



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE NO. 3146/2020P**

In the matter between:

**PHUMZA ETHEL MANKAYI**

**APPLICANT**

and

**THE MINISTER OF HOME AFFAIRS**

**FIRST RESPONDENT**

**NTOMBIZAKHE PORTIA MIYA**

**SECOND RESPONDENT**

**MASTER OF THE HIGH COURT OF SOUTH AFRICA**

**THIRD RESPONDENT**

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**ORDER**

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1. That the first respondent registers the customary marriage between Phumza Ethel Mankayi and Lawrence Bonginkosi Zikode and issue the certificate of registration as envisaged under section 4 (8) of the Recognition of Customary Marriages Act No. 120 of 1998.

2. That the appointment of Ntombizonke Portia Miya as Executrix in the deceased estate of late Lawrence Bonginkosi Zikode is with effect from the date of this order terminated.

3. The costs of the application of both the applicant and the second respondent on party and party scale be paid out of deceased estate of Lawrence Bonginkosi Zikode.

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**JUDGMENT**

**Delivered on:**

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**Mngadi, J:**

[1] The applicant seeks an order declaring that there existed a customary marriage between her and the late Lawrence Bonginkosi Zikode (the deceased); that the customary marriage be registered and she be issued with a certificate of registration; and she be appointed as executrix in the deceased's estate in the place of the second respondent. The second respondent opposes the application. The first and third respondents have not taken part in the litigation.

[2] The applicant is Phumza Ethel Mankayi an adult female aged fifty (50) years, of Soweto in Gauteng. The First respondent is the Minister of Home Affairs the minister of state responsible for the registration of customary marriages. The second respondent is Ntombizonke Portia Miya an adult female of Sebokeng in Gauteng. The third respondent is The Master of the High Court of South Africa in charge of the administration of the deceaseds' estates.

[3] The applicant deposed to the founding affidavit and she stated as follows. She was born on 22 October 1964. She resides in Pretoria North Ext 1. In Soweto. On 15 October 1994 at Vaalbank Village, Lady Frere she married Lawrence Bonginkosi Zikode, the deceased. The deceased was born on 21 July 1963. There were both majors at the time of the marriage. They married each other by a customary marriage and they both consented to the marriage.

[4] The applicant, further, stated that the deceased paid an amount of R15 000.00 (Fifteen Thousand Rand) as lobolo for her. He paid it on the same date of marriage. She attaches on her affidavit a lobolo letter. She stated that on 15 October 1989 the marriage was celebrated by both families. She was handed over to the Zikode family. Since then she lived with the deceased as husband and wife until his death. She and the deceased remained married to each other until his premature death on 12 April 2019. The applicant as evidence of the deceased's death attached a death certificate.

[5] The applicant stated that whilst still in mourning for the deceased's death, she visited the office of the Master of the High Court in Johannesburg to report the death of the deceased in terms of the provisions of the Administration of Estate Act No. 66 of 1965. She discovered that the second respondent had been appointed as executrix in the deceased's estate. She was surprised because she had not consented to the appointment of the second respondent as executrix and she had not been informed about her appointment. She reiterates that her marriage to the deceased was still in subsistence and they were still living together at the time of the passing of the deceased.

[6] The lobolo letter attached to in the founding affidavit is in isiXhosa it reads as follows: "**Ingxoxo yekhazi** Umhlaka 15 October 1994.

*Indawo: Vaalbank Village Bafikile Oonozakuzaku bethunywe likhaya lakwa Zikode bezocela ubuhlobo kwikhaya lakwa Mankayi malunga nentombi yethu engu Phumza Mankayi ebonwe lisoka UBonginkosi Zikode. Bashiye imali engange R15 000 00 ezi bethe inkomo eziyisibhozo kwishumi elinesibini ebesizibizile. Ingxoxo yokuvunywa kwabayeni iyakuphindwe ibanjwe ngokwesivumelwano Amangqina abekhona*

- (1) Na Mankayi
- (2) J W Fenako
- (3) M O Zikode
- (4) E m Zikode

[7] The loose translation of the lobolo letter is the following:

