

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 2019/37963

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES:NO

REVISED.

30 May 2022

In the matter between:

ABUWENG JUDITH SEGONE

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Second Respondent

TSAKANI CONFIDENCE RAMAKGOLO

Third Respondent

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] Central to the determination of this opposed application is whether the purported customary marriage made and entered into on 13 June 2009, by and between the applicant and the late Mr. Abner Tabudi Ramakgolo (the deceased) should be declared valid as contemplated in section 3(1) of the Recognition of Customary Marriages Act (The RCMA)¹. The applicant further seeks an order that the first respondent be ordered and directed to register the marriage in terms of

¹ Act 120 of 1998

section 4(7) of the RCMA², and to accordingly issue her with a certificate of registration of the marriage between herself and the deceased.

[2] The first and second respondent elected to abide the Court's decision. The third respondent, Ms Ramakgolo, was not initially cited as a party, but was subsequently joined to the proceedings following the filing of an application in terms of Rule 10(3) of the Uniform Rules by the applicant. She has accordingly filed an answering affidavit.

Brief overview of the RCMA:

[3] Under section 1 of the RCMA, "*a customary marriage*" is defined as a marriage concluded in accordance with customary law. "*Customary law*" in turn is defined to mean the customs and usages traditionally observed amongst indigenous African peoples of South Africa and which form part of the culture of those peoples.

[4] The requirements for the conclusion of a valid customary marriage are provided under section 3 of the RCMA. Thus, (a) the prospective spouses must both be older than 18; (b) they must both consent to be married to each other under customary law; and (c) the marriage must be negotiated and entered into (or celebrated) in accordance with customary law.

[5] A customary marriage under section 4 of the RCMA must be registered by the spouses within three months after its conclusion, or by either of them under section 4(2). Under section 4(8), a certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate. However, even if it is obligatory to register a customary marriage, section 4(9) nonetheless provides that a failure to do so will not affect the validity of that marriage.

² Which provides;

'(7) A court may, upon application made to that court and upon investigation instituted by that court, order-

- (a) the registration of any customary marriage; or
- (b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.'

The applicant's case:

[6] The applicant is currently employed by SARS as an Operational Manager in one of its branches in Johannesburg. She regards herself as the lawful and only surviving spouse of the deceased, who passed away on the 22 of October 2019. Her case is that she and the deceased had satisfied all the requirements for the conclusion of a valid customary marriage as set out in section 3 of the RCMA, in that *inter alia*, they consented, entered into, concluded, and further celebrated the marriage in accordance with customary law. She contended that *lobola* negotiations were undertaken and concluded by their respective families. Thereafter she was handed over by her family to the deceased's family as his bride, and had subsequent to the celebration of the marriage, lived together as husband and wife.

[7] The applicant's version of events leading to her claim is as follows;

7.1 She and the deceased had an intimate relationship in 2003, and their son was born on the 30 July 2005 in Johannesburg. They lived together and continued as a couple and had discussions surrounding marriage in 2006. This led to both their families initiating formal discussions towards the payment of *lobola*.

7.2 On 27 January 2007, the two families met at the applicant's parental home and an agreement was reached for the payment of a total amount of R16 000.00 towards *lobola*. As per agreement, the first payment of R8 000.00 was then delivered to the applicant's family. The families had further agreed that the final payment of R8000.00 was to be made on 13 June 2009 at their next meeting. The applicant could only produce a copy of the written confirmation of the meeting, and she averred that she had misplaced a copy of the note that confirmed receipt of the first payment of R 8 000.00. She nonetheless attached confirmatory affidavits of some of the family members that were in attendance at those meetings.

7.3 After the final negotiations and the full *lobola* was paid on 13 June 2009, both families travelled to Mankweng in Limpopo Province to the deceased's parents' residence, where a ceremony was held to hand her over and receive her as the bride into the deceased's family. The marriage according to the applicant was concluded in terms of both Northern Sotho and seTswana rites.

7.4 Subsequent to the handing over ceremony, the applicant and the deceased continued to stay as husband and wife, and with their minor son and the applicant's elder son from her previous relationship. According to the applicant, her relationship with the deceased turned sour sometime in 2015, when the deceased suddenly packed his belongings and left their home.

