IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

8/6/2016

APPEAL CASE NO: A79/16

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
8/6/2016
DATE SIGNATURE

SEBONA, PHILEMON PETER **Appellant**

and

MASHILOANE, MASEKGOWA MAGDELINE **Respondent**

JUDGMENT

MULLINS AJ:

[1] This is an appeal against a judgment of the Mpumalanga Regional Court held at Middelburg, delivered on 20th August 2015 in a divorce action.

[2] The appellant was the defendant in the court *a quo*. He was sued by the respondent as plaintiff for a decree of divorce and other relief, based on the plaintiff's allegation that the two had married one another under customary law in 2003[1].

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[1] The particulars of claim had erroneously referred to 2013, but the mistake emerged during the trial, and the plaintiff's particulars of claim were amended on an unopposed basis so as to state the date of the marriage as being 1 March 2003.

[3] The appellant was represented before us by Mr Omar, and the respondent by Advocate Ngoepe.

[4] The essential dispute between the parties - and the point on which the appeal turns - was as to whether the couple had in fact been married by customary law.

The appellant's version in this regard was as per paragraph 5 of his plea (I quote only that which is relevant):

> The Defendant categorically denies that the parties entered into any sort of customary marriage ... as alleged and/or that such marriage still subsists, and places the Plaintiff to the proof of same.
>
> The Defendant avers that the parties were mere boyfriend and girlfriend who had intended to enter into a civil marriage and not a customary marriage. However, such wish never materialised....

[5] The magistrate found in favour of the respondent on this point, in a detailed judgment which extends over 9 close-typed pages.

[6] I am in full agreement with the magistrate's findings. In this regard:

[6.1] Three witnesses testified in the respondent's case, viz (in the following order):

[6.1.1] Her father, Mr Daniel Mashiloane;

[6.1.2] Her great-aunt, Mrs Kura Manaswe; and

[6.1.3] The respondent herself.

[6.2] For the appellant, the appellant testified, followed by his uncle Mr Zulu.

[6.3] Mr Mashiloane's evidence was clear and unambiguous. He said this:

[6.3.1] That the lobolo discussions between the two families took place on 1 March 2003, and on 24 May 2003[2].

[6.3.2] Agreement was reached, Mr Mashiloane said, on the first occasion 1 March 2003, as to part of the lobolo, with the remainder to be negotiated thereafter.

This, incidentally, ties in with Dlodlo J's description of these negotiations at 415G-416C of Fanti v Boto and Others 2008 (5) SA 405 (C), where he spoke of a first round of negotiations at which the potential bride's family accepts gifts and indicates its willingness to enter into full lobolo negotiations, followed by a second round at which full agreement is reached.

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[2] Mr Mashiloane didn't stipulate the latter date. He simply said that it was "May in 2003". But he referred to a document signed by the family representatives on both sides, which formed part of the record. The document is in the vernacular, but bears signatures and two dates, viz 1 March 2003, and 24 May 2003.

[6.3.3] Mr Mashiloane said that the remainder of the lobolo was indeed agreed upon on the second date. He referred in this regard to the signed document to which I adverted in paragraph [6.3.1] above.

[6.3.4] The lobolo was partly paid, Mr Mashiloane said: R2 700,00 (the value of six cows) on the first occasion, and R2 250,00 (the value of five cows) on the second occasion, with a further R2 250,00 (the value of a further five cows, making the lobolo the equivalent of sixteen cows, of which R1 350,00 was to be paid in cash and the balance in the form of two slaughter-cows) outstanding.

Mr Mashiloane did not suggest that the fact that a portion of the lobolo was still outstanding detracted from the fact of marriage, and nor was that effectively suggested to him.

[6.3.5] Pursuant to the successful lobolo negotiations of March/May 2003, said Mr Mashiloane, his daughter the respondent was then delivered by members of his family to the appellant's family's home on 22 June 2003.

[6.3.6] Mr Mashiloane testified further that a goat had been ritually slaughtered on the second occasion (24 May 2003), in recognition of the fact that the lobolo had been successfully negotiated.