**'Lobolo Negotiations**

*Date: 15 October 1994*

*Place: Vaalbank Village*

*Negotiations sent by the Zikode family arrived to conduct negotiations for good relationship with Mankayi family in connection with their maiden Phumza Mankayi having attracted the youngman Bonginkosi zikode. They left the sum of R15 000.00 representing eight (8) head of cattle out of the twelve head of cattle stipulated.*

*The matter of recognition of the in-law's delegation to be held once arranged.*

*Those present and witnessed were:*

- (1) Na Mankayi
- (2) J W Fenako
- (3) M O Zikode
- (4) E m Zikode

Those present and witnessing are in different handwriting suggesting that each person wrote or signed his name.



[8] The death certificate of the deceased shows the marital status as never married. It shows the date of death to be 12 April 2019. The place of death is Soweto (Protea North) and in the cause of death as natural causes.

[9] The applicant attached a confirmatory affidavit by Ndodentsha Gladman Mankayi (Ndodentsha). Ndodentsha in the confirmatory affidavit stated as follows. He is an adult male with identity numbers 580201 6034 088 and he resides at Clairmont Village, Whittlesea, in the Eastern Cape. He is the brother of Phumza Ethel Mankayi (the applicant). On 15 October 1994 at Vaalbank Village in Lady Frere he was one of the delegates representing the Mankayi family during the lobolo negotiations between Mankayi family and the Zikode family. Other members of the delegation that represented Mankayi family were Jikile William Fenako and Mawethu Mhleka. The Zikode family was represented by Ernest Mzonjani Zikode.

[10] Ndodentsha, further, stated as follows; He confirms that the marriage agreement was reached between the two families. The Zikode family was charged and paid an amount of R15 000.00 for lobolo on behalf of Lawrence Bonginkosi Zikode the groom for Phumza Ethel Mankayi, the bride. The amount paid was equivalent to eight (8) cows out of twelve (12) cows, which the families had agreed upon. The marriage was celebrated in terms of customary rights and the bride was handed over to the groom and Zikode family to stay with them as Lawrence Bonginkosi Zikode's wife. They have been residing together as husband and wife since 1994 until the death of the husband in April 2019. He stated that he has read the founding affidavit of Phumza Ethel Mankayi and he confirms the contents thereof as far as they relate to the marriage celebrated on 15 October 1994.

[11] The applicant attached a second confirmatory affidavit by Themba Obert Zikode (Themba). Themba stated that his identity number is 620824 5577 088 and he resides at Swamp Location, Impendle, in KwaZulu- Natal. He stated as follows. He is the brother to the deceased. He was part of the delegation of the Zikode family during the lobolo negotiations and the persons who were part of the delegations as stated by Ndodentsha in his affidavit. The marriage was celebrated in terms of the customary rights and the

bride was handed over to the Zikode family to stay with Lawrence Bonginkosi Zikode as his wife. They have been residing together as husband and wife since 1994 until the death of the husband in April 2019. He confirms the contents of the founding affidavit as far as they relate to the marriage celebrated on 15 October 1994.

[12] The answering affidavit is disposed to by Ntombizonke Portia Miya (the second respondent). She stated that she is an adult female residing at Zone 3, Sebokeng in Johannesburg. She is the duly appointed executrix in the deceased estate of the deceased. The deceased was her father. She stated that the applicant in the founding affidavit has not explained why the customary marriage was not registered since 1994 and she has not dealt with the issue of the celebration of the customary marriage as it is required that 'the marriage must be negotiated and entered into and or celebrated in accordance with customary law'. She queried that the applicant is stating that the marriage was celebrated on 15 October 1989 before the lobolo negotiations took place on 15 October 1994 whereas according to the custom lobolo is negotiated first, followed by the exchange of gifts and then the celebration of the marriage.

[13] The second respondent stated that the applicant is making frivolous allegations to support the relief she is seeking. She submits that the applicant was not married to her father and she never stayed with her father but she used to stay at her own house. She stated that her uncle is supporting the applicant because he was opposed to the children of the deceased inheriting anything. He has taken all the cars that belonged to her father and he wants to sell the house at Protea North.

