THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 893/12
Reportable

In the matter between:

TSHAVHUNGWE MBENGENI MURABI **APPELLANT**

and

NALEDZANI CAROLINE MURABI **FIRST RESPONDENT**
MINISTER OF HOME AFFAIRS **SECOND RESPONDENT**
MASTER OF HIGH COURT **THIRD RESPONDENT**

Neutral citation: *Murabi v Murabi* (893/12) [2014] ZASCA 49 (1 April 2014)

Coram: Mthiyane DP, Petse, Saldulker JJA and Van Zyl and Legodi AJJA
Heard: 20 March 2014
Delivered: 1 April 2014

Summary: Marriage ─ Validity ─ civil marriage contracted while the man is a partner in a subsisting customary union with third party void ─ falling foul of s 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Shaik AJ sitting as court of first instance):

1 The appeal is upheld with costs.
2 The order of the court below is set aside and in its place is substituted the following:
'(a) The customary marriage between the applicant and the deceased contracted in 1979 is declared valid.
(b) The civil marriage contracted between the first respondent and the deceased on 2 August 1995 is declared null and void.
(c) The first respondent is ordered to pay the costs of the application.'

JUDGMENT

Petse JA (Mthiyane DP, Saldulker JA and Van Zyl and Legodi AJJA concurring):

[1] There are two issues for determination in this appeal. The first is whether the appellant, Ms Tshavhungwe Mbengeni Murabi, was lawfully married to the late Ranwedzi Ramathaga Godfrey Murabi (the deceased) who died on 7 April 2011. The second is whether the civil marriage of the first respondent, Ms Naledzani Caroline Murabi, to the deceased contracted on 2 August 1995 is valid.

[2] These issues arise against the following backdrop. The appellant instituted proceedings in the Limpopo High Court, Thohoyandou in which she sought against the respondents an order: (a) that the 'civil marriage' contracted between the first respondent and the deceased on 2 August 1995 be declared null and void *ab initio*; and (b) that the customary marriage concluded between the appellant and the deceased on 1 November 1979 be declared valid. By way of consequential relief she

also sought orders directing the second respondent, the Minister of Home Affairs, to register her marriage and concomitantly with that to expunge the civil marriage of the first respondent to the deceased from the marriage register.

[3] The principal protagonists both in this court and the high court are the appellant and the first respondent. The Minister of Home Affairs and the Master of the High Court, Thohoyandou did not enter the legal fray and both filed, through the State Attorney, notices to abide the decision of the court. In addition the master filed a report, pursuant to Uniform rule 6(9), explaining how it came about that the first respondent was appointed as the executrix of the deceased's estate.

[4] In support of her application, the appellant inter alia stated that on 1 November 1970 she entered into a customary marriage with the deceased after lumalo[1] in the sum of R600 was paid to her parents. In 1975 the deceased married the first respondent in accordance with Venda custom. Soon after this marriage her marriage relationship to the deceased became intolerable and insupportable for her, forcing her to return to her maiden home in 1979.

[5] In 1983 she and the deceased resumed their marriage relationship when the deceased obtained a residential site for her. On 31 January 1991 her customary marriage to the deceased was registered with the magistrate in Thohoyandou and pursuant thereto she was issued with a certificate as evidence of the registration of the customary marriage.

[6] Subsequent to the death of the deceased on 7 April 2011, the appellant attended at the offices of the third respondent, to report the death as contemplated in s 7(1)*(a)* of the Administration of Estates Act 66 of 1965. There she discovered that the death had already been reported by the first respondent and that the first respondent had been appointed as the executrix of the deceased's estate. The appellant suspected that the first respondent had claimed to be the sole surviving

[1] Lumalo is the Venda equivalent of lobola or ikhazi amongst the Nguni tribes. See also: Section 1 of the Recognition of Customary Marriages Act 120 of 1998 which defines 'lobolo' as: 'the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage'.

spouse and that she had married the deceased by civil rites in 1995. The appellant, on her part, asserted that she was the first wife by reason of her marriage having been concluded in 1970, whereas the first respondent's marriage was concluded in 1979 with the consequence that the first respondent became the second wife in keeping with Venda customary law and tradition.

[7] The allegations made by the appellant in her founding affidavit elicited the following response from the first respondent. She disputed that the deceased ever paid lumalo for the appellant and that the appellant ever married the deceased in 1970 or at all, contending that both the appellant and the deceased were at that stage still young. She alleged that when she married the deceased, the appellant was in fact married to one Frans Radzwabu of Tshirangadzi village. Moreover, the first respondent, whilst alluding to the possibility of an extra-marital relationship between the deceased and the appellant, alleged that since the deceased fell ill in 1994 until his death on 7 April 2011, the appellant never once visited him, nor did she attend the deceased's funeral.

