IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: 9223/2016P

In the matter between:

STHEMBILE MSHENGU	**APPLICANT**
vs	
ESTATE LATE MSHENGU AND OTHERS	**FIRST RESPONDENT**
MASTER OF THE HIGH COURT	**SECOND RESPONDENT**
CAWEKAZI MERCY MSHENGU N O	**THIRD RESPONDENT**
CAWEKAZI MERCY MSHENGU	**FOUTH RESPONDENT**

ORDER

In the result the order is made as follows:

1. The applicant is entitled to half of the family property that is allotted to her house, if any.

2. The applicant is entitled to one third of the family property that is not allotted to any of the wives' house, if any.
3. The third respondent is ordered to transfer to the applicant half of the family property that is allotted to the applicant's house if any and one third of the property that is not allotted to any of the wives' house if any.
4. Each party to pay his or her own costs.

JUDGMENT

Mathenjwa AJ

Introduction

[1] The issues for determination in this matter pertains to the proprietary system that is applicable to the customary marriage of a woman who was party to a polygamous marriage prior to the coming into effect of the Recognition of Customary Marriages Act 120 of 1998.

[2] The applicant, Mrs Sthembile Mshengu was married to the deceased, Mr. Mshengu by customary law in 1972, and the third respondent, Mrs Cawekazi Mshengu, was married to the deceased, firstly by customary law in 1981, and later by civil marriage in community of property and in profit and loss in 1994. The deceased passed away on 20 June 2016 leaving a will wherein he bequeathed his entire estate to the third respondent. The deceased's will was accepted by the Master of this Court, and the third respondent was appointed as the executrix to the deceased's estate.

[3] The applicant instituted these proceedings seeking an order that the estate of the deceased be liquidated, distributed fairly in accordance with customary law and the Master of this Court be directed to divide the deceased's estate equally between the applicant and the third respondent. This claim is grounded on the contention by the applicant that the proprietary system applicable to her customary marriage is in community of property therefore she was entitled to half of the deceased's estate. The third respondent opposed the application and contended that the applicant and the deceased were married by customary law in 1972 when section 22(6) of the Black Administration Act 38 of 1927 was applicable to their marriage, therefore, her marriage was out of community of property, and of profit and loss. It is further contended that the deceased deposed to a will and bequeathed his entire estate to the third respondent, therefore the applicant has no claim against the deceased's estate.

[4] The third respondent averred in her pleadings that the applicant was no longer married to the deceased at the time of the deceased's death, the applicant and the deceased had already divorced and they were no longer staying together as husband and wife when the third respondent married to the deceased by customary law in 1981 until the death of the deceased in 2016. However, at the hearing of this matter the third respondent's legal representative advised that the legal representative of the applicant has shown him the marriage certificate of the applicant and the deceased and therefore he formally withdrew the contention that the applicant was no longer married to the deceased at the time of his death, but still insisted that when the third respondent married the deceased by customary rites in 1981, the applicant was no longer staying with the deceased as husband and wife until the deceased's death in 2016.

[5] The applicant placed on record that she was not challenging the validity of the civil marriage between the third respondent and the deceased and she was not challenging the validity of the will in terms of which the deceased bequeathed his entire estate to the third respondent. It's appropriate to point out that section 22(1) of the Black Administration Act permitted a man, who was a partner in a customary marriage, to contract into a civil marriage with another woman. That section was amended by the Marriage and Matrimonial Property Amendment Act 3 of 1988. Subsection 1 of the amended Act provided that:

'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'.

Subsection 2 provided that:

'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'.

The subsections were repealed by the Recognition of Customary Marriages Act which came into effect on 5 November 2000. Section 10(1) of the Recognition of Customary Marriages Act prevented a man from contracting a civil marriage with a woman if either of them is a spouse in a subsisting customary marriage with each other.

