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THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 2358 / 2021

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: NO
REVISED.
21 October 2022

In the matter between:

BONGIWE PRETTY MALOPE	**PLAINTIFF**
And	
MINISTER OF HOME AFFAIRS	**FIRST DEFENDANT**
THE MASTER OF THE HIGH COURT	**SECOND DEFENDANT**
JEANIE ERASMUS (EXECUTOR OF THE ESTATE LATE MATSANE WELCOME THABO)	**THIRD DEFENDANT**
YVETTE BATHABILE MATSANE	**FOURTH DEFENDANT**
ASANDE BRANDON MATSANE	**FIFTH DEFENDANT**

BATHABILE CHANTEL MATSANE **SIXTH DEFENDANT**

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 14H00 on 21 October 2022.

[1] **Introduction**.

Facts of this case are largely undisputed. It is the legal interpretation thereof that is in dispute. Evidence led combines recent and not so recent history in the lives of the man and the woman he chose to be his wife. The following appears from a distant history. Two young hearts were bound together by love and romance. They agreed to take their enchantment to the next level so they could be a husband and a wife. Elders from the groom's family were sent to negotiate and pay *lobola* for the bride. A big day of traditional celebrations was set to be some six weeks later. As fate would have it, this was not to be. The big day found the bride lying paralysed in hospital. It was just two weeks before the big day that the groom was driving his bride at night, to Kanyamazane, where he had been renting a compound; that they were involved in a car accident.

[2] When she was discharged from hospital, she was wheelchair bound, a position that still subsists. The two proceeded to live together as a husband and wife, without the big day celebrations they had envisaged. Life turned to be different to what they had anticipated as lovers or as a couple. About three years later, they separated and even stopped cohabiting. That is how far the distant history goes. In the not so distant history, fast-forwarded to 10 years later, the groom died. That was on 19 March 2021. The Third to the Sixth Defendant (jointly referred to as the Defendants)

refuse to recognise the lady whose *lobola* was paid by the deceased in 2007 (the Plaintiff), as his wife.

[3] It is for the aforementioned reason that the Plaintiff launched an application, later converted into this action through a court order, seeking the order in the following terms:

a) That the customary marriage between the Plaintiff and the deceased, entered into on 04 November 2007 be declared valid;

b) That the First Defendant be directed to register the customary marriage;

c) The Second and the Third Defendants be directed to recognise the Plaintiff as the surviving spouse of the deceased;

d) Costs of suit in the event of the same being defended.

The action is opposed by the Defendants. The First and the Second Defendants do not oppose the Plaintiff's action.

[4] Gleaning from the above, issues to be determined are therefore limited to the following: Was there a valid marriage concluded between the Plaintiff and the deceased? If there was, did the said marriage subsist at the time of the deceased's demise. This would also entail a finding on how a traditional marriage is terminated and whether the same was done in this case.

[5] Three witnesses testified for the Plaintiff including the Plaintiff herself. The Third Defendant was the sole witness for the Defendants. Following is the summary of facts from the evidence that was led.

[6] **Case for the Plaintiff.**

Bongiwe Pretty Malope: She is the Plaintiff in this case. She is from Pedi tribe. She testified that she fell in love with Welcome Thabo Matsane (the deceased) in 2006. At that stage she was 26 and he was 32 years old. The deceased sent a delegation

of elders from his family arriving at her home on 04 November 2007, in order to negotiate and pay *lobola* for her. The delegation from her family's side to receive the Matsane delegates comprised of her neighbour named Isaac Simelane and her grandparents Sarah and Mbanjwa Gininda. When the Matsane delegation was there, her mother called her in to confirm if she knew them and she confirmed. The Matsane delegation asked to leave with her but her mother declined saying she would follow to their family the next day. This was to let her remain attending to the Malope visitors who were there for her *lobola* negotiations.

[7] As promised, she was taken to Matsane family on 05 November 2007. Once there, the deceased's brother, Selby Matsane introduced her to members of the Matsane family. She also testified that she and the deceased had planned a big celebration on 16 December 2007 but this did not materialise as she was involved in a car accident on 01 December 2007. She was in the company of the deceased who was the driver that night. He was however not injured. She was paralysed and lost her mobility since then. She was admitted in hospital for 13 weeks and when she was discharged, she was wheelchair bound.

[8] Prior to the car accident, she used to visit the deceased at his place. They only started staying together as a husband and a wife from June 2008 following her discharge from hospital. In August 2008, she moved to D[....] because she had secured a new job as a nurse there. The two however remained committed to their marriage as in December 2009, she left her job and came back to their marital home in W[....]. They continued staying together until 2011 when the deceased moved out to go and reside in B[....], in a house that he bought in 2009 through an auction. That marked the beginning of their separation, never to be together as a family again. She confirmed that during their years of separation, she had a lover named Cavallo. Out of this relationship, a child was born. That was in 2014. She however never stayed together with Cavallo. She was never married to anyone else except the deceased.

