



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

REPORTABLE

Case No: 1808/2023

Date heard: 11/05/2023

Date delivered: 04/07/2023

In the matter between:

ZIFIKILE KUNENE

APPLICANT

and

MONALISA BANGAZA

FIRST RESPONDENT

AVBOB FUNERAL SERVICES – MTHATHA

SECOND RESPONDENT

**ANY MEMBER OF SOUTH AFRICAN
POLICE SERVICES**

THIRD RESPONDENT

JUDGMENT

Notyesi AJ

Introduction

[1] Ms Zifikile Kunene, a daughter of the late Thabile Kunene (the deceased), born out of wedlock with Sindiswa Ndzeku, seeks for a declaratory order that the customary marriage entered into between the deceased and Monalisa Bangaza be declared invalid on the grounds of non-compliance with section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 ('the Act'). She is contending that there was no handing over of Monalisa Bangaza to the deceased's family and that the lobola negotiations were conducted by emissaries who were not members of her family.

[2] On the contrary, Monalisa Bangaza is contending that she was lawfully married to the deceased and that her marriage had complied with all the requirements for a valid customary marriage as set out in section 3 of the Act.¹ Accordingly, she disputed that there was non-compliance with the provisions of section 3(1)(b) of the Act.

[3] The crisp issue, therefore, is whether the deceased and Ms Bangaza complied with section 3(1)(b) of the Act and concluded a valid marriage, where the Bangaza family did not hand her over to the deceased's family and in circumstances where the emissaries, during lobola negotiations, were not members of the deceased's family.

The parties

[4] The parties shall be referred to simply as Zifikile Kunene and Monalisa Bangaza. The father of Zifikile Kunene, or husband of Monalisa Bangaza, is referred to as the deceased.

Background

[5] Zifikile Kunene, born out of wedlock, is a daughter of the deceased and one Sindiswa Ndzeku, who is also late. Ms Kunene launched these proceedings on an urgent basis. The dispute concerns two issues; the burial rights of the deceased and

¹ Section 3 of the Act sets out the requirements for validity of customary marriages as follows:

'(1) For a customary marriage entered into after the commencement of this Act to be valid—

- (a) the prospective spouses—
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

the validity of the marriage. The question pertaining to burial rights was resolved amicably as the parties agreed to separate the issues. They further agreed to conduct the burial of the deceased jointly. The only issue which remains to be determined by the court concerns the validity of the customary marriage between the deceased and Ms Bangaza.

[6] Regarding the validity of the customary marriage, Ms Kunene had made various contentions in her founding affidavit. In summary, she alleged that she was born out of wedlock by the deceased and her mother, Sindiswa Ndzeku. Her mother passed on during the late 80s. She was then moved from her maternal home to the deceased's family. She thereafter resided with the deceased since the late 80s. They were close to each other. The deceased, according to her, was never married at all during his lifetime. Even with her late mother, the deceased only had an intimate relationship. The deceased, to her knowledge, was only in an intimate relationship with Ms Bangaza.

[7] She was recently informed that the deceased, without informing her, purportedly concluded a customary marriage with Monalisa Bangaza. She viewed such customary marriage between the deceased and Monalisa Bangaza as invalid for reasons that it did not meet the prescripts of the law. She made those conclusions about the invalidity of the customary marriage for these reasons—

- (a) A woman can only enter into a valid customary marriage when the two families (husband and prospective wife) enter into negotiations and agree about lobola, and according to her, the Kunene family and Bangaza family did not engage in such negotiations. None of the Kunene family members was present during the lobola negotiations in respect of the customary marriage between the deceased and Monalisa Bangaza.
- (b) She alleged that the marriage is unknown to the deceased's family.
- (c) She further contended that the law requires that there must be a handing over of the bride to the groom's family. That process, according to her,

must be done by the elders of the Kunene family. This, she contended, did not occur.

- (d) In addition to the above grounds, Ms Kunene contended that there was no celebration of the customary marriage between the deceased and Monalisa Bangaza.

[8] In support of her application, Ms Kunene filed several confirmatory affidavits by some members of the Kunene family and close relatives. Amongst those who filed confirmatory affidavits is Patrick Nzukiso Nkalane. Mr Nkalane made these allegations in his confirmatory affidavit that he visited the deceased. On his visit, the deceased informed him that on 11 November 2022, as Amatolo, they would visit the home of his girlfriend, Monalisa Bangaza. The purpose of the visit would be to pay lobola, which would be followed on 26 November 2022 by a wedding. When he discussed lobola with the deceased, they were all men.

