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

Case no: 6134/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED: NO

DATE: 21/8/2023

SIGNATURE:

In the matter between:

**MARTHA KERILENG KGOSI
ID-6[...]**

APPLICANT

and

**KGANYANE LILLY KGOSI
ID-7[...]**

FIRST RESPONDENT

**ESTATE LATE RABAKI PETRUS KGOSI
(ESTATE NO: 0[...])
IDENTITY NO: 6[...]**

SECOND RESPONDENT

**KGANYANE LILLY KGOSI
IN HER CAPACITY AS *EXECUTRIX* OF:
LATE ESTATE NO: 0[...]**

THIRD RESPONDENT

DEPARTMENT OF HOME AFFAIRS

FOURTH RESPONDENT

JUDGMENT

*This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. This Judgment is made an Order of the Court by the Judge whose name is reflected herein and duly stamped by the Registrar of the Court. The judgment and order are accordingly published and distributed electronically. The date for hand-down is deemed to be **21 August 2023**.*

BADENHORST AJ**INTRODUCTION:**

- [1] The Applicant launched urgent proceedings wherein she sought an order validating the Applicant's marriage to the Deceased as well as an order to remove the First Respondent as the executrix of the estate of the Deceased.
- [2] The Fourth and Fifth Respondents elected not to oppose the relief sought.
- [3] Madam Justice Strydom AJ was seized with the application and delivered judgment on 23 May 2023 dealing with the dispute of removal of the First Respondent as *executrix*.
- [4] It is clear from the judgment that the Applicant no longer persists with the relief sought in prayers 1 and 2 of the Notice of Motion. The validity of the marriage between the Applicant and the Deceased is no longer disputed.
- [5] During argument before Strydom AJ the First Respondent made submissions that the marriage between her and the Deceased was a putative marriage.
- [6] There was no evidence on affidavit before the Court substantiating such a

claim. Strydom AJ refused to hear argument in this regard as the Court would need to refer to evidence that was not contained in the papers before Court.

- [7] The parties were granted leave to file supplementary affidavits dealing with the allegation that the marriage between the Deceased and the First Respondent constitutes a putative marriage.

THE COUNTER-APPLICATION:

- [8] The Applicant and the First Respondent are cited as the surviving wives of the late Rabaki Petrus Kgosi. (Herein after referred to as “the Deceased”)
- [9] It is common cause that the Deceased and the Applicant were married to each other in civil marriage of community of property, which was registered by the Fourth Respondent on 28 June 1986.
- [10] The Applicant avers she left the matrimonial home during 2006.
- [11] The Deceased and First Respondent entered into a civil marriage in community of property on 24 March 2017.
- [12] The Department of Home Affairs issued two marriage certificates certifying that both the Applicant and First Respondent entered into civil marriages with the Deceased and that said marriages were duly solemnized.
- [13] Two minor children were born of the marriage between the First Respondent and the Deceased. The First Respondent and the children are still residing in the matrimonial home.
- [14] The deceased passed away on 18 March 2021 without a Last Will and Testament.
- [15] The Applicant and First Respondent allege they only became aware that they were both married to the Deceased shortly after the passing of the Deceased.

- [16] It is the Applicant's case that the marriage between the First Respondent and the Deceased is unlawful and that the First Respondent was aware of the fact that the Applicant and the Deceased was still married. The First Respondent denies the contention that she knew that the Deceased was still married to the Applicant and states that the Deceased was cited as a 'bachelor' on their marriage certificate.
- [17] The First Respondent seeks an order that her marriage to the Deceased be declared a putative marriage and that she is entitled to 25% and one third of the child's share of the deceased estate.
- [18] The First Respondent avers that she contributed directly and/or indirectly to the growth in the joint estate with the Deceased. However, no detail is provided of the alleged contributions made to the joint estate, to enable this Court to decide to which portion the First Respondent is entitled to, if any.
- [19] The Applicant's view is that the First Respondent and her children are entitled to a claim against the deceased estate as heirs.

LAW ON PUTATIVE MARRIAGES:

- [20] To declare a void marriage to be a putative marriage both or one of the parties must have been unaware of the impediment to the marriage.
- [21] One or both parties must, in good faith, be unaware of the defect which renders their marriage void.
- [22] The Fourth Respondent informed the First Respondent *per* letter dated 6 May 2022, that the civil marriage contracted between her and the Deceased on 24 March 2017, is declared null and void and has been expunged from the national population register. The Fourth Respondent also declared that the marriage between the Deceased and the First Respondent constitutes bigamy.
- [23] Should the Court find that the void marriage is a putative marriage, a judicial

directive will be required confirming same.

