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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION,BLOEMFONTEIN

Case number: 1009/2016

In the matter between:

R. C. Plaintiff

and

M. S. P. Defendant

HEARD ON: 13, 14 December 2016, 18,19 and 20 January 2017

JUDGMENT BY: MOKGOBO, AJ

DELIVERED ON: 6 APRIL 2017

INTRODUCTION

[1] Plaintiff instituted a divorce action against the defendant. In terms of the particulars of claim she sought the following relief:

- (i) Decree of divorce
- (ii) Full parental responsibilities and rights in respect of the minor be awarded to both parties
- (iii) An order directing the defendant to pay maintenance in respect of the plaintiff and

the minor child and other ancillary relief.

[2] The defendant opposed the divorce action on the basis that no marriage existed between the parties. His opposition is grounded on the fact that the plaintiff was not formally handed over to his people in terms of the customary law, nor do the circumstances warrant a tacit handing over of the plaintiff.

[3] Shortly, prior the commencement of the trial, the parties reached an agreement that the issue relating to the existence or otherwise of the customary marriage be determined separately from the rest of the prayers encapsulated in the particulars of claim. In terms of the agreement reached between the parties, the agreement was made an order of Court in terms of Rule 33(4) of the Uniform Rules of Court. I was also requested by Adv. Van Aswegen that in the event I make a decision favourable to the applicant, I should make an order with regard to costs.

[4] I raised the issue whether customary law applies in this matter since the plaintiff is coloured. Both Counsel, ably and eloquently submitted that the Recognition of Customary Act, Act 120 of 1998 does not preclude such marriages and further the decision of the plaintiff to follow the Tswana custom was informed by her choice. I am grateful to them for their submissions on this point. I am satisfied that the Recognition of Customary Marriages Act and in particular, the Tswana customary law apply in this matter.

B: COMMON CAUSE FACTS

[5] It is common cause that the plaintiff and the defendant were in a relationship since 24 June 2011. It is further common cause that on [...] 2012, a child named E. L. was born out of the relationship between the plaintiff and the defendant. The name L. comes from the defendant's family and the name E. comes from the plaintiff.

[6] On 3 May 2014 the plaintiffs and defendant's families met at the plaintiff's home in Bloemfontein. An amount of Twenty thousand (R20 000) and a bottle of Chivaz Regal Whisky was handed over to plaintiff's mother. Two of the members representing the respective families signed a handwritten document (Exhibit D) which reads as follows:

This is to certify that

C.'s family received lobola from P.'s family on this day of 03 May 2014

Amount= R20 000

[7] It is further common cause that on 3 May 2014 and thereafter no festivities took place at the plaintiffs or defendants parental home, save for the food that was prepared and served by the plaintiff's mother.

C: ISSUES

[8] The only issue for determination by this Court is whether the parties were married according to the Customary Law.

D: SUMMARY OF EVIDENCE

E: PLAINTIFF'S CASE

[9] Ms R. C., the plaintiff, testified that she is coloured and thirty five (35) years old. The defendant showed some interest, things happened quickly and they stayed together from 2011 until 11 October 2015. Shortly after the birth of the child they started discussions about marriage. The defendant is Tswana and according to his tradition, the two families should meet to negotiate Lobola. On the defendant's advice, their marriage should firstly be a customary marriage and thereafter they will enter into a white wedding. She accepted and respected the defendant's tradition and agreed to the arrangements.

[10] Around 2014, the Defendant's family represented by Mrs P. and his uncle came to her parental home to negotiate their intended marriage. The defendant's father is late. Her family was represented by her mother, Mrs A. C., her brother, L. C. and uncle, Mr T.. Her father is also late. The feedback that she received from her mother is that lobola was negotiated and the parties agreed on the amount of twenty thousand (R20 000).

[11] On 3 May 2014, the defendant's family came to her place. The defendant's family was represented by his brother, uncles and their wives. The women were dressed in traditional blue and white dresses (shweshwe), white blankets over their shoulders and white cover material on their heads (doek). Her family was represented by her mother and brother. She was also present during that meeting. During that meeting the amount of twenty thousand (R20 000) was handed over to her family and a meal was served. She was handed over to the defendant's family on that day by her mother. Her direct words were: "I did not ask a lot of money because I want them to start a life. I am handing over my daughter to you. Look well after her, I don't want to see her getting hungry" Thereafter the meals were served.

[12] From that day she regarded herself as the defendant's wife and was treated and regarded as such by the defendant's family. Her belief is informed by the fact that prior 3 May 2014, when they visited the defendant's family in the North- West they were accommodated in separate rooms. However, after 3 May 2014 they were accommodated in a common room with the Defendant. Mrs P., the defendant's mother introduced her as (*mogatsa ga P.*), meaning the defendant's wife.

