THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 474/2012

In the matter between:

NOTHOZAMILE PUMLA MBABA **Appellant**

and

NOBELUSI MBABA **First Respondent**
(born NDAMASE)
MINISTER OF HOME AFFAIRS **Second Respondent**
MASTER OF HIGH COURT, MTHATHA **Third Respondent**
FIRST NATIONAL BANK LTD, MTHATHA **Fourth Respondent**
ABSA BANK LTD, MTHATHA **Fifth Respondent**
NEDBANK LTD, MTHATHA **Sixth Respondent**
NOZUKISEKILE MBABA **Seventh Respondent**

Neutral citation: *Mbaba v Mbaba* (474/12) [2013] ZASCA 137 (27 September 2013)

Coram: MAYA, LEACH, THERON, PETSE AND SALDULKER JJA
Heard: **29 August 2013**
Delivered: **27 September 2013**

Summary: Customary law ─ appellant seeking interdict to preserve estate of the deceased and the invalidation of a registered customary marriage between the deceased and the first respondent – appellant claiming to be the deceased's only lawful customary wife – subsequently seeking determination of validity of the respective customary marriages – Practice – notice of motion ill-formulated and not suitably amended – requisites for final interdict not met – appeal dismissed.

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Dawood J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MAYA JA (LEACH, THERON, PETSE AND SALDULKER JJA concurring):

[1] This is an appeal against the judgment of the Eastern Cape High Court, Mthatha (Dawood J). The high court dismissed the appellant's application which sought various forms of relief meant to preserve assets belonging to the estate of the late Mr Ngqele Edwin Mbaba (the deceased). The appellant also sought the expungement from the records of the Department of Home Affairs of the customary marriage between the deceased and the first respondent which was registered after the deceased's demise. The appeal is with the leave of this court. Only the first respondent opposes the appeal and none of the other respondents have been involved in the proceedings since inception.[1]

[2] The dispute was triggered by the death of the deceased who died intestate on 6 March 2009. The real protagonists are the appellant and the first respondent (the parties) who both claim to have been married to the deceased, under customary law, in November 1971 and November 2004, respectively. But each woman denies the validity of the other's marriage. In brief, according to the appellant (who, admittedly, had long been estranged from the deceased and resettled in a different province until his death) the first respondent was merely his lover with no rights to his estate. And it is on this basis that the application was premised. The first respondent, on the other hand, averred that the appellant's relationship with the deceased extended no further than bearing him a son, Mr Siyabulela Mbaba, out of wedlock in 1972. And as far as the first respondent knew, the appellant subsequently married another man, Mr Dumalisile Mafuxwana with whom she had further children, and had no contact with the deceased until his death. The appellant, therefore, had no locus standi to bring the proceedings against her.

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[1] The second and third respondents filed notices to abide the decision of the high court. The second and sixth respondents have filed notices to abide this court's decision.

[3] Despite the relief sought by the appellant, in the course of the litigation the dispute between the parties metamorphosed into the validity of the two alleged marriages. This is indeed how the appellant characterised the issue on appeal before us. But I will return to this aspect later in the judgment.

[4] It is necessary for a proper context to set out the litigation's meanderings in some detail. On 1 July 2009, the appellant approached the court below for a rule nisi in the following terms:

'…

1.1 That, the first respondent be and is hereby directed to forthwith hand over the letters of executorship that were issued to her by the third respondent on or about the 23 April 2009 relating to the winding up of the Estate Late Ngqele Edwin Mbaba (hereinafter referred to "the deceased") for cancellation.

1.2 That, the first respondent be and is hereby prohibited from continuing representing the said deceased's estate in any manner whatsoever; forthwith pending the finalization of this matter pending before court.

1.3 That, the fourth, fifth, sixth and seventh respondents are directed not to pay out any money that may have been processed as result of the applications lodged by the first respondent.

1.4 That, the first respondent be and is hereby ordered to deliver to the applicant, the deceased's original Identity Book, original Death Certificate and all the deceased's property including all motor vehicles to the applicant for safekeeping pending the finalization of this matter.

