



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: 4856/2016

In the application between:

THABO JACKSON MODIKO

1st Applicant

KOTSOANE JOSEPH MODIKO

2nd Applicant

and

MOHANUA ELISA SETHABELA

1st Respondent

DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS 2nd Respondent

MASTER OF THE HIGH COURT, FREE STATE DIVISION 3rd Respondent

REGISTRAR OF DEEDS: BLOEMFONTEIN, FREE STATE 4th Respondent

JUDGMENT BY: C REINDERS, J

DELIVERED ON: 4 AUGUST 2017

- [1] This is an application which has at its core the validity of a customary marriage. The first applicant, Mr Thabo Jackson Modiko is the uncle to the late Mr Moeketsi Philemon Modiko ("the deceased"). Mr Kotsoane Joseph Modiko is cited as the second applicant and is the brother of the first applicant. For ease of distinction between the two Modiko

uncles, reference to them would be made as Mr Thabo Modiko and Mr Kotsoane Modiko respectively. Ms Mohanua Elisa Sethabela (“Ms Sethabela”) is the first respondent, with the second to fourth respondents as cited above. Mr Thabo Modiko is the deponent to the applicants’ founding and replying affidavits. It is clear from the papers that he is effectively the party moving for the relief as stated below in para [2]. Mr Kotsoane Modiko denies being part of the application as the second applicant. In opposing the application it is evident that the dispute is essentially between Mr Thabo Modiko and Ms Sethabela. Accordingly reference would be made to them as the applicant and the respondent.

[2] In its notice of motion Mr Modiko moves for an order in the following terms:

- “1. An order setting aside the purported customary marriage entered into between the Late Moeketsi Philemon Modiko and the First Respondent on the 03rd August 2013 and declaring it to be null and void *ab initio*;
2. An order removing the First Respondent as the Executor in the Late Estate of Moeketsi Philemon Modiko;
3. An order appointing THABO JACKSON MODIKO as the executrix (sic) in the Late Estate of MOEKETSI JACKSON MODIKO;
4. An order directing the First Respondent to hand over all the assets of the Estate Late MOEKETSI PHILEMON MODIKO to Mr. THABO JACKSON MODIKO within (03) days of the date of this court order;
5. Costs order against the First and Second Respondent.”

[3] In as far as prayers 3 and 4 are concerned, the Master filed a report and submitted that even if prayers 1 and 2 are granted, prayers 3 and

4 cannot be granted as the power to so appoint an executor vests in the Master in terms of Section 18 of the **Administration of Estates Act 66 of 1965**. I agree and will deal with the remainder of the relief sought.

- [4] There are only three basic statutory requirements for the validity of a customary marriage in terms of **The Recognition of Customary Marriages Act 120 of 1998**. S 3(1) of the Act provides that:

“For a customary marriage entered into after the commencement of the Act to be valid –

(a) the prospective spouses-

- (i) must both be above the age of 18 years
- (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.”

- [5] From the papers it is evident that the third requirement, namely the negotiation and celebration of the marriage in accordance with customary law, is the requirement in dispute.

- [6] The legislature did not define what constitutes such negotiations and celebrations in terms of the customary law. In **Moropane v Southon** (755/12) [2014] ZASCA 76 (29 May 2014) Bosielo J articulated as follow at para [35]:

“This is understandable as customary law is as diverse as the number of ethnic groups we have in this beautiful country. Although Africans in general share the majority of the customs, rituals and cultures, there are some subtle differences which, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, VhaVenda and the Vatsonga. This is due to the pleuristic nature of African societies.”

And at para [37]:

“The most salutary approach to ascertaining the real meaning of this requirement is by examining the current cultural practises and customary law of that particular ethnic group.”

- [6] The relief sought in this application is final in nature. I take into account the facts averred by the applicant which is not disputed by respondent as well as the facts stated by the respondent.

See: **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E - 635C.