[14] The second respondent stated that the applicant was not involved in her appointment as an executrix because there was no need to involve her in their family negotiations. The South African Police Services informed the applicant that the deceased only wrote the names of his children as beneficiaries relating to his death benefits.

[15] The second respondent attached a confirmatory affidavit of Jabulile Ntombikayise Zikode (Ntombikayise). Ntombikayise stated as follows. She is the eldest daughter of



the deceased. She resided at Willowfontein in Pietermaritzburg. They as beneficiaries to the estate of the deceased, nominated the second respondent to be appointed as an Executrix. The deceased, her father, was never married to any woman during his lifetime.

[16] The second respondent attached a second confirmatory affidavit by Thembinkosi Lennox Mkhwanazi (Mkhwanazi). Mkhwanazi stated as follows. He resides in Protea North, in Soweto. He is the son of the deceased. He confirmed that the deceased was not married and they nominated the second respondent to be the Executrix. The deceased was never married to any woman during his lifetime.

[17] The second respondent attached a third confirmatory affidavit from Bizo Thokozani Siphesihle Makhathini (Makhathini). Makhathini stated as follows. He is a retired member of the South African Police Services. He resided at Protea North in Gauteng. He stated that he worked with the deceased who was his close friend since 1986 and they stayed together in the same room from 1986 until 1993. They then bought their properties. They continued to be friends until the deceased passed away on 12 April 2019.

[18] Makhathini stated that the deceased told him that he will never get married because he was not happy in the previous relationships. The deceased would have told him if he changed his mind, and the deceased would have invited him in a celebration of his customary marriage.

[19] The applicant in the replying affidavit stated that it was a typing error in her founding affidavit that the customary marriage was celebrated on 15 October 1989, what was meant was that it was celebrated on 15 October 1994.

[20] It must, in the evaluation and assessment of averments in the papers, be borne in mind that the applicant is seeking the relief in order to benefit as a spouse from the estate deceased. The second respondent and her siblings stand to benefit in the exclusion of the applicant as a spouse of the deceased. In the circumstances, an interested party may not disclose that would not advance that parties interest. Initially, the parties were asked

to consider referral to trial of the issue of whether there existed a customary marriage between the applicant and the deceased. The applicant's counsel adopted the attitude that his instructions were to argue the matters on the papers. The second respondent's counsel also indicated that the onus was on the applicant and the respondent was content to argue the matter on the papers in the absence of an application by the applicant to have the matter referred to the hearing of oral evidence.

[21] The approach in motion proceedings is that the final relief may be granted only if those facts averred in the applicants' affidavit that have been admitted by the respondent together with the facts alleged by the respondent justify such an order. However, allegations or denials of the respondent that are farfetched or clearly untenable may be rejected merely on the papers (See *Plascon – Events Paints Ltd v Van Riebeeck Paints (Pty)* 1984 (3) SA 623 A at 634 H-I and at 635 (C)).

[22] The onus is on the applicant to prove on the preponderance of probabilities that she and the deceased concluded a customary marriage. In motion proceedings a party does not have an opportunity to explain what may appear improbable in his version, therefore, probabilities play a far limited role. However, proof by inference may be resorted to. It means that from established fact or facts, the only reasonable inference is made.

[23] The Constitution of the Republic of South Africa Act No. 108 of 1996, section 15(3) (a) provides: 'This Act does not prevent legislation recognition of -

- (i) Marriages concluded under any traditional, or a system of religions, personal or family law; or
- (ii) Systems of personal and family law under any traditional or adhere to by persons professing a particular religion or;

(b) Recognition in terms of paragraph (a) must be consistent with this sections and other provisions of the constitution.'

[24] There are various rights and freedoms enshrined in the Bill of Rights – such as freedom of association, freedom to pursue a religion and culture of choice, equality before



the law, protection against direct or indirect unfair discrimination based on race, gender, sex, age or social origin. These provisions provide a foundation for the family law in South Africa. Legal protection must be accorded to families resulting from any type of marriage recognised by the constitution. To deny recognition as a married person, to a person who was factually married, traverses that persons constitutionally enshrined rights.