2. That, the second respondent be and is hereby directed to expunge from his registers the purported customary marriage entered into between the first respondent and the deceased on the 12 May 2009 (but the marriage certificate showed the 5 November 2004) even though the deceased died on 6 March 2009.

3. That, paragraphs 1.1, 1.2, 1.3 and 1.4 above shall operate as an interim interdict, pending the finalization of this application.

…'

[5] The appellant's application was supported by her son, Siyabulela, and one of the deceased's brothers, Mr Ntshukumo Pleasure Mbaba. The latter claimed to have been one of the deceased's emissaries when the appellant's marriage was negotiated. According to the appellant's founding affidavit, she was the deceased's

only lawful wife with whom he sired Siyabulela. All the rituals essential to formalize a customary marriage in the deceased's culture – payment of *lobola*, the *tsiki* ceremony by which a bride is welcomed into her new family, being given a new marital name and *ukwendisa*, the handing over of the bride by her maiden family to the husband's family – were performed on her behalf. The deceased's headman also allocated her a piece of land in her capacity as the deceased's wife. She alleged to have left the marital home, in Lady Frere, in 2005 as a result of the deceased's philandering. She moved to Cape Town but maintained contact with the deceased. She declined his pleas for her return because he did not follow the relevant custom and they remained estranged until his death. According to the appellant, the marriage was never dissolved, either under custom or the law,[2] and the deceased never sought her permission to marry another wife in accordance with custom and the law.

[6] The matter was heard in the unopposed court on 6 July 2009. The first respondent opposed the grant of interim relief. It transpired that no one had yet been appointed as executor of the deceased's estate. Thus, the relief sought in paragraph 1.1 of the notice of motion was incompetent. The parties then took a consent order which, inter alia, extended the rule nisi to a further date and granted the following interim relief:

'…

3.1 That, any dealings with the Estate of Edwin Ngqele Mbaba (deceased) is [frozen], subject to the following conditions:

3.1.1 That, the first respondent releases one of the deceased's motor vehicles and the deceased's Death Certificate to the [appellant];

3.2.2 That, the first respondent hands over the deceased's Identity book to the Master of the High Court for safekeeping;

3.2.2 That, the appointment of the Executor of the estate in question be held in abeyance pending the determination of who the deceased's lawful surviving spouse is.'

[7] Thereafter, the first respondent filed an answering affidavit which was supported by those of the deceased's sister, Mrs Noshumi Malothe, and the seventh respondent who was married to another brother of the deceased, Mr Solomzi Mbaba. The first respondent explained that she and the deceased always intended to register

[2] In terms of s 47 of the Transkei Marriage Act 120 of 1978 or s 8 of the Recognition of Customary Marriages Act 120 of 1998.

their marriage but procrastinated until he died. However, she did so after his death, on 12 May 2009. She was assisted at the registration which was officiated at the Home Affairs department by Mr Thulani Mbaba, whose father, Solomzi, had represented the deceased at her marriage negotiations, and the deceased's headman who was aware of the marriage. Siyabulela and the seventh respondent were also present. The thrust of the confirmatory affidavits was that the appellant never married the deceased and was last seen at his home in the mid-1970s. Noshumi said she saw the appellant again in 1996 nursing an infant to whose father she claimed to be married. In response to the appellant's query of her surprising description in the deceased's death notice as the deceased's divorced wife, as this did not tie in with the first respondent's version that the appellant was never married to the deceased, the first respondent said she heard that from the deceased.

[8] Obviously prompted by the factual disputes relating to their relationship with the deceased, the parties obtained a consent order which referred the matter for the hearing of oral evidence on the following issues:

'1.1 Whether the [appellant] is the wife of the [deceased];