7.5 In or around 2017, and after she had unsuccessfully made attempts to contact the deceased, she subsequently discovered that he had been involved in a relationship with Ramakgolo, and that unbeknown to her, the deceased and Ramakgolo were since married, and had stayed together in Limpopo. She contends that this marriage was unlawful, and fell outside the provisions of the RCMA and the accepted common law in that regard.

7.6 She averred that although the deceased moved out of their common home, they remained married to each other and that the deceased had continued to support their son even though they used to have fights over the issue. They had at all times intended to register their marriage in terms of section 4(1) of the RCMA, but did not get an opportunity to do so due to the circumstances that prevailed related to their work commitments and also as a result of the deceased's extra marital affair with Ramokgolo.

7.7 Upon her knowledge of the deceased's marriage to Ramakgolo, she ceased to have any further engagement with him, particularly since any attempts in that regard always ended up in

arguments. The applicant insists however that their customary marriage was not at any stage terminated, until the deceased passed away on 22 October 2019.

7.8 In the supplementary affidavit in which Ramokgolo was joined to the proceedings, the applicant sought to elaborate further on the reasons why the customary marriage was not registered in accordance with the provisions of section 3(b) of the RCMA. She added that prior to having a communication breakdown with the deceased, they had agreed that they would approach the Department of Home Affairs not only to register their customary marriage, but also to conclude a civil union in the presence of their elders and to celebrate the marriage at a later stage. However, problems associated with her relocation to another branch of the SARS, and the deceased's work demands that had necessitated that he relocate to another Province, contributed to their plans not materialising.

The third respondent's case.

[8] In her answering affidavit, and in argument, Ramokgolo had raised three preliminary points which I will address shortly. In a nutshell however in relation to the applicant's version, Ramakgolo's defence was that the applicant has not demonstrated that her customary marriage to the deceased was concluded, nor had she made out a case in that regard. To this end, it was submitted that the applicant failed and/or neglected to state or provide any evidence that both she and the deceased consented to be married to each other under customary law as provided for in section 3 (1) (a) (ii) of the RCMA. I will elaborate further on Ramakgolo's defence, and moreso within the context of the preliminary points as shall be discussed below.

The preliminary points and evaluation:

(i) *Condonation:*

[9] Ramakgolo had filed and served the answering affidavit out of time and had sought condonation in that regard. Even though the applicant took exception in the light of the nine months delay, her view was that should condonation be granted, Ramakgolo should be liable and be ordered to pay incidental costs occasioned by the late filing of the answering affidavit.

[10] I have had regard to the lengthy delay and Ramokgolo's explanation in that regard. In the light of the clear importance of this matter to both parties, the prejudice she may suffer should her case not be heard, the interests of justice ought to dictate that condonation be granted for the late filing of the answering affidavit. Given the indulgence granted to Ramakgolo to file the answering affidavit and the fact that the matter had to be removed from the unopposed roll at some stage, I however agree with the submissions made on behalf of the applicant that Ramokgolo should be liable for the incidental costs in respect of her late filing of her answering affidavit.

[11] The applicant's replying affidavit was equally filed out of time by some 15 days and she also sought condonation in that regard. In similar manner, I am of the view that given the important issues raised in this matter, the clearly non-excessive nature of the delay, and the reasons proffered in that regard, the interests of justice dictate that condonation be granted. I will address the applicant's reply within the context of the preliminary points as discussed below.

(ii) *The nature of the relief sought by the applicant:*

[12] Ramokgolo took issue with the applicant's relief as raised for the first time in her heads of argument, wherein she sought an order declaring her civil marriage to the deceased invalid. Clearly this relief was not pleaded in the Notice of Motion. It is a trite that a case ought to be made out in the founding papers, and not in the replying affidavit let alone in the heads of argument. It has long been held that holding parties to pleadings is not pedantry, and that the reason for the rule is that

every other party likely to be affected by the relief sought must know precisely the case it is expected to meet³.

