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**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CASE NUMBER: /2012

**MODJADJI FLORAH MAYELANE**

**APPLICANT**

and

**MPHEPHU MARIA NGWENYAMA**

**FIRST RESPONDENT**

**MINISTER OF HOME AFFAIRS**

**SECOND RESPONDENT**

**WOMEN'S LEGAL CENTRE TRUST**

***AMICUS CURIAE***

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**MODJADJI FLORAH MAYELANE,**

declare under oath as follows:

**INTRODUCTION**

1.

1.1 I am the applicant in this application. I am an adult widow and I reside at house number 100 Nkovani village, Malamulele district, Limpopo province.

1.2 To the extent that I deal with matters of a legal nature in this affidavit, I rely on the advice of my legal representatives, which advice I believe is correct. I have been advised that full and appropriate legal argument on the issues referred to in this affidavit will be advanced to the Honourable Court at the hearing of this matter.

1.3 Unless the contrary is stated, all the facts set out herein fall within my personal knowledge and are to the best of my knowledge both true and correct.

### **THE PARTIES**

2.

I have already pointed out that I am the applicant in this application.

3.

The first respondent is **MPHEPHU MARIA NGWENYAMA**, an adult female residing at Xigalo village Malamulele district, Limpopo province.

4.

The second respondent is the **MINISTER OF HOME AFFAIRS**, the political head of the Department of Home Affairs, who is responsible for the registration of customary marriages in terms of section 4 of the Recognition Customary

Marriages Act, Act 120 of 1998 (hereinafter referred to as “*the Act*”). For purposes of these proceedings, the second respondent’s address is that of the State Attorney, 20<sup>th</sup> Floor, SALU Building, 255 Schoeman Street, Pretoria.

5.

The second respondent has not opposed this matter in the courts *a quo* and has abided whatever decision may be given. She is cited herein by virtue of the potential interest the Department of Home Affairs may have in this application. No order for costs will be sought against the second respondent.

6.

The *amicus curiae* is the **WOMEN’S LEGAL CENTRE TRUST**, a non-profit independent Law Centre with the right to sue and be sued with principal place of business at 7<sup>th</sup> Floor, Constitution House, 124 Adderly Street (cnr Church Street), Cape Town.

**AN OUTLINE OF THE CASE OF THE APPLICANT ON APPLICATION FOR LEAVE TO APPEAL**

7.

I seek leave to appeal to this Honorable Court against the judgment delivered by the Supreme Court on 1 June 2012 under case number: 474/2011 (“the SCA judgment”). A copy of the SCA judgment is annexed hereto and marked

Annexure “A”.

8.

The appeal that I intend to launch concerns the validity of a subsequent customary marriage, purportedly entered into with the first respondent when my husband did not comply with the formal requirements of Section 7(6) of the Act.

9.

For the sake of convenience the full provisions of section 7 of the Act are quoted. Section 7 of the Act provides as follows:

“7. Proprietary consequences of customary marriages and contractual capacity of spouses

- (1) *The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.*
- (2) *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.*
- (3) *Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2).*
- (4) (a) *Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that-*
  - (i) *there are sound reasons for the proposed change;*
  - (ii) *sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount*

as may be determined by the Minister of Justice by notice in the Gazette; and

(iii) no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(b) In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings.

(5) Section 21 of the Matrimonial Property Act, 1984 (Act 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse.

(6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection 6-

(a) the court must-

(i) in the case of a marriage which is in community of property or which is subject to the accrual system-

(aa) terminate the matrimonial property system which is applicable to the marriage; and

(bb) effect a division of the matrimonial property;

(ii) ensure an equitable distribution of the property; and

(iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;

(b) the court may-

(i) allow further amendments to the terms of the contract;

(ii) grant the order subject to any condition it may deem just; or

(iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a court grants an application contemplated in subsection (4) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must

*cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated”.*

(My underlining)

10.

The Act does not specify the effect of a husband’s failure to comply with the requirements of section 7(6) of the Act.

