

**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

Reportable

Case Number: 14/3/2-234/05

Magistrate Serial No: 19/07

LB626/05

Special Review No: 19/07

DATE: 19/02/2010

In the matter between:

N S R M Applicant

and

Z G M Respondent

JUDGMENT

MOKGOATLHENG J

INTRODUCTION

- 1) This matter was referred to me by Magistrate Fatima Khan
in terms of *section 304 (4) of the Criminal Procedure Act No
51 of 1977* to determine whether:

- a. her conclusion that the respondent had a legal
duty to maintain the minor child he and the

applicant had adopted in terms of Xhosa customary law; and

- b. in holding that the respondent had a legal duty to support the minor child, she was entitled to develop the common law in terms of *section 39(3) of the Republic of South Africa Constitutional Act 108 of 1996 “the Constitution”*.

THE FACTUAL MATRIX

- 2) The parties married each other in community of property on the 22 October 1992 after having first concluded a customary law marriage. No children were born of the said marriages.
- 3) In January 1997 at the instance of the respondent, the parties jointly decided to adopt in terms of Xhosa customary law an eight months old female minor child whose biological parents had deceased.
- 4) The minor child was lawfully adopted by the parties in terms

of Xhosa customary law subsequent to the performance of Xhosa traditional rites and rituals. The minor child was taken into the parties' home at the age of eight months and is now twelve years old. A fully developed parent/child relationship exists.

- 5) The rationale of a customary law adoption ceremony is to proclaim and signify to the world that the adoptive parents have formally accepted parental responsibility for the minor child. The adopted minor child is thereafter accepted and regarded by the parties and the society as a child of the parties. Customary law adoption is widely practiced by Xhosas in the Eastern and Western Cape Provinces of the Republic of South Africa.
- 6) Pursuant to the customary law adoption, the parties approached the Department of Home Affairs in Westonaria and registered the minor child "*as their own child*". The parties named the minor child J M.
- 7) The respondent maintained the minor child and paid for its educational and medical needs. The minor child regards the

parties as its parents. The minor child has bonded with the parties and is also emotionally and psychologically attached to the respondent, to such an extent that even after the parties had separated in March 2004, it still regards him as its parent.

- 8) In March 2004 after the breakdown of the parties marital relationship, the applicant lodged a maintenance complaint against the respondent in terms of *section 10 of The Maintenance Act No 99 of 1998 (“The Act”)* at the Westonaria Magistrate’s Court. An enquiry was held at the end whereof, the Magistrate found that the respondent had a legal duty to maintain the customary law adopted minor child.

THE ISSUE

- 9) The cardinal issue is whether the respondent who has not lawfully adopted the minor child in terms of **the Child Care Act 74 of 1983** or **the Children’s Act 38 of 2005** is legally obliged to pay maintenance for the minor child as envisaged by *section 10 of “The Act”*. The common law, *the Constitution, “The Act”, the Child Care Act 74 of 1983 and the Children’s Act 38 of 2005*, are the legal sources which

impact on this issue.

THE LEGAL FRAME WORK

10)The respondent's counsel argued that the court could not issue any maintenance order against his client, because in terms of *sections 6(1)(A) and 15(3)(a)(iii) of "The Act" and section 18 of the Child Care Act 74 of 1983* the respondent was not the biological parent and had never legally adopted the minor child, nor was it placed in his foster care in terms of *Chapter 3 or 6 of the Child Care Act or section 290 of the Criminal Procedure Act, 51 of 1977*; consequently he was not legally obliged to maintain the minor child.