[9] As introduction to the cross examination, lights were dimmed and the court was treated to a moment of watching a powerful and motivating documentary called My First. This is an SABC 1 production which is also accessible on YouTube on this website: https://www.youtube.com/watch?v=1JutqA4xSaQ. It was aired by the SABC

on 18 December 2017. It focused on the Plaintiff as a person overcoming her disability and resolving to open a private clinic against all odds. People close to her like her mother and friends were interviewed talking about the Plaintiff's upbringing, her strengths and her strong will.

[10] Only few snippets of the documentary were relevant for this trial. In the documentary, the Plaintiff avers that she was traditionally married and she refers to the person she was married to, as her ex-husband. The Plaintiff's mother confirms in this documentary that *lobola* was paid for her. She however adds that she had planned to take the Plaintiff to her in-laws on the 16th December 2007. This however did not happen as she was involved in a car accident. Lastly, the Plaintiff states in the documentary, just as she testified, that after she was discharged, she stayed with her husband in W[....] and that things did not work out between her and the husband. She finally called her mother to say she will be leaving her marital home in W[....], which she eventually did.

[11] In cross examination, the Plaintiff confirmed the documentary as reflecting what was recorded and aired by the SABC. She was steadfast in her version to the effect that she was introduced to her in-laws on 05 November 2007 and that there was no need for her to be handed over by her mother as she said she planned to do on 16 December 2007 in the documentary. She also indicated that she referred to her marriage in the past tense although she was only separated from her husband as she had moved on and she was not going to be able to prove the existence of that marriage.

[12] She was further referred to a document that she completed in applying for home loan where she had indicated her marital status as single.[1] She confirmed this to have been a document processed when she applied for home loan finance and that she had to write that she was single as she would not have been able to produce a marriage certificate if she had indicated that she was married and they asked for proof. This was because their marriage was not registered with the Department of Home Affairs. She gave the same explanation on why her status in the companies where she served as a director is reflected as being single. She also

[1] See p. 163 of the Defendants' paginated bundle.

confirmed that she is the one who walked out of the marriage when she left the marital home. She did not attend the deceased's funeral because her in-laws did not come to collect her as they had promised.

[13] Of some great importance is a document presented to the plaintiff by the Defendant's counsel which happened to be the deceased's will. The will is not disputed by any of the parties. In fact, it is because of the will that the Third Defendant finds herself with the requisite *locus standi* as she had been nominated by the beneficiaries listed in it, including the Plaintiff. It is apposite though to indicate at this stage that the Plaintiff denied having nominated the Third Defendant as the executor of the deceased's estate. According to her, she was asked by the Third Defendant to simply sign a document and to write that she was an ex-wife.

[14] In the opening paragraphs of the deceased's will, dated 13 November 2009 which remains valid to this day, the deceased stated as follows:

> "I Welcome Thabo Matsane (Identity number [....]), declare this to be my Last Will and Testament, and I hereby revoke, cancel and annul all wills, codicils or other testamentary dispositions previously made by me.
>
> 1. It is my wish and desire that if practicable my body shall be buried.
>
> 2. I bequeath my estate as follows:
>
>   a) 25% (Twenty five percent) to my wife Bongiwe Pretty Malope (ID [....])…"

He then proceeded to bequeath the remainder of 75% to other persons including his children and his parents.

[15] The purpose of introducing the will was to show that the Third Defendant, who was defending the action on behalf of the Fourth to the Sixth Defendants, was willing to release 25% share of the estate to her, but that should be it. Another reason for referring to the will was to introduce evidence by the Third Defendant to the effect that at the time of his demise, the deceased did not consider himself married and

that he intended to amend the will to exclude Plaintiff. This piece of evidence was ruled to be inadmissible by the court, as it constitutes hearsay evidence. Although the reasons were given at the time the ruling was made, they will be further ventilated later in this judgment.[2]

[16] Selby Matsane: He is the deceased's elder brother and a teacher by profession. He referred to the Plaintiff as his younger brother's wife. He and the deceased were of Sotho tribe. He gave evidence in Tsonga because his grandmother was Tsonga and following the death of his grandfather, she grew up the whole family observing the Tsonga culture and practices. He testified that he led the delegation that went to negotiate and pay *lobola* for the Plaintiff on 04 November 2007 at the Malope family; having been sent by the deceased. Other members of the delegation that went with him are Liza Phaswane, Thesina Bangale, Idina Matsane and Gideon Mathebula.

[17] Upon their arrival, they waited outside the gate in line with the cultural practices, so they could be invited in, which is a sign of being welcomed. Someone from the host family came and invited them in. Once inside and after they greeted and introduced themselves, they then indicated that they were there because they saw a beautiful woman. The Malope family wanted to know if the visitors knew the said woman and they brought in three women for them to identify Bongiwe, which they did. They proceeded to hand over the gifts they had brought along being, a blanket, a case of beer, soft drinks and a 750 ml bottle of Viceroy brandy. They were charged 15 cows for *lobola*, with each cow valued R1 000.00. They paid R6 000.00 and said they would come back to pay the balance of R9 000.00. He confirmed that the document on page eight of the paginated bundle was the *lobola* letter he signed on that day. It was written in Swati by Isaac who was part of the Malope delegation.