[13] During cross-examination she admitted that in her application for a protection order she referred to the defendant as her boyfriend. She explained that although she was subjectively convinced that she was the defendant's wife was not sure about the legal effect of a customary marriage. On a subsequent question as to why they delayed the white wedding

until September 2015, she explained that they planned to delay their civil marriage in order to save and their plans had the blessings of the defendant's mother. She was convinced that to best of her knowledge a customary marriage was concluded and counselling would have taken place after the civil marriage.

[14] Mrs G. C. testified that she is the biological mother of the plaintiff. Her husband passed on long time ago. She is Sotho and her daughter is Coloured. She knows the defendant and had stayed with her daughter for three (3) years. She further testified that Mrs P., the defendant's mother called her and told her that she is would be becoming to her place to negotiate the marriage for the children. Subsequent their telephonic discussion, on a Saturday, Mrs P. accompanied by the defendant's uncle arrived at her place and they negotiated lobola. They agreed on an amount of twenty thousand (R20 000).

[15] On 3 May 2014, the defendant's family came to her place to pay lobola. The defendant's family was represented by his brother-, his aunt and other people unknown to her. The ladies were dressed in shweshwes with shawls around their shoulders and white doeks on their heads. They told her that they were sent by Mrs P. to bring the lobola. They counted the money and it was correct. After the money was handed over to her, proof of payment prepared by the defendant's brother was signed by two members from each family (See exhibit 0). She further testified that she handed over her daughter to the defendant's family by uttering the following words:

"Here is my daughter, I am handing her over to you. I don't want to see her coming home naked and having scratches." A meal was served and thereafter the defendant's representatives left.

[16] She further testified that she was satisfied that her daughter was accepted and loved by Mrs P.. She accepted the defendant as her son and considered her daughter married by the

defendant.

[17] She was subjected to a lengthy cross-examination however, her version remained unaffected. She was emphatic that her daughter was married and the twenty thousand she received on 3 May 2014 was for payment of lobola. Her version in this regard is corroborated by objective facts. (See exhibit "A" paragraphs 4.3 and 4.5, "D" and paragraph 2.3 of the defendant's plea page 21 of the paginated papers). I have to doubt her version.

[18] Mr B. L. C. testified that the plaintiff is his sister and he was present at both meetings. During the first meeting lobola was negotiated and his mother said that it was not necessary for damages because the defendant is marrying her daughter. Few weeks after the first meeting, the lobola was paid and the plaintiff was handed over by his mother to the defendant's family. His version is substantially corroborated by his mother's and the plaintiff.

[19] The plaintiff then closed her case.

F: DEFENDANT'S CASE

[20] Mr M. S. P. testified that after the birth of the child, the plaintiff's mother chased her and the child out of her house and he accommodated them for five weeks and he took them back to her parental home. He denies that plaintiff ever stayed permanently with him. He further testified that after 3 May 2014, the plaintiff stayed less regularly with him. One day when they took a stroll, the plaintiff told him that if nothing is going to happen regarding their marriage before the end of 2014 she will move on with her life. During December 2013 he told his mother that they should pay lobola for the plaintiff. He did not have the money, but assured his mother that he will have the money in March. By the end of March he had the money and he transferred an amount of R20 000 into her mother's account and told her that they can start negotiating for lobola.

[21] On 3 May 2014 his family met the plaintiff's family to start the lobola negotiations. The negotiations did not take place because there were no delegates from the plaintiff's family and on the request of the plaintiff's mother negotiations were postponed to a date to be given to his family by the plaintiff's family. It is his custom that lobola (the cattle) cannot go back and the R20 000, representing the cattle and the Whisky representing the whip, were left with the plaintiff's mother. To date his family was never contacted for lobola negotiations. Since lobola was not negotiated or paid and the fact that plaintiff was not handed over to his family, no valid customary marriage was concluded. In any event he had no intention to enter into a customary union, he wanted a civil union. He or his family never regarded the plaintiff as his wife. For his view, he relies heavily on exhibits A and in particular the parental responsibilities and rights of unmarried fathers given to him and the fact that on 14 March 2016 at the Domestic Violence Court the plaintiff said under oath that he is her ex boyfriend.

