huge cost. Thus- due to financial constrain and/or means, parties at times postpone these ceremonies. In *casu*, the deceased, who has been living together with the plaintiff at the time the ilobolo was negotiated and paid, returned to her husband a few days later. It is the undisputed testimony of the plaintiff that she returned the following Wednesday after payment of

ilobolo.

[39] I am of the view therefore that, with the testimony of the plaintiff that he was not aware nor was he alerted that there was other ritual and/or custom to be observed and the undisputed fact that she returned to her husband on her own on the Wednesday after ilobolo was paid and the other rituals performed, the handover of the bride to the family of the plaintiff was condoned and/or waived by the parties.

[40] I conclude therefore, that a customary marriage was entered into between the plaintiff and the deceased on the 2 April 2010 although there was no formal handing over of the bride to the family of the plaintiff. I therefore conclude that the plaintiff was married to the deceased by customary law. Therefore the plaintiff succeeds in its claim against the defendants.

[41] In the circumstances, I make the following order:

- a. That the plaintiff and the deceased Ntombi Eunice Mbungela entered into a customary marriage on 2 April 2010 and as such the Plaintiff is the customary husband of the deceased;
- b. The customary marriage referred in (a) above has not been dissolved by law or otherwise;
- c. The first defendant is ordered to enrol and register the customary marriage referred in (a) above in the first defendant's Marriage Register;
- d. The first defendant is ordered to issue a Recognition Certificate in favour of the plaintiff within 14 (fourteen) days from the date of this order;
- e. The third defendant is liable for the costs of this action in her representative capacity as the Executrix of the deceased estate.

TWALA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of Hearing:

4-6 MAY 2016

Date of Judgment:

8 JUNE 2016