He described the reason for this ritual as follows (I quote from p40 of the record):

In our culture when we do that, it is an indication that we are welcoming them so that they can marry our daughter.

[6.3.7] Mr Mashiloane expressed no doubts as to the fact that his daughter had married the appellant, in terms of their custom.

I quote in this regard from his evidence on pp35-36 of the record (this was in the course of evidence in chief):

Do you know the man sitting here next to this attorney? - Yes, I know him.

What are his names? - It is Philemon Sebona.

Any relation between you and this Mr Sebona? - He is my son-in-law. He is the one who is married to Poppie Mashiloane [i.e. the respondent].

Mr Mashiloane, your daughter and the defendant, are they married? - Yes, they are married.

How are they married? - They are customarily married.

What do you mean by customarily married? What happened? - They paid lobolo.

[6.4] Mr Mashiloane was equally clear under cross-examination by the appellant's attorney. I quote a few extracts from his evidence under cross-examination:

[6.4.1] On p45 of the record:

> Yes. They just came and paid lobolo. And on the last date, that is when we negotiated the total amount of lobolo.

[6.4.2] On p46 of the record:

> Your Worship, in our culture when the daughter is supposed to be married, us as family we gather ourselves and then we agree on the amount of lobolo.

[6.4.3] On p47, in response to the hypothesis that the families might not have reached agreement on the lobolo on the second occasion:

> Now you say you suppose, but they *did* come and then we negotiated as to how much must they pay and how much are they left with.

[6.4.4] And on p48, as to when the marriage took place:

> The marriage started when they gave us six cows on the first day.

[6.5] I have quoted only four passages in Mr Mashiloane's evidence. There are many passages in the record in which the appellant's

attorney attempted to get Mr Mashiloane to depart from his straightforward evidence, without success.

[6.6] Mrs Manaswe was in my view an equally credible witness.

She testified that she, together with another woman (Sapina Taung; see p69 of the record) and one Daniel Moshlala (who appears to have been part of the lobolo negotiations and who, she says, "knocked on the door and [when it was opened for the party of females].... went back to the car"), accompanied the respondent to the home of the appellant's mother in Middelburg. Her evidence was as follows on p71:

> And when you arrived there you told them your mission, and what happened? - When we arrived we told them that we brought the bride and they gave her orders, and after that we left.
>
> When you say they gave her orders, can you recall what type of orders she was given? - The groom's mother said you have arrived at Sebona family, you are welcome. You must behave very well. And we also told her that in marriage you must be patient. They gave us tea, and after we drank tea we left.
>
> Just plain tea - And cakes.
>
> And then when you left, did you leave with Mashiloane [the respondent]? - No, we left her there.

[6.7] The appellant's attorney attempted to persuade Mrs Manaswe in cross-examination that all she had really done was to accompany a

young woman[3] on a trip without any particular significance from one place to another. In this, he was singularly unsuccessful. See for example the following passages on pp72-73 of the record:

> Ma Manaswe, when I look at you, you come across as somebody who understands the cultural practices of the Pedi. Am I correct? - Yes.
>
> And I take it that this was not the first occasion that you took a bride to be handed over - No, it was not the first time.
>
> How many times prior to this occasion did you partake in such ceremonies? - Masekgowa [the respondent] was the second bride that I have handed over.
>
> During that time - The other one I accompanied her years ago and Masekgowa was the second.
>
> Now if you were to compare what happened with the first person that you accompanied and now when you accompanied the plaintiff, Masekgowa, would you say there are differences or the process was the same? - We accompanied them at the same way.

[6.8] It is so that Mrs Manaswe said on p76 of the transcript that she was "surprised" to be received by only two members of the appellant's family, but there could have been any reason for this (certainly, none of the receiving members of the appellant's family testified to explain this), and her surprise in no way detracts from the picture painted by her of the respondent's being delivered, and received and instructed, as a bride.

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[3] Judging from the summons, the respondent will have been 21 years old at the time, and the appellant 33 years old.