[18] He testified further that he and his delegation requested to take their bride with now that they married her. The Malope family however did not accede to this saying, she would be brought to the Matsane family the following day and they agreed. As promised, the bride was brought following day. It was the deceased who went to fetch her in his car. She was in the company of her aunt and her two sisters who

[2] See paras 27-36 below

handed her over to Matsane family. He testified that he then took over and presented the Plaintiff to the Matsane family as *makoti*. There were ululations and celebrations. There were many people there and plenty of food to eat as they celebrated the arrival of *makoti*.

[19] He agreed that the signature on the *lobola* letter looked different to his signature appended to an affidavit allegedly made by him in 2021.[3] The signatures in both documents were however his. The difference was due to time passage between 2007 and 2021 and that when he signed the 2021 document, he did not look at the *lobola* document to make sure that the signatures would look similar. He denied that he and his brother Mandla were the driving force behind this action or that they were angry because the deceased did not include them in his will. He indicated that he was financially stable as he worked as a teacher and Mandla was a successful businessman.

[20] Thesina Busisiwe Matsane: She was part of the delegation that went to marry the Plaintiff on 04 November 2007 at Kanyamazane. The deceased was her brother's son. Other people who went with her are Selby Matsane, Idina Matsane, Gideon Mathebula and a certain Phaswane. They were sent by the deceased, Welcome Trompies Matsane, who also gave them cash for *lobola*, a blanket, a beer crate, another crate soft drinks, a hat and a jacket to exchange as gifts. Her evidence regarding the *lobola* negotiations is identical to that of Selby Matsane and as such, need not be duplicated here.

[21] She was confronted with the fact that her signature on the *lobola* letter looked different to a signature she appended to an affidavit in 2021.[4] The one on the *lobola* letter read Mpangane and the one made in 2021, Matsane. She confirmed that both were her signatures. At the time she signed the lobola letter, she was married to Mpangane who had already paid *lobola* for her. She however also signs as Matsane as she never changed her surname in the identity book after marrying to Mpangane. It was a common practice for her to interchange signatures to this day because when

[3] See pages 8 & 87 of the paginated bundle.
[4] See pages 8 & 89 of the paginated bundle.

called as Mrs. Mpangane at church, she would sign as Mpangane while she also signs other documents as Matsane.

[22] At the time she gave evidence, she was a 67 years old pensioner who was a housewife throughout and was not employed at any stage of her life. She knew the Plaintiff prior to 04 November 2007. She was there at the Matsane family home when on 05 November 2007, the deceased brought the Plaintiff and introduced her as *makoti*. There was a plan to have a celebration in which the community would be informed that the deceased was now a married man. This did not take place as on that date, the Plaintiff was hospitalised following a car accident. According to her understanding of the custom, once *lobola* was paid for a woman, albeit just a portion thereof, she becomes a wife immediately.

[23] With this evidence, case for the Plaintiff was closed. The Defendants then applied for absolution from the instance to be granted arguing that there was no case made out for them to answer. This application was opposed by the Plaintiff. The court refused this application holding that there was a case for the Defendants to answer. Although the reasons were given at the time the ruling was made, they are further ventilated later in this judgment.[5]

[24] **Case for the Defendant.**

Jeanie Erasmus: She is the executor in the deceased estate having been nominated as such by the beneficiaries. According to the deceased's will, the beneficiaries are the Plaintiff, the children of the deceased or their parents acting on behalf of the minor children. She is also the Third Defendant in this case. She was the deceased's financial adviser since 2009. Her evidence focused mainly on her role as the executor and the meetings and/or talks she had with various people regarding the estate which is not directly linked to issues at hand. Eventually, she testified that the Plaintiff did not want to have anything to do with the claim from the deceased's estate. She (the witness) is the one who persuaded her to take part in the inheritance and she agreed. When she talked to her, the Plaintiff presented herself

[5] See paras 37-40 below

as an ex-fiancé of the deceased. According to her records, the deceased was not married for the whole duration that she dealt with him.

[25] She worked for First National Bank as a financial advisor at the time she met the deceased for the first time. When he brought to her attention that he wanted a will drafted, she referred him to the legal department for that purpose. She only saw the will about a month after it was drafted and that it made reference to a wife. Despite the ruling regarding hearsay evidence, she did testify to the effect that the deceased told her he was not married and that he intended to have the will amended to remove the Plaintiff as one of the beneficiaries. When questioned about her understanding of the words “my wife” contained in the will, she indicated that many people do refer to others as wives while not married to them.

[26] With this evidence, case for the defendant was closed. Heads of arguments were made available by both parties in which the Plaintiff submitted that the court should find in her favour. The Defendants on the other hand submitted that the claim by the Plaintiff should be dismissed.