[6] The civil marriage between the deceased and the third respondent contracted in 1994, when the contracting of such marriage while a man was a partner to a customary marriage with another woman, was prohibited. In *Netshetuka v Netshetuka and another* 2011 (5) SA 453 (SCA) the Supreme Court of Appeal declared invalid a civil marriage contracted while a man was a partner in existing customary union with another woman. It follows that the civil marriage between the deceased and the third respondent ought to be a nullity, if it was contracted while the

deceased was a partner in a customary marriage with the applicant. However, the parties have not made submissions before the court on the validity or invalidity of the third respondent's civil marriage, probably because the applicant was not seeking for an order nullifying the civil marriage between the deceased and the third respondent. Considering the contention by the third respondent that the applicant was no longer living with the deceased as husband and wife, at least since 1981, until the deceased's death in 2016, it is possible that the civil marriage could be a putative marriage with all the consequences of a valid marriage, it would amount to a putative marriage if, both the deceased and the third respondent, or only one of them, honestly believed that the applicant and the deceased were divorced at the time of contracting the civil marriage.

[7] The position is that this court is seized with a polygamous marriage involving two women who were married to the deceased at the time of his death. Even if the civil marriage was not valid, the third respondent would still be married to the deceased by virtue of the customary marriage contracted by the parties in 1981. If the civil marriage was a nullity, then the customary marriage between the deceased and third respondent would be revived. This view is supported by *Netshetuka* para 13 where it was held that although the deceased's civil marriage may have terminated his customary marriage with his wives the customary marriages were revived after the deceased's divorced with the wife he was married to by civil rites. Therefore, if the third respondent was not legally married to the deceased by civil rites she would still be legally married to the deceased by customary marriage that was contracted before the civil marriage.

[8] Although the court was not required to make a declaration on the validity of the civil marriage, the legal position of such marriage could not be overlooked in

determining the proprietary system applicable to the marriage of the applicant. Given the uncertainty about the validity of this marriage the court cannot with certainty determine which proprietary system is applicable to the third respondent's marriage with the deceased.

[9] Before exploring the matter any further, it is appropriate to hint to the duty imposed on legal practitioners presenting cases before the courts to prepare and assist the court in arriving at an informed and just decision. It's not proper for the legal practitioners to simply make submissions to court without supporting their submissions with a single relevant authority including legislation, case law or other persuasive sources in a case of this nature involving a dispute on the deceased's estate and the proprietary system that is applicable to the customary marriage, especially when there is plethora of authorities in support of or against their submissions. Litigants pin their hopes to the legal practitioners as professionals in court litigation for proper execution of their case before the courts. For this reason, legal practitioners are expected at the most to have consulted basic sources that are relevant to the case before court.

[10] I now turn to consider the matrimonial property system applicable to the customary marriage between the applicant and the deceased.

The proprietary system applicable to polygamous customary marriages

[11] In support of his submission, that the customary marriage between the applicant and the deceased was in community of property, the legal representative for the applicant refers this court to *Bhe and others v Magistrate, Khayelitsha Magistrate and others (Commission for Gender Equality as amicus curiae) and A Similar Case* 2005 (1) SA 580 (CC) where it contended that all marriages of black

people which were concluded in terms of the repealed section 22(6) of the Black Administration Act were declared to be in community of property. The legal representative for the third respondent on the other hand contended that the marriage was out of community of property because the provisions of the Recognition of Customary Marriages Act provides that all customary marriages concluded prior to the coming into effect of this act were and are still out of community of property.

[12] The factual circumstances of *Bhe* are different from this one. The *Bhe* case dealt with the constitutionality of the indigenous law of succession, not with the proprietary system that is applicable to customary marriages. Furthermore, section 22(6) of the repealed Black Administration Act did not regulate the proprietary system applicable to a customary marriage, but it regulated the proprietary system applicable to marriages of black people who were married by civil rites. The matrimonial property system for black people who were married by civil rites was considered in *Sithole and another v Sithole and another* [2021] ZACC 7; 2021 (6) BCLR 597 (CC) where the default position created by section 22(6) of the Black Administration Act and maintained by the Matrimonial Property Act 88 of 1984 was addressed. The Constitutional Court declared section 21(1)*(a)* of the Matrimonial Property Act unconstitutional and invalid to the extent that it maintained and perpetuated the discrimination created by section 22(6) of the Black Administration Act, in respect of marriages of black couples, entered into under the Black Administration Act before 1988. These marriages were declared to be automatically in community of property and of profit and loss.

