



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

Case Number: 332/2021

In the matter of:

XOLISA NOFUMA

APPLICANT

and

PUSELETSO ELIZABETH DLHAMINI

1st RESPONDENT

THE DEPARTMENT OF HOME AFFAIRS

2nd RESPONDENT

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 21 OCTOBER 2021

DELIVERED ON: 26 OCTOBER 2021

- [1] The applicant seeks an order to declare the customary marriage between him and the first respondent valid. He further seeks an ancillary order to authorise the second respondent to register and issue a marriage certificate for him and the first respondent.

[2] The first respondent opposes the application on the basis that this court lacks jurisdiction to adjudicate this matter. The first respondent further opposes the application on the basis that there are pending divorce proceedings between her and the applicant relating to the alleged marriage in the Palm Ridge Regional Court. In her view there is no justification for the institution of the proceedings in this court. On the merits she denies the existence of the marriage. I am of the view that the issue of *lis pendens* will dispose of this matter and will accordingly deal with it only.

[3] For the purpose of this application it is necessary to set out the following brief background:

The applicant and the First Respondent were in a love relationship. On 29 April 2017 the families of the parties met in order to negotiate the issue of their marriage. Lobola was negotiated, agreed upon and paid. On 29 April 2017 and in Phuthaditjhaba, celebrations were held in accordance with the cultural practises of the First Respondent. On 16 December 2017 and in the Eastern Cape another celebration was held in accordance with the Applicant's cultural practise welcoming the First Respondent into the family of the Applicant. She was also given a name during these celebrations.

[4] The Applicant contends that a customary marriage came into being while the First Respondent denies that allegation and in support of her denial she annexed to her answering affidavit an alleged agreement signed allegedly by the Applicant and First Respondent. Clause 4.1 of the said agreement stipulates that:

"The parties confirm that they participated in the customary(traditional) processes that were held by both respective families, however, they both agree that neither of the parties intended or intend for such traditional processes to result

into a customary marriage as envisaged in the RCMA (the Act). Accordingly, the parties do not consent to be married, to each other, in terms of the RCMA.”

- [5] On 11 December 2019 the Applicant instituted an action for a divorce in the Palm Ridge Regional Court against the First Respondent (defendant in the divorce action) in which he, inter alia, sought an order of divorce. At the time when the application before me was instituted the divorce action was still pending. In his particulars of claim in the divorce action the Applicant alleges that the “*parties entered into a customary marriage on 29 April 2017 at Monontsha, Phuthaditjhaba, Qwaqwa*’ and further that the marriage still subsisted. In her Plea the First Respondent denied the existence of the marriage. This denial of the First Respondent prompted the Applicant to bring this application while the case in the Regional Court was still pending.
- [6] The Jurisdiction of Regional Courts Amendment Act, 31 of 2008 amended the Magistrate Court Act, 32 of 1944 and clothed the regional courts with jurisdiction to deal with civil litigation including divorce matters. Section 29 of the Magistrate Court Act provides as follows:
- “(1B)(a) A court for a regional division, in respect of causes of action, shall, subject to section 28(1A) , have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act ,1998(Act No 120 of 1998).
- (b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such matter.”

- [7] The reading of the above legislation indicates that the regional court is empowered to hear any matter provided for in the Recognition of the Customary Marriages Act (the Act). Section 3(1) of the Act stipulates the requirements for a valid customary marriage. In essence, this is what the Applicant seeks to achieve with the application before me, namely, that he entered into a valid customary marriage.
- [8] It is common cause that the Applicant has instituted divorce proceedings in the Palm Ridge Regional Court in Gauteng. Those proceedings have not been finalised. The said proceedings form part of the subject matter in these proceedings. The end result is that there are currently two cases pending before two different courts aiming to settle the same dispute.
- [9] This calls upon this court to determine the defence of *lis pendens*. It is settled that the underlying principle for the *alibi pendens* is that there should be finality in litigation.¹ The Court in *Nestle(South Africa)* went on further to say:²
- “Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, this suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*).”
- [10] There is thus an obligation upon a litigant instituting proceedings to prosecute the case to finality rather than to institute other proceedings again without having regard to the time and costs. To allow parties to willy-nilly institute proceedings between the same parties on the same cause of action in different courts

¹ *Nestle(South Africa)(Pty) Ltd v Mars Inc* 2001(4) SA 542(SCA),.

² *Supra* at para 16.

would also congest the court rolls unnecessarily and would have an indirect consequence of denying the majority of litigants speedy resolution of their disputes and may in certain instances deny them access to justice. In *Socratous v Grindstone Investment*³ the court held that the South African courts are under pressure due to contested court rolls, and the defence of *lis pendens* must be allowed to operate in order to stem unwarranted proliferation of litigation involving the same parties based on the same cause of action and related to the same subject-matter.

[11] The other concern for the courts is to avoid a situation where different courts pronounce on the same issue with the risk of differing or conflicting decisions⁴.

[12] In order for a party to successfully raise *lis pendens* as a defence, he must allege and prove the following requisites:

- a) A pending litigation between the same parties;
- b) The litigation must be based on the same cause of action;
- c) The litigation must be based on the same subject matter.

[13] In my view the First Respondent, bearing the onus, has established the requirements referred to in paragraph [10] above. This, notwithstanding, the court still retains the discretion to order the stay of these proceedings. I am satisfied that despite all the requirements for *lis pendens* being present, the balance of convenience and equity require the case to proceed⁵. In spite of the issue of a pending case being raised in the answering

³ 2011(6) SA 325(SCA).

⁴ Caesarstone SDOT-YAM Ltd v World of Marble and Granite 2000 CC and Others 2013(6) SA 499(SCA).

⁵ See Amler's Precedents of Pleadings, 9th ed by LTC Harms.

affidavit⁶ by the First Respondent, the Applicant failed to deal with this issue and give reasons why this matter must proceed despite the pending matter in the regional court.

- [14] The Applicant has raised the issue of a customary marriage in the Palm Ridge Regional Court. The First Respondent disputes it. The regional court must, in my view, pronounce itself on that said contentious issue. This issue raised forms the subject matter of the cause of action in the divorce court. The conduct of the Applicant in seeking declaratory relief in this court while the divorce proceedings are pending borders on the abuse of the court process. I am of the view that the proceedings in this court should be held over pending the finalisation of the divorce proceedings instituted at Palm Ridge Regional Court. I can find no reason why the costs shall not follow the cause.

ORDER

1. The application in this court under case number 332/2021 is hereby stayed pending the final determination of the action instituted in the Palm Ridge Regional Court under case number GP/PAL/RC 547/2019.
2. The Applicant is ordered to pay the costs of this application.

⁶ Page 64 para 3.1.1.1 of the paginated record.

P.E. MOLITSOANE, J

On Behalf of the Applicant:

Instructed by:

Adv L MHLANGA

Magadla Attorneys

c/o Maduba Attorneys

BLOEMFONTEIN

On Behalf of the First Respondent: Adv J FERREIRA

Instructed by:

Simon Dippenaar & Associates