[27] **The ruling against the hearsay evidence.**

As indicated above, the Defendants sought to introduce hearsay evidence through cross examination. The urge to lead this evidence showed up again when the Third Defendant gave evidence as she argued that disallowing her to testify on conversations she had with the deceased would leave her case with no evidence to present at all.

[28] The application to lead hearsay evidence was premised on the Law of Evidence Amendment Act 45 of 1988. The Defendants argued that since the deceased was no more, it would be fair to hear what his voice would have been in this trial as his views were expressed to the Third Defendant. It was therefore submitted that the court should provisionally admit hearsay evidence. This application was opposed by the Plaintiff who argued that it would be unfair to have hearsay evidence admitted on issues that were decisive whereas the Plaintiff is deprived of a right to cross examine such a witness as he is no more.

[29] Section 3 of the Law of Evidence Amendment Act 45 of 1988 provides,

"3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the Court, having regard to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the Court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

> (2) The provisions of ss (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
>
> (3) Hearsay evidence may be provisionally admitted in terms of ss (1)(b) if the Court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of para (a) of ss (1) or is admitted by the Court in terms of para (c) of that subsection."

[30] It is clear from section 3(3) of Act 45 of 1988 that the only time a Court may admit hearsay evidence provisionally is when it is informed that the person upon whose credibility the probative value of such evidence depends, will himself/herself testify in such proceedings at a later stage. It is also clear that when evidence is provisionally admitted and the said person does not later testify in such proceedings, the hearsay evidence must be left out of account. When it is known that such a witness shall not testify because he died, there is therefore no room for provisional admission of such evidence. The only room left open would therefore be to admit it in terms of section 3(1)(a) or 3(1)(c) of this Act. Section 3(1)(a) which provides for evidence admission by agreement between the parties, is also out of choice as the Plaintiff is opposed to this application. This leaves the Defendants confined to section 3(1)(c) in their application.

[31] The seven factors listed under section 3(1)(c) of Act 45 of 1988 need to be evaluated as a whole as opposed to singling out just one of them for purpose of determining the admissibility of hearsay evidence. As for the nature oif proceedings, this is a civil trial and the reason for the application is because the person upon whose credibility the probative value of such evidence depends has died. This leaves the court to consider only a limited number of factors, being the purpose for which the evidence is tendered, the probative value of the evidence, any prejudice to

a party which the admission of such evidence might entail and any other factor which should in the opinion of the Court be taken into account.[6]

[32] As for the purpose for which the evidence is tendered and the probative value of the evidence, Schutz JA said the following in *S v Ramavhale*[7],

> "I do not wish to enter into the debate whether s 3(1)(*c*) should or should not 'be lightly applied,' but I would agree with the remarks in this and other cases, the effect of which is that a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so."

I would add to this that a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in finding for any of the parties in a civil claim.

[33] As for the prejudice the Plaintiff may suffer with the admission of such evidence, it appears to be enormous. The kind of evidence sought to be led appears to give a direct response to the issues being tried in this matter. The Plaintiff has a right to cross examine the witnesses whose evidence is determinative on the outcome of the trial. In considering the purpose for which the evidence is tendered, the court was of a view that the provision above was meant to allow evidence necessary to complete a puzzle for the court to have a clear background picture, provided the same is not determinative of the trial outcome.

[34] Lastly, any other factor which should in the opinion of the Court be taken into account. Given the issues in dispute and the kind of evidence sought to be led, it is my view that the court should also consider whether such evidence would be relevant and necessary. Two aspects come from the submissions made by the Defendants: The first is what the deceased considered his marital status to be as

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[6] See sec 3(1)(c)(iii), (iv). (vi) & (vii) of Act 45 of 1988.
[7] 1996 (1) SACR 639 (A) at 649C-D

told to the Third Defendant. The second is what the deceased intended to do regarding his will.

[35] I am of the view that this hearsay evidence would not take the case for the Defendants any further because in order to determine if the deceased was married, there would be very little weight attached to what he believed his status to be, even if he was to be alive and give evidence to that effect. What is relevant is the facts, in other words, whether what happened depicts a status of being married in terms of the law. This has nothing to do with one's conviction or intention.

[36] If the deceased was alive and was to defend this action, the court would be interested in hearing from him the facts around the *lobola* negotiations for the Plaintiff and evidence about him staying with the Plaintiff as a family. Evidence on what he planned to do in his will or what he considered himself to be would be as irrelevant as what the Plaintiff considered herself to be her status when she was interviewed by the SABC in 2017 or when she applied for a home loan. For all the reasons stated above, the court declined to admit hearsay evidence. To the extent that hearsay evidence was led irrespective of this ruling, the same shall be excluded and not considered as evidence tendered.

[37] <u>Absolution from the instance.</u>

The principles that apply when considering if an absolution from the instance should be granted, at the close of the plaintiff's case were laid down in *Claude Neon Lights (SA) Ltd v Daniel*[8] where Miller AJA said the following,

> "It is to that question that I now turn, bearing in mind that, when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter*,

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[8] 1976 (4) SA 403 (A) at 409G-H.

