

**IN THE HIGH COURT OF SOUTH AFRICA  
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

Case No. 6254/2018

In the matter between:

**FEZILE MLAMLA**

**Applicant**

**And**

**NOMATHAMSANQA RUBUSHE**

**1<sup>st</sup> Respondent**

**MTHUTHUZELI KULA**

**2<sup>nd</sup> Respondent**

**THANDIKHAYA RUBUSHE**

**3<sup>rd</sup> Respondent**

**VAKUTSHIWO RUBUSHE**

**4<sup>th</sup> Respondent**

**KHEHLANA RUBUSHE**

**5<sup>th</sup> Respondent**

**THE MINISTER OF HOME AFFAIRS**

**6<sup>th</sup> Respondent**

**THE MASTER OF THE HIGH COURT, MTHATHA**

**7<sup>th</sup> Respondent**

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## JUDGMENT

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### JOLWANA J

[1] Whether or not a valid customary marriage was concluded between a husband and wife is oftentimes fraught with controversy. The answer to this question can have dire or even disastrous consequences for the parties as the answer does not always lie in the production of the so-called marriage certificate or certificate of registration of the customary marriage which may or may not be there.

[2] The applicant approached this court seeking a declaratory order that a valid customary marriage between herself and her late husband (the deceased) was concluded. She also seeks relief for the 6<sup>th</sup> respondent to be ordered to register the said customary marriage so that she can claim the benefits that would accrue to her as the customary law wife of the deceased. The 6<sup>th</sup> and 7<sup>th</sup> respondents do not oppose the application and no orders are sought against the 7<sup>th</sup> respondent.

[3] The applicant's case is founded on the fact that she and the deceased were both above eighteen years of age at the time the lobola negotiations took place culminating in the lobola being paid in full; the said marriage was concluded and consummated and she and the deceased had consented to the customary marriage.

[4] In December 2011 the 1<sup>st</sup> to 5<sup>th</sup> respondents (the respondents) sent emissaries to negotiate lobola for purposes of concluding a customary marriage between the

applicant and the deceased who later passed away in March 2018. Following the conclusion of those negotiations and the payment of lobola the *utsiki* ritual was performed at the deceased's home. She was given the name Olulutho by which she was to be called by the deceased's family as is common in traditional African families that eschew calling their bride by her maiden name.

[5] On both versions the applicant did go to the respondents' family and the *utsiki* ritual was done. They did live together as would a husband and wife. The applicant and the deceased had some challenges in their marriage with accusations of infidelity allegedly committed by the deceased which were not resolved. The deceased left their common home and returned to his family home. It is unclear whether this state of affairs was reported to the applicant's family for intervention. It seems that after they failed to resolve their issues they lived separate lives for some years. It is alleged that the applicant later got engaged to one Pastor Mthombeni and there are even allegations of lobola having been paid by Pastor Mthombeni for the applicant. This is more or less the factual matrix on which this matter falls to be decided.

[6] In the main the issue is whether a valid customary marriage was concluded between the applicant and the deceased. Section 3 of the Recognition of Customary Marriages Act<sup>1</sup> (the Act) prescribes three requirements for a valid customary marriage to be concluded, as follows:

“3. Requirements for validity of customary marriages

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

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<sup>1</sup> Recognition of Customary Marriages Act 120 of 1998

- (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.”

[7] It is common cause that the requirements provided for in subsection (1) (a) of the Act were complied with. It is the requirement in subsection (1) (b) that is a subject of dispute in this matter. The respondents contend that even though lobola negotiations took place and lobola was agreed upon their emissaries never returned to the applicant's family to pay the balance outstanding in respect of the said lobola. Secondly, the applicant was never handed over to the respondents at all. Thirdly, during the life time of the deceased the applicant got engaged to another man who allegedly also paid lobola for her during the life time of the deceased.

[8] The submission about the balance of lobola not being paid misses an important point about lobola negotiations. While the agreed lobola is expected to be paid, I do not understand the requirement and the practice to be that it must necessarily be paid in full before the bride is handed over. In some cases lobola or the amount thereof may be agreed upon but it is not always necessarily insisted that it must be paid in full before the handing over of the bride is done. While the groom's family may not be able to insist that the bride must be handed over before the agreed lobola is paid in full, the bride's family is perfectly entitled if they so decide, to hand over their daughter knowing fully well that there is a balance of lobola that has not yet been paid.