11.

As a background I must explain that I married my deceased husband Hlengani Dyson Moyana (herein referred to as “*the deceased*”) on the 1<sup>st</sup> of January 1984 at Nkovani Village, Limpopo Province, in accordance with customary law and tradition.

12.

The deceased passed away on the 28<sup>th</sup> February 2009. It was after his death that I was informed by the officials of the second respondent that almost a year prior to his death, on the 26<sup>th</sup> January 2008, he purportedly entered into a customary marriage with the first respondent.

13.

The deceased and the first respondent entered into their alleged customary marriage without my knowledge and or consent.

14.

First respondent vehemently denies that I ever married the deceased. She instead contended that I merely cohabited with him and had 3 (three) children with him. It is respectfully pointed out that the first respondent has no personal knowledge of events which took place more than twenty-four years ago and it is submitted that the first respondent does not create a real dispute of fact in her answering affidavit in this regard.

15.

The deceased's brother one, Mzamani Temson Moyana in his affidavit supported my contention that the deceased's blood relatives did not have knowledge of the first respondent's marriage. He further stated that in accordance to deceased's known custom and tradition, I should have consented to deceased's second marriage.

16.

After the deceased's death, the second respondent registered the customary marriage entered into by the deceased and the first respondent. My marriage to the deceased remained unregistered.

17.

As appears from Annexure "A" hereto, the Supreme Court of Appeal held that:

- 17.1 An interpretation of section 7(6) of the Act which declares the marriage to the second spouse null and void discriminates against women in polygamous marriages and is injurious to women in such marriages and negatively affects them;
- 17.2 Declaring the second marriage invalid, constitutes a gross and fundamental infringement of the second spouse's right to dignity, her right to equal status in the marriage, her right to physical and emotional integrity;
- 17.3 An interpretation of section 7(6) of the Act which declares the second spouse's marriage null and void renders children of the said marriage illegitimate;
- 17.4 An interpretation that renders a polygamous customary marriage recognized in customary law invalid is untenable and such an interpretation could not have been the intention of the legislature;
- 17.5 The consequence of the failure to comply with the provisions of the section 7(6) is that the matrimonial property system existing before the conclusion of the second customary marriage continues in existence and is not terminated by the conclusion of the second marriage;

- 17.6 By declaring the second customary marriage null and void, it would fundamentally violate the dignity of women who would otherwise have entered into a valid marriage under customary law because the husband failed either through ignorance or by design to obtain a court order under section 7(6) of the Act; and
- 17.7 That the second customary marriage was declared to be a marriage out of community of property.

18.

The effect of the judgment of the Supreme Court of Appeal was that:

- 18.1 The first respondent's largely contested customary marriage is now valid;
- 18.2 Though the first respondent's rights to dignity, equality and integrity were recognized, the applicant's rights to dignity, equality, physical and emotional integrity were not considered and were in fact ignored;
- 18.3 The applicant's rights, particularly her rights to equality, dignity, and physical and emotional integrity have not been adequately protected;
- 18.4 It is submitted that the Supreme Court of Appeal overlooked the fact that the first respondent's marriage did not comply with the requirements of a valid customary marriage in terms of custom and tradition.

19.

Apart from the obvious injustice that I have suffered and will continue to suffer, it is respectfully submitted that I was affected by the Supreme Court of Appeal's failure to properly interpret the non-compliance with section 7(6) of the Act in accordance with Section 39(2) of the Constitution Act 108 of 1998. In this regard the applicant has four independent submissions, namely:

20.

The first submission is that while the first respondent's rights to dignity, equality and integrity were recognized and emphasized, the applicant's rights to dignity, equality and integrity were not considered;

20.1 While it was common cause that the applicant did not have knowledge of the second marriage and that she also has an uncontested rights to her dignity, equality, physical and emotional integrity, her rights were never considered;

20.2 I was married to the deceased for 24 (twenty-four) years, while the first respondent alleges that she married him for only 11(eleven) months. Throughout my marriage I labored under the impression and/or honest belief that I was a spouse in a monogamous customary marriage.

