



CONSTITUTIONAL COURT OF SOUTH AFRICA

Modjadji Florah Mayelane v Mphephu Maria Ngwenyama and Another

Case CCT 57/12

Date of hearing: 20 November 2012

Date of delivery: 30 May 2013

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday 30 May 2013, the Constitutional Court handed down judgment in a matter regarding Tsonga customary marriages in which it had to determine the extent to which the absence of a first wife's consent to her husband's subsequent polygynous marriages affects the validity of the latter marriages.

The applicant married her late husband (the deceased) in 1984 in terms of Tsonga customary law. Their marriage was not registered. After his death the applicant was informed that her husband had purported to conclude a further customary marriage with the first respondent. The applicant successfully applied to the North Gauteng High Court, Pretoria (High Court) for an order declaring her customary marriage valid and the first respondent's purported customary marriage invalid. On appeal, the Supreme Court of Appeal confirmed the validity of the applicant's customary marriage, but ruled that the first respondent had also concluded a valid customary marriage with the deceased.

On appeal to the Constitutional Court, the applicant argued that the purported second marriage was invalid because she (the applicant) had not consented to it.

The first respondent submitted that it would be inappropriate to determine the consent issue raised by the applicant as there was no proper evidence on the applicable customary-law regime and further because that issue had not properly been traversed in the courts below. She asked the Constitutional Court to uphold the decision of the Supreme Court of Appeal.

After the hearing, the Constitutional Court called for further evidence on the content of Tsonga customary law.

In a majority judgment penned by Froneman J, Khampepe J and Skweyiya J, with whom Moseneke DCJ, Cameron J and Yacoob J concurred, the Constitutional Court upheld the appeal. The majority held that, at the time of the conclusion of the purported marriage between the first respondent and the deceased, Tsonga customary law required that the first wife be informed of her husband's subsequent customary marriage. The first respondent's marriage was found to be invalid because the applicant had not been informed.

The majority was nevertheless of the opinion that, in accordance with this Court's obligations to develop living customary law in a manner that is consistent with the Constitution, Tsonga customary law had to be developed to include a requirement, to the extent that it does not yet do so, that the consent of the first wife is necessary for the validity of her husband's subsequent customary marriage. This development stems from the fundamental demands of human dignity and equality under the Constitution.

The import of the judgment is that, from now on, further Tsonga customary marriages must comply with the consent requirement in order to be valid.

In a separate judgment, Zondo J agreed that leave to appeal should be granted and that the appeal should be upheld, but for different reasons. He held that the applicant's evidence before the High Court was sufficient to show that Tsonga custom required a first wife's consent for the validity of her husband's subsequent customary marriages.

In a further separate judgment, Jafta J (with whom Mogoeng CJ and Nkabinde J concurred) agreed that leave to appeal should be granted and that the appeal should be upheld, but concluded that there was no need to develop Tsonga customary law in the circumstances of this case. He held that the development was both unnecessary because there was sufficient evidence on record to support the applicant's case, and undesirable because development of the law should be undertaken by courts of their own accord only in exceptional circumstances.