[9] The foundational and fundamental principle of this process is negotiations at the core of which is the bringing together of the two families. The bride's family may very well

decide to hand over their daughter and inform the groom's family that they intend to do so. This is normally welcomed by the groom's family who are, as would be expected, eager to receive their *makoti* (bride) and the terms of the handing over are negotiated and agreed upon.

[10] Mr Notyesi who appeared for the applicant pointed to certain facts alleged in the papers and referred to some authorities on the basis of which he submitted that it is not necessary that there be a formal ceremony for the handing over to have taken place. Those facts are that lobola negotiations took place and lobola was agreed upon. The *utsiki* ritual was performed by the groom's family which included her being fed *isipanga* by one of her uncles and she was named Olulutho as her marital name by her in-laws. The applicant describes this occasion as the conclusion of a valid customary marriage between herself and the deceased.

[11] This submission is not without some difficulties. Firstly, the applicant does not say which one of her uncles fed her *isipanga* as this is denied by the respondents. This is important because it means that that uncle would have had to be present at the deceased's home when this feeding of *isipanga* took place. Some of her uncles have signed confirmatory affidavits in which they have confirmed being applicant's family's emissaries. I find it perplexing that not one of them confirmed being the one who performed the feeding of the *isipanga* nor does any of the other two say which one of them did.

[12] This is important because in the founding affidavit the applicant only dealt with the *utsiki* ritual which she says was performed at the deceased's home and is not in

dispute. Nowhere in the founding affidavit does she say that the handing over took place even during the *utsiki* ritual. She seems to make her case on the handing over requirement in the replying affidavit. I need not cite any authority for the trite legal position that the applicant must make her case in the founding affidavit.

[13] That is not the only problem. Even in the replying affidavit the submissions on the alleged handing over lack particularity and are surprisingly couched in vagueness. For instance the applicant says that her family visited the deceased's family for the specific purpose of handing her over to the deceased's family. They brought some gifts being clothes, cutlery and household appliances which she was going to use at her marital home. Again she does not mention any person amongst her own family who was part of this delegation that brought her to the deceased's family. She also says that during the handing over ceremony her mother-in-law was given blankets and traditional dresses. It is not clear if she is referring to what is normally called *umembeso* (giving of gifts). As far as I understand this custom it is usually not only the mother-in-law who is given gifts but also other select members of the husband's family. Usually the husband's emissaries are also given some gifts.

[14] The applicant once more does not say who did the giving of the gifts to her mother-in-law in addition to her failure to say which of her family's emissaries or uncles were present when this handing over took place. As I said before, I would have expected this important detail to feature prominently in the founding affidavit and not in the replying affidavit where it seems to be an afterthought. Contrariwise there is not even a mention of the handing over in the founding affidavit.

[15] The handing over is so essential that it becomes one of the leverages the bride's family have to force the groom's family to pay not necessarily all the agreed lobola but certainly to reach the required threshold of the lobola after which the bride can and is often handed over by her family even if the lobola has not been paid in full. There is an old Xhosa adage that *ikhazi aligqitywa* – loosely translated this means lobola is never paid in full as the *makoti* becomes part of her husband's family and her husband *umkhwenyana* (son-in-law) becomes part of her maiden family.

[16] In *DRM v DMK*<sup>2</sup> the court pointed out, correctly in my view, that there has to be a distinction between a cohabitation and a marriage. The court said:

“[31] 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. TW Bennett in Customary Law in South Africa 18<sup>th</sup> Edition states at p 217 that:

‘Hence, when the Recognition of Customary Marriages Act provides that in order to qualify as customary, a marriage must be negotiated and entered into or celebrated in accordance with customary law, the form of negotiations, the handing over of a bride and the wedding are all relevant to giving the union the character of a customary marriage. It may then be distinguished, on the one hand, from an informal partnership and, on the other, from a marriage according to other cultural or religious traditions.’”

[17] I agree with the authorities that say that the handing over need not be a big formal ceremony as Mr Notyesi pointed out. I also agree with the concept of constructive delivery to the extent that it suggests, at the very least, some authorized members of

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<sup>2</sup> *DRM v DMK* (2017/2016) [2018] ZALMPPHC 62 (7 November 2018)

the bride's family delivering or handing her over to the groom's family without a big formal occasion. But if she goes to the groom's family either on her own unaccompanied by any authorized person, a handing over or even constructive delivery cannot be said to have taken place, especially bearing in mind the importance of the handing over in the integration of the two families. The applicant is rather sketchy on the details of how she got to be at the deceased's homestead where the in-laws ended up performing the *utsiki* ritual and how that process unfolded.