11)*Sections 15(3) of "The Act" provides: "the duty of biological parents to support children exists irrespective whether the child was born in or out of wedlock. An adopted minor child is for all intents and purposes regarded as a legitimate child of the adoptive parent as though it was born from such parent or from his or her marriage".*

- 12) ***The Constitution*** is the supreme law, any act or conduct inconsistent with it is null and void. ***Section 28(2) of the Constitution*** provides: “*A child's best interests are of paramount importance in every matter concerning the child*”.
- 13) ***Section 211 (3) of the Constitution*** provides: “*The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*”
- 14) ***Section 30 of the Constitution*** provides: “*Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.*”
- 15) ***Section 39(1) of the Constitution*** decrees: “*When interpreting the Bill of Rights, a court, tribunal or forum-*
- a) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- must consider international law; and*

may consider foreign law.

16) **Section 39(2) of the Constitution** provides: “*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*”.

17) **Section 39(2) of the Constitution** entitles a court to develop the customary law with the object of promoting the spirit, purport and object of the Bill of Rights. The Bill of Rights does not eschew the existence of Xhosa customary law of adoption. In fact the Xhosa customary law of adoption promotes the values that underlie an open and democratic society based on human dignity, equality and freedom and is not anathema to public policy nor *contra bonos mores*.

18) The recognition of common law receives express recognition in the Constitution which is the supreme law. In the development of common law it is necessary to consider international conventions pertaining to the rights of children adopted by the United Nations General-Assembly in terms of **resolution 44/25** of 20 November 1989 which came into force

on 2 September 1990 in terms of *Article 49*.

19) Under the common law, a judicial act is required in order to effect an adoption. Xhosa customary law of adoption is not in conflict with *The Bill of Rights or section 18(1)(a) Child Care Act 74 of 1983 and sections 23 and 25 of the Children's Act No 38 of 2005*, decree that adoption or guardianship must be effected by an order of the Children's Court.

20) In *Kewana v Santam Insurance Co. LTD 1993 (4) SA 771 (TkA)* it was held: “*A child adopted according to customary law in Transkei is entitled to compensation for loss of support resulting from the negligent killing of such child's adoptive parent. Such an action can be maintained under the Compulsory Motor Vehicle Insurance Act 25 of 1977 (Tk)*” and that the previous *Children's Act 33 of 1960*, did not affect customary law.

21) *Section 7(1)(c) and (d) of the Children's Act No 38 of 2005* provides: “*Best interests of child standard-*

- (1) *Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-*
- (a) *the nature of the personal relationship between-*
 - (i) *the child and the parents, or any specific parent;*
 - and*
 - (ii) *the child and any other care-giver or person relevant in those circumstances;*
 - (b) *the attitude of the parents, or any specific parent, towards-*
 - (i) *the child; and*
 - (ii) *the exercise of parental responsibilities and rights in respect of the child;*
 - (c) *the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;*
 - (d) *the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-*
 - (i) *both or either of the parents; or*
 - (ii) *any brother or sister or other child, or any other care-giver or person, with whom the child has been living.”*

22)The words “***for the adoption of children***” enunciated in the

preamble *of the Child Care Act No 74 of 1983* should be read and interpreted purposively not to exclude adoption by customary law as it is not contrary to this law of general application, consequently a minor child adopted in terms of Xhosa customary law should be deemed to be legally adopted in terms of the common law and *The Constitution of the Republic of South Africa*.

23)The development of customary law in this matter is consonant with promoting the best interest of the minor child. *Section 28 (2) of the Constitution of the Republic of South Africa Act No 108 of 1996*, provides: “*A child’s best interests is of paramount importance in every matter concerning the child.*”

24)*Section 9 of the Children’s Act No 38 of 2005* provides: “*In all matters concerning the care, protection and well-being of a child the standard that the child’s best interest are of paramount, must be applied.*”

25)The Constitutional Court in the case of *Alexkor Ltd and Another v The Richtersveld Community and Others 2004 (5) SA 460 (CC)* on page 478 paragraph 51 held:

“While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by **section 211 (3) of the Constitution** to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law...;

In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.”