[24] In **Zulu v Zulu and Others** 2008 (4) SA 12 (D) (25 February 2008) the Court sets out the requirements for a putative marriage. The first requirement was complied with. It is common cause that the First Respondent's marriage to the Deceased was registered with Home Affairs and duly solemnized.

[25] The First Respondent must prove the following two requirements to succeed with her counter-application:

[25.1] That the First Respondent has been ignorant of the impediment, not only at the time of the marriage, but must also have continued ignorant of it during her life, because if she became aware of it, she was bound to separate herself from such marriage relationship.

[25.2] That the First Respondent considered the marriage to be lawful and a valid marriage.

DISPUTE OF FACT:

[26] As previously stated, both parties were given leave by Strydom AJ to file supplementary affidavits on this point to limit the issue to whether a putative marriage came into existence between the Deceased and the First Respondent.

[27] The Applicant uploaded onto caselines six video clips and a loose translation (from Setswana to English) of these video recordings, made during the Deceased and the Applicant's youngest son's 21st Birthday celebrations held on 16 August 2014.

[28] The Applicant's supplementary replying affidavit contains the translation of conversations between the guests and photographer during the abovementioned Birthday celebration.

[29] The Applicant avers that the content of these videos is evidence that the

First Respondent's version that the Applicant disappeared for many years and that the First Respondent raised the Applicant's and Deceased's children, are not true. The content of the videos is allegedly further proof that the First Respondent was aware that the Applicant and the Deceased were still married.

- [30] It is the Court's view that these video clips and translations from Setswana to English, of what was said by certain guests, cannot be dealt with in motion proceedings.
- [31] Furthermore, the First Respondent never had the opportunity to reply to these new allegations and new evidence in the form of video clips and translations. This is extremely prejudicial to the First Respondent considering the *audi alteram partem* rule.
- [32] Counsel for both parties agreed that they will comply with any directive this Court may give and referring this application to oral evidence was ventilated in Court.
- [33] The parties' contesting version reveals a material dispute of fact on the papers on whether a putative marriage exists or not and the First Respondent should be provided the opportunity to rebut the new evidence.
- [34] There is, in the circumstances, a dispute of fact on the papers concerning whether the First Respondent knew that the Deceased was still married to the Applicant.
- [35] In my view, neither the Applicant nor the First Respondent could have foreseen the dispute of fact involving the validity of two properly registered civil marriages and a counter-application for an order declaring one of these marriages a putative marriage.
- [36] In this application the dispute of fact has emerged and the probabilities are sufficiently evenly balanced.

[37] I am of the view that here is a material and bona fide dispute of fact that cannot be decided on the papers.

[38] I am faced with three alternatives. Firstly, I may dismiss the application. Secondly, I may direct that oral evidence be heard on specified issues and thirdly, I may refer the matter to trial.

[39] Rule 6(5)(g) of the Uniform Rules of Court stipulates:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[40] In **Ntsala v Rustenburg Local Municipality and Another** (M124/20) [2021] ZANWHC 48 (20 April 2021) it is confirmed that should a court be unable to decide an application on paper, it may dismiss the application or refer the matter for oral evidence or refer the matter to trial. *The court should adopt the process that is best calculated to ensure that justice is done with the least delay on the merits of the case.*

[41] In **Moosa Bros & Sons (Pty) Ltd v Rajah** 1975 (4) SA 87 (D) at 93H the court held:

“Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.”

[42] In *Herbstein & Van Winsen: The Practice of the High Courts of South Africa* 5th ed Volume 1 page 460 it is stated that: “*The wide ambit of the court’s discretion is evident from rule 6(5)(g), according to which the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision.*”

[43] In terms of rule 6(5)(g) a court has a wide discretion regarding the hearing of oral evidence where an application cannot properly be decided on affidavit.

[44] I am not inclined to dismiss the counter-application by reason of the dispute of fact.

[45] The dispute of fact is, in my view, is genuine and the resolution thereof is material to the determination of:

[45.1] Whether a putative marriage exists;

[45.2] Whether the First Respondent is *bona fide* in her application;

[45.3] The status of the minor children;

[45.4] How the deceased estate will be divided; and

[45.5] For the expeditious administration of the intestate estate.

[46] In my view, referring the specific issues to oral evidence would ensure a just and expeditious decision. The issues to be determined are crisp and I can see no reason to put the parties through unnecessary delay and the costs of an action commenced afresh.

[47] It is trite that the concept of a putative marriage has been recognised at common law as a measure to provide relief to an innocent party who entered into an invalid marriage without knowing of the invalidity.