[8] In a strange twist, the appellant admitted in her replying affidavit and supplementary replying affidavit that when the deceased married the first respondent she was still married to Frans Radzwabu. The appellant further admitted that she had an extra-marital liaison with the deceased whilst the latter was married to the first respondent and that the first respondent 'was not happy with the relationship'. The appellant's extra-marital relationship from which two children were born led, the appellant asserted, to the irretrievable breakdown of the appellant's marriage to Frans Radzwabu.

[9] On 29 June 2012 the parties concluded a settlement agreement in terms of which the issues in dispute were circumscribed. The parties agreed that the appellant concluded a customary marriage with the deceased in 1979, the validity of which remained in dispute. The matter eventually served before Shaik AJ who found that the appellant failed to establish the existence of the customary union asserted by her and dismissed her application with costs. The learned judge also declared the first respondent the only surviving spouse of the deceased. The appeal to this court is with the leave of the high court.

[10] In the high court the contentions of the appellant were, in essence, that: (a) the registration of the appellant's customary marriage with the deceased concluded in 1979 was at the very least and remained prima facie proof of the existence of such customary marriage as contemplated in s 2(1)[2] of the Recognition of Customary Marriages Act 120 of 1998; (b) s 22(1)[3] of the Black Administration Act 38 of 1927 which provided that a male person who is a partner in a subsisting customary union cannot contract a marriage without first making a declaration to a magistrate or commissioner of the matters dealt with in that section was unavailing to the first respondent; and (c) that the first respondent's marriage to the deceased on 2 August 1995 is null and void *ab initio* because it was hit by the prohibition in s 1[4] of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 as the deceased was on that date a partner in a subsisting customary union with the appellant. These contentions were summarily dismissed by the high court.

[11] The reasons of the high court in rejecting these contentions were in essence the following. First, the high court, relying on *Road Accident Fund v Mongalo*; *Nkabinde v Road Accident Fund* 2003 (3) SA 119 (SCA) para 6, held that as the appellant initially asserted in her founding affidavit that her customary marriage was concluded on 1 November 1970, which turned out to be untrue, she could not rely on the registration certificate issued to her in 1991, for to allow her to do so would be assisting her to perpetrate a fraud. Second, that the appellant had approached the court 'with dirty hands' and withheld 'material facts in her founding affidavit'. Third,

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[2] Section 2(1) provides that 'a 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'. The Act came into operation on 15 November 2000.

[3] Section 22(1) provides:
'No male [African] shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared upon oath, before the magistrate or native commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or house under native custom; and such other information relating to any such union as the said official may require.' Section 22(1) to (5) since repealed by the Recognition of Customary Marriages Act 120 of 1998.

[4] Section 1 reads:
'*(a)*(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.
(b)(2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union.'

that having regard to the prescripts of s 22(1) of the Black Administration Act the [appellant] had in any event 'failed to prove on a balance of probabilities that the deceased concluded a valid customary marriage' with her.

[12] Before turning to a consideration of counsel's submissions it is convenient to make certain preliminary observations concerning aspects of the settlement agreement concluded by the parties on 29 June 2012 preceding the hearing of the matter in the high court. The settlement agreement obviated the hearing of oral evidence. Most significantly the first respondent admitted that the deceased concluded a customary marriage with the appellant in 1979. Following the agreement reached between the parties, only two issues remained for determination by the court below. The court below was called upon to decide whether: (a) the appellant's customary marriage to the deceased was valid; and (b) the marriage between the deceased and the first respondent contracted on 2 August 1995 is valid. The answer to the first question hinged solely on the construction of the provisions of s 22(1) of the Black Administration Act. And the answer to the latter question hinged on the construction of the provisions of s 1 of the Marriage and Matrimonial Property Law Amendment Act and the status of the appellant's customary marriage with the deceased. Thus, if the appellant's customary marriage is valid then in that event the first respondent's marriage would not survive.[5] Counsel were in agreement that the customary marriage of the first respondent to the deceased concluded in 1975 was not in issue.

[13] In this court, the argument advanced on behalf of the appellant was in essence the following. First, it was argued that the existence of the appellant's customary marriage was borne out by the certificate of its registration issued to the appellant in 1991 which constitutes conclusive proof of such marriage. Accordingly, so it was contended, such conclusive proof can only be rendered invalid if there is countervailing evidence to show that it was obtained by fraud, whether by the holder or any other person.