> 1917 T.P.D. 170 at p. 173; *Ruto Flour Mills (Pty.) Ltd*. v *Adelson* (2), 1958 (4) SA 307 (T)).”

[38] These principles were restated in *Gordon Lloyd Page & Associates v Rivera and Another*[9] where the Supreme Court of Appeal (the SCA) Harms JA said,

> “This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; Schmidt *Bewysreg* 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (*Gascoyne (loc cit*)) - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.”

[39] At this stage of proceedings, credibility plays no role at all, unless the credibility of the witnesses for the Plaintiff was hopelessly destroyed, it may warrant the granting of the order absolving the Defendants. But this was not the argument before the court. The argument was more about the Plaintiff having made no case for the Defendants to answer. Given the totality of the evidence presented by the Plaintiff of which the witnesses that the Defendant undertook to call could not counter as they were not there in 2007 or could not have participated; the court was of the view that there was evidence upon which a court, applying its mind reasonably to such

[9] 2001 (1) SA 88 (SCA) at 92G-93A.

evidence, could or might (not should, nor ought to) find for the plaintiff. For that reason, the application was refused.

[40] Any reliance by the Defendants on *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie & Others*[10] regarding the technique generally employed by courts in resolving factual disputes was misplaced as at this stage of proceedings the court only had one version being that of the Plaintiff. Any version that was put by the Defendants to the Plaintiff's witnesses cannot count as evidence as the same was not made under oath and tested through cross examination. It would therefore be premature to apply the said techniques for purposes of absolution from the instance.

[41] **Evidence evaluation.**

Although the factual disposition presented by the Plaintiff is disputed by the Defendants, they offer no alternative version as being the accurate facts. The simple reason is that the only witness who testified for the Defendants was not there when the alleged incidence pertaining to *lobola* negotiations took place. In fact, she only met the deceased in her professional capacity as a financial advisor who worked for First National Bank where the deceased was a client. At the time she met him in 2009, the alleged *lobola* negotiations had long passed – in 2007. It is for this reason that I hold a view that the factual disposition presented by the Plaintiff stands undisputed. The Defendants could not produce a witness to counter the Plaintiff's version.

[42] The court is conscious of the fact that failure by the opponent to present a counter version does not automatically translate to the one presented being accepted. One can hope, as the Defendants appear to have done *in casu*, that the only version presented would be self-contradictory to the extent that it would be found to be improbable and not worth of being accepted as being probable on the balance of probabilities. This is more like hoping for the Plaintiff to score own goals. A number of issues were raised by the Defendants during the trial in an attempt to expose the improbabilities in the Plaintiff's version which I will deal with.

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[10] 2003 (1) SA 11 (SCA) at para 5.

[43] Suggestions that Selby Matsane could be pushing for this litigation because he was left out of a will by his brother is speculative, lacking the basis and not supported by facts. He was justified to be offended by the accusations as nobody testified that he was pushing for the litigation. The Plaintiff herself denied this. I also do not see how this claim, if true would stand to benefit him even if the Plaintiff is successful. Equally, there is nothing wrong in pushing for the litigation, as long as in so doing it is based on the truth and meant to acquire justice.

[44] Perhaps the issues that stand out deserving some analysis by the court pertain to the fact that Selby Matsane did not mention that the jacket and the hat were presented by the Matsane delegation as gifts to Malope family, something that was mentioned in the *lobola* letter. Another issue is about the signatures of the two witnesses who testified for the Plaintiff who are alleged to have signed the *lobola* letter, which differ from the signatures they appended to their affidavits in 2021. The last issue would be that the Malope delegation did not sign the *lobola* letter.

[45] On the first issues, Selby Matsane indicated that he was testifying only on the things he could remember and things of value in respect to *lobola* negotiations. At the time he gave evidence, it was almost 15 years from the date of *lobola* negotiations. Forgetfulness comes naturally even with the very genius of this earth, with the passage of time. For him to remember every detail of what was exchanged could even suggest a recently cooked or fabricated story.

[46] The court reaches the same conclusion when it comes to the signatures that appear different when compared to those appended some 15 years later. After all, the two witnesses acknowledged that different as they appear to be, the signatures were appended by them. Selby Matsane indicated that when he signed in 2021, he did not first look at the document he had signed in 2007 so he could sign the same way. His signature has been evolving with passage of time. Thesina Busisiwe Matsane also indicated that she sometimes signs using the marital name (like when she is addressed as Mrs. Mpangane at church) while she also uses her maiden name. For a woman who was at the Malope family to negotiate *lobola* and marry a woman for her brother’s son, presenting herself as Mrs. Mpangane should not come as a surprise. The explanation makes sense in my view.

[47] If this version is not acceptable, there would just be no logical explanation regarding the different signatures and the omission of the other gifts in the evidence tendered by Selby Matsane. That is, if the *lobola* letter was a recently fabricated document, one would have expected the signatures therein to be identical to those appended in the 2021 affidavits since both documents would have been manufactured post the deceased's demise in 2021, by the very witnesses. Again, Selby Matsane would have no reason to forget that the gifts exchanged included a jacket and a hat as these would both have started existing in his mind in 2021.