[21.1] His response was that those were preliminary stages. He was further asked to explain why did he say in subparagraph 2.3 in his plea that his delegates did pay to the plaintiff's mother an amount of R20 000 which included damages in terms of the customary law for the pre-marital conception of the child and advance payment towards lobola and his version under oath that negotiations did not take place and no lobola was paid. His response was that subparagraph 2.3 should be understood in the context that negotiations will be on lobola and damages. When asked to explain the contents of exhibit D in which it is recorded that the plaintiff's family received lobola from P.'s family in the amount of R20 000 and signed by both families. His response was that the document signified the agenda of the day. When asked with regard to exhibit A paragraph 4.3 and 4.5 where he and the plaintiff stated that they were staying in a permanent life partnership during conception and birth of the child and that they

are married in accordance with customary law. He could not provide any convincing reason save to say that the information is incorrect.

[22] Ms J. S. M. testified that both the plaintiff and the defendant are known to her. The defendant is her sister's child and the plaintiff has a child with the defendant. On 3 May 2014 she was part of the delegate representing the defendant's family. She is adamant that meeting was the first and the only meeting that took place between the two families. Their mandate was to negotiate lobola with the view of concluding a white wedding and not a customary marriage. An amount of R20 000 representing (cattle) and a bottle of Whisky, representing the whip, traditionally used to drive the cattle were handed over to them to negotiate lobola. All the women who were part of the delegate wore their traditional regalia and will ululate after the successful conclusion of the lobola negotiations. However, the lobola negotiations did not take place because the plaintiff's mother told them that her delegates did not come.

[22.1] According to the Tswana custom, cattle cannot go back home thus the R20 000 and the Whisky were left with the plaintiff's mother. As proof that the plaintiff's mother received the money, a document prepared by the defendant's brother was signed by two delegates from each family. (See exhibit D). It was further her testimony that the plaintiff's mother will contact them in future to resume the negotiations. To date the plaintiff's mother has not contacted them and they are still waiting to be contacted.

[23] It was further her testimony that since lobola was not negotiated or paid that the plaintiff was never handed over to them and there was no white wedding, the plaintiff is not married to the defendant. The plaintiff will only be accepted as the defendant's wife upon conclusion of a white wedding and production of a marriage certificate.

[24] During cross-examination she admitted that the amount of R20 000 will only attain the status of lobola after the negotiations. On a follow up question as to why did they leave the money and the Whisky because negotiations had not taken place. Her response was that the cattle cannot go back home. When further confronted about the contents of exhibit D, her response was that lobola was the agenda of the day and for Jack of better words the document was couched in that fashion. On the question of Adv Van Aswegen that if she was not part of the first meeting how could she say such meeting never took place her response was that such meeting never took place.

[25] Mr K. P. T. P. testified that he is a medical doctor by profession and practised as a general practitioner in Rustenburg. The defendant is his younger brother. The plaintiff is known to him as his brother's girlfriend. Around December 2013, the Defendant told them that he wants to have a white wedding. A delegation was chosen to negotiate lobola. His mother and the plaintiff's mother agreed that the two families should meet on 3 May 2014 for the lobola negotiations.

[25.1] On 3 May 2014, accompanied by his uncles and aunts they arrived at the plaintiff's house. The plaintiff's mother served them with tea where after she left them and went to the kitchen to prepare some food for them. After a while a meal was served and the plaintiff's mother told them that her delegates were no longer coming. The lobola negotiations did not take place.

[25.2] The money and the whiskey they had in their possession were left with the plaintiff's mother because the elders had told them that they cannot take the cattle back home. In his own handwriting he prepared exhibit D as proof of receipt of the money by the plaintiff's family. The plaintiff's mother said she will contact them to resume negotiations. Since 3 May 2014 to date, they have not heard a word from Mrs

C.. According to his knowledge no customary marriage was concluded between the plaintiff and the defendant.

[25.3] He was confronted with the contents of exhibit D, a document he compiled in his own handwriting. He was at pains to explain the discrepancy between his testimonial version that no lobola was paid and the contents of exhibit D, that the C. family received lobola from the defendant's family, save to, say that lobola was the agenda of the day. He conceded that he is not clued up with custom but was emphatic that no customary marriage was concluded between the Plaintiff and the Defendant.

[26] Mrs M. T. P. testified that she is an educator by profession and the mother of the defendant. Around December 2013 she was approached by the defendant who told her that he wants to marry. He will have the necessary money for lobola around March 2014. She initiated the meeting with the Plaintiffs mother and they agreed to meet on 3 May 2014 for the lobola negotiations. She initiated a meeting with the defendant's family and in that meeting the delegates were chosen. She was not part of the delegate.

