



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 426/10

In the matter between:

RUDZANI NETSHITUKA

Appellant

and

JOYCE MUNYADIZWA NETSHITUKA

First Respondent

MASTER OF THE HIGH COURT

Second Respondent

ESTATE OF MASEWA JOSEPH NETSHITUKA

Third Respondent

MUTHUFELA NETSHITUKA

Fourth Respondent

DIANA NETSHITUKA

Fifth Respondent

**MINISTER OF THE DEPARTMENT OF
HOME AFFAIRS**

Sixth Respondent

Neutral citation: *Netshituka v Netshituka* (426/10) [2011] ZASCA 120 (20 July 2011)

Coram: MPATI P, BOSIELO, TSHIQI, SERITI JJA and PETSE AJA

Heard: 10 May 2011

Delivered: 20 July 2011

Summary: Customary Law — whether a civil marriage contracted between a partner to a customary union and another man or woman during the subsistence of that union is valid. Succession — validity of will — whether last will and testament of testator valid.

ORDER

On appeal from: Limpopo High Court (Thohoyandou) (Hetisani J sitting as court of first instance.):

1. The appeal is upheld in part.
2. That part of the order of the court below dismissing the application to declare invalid the marriage between the deceased and the first respondent is set aside and substituted with the following:
‘The marriage contracted between the first respondent and the deceased on 17 January 1997 is declared null and void.’
3. The costs order made by the court below is set aside.
4. The costs of the appeal and the costs of the proceedings in the court below are to be paid by the third respondent.
5. The appeal is otherwise dismissed.

JUDGMENT

PETSE AJA (MPATI P, BOSIELO, TSHIQI and SERITI JJA concurring)

[1] The appellant (as third applicant in the court a quo), together with two other persons who do not feature in this appeal, instituted proceedings against the respondents in which they sought, in the main, an order declaring: (a) the marriage between the first respondent and the late Mr Masewa Joseph Netshituka, contracted on 17 January 1997, null and void ab initio, and (b) the last will and testament of the late Masewa

Joseph Netshituka, executed on 20 November 2007, invalid. The late Masewa Netshituka (the deceased) died on 4 January 2008.

[2] The proceedings were opposed by the first and third respondents only. The court a quo (Hetisani J) dismissed the application with costs. This appeal is with its leave. I shall, for the sake of convenience, refer to the first and third respondents simply as the respondents.

[3] A brief factual background giving rise to the proceedings in the court a quo is necessary. Tshinakaho Netshituka, who was the first applicant before the court a quo but has since died, averred in her founding affidavit that she was married to the deceased by customary rites on 1 December 1956. This marriage was not registered with the Department of Home Affairs. I shall, for convenience, refer to her as ‘Tshinakaho’.

[4] According to Tshinakaho the deceased was also married by customary rites to three other women, namely Masindi, Martha and Diana Netshituka, whose marriages were likewise not registered. A number of children were born of these customary marriages, the appellant being one of them. She was born of the union between the deceased and Masindi. The first respondent was also married to the deceased by civil rites, the marriage having been contracted on 17 January 1997.

[5] Following the death of the deceased the appellant and her erstwhile co-applicants learnt from the first respondent that the deceased had executed a will and that the first respondent had been appointed executrix of his estate. Upon obtaining a copy of the will they took a decision, on

legal advice, to contest the validity of both the will and the deceased's marriage to the first respondent.

[6] The validity of the marriage was contested on the grounds that it fell foul of the provisions of s 22(1) of the Black Administration Act 38 of 1927 (the Act), read with s 1(a) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 regard being had to the fact that Tshinakaho's customary marriage and those of the other three customary law wives to the deceased, respectively, were recognised in terms of ss 2(1) and (3) of the Recognition of Customary Marriages Act 120 of 1998. The validity of the will was contested on account of the deceased's chronic state of ill-health and alleged incapacity to manage his own affairs at the time the will was executed. It was contended that this state of affairs was borne out by the fact that the deceased had (i) purported to bequeath property of which he was not the owner; (ii) purported to dispose of only a half-share of what he believed was his and the first respondent's joint estate; and (iii) the alleged vagueness of some of the provisions of the will.

The validity of the marriage

[7] The first respondent averred, in her answering affidavit, that she married the deceased by civil rites on 17 January 1997 in community of property, at a time when there was no impediment to her contracting a lawful marriage with him. She responded as follows to the allegation that Tshinakaho and three other women were married to the deceased by custom:

'I deny the existence of the customary marriage and more specifically that it existed at the time when the deceased and I got married. The

deceased was married to Martha Mosele Netshituka (born Lebona) and got divorced from her on 5 July 1984.¹

It was accordingly contended, on her behalf, that when she married the deceased on 17 January 1997 the latter was not a partner ‘to a valid existing customary union’ in that any customary union to which the deceased may previously have been a partner ‘was terminated by force of law in accordance with section 22 of the Act when he married Martha by civil rites’. It was submitted further that s22(2) of the Act, which provided that no person who was a partner in a customary union ‘shall be competent to contract a marriage [with another woman] during the subsistence of that union’, had no application to the first respondent’s marriage to the deceased. This was because whatever customary union may have subsisted was rendered invalid when the deceased married Martha Mosele Netshituka (Martha) by civil rites.