[25] Only persons who are not married are allowed to contract a customary marriage. Persons married by customary marriage may however contract a civil marriage with each other. Persons married to each other by a civil marriage may celebrate their marriage as if it was a customary marriage. Persons may marry each other by either a civil marriage or customary marriage without ever celebrating their marriage.

[26] The Recognition of Customary Marriage Act 120 of 1998 (the Act), seeks to give full recognition to customary marriages to place them on par with civil marriages. The Act defines (s1) a customary marriage to mean a customary marriage concluded in accordance with customary law. It defines customary law to mean the customs and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of the culture of those peoples. Although the section refers to 'customs and usages traditionally observed among indigenous African peoples and which form part of the culture of those peoples' it has no cut off point, it includes customs/usages or culture and traditions of the 21<sup>st</sup> century.

[27] The Act in s 3(1) as requirements for validity of a customary marriage entered into after the commencement of the Act provides that the prospective spouses must both be above the age of 18 years. Secondly, they must both consent to be married to each other under customary law. Thirdly, the marriage must be negotiated and entered into or celebrated in accordance with customary law. The Act commenced on 15 November 2000. The requirement that the marriage be entered into or celebrated in accordance with customary law incorporates by reference the customary law requirements for a valid customary marriage. In fact, the requirements in the Act modify the requirements found

in customary law. The core requirements for the formation of a customary marriage remain those found in customary law.

[28] The applicant's position straddles the position prior to November 2000 and the position thereafter. Bekker & Coertze *Seymour's Customary Law in Southern Africa* (4<sup>th</sup> ed) pp106-109 states that the essential of a customary union are as follows:

- (i) The consent of the bride's guardian.
- (ii) The consent of the bride.
- (iii) The consent of the bridegroom.
- (iv) The payment of lobolo, bogadi or ikhazi.
- (v) The handing over of the bride to be bridegroom.

Lobolo is the key essential to the requirements of a customary marriage. Without an agreement, relating to lobolo there is no customary marriage. *Seymour* p150 states that lobolo is the rock on which the customary union is founded. An agreement on lobolo and staying together of the bride and bridegroom as husband and wife with knowledge of her people means the existence of a customary marriage. In those circumstances, the failure to formally hand over the bride or to celebrate the union are of no consequence. Lobolo signifies the transfer to and acceptance of the bride by the family she is marrying to. See *Seymour* p149. The express handing over of the woman to her husband or his people or to allow her to live with him or his people as his wife, after the agreement relating to lobolo, concludes the existence of a customary marriage. Some traditional community, after an agreement on lobolo and part payment thereof, slaughter a beast celebrating the event, which effectively recognises the bride and the bridegroom as husband and wife. The other customs and rituals relating to the customary marriage including its celebration may remain outstanding. See *Moungela and Another vs Mkabi and others* 2020 (1) SA 41 (SCA) para 7.

[29] The indigenous communities may differ in the manner the prospective spouses convey their consent to marry each other or in the manner they conduct the lobolo negotiations. They may also differ in the manner the handover over of the bride and in the manner, the bride is accepted in her new family or in the manner, they exchange gifts,



and the manner they conduct various rituals and ceremonies around the customary marriage. The core requirement must not be lost sight of which is the factual existence of the marriage. Others, although factually married, might be heard saying they are not married meaning that the marriage has not yet been celebrated. The factual position trumps the dogmatic expectations. See *Butters v Mncosa* 2012 (4) SA 1 (SCA) para 20.

[30] The conclusion of a customary marriage is a process rather than an event. Once there has been an agreement on lobolo and the bride allowed to join her husband or his family a customary marriage has been formed. Children born from the relationship are the children of the marriage. The wife is expected and is entitled to carry out all the wifely duties for her husband and she becomes a daughter-in-law to his family.