[48] Lastly, the *lobola* letter was criticised for having not been signed by the Malope delegates. An explanation proffered by Selby Matsane was the possibility that as elderly couple, the old man and the old woman might have been illiterate. He however believed that the people who were bound to sign were the visitors. This aspect brings up the question as to who is supposed to sign a *lobola* letter between the bride and the groom's family. Similarly, it may be asked as to whether a *lobola* letter has to be signed at all or it suffices to mention the names of those present. As if the conundrum is not complicated enough, one may also ask if a *lobola* letter is even necessary or a prerequisite in completion of a customary marriage.

[49] The answer to all the above is that there is no hard and fast rule. Customary law is not rigid hence the statute does not attempt to define it when it comes to a marriage celebrated in terms of custom. It is however 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.[11] While its production would normally solidify the assertion of *lobola* negotiations, a *lobola* letter is not even a requirement for concluding a valid customary marriage. The explanation given by Selby Matsane cannot be rejected given that his was not to explain himself on anything done that was not supposed to be done in the first place.

[50] The Plaintiff's version gets more probable when one compares it with the deceased's will which was discovered by the Defendants and the SABC documentary referred to above as these were done without any of the parties

[11] See *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) para 17.

envisaging this litigation. When the deceased wrote a will in 2009, he bequeathed 25% of his assets to a woman he described as his wife. It therefore cannot be true that the deceased always presented himself to the Third Defendant as a single man in all his dealings with her, or at least from the records she had access to pertaining to him. This is because she claims to have been the one who referred the deceased to the legal department for the drafting of the will, which she had sight of, about a month later. It means that the Third Defendant is aware that when the deceased presented himself for will drafting, he presented himself as a married man.

[51] Denying this plain truth contained in writing in her hands must be for other reasons not disclosed to the court. The court is mindful though that naturally, executors benefit more when the estate is huge and when it is not, the benefits would also be less as the fees charged are usually calculated on a percentage of the total value of the estate. A successful claim by the Plaintiff has a potential to slash the deceased's estate by up to half, depending on the value of her own assets.

[52] If in 2009, away from the view of the Plaintiff, the deceased believed himself to be married to her, the question would then be how else would he be married if not through the 2007 *lobola* negotiations that the Plaintiff testified about as there appears to be no other *lobola* payment except that one. The Third Defendant should have made a choice on whether she was happy with the validity of the will, in which case, she should accept the contents thereof, or else challenge it for containing what she believed not to be in line with how the deceased presented himself to her. Obviously, she could find herself with no *locus standi* with the later choice. However, standing by the will and ignore the utterances therein can find her talking in forked tongue.

[53] The SABC documentary presented in this trial by the Defendants, does not only contain the piece of evidence that they wanted on trial record, to wit, that the Plaintiff's mother intended to hand her over to her in-laws on 16 December 2007, but it also contained other factors that corroborate the existence of a marriage between the Plaintiff and the deceased. The Defendants however want the court to believe what the mother said in the documentary even though she was not called as a witness. The court has no problem accepting that she said what is in the

documentary as the Plaintiff confirmed that she said so and the recording was not manipulated with.

[54] The court is mindful of the fact that the documentary was not under oath and it is not evidence before it. The court is also mindful that in that recording, the Plaintiff's mother averred that *lobola* was paid for the Plaintiff around the same time that the Plaintiff testified that the Matsane delegation came for *lobola* negotiations. The Plaintiff's mother further averred that the Plaintiff went to stay with her husband in W[....] and that at some stage she called her to tell her that she would be leaving W[....] as things were not working out in the marriage.

[55] In the same documentary, it is clear that the Plaintiff regarded herself as having been married at some point in her life and that such marriage was no more. This is because she kept on referring to herself as an ex-wife. As much as one does not become a wife or a husband by merely referring to himself/herself as such, the same goes to being an ex-wife or ex-husband. I will deal with the dissolution of a customary marriage when dealing with the legal provision hereunder.[12]

[56] After considering all the discrepancies and possible contradictions highlighted in the Plaintiff's case, the court is unable to see the Plaintiff's version as being improbable. Her version remains the only version presented regarding the *lobola* negotiations that took place in 2007. The court also finds that the credibility of the Plaintiff's witnesses remained intact throughout the gruelling cross examination by the Defendants' counsel. The court accepts that a portion of *lobola* was paid for the Plaintiff and that the following day she was accompanied by her family members and handed over to her in laws.

[57] While it is possible that the Plaintiff's mother may have planned to hand her over on the 16 December 2007, the court accepts that the Plaintiff was handed over on 05 November 2007 meaning any handing over would have been just ceremonial. After all, it is not uncommon for traditional marriages to be celebrated after the parties are already residing together after *lobola* payment and handing over have been done. For the reason that it remains possible that the Plaintiff's mother may

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[12] See para 66-69 below.

have planned to still hand her over at a function that did not happen, I will deal with the aspect of not handing over the bride under the law. The fact that the version is accepted as being accurate does not mean the claims stand to be allowed as the next hurdle is whether legal interpretation favours the Plaintiff or the Defendants.