20.3 I discovered only after the deceased's death that the first respondent has registered an alleged customary marriage to the deceased. This is a complete intrusion of my right to dignity, equality, physical and emotional integrity contained in section 39(2) of the Constitution.

## 21.

The applicant's second submission relates to the protection of the Applicant's rights to equality, dignity and integrity.

21.1 Applicant being a married rural woman has a right to integrity and belief that she is in a monogamous customary marriage and be afforded all the protection that she deserves;

21.2 The Supreme Court of Appeal's judgment has a far reaching effect on rural women who will be prejudiced by finding themselves in polygamous marriages that they were not aware of nor consented to. In fact the Supreme Court of Appeal's judgment affects all women in South Africa.

21.3 It is submitted that this was clearly not the intention of the legislature in passing the Act.

## 22.

Applicant's third submission concerns the proper interpretation of section 7(6) of

the Act to promote the spirit, purport and objects of the Bill of Rights, and, in particular, the applicant's fundamental right as a woman to her dignity, equality, and integrity. In this regard the following submissions are made:

22.1 Although the Supreme Court of Appeal held that the requirements for a valid customary marriage are contained in section 3(1) of the Act, it is submitted that this finding is clearly wrong. Section 3(6) of the Act contains at least a further requirement in that a customary marriage between persons on account of their relationship by blood or affinity which is determined by customary law is prohibited. The Act specifically provides in section 2(2) that a customary marriage entered into after the commencement of the Act, "*which complies with the requirements of the Act*", is for all purposes recognized as a marriage. It is submitted that the "*requirements*" of the Act includes compliance with section 7(6) that a husband who wishes to enter into a further customary marriage must make an application to Court. It is submitted that the Supreme Court of Appeal did not take these considerations into account in its judgment.

22.2 It is submitted that section 7(6) specifically requires a husband "*who wishes to enter into a further customary marriage*" must make an application to Court and the provisions contained in section 7(7) must be considered by the Court. In other words, it is submitted, that a husband who wishes to enter into a further customary marriage must launch an application so that the provisions of section 7(7) must be considered. It is submitted that on a proper interpretation of section 7 that the provisions

of section 7(7) cannot merely be ignored, in accordance with the finding of the Supreme Court of Appeal.

22.3 It is respectfully pointed out that the word “*must*” appears in section 7(6) and that it then appears in section 7(7) and section 7(8). It is submitted that on a proper interpretation of these sections, that the word “*must*” should be interpreted as being peremptory. It is submitted that on a proper interpretation of these provisions if a husband does not comply with these provisions the resultant “*customary marriage*” is null and void.

22.4 Bertelsmann J in the Court *a quo* in **MM v MN 2010 (4) SA 286 (GNP) at 291 B – F** relied on the SCA’s judgment in **Minister of Environmental Affairs & Tourism & Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs & Tourism & Others v Smith 2004 (1) SA 308 (SCA)** where the following was stated at paragraph 32:

*“The general principle is, of course, that language of a predominantly imperative nature such as ‘must’ is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction.”*

The Supreme Court of Appeal in its judgment did not deal with this principle and merely found that should the provisions of section 7(6) be ignored, that such a marriage is valid and that the second spouse is married out of community of property. There are no provisions in section 7 which support this latter conclusion.