[9] He observed that the deceased was not well and tried to stop him from thinking about marriage. However, the deceased insisted and advised them that he would send Dr Nuku and another man to go and pay lobola for him if they refused. After the aforesaid discussion, they went out and held a meeting in the absence of the deceased. In that meeting, it was agreed that they would not proceed with the payment of lobola on behalf of the deceased because he was mentally disturbed, confused and of unsound mind. In their view, the deceased was not a fit person to conclude a marriage.

[10] Another confirmatory affidavit filed in support of Ms Kunene is by Thando Kunene. According to Thando Kunene, he received a telephone call from Monalisa Bangaza advising him that the utsiki ceremony was going to be performed for her at the Xilinx, the homestead of the deceased. At the time of the telephone discussion with Ms Bangaza, he was in Gauteng. A few days thereafter, he received another call from his wife, Sichumise, advising him that his sheep were dying and that he should return home. He returned, and upon arrival at home, he noticed several people at the deceased's homestead. He was advised that the deceased had a traditional beer ceremony. According to the deceased, he was thanking his ancestors for giving him a

further life, and he was discharged from the hospital. At about 13h30 pm, the deceased called him aside and informed him that he was going to book a bed and breakfast where they would conduct an utsiki ceremony for himself and Monalisa Bangaza. Indeed, at about 17h00, he learned that the deceased had conducted the utsiki customary marriage ceremony and thanksgiving.

[11] Another confirmatory affidavit filed on behalf of the applicant was by Singatha Kunene. She confirmed that on 26 November 2022, there was a traditional ceremony at the deceased's homestead. The deceased tendered an apology to her for not timeously advising that he had sent people to pay lobola on his behalf. She asked the deceased for the names of the emissaries. The deceased advised her that he sent Dr Nuku and Mr Mkhokeli Bovungana. According to her, this was strange because both names were not from their family. The deceased had also informed him that he was conducting a utsiki ceremony. He was referring to the traditional beer ceremony as utsiki. This witness disputed that the aforesaid utsiki ceremony was in accordance with the tradition of their family.

[12] Another witness who filed a confirmatory affidavit in support of Ms Kunene was Ntombenkosi Vivian Dinizulu. She confirmed that on 26 November 2022, there was a traditional beer ceremony at the Kunene family. She was informed by one Nothobela Kunene that the deceased was performing a utsiki ceremony, although the deceased never confirmed to her.

[13] She saw Monalisa Bangaza being dressed as a newlywed woman, although she had no further details.

[14] It bears mentioning that Ms Kunene and all her witnesses confirmed that the deceased and Monalisa Bangaza were in an intimate relationship for a very long time. They all dispute that the deceased was married to Monalisa Bangaza. They contended that the customary marriage, if any, was invalid for reasons that the Kunene family was not involved in the negotiations and that there was no handing over of Monalisa Bangaza to their family. According to them, the utsiki ceremony that was performed on 26 November 2022 did not comply with their practice and tradition as a family.

[15] Ms Bangaza contended in her answering affidavit that she was lawfully married to the deceased and that she had entered into a valid customary marriage. In short, Ms Bangaza submitted that the deceased was initially her boyfriend since 2015. He proposed marriage to her. She consented to the marriage proposal. Both, at the time, were adults above the age of 18 years. They were both of sound and sober minds. None of them were declared mentally unsound, as suggested by Ms Kunene and her witnesses.

[16] Ms Bangaza alleged that she had been in a relationship with the deceased since 2015. She moved to stay with the deceased. During all that time, she would visit the deceased's family. She is well known to the Kunene family. On the other hand, Ms Kunene did not reside with them. She moved to Cape Town, where she was employed by KPMG. She later relocated to the Caribbean Islands, where she works at Caymans Island. Ms Bangaza alleged that Ms Kunene was testifying on matters that were not within her knowledge. She had left for a long time. She further alleged that Ms Kunene was not present when utsiki was performed and during the time of the lobola negotiations.