[18] I disagree, with respect, with the authorities cited in the applicant's heads of argument to the effect that two individuals deciding to live together on their own after lobola was paid can be said to constitute constructive delivery, if they live together with the knowledge of the bride's family. It is not difficult to imagine situations in which a man and a woman live together with the knowledge of their respective families without lobola being paid. Similarly, where lobola has been paid whether in full or partially the process is incomplete if some form of handing over does not happen. The fact that the two individuals lived together publicly may found some other claim. However, it cannot, be the basis for the conclusion that a valid customary law was concluded, merely on the basis of lobola having been paid. It must be emphasized that customary marriage is not a transaction where money and gifts simply change hands, but it is a sacred institution founded on the customary value system of the African traditional way of life.

[19] Whether or not in a particular case handing over or constructive delivery of the bride took place is a factual enquiry. It, however, cannot be said to have taken place only on the basis that the couple lives together. The centrality of the role played by the bride's and groom's families in a customary marriage is indispensable. The converse is



also true which is that beyond consent and playing the role which she is directed to play by the elders, the woman cannot take over and do things on her own or go to her husband's family on her own without being handed over.

[20] In *Mrapukana v Master of the High Court and Another*<sup>3</sup> Dlodlo J (as he then was) explained the legal position as follows on the existence or otherwise of a customary marriage:

“[25] It is fairly simple to determine whether or not a party has successfully proved the existence of a customary marriage. There are requirements for a valid customary marriage, namely consensus between the parties, a formal ceremony to transfer the bride to the other family and the payment of lobolo. Initially the consensus I have referred to was not concerned with consensus between the two marrying parties. The marriage was and is still regarded as a union between two (2) families rather than two (2) individuals. See *Mabena v Letsoalo* 1998 (2) SA 1068 (T). We know that because customary law is not static but it also develops with the times, this requirement is now such that the two marrying individuals should agree to the marriage as well. Section 3(2)[1](a) of the Recognition of Customary Marriages Act has nowadays explicitly provided that permission of both individuals to the marriage is required. In my view this does not amend or outlaw the old customary practice to any greater extent. It is inconceivable that individuals to such a marriage can exclude the two families. The new provision in the Act compliments the agreement between two (2) families in my view. Lobolo can consist of cattle or the momentary value thereof. In nowadays cash is seemingly preferred, particularly in urban areas. In rural areas cattle on hooves are still the only known form of paying lobolo. Lobolo can either be partially paid or fully paid. In the event of the former scenario, an agreement would have to be entered into as to when and how the balance of lobolo shall be paid. Lobolo survived evolution and was never declared contrary to the rules of natural justice or public policy. See: *Thibela v Minister of Wet en orde* 1995 (3) SA 147 (T). The bride must be formally transferred to the family of the prospective husband. Once this is done, she is then formally regarded as part of the latter family. Her release from her own family relationship and her incorporation into her husband's family is celebrated with extensive public rituals and ceremonies. This is a very important requirement for the validity of the customary marriage.”

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<sup>3</sup> *Mrapukana v Master of the High Court and Another* (6567/2007) [2008] ZAWCHC 113 (21 November 2008)

[21] It needs to be emphasized, even at the risk of being repetitive, that in the founding affidavit where the applicant's case ought to be made, there was no mention of the applicant being handed over. When this issue was raised in the answering affidavit the applicant suddenly brought some facts in the replying affidavit the import of which is to suggest that a handing over was done. Even then the applicant skirts around the issue and the affidavit is bereft of all the essential averments on aspects as basic as by whom from her family she was handed over to her in-laws. She belatedly creates the impression that what she had described as *utsiki* ritual in the founding affidavit was in fact a handing over ceremony. The respondents pointed out that the *utsiki* ritual was not a handing over occasion.

[22] Most decided cases across the country from many different traditional communities in South Africa have emphasized the importance of the handing over of the bride. In *Moropane v Southon*<sup>4</sup> the Supreme Court of Appeal finally confirmed the legal standing of the handing over requirement as follows:

“[40] Importantly, the two experts agreed that the handing over of the *makoti* to her in-laws is the most crucial part of a customary marriage<sup>5</sup>. This is so as it is through this symbolic customary practice that the *makoti* is finally welcomed and integrated into the groom's family which henceforth becomes her new family.”