[5] See eg *Thembisile & another v Thembisile & another* 2002 (2) SA 209 (T) para 32. *Thembisile* was cited with approval in *Netshituka v Netshituka & others* 2011 (5) SA 453 (SCA) para 15.

[14] The proposition advanced by counsel on behalf of the appellant is of course supported by decisions of this and other courts. In *Road Accident Fund v Mongalo*; *Road Accident Fund v Nkabinde*[6] this court said (paras 6-7):

'[6] The starting point in establishing the meaning of 'conclusive proof' must be principle. This Court stated the principle in question in *African and European Investment Co Ltd v Warren and Others*. A statute of the Transvaal Republic provided that a surveying diagram signed by the State President was to be "een wettig en onwederlegbaar document" (a lawful and unimpeachable document). De Villiers JA observed:

"But there is no document in law which is wholly unimpeachable. Any document can be upset on the ground of fraud."

[7] Powerful policy reasons underlie this principle. Deliberate deceit in the procurement of a document must taint its entire subsequent existence, and the law cannot permit propagation of the fruits of dishonesty. The intrinsic meaning of "conclusive" does not impede this conclusion. "Conclusive" means "decisive, convincing" (*The Concise Oxford Dictionary*). It suggests that the condition or state it qualifies brings something to a conclusion. It does not mean that the conclusion in question must in all circumstances be unimpeachable or unassailable. In principle, therefore, a statutory provision that a document constitutes "conclusive proof" of a state of affairs cannot immunise the document from attack on the basis that it was procured fraudulently.'[7]

Counsel who appeared for the first respondent conceded that no such countervailing evidence was presented by the first respondent. Accordingly, the registration certificate issued to the appellant in 1991 constitutes, at the very least, prima facie proof of the existence of the appellant's marriage.[8] Thus, in the absence of countervailing evidence impugning its authenticity, it establishes the truth of the fact stated therein.[9]

[15] Furthermore, counsel representing the appellant sought to meet the submission advanced on behalf of the first respondent in relation to s 22(1) of the Black Administration Act by contending that the essence of that provision is that no

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[6] *Road Accident Fund v Mongalo*; *Nkabinde v Road Accident Fund* 2003 (3) SA 119 (SCA) paras 6-7.

[7] See also *Registrar of Asiatics v Salajee* 1925 TPD 71 at 72 and 76.

[8] See in this regard s 4(8) of the Recognition of Customary Marriages Act 120 of 1998 which reads:
'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.' (My emphasis.)

[9] *Ex Parte The Minister of Justice: In re R v Jacobson and Levy* 1931 (AD) 472 at 474 in which this court said:
'Prima facie proof, in the absence of rebuttal, therefore means clear proof leaving no doubt.' See also *Salmons v Jacoby* 1939 (AD) 588 at 593 and the cases there cited.

male who is a partner in a subsisting customary union with any woman may contract a civil marriage with another woman without first paying heed to the prescripts of that provision. In elaboration it was contended that there is no legal impediment to a man who is a partner in a subsisting customary union from concluding a second or subsequent customary union with another woman, and that s 22(1) does not purport to proscribe ─ subject to its requirements being satisfied ─ the conclusion of successive customary marriages in a polygamous customary marriage context. And what it sought to regulate was the proprietary consequences of a marriage by civil rights when the man is also a partner to a subsisting customary marriage.

[16] Section 22 (1) does not itself contain an express provision to the effect that it applies to marriages other than polygamous customary marriages. But to my mind there is merit in the contention advanced on behalf of the appellant that if regard is had to the overall scheme of the Black Administration Act and one contrasts subsections (a) and (b) of s 9[10] there can be no room for any doubt that a material distinction is drawn between the two subsections. This has to be seen against the backdrop that according to the common law it has always been the case, as this court found in *Nkambula*,[11] that 'in respect of a man or woman bound by a civil marriage the law cannot recognise the bond of another "association of a man and a woman in a conjugal relationship". . .' To my mind *Nkambula* puts paid to the contention advanced on behalf of the first respondent that the word 'marriage' in s 22(1) must be construed to encompass a customary union. That this is not the case is put beyond doubt by the amendment introduced by s 9*(a)* and *(b)* of Act 9 of 1929.[12]

[17] I turn now to a consideration of the question whether, in the light of the conclusion that the appellant's customary union is valid, the civil marriage of the first