[31] The applicant averred that on 15 October 1994 there were lobolo negotiations between her family and the family of the deceased. The negotiations related to the deceased paying lobolo for her. The negotiations took place at her home in her village. She identified persons who formed delegations to the negotiations and what was agreed to in the negotiations. She furnished a brief interim contemporaneous recording of the negotiations. She furnished confirmatory affidavits from the side of her family and from the family of the deceased. The second respondent has not disputed that the alleged lobolo negotiations took place. After the lobolo negotiations were successfully completed and a substantial part of the lobolo paid the event was celebrated. It was the important part in the process of applicant becoming the wife of the deceased. Obviously before such negotiations are embarked upon both sides, satisfy themselves that the prospective spouses want to marry each other and there are no known impediments to them marry each other.

[32] The successful holding of the lobolo negotiations and part payment of the lobolo although it is a very important step in the process, on its own alone, it would not be tantamount to a conclusion of a customary marriage. The applicant averred that from 1994 until the deceased died she stayed with the deceased as his wife. The paternal uncle of the deceased confirms the averment. The close friend of the deceased does not



deny it. There is no evidence that the deceased stayed alone or stayed with another woman. If the deceased was not staying with the applicant for a period of 27 years those close to him including his children, uncles, brothers, friends would have known where he stayed and with whom. The connection between the deceased and the applicant is confirmed by the second respondent averment that on the death of the deceased, the employer of the deceased told the applicant that the deceased had written his children as persons to receive the death benefits. The second respondent denies that the applicant lived with the deceased as a man and wife as claimed by the applicant. She furnishes no basis for her denial. She does not state where the deceased was staying and with whom. She is content to repeatedly state that the deceased was not married to the applicant. In my view, the bare denial of the averment by the second respondent is farfetched and can safely be rejected on the papers.

[33] The deceased paid lobolo for the applicant in 1994. By definition, you pay lobolo for somebody you want to take as your wife. From 1994 up to the date of his death for a period of 27 years, the deceased stayed with the applicant as his wife. The applicant and the deceased were committed to each other as husband and wife; they had no other relationship with each other except that of husband and wife. The applicant's family must have known and accepted that the applicant was staying with the deceased as his wife. The applicant and the deceased might not have celebrated their customary marriage but they factual formed a customary marriage. The deceased took the applicant and stayed with her as his wife with the approval of her parents as from 15 October 1994. The customary marriage was concluded on 15 October 1994 when the lobolo negotiations were held, part of the lobolo paid and they started staying together as husband and wife.

[34] The third respondent appointed the second respondent as executrix in the deceased estate of Lawrence Bonginkosi Zikode without knowing that the applicant was the surviving spouse of the deceased. Section 54 (1) of the Administration of Estate Act No. 66 of 1965 provides that an executor may at any time be removed from his office if for any other reason the court is satisfied that it is undesirable that he should act as executor of the estate concerned. The applicant as a surviving spouse of the deceased

needed to be consulted and be considered before an executor is appointed for the deceased estate. The second respondent is contesting the applicant's position as the surviving spouse of the deceased. The second respondent has placed herself in a position where she is unlikely to act in the best interest of the applicant relating to her interest in the deceased estate as a surviving spouse. I am satisfied that it is undesirable that the second respondent continues to act as executrix of the deceased Estate.

[35] In the result, it is ordered.

1. That the first respondent registers the customary marriage between Phumza Ethel Mankayi and Lawrence Bonginkosi Zikode and issue the certificate of registration as envisaged under section 4 (8) of the Recognition of Customary Marriages Act No. 120 of 1998.
2. That the appointment of Ntombizonke Portia Miya as Executrix in the deceased estate of late Lawrence Bonginkosi Zikode is with effect from the date of this order terminated.
3. The costs of the application of both the applicant and the second respondent on party and party scale be paid out of deceased estate of Lawrence Bonginkosi Zikode.

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**Mngadi, J**

## APPEARANCES

Case Number : 3146/2020P

For the Applicant : Mr T. Mlambo

Instructed by : Ratshibvumo Attorney Inc.

JOHANNESBURG

For the respondent : Mr S. H. Zondi

Instructed by : B.S Mabaso Inc.

PIETERMARITZBURG

Heard : 15 June 2021

Judgement delivered on : 02 July 2021