[23] Commenting on this decision and its impact on the requirement of the handing over *P. Bakker*<sup>6</sup> analysed a number of cases and stated that:

“After the decision in *Moropane v Southon* the integration of the bride is a requirement for a valid customary marriage in the official customary law. A deviation can be allowed only

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<sup>4</sup> *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014)

<sup>5</sup> My underlining

<sup>6</sup> Bakker P. Integration of the Bride as a requirement for a valid Customary Marriage: *Mkabe v Minister of Home Affairs and Others* (2014/84704) [2016] Potchefstroom Electronic Law Journal (Vol 21) [2018]

if it can be proved that the living customary law of a certain tribe has evolved to such an extent that integration of the bride can no longer be regarded as an essential requirement for a valid customary marriage.

The view of Twala AJ in *Mkabe* that the integration of the bride (an essential requirement for a valid customary marriage) can be waived or condoned by agreement between the parties cannot be followed. The decision is based on an error in law due to an incorrect reading of *Mabuza*. The essential requirements of a customary marriage cannot be waived or condoned, but the accompanying rituals or ceremonies may be waived or abbreviated by the parties. Parties concluding a customary marriage must always keep in mind that the rituals are performed to provide proof that a valid customary marriage did take place should such proof be required in the event of divorce or death. For this reason, it is not possible to waive all the rituals relevant to an essential requirement of a customary marriage”

[24] Of and about the applicant’s engagement to Pastor Mthombeni, the first respondent, in her answering affidavit, has alleged that she and other family members became aware that there was an engagement ceremony in which the applicant and one Pastor Mthombeni of God Never Fails Ministries got engaged; that such ceremony was officially recorded and that she is in possession of the said video recordings and that the applicant should have them as well. In those recordings the applicant’s family allegedly confirmed that Pastor Mthombeni was their son-in-law and that lobola was paid. The first respondent also attached annexures A1 to A4 being the alleged pictures downloaded from God Never Fails Ministries’ Youth Facebook page.

[25] Those Facebook page pictures depict a gentleman and a lady who the respondents allege, is the applicant. On that page the following message is also posted:

“Congratulations to Pastor Mthombeni and Fezile Mlamla who got engage (sic) this weekend, we wish them all the best on their journey to marriage.

May the Lord keep them

GOD NEVER FAILS”

[26] On the basis of this information the respondents’ family believed that the applicant was another man’s wife. For this reason when the deceased passed away in March 2018, they did not report his passing to the applicant’s family because at that stage she was already another man’s wife.

[27] The applicant’s response to these very serious allegations is rather disappointing, to say the least. One would have expected her to explain if she is indeed the person depicted in the pictures and who the gentleman she is standing with in the pictures is. She would also have been expected to contextualize what the occasion that was as well as the circumstances in which the pictures were taken, if known to her.

[28] This is the applicant’s dismissive response in her replying affidavit:

“AD PARAGRAPHS 20, 21, 22, 23, 24, 24, 25, 26, 27 & 28

20. I deny the allegations contained in these paragraphs. I reiterate the contents of my founding affidavit. I dispute the authenticity of the annexures referred herein as A1–A2 as they constitute inadmissible evidence. In any event the alleged engagement is irrelevant on the issue for determination in this matter. The deponent is just a curious person who does not want me to benefit from the estate of my ex-husband, the deceased.”

[29] This is rather sketchy and evasive. The applicant does not deal with whether or not she is the person in the pictures. Most importantly she does not dispute that what was taking place was her engagement to Pastor Mthombeni. She simply dismisses it as an alleged engagement and characterizes it as irrelevant to the issue for determination. This baffles me as I cannot understand how allegations of another man’s wife being engaged to another man during the lifetime of her husband in a public ceremony can

ever be said to be irrelevant to the question of whether she is still a customary wife of her husband. Even the basis on which the authenticity of those pictures is disputed is not explained.

[30] If she is the person depicted therein she could, at the very least, say that she does not know how the pictures were put together as there was no engagement in the first place or that the pictures may have been fraudulently manipulated to create the impression that she was engaged to somebody else. She makes no attempt at all to lay the basis for disputing the authenticity of the pictures beyond merely dismissing them as irrelevant. She basically and very disturbingly chooses to say almost nothing beyond a bare denial on such an important aspect of the case.