1.2 Whether the first respondent was married to the deceased;

1.3 Whether the [appellant] was married to one Dumalisile Mafuxwana.'

[9] All the individuals who previously deposed to affidavits, except Ntshukumo who had since died, gave *viva voce* evidence at the hearing. The appellant's oral version did not quite tally with the allegations in her affidavit in a number of material respects. For example, it emerged from her evidence that, contrary to her statement in her affidavit that she had one child with the deceased, she did bear a son, Siphiwo, with Mafuxwana in 1983. The fact and timing of this birth in relation to a continuing marriage to the deceased is unclear. She later gave birth to two daughters in 1992 and 1996. She and Siyabulela claimed that the girls were fathered by the deceased. The appellant then narrated certain events that were not mentioned in her affidavits. She recounted that she once left the marital home in 1979 but returned in 1981 after she was fetched by Ntshukumo. She said that she left again in 2005 but returned in 2008 but left within a week because the deceased had not mended his errant ways. She denied that the deceased occasionally visited her in Cape Town, contrary to her allegations in her affidavits. She gave different accounts about the period she spent at the deceased's home and the capacity in which she attended his funeral.

[10] Interestingly, according to Siyabulela, the appellant left the marital home for good in 1998. He disputed his mother's elaborate version that she worked in Cape Town in 2009 and had to seek leave from her employer to attend the deceased's funeral. He said that she had not been employed since 2008 and had actually returned from Cape Town permanently (although obviously not to the deceased) during that year. But he was adamant that the first respondent had been merely his father's girlfriend, since 2008. He said he was lured to attend the first respondent's marriage registration on the pretext that the deceased's estate was going to be transferred into his name.

[11] The first respondent's application for absolution from the instance, motivated by the unsatisfactory quality of the appellant's version, was refused. The court below considered that it was inappropriate to make credibility findings at that stage and that the first respondent still had to discharge her onus of proving the appellant's alleged marriage to Mafuxwana and explain the circumstances surrounding the issue of her marriage certificate. The first respondent and her witnesses, Noshumi and the seventh respondent then testified. Their version was also not without blemish. The first respondent said that she and the deceased had been married in 2004 whereas it was put to the appellant and Siyabulela that she married the deceased in 2005. She did not challenge Siyabulela's evidence that she commenced a love affair with his father only in 2008 and that they lived apart. It appeared that she had no first-hand information about the appellant's alleged marriage to Mafuxwana.

[12] The evidence of her witnesses deviated materially from their affidavits. The seventh respondent denied even deposing to hers in which she said she last saw the appellant when she 'deserted' the deceased between 1974 and 1975. This conflicted with her oral evidence that she saw the appellant only in 1976 when she brought Siyabulela to the deceased's home because he was sick. And this version had not been put to the appellant. Noshumi, on the other hand, denied the allegations in her affidavit that she found the appellant at her home and was informed that she had been brought by the deceased whom she subsequently deserted before the *utsiki* ceremony could be performed for her. Interestingly, her version now matched the seventh respondent's; that the appellant only brought her sick child to the family home. She denied that any marriage ceremony was planned although damages for the pregnancy had been paid to the appellant's family.

[13] The court below found the appellant to be an unsatisfactory witness and her

version fraught with inconsistencies. The court also rejected Ntshukumo's affidavit. It transpired that he was not the deceased's eldest brother as his affidavit proclaimed and this, in the court's view, tainted his credibility. The court below made adverse credibility findings against both Noshumi and the seventh respondent in light of the discrepancies in their evidence, which it accordingly rejected. Only the first respondent found favour with the court even though it found no real flaw in Siyabulela's evidence. The court considered her a 'better witness' than the appellant and was impressed by her marriage certificate which, it found, was properly issued upon production of proof of her marriage to the deceased. The court made further findings that it viewed as supporting the first respondent's version which, however, were not borne out by the record: for example, that her marriage was not challenged vigorously and was confirmed by the affidavits of the headman and Solomzi and that her uncle confirmed payment of her *lobola*. The court below concluded that the appellant had failed either to prove her marriage or disprove the first respondent's marriage to the deceased and had not made out a case for the grant of a final interdict.

[14] The appeal was founded mainly on the grounds that the court below misdirected itself by: (a) accepting the first respondent's marriage certificate as valid and sufficient proof of her marriage to the deceased despite its issue after his death; (b) not giving due weight to Ntshukumo's affidavit; and (c) not deciding who was the wife of the deceased. Before us, counsel for the appellant contended that the dispute between the parties had 'narrowed to an issue who the lawful spouse of the deceased is'. He, very feebly I might add, argued that the appellant had proved that she was the deceased's lawful wife. He urged that even if it were accepted that the first respondent was also married to the deceased the appellant's marriage should take precedence because she did not consent to that marriage.