[17] According to Ms Bangaza, the deceased had proposed marriage to her in 2021. She consented to the proposed marriage. According to her, pursuant to her consent, the deceased informed his family that they had agreed to enter into a customary marriage. She is aware of no objection to the marriage. On 26 September 2022, the deceased sent his delegation to her home. The delegation consisted of Dr Nuku and Mr Bovungana. Lobola negotiations were conducted with her family. On the first day, 26 September 2022, a sum of R10 000 was paid as part of the lobola. The R10 000 was said to be for two cows. On 22 November 2022, a sum of R25 000 was paid, and it was agreed that such an amount, including the first payment, represented ten cows. Both families agreed that she was handed over to the deceased and his family as a wife.

[18] On 26 November 2022, she went to the deceased's family. On that day, according to her, the marriage was celebrated by performing utsiki custom. She averred that a sheep was slaughtered in celebration, and an incense, together with other leaves, were prepared to put a braai meat over as it is their custom. She further

alleged that bile was poured over her head by the deceased's relatives. She was then given a name by one No College Kunene. Her marriage name is Qhayiyalethu. After the celebrations, she lawfully became the wife of the deceased.

[19] In substantiating the allegations of lobola, Ms Bangaza had attached the minutes of the negotiation meeting between her family and the emissaries. The minutes were written in Xhosa. However, an interpretation was given on 26 September 2022. The emissaries of Amatolo (deceased family) were Dr Nuku and Mr Bovungana, and they met with AmaJwara (Bangaza family). During the meeting, the emissaries asked for the customary marriage of Monalisa Bangaza and the deceased. The families agreed that two cows in monetary terms were paid. The cows were valued at R5 000 each. Again on 22 November 2022, the emissaries visited the home of Bangaza and lobola negotiations were concluded. The agreement was that the total lobola would be ten cows, and the emissaries paid an amount of R25 000, which was in addition to the initial R10 000 paid on 26 September 2022. After the lobola negotiations were concluded, Ms Bangaza was then permitted to go ahead with the marriage to the deceased.

[20] Another relevant document is annexure 'A', which is attached to the applicant's founding affidavit. This is a memorial service programme. According to the document, the deceased is said to be leaving behind his wife, Qhayiyalethu, family, children and his nieces and nephews.

The legal framework

[21] The Act defines a customary marriage as a marriage concluded in accordance with customary law. The requirements for a valid customary marriage are set out in section 3(1) of the Act—

- “(1) For a customary marriage entered into after the commencement of this Act to be valid—
- (a) the prospective spouses—
 - (i) must be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
- (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”

[22] In *Mbungela & Another v Mkabi & Others*,² Maya P (as she then was) held—

“[C]ustomary law is defined in s 1 of the Act as “customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”. But s 3(1)(b) does not stipulate the requirements of customary law which must be met to validate a customary marriage. The reason for this is not far to seek. It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned. As this Court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society. Thus the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.”

[23] The contentions of the parties revolve around s 3(1)(b) of the Act; the jurisdictional factors in s 3(1)(a) are not an issue. Subsection (1)(b) only provides that the marriage must be negotiated and entered into or celebrated in accordance with customary law. The subsection does not expressly provide for the handing over of the bride by her family to the family of the bridegroom. It requires negotiations between the two families and consummation of the marriage or celebration thereof. The requirement of the handing over was a customary law requirement before the coming into effect of the Act.³

[24] In *Tsambo v Sengadi*⁴ Molemela J, after analysis of cases and other authorities, held—

‘It is evident from the foregoing passage that strict compliance with rituals has, in the past, been waived. The authorities cited by the respondent, mentioned earlier in the judgment, also attest to that. Clearly, customs have never been static. They develop and change along with the society in which they are practised. 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.’

² *Mbungela & Another v Mkabi & Others* [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) para 17.

³ *Fezile Mlamla v Nomathamsanqa Rubushe and Others* unreported judgment of the Full Bench of the Eastern Cape Division under Case no CA04/2020 delivered by Tokota J para 30.

⁴ *Tsambo v Sengadi* [2020] ZASCA 46 para 18.

[25] In *Shilubana and Others v Ntwamitwa*⁵ the Constitutional Court made the following statement–

“To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.”

[26] In *Nduli v Minister of Home Affairs and Others*⁶ it was held–

“I can find no reason to differ from what was held in *Mankayi* and I agree that the fact that a bride was not formally handed over to the bridegroom’s family or to the bridegroom himself for that matter, is not an impediment to a valid customary marriage and further that by living together as husband and wife, the applicant and deceased had clearly concluded their customary marriage. This also takes into account the evolving nature of customary law and how certain elements are influenced by changing social and economic conditions.”