- 22.5 Although Justice Ponnann (paragraph 38 of the judgment) holds that the first respondent's marriage is out of community of property there is no provision in the Act and in customary law and tradition which supports such a finding. It is also uncertain what the first respondent's contentions are in this regard. It is imperative that the Constitutional Court makes a finding in this regard.
- 22.6 It is submitted that the provisions contained in section 7 of the Act are to receive general application. That is the purpose of a statutory enactment. Considerations such as the following were not considered by the Supreme Court of Appeal:
- 22.6.1 Where the first spouse is married in accordance with the accrual system, and what the effect of such a matrimonial regime would be on the second and subsequent spouses.
- 22.6.2 Where the first spouse is married out of community of property and what the effect of such a matrimonial regime would be on the second spouse and subsequent spouses.
- 22.6.3 The implication of the law of succession of the particular spouses would have under the circumstances.
- 22.7 Section 7(8) of the Act specifically requires that the existing spouse or spouses must be joined in the proceedings instituted under sub-section

(6). This clearly indicates that a husband “*who wishes to enter into a further customary marriage*” must inform the existing spouse of his prospective further customary marriage. This procedure was clearly not followed in the present case and it appears from the Supreme Court of Appeal’s judgment that no sanction is visited upon this conduct.

22.8 It is submitted, that on the failure of the husband in complying with section 7(6) of the Act and on taking into account applicant’s right to dignity, equality with her physical and emotional integrity, that on a proper interpretation of the provisions of section 7(6) of the Act the subsequent marriage is null and void.

## 23.

The fourth submission is that on the facts before the court *a quo* the first respondent’s marriage remains invalid because there is sufficient uncontested evidence that the first respondent’s marriage is not a valid customary marriage.

23.1 It is perfectly clear that the second customary marriage is invalid because it did not comply with the requirements of a valid customary marriage.

23.2 This issue becomes pivotal even more so when the issue of the status that the first respondent enjoyed as “*married woman*” is to be decided. Preserving first respondent’s rights to dignity and equality were the most

important considerations that the Supreme Court of Appeal considered when deciding that her marriage should be declared valid.

23.3 In this matter it is probable that the first respondent never enjoyed the status of a married woman.

23.4 Despite the fact the Supreme Court of Appeal found that it did not have to decide the issue because the applicant failed to file a cross-appeal it is submitted that any case must be decided on the facts and that a Court should ensure that justice is done on the proven facts. It is submitted that a Court cannot close its eyes to the facts and decide a matter in abstract.

24

With reference to the applicant's prospects of success, I respectfully submit further that:

24.1 The Supreme Court of appeal judgment discriminates against me *inter alia* on the grounds that I am not afforded the right to know of and consent to my husband's further customary marriage. The result is that my right to dignity and my right of equality with my husband is infringed.

24.2 There is no evidence that customary law and or tradition has evolved to such an extent that when a husband in a customary marriage wishes to

enter into a further customary marriage his existing wife's consent and or acquiescence is no longer required.

24.3 The Supreme Court of appeal did not address my right to be in a monogamous customary marriage, despite the fact that customary marriages in their own nature are prevalently polygamous, they can however be monogamous and women in such marriages are entitled to their belief and choice to be in a monogamous customary marriage.

25

In relation to the interests of justice in granting leave to appeal, I respectfully submit that apart from my reasonable prospects of appeal, the issue in this matter is very prevalent in rural communities in this country and scores of rural women face this dilemma daily. It is therefore submitted, that it is of paramount importance that this Honorable Court decide this issue.

### **CONCLUSION**

26

For the reasons set out above, I respectfully submit that I have reasonable prospects of success in this application for leave to appeal and that it would be in the interests of justice that I be granted leave to appeal.

I accordingly request that an order be granted in terms of the prayers set out in the notice of motion which accompanies this founding affidavit.

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**DEPONENT**

THUS SIGNED AND SWORN TO BEFORE ME AT PRETORIA ON THIS \_\_\_\_\_ DAY OF JUNE 2012 THE DEPONENT HAVING ACKNOWLEDGED THAT HE / SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THAT IT IS BOTH TRUE AND CORRECT TO THE BEST OF HIS / HER KNOWLEDGE AND BELIEF, THAT HE / SHE HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT THE PRESCRIBED OATH WILL BE BINDING ON HIS / HER CONSCIENCE.

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COMMISSIONER OF OATHS  
FULL NAMES :  
DESIGNATION :  
ADDRESS :