[6.9] I pause at this stage to deal with the central point in Mr Omar's argument, viz his contention that there had been no handing over of the bride as required by customary law, that as a result there was no customary law marriage, and his reliance in this regard on the judgment of Matlapeng AJ in Motsoatsoa v Roro and Two Others (unreported South Gauteng High Court, Case No: 46316/09, dated 1 November 2010). In this regard:

[6.9.1] See, in the first place, Mrs Manaswe's evidence as to the handing over in paragraph [6.6] above.

What Mrs Manaswe described there was clearly intended and understood to be a formal handing over of the bride to the bridegroom's family, and the instructing of her as a young bride. It would in my view be absurd to describe it as anything else.

[6.9.2] Although the appellant's attorney questioned Mrs Manaswe (along the lines outlined in paragraph [6.7] above) as to a relative lack of ceremony and numbers, what Mrs Manaswe said on pp71-73 of the record, as quoted by me in paragraphs [6.6] and [6.7] above, was unchallenged.

[6.9.3] Motsoatsoa is, I am satisfied, totally distinguishable.

What happened in Motsoatsoa is that the applicant and the deceased lived together from 2005 until the deceased's death on 21 July 2009. During that period, in 2007 and 2008, steps were taken to set a customary marriage in motion[4] but, on the strength of the judgment, nothing more. In contradistinction with the facts of this case, there was no handing over of the bride, no instruction of her by her new family, nothing of that nature.

It is consequently unnecessary for me to decide whether Motsoatsoa was correctly decided or not.

[6.9.4] It is apposite in this regard to refer to the judgment of Hlophe JP at 226D-G of Mabuza v Mbatha 2003 (4) SA 218 (C) (Mabuza related to the question of whether the couple had been married in accordance with siSwati customary law, and in particular the apparent failure to comply with the siSwati Ukumekeza custom, in terms of which the bride must be handed over and must, apparently, traditionally cry in the course thereof; see p225E-G of the judgment):

> In my judgment, there is no doubt that Ukumekeza, like so many other customs, has somehow evolved so much that it is probably practised differently than it was centuries ago. I got a firm impression that Mr Shongwe [expert for the defendant] was not being truthful to the Court insofar as he attempted to elevate Ukumekeza into something so

[4] The deceased's family sent emissaries to the applicant's parents; negotiations were embarked upon; lobolo of R18 000,00 was agreed; R5 000,00 of the lobolo was paid.

indispensible that without it there could be no valid siSwati marriage. It is my view that his evidence in that regard cannot be safely relied upon. As Professor de Villiers [expert for the plaintiff] testified, 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.

Further support for the view that African customary law has evolved and was always flexible in application is to be found in TW Bennett *A Sourcebook of African Customary Law for Southern Africa*. Professor Bennett has quite forcefully argued (at 194):

> 'In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters'.

[6.9.5] I am in full agreement with the reasoning of Hlophe JP in Mabuza.

Applying that reasoning to this matter, there can in my view be no doubt of the fact that the respondent was handed over as a bride to her bridegroom in accordance with their custom.

[6.10] As for the respondent's evidence:

[6.10.1] The respondent confirmed the evidence of those who preceded her, i.e. that she understood that lobolo had been agreed upon and that she was married, that she consented to be married to the appellant, that she was delivered to the appellant's mother's home as his wife, and that she thereafter lived with him as man and wife[5] for ten years until he returned her to her father in August 2013, and bore him three children[6].

[6.10.2] The appellant's attorney attempted in cross-examination to suggest that the appellant and the respondent had always intended a civil wedding, and had never regarded themselves as married without such a civil wedding.

The respondent readily agreed that the appellant had, as she put it (p87 of the record), told her that

> one day I want to marry you. I want to put a ring on your finger.

But she was adamant that this related to the idea of a civil ceremony, and didn't detract from their marriage by custom.

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5 I say "as man and wife" for ten years, but her evidence was that the appellant slept on the couch for the last eight to twelve months.

6 The eldest was born on 11 December 2003, which suggests that the respondent was impregnated in March of 2003, but would only have become aware of the pregnancy in April or May of 2003 at the earliest - a court can take judicial notice of these things, which are in any event not material to the question of whether the parties were married or not.