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[10] Section 35 of the Black Administration Act which contained a definition of 'customary union' was amended in terms of s 9(a) and (b) of Act 9 of 1929 which substituted the following definitions:
'*(a)* "Customary union" means the association of a man and a woman in a conjugal relationship according to native law and custom, where neither the man nor the woman is a party to a subsisting marriage.
(b) "Marriage" means the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under native law and custom or any union recognised as a marriage in native law.'
[11] *Nkambula v Linda* 1951 (1) SA 377 (A) at 381A-D.
[12] Fn 10 above.

respondent contracted on 2 August 1995 can survive. The answer to this question lies squarely in s 1(1) and (2)[13] of the Marriage and Matrimonial Property Law Amendment Act which came into operation on 2 December 1988. Dealing with the provisions of s 1(1) and (2), this court said the following in *Netshituka* (paras 14-15):[14]

'[14] The next question is whether it was competent for the deceased to contract a civil marriage with the first respondent during the subsistence of the customary unions with Tshinakaho and Diana Netshituka. Section 22 of the Act [Black Administration Act] was amended by the Marriage and Matrimonial Property Law Amendment Act, which came into operation on 2 December 1988. After the amendment ss (1) and (2) provided:

"(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.

(2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union."

Subsection (3) barred a marriage officer from solemnising the marriage of an African "unless he has first taken from him a declaration to the effect that he is not a partner in a customary union with any woman other than the one he intends marrying". And in terms of the amended ss (5) a man who made a false declaration with regard to the existence or otherwise of a customary union between him and any woman made himself guilty of an offence. A marriage officer could thus not solemnise a marriage where a man intended to marry a woman other than the one with whom he was a partner in an existing customary union. That, in my view, was the clear intention of the legislature when it amended s 22 of the Act.

[15] Subsections (1) – (5) of s 22 of the Act, as amended, were in force as at the date on which the civil marriage between the deceased and the first respondent was contracted. (The subsections were repealed by the Recognition of Customary Marriages Act, which came into operation on 15 November 2000.) In *Thembisile v Thembisile* 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 been contracted while the deceased was a partner in existing customary unions with Tshinakaho and Diana, was a nullity.' (Citations omitted.)

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[13] Fn 3 above.
[14] Fn 5 above.

Accordingly, it goes without saying that the marriage of the first respondent to the deceased contracted on 2 August 1995 must ineluctably suffer the same fate. 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.

[18] Before concluding there is one other aspect that requires mention. In this case the record comprises documents that are illegible. These documents were annexed to the appellant's founding papers and are critical to her case. All of the documents were intended to substantiate the appellant's case that her customary marriage to the deceased preceded the conclusion of the first respondent's civil marriage which she sought to impugn. In addition the appellant filed a document in support of her case that the deceased obtained a residential site on which he built a home for her and the children born of their customary marriage. Not only is this document barely legible it is also in manuscript. A typed version of this document could easily have been prepared. Unsurprisingly counsel for the appellant could offer no explanation for this shortcoming. It is evident that no consideration was given in the preparation of the record to the fact that the foresaid documents could not, in their condition, serve the purpose for which they were intended.

[19] This court has on various occasions in the past expressed its utmost displeasure at the state of some of the records filed. In some cases it has warned that failure to file records that are satisfactory may lead to an adverse costs order whilst in others it has made punitive costs orders or deprive the party responsible for such infraction of part of its costs. Accordingly, it must be said without equivocation that this court views non-compliance with its rules in an extremely serious light. Thus it will not hesitate in more serious cases, if transgressions of this kind persist in the future, to mark its displeasure by making an appropriate costs order.[15]

[15] Compare: *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd & others* 1997 (4) SA 399 (SCA) at 415H-J; *Minister of Health & another v Maliszewski & others* 2000 (3) SA 1062 (SCA) paras 33-37.

[20] In the result the following order is made:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and in its place is substituted the following:

‘(a) The customary marriage between the applicant and the deceased contracted in 1979 is declared valid.

(b) The civil marriage contracted between the first respondent and the deceased on 2 August 1995 is declared null and void.

(c) The first respondent is ordered to pay the costs of the application.’

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JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	A D Ramagalela Instructed by: Mathivha Attorneys, Thohoyandou Molefi Thoabalala Attorneys, Bloemfontein
For the First Respondent:	M S Sikhwari Instructed by: Wisani Baloyi Attorneys, Makhado Matsepes Incorporated, Bloemfontein