[8] For these submissions counsel for the respondents relied on the decision of this court in *Nkambula v Linda*² where it was held that:

‘[a] man who is a partner to a customary union and subsequently contracts a civil marriage with another woman during the subsistence of the customary union must be regarded by this act as having deserted his wife, and under these circumstances the woman to the customary union is justified in leaving her husband without rendering her guardian liable for a refund of the lobola [dowry].’³

Earlier in the judgment this court held that the Act ‘does not contemplate the existence side by side of a civil marriage and a customary union’.⁴

¹ A copy of the decree of divorce was annexed to the answering affidavit. It is not clear from the papers whether Martha Mosele Netshituka is the same person to whom Tshinakaho referred in the founding affidavit as one of the deceased’s customary law wives.

² *Nkambula v Linda* 1951 (1) SA 377(A).

³ At 384 C-D.

⁴ At 382 G.

[9] At the time the deceased would have married Martha by civil rites s 22(1) of the Act read thus:

‘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.’

The subsection thus permitted a man who was a partner in a customary union to contract a civil marriage with another woman provided he complied with its provisions.

[10] A number of academic writers and commentators hold the view that the effect of *Nkambula* was that where one partner in a customary union contracted a civil marriage with someone other than his or her partner in the union the civil marriage automatically terminated the customary union.⁵ In *Nkambula* the respondent’s customary law wife, Lena, left him after he had entered into a civil marriage with another woman. The respondent claimed that Lena had, by leaving him, dissolved the customary union, thereby entitling him to a refund of the lobola he had paid for her. The Commissioner’s Court upheld his claim and ordered Lena to return to him, failing which her father (the appellant) was to

⁵ I P Maithufi ‘the recognition of Customary Marriages Act of 1998: A Commentary’ (2000) 63 *THRHR* 509; I P Maithufi & G B M Moloi ‘The Need for the Protection of Rights of Partners to Invalid Relationships: A Revisit of the “Discarded Spouse” Debate’ (2005) 38 *De Jure* 144; R M Jansen ‘Multiple marriages, burial rights and the role of *lobola* at the dissolution of the marriage’ (2003) 28(1) *Journal for Juridical Science* RG; A West ‘Black Marriages’: The Past and the Present (2005) 7 *South African Deeds Journal* 10.

return the lobola as prayed, with costs. On appeal to it the Native Appeal Court dismissed the appeal and ordered further that upon failure of Lena to return to her husband within one month ‘the customary union is dissolved’. The President of the appeal court, however, viewing the matter as one of importance, referred the following question for this court’s consideration:

‘Whether or not a man who is a partner to a customary union and subsequently contracts a civil marriage with another woman during the subsistence of the customary union can be regarded as having deserted his customary union wife, and whether under these circumstances the woman to the customary union is justified in leaving her husband without her guardian becoming liable for a refund of the lobola.’

The question was answered in the affirmative (see the excerpt from this court’s judgment in paragraph 8 above).

[11] It appears to have been common cause before the court below that in the instant matter the customary law wives of the deceased never left him after he had married Martha by civil rites, but continued with their roles as his customary law wives. The question to be answered in these circumstances is: What was the status of the relationship between the deceased and his ‘deserted’ customary law wives after his civil marriage to Martha was terminated by divorce?

[12] In customary law, where a husband has deserted his wife his offence is not irreparable and does not give her the right to refuse to return to him when he comes to *phuthuma*⁶ her. It was held in *Bobotyane*

⁶ The husband is obliged to ‘phuthuma’ (fetch) his wife who has left him, whether through his fault or hers, unless he intends to abandon her. (See Bekker *Seymour’s Customary Law in Southern Africa* 5 ed (1989) p181–195.)

v Jack 1944 NAC (C & O) 9⁷ that customary law ‘does not recognise a dissolution of the union by mere desertion of the wife or husband, by abandonment, or even by bare repudiation, for these are all eventualities provided for by the lobola cattle; the husband can always “*putuma*” his wife after any length of absence; the wife can always return to her husband’s kraal and resume her former status’.⁸ But on the authority of *Nkambula* a customary law wife who has left her husband as a result of his having contracted a civil marriage with another woman would be entitled to refuse to return to him when he goes to *phuthuma* her. She would be entitled to assert that he had terminated the union between them. It seems to me, however, that nothing would prevent her from returning to him if she was prepared to do so. No fresh lobola negotiations would have to be undertaken because customary law ‘does not recognize a dissolution of the union by mere desertion’.⁹ The husband might be called upon by her guardian to pay a beast or more as a penalty for his ‘misdeed’.¹⁰

[13] In the present matter the deceased did not have to *phuthuma* his customary law wives because they never left him after he had married Martha. His continued cohabitation with them after the divorce was clear evidence of a husband who had reconciled with his ‘previously deserted’ wives. And in his last will and testament, the validity of which I shall consider presently, the deceased refers to Tshinakaho, Diana and the first respondent as his first, second and third wives respectively. What is

⁷ *Bobotyane v Jack* 1944 NAC (C&O) 9.

