Netshituka v Netshituka
2011 (5) SA 453

Revival of a customary marriage previously dissolved by a subsequent civil marriage

1 Introduction

Prior to the coming into operation of the Recognition of Customary Marriages Act 120 of 1988 (RCMA) on 15 November 2000, customary marriages were referred to as "customary unions" and were not recognised as valid (Bakker & Heaton "Co-existence of customary and civil marriages under the Black Administration Act 38 of 1972 and the RCMA 120 of 1998 – the Supreme Court of Appeal introduces polygamy into some civil marriages" 2012 *TSAR* 586). As they were not recognised as valid marriages they presented no legal obstacle to the conclusion of a civil marriage during their existence.

Customary unions were regulated by the Black Administration Act 38 of 1927 (BAA). Of particular interest for present purposes is section 22 of the BAA. This section did not render an existing customary union an impediment to a civil marriage and spouses could thus at any time during the subsistence of such union, conclude a valid civil marriage with another person. The effect of such civil marriage on the customary union was that it dissolved the customary union (*Nkambula v Linda* 1951 1 SA 377 (A)). On 2 December 1988, section 22 of the BAA was amended by section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. This section prohibited a husband of a customary union from contracting a civil marriage with another woman during the subsistence of such customary union. A civil marriage concluded in contravention of this section did not dissolve the customary union. As the amendment was not retroactive, the position before 2 December 1988 was left unchanged (Bakker & Heaton 2012 *TSAR* 586 587).

When the RCMA came into operation on 15 November 2000 "customary unions? were turned into "customary marriages?. The act afforded retrospective recognition to all customary unions that were valid in terms of customary law and existed at the time of the commencement of the RCMA. The RCMA also repealed section 22(1) to (5) of the BAA. However, the repeal does not have retrospective effect (Bakker & Heaton 2012 *TSAR* 586 587).

Of further particular interest for present purposes is that the RCMA does not deal explicitly with the status of customary unions that had previously been nullified by the subsequent civil marriages. After 60 years, the Supreme Court of Appeal in *Netshituka v Netshituka* 2011 (5) SA 453 (SCA) revisited the decision in *Nkambula v Linda* 1951 1 SA 377 (A) and adjudicated firstly on the question whether, in particular circumstances, a customary marriage which had previously been

dissolved by a subsequent civil marriage could be revived and secondly, if so, what the effect thereof would be on the validity of a further civil marriage.

The purpose of this discussion is to look at the court's approach in addressing these questions and to indicate that the court's approach is in material respects the opposite of current legal practice.

2 Facts and Judgment

While the facts are not altogether clear from the judgment of Petse AJA, they appear to be as follows:

> The deceased was (prior to 1988) married to three women, namely Tshinakaho, Masindi and Diana by customary rites (parr 3, 4, 7, 11). During the subsistence of these customary marriages the deceased contracted (prior to 1988) a civil marriage with Martha (parr 7, 11), which marriage was terminated by a divorce in 1984 (par 7). After divorcing Martha the deceased continued to cohabit with the wives of the former customary marriages (par 11). On 17 January 1997 the deceased contracted a civil marriage with Joyce (first respondent). The deceased died in 2008, leaving a will in which he appointed Joyce executrix of his estate. One of the deceased's customary wives and her daughter contested the validity of the deceased's civil marriage to Joyce as well as the validity of the will. The trial court dismissed their application for an order declaring the civil marriage between Joyce and the deceased void and declaring the deceased's will invalid. The appellants appealed to the Supreme Court of Appeal. This note does not deal with the validity of the deceased's will. It focuses solely on whether the civil marriage between the deceased and Joyce was valid.

The appellants contested the validity of the civil marriage to Joyce on the grounds that the marriage did not comply with the provisions of section 22(1) and (2) of the BAA, read with section 1(a) of the Marriage and Matrimonial Property Law Amendment Act. This section prohibits a husband of a customary union from contracting a civil marriage with another woman during the subsistence of such customary marriage. Joyce denied the existence of the customary marriages, and more specifically, that they were in existence at the time she married the deceased (par 7). She argued that the deceased's customary marriage had automatically been dissolved when he and his first wife at civil law, Martha, had entered into their civil marriage. Therefore, the deceased was an unmarried man when she had entered into a civil marriage with him after the dissolution of his civil marriage to Martha by divorce in 1984. In support of this argument, she cited *Nkambula v Linda supra*.