[58] **The law.**

Relevant parts of the Recognition of Customary Marriages Act, no. 120 of 1998 (the Act) read,

"3. Requirements for validity of customary marriages.—(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*) <u>the marriage must be negotiated and entered into or celebrated in accordance with customary law</u>.

4. Registration of customary marriages.—(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(9) <u>Failure to register a customary marriage does not affect the validity of that marriage</u>.

8. Dissolution of customary marriages.—(1) <u>A customary marriage may only be dissolved by a court by a decree of divorce</u> on the ground of the irretrievable breakdown of the marriage.

…” [Own emphasis].

(i) While the law stipulates that a customary marriage must be negotiated and celebrated in accordance with customary law, no mention on what the said customary law entails. This is because it is established that indigenous law is a dynamic, flexible system, which continuously evolves within the context of the community in which it operates.[13] It is not a fixed body of classified rules. For that reason, in applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.[14]

[59] The requirements for a valid customary marriage have been subject of interpretation by the courts on several occasions. In *Ndlovu v Mokoena and Others,*[15] the court held that the “requirements for valid customary marriage are (1) consensual agreement between two family groups as to two individuals who are to be married and *lobola* to be paid; and (2) transfer of bride by her family group to family of the man. Payment of *lobola* is merely one of essential requirements and not sufficient in absence of other essential requirements. When *lobola* is partly paid but the woman not delivered or living with \the husband, there is no valid customary marriage concluded.”[16]

[60] I am in full agreement with the legal writers, *Maithufi & Bekker*[17] who describe a customary marriage as something which is not an event but a process that comprises a chain of events and that it is not about the bride and groom alone; but

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[13] *Mbungela and Another v Mkabi and Others supra* at fn 11 above. See also *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & others; South African Human Rights Commission & another v President of the Republic of South Africa 2005* (1) SA 580 (CC) paras 81 and 86-87 & 153.
[14] *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at para 51.
[15] 2009 (5) SA 400 (GNP).
[16] See also *Fanti v Boto* 2008 (5) SA 405 (C).
[17] See *Recognition of Customary Marriages Act 1998 and its impact on family law in South Africa* CILLSA 182 (2002).

their two families. It is a meeting of the two families who convene and *lobola* is negotiated and a portion thereof (sometimes in full) is handed over to the bride's family.

[61] The argument that *lobola* must be paid in full before a valid customary marriage is concluded is misguided and has no foundation in law or indigenous practice of any culture. The payment of *lobola* does not have to be in full. Just as Ngwenya J (with whom Hlophe JP concurred) observed in *Bhe and Others v Magistrate, Khayelitsha and Others*,[18]

> "[t]here is one misconception on the part of the third applicant which requires correction. She averred that had it not been the inability of the deceased to pay *lobola* for her, they would have been married before he died. It has never been a prerequisite under African customary law to pay *lobola* before marriage is consummated. There must be agreement, however, as regards *lobola*. It may be deferred as long as circumstances do not permit payment."

[62] The rigidity with which all these requirements should be enforced was the subject before the SCA in *Mbungela and Another v Mkabi and Others.*[19] Common cause facts were that only a portion of *lobola* was paid and the parties proceeded to reside together as a husband and wife without the bride being handed over by her family to the groom's family. Maya P (as she then was) referred with approval to *Mabuza v Mbatha*[20] where the court dealt with a question on whether the handing over of the bride (*ukumekeza*) cannot be waived by the parties as a requirement for a valid customary marriage. In that judgment, the court held,

> "[T]here is no doubt that ukumekeza, like so many other customs, has somehow evolved so much that it is probably practised 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.

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[18] 2004 (2) SA 544 (C) at p. 551 para E-G. See also See J C Bekker *Seymour's Customary Law in Southern Africa* at 112 - 13.
[19] 2020 (1) SA 41 (SCA).
[20] *Mabuza v Mbatha* 2003 (4) SA 218 (C).

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 quite 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]."

In my judgment, there was a valid siSwati customary marriage between plaintiff and defendant."[21]

[63] The SCA then referred with approval to the learned author, J C Bekker,[22] who wrote,

> "the handing over need not be a formal ceremony; for example, upon delivery of *lobola* or a fine for seduction only, the subsequent *thwala* ie the abduction of the maiden to the groom's home without her guardian's consent, consummates the customary marriage, if her guardian then allows her to remain with her suitor on the understanding that further *lobola* will be paid due course. And proof of cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has raised no objection nor showed disapproval, by, for example, demanding a fine from the groom's family."

[64] The SCA concluded therefore that,

> "the importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be

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21 *Mabuza v Mbatha supra* at paras 25-26.