[15] It seems to me that the appeal may be disposed of shortly. The inept manner in which the appellant's case was framed and conducted up to appeal stage was deplorable. Quite clearly, in addition to the interdictory relief the appellant wished for, a declarator that she was the deceased's lawful wife as a likely precursor to the appointment of an executor in the deceased's estate. This is patent from the parties' Uniform rule 37 pre-trial minute which clumsily recorded that they –

'agree that the issues that fall to be decided by the court at the hearing are as follows

1. Whether the alleged desertion by the [appellant] did amount to the dissolution of her customary marriage or not?

2. Whether the first respondent was a customary wife of the deceased?
3. *To declare whether the [appellant] or the first respondent is the surviving spouse of the deceased or both*.' (Emphasis added.)

[16] But, in the view I take of this ill-fated matter, it is neither necessary nor even proper to decide the validity of either of the alleged marriages.[3] The appellant is bound by the poor manner in which the relief she seeks was formulated in the notice of motion. That remains in its original form and makes no mention of declaratory relief. Significantly, both in her affidavit filed in opposition of the grant of interim relief and in the main answering affidavit, the first respondent pertinently pointed out that the appellant had brought a wrong application and that the notice of motion should be amended. However, the appellant persistently contended otherwise and obstinately pursued the matter in this flawed form.

[17] Furthermore, as her counsel was ultimately constrained to concede, the appellant has not made out a case for any of the relief requested in her notice of motion. Even assuming that she proved that she was the deceased's wife, she would still face an insurmountable hurdle. First, as indicated, the relief sought in paragraph 1.1 is incompetent because the first respondent was never appointed as the executor of the deceased's estate and had no 'letters of executorship' to relinquish. This is something that, with a modicum of diligence, could have been easily verified with the third respondent's office. Second, no evidence was adduced that the first respondent held herself out as the representative of the deceased's estate. Thus, the relief set out in paragraph 1.2, has no basis. Third, the deceased's banking accounts were all frozen on his death. There is, therefore, no need for the relief sought in paragraph 1.3 as the deceased's bankers would not be able to disburse any funds from such accounts. And the inclusion of the seventh respondent, a housewife, in this class of respondents and the refusal to remove her when this was pointed out is just another example of the slovenly manner in which the application was conducted. Fourth, the items mentioned in paragraph 1.4 were surrendered to the third respondent for safe keeping. Accordingly, it is impossible for the first respondent to deliver them to the appellant. Fifth, there is no evidence of a customary marriage that was 'solemnized' by the deceased posthumously as suggested in paragraph 2. It became common

[3] Thus, the representations on the customary law rules applicable to the deceased on the necessity of a customary wife's consent to her husband to marry another wife and the requirements of a valid customary marriage and its dissolution, which we directed the parties to file, *ex abundante cautela*, in light of the Constitutional Court judgment in *MM v MN & another* 2013 (4) SA 415 (CC) 14, are irrelevant.

cause quite early in the proceedings that the first respondent sought to register a marriage that she alleged existed before the deceased's death. Yet, no attempt was made to amend this prayer as well.

[18] The requisites for the grant of a final interdict are trite: a clear right on the part of the applicant; an injury actually committed which continues or is reasonably apprehended and the absence of any other satisfactory remedy available to the applicant. Not even the slightest attempt was made to establish them on the appellant's papers. It follows that the appeal cannot succeed.

[19] In the result, the appeal fails. The following order is made:
The appeal is dismissed with costs.

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MML Maya
Judge of Appeal

APPEARANCES

FOR APPELLANT: V Notshe SC
Instructed by:
AF Noxaka & Company, Mthatha

Symington & De Kok, Bloemfontein

FOR IST RESPONDENT: E Crouse

Instructed by:

Port Elizabeth Justice Centre

Bloemfontein Justice Centre