[13] It is further acknowledged arising from *Netshituka v Netshituka and others*⁴ that a civil marriage between A and B that was entered into while A was married in terms of customary law to C was a nullity. In this case, clearly Ramakgolo whose civil marriage to the deceased is sought to be invalidated and thus nullified, is entitled to put up a case against such relief. She had not been afforded an opportunity to do so by the applicant in her founding affidavit. In any event, any invalidity of Ramakgolo's civil marriage to the deceased can only be an issue that arises upon the requirements of a customary marriage between the applicant and the deceased having being met⁵. To this end, the objection raised on behalf of Ramakgolo ought to be upheld in that in the absence of any attempt by the applicant to seek an amendment to her Notice of Motion and the founding affidavit.

(iii) *The non-joinder of the Executor of the deceased estate:*

[14] The deceased signed a last will and testament in September 2018, in which he had *inter alia*, bequeathed certain properties and all monies held in any financial institutions under his name to his appointed heirs including Ramokgolo. Ramokgolo was also appointed as the sole administrator of the deceased's funeral service and to decide where he was to be buried, whilst a Mr Christopher Moeketsi Leballo, was appointed as executor.

[15] To the extent that the applicant's customary marriage will be declared valid, it is trite that the consequences thereof are that she and the deceased would have been deemed to be married in community of property subject to the accrual system, unless these consequences were excluded by means of an antenuptial contract which will then regulate the matrimonial property system of their marriage.⁶.

³ See *My Vote Counts NPC v Speaker of the NA* 2016 (1) SA 132 (CC) at para 177; *Holomisa v Holomisa & another* 2019 (2) BCLR 247 (CC) at para 30; *South African Transport & Allied Workers Union and others v Garvas* 2013 (1) SA 83 (CC) at para 114

⁴ *Netshituka v Netshituka and Others* (426/10) [2011] ZASCA 120; 2011 (5) SA 453 (SCA); [2011] 4 All SA 63 (SCA) at para 15

⁵ See *Monyepao v Ledwaba and Others* (1368/18) [2020] ZASCA 54 (27 May 2020) at para [19]

⁶ See *Ramuhovhi and Others v President of the Republic of South Africa and Others* (CCT194/16) [2017] ZACC 41; 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) at para [31]

Furthermore, since the applicant would be entitled to a portion of the deceased estate, there would be a need for the executor to take control of her estate as well, which estate would have to be included in the final liquidation and distribution of account before the joint estate can be wound up.

[16] Ramokgolo has pointed out that despite the applicant's knowledge of the deceased's last will and testament, and the appointment of an executor, she nonetheless omitted to join the latter in the proceedings, despite his direct and substantial interest in the order sought by her. Since she failed to do so, this constituted a material non-joinder fatal to her application.

[17] The applicant's response was that there was no executor appointed for the deceased estate to be joined in the matter. She further averred that the executor nominated in the document purporting to be the deceased's last will and testament, was nowhere to be found, and that further investigations by her attorneys of record with the Legal Practice Council (LPC) had revealed that Leballo was no longer in practice.

[18] There is nothing to gainsay the fact that indeed there is a valid deceased's will in place, with an appointed executor. I find it extraordinary that the applicant would allege that there was no executor to be joined in this matter because on her version, none was appointed. Other than the fact that the applicant despite knowledge of the deceased's will had not taken any steps to invalidate it, all that she could allege was that the appointed executor could not be found or that her attorneys of record have since established with the LPC that the appointed executor was no longer in practice.

[19] The applicant's version is nonetheless confusing if not contradictory in that it is either there was no executor of the deceased estate that was appointed, or if there was one so appointed, such an executor cannot be found. It cannot be both. Even if there is any merit to the contention that an executor could not be found, significant with this allegation as further confirmed by the applicant's attorney, is that it is bare, without any effort made regarding the nature of investigations into the whereabouts of Leballo by the applicant's attorneys of record, and how and when it was

established with the LPC that Leballo is no longer in practice. In fact, no correspondence or even a confirmatory affidavit from the LPC was referred to in support of these allegations.

