IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION: MTHATHA)

CASE NO: 3932/2024

REPORTABLE

In the matter between:

NOWANDILE NGCWAZITSHE	First Applicant
SIMPHIWE NGCWAZITSHE	Second Applicant
LOYISO NGCWAZITSHE	Third Applicant
NOMAKHOSI NGCWAZITSHE	Fourth Applicant

and

BONISWA NGCWAZITSHE	First Respondent
THE MINISTER OF HOME AFFAIRS	Second Respondent
THE DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	Third Respondent
THE MASTER OF THE HIGH COURT, MTHATHA	Fourth Respondent

EXECUTOR ESTATE LATE VELILE NGCWAZITSHE Fifth Respondent

JUDGMENT

MHAMBI AJ

[1] This case deals with an important aspect in legal jurisprudence, the question is how a customary marriage is dissolved. This judgment answers the question of whether the desertion of the matrimonial home by either of the spouses dissolves the customary marriage. In order to answer the question raised in this judgment regard had to be to the provisions of the Recognition of Customary Marriages Act.[1]

[2] The salient facts of this case are as tabulated hereunder.

[3] The applicants seek, in the main, for an order that a civil marriage between the first respondent and the late Velile Ngcwazitshe, "**the deceased**", be declared to be *null and void*. The other reliefs or orders are ancillary to the main one, it goes without saying that if the application succeeds in respect of the main order sought, the ancillary orders will be granted as this court deems appropriate to do so.

[4] The first applicant is the customary wife of the deceased, having married the deceased during 1978 by customary rites. It appears from the founding affidavit that the emissaries from the deceased family were sent to the first applicant's family for lobola negotiations. According to the first applicant, who has deposed to the founding affidavit, the following was paid as lobola:-

[1] Recognition of Customary Marriages Act 120 of 1998

a) Seven live cows,

b) R10 cash, known as uswazi,

c) R15 cash, known as imvula mlomo;

d) R20 cash, known as isazimzi;

e) R20 cash, known as igqeshe.

[5] According to the first applicant, all those who were emissaries had predeceased her, however, the deceased younger brother, Phumzile Ngcwetshe, and one Nombasa Vava, who is the headwoman of the administrative area had witnessed the handing over of the first applicant by her family to the deceased family. Both have deposed to the confirmatory affidavit agreeing to this fact.

[6] The first applicant further alleges that customary ceremony was performed to welcome her as the deceased bride, and she was given the name "**Nowandile**". Out of the customary marriage between the first applicant and the deceased, the second, third and fourth applicants were born, and the late Mawethu Ngcwazitshe, who predeceased all the parties to this application.

[7] The first applicant and the deceased separated with each other during 1998, whilst the deceased was working at the Welkom mines. The cause of separation is not stated in the papers. It is apposite to state that the customary marriage between the deceased and the first applicant was not registered until the deceased death, during 24 October 2023.

[8] The first applicant alleged that when she approached the offices of the Department of Health, for the purposes of late registering the customary marriage she had with the deceased, she was informed that the deceased is married by civil marriage with the first respondent. The civil marriage between the deceased and the first respondent was allegedly registered on or about 11 November 2017. According to her, it is only then that she knew of the civil marriage between the deceased and the first respondent.

[9] The first applicant alleges that she did not give the deceased consent to marry the first respondent, the civil marriage between the deceased and the first respondent was registered despite the existence of the customary marriage she had with the deceased.

[10] This application is opposed by the first respondent. She has filed an answering affidavit. The summary of her averments in the answering affidavit may be summarized as appearing hereunder: -

[11] The first respondent stated that she fell in love with the deceased in 1999 during the same year the deceased visited her home in Swaziland. According to her culture, the deceased was made to pay for a black and white heifer before he can be allowed to marry her. The deceased paid for the cow.

[12] The first respondent stated that she was advised by the deceased, he no longer has a wife, as he, (the deceased), expelled the first applicant, by that time the deceased was working at Beatrix Mine, in Welkom.