[6.10.3] See in this regard for example the respondent's evidence on p89 of the record, when she was tackled on her dissatisfaction with the appellant's infidelity, given that customary union marriages are potentially polygamous:

> Now if you do not have any problem with polygamy, why are you having a problem with [the appellant's having an intimate relationship with another woman] ...? - According to my understanding, if he wishes to have another wife, in our culture he must first approach me. He must not just go out and have a relationship with another woman.

[6.10.4] And see p90 of the record (the references in what follows to a "white wedding" are references to the ceremony of a civil marriage):

> Now you say you were talking about marriage with the defendant. - You mean the white wedding.
>
> Yes. As explained to you what a white wedding is - Yes. He will always tell me that one day when he gets he will marry me in white wedding.
>
> In your discussions and your understanding, what did that mean to you? - He was trying to explain that he also wishes to marry me in white wedding, but it does not mean that we are not married, and it does not mean that he does not understand the way we are married ... our customary marriage.
>
> Now when did you get married customarily? - In 2003.

> When specifically in 2003? - On the 24th of May.
>
> What gave you the impression, or what signs were there that indicated to you that now we are entering into a customary marriage? - Because according to our customs, when a person is paying a lobolo that means he is taking you as his wife.

[6.11] I pause here to say that the question of the exact date of marriage, if the couple were married by customary law, was debated in the evidence, and that the particulars of claim claimed[7], and the magistrate held, that it was the date of the first meeting, 1 March 2003.

For my part, I would have thought that the respondent's evidence, which I quoted in paragraph [6.10.4] above, was correct to the effect that the marriage actually only commenced on the date when full agreement was finally reached on lobolo, 24 May 2003. In this respect I would differ from the magistrate. But I might be wrong about that, and it bears emphasising that the issue on appeal is *whether*, not *when*, the couple were married.

[6.12] [6.12.1] Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 provides as follows:

> For a customary marriage entered into after the commencement of this Act to be valid -

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7 See paragraph [2], and fn 1, above.

(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.

[6.12.2] Dlodlo J in Fanti above at 413G-H confirmed the finding of Hlophe JP in Mabuza above at 223, that the essential requirements for a union to have been negotiated and entered into or celebrated in accordance with customary law are (a) consent of the bride, (b) consent of the bride's father or guardian, (c) payment of lobolo (for which one can substitute agreement on lobolo, it being clear that whatever the consequences of a failure to make full payment, it doesn't void the marriage), and (d) the handing over of the bride.

[6.12.3] The evidence for the respondent clearly established that these requirements had been met to the satisfaction of the parties, such that they regarded themselves as married by customary law.

[6.13] The writing was, I think, already discernible on the wall by the time the respondent's case was closed and the appellant had to testify.

[6.14] [6.14.1] I say this firstly because one had by then heard the evidence for the respondent, which was clear, credible and, in my view, unscathed by cross-examination.

[6.14.2] I say this secondly because one knew by then what the appellant's version was going to be, because it had been put in cross-examination. And what had been put sounded unconvincing and improbable.

[6.14.3] See for example what Mr Rakwenya, the attorney for the appellant, was constrained to put to Mr Mashiloane on p57 of the record:

> Sir, I put it to you that, it was never the intention of your son-in-law, as well as your daughter to be married customarily. Customarily they only wanted to perform the ceremony of lobolo and pass on to a civil marriage.

That passage begs a number of questions: why go to the trouble of negotiating lobolo, and of paying most of the lobolo, if it was intended to have no significance? If a civil marriage was the parties' only intention, why was it never carried out despite ten years and the birth of three children? Why was the respondent formally delivered to the appellant's family and instructed by them in accordance with custom, if nothing was intended by it?

[6.15] I mentioned what I did in paragraph [6.14] above because, as it turned out, the evidence for the appellant was, in contrast with that for the respondent, singularly unconvincing.