[20] Equally so, to the extent that the applicant had full knowledge of the deceased's will, there is no discernible demonstration that she had at all made any attempts under the provisions of section 18 (1) read with subsections (3), (5) and (6)- of Administration of Estates Act⁷ to attend to any matters pertaining to the deceased's will. Thus, in the light of the implications of the nature of the relief that she seeks, and in the absence of anything to gainsay that an executor was indeed appointed, I agree that the failure to join the executor constitutes a material non-joinder.

(iv) *The disputes of fact arising from the pleadings:*

[21] Ramakgolo's case was that there were material disputes of fact arising from the papers, and that the Court would be unable to make a proper determination on the papers. In this regard, Ramakgolo's submissions were that she had no knowledge of certain of the allegations raised by the applicant, more so in the light of the fact that she did not have the deceased's evidence. She was thus unable in these proceedings, to lead evidence to test and/or dispute the truth of the applicant's statements. To the extent that there existed material disputes of fact, it was contended that it would be appropriate to put the applicant to the proof of her statements way of oral evidence, subject to cross-examination, and that the Court should under the provisions of Rule 6(5)(g) of the Uniform Rules of Court, exercise its discretion and refer these disputes for oral evidence , or in the alternative, dismiss the application insofar as the applicant foresaw or ought reasonably to have foreseen these disputes of fact.

[22] Despite having refuted any of the allegations made in the answering affidavit, the applicant denied that any material disputes of facts were raised therein, particularly since Ramakgolo had conceded that she was not privy to the events

⁷ Act 66 of 1965. Section 1 provides for **Proceedings on failure of nomination of executors or on death, incapacity or refusal to act, etc.**

described in the founding affidavit. She submitted that since Ramakgolo did not have a version to place her (applicant's) allegations in dispute, the sole issue to be decided based on the pleadings was a question of law, which was whether or not a customary marriage was concluded between her and the deceased.

[23] The disputes of fact raised by Ramokgolo related to whether the applicant had demonstrated that her purported customary marriage to the deceased was consented to and concluded in accordance with customary law; whether in fact *lobola* was actually paid to the applicant's family; whether she was handed over as a bride to the deceased's family; whether certain customary rites as applicable to baTswana and Northern Sotho people were observed, and also the failure to register the purported customary marriage.

[24] It must be stated that I have difficulties in appreciating the applicant's contentions that the Court is merely tasked with a determination of legal issues, in the light of the glaring disputes of facts raised by Ramokgolo. It has long been stated that motion court proceedings are unsuited for a determination of factual disputes, and that the approach to be adopted in resolving such disputed facts is that as enunciated in *Plascon Evans Ltd v Van Riebeeck Paints (Pty) Ltd*⁸.

[25] Thus, applying the *Plascon-Evans* principle to the facts of this case, the Court must therefore first, establish which facts are common cause between the applicant and Ramokgalo. In this regard and without doubt, clearly from the pleadings, nothing of substance appears to be common cause between Ramokgolo and the applicant. The only facts which are not seriously disputed are that the applicant and the deceased had a romantic relationship from 2003 out of which their

⁸ 1984 (3) SA 623 at 634E to 635C; See also *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA), where it was held that;

'[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers...'

son was born in July 2005. The applicant and the deceased lived together with their two sons until sometime in 2015, when the latter moved out of their house. Furthermore, there can be no dispute that Ramokgolo and the deceased entered into a civil union on 8 February 2016 in Krugersdorp, and that the deceased having passed away on 22 October 2019, he had left his last will and testament.

[26] Other than the above, from the pleadings and as further submitted in argument, it is apparent that the applicant and Ramokgolo accused each other's versions as being riddled with untruths, material contradictions, vagueness, selective disclosure, inconsistencies, and lack of substantiation of those versions.

[27] In the light of the above, the next stage in line with the *Plascon-Evans* principle is for the Court to consider which facts as denied by Ramokgolo raises genuine and *bona fide* disputes of fact. To the extent that it is established that there are indeed real, genuine and *bona fide* disputes of fact, Ramakgolo is entitled to an order in terms of Rule 6(5)(g) of the Uniform Rules, to have such disputes referred to the hearing of oral evidence.