[27] On these principles, I turn to consider the submissions of the parties.

Discussion

[28] Mr *Mzileni*, counsel for the applicant, had submitted that there is no evidence regarding the handing over of Ms Bangaza to the deceased’s family. He relied, in this regard, on the case of *DRM v DMK*,⁷ where it was held–

“In my view the handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially been handed over to the groom’s people there can be no valid customary marriage. In terms of practice or living customary law, the bride cannot even hand herself over to the groom’s family. She has to be accompanied by the elders or relatives for the handing over to her in-laws.”

[29] However, Mr *Mzileni* was hard-pressed to explain the form and the nature of the handover that is required for compliance with the requirements of a valid

⁵ *Shilubana and Others v Ntwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) para 49.

⁶ *Nduli v Minister of Home Affairs and Others* [2023] ZAKZPHC 24 para 60.

⁷ *DMR v DMK* unreported Judgment of Limpopo Division under Case no 2017/2016.

customary marriage. I find this submission to lack merit, and in my view, his submission finds an answer from *Mbungela and Another v Mkabi and Others*⁸ where Maya P said—

“The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that 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, could yield untenable results.”

[30] I accept the version of Ms Bangaza. She started her intimate relationship with the deceased in 2015. The relationship was an open one, as she would even visit the family of the deceased. Ms Kunene was not living with the deceased and Ms Bangaza. There is overwhelming evidence from both Ms Bangaza and the witnesses of Ms Kunene that the deceased proposed marriage to Ms Bangaza. The allegations of Ms Bangaza that emissaries, Dr Nuku and Mr Bovungana, were sent to her home have not been disputed. The minutes of the lobola negotiations, which form part of the record, could not be denied. The agreement on lobola and payment of that lobola appears *ex-facie* from the minutes. The version of Ms Bangaza could not be controverted. On the other hand, the version of Ms Kunene is unconvincing. She does not have personal knowledge of the events. Her witnesses make unsubstantiated allegations that the deceased might have been of unsound mind. There is no objective evidence in this regard. No medical records were furnished to the court. It seems to me that Ms Kunene’s witnesses were simply not approving of the customary marriage of the deceased and Ms Bangaza. This cannot be a reason to invalidate a marriage.

[31] The contention that Dr Nuku and Mr Bovungana are not family members of the Kunene family stands to be rejected for the simple reason that the representatives need not be members of the family for as long as they speak on behalf of that family and the groom.

[32] All the witnesses agree that on 26 November 2022, there was an utsiki ceremony at the deceased’s family where Ms Bangaza was introduced as the wife of

⁸ Above n 4 para 27.

the deceased and given the name of Qhayiyalethu. The memorial service programme makes it apparent that the deceased has left behind his wife, Qhayiyalethu and children. This objective evidence has been submitted by both Ms Kunene and Ms Bangaza. The only complaint is that the utsiki ritual was not performed in accordance with the Amatolo tradition. There was no evidence regarding the Amatolo tradition on utsiki. My view is that compliance with such rituals is not a requirement in terms of the Act, and therefore, even if utsiki was not in terms of Amatolo's custom, that would not invalidate the marriage. The fact of the matter, in my view, is that the marriage was celebrated on 26 November 2022.

[33] The applicant, Ms Kunene, does not know all of these events for the reason that she was not present. She was in the Caribbean Islands, and she cannot dispute the allegations of Ms Bangaza and her witnesses. Another aspect which I must comment on concerns the allegations that the deceased was not mentally sound when he concluded the customary marriage.

[34] I find no merit in the allegation concerning the mental status of the deceased for the simple reason that the deceased, himself, confirmed to various members of his family that he was paying lobola for Ms Bangaza. He set the dates for utsiki himself. There is not even a medical report which suggests that the deceased was not mentally sound when he concluded the customary marriage. On the contrary, the evidence is overwhelming that he intended, at all times, to conclude the customary marriage with Ms Bangaza. He paid a whopping amount of R35 000 in total as lobola. He informed the members of his family that if they refused to negotiate lobola on his behalf, he would send Dr Nuku and Mr Bovungana. The family was always aware that Dr Nuku and Mr Bovungana would be family representatives in their absence.

[35] The celebration of the marriage did occur, and it followed a symbolic handing over of Ms Bangaza, which had taken place pursuant to the conclusion of the lobola negotiations on 22 November 2022.