[13] During 2022, the first respondent was welcomed by the deceased family as a bride, a traditional bride welcoming ceremony was performed, and she was named, **"Nobuntu**".

She alleged that most of the deceased family members were present at her welcoming ceremony. Because she was pregnant, she moved to Virginia with the deceased.

[14] It appears from first respondent's answering affidavit that three children were born out of the civil marriage with the deceased. She avers that the deceased phoned the first applicant in her presence to advise that he, (the deceased), has taken a wife, and thereafter he phoned the sisters of the deceased.

[15] She alleged that, during 2011, she together with the deceased sought for a site, they built a two roomed structure, in which she stayed together with the deceased until the deceaseds death in 2023, November. The deceased died tragically by shooting himself without leaving any suicidal note.

[16] The first respondent avers that some of the deceased family members went to the first applicant's home to fetch her to mourn for the deceased, indeed the first applicant mourned for the deceased. The averments by the first respondent have not been confirmed by any family members of the deceased. The averments by the first respondent are not supported by any confirmatory affidavit, unlike those of the first applicant.

[17] Our legal jurisprudence is rich in case law and text books, etc. with regard to the recognition of customary law. In the paragraphs below, I deal with summary of legal position relating to customary law.

[18] Certain provisions of the Constitution put it beyond doubt that our basic law requires that customary law should be accommodated, not merely tolerated, as part of South African Law, provided the particular rules or provisions are not in conflict with the

Constitution. Section 30 and 31 of the Constitution[2] entrench the respect of cultural diversity. Further, Section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and the objects of the Bill of rights. In similar vein, Section 39(3) states that the Bill of rights does not deny the existence of any other rights and freedoms that are recognized or conferred by customary law as long as they are consistent with the Bill of Rights. Lastly, section 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

[19] The position of customary law was affirmed by the Constitutional Court in *Alexkor Ltd and Another v Richtersveld Community and Other,*[3] the court held that:-

'While in the past indigenous law was seen through common lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the constitution. Its validity must now be determined by the reference not to common law, but to the Constitution'

[20] Langa DCJ, as he then [4]was, affirmed the position of customary law in *Bhe V Khayelitsha Magistrate* as follows:-

'Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated not merely tolerated as part of South Africa Law,

[2] The Constitution of the Republic of South Africa, 1996
[3] [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 CC at para 51. See also Mabuza v Mbatha 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) at para 32.
[4] 2005 (1) BCLR 1 (CC) para 41

provided the particular rules or provisions are not in conflict with the Constitution.' Own emphasis added).

Langa DCJ goes on to say:-

'It bears repeating, however, that as with all law, the Constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights'.[5]

[21] The Recognition of Customary Marriages Act[6], "**RCMA**", is the product of this Constitutional Court affirmation of recognition of customary law.

[22] The RCMA defines Customary Law as:-

'The customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people.'[7] RCMA defines customary marriage as:-

'a marriage concluded in accordance with Customary Law[8]'.

[23] Section 2 of the RCMA deals with the recognition of customary marriages, for the purpose of this case, I will deal only with Subsection 1 of Section 2, which states: -

2.

[5] See para 46 of Bhe
[6] Supra at footnote 1
[7] Section 1 of the RCMA
[8] Section 1 of the RCMA

(i) ‘A marriage which is a valid marriage at Customary Law and existing at the commencement of this Act is for all purposes recognized as a marriage’.

Section 3 of the RCMA deals with the requirements for validity of customary marriages. Subsection 1 of Section 4 puts a duty on the parties to ensure registration of their marriage for the purpose of this case I will specifically deal with Section 4, Subsection 3, which states that: -

4. (3) A Customary Marriage:-

a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of twelve months after that commencement or within such longer period as the minister may from time to time prescribe by notice in the Gazzette; or

This Subsection is sufficient for the facts of this case. Section 8 deals with dissolution of customary marriage, and states that:-

8.(i) “A Customary Marriage may only be dissolved by a court by a decree of divorce on the ground of irretrievable broken down of the marriage”.