⁸ At p11.

⁹ *Bobotyane v Jack*, supra.

¹⁰ Bekker *Seymour’s Customary Law in Southern Africa*, fn 6 above, at p191. See also T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 261–262. According to Bennett the term ‘*phuthuma*’ is used by the Southern Nguni people, but it was not suggested in this court that the convention is not practiced by the nation/s of which the deceased and his customary law wives were members.

important, in my view, is the intention of the parties, which can be inferred from their conduct of simply continuing with their relationships and roles as partners in customary unions with the deceased after the divorce. Their conduct clearly indicated that to the extent that the deceased's civil marriage to Martha may have terminated his unions with his customary law wives, those unions were revived after the divorce.

[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 was amended by the Marriage and Matrimonial Property Law Amendment Act¹¹, which came into operation on 2 December 1988. After the amendment subsections (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 solemnizing 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 subsection (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 solemnize 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,

¹¹ 3 of 1988.

in my view, was the clear intention of the Legislature when it amended s 22 of the Act.

[15] Subsections (1) to (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,¹² which came into operation on 15 November 2000). In *Thembisile v Thembisile*¹³ 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.¹⁴ 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.

The validity of the will

[16] I turn now to the question whether the appellant and her erstwhile co-applicants discharged the onus that rested on them to establish on a balance of probabilities that the deceased was not in a sound mental state when he attested to his last will and testament on 20 November 2007. In support of the contention that the deceased was not in a sound mental state, Tshinakaho attached to her founding affidavit a copy of a medical report from Dr Chitate, a specialist physician attached to the Limpopo Mediclinic, and a memorandum from the Siloam Hospital. It is apparent from the medical report and memorandum that the deceased was chronically ill when he underwent treatment at the two institutions. There is, however, no indication that his mental capacity was in any way

¹² 120 of 1998.

¹³ *Thembisile & another v Thembisile & another* 2002 (2) SA 209(T).

¹⁴ Para 32.

impaired. On the contrary, Dr Chitate's report states explicitly that 'despite being chronically physically ill' the deceased was 'mentally normal and fully conscious, aware of his surroundings' and 'oriented in time, place and person'.

[17] In his report Dr Chitate states, however, that 'episodes of hypoglycaemia had occurred and, if these recurred after discharge, could have led to a deterioration in [the deceased's] mental function'. According to the report Dr Chitate examined and treated the deceased from 12 to 16 November 2007. The memorandum from the Siloam Hospital covers the period 30 November 2007, the date of his admission, to 4 January 2008 when he passed away. No mention is made of the deceased's alleged mental incapacity in the memorandum. There is thus no evidence that when he attested to his last will and testament on 20 November 2007 the deceased was mentally incapacitated. The contention that he was, therefore, has no basis.

[18] As to the allegation that the deceased purported to bequeath property of which he was not the owner and that therefore his will was invalid, counsel for the appellant conceded that even accepting this to be so it would not render the will invalid. Nor would it necessarily point to the deceased being mentally incapacitated. The same applies to the allegation of vagueness in respect of certain of the provisions of the will. We were in any event not referred to any provision which could be said to be vague.

[19] There remains the issue of costs. Counsel for the appellant submitted that if the appeal succeeds the first respondent should pay the costs. On the other hand counsel for the respondents argued that it would

be fair and equitable that any costs incurred in this matter be paid out of the deceased estate. I am satisfied that the argument on behalf of the respondents should prevail, for two principal reasons. First, the appellant has been partially successful. Second, the respondents were to my mind neither unreasonable nor frivolous in opposing the relief sought.

[20] The following order is made:

1. The appeal is upheld in part.
2. That part of the order of the court below dismissing the application to declare invalid the marriage between the deceased and the first respondent is set aside and substituted with the following:
‘The marriage contracted between the first respondent and the deceased on 17 January 1997 is declared null and void.’
3. The costs order made by the court below is set aside.
4. The costs of the appeal and the costs of the proceedings in the court below are to be paid by the third respondent.
5. The appeal is otherwise dismissed.

XM Petse
Acting Judge of Appeal

APPEARANCES

APPELLANT: PM van Ryneveld
Instructed by
Danie van Ryneveld Attorneys, Thohoyandou
Symington & De Kok, Bloemfontein.

RESPONDENTS: 1, 3, 4 and 5th
GJ Scheepers
Instructed by
Booyens Du Preez & Boshoff Inc.,
Thohoyandou
Honey Attorneys, Bloemfontein.