The Supreme Court of Appeal declared the civil marriage contracted between Joyce (first respondent) and the deceased on 17 January 1997 null and void. The reason is as follows:

> During the subsistence of the customary marriages the deceased contracted a civil marriage with Martha, which marriage was terminated by divorce in 1984. At the time the deceased entered into the civil marriage the amendments brought about to section 22 of the BAA by the Matrimonial Property Law Amendment Act did not yet apply (par 9). It was also common cause that the deceased's customary wives did not leave him after he entered

> into the civil marriage with Martha (par 11). After he divorced Martha, he continued cohabiting with his customary marriage wives, thus showing his reconciliation with them (par 11). Petse AJA concluded that the intention of the parties, indicated by their conduct "clearly indicates that to the extent that the deceased's civil marriage may have terminated his unions with his customary law wives, those unions were revived after divorce? (par 13). As the customary marriages revived, the deceased was still married to his customary wives when he entered into the civil marriage with Joyce in 1997. This civil marriage was solemnised before the coming into operation of the RCMA, but after the amendment of section 22 of the BAA by the Matrimonial Property Law Amendment Act. As indicated above, this section prohibits a husband of a customary union from contracting a civil marriage with another woman during the subsistence of such customary marriage. As he was still married to his customary law wives, he was not competent to enter into a civil marriage with Joyce.

The court's approach in reaching this decision is in material respects the opposite of current legal practice and deserves consideration.

3 The Law

Since the provisions of the RCMA that deal with the validity of civil marriages concluded during the subsistence of customary marriages (ss 3(2), 10(1)) do not apply retrospectively, the validity or otherwise of such marriages have to be determined in terms of the provisions of section 22 of the BAA in force at the time. As indicated above (par 1) section 22 was amended by the Marriage and Matrimonial Property Law Amendment Act, which commenced on 2 December 1988. Because the deceased's civil marriage with Martha pre-dated the Marriage and Matrimonial Property Law Amendment Act, having been concluded before 1988, it is vital for this discussion to distinguish between civil marriages entered into before 2 December 1988 and those that were concluded after 2 December 1988, up to the commencement of the RCMA.

3 1 Position Before 2 December 1988

The deceased divorced Martha in 1984. Therefore the deceased's prior civil marriage to Martha was regulated by section 22 of the BAA. Section 22(1) provided that:

> No male Black shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he first declared upon oath, before the magistrate or 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 Black custom; and such other information relating to any such unions as the said official shall require.

The act was silent on the validity of a civil marriage concluded without the declaration. Section 22(5) merely stated that it was an offence to enter into a civil marriage without having made the declaration. However, in *Malaza v Mndaweni* 1975 BAC 45 (C) 58 it was held that the civil marriage was valid.

Section 22 did not forbid or expressly declare invalid a civil marriage concluded with another woman during the subsistence of a customary marriage. In 1951 the Appellate division in *Nkambula v Linda supra*, intimated that where a man marries a woman by civil rights during the subsistence of a customary marriage the civil marriage would be valid, while the customary marriage would be dissolved by the conclusion of the civil marriage. The reasoning appears to be that civil marriages are by definition monogamous and cannot exist alongside customary marriages (see also *Kos v Lephaila* 1945 NAC (C & O) 45; *Bucwa v George* 1946 BAC 1 10 (S); *Malaza v Mndaweni* 1975 BAC 45 (C)). Where a man was a partner to both a civil marriage and customary marriage, the existing customary marriage had to give way because (*Nkambula* 381H-I):

> [s]ince our common law did not regard a Native customary union as a legal marriage, such a union was no legal obstacle to a civil marriage between one of the partners to it and a third person, and there was no reason why the Act should make it so.

Modern writers are also of the view that a subsequent civil marriage had the effect of automatically dissolving an existing customary marriage (Dlamini "The new marriage legislation affecting Blacks in South Africa" 1989 *TSAR* 409; Bekker *Seymour's customary law in Southern Africa* (1989) 153, 181; Bonthuys & Sibanda "Till death us do part: *Thembisile v Thembisile?* 2003 *SALJ* 787; Bennet *Customary law in South Africa* (2004) 239; Maithufi "The need for the protection of rights of partners to invalid marital relationships: A revisit of the discarded spouse debate? 2005 *De Jure* 145; Rautenbach, Bekker & Goolan *Introduction to legal pluralism* (2010) 72).