[24] It is a matter of fact that the customary marriage between the first applicant and the deceased was not registered until the death of the deceased. The first respondent does not in her answering affidavit, dispute that the first applicant was married to the deceased before her civil marriage with the deceased. It is again a matter of fact and the law that non registration of customary marriage does not nullify the customary marriage.

[25] The crux of this application is whether the marriage between the first applicant and the deceased was dissolved before the deceased married the first respondent.

[26] Both parties have not alleged in their papers, the custom or indigenous law applicable in their scenarios, and have both not put this court into clear picture on how customary marriage is dissolved according to their customs. The first applicant has only averred that she was in separation with the deceased, the first respondent having alleged that the deceased telephonically informed the first applicant that he had taken another wife, and that she was informed by the deceased that he expelled the first applicant, that was before the civil marriage was concluded. This court therefore has to consider the provisions of the RCMA in relation to the dissolution of a customary marriage.

[27] The primary question is whether customary law applies to the facts of this case, I find, it applies, in that regard this legal controversy between the parties has to be determined in terms of the RCMA.

[28] This court is mindful of the dynamic nature and constant evolvement of Customary Law. The following need to be stressed when this court applies customary law:-

[29] In *Tsambo*[9] the Supreme Court of Appeal remarked: -

'When dealing with customary law, it should always be borne in mind that it is a dynamic system of law'[10].

'customs have never been static. They develop and change along with the society they are practiced'.

[9] *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 30 April 2020, at para 15
[10] *Tsambo* at para 18

[30] In *Alexkor*[11] the Constitutional Court gave the following guidance:

'In applying indigenous law, it is important to bear in mind that, unlike common indigenous law is not written. It is a system of law that was known to the community practiced and passed on from generation to generation. It is a system of law that has its own value and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.

Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, may include the evidence of witnesses if necessary. However caution must be exercised when dealing with textbooks and old authorities of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it…'

[31] In Mbungela[12], Maya P, as she then was, provided guidance on the manner in which content is to be given to section 3(1) (b) of the Recognition Act.

'"It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms consistently with the Constitution, so to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned. As this court has pointed out, although the various African cultures generally observe that same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society thus, the legislature left it open for the various communities to give content to s3(1)(b) in accordance with their lived experiences.'

[11] Alexkor at paras 53 to 54
[12] *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA)

[32] After having considered the provisions of the RCMA the facts presented by the Applicant, I am satisfied that the first applicant and the deceased concluded a valid customary marriage. If find that the spousal consent, in this case, first applicant was not necessary when the deceased married the first respondent as that marriage was registered as a civil marriage, the provisions of the RCMA relating to spousal consent before conclusion of 2nd or other customary marriage, is not applicable in this case, as the 2nd marriage was a civil marriage between the deceased and the first respondent.

[33] The validity of the 2nd marriage, between the deceased and the first respondent depends on whether the first marriage, customary marriage between the deceased and the first applicant was dissolved or not.

[34] The RCMA is clear that a Customary Marriage is dissolved by a court by a decree of divorce. Absent decree of divorce issued by a competent court a customary marriage subsists and remains valid. In this case there is no decree of divorce dissolving the bonds of customary marriage between the deceased and the first applicant. Clearly, the customary marriage does not dissolve because the parties to it feel it is irretrievable broken down, it is the court that must be satisfied, having considered relevant factors, that the relationship between the parties has reached such a stage of disintegration that there is no reasonable prospect of restoration to the normal marriage relationship between them, whereafter the court issues the decree of divorce.