[28] If Ramokgolo's defence however merely constitutes bare denials of the applicant's material allegations, and her version of the facts is so improbable or unrealistic and consists of bald or uncreditworthy denials, or raises fictitious disputes of fact, or is palpably implausible, far-fetched or so clearly untenable, the Court would reject her version merely on the papers, and determine the matter on the applicant's version of facts, *albeit* on condition that such a version is inherently credible.

[29] The nature of the disputes of fact raised by Ramakgolo ought to be evaluated within the context of burden of proof related to proof of the existence of customary marriages. In this regard, the issue is whether the applicant and the deceased consented to be married to each other under customary law, and whether the marriage was negotiated and entered into, and/or celebrated in accordance with

customary law, including the payment of *lobolo* a formal ceremony to transfer the applicant as a bride to the deceased's family⁹.

[30] The enquiry into the onus of proof related to the validity of a customary marriage commences from section 1(1) of the Law of Evidence Amendment Act (LEAA)¹⁰. A further approach is invariably to call witnesses to prove whether in fact a customary marriage was concluded in line with the provisions of section 1(2) of LEAA¹¹. The question of whether the onus was discharged is crucial in the light of the recognition that customary law is a dynamic and diverse system of law that along with society, changes with time, and which varies between ethnic groups and their respective practices¹². It follows that a determination of whether there is a valid customary marriage would in the light of the disputed facts, entail sufficient evidence to be determined in regards to aspects such as the credibility of the various factual witnesses; their reliability; and the probabilities in line with the approach in

⁹ See *Mrapukana v Master of the High Court and Another* (6567/2007) [2008] ZAWCHC 113 (21 November 2008) at para [25]

"[25] It is fairly simple to determine whether or not a party has successfully proved the existence of a customary marriage. There are requirements for a valid customary marriage, namely consensus between the parties, a formal ceremony to transfer the bride to the other family and the payment of lobolo. Initially the consensus I have referred to was not concerned with consensus between the two marrying parties. The marriage was and is still regarded as a union between two (2) families rather than two (2) individuals. See *Mabena v Letsoalo* 1998 (2) SA 1068 (T). We know that because customary law is not static but it also develops with the times, this requirement is now such that the two marrying individuals should agree to the marriage as well. Section 3(2)[1](a) of the Recognition of Customary Marriages Act has nowadays explicitly provided that permission of both individuals to the marriage is required. In my view this does not amend or outlaw the old customary practice to any greater extent. It is inconceivable that individuals to such a marriage can exclude the two families. The new provision in the Act compliments the agreement between two (2) families in my view. Lobolo can consist of cattle or the momentary value thereof. In nowadays cash is seemingly preferred, particularly in urban areas. In rural areas cattle on hooves are still the only known form of paying lobolo. Lobolo can either be partially paid or fully paid. In the event of the former scenario, an agreement would have to be entered into as to when and how the balance of lobolo shall be paid. Lobolo survived evolution and was never declared contrary to the rules of natural justice or public policy. See: *Thibela v Minister of Wet en orde* 1995 SA (3) 1995147 (T). The bride must be formally transferred to the family of the prospective husband. Once this is done, she is then formally regarded as part of the latter family. Her release from her own family relationship and her incorporation into her husband's family is celebrated with extensive public rituals and ceremonies. This is a very important requirement for the validity of the customary marriage."

¹⁰ Act 45 of 1988, which provides that;

'any court may take judicial notice ... of indigenous law in so far as such law can be ascertained readily and with sufficient certainty...'

¹¹ which provides that;

'[t]he provisions of subsection (1) shall not preclude any part from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned'.

¹²See *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) at para 87; *Moropane v Southon* (755/12) [2014] ZASCA 76 at para 36;

*Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*¹³.

