



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

CASE NO: 6033/2022

In the matter between:

MOEKETSI ANDRIES MAKHETLA

Applicant

And

MINISTER OF HOME AFFAIRS

1st Respondent

MASTERS OF HIGH COURT, BLOEMFONTEIN

2nd Respondent

NTSOEU VICTOR FINGER N.O.

3rd Respondent

MUSO SELOANE

4th Respondent

HEARD ON: 25 May 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for hand-down are deemed to be at 14h30 on 26 July 2023

[1] In this application, the applicant seeks the following orders:

1.1 That the customary marriage entered into between the applicant and the late Mateboko Shirley Mamashie in September 2008 be declared valid and of effect in terms of the Recognition of Customary Marriages Act 120 of 1998.

1.2 That the first respondent be ordered to register the customary marriage between the applicant and the late Mateboko Shirley Mamashie, alternatively issue a certificate as proof of the registration of the marriage.

1.3 That the respondents are ordered to pay the costs of this application (only if opposed).

1.4 Further and/or alternative relief.

- [2] The application is opposed only by the fourth respondent.
- [3] The applicant and the late Mateboko Shirley Mamashie, who passed away on 18 July 2020, stayed together as a couple for 17 years before her demise. During 2007, the representatives of the two families entered into negotiations for the payment of lobolo which was fixed at R 9 500.00. The applicant's family paid the lobolo in cash in September 2008 and it was instructed to bring a knobkierie, coat and a travelling blanket before the deceased was handed over as a bride.
- [4] The applicant was represented during the negotiations by his uncle and brother while the deceased family was represented by her aunts and her uncle who was a pastor at the St John's Church. The deceased was formally handed over and given the clan name of Mmasechaba during the traditional celebrations held at the applicant's home at Kroonstad in 2008. The couple were known to be married and a child was born from the union.
- [5] The couple acquired property that was registered in the deeds office. The couple was referred to in the title deed as having been married in community of property to each other. The deed was executed on 16 October 2013 in Bloemfontein. On 23 August 2016, the deceased caused an email to be forwarded to her bank, FNB, in which she stated that the applicant, as her spouse, should be included in one of her policies as a beneficiary.

- [6] The fourth respondent, the son of the deceased born out of her relationship with another man, opposed the application on the basis that no negotiations took place between the two families and that the parties were not married to each other in terms of the Sesotho customary law in September 2008 or at any time during the life of the deceased. It is, however, not in dispute that both the applicant and the deceased were above the age of 18 in 2008 and that the deceased passed away on 18 July 2020. Furthermore, the applicant and the deceased owned a house, had a child and lived together for a period of about 12 years.
- [7] In support of his claims, the 4th respondent attached 4 brief affidavits by the deceased's mother, two sisters and a neighbour, Lekhina Lawrence Mashoene. The mother briefly stated in her affidavit that the deceased was never married and she never received any lobolo for the deceased. Both the two younger sisters denied that the deceased was married. It is interesting to note that Lekhina Lawrence Mashoene, deposed to two affidavits: one dated 22 February 2023, attached to the 4th respondent's founding affidavit, wherein he stated that he was the deceased's neighbour at Gamphahlele, Seleteng in Limpopo. He knew that the deceased was involved in an open relationship with the father of her daughter (Keke Makhethla) whom she knew since 2005. She, the deceased, remained in that relationship until her date of death. She confirmed that the deceased was never married. In an earlier affidavit, dated 19 August 2020, Lawrence confirmed and acknowledged the marriage between Moeketsi Makhethla, the applicant, and Shirley Mamashiye, the deceased. He stated in that affidavit that he was accommodated at the couple's residence at Grasslands, Bloemfontein when he first arrived there.
- [8] For a customary marriage to be valid, the prospective spouses must both be above the age of 18 years; should consent to be married to each other under customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law.¹ Lobolo, on the other hand, is defined in the Act as property in cash or kind which a prospective husband or the

¹ Section 3(1)(a) and (b) of the Recognition of Customary Marriages Act 120 of 1998.

in consideration of a customary marriage. Section 4(7) of the Act empowers the court to order the registration of any customary marriage upon application made to it and upon investigation instituted by that court.

- [9] In *Mbungela and another v Nkabi and others*,² it was stated that the ritual of handing over a bride is simply a means of introducing a bride to her new family and signified the start of the marital consortium. Cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has raised no objection nor showed disapproval. It is an important but not necessarily a key determinant of a valid customary marriage. The value of the custom of bridal transfer cannot be denied but an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results.
- [10] In *Tsambo v Sengadi*,³ it was stated that: "Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law."
- [11] The thrust of the fourth respondent's argument is that no customary marriage came into being as the requirements of the Act were not complied with by the applicant. The fourth respondent contended that the applicant, instead of relying on a written document to prove the agreement between the parties, failed to do so. Moreover, the applicant's representatives did not negotiate with the deceased's family or her family's representatives. The fourth respondent, it was contended, as the deceased's son, laid a sound basis for disputing the veracity of the applicant's averments.
- [12] It was contended on behalf of the applicant that none of the fourth respondent's witnesses were present during the lobolo negotiations or took part in the handing

² 2020 (1) SA 41 (SCA).

³ *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020).

over of the bride or the wedding celebrations. Furthermore, neither the fourth respondent nor his witnesses alleged in their affidavits that they should have been part of the marriage negotiations and celebrations. The alleged disputes by the fourth respondent were based on bare denials and the court should adopt a robust approach in considering the disputes.⁴ I agree. In his replying affidavit, the applicant stated that although records were kept of the negotiations, he did not have a copy in his possession.

[13] I agree with the fourth respondent's legal representative's submissions that it was not necessary to refer the matter to oral evidence. I am persuaded that the applicant provided sufficient evidence that the marriage was negotiated, entered into and celebrated in accordance with customary law. The parties were adults who consented to their marriage, lobolo was negotiated and paid for in cash. Gifts were provided to the deceased's family. The deceased, as the bride, was handed over to the applicant's family in September 2008 and given a new name of Masechaba. The applicant and the deceased cohabited for a long period, had a child and acquired movable and immovable property together, the latter having been registered in the Deeds Office. The applicant is mentioned as a spouse on the transfer deed. In the parties' world, they were known as husband and wife.

[14] I am therefore satisfied that the applicant succeeded in making out a case for the relief sought. On the other hand, the fourth respondent presented a weak case which was founded on no merit.

[15] Consequently, I make the following order:

ORDER:

1. The customary marriage entered into between the applicant and the late Mateboko Shirley Mamashie in September 2008, is declared valid and of effect in terms of the Recognition of Customary Marriages Act 120 of 1998;

⁴ Tsoeute v Yawa and Others [2020] JOL 46804 (FB).

2. The first respondent is ordered to register the customary marriage between the applicant and the late Mateboko Shirley Mamashie, alternatively, issue a certificate as proof of the registration of the marriage;
3. The fourth respondent is ordered to pay the costs of this application.



MHLAMBI, J

On behalf of applicant: Adv. A Swanepoel

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