IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) NOT REPORTABLE
(2) OF INTEREST TO OTHER JUDGES
(3) REVISED

CASE NO: HCAA06-2017
20/4/2018

BEFORE THE HONOURABLES EM MAKGOBA JP, MG PHATUDI J AND D NAIR AJ

In the matter of:

MOKGAETTJI MARIA LEDWABA	**APPELLANT**

And

MATSATSI DINAH TINY MONYEPAO	**1st RESPONDENT**
THE MASTER OF HIGH COURT, POLOKWANE	**2nd RESPONDENT**
ELMARIE BIERMAN	**3rd RESPONDENT**
MATUBA MAPONYA	**4th RESPONDENT**

JUDGMENT

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[1] This appeal concerns the validity of a civil marriage during the subsistence of a customary marriage, the circumstances that a marriage under customary law is terminated and whether the provisions of section 9(1) of the Divorce Act 70 of 1979, are applicable in circumstances other than a divorce.

[2] The first respondent, as applicant in the court a quo, instituted proceedings against the appellant in the Limpopo Division of the High Court, Polokwane in which she sought an order

> "(a) declaring that the customary marriage between Tieu Coliphter Phage (hereinafter called the "deceased") and the first respondent was dissolved in February 2008, alternatively, that first respondent's customary patrimonial benefits of the marriage be forfeited to the estate of the deceased,
>
> (b) that the immovable property, currently occupied by the Respondent and the minor child, known as Erf No. [….], held by virtue of a Deed of Transfer T18990/2005 is awarded to the minor child, Matilda Phuti Ledwaba,
>
> (c) that the Master of the High Court, Polokwane, is ordered to withdraw or revoke the appointment of the First Respondent as one of its Executrix in the estate of the late Tieu Coliphter Phage, Estate No 189/2013,
>
> (d) that the Master of the High Court Polokwane, is ordered to appoint Matsatsi Dinah Tiny Monyepao as the sole Executrix to the estate of the late Tieu Coliphter Phage, Estate No 189/2013."

[3] The second respondent in the court a quo is the Master of the High Court, duly appointed in terms of section 2 of the Administration of Estates Act 66 of 1965, with Offices at the High Court building, Polokwane. The third and fourth respondents are attorneys who were cited due to their roles in the administration of the deceased's estate.

[4] The appellant filed her counter - application and argued that the respondent had only launched the application because an amount of R 3, 8 million had been paid into the deceased's business accounts and was either concealing or failing to account for these funds.

[5] It was further contended that these funds are neither accounted for in the deceased's estate nor is there an explanation for the transfer of an amount of R1119 728 that was allegedly paid from the deceased's banking account to the Trust account of the third respondent. These funds were also not accounted for in the liquidation and distribution account.

[6] The proceedings were opposed by the appellant. The court a quo (Makgohloa DJP) granted the application and made the following order:

> "The first respondent's interest in the estate of the deceased is forfeited to the deceased's estate.
>
> The costs of this application are costs in the estate.
>
> The counter application against the second and the third respondent is struck off the roll with costs."

THE FACTS

[7] The appellant was married to one Tlou Coliphter Phage (the deceased) on the 2nd June 2007 according to customary law. To this end the necessary formalities with regard to the payment of lobola were met. Mr Phage passed away on 22 December 2012. One minor child was born of this marriage.

[8] The deceased left the marital home in 2008. The reasons for his leaving the home are in dispute but not relevant to the issues that need to be determined in this matter.

[9] The deceased then married the first respondent in July /August 201o also in terms of customary law and they lived together until his death. They had one minor child. In 2009, the appellant entered into a civil marriage with one Mr K.

[10] After the deceased's death in 2012, the Master of the High Court, Polokwane, appointed both the appellant and the first respondent as executrix in

the estate of the deceased.

[11] The grounds of appeal upon which the judgement of the trial court is assailed are set out below:

> [9.1] The Honourable judge ignored the provisions of section 8(1), Section 10(4) and section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 and decided not to make a finding to a crucial legal question before her as to the validity of appellants civil marriage to Mr Kin terms of Section 10(4) and the validity of the customary marriage between the deceased and the first respondent in terms of section 7(6) and determination of the dissolution of her marriage to the deceased in terms of section 8(1) of the same Act.
>
> [9.2] The judge also applied the provisions of section 9(1) of the Divorce Act 70 of 1979 in the proceedings in which it was not applicable and concluded that there was breakdown of the marriage which had already been dissolved by death of the deceased.
>
> [9.3] The judge erroneously concluded that there was a breakdown of appellant's marriage with the deceased and assumed retrospective dissolution of the marriage by divorce after the deceased had already passed away in favour of the first respondent who was not a party to the said marriage
>
> [9.4] The judge relied on a null and void civil marriage between the appellant and Mr K to conclude that she renounced her marriage to the deceased instead of applying the provisions of the recognition of Customary Marriages Act 120 of 1998 to the legal question before her in respect of all these marriages.