[31] Thus, whether the customary marriage in this case was negotiated and entered into in accordance with customary law for the purposes of its validation involves an investigation as to whether the traditional customs, cultures, rituals or other relevant applicable customary rites were observed by the deceased, the applicant, and their families. Of course the Court must take due regard to the fact that the provisions in section 3 of the RCMA do not restrict parties to a specific list of requirements that ought to be complied with for a valid customary marriage to exist. Thus the Court will be required to consider the flexibility of the customary law systems as well as the present practices and lived experiences of the communities and customs concerned¹⁴. It is at the stage when disputes of fact arise as to whether a customary marriage was concluded, that the importance of such a marriage not being about the bride and the groom, but also involving the two families, becomes obvious¹⁵.

[32] In line with the above considerations, the enquiry therefore is whether Ramokgolo has raised genuine and *bona fide* disputes of fact, to the extent that her version is incompatible with that of the applicant, in particular on the issues surrounding whether the deceased and the applicant had consented to be married by customary law; the payment of *lobola*; the handing over of the applicant as the deceased's wife to his family; and disputes regarding the reasons the marriage was not registered.

Consent:

[33] It is safe to assume that before there was consent between the deceased and the applicant, the former must have proposed marriage to the latter, and from which thereafter they had consented to have a customary marriage. Despite the obvious difficulties Ramokgolo is faced with in disproving that the deceased and the

¹³ (427 of 2001) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5

¹⁴ See *Mbungela and Another v Mkabi and Others* (820/2018) [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) at paras [17] – [18]

¹⁵ See *fn 10*; *Fanti v Boto and Others* 2008 (5) SA 405 (C)

applicant had between the two of them consented to a marriage under customary law, she nonetheless contended that the applicant had not produced any evidence in that regard. Of course she cannot disprove the deceased's consent. Thus, as to whether any vigorous cross-examination of the applicant in that regard will yield anything else is doubted. However, even if the deceased had consented, that would not be the end of the matter in that as correctly observed, a customary marriage in true African tradition is not an event but a process that comprises a chain of events and involves not only the bride and the groom but also their families¹⁶. It is therefore the events subsequent to the consent by the applicant and the deceased, that is determinative of whether in the end, a customary marriage was entered into and concluded.

Payment of lobola and conclusion of the customary marriage:

[34] It can be accepted that upon the couple having consented to be married in accordance with customary law, a process will be placed in motion that involves the two families to negotiate and agree on *lobola*. Thereafter the two families will agree on the formalities to be followed including the finalisation of the payment of *lobola* (where required), the date on which the woman will be handed over to the man's family as the bride and new member of the family, and any other customs and rites to be observed thereafter, before the marriage is concluded. Significant however within that process is that different other rites are observed, indicative that the wife has now been integrated into the husband's family. Thus, in the absence of the final stage of handing over of the *makoti* (bride) to her in-laws, one cannot speak of a customary marriage having taken place¹⁷.

[35] In the founding affidavit, the applicant had mentioned various family members from both sides who were present at the meeting in January 2007 at her parental home where *lobola* was agreed to, and in June 2009 at the deceased's

¹⁶ See IP Maithufi and JC Bekker, in their article: *Recognition of Customary Marriages Act 1998 and its impact on Family Law in South Africa* CILSA 182 (2002)

¹⁷ See *fn 10*; *Ndlovu v Mokoena* (2973/09) [2009] ZAGPPHC 29. At para 12; *Motsoatsoa v Roro* [2011] 2 All SA 324 at paras 19 – 20; *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020); *Moropane v Southon* [2014] JOL 32177 (SCA) the SCA at para 40, where it was held;

'... the handing over of the makoti to her in-laws is the most crucial part of a customary marriage. This is so as it is through this symbolic customary practice that the makoti is finally welcomed and integrated into the groom's family which henceforth becomes her new family'

parental home in Mankweng, Limpopo Province, where the final payment in respect of the *lobola* was made, and a ceremony to hand her over and receive her as a bride was held.