26) In ***Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC)**

in paragraph 43 it was held: “*The import of this section, in the words of Langa DCJ in **Bhe**, is that customary law 'is protected by and subject to the Constitution in its own right'. Customary law, like any other law, must accord with the Constitution. Like any other law, customary law has a status that requires respect. As this court held in **Alexkor v Richtersveld Community**, customary law must be recognised as 'an integral part of our law' and 'an independent source of norms within the legal system'. It is a body of law by which millions of South Africans regulate their lives and must be*

treated accordingly". It is pertained that courts must be cognizant of the fact that customary law, like any other law, regulates the lives of people.

27)In case of ***Gumede v President of the Republic of South Africa and Others 2009 (3) BCLR 243 (CC) at 21-22*** it was held:

"Courts are required not only to apply customary law but also to develop it..."

"The adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfill and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law—the Constitution. In this regard we must remain mindful that an important objective of our constitutional enterprise is to be "united in our diversity." In its desire to find social cohesion, our Constitution protects and celebrates difference. It goes far in guaranteeing cultural,

religious and language practices in generous terms provided that they are not inconsistent with any right in the Bill of Rights. Therefore, it bears repetition that it is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation.”

28) **The Constitution** does not abjure the existence of any rights recognized or conferred by the common law, or customary law to the extent that they are consistent with the Bill of Rights. In the case of **Metiso v Padongelukfonds 2001 (3) SA 1142 (T)** Bartelsman J held; *“Act of adoption possibly incomplete - Offer to adopt children a binding offer which can and should be enforced on behalf of children. Recognition of such duty to maintain enforceable in terms of customary law and reconcilable with boni mores - Insofar as such duty not recognised by common law, it is logical extension thereof - Acceptance of validity of duty to maintain minor children which arises from promise made in context of (possibly) incomplete customary adoption merely a logical further step in development of common law.”* The Learned Judge further held: *“Gemeenregtelik is 'n onderhoudsplig wat voorspruit uit 'n ooreenkoms, en nie suiwer uit*

*bloedverwantskap of ouerskap nie, reeds ten minste in beginsel en by implikasie deur ons Howe erken, vergelyk **Raff v Cohen 1956 (4) SA 426 (K); Smit v Smit 1980 (3) SA 1010 (O); B v B and Another 1997 (4) SA 1018 (SO); en, op appèl, Bursey H v Bursey and Another 1999 (3) SA 33 (HHA)***”.

29)The Learned Judge further held in **Metiso v Padongelukfonds**, that the deceased had a legal duty to maintain the minor children, because he had adopted them according to customary law. The Learned Judge found that it was in the children’s best interests to give effect to the deceased’s duty, and accordingly refused to declare the customary adoption invalid for failure to comply with all the statutory requirements.

30)The respondent’s legal obligation to support the adopted minor child as a consequence of the development of common law is not contrary to public policy, *bonis mores*, the principles of natural justice or the spirit, purport and objects of the Bill of Rights. The **Child Care Act, the Maintenance Act** or **The Children’s Act** do not repeal or modify Xhosa

customary law of adoption.

31)The recognition of the duty to maintain a minor child in terms of customary law and the civil law is reconcilable with the common law and a Bill of Rights. The logical extension and development of the common law to accommodate customary law adoption is not inconsistent with the prescripts of ***The Constitution***.

32)In ***Thibela v Minister Van Wet en Orde en Andere 1995 (3) SA 147 (T)*** Van Dyk J applied customary law by virtue of the provisions of ***section 1(1) of the Law of Evidence Amendment Act 45 of 1988*** which provides:

“Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.” The facts in the ***Thibela’s*** case are distinguishable from the facts in the present case, but ***section (17) of the Law of Evidence Amendment Act*** nevertheless

applies, and empowers any court to take judicial notice of indigenous law insofar as such law can be ascertained readily and with sufficient certainty. Xhosa customary law adoption is readily ascertainable, with sufficient certainty to dispense with the requirement of an expert to adduce expert evidence to establish it as a fact.