[36] In *Mbungela & Another v Mkabi & Others*, Maya P summarised the position as follows—

“The question whether non-observance of the bridal transfer ceremony invalidates a customary marriage has been decisively answered by our courts. In *Mabuza v Mbatha*, the court considered whether non-compliance with the siSwati custom of bridal transfer, ukumekeza, invalidated a customary marriage. The court held”

“There is no doubt that ukumekeza, like so many other customs, has somehow evolved so much that it is probably practices differently than it was centuries ago As Professor De Villiers testified, it is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.

Further support for the view that African customary law has evolved and was always flexible in application is to be found in T W Bennett *A Sourcebook of African Customary Law for Southern Africa*. Professor Bennett has quire forcefully argued (at 194):”

“In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man’s second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters [because of a pregnancy or elopement].”

[37] I must add that, in terms of the provisions of the Act, the handing over of a bride in a customary marriage has not been formally set out as a requirement. The handing over, in my view, is a mere formality which serves as one of the evidential materials for confirmation that a customary marriage was indeed concluded. Handing over should never be elevated to a level of a statutory requirement. Customary law is a living law of the people, and it does not incorporate inflexible rules which are cast in stone. The temptation to infuse inflexible rules on customary law principles would be contrary to the living of the people and their ever-changing circumstances. I do find that handing over of a bride may always be condoned if other requirements set out for the validity of a customary marriage have been met. One should also bear in mind that the envisaged ceremonial handing over in a customary marriage is not akin to the offloading of a cement bag from a truck and handed to a builder.

[38] In my view, the envisaged handover could take any form for as long as the final effect is to ensure that both the bridal and groom families have been made reasonably

aware that the parties have concluded a customary marriage. It would serve no purpose to deny recognition of a customary marriage of two adult consenting parties based on demanding strict adherence to some form of rituals and practices. The day has come for an acceptance that a mere symbolic or constructive delivery of the bride is sufficient for confirming that a customary marriage was concluded. For as long as the bride's family is aware that their daughter has married in terms of customary law and raised no objections, there should be no demand for further compliance with rituals such as handing over. Constructive delivery would have taken place in circumstances where the groom's family is also aware that their son is married. Their objections would be meaningless in circumstances where the spousal consent has been granted, and the marriage has been negotiated and celebrated, as is the case here. The decision in the *DRM v DMK*⁹ and other similar cases had sought to overburden the principles of customary law, which is a living law, and I, therefore, disagree with what was set out in those cases. The *Mbungela and Another v Mkabi and Others* judgment settled the principles of customary law as a living law of the people.

Findings

[39] Given the overwhelming evidence before the court, I find no reason to differ from what was held in *Mbungela and Another v Mkabi & Others*, and many other cases that the fact that a bride was not formally handed over to the bridegroom's family or the bridegroom himself for that matter, is not an impediment to a valid customary marriage and further that by living together as husband and wife, Ms Bangaza and the deceased had concluded their customary marriage. The deceased and Ms Bangaza were above the age of 18 years. They consented to be married to each other in terms of customary law. Lobola negotiations were conducted, and utsiki, as a form of welcoming Ms Bangaza, was performed, albeit unsatisfactorily to the deceased's family. Ms Bangaza was given a marital name. All these factors, considered together, conclusively prove that a valid customary marriage was concluded between the deceased and Ms Bangaza.

⁹ *DRM v DMK supra*

Costs

[40] The general rule is that costs should follow the results. The court may depart from the general rule in the exercise of its discretion. I have considered the fact that Ms Kunene is the daughter of the deceased. She was not present when the customary marriage was concluded. She might have been influenced by some family members who were aggrieved by the marriage, as it appears from the confirmatory affidavits. In the confirmatory affidavits, some members of the family had sought to suggest that the deceased was mentally unsound when he concluded the customary marriage. All these, taken together, may have led Ms Kunene to challenge the marriage of Ms Bangaza. I will, therefore, not award costs against Ms Kunene in these circumstances.

Conclusion

[41] In the result, the following order is made—

- (1) The application is dismissed;
- (2) Each party shall bear its own costs.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION MTHATHA

Appearances

Counsel for the Applicant : *Adv Mzileni*

Attorneys for the Applicant : *Mdledle-Malefane & Associates*
Mthatha

Counsel for the First Respondent : *Adv Sintwa*

Attorneys for the First Respondent : *T Qina & Sons Attorneys*
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