[36] The applicant conceded in her replying affidavit that she had initially in her founding affidavit, mixed the family representatives' names. In any event, at the January 2007 meeting where *lobola* was negotiated and agreed to, her family representatives comprised of Messrs John Matsobe, Michael Mohale, Lebeko Albert Malematja and Ms. Rebecca Mohale, whilst the deceased's family was represented by Messrs Isaac Ragophala, Frans Ragophala, Sello Manamela, and Ms Maria Kgaladi Mamabolo. The applicant relied on the confirmatory affidavits of Michael and Rebecca Mohale, and Mamabolo for her contentions that indeed these events took place. Errors in these confirmatory affidavits were noticed by Ramokgolo, wherein the deponents stated that; *Wherefore I pray that the Honourable Court dismiss the application made by the applicants.* Ramokgolo sought to infer from this that even the people that the applicant had relied upon sought that her case be dismissed. I disagree. Clearly apparent in the confirmatory affidavits is sheer shoddiness in the drafting of the affidavits by the applicant's legal team, and the Court will refrain from making any inferences from this shoddiness.

[37] In disputing that any *lobola* was paid or that the applicant was handed over as a bride, Ramokgolo's contention was that to the extent that any amounts were paid to the applicant's family, this was only in respect of *damages* in relation to the couples' son who was born out of wedlock as was a cultural practice. In this regard, Ramokgolo relied on the confirmatory affidavit of Mr Frans Magono Ragophala, the deceased's uncle, who the applicant had averred was in attendance in the meetings.

[38] Ragophala in a confirmatory affidavit had disputed that he had signed the handwritten letter that allegedly confirmed a meeting to discuss *lobola*. He confirmed having attended the meeting or negotiations, but solely for the sole purpose of the payment of *damages*, and not for *lobola*. He further disputed his purported signatures on the annexures attached to the applicant's founding affidavit in respect of meetings held on and 13 June 2009 when the applicant was allegedly handed over. He further disputed that Maria Kgaladi Mamabolo, the deceased's younger

sister who had filed a confirmatory affidavit in support of the applicant's version was an elder for the purposes of *lobolo* negotiations. Equally so, the standing of Mr Johannes Masilo Manamela, who also filed a confirmatory affidavit in support of the applicant's case was also questioned, as Ragophala's view was that this individual was merely a friend of the deceased, and not a relative or an elder for the purposes of negotiating *lobolo*.

[39] The handwritten letters referred to above are annexures 'AJS4' to the founding affidavit, which the applicant averred is confirmation of the first meeting of 27 January 2007, and 'AJS7', which related to the meeting of 13 June 2009, where the final R8000.00 was paid by the deceased's family and subsequent to which she was then formally handed over and accepted as the deceased's wife.

[40] The difficulties with Annexure 'AJS4' is that it is undated and written in an African language. No attempt however was made by the applicant to have it officially translated for the benefit of the Court. Equally so, annexure 'AJS5' which is dated 13 June 2009 is written in an African language, with no attempt at having it translated. To the extent that the applicant had placed heavy reliance on these two annexures, and further to the extent that Frans Ragophala had placed them in dispute, let alone his purported signature, it is not clear how it was expected of the Court to make any sense or place any weight on them in determining whether they evinced an agreement to pay *lobola* or more crucially, the handing over of the applicant as the bride.

[41] Since the primary factual dispute arising from the papers was whether meetings between the two families did indeed take place resulting in an agreement on *lobola* and its payment, and whether the applicant was handed over as a bride for the purposes of the conclusion of a customary marriage, mere reliance on handwritten documents in support of competing versions, when those documents cannot be understood by the Court, or where the linguistic nuances or the factual context of those letters are not explained, the Court's hands are clearly constrained to make any fair determination on the papers as to whether indeed *lobola* was negotiated and agreed to, and whether the applicant was handed over as the *makoti*.

[42] To the extent that the above handwritten annexures relied upon by the applicant and as further placed in disputes by Ramokgolo do not assist the Court, and given their importance in relation to the issues to be determined, it is therefore unnecessary for the Court to consider other ancillary *albeit* important issues such as whether the all other rites and customs as practiced in both the seTswana or Northern Sotho were observed within the celebration of the customary marriage.