- [5] Ms Sethabela states that she was customarily married to her husband, the deceased. According to her lobola negotiations started on 3 Aug 2013. A bride price of R 15 000,00 was agreed upon between the families of the bridegroom (the Modikos) and the bride (the Sethabelas). The first instalment was paid on that day. On the 30th November 2013 a further instalment of R 5 000,00 was paid, and almost a year later on 15 November 2014 all the customary rituals were observed and completed. She was dressed in new clothes by the Modiko family, sheep were slaughtered, she received a new name, Makatleho Modiko and was welcomed into the Modiko family. These allegations are confirmed by affidavits of members of both families who were witnesses to the celebrations, to wit Ms Sethabela's father Petrus Tefo Sethabela and her mother Joalane Miriam Sethabela, and Mr Kotsoane Modiko and Ms Agnes Thembekile Modiko from the deceased's family.
- [6] Mr Thabo Modiko, except for the negotiations for lobola and part payment thereof, deny the allegations in respect of the rituals that were

concluded *in toto*. He avers that as uncle of the deceased and being the main negotiator in lobola negotiations he can confirm that no customary rituals and practises as alleged took place. The applicant bears the onus herein to proof his allegations. According to him, “in his custom”, the following requirements had to be met: delivery of the bride to the parental home of the groom, exchange of gifts between the families, the re-naming of the bride and the slaughtering of sheep. He denies that Ms Sethlabela was delivered to **his** home as the customary wife of the deceased or that any of the other customary rituals took place. Nowhere does he state to which particular ethnic group he belongs and what the particular rituals of a customary marriage *in casu* should accordingly be. No assistance by way of expert evidence was rendered to me to determine whether the marriage was negotiated, concluded and celebrated according to his particular custom.

See: **Moropane v Southon** *supra* at para [39].

But even if he did, it would have made no difference to the conclusions I reach herein.

- [7] Although I take notice of Mr Modiko’s denial of the allegations made by Ms Sethabel, I am to apply the principles set out in the Plascon-Evans rule. I would only be entitled to reject the respondent’s version if I can safely find that her version is to be rejected as being so far fetched and untenable that it stands to be rejected on that basis.

See: **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)** at para [26].

- [8] There is nothing in Ms Sethlabela’s version entitling me to find same as being far fetched or untenable. In fact (as mentioned) she is supported in her version by affidavits of members from both families. Even if I were to approach the application in a robust manner as I was encouraged to do by both counsel appearing before me, it would seem

that the probabilities favour the respondent's version. In this regard it is noteworthy that at the time of the death of the deceased Ms Sethabela and the deceased were not only living together in the same communal home at House 2669, Gelukwaarts, Maokeng, Kroonstad, but were raising their child Katleho Modiko.

[9] The applicant confirms the initial negotiations between the parties for purposes of concluding a customary marriage. He at least confirms payment of two instalments of the bride price. Applying a robust approach I would have been satisfied with the respondent's version that the customary marriage was indeed concluded between her and the deceased.

[10] The complaint of the applicant that all the lobola have not been paid and that therefore no customary marriage could have been concluded, is ill-founded. Payment of the entire lobola does not seem to be an insurmountable hurdle for the conclusion that a customary marriage was properly concluded.

See: **Southan v Moropane** (14295/100)[2012]ZAGPHJHC 146 (18 July 2012).

[12] Mr Mokhele on behalf of the applicant insisted that a dispute of fact was not foreseeable and in fact there is no dispute of facts *in casu*. I cannot agree with him. The parties on very similar facts were involved in previous litigation in the Kroonstad Magistrates Court under case nr 2152/2016. Ms Sethabela in her supporting affidavit to the spoliation application stated that she was married by customary law to the deceased and was kicked out of the communal home by the applicant a day after the funeral of the deceased. She was refused access to the communal home where all their belongings and furniture were. It is hard to imagine that the applicant in launching this application did not

foresee a serious dispute of fact. It is trite that where an applicant foresees a dispute of fact but elects to proceed by way of application he cannot be heard to complain if a court for that reason dismisses the application.

[13] Not only am I satisfied that the application cannot succeed for the reasons stated above, but the application also stands to be dismissed as the applicant in initiating these proceedings, should have foreseen the insurmountable factual dispute. Mr Janse van Rensburg on behalf of the respondent pressed hard upon me to award a punitive cost order against Mr Modiko, arguing the latter is vexatious in bringing this application. In my discretion however I see no reason to deviate from the usual cost order.

[14] I therefore make the following order:

The application is dismissed with costs.

C. REINDERS, J

On behalf of the Applicants: Mr L.M. Mokhele
Instructed by:
L.M. Mokhele Attorneys Inc.
BLOEMFONTEIN

On behalf of the First Respondent: Adv. G.S. Janse van Rensburg
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