22 J C Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) at 108-109 & 116.

> 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 ones, could yield untenable results."[23]

[65] The relevance of the above is that even if the court could be wrong in its finding that the Plaintiff was handed over by her family to Matsane family on 05 November 2007, the behaviour of the parties involved should be looked at holistically. It would become apparent that if there was *lobola* negotiation and payment, exchange of gifts and the parties proceeded to stay together as husband and a wife thereafter, it can be safely assumed that they decided to waive the need for the bride to be handed over to the groom's family. That would therefore have no impact on the validity of the customary marriage. I however emphasise that the Plaintiff's version regarding her being handed over remains undisputed and there is no reason not to accept it.

[66] **The dissolution of a customary marriage.**

The last question is whether the customary marriage concluded as above was dissolved in any manner lawfully. This question is invoked through an alternative submission made for the Defendants who argue that if there was such a marriage, the same was dissolved. It is common cause that both the Plaintiff and the deceased referred to themselves as being married at some stage. While there is no evidence on whether the deceased ever regarded himself as single or divorced in the later years, there is evidence to the effect that the Plaintiff considered herself as an ex-wife, suggesting, she was divorced from the deceased. It is however common cause that the two never divorced at any stage.

[67] Pronouncing oneself to the public, the SABC or even financial advisors as divorced, without a decree of divorce issued by the court does not make one a divorcee. It may however help one find a new love which for all purposes would remain an extramarital affair, no matter how much it gets glorified. Perhaps it is out

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[23] *Mbungela and Another v Mkabi and Others at para 27.*

of this self-declaration that the Plaintiff earned herself a lover and a child in 2014. It is this relationship which the Defendants want the court to see as a sign of a marriage she might have been in with the deceased having been dissolved.

[68] Listening to this argument, the facts in *Monyepao v Ledwaba and Others*[24] come to mind. The question before the SCA was whether a woman (Ledwaba) whom the deceased paid *lobola* for in 2007, and left her marital home in 2008 only to sign into a civil marriage with another man in 2009, should still be recognised as a wife of the deceased when he died in 2012. Her marriage to the deceased was not dissolved through a divorce decree. Not only had Ledwaba deserted her marriage and married another man, but the deceased had also moved on to marry another woman (Monyepao) customarily, in 2010. As the SCA held, the second marriage entered into by Ledwaba was a nullity as she was still married to the deceased and that second "marriage" has no impact on the marital status she had with the deceased, until such time that she is divorced from him through a court of law.[25]

[69] From the evidence before me, it would appear that the Plaintiff was in constant contact with the deceased and that one of his children would often contact her (the Plaintiff) if she wanted anything from the deceased so she could talk to him on her behalf, and she did it up to the final weeks of his life. That portrays a picture of a man who knew what was going on in the life of the Plaintiff. He obviously was aware that she had a child with another man. The SABC documentary referred to above was aired in his lifetime. These did not persuade him to alter his will in which he had declared 25% to be bequeathed not just to Bongiwe Pretty Malope, but "his wife." I must however be quick to indicate that the title the deceased gave to the Plaintiff does not on its own impact on his and her marital status, as much as deleting the words "my wife" would not have meant anything without a divorce decree. This simply signifies how he considered himself to be, at the time.

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[24] (1368/18) [2020] ZASCA 54 (27 May 2020).

[25] See also *Netshituka v Netshituka and Others* 2011 (5) SA 453 (SCA) para 15 where the SCA held, "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." See too, *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T) para 32; *TM v NM and Others* 2014 (4) SA 575 (SCA) para 17.

[70] The year he wrote this will, is the same year the Plaintiff left their marital home. If the deceased had plans to change anything in that will, he could have done it in the 12 years following the scribing thereof, before his death in 2021. This must have been deliberate or there is no evidence to suggest otherwise. I am mindful of the fact that the will is not in dispute. It is however in that will that he bequeathed a portion of his estate to “his wife” and that should be respected. If any of these parties wanted to be divorced, they could have approached the court for a divorce decree and none of them did.

[71] With the above, the court finds that there was a valid customary marriage concluded between the Plaintiff and the deceased on 04 November 2007, which marriage still subsists.

[72] As for costs, no argument was advanced in which the court could find malice in the Defendants opposing this action. There is no reason for any of them to be mulcted with costs.

[73] For the aforesaid reasons, I make the following order:

> [73.1] The customary marriage between the Plaintiff and the deceased, entered into on 04 November 2007 is declared valid;
>
> [73.2] The First Defendant is directed to register the customary marriage between the Plaintiff and the deceased and
>
> [73.3] Costs to be paid from the deceased’s estate.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

MBOMBELA

FOR THE PLAINTIFF	**: ADV LD TJALE**
INSTRUCTED BY	**: TP RADEBE ATTORNEYS**
	MBOMBELA
FOR THE FIRST & SECOND	**: NO APPEARANCE**
	DEFENDANTS
FOR THE THIRD-SIXTH	**: ADV P SIBERHAGEN**
	DEFENDANTS
INSTRUCTED BY	**: MARKUS SAAYMAN INC**
	: MBOMBELA
DATES HEARD	**: 22-26 AUG & 17 OCT 2022**
JUDGMENT DELIVERED	**: 21 OCTOBER 2022**