[31] This, in my view, is totally unacceptable. The question is whether she was ever engaged to another man, specifically Pastor Mthombeni, as alleged during the lifetime of the deceased. This is very important in these circumstances in which the applicant contends that she is still the customary wife of the deceased and must be recognized as such. It goes without saying that if there was no valid customary law, she would be entitled to be engaged and even get married to another person even if lobola had been paid for her. What the family of the deceased does about that is a totally different matter altogether.

[32] A married woman does not and cannot be engaged to another man during the subsistence of the marriage. It must be that she did not regard herself as still married to the deceased. I do not agree with Mr Notyesi's rather simplistic submission that if she did become engaged and lobola was paid for her while she was still married to the

deceased, such purported marriage stands to be nullified. That is certainly not my understanding of customary law as it relates to customary marriages.

[33] In *Mayelane v Ngwenyama and Another*<sup>7</sup> the Constitutional Court made the following observations, about customary law in general and customary marriages in particular:

“[24] This Court has, in a number of decisions, explained what this resurrection of customary law to its rightful place as one of the primary sources of law under the Constitution means. This includes that:

- a) customary law must be understood in its own terms, and not through the lens of the common law;
- b) so understood, customary law is nevertheless subject to the Constitution and has to be interpreted in the light of its values;
- c) customary law is a system of law that is practiced in the community, has its own values and norms, is practiced from generation to generation and evolves and develops to meet the changing needs to the community;
- d) customary law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life;
- e) customary law will continue to evolve within the context of its values and norms consistently, with the Constitution;
- f) the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements; and
- g) these aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like *Ubuntu*.

[25] Paradoxically, the strength of customary law – its adaptive inherent flexibility – is also a potential difficulty when it comes to its application and enforcement in a court of law. As stated by Langa DCJ in *Bhe*, “[t]he difficulty lies not so much in the acceptance of the notion of ‘living’ customary law...but in determining its

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<sup>7</sup> *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC)

content and testing it, as the Court should, against the provisions of the Bill of Rights.” This difficulty will be addressed later on in this judgment.

### ***The Recognition Act***

[26] The Recognition Act represents “a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country.” Past law accorded marriages under customary law recognition only as customary “unions” and this “grudging recognition of customary marriages prejudiced immeasurably the evolution of rules governing these marriages.” The Recognition Act is legislation “specifically deal[ing] with customary law”, as envisaged in terms of section 211(3) of the Constitution. Its enactment was inspired by the dignity and equality rights and the normative value system of the Constitution. It is an adaption of customary law which “salvage[s] and free[s] customary law from its stunted and deprived past.”

[27] The Recognition Act defines customary law as “customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those peoples” and a customary marriage as “a marriage concluded in accordance with customary law.”

[28] Section 3(1) of the Recognition Act provides that:

*“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.”*

[29] Section 3(1)(a) introduces express substantive validity requirements that were not required under pre-colonial notions of customary law: the majority age and the consent of both parties to the impending marriage. This development is significant since, in pre-colonial times, “marriage was always a bond between families and not

between individual spouses” and the bride – and groom-to-be were thus not always the most important decision-makers with regard to their pending nuptials. Section 3(1)(b) goes on to stipulate that “the marriage must be negotiated and entered into or celebrated in accordance with customary law”. Customary law may thus impose validity requirements in addition to those set out in subsection (1)(a). In order to determine such requirements a court would have to have regard to the customary practices of the relevant community.”

[34] The applicant has failed to establish all the requirements for the validity of her customary marriage to the deceased. It was not her case that a handing over is not a requirement for the validity of her customary marriage to the deceased. On the contrary, she unsatisfactorily and belatedly in the replying affidavit wanted this court to conclude that what she clearly called the *utsiki* ritual performed by the deceased’s family must be regarded as her handing over to the deceased’s family. In terms of Uniform Rule 6(5)(g)<sup>8</sup> of the Uniform Rules of Court, the court is entitled to dismiss an application where it cannot be properly decided on affidavits. Furthermore none of the parties asked for the hearing of oral evidence. The applicant has not made out a case for the relief sought and therefore her application must fail.

[35] In the result the following order will issue:

1. The application is dismissed with costs.

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<sup>8</sup> Uniform Rule 6(5)(g) reads as follows:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”



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**M.S. JOLWANA**

**JUDGE OF THE HIGH COURT**

Appearances:

Counsel for the Applicant: M. NOTYESI

Instructed by: MVUZO NOTYESI INC.

Mthatha

Counsel for the Respondent: S. SINTWA

Instructed by: T. QINA & SONS

Mthatha

Heard on: 05 September 2019

Delivered on: 29 October 2019