[26.1] The R20 000 she received from the defendant was handed over to the delegates to negotiate lobola with the plaintiffs family on 3 May 2014. Her delegates reported to her that things did not go according to plan. Since then she has not heard a word from the plaintiff's family. It was further her testimony that since the Plaintiff and the defendant had not appeared before a Pastor or Home Affairs to conclude a marriage, there is no marriage. She vehemently denies that she has ever introduced the plaintiff as the defendant's wife or has allowed that they be accommodated in a common room whenever they visited North-West after 3 May 2014.

[26.2] The following emerged during her cross-examination.

Question: Did your son tell you that it will be a customary marriage or a civil union?

Answer: He left everything in my hands. He is my son. He was a bit shy to tell me that he is going to pay lobola.

Question: You must decide whether it is a customary or civil union.

Answer: No, after the negotiations, he will come to me and tell me how they are intending to marry. After the conclusion of the civil marriage she will wear certain clothes.

[27] The defendant then closed his case.

G: PLAINTIFF'S SUBMISSIONS

[28] Adv. Van Aswegen on behalf of the plaintiff argued that all the essentialia for a valid customary marriage were observed and therefore a valid customary marriage between the plaintiff and the Defendant was concluded on 3 May 2014. He further argued that subsequent festivities to be performed are merely ceremonial gestures and non-observance thereof does not invalidate the marriage. For his submissions, reference was made to a number of authorities, however, much reliance was put on the unreported judgment of Vilakazi AJ, *MAMUTEANE HLOKA'MONI MMUTLE v DIBUSENG MARY THINDA AND DEPARTMENT OF HOME AFFAIRS* (TPD) Case No: 20949/07: Date 23 July 2008 and Bekker *in Seymour, s Customary Law in South Africa*.

H: DEFENDANT'S SUBMISSIONS

[29] Mr Loubser argued that the marriage was never negotiated or celebrated and the plaintiff was not formally handed over to the defendant's family. He further argued that the plaintiff lacked the required consent because of her limited knowledge of customary law and therefore a valid customary marriage was and could never have been concluded. For his submissions he relied on the reasoning of Matlapeng AJ in *Motsoatsoa v Roro and Others* (2011] 2 All

SA 324 (GSJ).

I:THE LAW

[30] The Recognition of Customary Marriages Act, Act No 120 of 1998 provides as follows:

Requirements for validity of customary marriages

3. (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.

[31] In *Bhe and others v Magistrate, Khayelitsha and others* [2004] ZACC 17; 2005 (1) BCLR 1 (CC) para 150 Ngcobo J declared as follows:

"There are at least three ways in which indigenous law may be established. In the first place, a court may take judicial notice of it. This can only happen where it can be readily be ascertained with sufficient certainty. Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 says so. Where it cannot be readily ascertained, expert evidence may be adduced to establish it. Finally a court may consult text books and case law."

[32] In *Kgapula v Maphai* 1940 NAC (N&T) 108 (Hamanskraal), the parties regarded their cohabitation as a valid customary marriage although there had been no marriage feast or formal handing over of the woman by her father.

[33] In *Msutu v Road Accident Fund* [2011] ZAGPPHC 232, Kubushi J said:

"It is trite that where a woman is living with the man with the knowledge of the family of the bride it is regarded as having been handed over"

[34] In *Seymour's Customary Law in Southern Africa* the author wrote:

"The handing over need not be a formal ceremony". (page 108).

"The rendering of lobolo by the bridegroom's father or by the bridegroom as the case may be, to the bride's guardian (or custodian) is the major essential of the customary marriage. Such phrases as 'there can be no customary marriage if there are no cattle with the girl's guardian' are essentially correct statements of customary law. The number of cattle is immaterial so long as some have been delivered and accepted as lobolo; this is so for all tribes" (pages 107 and 108).

[35] In *Customary Law in South Africa*, [2004] T W Bennett wrote:

"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 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." (page 194).

"If the guardian did not object to the couple's relationship which had to be deduced from his accepting lobolo or from not suing for seduction damages a marriage was presumed, irrespective of where the matrimonial home happened to be or how the parties came to be living together" (page 216)

J: ANALYSIS

[36] Section 3 (1) (a) of the Recognition of the Customary Marriages Act, Act 120 of 1998

introduces express substantive validity requirements: age and consent of both parties to the marriage. The Act further recognises the bride and the groom as the most important decision-makers in their pending nuptials.

[37] In the present case, it is common cause that both the plaintiff and the defendant are above the age of eighteen (18) years. With regard to the requirement that both parties must consent to be married to each other under customary law, in his closing address, Mr Loubser argued that plaintiff did not fully appreciate the legal status of a customary marriage and therefore lacked the required consent for the conclusion of a valid customary marriage.