The wife to such customary marriage was known as a "discarded spouse? (concept raised in *Nkambula* case – see discussion in par 4). Section 22(7) of the BAA did, however, provide some measure of protection to the discarded spouse. Section 22(7) read as follows:

> No marriage contracted after the commencement of the Act during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.

This section served to safe-guard the material rights (property rights) of the discarded wife (or wives) and her children by ensuring, firstly, that she continued to enjoy rights to property allotted to her house before the civil law marriage and, secondly that upon death of her husband, she, although no longer married to the deceased, would be entitled to share in his deceased estate in accordance with customary law (Bennet 240; Maithufi & Moloi 2005 *De Jure* 145 147). Thus, on the death of the husband both types of marriages were regarded as customary marriages for the purpose of succession. The customary law wives and their children were placed in the same position as her deceased ex-husband's

civil law wife and children to whom also, customary succession law rather than common law applied.

Previous court decisions as well as writers support the conclusion that when the deceased entered into a civil marriage with Martha his prior customary marriages were automatically dissolved, irrespective of whether his relationships with his customary law wives continued. The Supreme Court of Appeal's approach and decision, on the other hand, will be considered under the heading "The 'discarded wife' concept".

3 2 Position Between 2 December 1988 and the Commencement of the RCMA

Due to the desperate situation of customary wives, section 22 was amended by the Marriage and Matrimonial Property Law Amendment Act.

The respondent, Joyce, alleged that she had entered into a civil marriage with the deceased on 17 January 1997. At the time the civil marriage was concluded the amended section 22 was therefore in force (This section was repealed by the RCMA and replaced with similar provisions in s 3(2), 10(1) and 10(4)). The amended section 22 read as follows:

> (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 ('marriage' denoting a civil marriage).
>
> (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.

Contrary to the position before 2 December 1988, the customary union is not automatically terminated by the subsequent civil marriage (concluded in contravention of s 22). This also means that the phenomenon of the "discarded customary wife" is no longer legally possible.

The BAA did not expressly provide that a civil marriage contracted contrary to this prohibition would be invalid, but merely provided that where a husband to a customary union contracted a civil marriage with another woman, he committed a criminal offence (s 22(3)-(5) BAA). Various opinions have been expressed as to the validity of these marriages, but it would appear from *Thembisile v Thembisile* 2002 2 SA 209 (T) that the purported civil marriage is null and void (see Maithufi "Do we have a new type of voidable marriage?" 1992 *THRHR* 628; Sinclair *The law of marriage* (1996) 225-227).

The amendment, however, did not apply retrospectively (Bakker & Heaton 2012 *TSAR* 586 587). The provision relating to the protection of the material rights of the discarded wife and children of a customary union which was dissolved by a civil marriage was retained (Bennet 240). It should be noted that subsequent to *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole;*

South African Human Rights Commission v President of the Republic of South Africa 2005 1 SA 580 (CC) both the discarded wife and the civil law wife will be deemed spouses of the deceased for purpose of intestate succession.

Had the deceased's civil marriage to Martha in fact been valid (as accepted by the Supreme Court of Appeal) positive law indicates that his customary marriages would automatically have been dissolved, and that there would be no impediment against his entering into a civil marriage with Joyce in 1997 (ie after his divorce from Martha). However the Supreme Court of Appeal did not consider the effects of a civil marriage on the validity of existing customary marriages. The court decided to adjudicate the matter on the "discarded wife" concept raised in *Nkambula*.

4 The "Discarded Wife" Concept

In the *Nkambula case*, the wives of the customary unions which were dissolved by civil marriage were referred to as "discarded wives". In *Nkambula* the court stated "[A] civil marriage is 'the union of one man and one woman', incompatible with a continued association of the man in conjugal relationship with another woman" (381B), and further that the material rights protected by section 22(7) of the BAA do not include the right of the woman to cohabit with her husband from the dissolved customary union (382B). The court concluded by stating (384C-D) that:

> [a] man who is a partner in terms of 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 the refund of lobolo.