[43] The issue as to the reason why the customary marriage was not registered between 2007 and 2018 and its impact is equally important, *albeit* it is appreciated under the provisions of section 4 (9) of the RCMA that non- compliance with this legal process is not fatal to the validity of the marriage. As already indicated, Ramokgolo has posed probing questions as to the reason why since 2007 or 2009 at least, the applicant had not bothered to have the customary marriage registered, to reinforce her claim that the marriage was indeed concluded. At a minimum, at mere response that there was such an intention since 2007 or that work commitments prevented her from both registering the marriage is not satisfactory. Equally so, little came by way of an explanation as to the reason that she on her own could not have registered the marriage, or why having had knowledge of the civil marriage and its nullity, she took no steps in that regard, at least until the passing of the deceased.

[44] It is apparent that the applicant's version is incompatible with that of Ramokgolo in particular on the issue whether there were negotiations and conclusions in regards to *lobola*, and whether the applicant was handed over as the bride. Ragophala's evidence, being the uncle to the deceased and the sole elder who had witnessed some of the events and placed same in dispute, would in my view, be of importance in placing the court in a position to determine Ramokgolo's defence. Other than these issues, too much is at stake for the applicant and the deceased's son, and Ramokgolo for this matter to be simply disposed of on the papers. The Court is therefore unable on the irreconcilable versions, to fairly determine the issues as to whether the applicant's version is upon a preponderance of probabilities, true and accurate and therefore acceptable, or even so, whether that of Ramokgolo's is false or mistaken and falls to be rejected. In my view, if family members of the deceased that had attended the meetings of January 2007 and June 2009 are on opposing sides of this dispute, and cannot agree in relation to what was

discussed, and what the status of each was in the meeting when important issues such as *lobolo* and the acceptance of a wife by way of customary marriage were purportedly discussed, clearly one cannot speak of Ramokgolo's version as being improbable or unrealistic, and as merely constituting bare or uncreditworthy denials of the applicant's material allegations.

[45] In the light of the above conundrum, it is apparent that cross-examination would assist in determining the veracity of each party's version. Even though the applicant ought to have seen these factual disputes, or clearly did not anticipate that Ramokgolo would oppose the application to the extent that she was not initially joined as a party to the proceedings, a dismissal of the application would not in my view resolve the matter and would instead prolong it. To this end, I agree with the submissions made on behalf of Ramokgolo that in accordance with the provisions of Rule 6(5)(g) of the Uniform Rules, the Court must refer the material disputes of fact to oral testimony.

[46] I accordingly make the following order:

Order:

1. The late filing of the answering affidavit and notice of intention to oppose is condoned.
2. The late filing of the replying affidavit is condoned.
3. The failure by the applicant to join the Executor of the deceased estate (of the late Mr. Abner Tabudi Ramakgolo) constitutes a material non-joinder.
4. In terms of Rule 6(5) (g) of the Uniform Rules of Court, the issue of whether a customary marriage was concluded between applicant and the deceased is referred to oral evidence on a date to be arranged with the Registrar.

5. The applicant's notice of motion shall stand as a simple summons, and the founding affidavit shall stand as her declaration.
6. The third respondent's answering affidavit shall stand as her plea.
7. The applicant and the third respondent will be entitled to call any witnesses who deposed to any affidavit in the application proceedings.
8. The applicant and the third respondent are obliged to make available for cross-examination such witnesses who deposed to affidavits in these proceedings to the extent that such party persists in seeking to place any reliance on that person's evidence in the affidavits.
9. The applicant and the third respondent are entitled to call any further witnesses who were not deponents to the affidavits in these application proceedings.
10. The applicant and the first respondent may subpoena any witness to give evidence or to furnish documents at the hearing, whether such person has consented to furnish a statement or not in relation to the issue referred to oral evidence.
11. The provisions of Uniform Rule 35 will be applicable to the discovery of documents on the issues referred to oral evidence.
12. The third respondent is ordered to pay the incidental costs of the late filing of the answering affidavit.
13. The costs of the main application will be determined after the hearing of oral evidence.

Edwin Tlhotlhemaje

ACTING JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be ...May 2022.

Heard on : 09 February 2022 (Via Microsoft Teams)

Delivered: ...May 2022

Appearances:

For the Applicant: Adv. JD Napo, instructed by Mthembu INC Attorneys.

For the Third Respondent: Adv M Bezuidenhoudt, instructed by Adam Creswick Attorneys