- [48] The *obiter dictum* in paragraph 43 of the judgment of Strydom AJ confirmed the present legal position *i.e.* that 50% of the estate to be distributed belongs to the Applicant as the Applicant and the Deceased were married in community of property.
- [49] The First Respondent placed no facts before this Court with regards to the alleged direct and/or indirect contribution the First Respondent made to the joint estate.
- [50] It was held in **Zulu v Zulu** 2008 (4) SA 12 (D): *“as a joint estate still existed between the common spouse and his first wife, no new community of property regime could be created between the common spouse and the second wife.”*
- [51] I am however inclined to agree with Loubser J in **MS v Executor, Estate Late NS and Others** 2021 (6) SA 483 (FB) where the court did not follow the judgment in **Zulu** *supra*.
- [52] The Court held in paragraph 18 of **MS v Executor** *supra*: *“In such circumstances it would be unjust, unfair and contrary to the interests of justice to deprive the applicant from the half-share to which she is certainly entitled. To argue otherwise would be to ignore the established legal principle that a putative marriage exists as a common-law qualification to the general rule that a void marriage has no legal consequences.”*
- [53] In paragraph 19 the Court went further: *“This approach appears to me to be consistent with the values and the norms written into the Constitution. A court is enjoined by s 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.”*
- [54] Although the length of the marriage in the current application can be distinguished from that in the **MS v Executor**, the values and norms laid down in the Constitution should still be applicable.
- [55] A further important consideration is the fact that there are minor children

involved. Declaring the void marriage to be a putative marriage is significant, because the children born out of a putative marriage are children born of married parents, this means the children may inherit in the intestate estate of their parents.

[56] In my view, having regard to the Uniform Rules 6(5)(g), the application falls to be referred to oral evidence with the view to resolve the dispute of fact:

[56.1] Whether the First Respondent was an innocent party and had no knowledge that the Deceased was married to the Applicant.

[56.2] The extent of the alleged direct and/or indirect contribution by the First Respondent to the joint estate during the four-year existence of the marriage to the Deceased.

[57] The Court seized with the matter will decide the outcome of the counter-application and relief sought pertaining to the patrimonial consequences.

[58] Considering the case law *supra* the Court should adopt the process that is best calculated to ensure that justice is done with the least delay on the merits of the case.

[59] Therefore, in exercising my discretion as envisaged in Uniform Rule 6(5)(g), I am not referring the matter to trial but attempt to rather pursue a practical, just, efficient and cost-effective resolution to the dispute. This approach will ensure a quick resolve of the patrimonial consequences and the status of children.

[60] The issues are clearly defined and are comparatively simple. The First Respondent should prove that she entered into the invalid marriage with the Deceased without knowing of the invalidity. If the answer is affirmative, the marriage constitutes a putative marriage.

[61] Only if the marriage constitutes a putative marriage, the Court should determine which share or percentage of the joint estate, the First

Respondent is entitled to and from whose share it should be claimed.

COSTS:

[62] All that remains is the issue of costs.

[63] The costs of the application are reserved for determination by the Court that hears the oral evidence upon issuing of a final order.

ORDER:

In the result the following order is made:

[1] The counter-application declaring the marriage between the Deceased and the First Respondent a putative marriage, is postponed to a date to be determined by the Registrar of the Gauteng Division, Pretoria, for the hearing of oral evidence in terms of Uniform Rule 6(5)(g) on the issues set out in paragraph 2 below.

[2] The issues upon which oral evidence is to be led at the aforesaid hearing are:

[2.1] Whether or not the marriage between the Deceased and the First Respondent constitutes a putative marriage; and

[2.2] Only if the Court declares the void marriage to be a putative marriage, to hear evidence on:

[2.2.1] The direct and/or indirect contributions made by the First Respondent to the joint estate during the existence of the marriage from 24 March 2017 to 18 March 2021.

[2.2.2] To determine the percentage/share the First Respondent is entitled to and from whose share it should be claimed.

[3] Oral evidence shall be admitted from any person who has already depose to an affidavit concerning the merits of this application.

[4] Nothing in this order shall preclude the Court that hears the oral evidence from permitting the evidence of any other witness to be admitted.

[5] The costs of the application are reserved for determination by the Court that hears the oral evidence upon issuing of a final order.

L BADENHORST

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances:

For the Applicant:

Counsel: Adv ZD Maluleke

Instructed by: B Rikhotso Attorneys

For First and Third Respondents:

Counsel: Adv T Sebata

Instructed by: Tisana Madimetja Attorneys Inc

Date of Hearing: 26 May 2023

Judgment delivered: 21 August 2023