It is important to note that this part of the decision dealt primarily with the issue of the return of lobola, that is, one of the consequences of the dissolution of the customary marriages (see also Bakker & Heaton 2012 *TSAR* 586 591).

In the present (*Netshituka*) case (par 11), the question posed is, what was the relationship between the deceased and his "deserted" customary law wives after his civil marriage to Martha was terminated by divorce? Apparently, the court avoids adjudicating on the validity of the customary marriages after the deceased had entered into the civil marriage with Martha. The factual position was that the deceased had continued to cohabit with his customary law wives during his civil marriage to Martha. Without addressing the effect of a civil marriage on the validity of a customary marriage, the court refers to the customary law rule of "phuthuma" (literally "to fetch her"). Petse AJA held that at customary law, desertion by a husband of his customary wife is not irreparable, because the husband may "phuthuma" (fetch) his wife and his desertion does not give her the right to refuse to return to him when he comes to "phuthuma" her, unless the circumstances correspond to those set out in the *Nkambula* case (par 12). It is clear that if a customary law wife left

her husband as a result of him having contracted a civil marriage with another woman she 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. Petse AJA, however, stated that nothing would prevent her from returning to him if she was prepared to do so (par 12).

It is interesting to note that the court takes judicial notice of the "*phuthuma*" custom without referring to readily available literature on the subject (see Koyana *Customary law in a changing society* (1980) 18-19; Olivier *et al Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1981) 180-181; Bekker *Seymour's customary law in Southern Africa* (1989) 181). A reference to relevant literature would have made the judgment more informative and, with respect, authoritative. From the literature it could have been established that "*phuthuma*" is an Eastern Cape Nguni custom and that it is not known whether it is also practiced by other ethnic groups (Olivier 193). The appeal originated from the Limpopo High Court (Thohoyandou) and the parties involved were from the Venda group. The Venda has a custom called "*tshipfumelo*" where the wife on being maltreated seeks refuge with her husband's sister, her mother-in-law or her husband's eldest brother. To restore friendly relations with his father-in-law the husband has to approach his father-in-law and hand to him the "*tshipfumelo*" (gift of reconciliation or to make amends) which is usually a beast or goat (Van Warmelo *Venda law* (1948) 465). Although both "*phuthuma*" and "*tshipfumelo*" relate to the reconciliation of the parties concerned the preceding processes differ. In this regard Bekker's ("Phuthuma/Ngala" en siviele huwelike? 1985 *De Jure* 178) observations are apt:

> Die howe doen soms baie moeite om ou Romeinse bronne te ontrafel. Die opspoor en analise van inheemsregtelike bronne is eintlik makliker. As daar onsekerheid is, is dit ook nie baie moeilik om getuienis oor die aspek te bekom nie. Daar word tans heelwat navorsing oor die inheemsereg van die verskillende etniese groepe gedoen en volkekundiges en regsgeleerdes wat daarmee besig is, sou maar te bereid wees om daaroor te getuig.

In *Zwane v Twala* 1945 NAC (N&T) 59 it was held that a court has no power to alter African customs or attempt to introduce any uniform system of customs, however desirable it may be, since the court would be usurping the functions of the legislature.

The application of the "*phuthuma*" custom in this particular case fortunately had no effect on the court's decision, as per Petse AJA "the customary law wives (had) never left (the deceased) after he had married Martha (by civil rights)? (par 13).

As already stated it appears that the Supreme Court of Appeal avoids the question on the validity of the pre-existing customary marriages. The court is not bound by *stare decisis* but if it refuses to apply a particular existing legal ruling it is customary to provide a reasoned judgment on the aspect under consideration. Previous decisions indicated that a customary marriage was dissolved by a subsequent civil marriage. The

question now arises whether the court confirmed, overruled or qualified this decision. By not pertinently addressing the effect of this rule it appears as if the court by implication recognised the ruling. If it overruled the rule it would have provided specific reasons for its rejection. It does appear as if the court has qualified the rule based on the fact that the customary law wives have never left the deceased after his civil marriage to Martha. His continued cohabitation with them after the divorce was clear evidence of a husband who had reconciled with his previously deserted wives. The intention of the parties, indicated by their conduct, "clearly indicates that to the extent that the deceased's civil marriage may have terminated his unions with his customary law wives, those unions were revived after divorce? (ie from Martha – par 13).