See: Masenya v Seleka Tribal Authority and Another 1981 (1) SA 522 (T)

33) *In Human Rights and African Customary Law and a Source-book of African Customary Law for South Africa at page 291* Bennett J states:

‘Courts.....have assumed protective jurisdiction as upper guardian of all minor children, which they exercise at any time when, a child is without a guardian, the guardian has neglected his or her duty, or the natural guardians cannot agree on what is best for the child. In the second place the welfare of the child is deemed to be of paramount importance.....’ Statutory provisions governing the procedure and effect of adoption do not *per se* override customary law.

34) It is not inconsistent with the Bill of Rights for persons to

marry in terms of Xhosa customary law and thereafter marry in terms of the civil law. It is not inconsistent with the Bill of Rights for persons to adopt a child in terms of Xhosa customary law and not in terms of the civil law. No law of general application declares unlawful a person's right to adopt a child by customary law.

35)The Republic of South Africa subscribes to the tenets of the *Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country –Adoption signed at The Hague on 25 October 1980, Article 3* states: “*The best interest of the child shall be of primary consideration to ensure the child such protection and care as is necessary for its wellbeing taking into account the rights and duties of parents, legal guardians and other individuals legally responsible for it. Article 5 recognizes the applicability of the local customs of each country.*”

36)In terms of Xhosa customary law the respondent and applicant both have a duty to maintain and support the minor child. The parties cannot terminate or abandon their parent/child relationship in respect of the adopted minor child.

The legal duty to maintain the minor child under customary law is legally enforceable. There is no reason why such legal duty having regard to *section 39(2) of the Constitution Act* should not be enforceable against the respondent under the common law.

37) Customary law adoption is an established institution and is practised by millions of people who adhere to Xhosa customary law and traditions. Customary law adoption by a patriarch who has no male progeny of his own, to inherit his estate it is a custom that accepted and recognised in Xhosa customary law to be one which is in the best interests of a minor child. Consequently, customary law must be adapted and developed to put the minor child's interests first and to harmonise them with the following sources of authority, *the Constitution, the Child Care Act, The Childrens Act, The Maintenance Act, Public Policy, and the United Nations Conventions*.

38) The development of the common law in this matter will assist in the improvement of the effectiveness of the application of the maintenance system as there is a huge number of people in

the population who are regulated by customary law who find themselves in the same situation and the circumstances as pertaining in this matter. Such people will be encouraged to approach the courts and have access to the state maintenance legal services without hesitation to enforce the legal rights to maintenance of customary law adopted minor children.

39)The Director of Public Prosecutions in his written submissions argued that this was a matter in which the facts entitle the High Court to develop the common law in terms of ***section 39(2) of the Constitution*** in order to harmonise the efficacy relating to the constitutional right to maintenance of minor children adopted in terms of customary law.

40)The development of the common law will be seen by the public not only as a progressive positive contribution to the advancement of the “*undocumented customary law maintenance practices*” but also as a development of the common law and its jurisprudence.

41)From a minor child’s point of view, placement in a family carries material and educational advantages. Children develop

fully only under the protective umbrella of their culture of origin. For the minor child's dignity, sense of identity and psychological well being, it is preferable if it grows up in the social milieu from which it originates. The minor child's long-term emotional and psychological well-being is of paramount importance in circumstances where a customary law adoptive parent unlawfully relays to carryout its parental duties and obligations.

42) In the premises the conclusion that the respondent has a legal duty to maintain the minor child as a consequence of the development of the common law is in accordance with the precepts of justice.

THE ORDER

43) The Director General of the Department of Home Affairs is ordered in terms of **section 2** of ***The Births and Deaths Registration Act 51 of 1992*** to register the minor child J M as the adopted child of N S R M and Z A M.

44) The Magistrate is ordered to determine the amount of maintenance to be contributed by the respondent towards the

maintenance of the minor child J M.

Signed at Johannesburg on this the 17th day of February 2010.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 19 February 2010

TO THE MAGISTRATE WESTONARIA

THE RESPONDENT

THE NATIONAL DIRECTOR

OF PROSECUTIONS

PRETORIA