[35] In *Mphosi v Mphosi*[13], the court held that:-

'……. to require of the spouses to dissolve their subsisting customary marriage by [a] decree of divorce, as provided for in Section 8, before they may enter into a civil marriage on the ground of irretrievable break down of the marriage relationship between them, which is the only

[13] 1142/2014 (29 November 2018), unreported judgment by Limpompo Division of the High Court.

basis upon which the customary marriage, in Casu, may be dissolved where there is no such break down, is simply absurd and against clear meaning of Section 10)1)'

[36] My emphasis is that the Mphosi case stresses that the decree of divorce Is required by Section 8 of the RCMA is the only basis upon which customary marriage may be dissolved.

[37] The authorities are clear that even desertion or adultery, is not a blameworthy conduct to render dissolution of a customary marriage, it merely is a reason for marital breakdown. Recently, the North Gauteng High Court in *MBM v MG*[14], the court held that: -

'The plaintiff brought to the attention of this court the judgment in Swart v Swart[15], as the Judge held in that case adultery and desertion in certain instances merely may be symptoms and not the cause of the marriage breakdown and that conduct cannot be considered blameworthy. (emphasy added and all footnotes omitted) ……. Simply put, Section 8(1) of RCMA is clear in that it is only the courts that are empowered to dissolve the marriage and not the defendant's mere desertion of the marital home ……'.

[38] Consequently, I disagree with the first respondent that the first applicant's desertion of the marital home, coupled with the alleged expulsion by the deceased and lastly, the alleged telephone call advice by the deceased in front of the first respondent that the deceased has taken her as the wife, does not at all render dissolution of the marriage between the deceased and the first respondent.

[14] (2023/ 126365) [2025] ZAGPJHC 137 (27 March 2025) at para 20, unreported judgment.
[15] 2011(1) SA 545 (GHP)

[39] I now turn to deal with the status of the civil marriage between the deceased and the first respondent.

[40] The SCA has rendered the Civil Marriage a nullity when concluded by a partner during the subsistence of a Customary Marriage. Petse AJA, as he then was, in *Rudzani Netshituka v Joyce Munyadizwe Netshituka*[16], held that:-

'In Thembisile v Thembisile,[17]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. It was not argued in this court that Thembisile was wrongly decided. It follows that the civil marriage between the deceased and the first respondent, having contracted while the deceased was a partner in existing civil customary union with Tshinakaho and Diane, was a nullity'.

[41] I have assessed the conflicting versions of the parties, and considered the admitted facts, I find the version of the first applicant, supported by the deceased brother and the headwoman, credible to the extent that the deceased and the first applicant married by customary law, and that marriage subsisted until the death of the deceased. I reject the version of the first respondent; it lacked corroborative evidence on dissolution of the marriage between the deceased and the first applicant. Consequently, I find the civil marriage between the deceased and the first respondent to be a nullity, on the basis that it was contracted during the subsistence of customary marriage between the deceased and the first applicant.

I see no basis why costs should not follow the result, as this is a general principle.

[16] 2011 (5) SA 453 at para 15
[17] 2002 (2) SA 209 (T)

42. In the result the following order issues:-

ORDER: -

1. **The civil marriage contracted between the first respondent and the deceased, Velile Ngcwazitshe, is declared to be *null and void ab initio*.**

2. **It is declared that the first applicant and the deceased, Velile Ngcwazitshe concluded a valid customary marriage.**

3. **The third Respondent is directed to register the customary marriage between the first applicant and the deceased, Velile Ngcwezitshe within fifteen days, from the date of service of this order, together with completion of the documents necessary for that purpose.**

4. **The fourth and fifth respondents are ordered and directed to proceed with the administration and distribution of the deceased estate, taking into account the first applicant as the wife of the deceased, and the second, third and fourth applicants as the deceased children.**

5. **The first respondent is directed to pay costs of this application on scale A of the uniform rules 67 A.**

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M. MHAMBI
JUDGE OF THE HIGH COURT (ACTING)

Date heard **:** 12 December 2024

Date delivered **:** 05 June 2025

APPEARANCES: -

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