THE LEGAL POSITION -

[12] The court a quo found that the marriage between the first respondent and deceased lasted "for less than a year." It firstly falls to be considered whether the first respondent's marriage to K dissolved the marriage to the deceased.

[13] In *Thembisile & another v Thembisile & another* 2002 (2) SA 209 (T), Bertelsmann J held that a civil marriage contracted while the man was a partner in an existing customary union with another woman was a nullity. See the commentary by A Maithufi in the *De Jure* 36 (2003) 195,

> "Before this date (200-11-15), the general trend in South African Law was that an existing customary marriage was dissolved when one of the spouses to such marriage contracted a civil marriage with another person see (Nkambula v Linda 1951 (1) SA 377 (A). Where such spouses contracted a civil marriage with each other, this had the effect of superseding the existing customary marriage. The RCMA at section 10 (1) prohibits a spouse of a customary marriage from contracting a civil marriage with another person.

[14] The dictum in *Thembisile* and another was followed with approval in *Murabi and Murabi* (893/12) [2014] ZASCA 49 (1 April 2014), reported in *TM v NM* 2014(4) SA 575 (SCA), where the Supreme Court Of Appeal, confirming *Netshituka v Netshituka & others* 2011 (5) SA 453 (SCA) para 15 stated as follows:

> "It follows that it was not legally competent for the deceased to contract a civil marriage with the first respondent during the subsistence of the customary marriage between the deceased and the appellant. The effect of this conclusion is that both the appellant and the first respondent are the deceased's surviving spouses in terms of customary law."

[15] *Section 8 of the Recognition of Customary Marriages* Act 120 of 1998 (RCMA) reads as follows:

> (1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.
>
> (2) A court may 9rant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage

relationship between the parties to the marriage has reached such a state of disintegraiton that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

(3) The Mediation in Certain Divorce Matters Act 1987 Act No, 24 of 1987) and section 6 of the Divorce Act, 1979 (Act No. 70 of 1979), applies to the dissolution of a customary marriage.

(4) A court granting a decree for the dissolution of a customary marriage-

(a) has the power contemplated in section 7,8,9, and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);

(b) must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 7 (4), (5), (6) or (7) and must make any equitable order that it deems just;

(c) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings;

(d) may make an order with regard to the custody or guardianship of any minor child of the marriage; and

(e) may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law.

[16] It is clear that the appellant's marriage to Mr K was a nullity and therefore does not dissolve the customary union between the appellant and the deceased. This much was conceded by the respondent's counsel. It appears that the court a quo considered the appellant's conduct in marrying K as an indication of misconduct on her part. This cannot be so especially in light of the fact that the marriage to K was a nullity.

[17] This brings us to the next question which is whether the provisions of Section 9(1) of the Divorce Act are applicable to the facts of this matter.

[18] The court a quo approached the matter with a view to establish misconduct on the part of the appellant in order to determine whether there should be a forfeiture order made against her. This is clear from the following passage:

> "The question that arise is whether the first respondent's interest in the estate of the deceased should be forfeited to the estate of the deceased as a result of her own conduct.....The marriage between the first respondent and the deceased lasted for a period of less than a year. Thereafter she married K on 26 November 2009. The first respondent's version is that she still regarded herself married to the deceased irrespective of her marriage to Mr K. If that is true, then, the first respondent practised polyandry which is illegal in our law. She does not argue that she was that such practice is unlawful. In my view the first respondent's conduct gave rise to the breakdown of her marriage to the deceased."

[19] **Section 9(1) of the Divorce Act 70 of 1979** stipulates:

> " when a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of another either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties satisfied that, if the order of forfeiture is not made, the one party in relation to the other will be unduly benefitted."

[20] **In Family Law Service, Lexis Nexis, Service Issue 58 at D9, at page 26:**

> "In terms of section 9 of the Divorce Act 1979, the court has a discretion, when granting a divorce on the grounds of irretrievable

break-down of the marriage or civil union, to order the patrimonial benefits of the marriage or civil union be forfeited by one party,"

[21] **In Family Law Service, Lexis Nexis, Service Issue 58 at page 28.**

"The forfeiture order must be sought at the time of the divorce. Once a court has made an order for equal division of a joint estate, for example, it cannot afterwards make a forfeiture order."

[22] The court a quo also appears to have found it proper to forfeit the appellant's patrimonial benefits in circumstances other than in divorce proceedings. This approach is flawed because a forfeiture of benefits must follow an enquiry into misconduct on the part of one of the parties to the marriage.

[23] This did not occur in this matter. There were no divorce proceedings at all. In the circumstances the order falls to be set aside. The provision of the Divorce Act in so far as forfeiture of patrimonial benefits is concerned applies only in respect of divorce proceedings between the parties to the marriage. To apply these provisions in circumstances unrelated to divorce proceedings between the parties themselves is incorrect.