[6.16] The magistrate said the following in this regard in paragraph 17 of her judgment (p193 of the record), with which I fully agree:

> It cannot be denied that the steps which were taken by the parties themselves in agreeing to marry each other; then causing their families to meet to negotiate lobolo; and thereafter settling together and establishing a family, are all ingredients of a customary marriage. Defendant's only qualm with the process is that he had not asked for the plaintiff to be brought to his mother's house.... However, his denial of his family or himself requesting her formal delivery is lame and cannot stand in the face of the rest of the evidence that it *was* arranged; and that she *was* received by his mother.... He was obviously grateful that she was brought, and so much that he took her to his house the same night to start the cohabitation. Unconvincing too is his contention that he was not relying on the existence of a customary marriage between them when he lived with her as a family replete with the children. It would have been quite in conflict with the character of a born again Christian that he says he is if he simply lived together with the plaintiff without any justification 'before God and man' in the form of a marriage. The fact that he did, makes it abundantly clear that he recognised the process that he had followed, and the steps which were taken, as constituting a marriage which legitimated his cohabitation with plaintiff.
>
> Also unconvincing is the defendant's version that he did not consent to be married under customary law even when he had followed every step of that process.

[6.17] Suffice to quote the following passages from the appellant's evidence under cross-examination on pp125-126 of the record:

In March 2003 you were staying in Bloukomsig. Is that correct? - Yes.

You were not staying in Mhluzi. Is that correct? - That is true.

In May 2003 when she was brought to your home or to your mother, she was not taken to Bloukomsig. Is it not? - That is true.

Why was she taken to Mhluzi to your mother? It is not your mother's wife - I do not know how that happened.

It is a mystery. - Yes, it is a mystery.

And to add further to this mystery, she does not come alone. She is accompanied by her aunts, two women - Yes, it is so.

And another man, Mr Mohlala. - Yes, it is so.

And I guess in May she already knew that you were staying in Bloukomsig, she had been to Bloukomsig before. Is it not? In May when she was taken to Mhluzi, she already knew where you were staying. - It is correct.

And to add to our argument, you are also there at Mhluzi waiting for her to be brought there - Your Worship, on that particular day I was at Mhluzi to see my mother as it is what I normally do on Sundays to go to see my mother or to visit my mother.

So her being brought there was coincidental.... - Yes, it is so, Your Worship.

The unconvincing nature of the appellant's evidence is I believe fully apparent from the passage that I have just quoted.

[6.18] The appellant's uncle Mr Zulu's attempts to support the appellant's version were not successful. See the following passage in his evidence in chief[8]:

> So according to you, you say on that day it was a stalemate, nothing was agreed on - Your Worship, ultimately the father of the bride accepted what we presented.
>
> Which was for her daughter's hand in marriage with your nephew ... can marry your nephew. - Yes.

I must add that Mr Zulu's evidence related to the first meeting, and not the second - he confirmed on p163 of the record that he was not present on the second occasion.

[7] I need not refer to the binding authority (Rex v Dhlumayo and Another 1948 (2) SA 677 (A); Protea Assurance Company Limited v Casey 1970 (2) SA 643 (A)) to the effect that an appeal on issues of fact such as this can only succeed if we are satisfied that the decision was wrong.

I need not do so, because I am to the contrary quite satisfied that the magistrate's decision was correct, and was amply justified by the evidence.

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8 See p162 of the record; note the leading question, which was not preceded by any evidence by Mr Zulu of a lack of agreement.

[8] The law must pay due respect to the parties' custom and, as per Mabuza above, to the inherent flexibility in that custom.

If one takes a step back and looks at the evidence in its totality, I can see no basis whatsoever for doubting that all concerned (including the parties) were satisfied at the time and for years thereafter that this couple was married in accordance with their custom.

[9] In the result, the order which I propose is the following:

The appeal is dismissed, with costs.

JF MULLINS
ACTING JUDGE,
GAUTENG DIVISION, PRETORIA
HIGH COURT OF SOUTH AFRICA **8 JUNE 2016**

I CONCUR AND IT IS SO ORDERED:

DS MOLEFE J
GAUTENG DIVISION, PRETORIA
HIGH COURT OF SOUTH AFRICA **8 JUNE 2016**