[13] All customary marriages are regulated by the Recognition of Customary Marriages Act. Section 7(1) of the Recognition of Customary Marriages Act provided that:

'The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.'

Section 7(2) of the Act provided that:

'A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.'

[14] Customary marriages in KwaZulu-Natal were regulated by KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law of 1987. Section 20 of both the Act and the code provided that:

'The family head is the owner of all family property in his family home. He has charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors. He may use, exchange, loan or otherwise alienate or deal with such property for the benefit of or in the interests of the house to which it attaches, but should he use property attaching to one house for the benefit or on behalf of any other house in the family home an obligation rests upon such other house to return the same or its equivalent in value.'

All customary marriages concluded before the coming into effect of the Recognition of Customary Marriages Act in South Africa were marriages out of community of property and of profit and loss.

[15] The constitutionality of the proprietary system applicable to the customary marriages was considered in *Gumede v President of South Africa and others* 2009 (3) SA 152 (CC). In this case the Constitutional Court declared unconstitutional and invalid section 7(1) of the Recognition of Customary Marriages Act to the extent that it related to monogamous customary marriages. Section 7(2) was declared invalid insofar as it distinguishes between a customary marriage entered into after

and before the commencement of the Recognition of Customary Marriages Act, by virtue of the inclusion of the words 'entered into after the commencement of the Act'. Also, both section 20's of the KwaZulu Act on the Code of Zulu Law and the Natal Code were declared unconstitutional and invalid because it provided that during the course of a customary union the family head is the owner of and has control over all family property in the family.

[16] The institution of customary marriage anticipates two kinds of marriages namely monogamous marriages and polygamous marriages. *Gumede* declared unconstitutional and invalid section 7(1) of the Recognition of Customary Marriages Act only to the extent that its provision relates to monogamous customary marriages. The judgment resulted to all monogamous customary marriages deemed to be in community of property, but polygamous marriages contracted prior to the commencement of the Recognition of Customary Marriages Act remained out of community of property.

[17] On 1 June 2021 the Recognition of Customary Marriages Act was amended by the Recognition of Customary Marriages Amendment Act 1 of 2021 (the Amendment Act). Section 2(1) of the Amendment Act amends s 7 of the Recognition of Customary Marriages Act, which now provides that:

'(1)*(a)* The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act, are that the spouses in such a marriage have joint and equal-

(i) ownership and other rights; and

(ii) rights of management and control,

over marital property.

(b) The rights contemplated in paragraph (a) must be exercised-

(i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and

(ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(c) Each spouse retains exclusive rights over his or her personal property.

(d) . . .'

Section 3(1) of the Amendment Act provides that:

'The provisions of section 2 of this Act do not invalidate-

(a) the winding up of a deceased estate that was finalised; or

(b) the transfer of marital property that was effected,

before the commencement of this Act'.

[18] From the reading of the Amendment Act it transpires that the Act gives recognition to three separate types of matrimonial property in a polygamous marriage entered into before the commencement of the Recognition of Customary Marriages Act. These properties are described according to their allotment or non-allotment to a specific wife's house. In customary law the house is defined as 'a separate unit of the family home with its own rights and responsibilities' (See *Bekker Seymour's Customary Law in South Africa* 5ed (1989) at 74).

[19] Firstly, there is a family property that is allotted to a specific house. That property is owned, managed and controlled jointly by the husband and wife in that particular house concerned. Secondly, there is a family property that is not allotted to any of the wives' house. That property is owned, managed and controlled jointly by the husband and all wives, and thirdly, there is the exclusive personal property of each spouse. The spouse concerned has the exclusive ownership, rights of management and control to his or her personal property. Finally, the provisions of

the Amendment Act is applicable to all deceased estates that were not yet wound up, and to the transfer of marital property that was not yet effected before the commencement of the Amendment Act.

[20] Accordingly, the Amendment Act is applicable to this matter since the winding up of the deceased's estate was not yet finalised when the Act commenced on 1 June 2021. The legal representatives of both parties did not refer to the Amendment Act probably because it has come to operation merely two days before the matter was argued in court on 3 June 2021. Consequently, no facts or evidence was brought before court on the allotment of, or non-allotment of, properties to the party's houses. Therefore, the claim before this court is not on identified and described properties, but it's on the applicant's share of ownership to the deceased's property by virtue of her customary marriage to the deceased.