In the light of the Supreme Court of Appeal's decision the rule regarding the validity of customary marriages prior to the period 2 December 1988 would now appear to be as follows: A customary marriage is dissolved by a subsequent civil marriage but is revived after divorce (or death) of the civil marriage wife if the "husband? continued cohabiting with the customary wives after and during the civil marriage, and the intention, inferred by the conduct of the parties, was to simply continue with their relationship and roles as partners in customary marriages.

The effect of this rule is that should a particular factual situation exist, the dissolved customary marriage will now be regarded as so-called latent (suspended) marriages which may be revived if the civil marriage is terminated by divorce (or death) of the civil law wife. This is clearly contrary to positive law, which does not recognise latent (suspended) marriages. This would also produce intractable legal problems as far as the property rights of the women are concerned. The Supreme Court of Appeal has with the resurrection of the customary marriage wives released on us an arcane mystery void of legal certainty.

5 Validity of Civil Marriage to Joyce

The second question before the court was whether it was competent for the deceased to contract (on 17 January 1997) a civil marriage with the first respondent (Joyce), during the subsistence of the customary marriages. In dealing with this question, the Supreme Court of Appeal does apply positive law. With reference to section 22 of the BAA as amended by the Marriage and Matrimonial Property Law Amendment Act and the interpretation thereof in the *Thembisile* case (see par 2 2 above), it comes to the conclusion that as the deceased had been a partner in existing customary marriages, his civil marriage to Joyce was a nullity.

However, had *Nkambula v Linda* been applied to the so-called "discarded wives? and their customary unions viewed as dissolved by the civil marriage to Martha prior to 1988, the court's findings would most likely have been the opposite. In other words the civil marriage to Joyce would have been considered valid. It is unfortunate that the court did not indicate why it chose to apply positive law in the one instance and not in

the other. One reason may be that the court did not want to perpetuate the previously subordinated status of customary marriages. However, the court's decision to declare the civil marriage void simply puts the proverbial boot on the other foot, leading to a host of problems similar to those previously experienced by the discarded customary wives. Previously it was the customary law wife that was discarded in favour of the civil marriage wife (*Nkambula* case) but now it appears that the civil law wife is discarded. In fact, a discarded civil marriage wife is worse off than before, as her patrimonial rights are not protected in the same way as those of the customary wife. The discarded civil law wife is for example not entitled to share in any matrimonial property system, or intestate inheritance from her deceased husband's estate. These consequences are also emotionally devastating in that the right to bury the husband is that of the customary wives (*Fanti v Boto* 2008 5 SA 405 (C)). It appears that the court paid greater homage to the "rights? of the discarded customary marriage wives, to the extent of excluding the patrimonial, and indeed also human rights (such as to respect her dignity, physical and emotional integrity) of the civil law wife.

6 Conclusion

As stated *supra* (par 3), the decision in *Netshituka* rings contrary to positive law because the latter does not recognise latent (suspended) marriages. In addition, by not being consistent in the application of positive law, it meanders into the sphere of usurping the powers of the legislature. The court has also failed to give an equitable solution to the rights of both the customary marriage and civil marriage wives.

Should it be the legislature's intention to revive customary unions that had previously been nullified due to the conclusion of civil marriages, they should be so revived by the appropriate legislation. This could be affected by amending the RCMA. The effect of the "revival" of customary marriages in the case of subsequent civil marriages also requires the urgent attention of the legislature. Various authors are of the opinion that polygamy should be legalised to avoid the harsh consequences for the woman who is a party to the invalid marriage (Bonthuys & Pieterse "Still unclear: The validity of certain customary marriages in terms of the RCMA? 2000 *THRHR* 624; Maithufi & Bekker "The existence and proof of customary marriages for purposes of Road Accident Fund claims? 2009 *Obiter* 74). Both these marriages can, for example, be recognised as valid customary marriages.

One can only hope that, especially in the light of the constraints of section 39 of the Constitution of the Republic of South Africa, 1996, the legislature and in the interim, the courts, will earnestly consider ways and means to promote the spirit, purport and objects of the Bill of Rights (Ch 2 Constitution) that will serve to protect and indeed engender the values of human dignity and equality amongst wives variously married to a husband, whether in terms of customary marriages or a civil marriage, or as in this case, both.

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