



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

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

Case No: 4051/2023

In the matter between:

N... C... N...

Applicant

and

MINISTER OF HOME AFFAIRS

1st Respondent

MASTER OF THE HIGH COURT: BLOEMFONTEIN

2nd Respondent

TSIE THEODOSIUS MOKHOB

3rd Respondent

E... N... N..

4th Respondent

HEARD ON: 30 NOVEMBER 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 16 FEBRUARY 2024

[1] The applicant approached this court seeking the following orders:

- 1.1 That the customary marriage entered into between the applicant and the late T... N... in December 1992, is declared valid and of effect in terms of the Recognition of the Customary Marriage Act 120 of 1998.

- 1.2 That the first respondent is ordered to register the customary marriage between the applicant and the late [TN] and register it in community of property, alternatively issue a certificate as proof of the registration of the said marriage.
- 1.3 that the respondents are ordered to pay the costs of this application (only if opposed).
- 1.4 Further and/or alternative relief.
- [2] The application is opposed only by the 4th respondent on the basis that the applicant and the deceased, the late [TN], were never married and consequently no customary marriage came into being.
- [3] The applicant stated that she was married to the late [TN], who died on 25 February 2018,¹ in terms of the Isizulu customary law on 28 July 1992.² Thirteen children, who are at present all majors, were born of the union³ since their marriage, they lived in Umzimkhulu until the deceased left for Bloemfontein to look for work during the year 2000. The deceased stayed in Bloemfontein since then, but came home every December holidays to be with her and the children.⁴ The marriage was never formally registered but she was advised that the failure to register the customary marriage did not affect the validity thereof.⁵
- [4] At the time of the marriage, both parties agreed to marry each other in terms of the customary law, and the marriage was concluded in terms of the Isizulu customary procedures in that:
1. Both the parties' families started the negotiations in February 1992 for the intended marriage between them.

¹ Paragraph 4 of the Founding Affidavit.

² Paragraph 12 of the Founding Affidavit.

³ Paragraph 13 of the Founding Affidavit.

⁴ Paragraph 15 of the Founding Affidavit.

⁵ Paragraph 14 of the Founding Affidavit.

2. The applicant's family was represented by her aunt, H... M..., and her elder brother B... A... M..., and the deceased's family was represented by the deceased's elder brothers, Z... N... and K... N..., including his cousin N... N.... Both their confirmatory affidavits to the founding affidavit were attached and marked annexures "F" and "G".
 3. The agreed lobolo was sixteen cows or the monetary equivalent of R 25 000.00.
 4. The deceased's family paid the applicant's family R 10 000.00 as part of the agreed lobolo on the same day of the negotiations.
 5. The applicant was then handed over on 10 June 1992 by her family representatives, B... A... M... and H... M..., to the deceased's family who accepted her. Both families celebrated the event in terms of the isiZulu custom.
 6. On 28 July 1992, the deceased's family paid the remaining lobolo of R 15 000.00 to the applicant's family and, on the same day, celebrated the *indlakudla* at the deceased's family's household. A copy of a letter of authority as proof of the customary union was signed by an Inkosi (chief) at the Gidikazi Traditional Community head office at Mfulamhle, UMzimkhulu.
 7. The couple continued with their customary marriage until the deceased passed away on 25 February 2018.
- [5] The 4th respondent submitted that she was married to the deceased in a customary marriage. She attached a lobolo letter and a copy of the marriage certificate⁶ to her opposing affidavit. She admitted the applicant's statements contending paragraph 14 of the founding affidavit that stated that, though the marriage was never formally registered, the applicant was advised that the failure to register the customary marriage did not affect the validity of the marriage.⁷ However, the fourth respondent failed to address the contents of

⁶ Paragraph 6 of the Answering Affidavit.

⁷ Paragraph 8 of Answering Affidavit.

paragraph 18 to 25 of the applicant's founding affidavit which dealt specifically with the applicant and the deceased's compliance with the requirements of a valid customary marriage, the consent and the Isizulu customary procedures which they followed . The validity and the existence of the applicant's customary marriage was not put in issue. It was only in oral argument and that 4th respondent's written heads of argument that the customary proceedings which gave rise to the customary marriage were put in issue.

- [6] Section 4(7) of the Recognition of Customary Marriages Act 120 of 1998 provides that a court may, upon application made to that court and upon investigation instituted by that court, order the registration of any customary marriage or the cancellation or rectification of any registration of a customary marriage effected by a registering officer. A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.⁸ Section 4(9) provides that failure to register a customary marriage does not affect the validity of that marriage.
- [7] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*⁹ "the court held that a real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed" The 4th respondent failed to grapple with the factual allegations contained in the affidavit and her opposition is based on a bare denial. There was therefore no irresolvable disputes of fact.
- [8] The central issue for adjudication, according to the respondent, is whether the applicant was married to the deceased and whether such marriage meets the requirements of a customary marriage in terms of section 3 of the Recognition of Customary Marriages Act 120 of 1998. The respondent contended further that, for a customary marriage concluded before the commencement of the Act, the applicant bore the onus of satisfying the court that the marriage was

⁸ Section 4(8) of the Act.

⁹ 2008 (3) SA 371 (SCA)

solemnised in terms of the Zulu customs, which the applicant neglected to do. As indicated earlier, the respondent failed to grapple with the relevant factual allegations in the applicant's founding affidavit and only raised this issue in her written heads of argument. The evidence shows that the families met and concluded the marriage in accordance with Zulu custom.

[9] Customary law is defined in the Act as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples and a customary marriage means a marriage concluded in accordance with customary law. Section 2(1) of the Act provides that the marriage which is a valid marriage at customary law and existing at the commencement of this act is for all purposes recognised as a marriage. Section 3(1) provides that for a customary marriage entered into after the commencement of the Act to be valid, the prospective spouses must both be above the age of 18 years; and both must consent to be married to each other under the customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law.

[10] I am satisfied that a customary marriage was concluded between the applicant and the deceased in accordance with customary law. The applicant consented to the customary marriage, followed by the payment of lobolo, whereafter she cohabited, built a home with the deceased and bore him children with the full knowledge of his family.¹⁰

[11] Consequently, I make the following order:

Order:

1. The customary marriage entered into between the applicant and the late [TN] in December 1992 is declared valid and of effect in terms of the Recognition of the Customary Marriage Act 120 of 1998.

¹⁰ Mbungela and Another v Mkabi and Others 2020 (1) All SA 42 (SCA).

2. The first respondent is ordered to register the customary marriage between the applicant and the late [TN] and issue a certificate of registration of that customary marriage.
3. The 4th respondent is ordered to pay the costs of this application.

MHLAMBI, J

On behalf of the applicant: Mr H Rapapali

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On behalf of the respondent: Adv. Nyezi

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