[24] A further question that falls to be answered is the following: what is the status of the first respondent's marriage to the deceased. Stated otherwise, is the second customary marriage to the respondent valid in light of the provisions of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA)?

[25] It was contended on behalf of the appellant in the court a quo that the first respondent's marriage to the deceased is equally null and void because the deceased entered into this marriage whilst her customary marriage with the deceased was subsisting.

[26] *Section 7(6) of the RCMA* states that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve

a written contract which will regulate the future matrimonial property system of his marriages.

[27] It appears that the court a quo found that the deceased's marriage to the respondent to be valid and the only marriage that subsists. Our courts have considered whether non-compliance with section 7(6) affects the validity of such marriage and held that as it affects the propriety consequences of such marriage, such marriage is to be considered to be out of community of profit and loss.

[28] It is argued on behalf of the appellant that the failure of the deceased to comply with section 7(6) of the RCMA when he concluded the customary marriage with the first respondent rendered that marriage null and void.

[29] Reliance was placed on the decision of *MM v M.N 2010 (4) SA 286 (GNP)* for that proposition. In this regard Bertelsmann J held as follows:

> "A further customary marriage contracted after 15 November 2000, must, be preceded by the application envisaged by section 7(6) of the RMCA to be valid. This is evident from the peremptory language employed in this provision, namely, the use of the word "must". In this respect, the court concluded (par 23) that the failure to comply with the mandatory provision of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect."

[30] n *MG v BM and Others (10/37362) [2011] ZAGPJHC 173; 2012 (2) SA 253 (GSJ) (22 November 2011)* Moshidi J held:

> "In any event, as indicated earlier in this judgment, Bertelsman J in *MM v M N (supra),* came to the conclusion, and correctly so in my view, that the Act does not contain an express provision to invalidate a subsequent customary marriage for failure to comply with the provisions of sec 7(6) of the Customary Marriages Act. For all these reasons, I conclude that the failure by the deceased and/or the applicant to apply to court timeously to approve a written contract which would regulate the future matrimonial property system of their customary marriage, does not invalidate their customary marriage as

contended for by the first respondent. It is a valid customary marriage. It follows that the applicant has succeeded in making out a case for the relief claimed in the notice of motion.

[31] The judgement of Bertelsman as quoted above was overturned in *MM v NM and Another* 2012 (4) SA 527 (SCA) at para 37-38 and it was held that section 7(6) of the RCMA does not relate to validity of customary marriages, but the proprietary consequences thereof. The SCA found that the consequences of non-compliance with section 7(6) were adequately met by treating subsequent customary marriages as being marriages out of community of property. See also *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).

[32] As to the validity of the deceased's marriage to the first respondent, *Section 3(1) of the RCMA* reads as follows:

> "For a customary marriage entered into after the commencement of this Act to be valid-
>
> (a) the prospective spouses-
>
> (i) Must both be above the age 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"

[33] Further the Constitutional Court in *Mayelane v Ngwenyama* and Another 2013 (4) SA 415 (CC) held that, if a man wishes to marry more than one wife under Xitsonga custom, he must obtain the consent of his existing wife. The judgement in Mayelane was however ordered to run prospectively.

[34] The effect thereof is that the judgment has no effect on the validity of the customary marriage between the first respondent and the deceased. In the circumstances, both customary marriages are recognised and valid.

[35] The counterclaim relates to the propriety consequences that are relevant to the deceased estate which must devolve according to the laws of intestate

succession. The court a quo dismissed the counterclaim on other grounds which are not relevant to consider now. It was argued by the first respondent's counsel that the Intestate Succession Act applied in this matter and to that end the respondent's child stood to be prejudiced by the non-recognition of the first respondent's marriage to the deceased. The argument is flawed on the basis that the second respondent had already appointed both the appellant and first respondent as co- executrix.

[36] The appointment of both appellant and first respondent as co-executrixes will r solve any issues with regard to the devolvement of the estate in terms of the Intestate Succession Act under the auspices of the authority vested in the 2nd respondent. Therefore any issues that follow from the administration of the estate fall to be resolved by the Master in the determination of the liquidation and distribution account.

[37] In the circumstances, the appeal succeeds and the order of the court a quo is set aside and substituted with the following order:

ORDER

[38] The application is dismissed with costs and such costs are to be paid out of the deceased estate.

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D NAIR AJ

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

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MG PHATUDI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I CONCUR AND IT IS SO ORDERED

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E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

APPEARANCE:

COUNSEL FOR THE APPELLANT	**: MR M MAPONYA**
INSTRUCTED BY	**: M MAPONYA ATTORNEYS**
COUNSEL FOR RESPONDENT	**: ADVOCATE M COETZEE**
INSTRUCTED BY	**: DIAMOND INC**
DATE OF HEARING	**: 29 MARCH 2018**
DATE OF JUDGEMENT	**: 25 APRIL 2018**