[21] The position created by the Amendment Act on the deceased's estate is that all spouses, the applicant, the third respondent and the deceased had joint and equal ownership over the family property that was not allocated to any of the wives' house; the applicant and the deceased had joint ownership over the family property that was allocated to the applicant's house; the third respondent and the deceased had joint ownership of the family property that was allocated to the third respondent's house; and each spouse had exclusive ownership of his or her personal property. I now turn to consider the effect of the will to the party's ownership of the family property.

The effect of the deceased's will

[22] Although the applicant is not challenging the will it is appropriate to point out that spouses who are married by customary rites are permitted to depose to a will and dispose their property accordingly. Section 4(3) of the Reform of Customary

Law of Succession and Recognition of Related Matters Act 11 of 2009 permit any person subject to customary law to depose his or her assets in terms of a will. The deceased bequeathed only his estate to the third respondent. Therefore, the contention by the applicant that the deceased's estate should be liquidated and distributed in terms of customary law is untenable because the deceased left a will which is not challenged by the applicant, and that is already accepted by the Master of this court as valid. The deceased's estate could only devolve in terms of customary law if the deceased died intestate or the deceased's will be declared invalid (See section 2(1) of the Reform of Customary Law of Succession and Recognition of Related Matters Act).

[23] What is left now to consider and determine is the share of the applicant to the deceased's estate, if any. As stated above there is no evidence before this court on the allotment or non-allotment of the family property to a specific house. Furthermore, no submission was, made with regard to the interpretation of the Amendment Act on the proprietary system of a polygamous customary marriage. Although, the validity of the third respondent's civil marriage was not challenged, given the uncertainty around the validity of her second marriage by civil rites, I believe that both wives should be placed on the same footing with regard to the matrimonial property applicable to their marriages. In the post-democratic dispensation customary marriages are no longer inferior to civil marriages. Therefore, woman married in civil rites has no better rights than woman married in customary rites. I am mindful of the rights of spouses to choose their appropriate proprietary system that would apply to their marriage when they contract such marriage. However, the situation was different in the pre-democratic dispensation because black couples had no choice on the appropriate proprietary system that

would apply to their marriages. Thus, all their customary marriages were automatically out of community of property.

[24] The Amendment Act created a proprietary system where by a husband and wife have joint ownership of the property allotted to that wife's house to the exclusion of all other wives, and the husband and all his wives have joint ownership to the property not allotted to a specific house. It follows then that the applicant is entitled to half of the property that was allotted to her house if any, and she is further entitled to one third of the property that was not allotted to any of the houses. Since all three spouses had joint ownership of the later property it follows that each spouse owns one third of this category of family property.

[25] There remains the issue of costs. The circumstances of this case calls for a deviation from the rule that the successful party should as a general rule have his or her costs. The third respondent was not unreasonable or frivolous in opposing the relief. The position on the matrimonial property applicable to polygamous customary marriages has been recently clarified by the legislator through the Amendment Act on 1 June 2021, merely two days before this case was argued in court. For this reason, I do not believe that a cost order against the third respondent is warranted.

Order

[26] In the result the order is made as follows:

1. The applicant is entitled to half of the family property that is allotted to her house, if any.
2. The applicant is entitled to one third of the family property that is not allotted to any of the wives' house, if any.

3. The third respondent is ordered to transfer to the applicant half of the family property that is allotted to the applicant's house if any and one third of the property that is not allotted to any of the wives' house if any.
4. Each party to pay his or her own costs.

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MATHENJWA AJ

Appearances

Date of Hearing	:	3 June 2021
Date of Judgment	:	6 August 2021
Counsel for applicants	:	Mr Nhlabathi
Applicant's Attorneys	:	LM Nhlabathi Inc Mpumuza Location Off Caluza Road Ezitezi: Stand Number 18842
Counsel for third respondent	:	Mr Tenza
Third Respondent's Attorneys	:	Tenza Attorneys MRT House, 11 Stranack Street Pietermaritzburg