[38] I disagree within and on the following grounds:

Firstly, the undisputed evidence of the plaintiff is that she was well advised and informed by the defendant that his tradition dictates that they should firstly marry according to custom and thereafter a civil union will be concluded. As a gesture of respect for his tradition, she accepted the advice and agreed to be married according to the customary law. Secondly, her conduct on 3 May 2014 by not objecting to be handed over to the defendant's family, which is of course disputed by the defendant, and her continued stay with the defendant until 11 October 2015, amply demonstrates her consent and willingness to be married in accordance with the customary law. See also Exhibit A paragraph 4.5. Her lack of knowledge with regard to the legal status of a customary marriage, and the fact that there is nothing suggesting that she was wrongly advised, I am satisfied that her consent is valid. The argument of Mr Loubser is with respect without any merit. I am satisfied that the requirements mentioned in section 3 (1) (a) (i) and (ii) of the Recognition of Customary Marriages Act, Act No 120 of 1998 have been complied with.

[39] In addition to the above requirements, section 3 (1) (b) lays down that:

"The marriage must be negotiated and entered into or celebrated in accordance with

customary law".

[39.1] Although lobola is not specifically mentioned in the Act, it is trite that payment thereof either in full or part is one of the essential requirements that a marriage have been negotiated and entered into in accordance with customary law. See *Seymour's Customary law in South-Africa* supra.

[39.2] The requirement set out in the above section is couched in broad terms and poses some problems. Firstly, the problem is triggered by the fact that the specifics and contents of this requirement are not mentioned and secondly, the customs and usages differ from one community to the other as a result of the ever changing needs of the various communities. In order to determine the exact specifics and contents of section 3 (1) (b), it is incumbent upon a court to have regard to the customary law as practised in the community, also referred to as the living indigenous law.

[40] On this aspect, both the plaintiff and the defendant raised two mutually destructive versions.

[41] The plaintiff's case is that prior 3 May 2014 lobola was negotiated between her and defendant's families. In that meeting her family was represented by her mother, uncle and brother and the defendant's family was represented by the defendant's mother and one of his uncles. Both families agreed that lobola will be R20 000. Upon conclusion of the negotiations, the defendant's mother said she will send her delegates to pay lobola. On 3 May 2014 the delegates from the defendant's family arrived at her place and lobola was paid. She was handed over to the defendant's family by her mother. No festivities took place. With the knowledge and blessings of her mother she continued to live with the defendant until 11 October 2015. Her version is substantially corroborated by her mother, brother, exhibits A and D.

[42] On the other hand the defendant is adamant that prior to and on 3 May 2014 no lobola was negotiated or paid. It further his version that the contents of exhibit D is merely proof that the R20 000 was left with Mrs C. for future negotiations as lobola cannot go back home. It is further his version that the plaintiff was not handed over to his family. The required celebrations were not observed and therefore no marriage came into existence. The plaintiff only visited him and did not stay with him permanently. This version is corroborated by his aunt, brother and his mother.

[43] Upon a critical analysis of the respective versions, the plaintiff, her mother and brother had impressed me as good witnesses. Notwithstanding the lengthy and excruciating cross-examination their respective versions remained unaffected. They corroborated one another in every material respect and further their versions are corroborated by neutral facts. See in this regard exhibit D and para 2.3 of the defendant's plea which substantially support their version that lobola was paid. The plaintiff's version that after payment of lobola a customary marriage was concluded and had lived with the defendant is substantiated by exhibit A paras 4.3 and 4.5 wherein both plaintiff and the defendant unequivocally stated that they are married in accordance with the customary law and are staying together in a permanent life partnership. Exhibit A further supports the plaintiff's version that she is the defendant's wife and explains why she was referred to as *mogatsa ga P.*. In view of the above, I have no justification to doubt the plaintiff's and her witnesses' versions.

[44] Unfortunately, same cannot be said about the defendant and his witnesses. They are adamant that no negotiations took place between the two families, no lobola was paid and the plaintiff was not handed over to the defendant's family and the accompanying celebrations were not observed.

[44.1] It is true that the ceremonial celebrations were not observed but I am at pains

to accept the defendant's version that negotiations did not take place and lobola was not paid. My difficulty with regard to this version is grounded on the following:

[44.2] Firstly the defendant, his aunt and brother were not part of the meeting that preceded the meeting on 3 May 2014, but they are emphatic that there was no such a meeting. Their denial that there was no such meeting is baseless and inadmissible hearsay.

[44.3] Secondly, on the version of Ms M. the money will only attain the status of lobola or cattle after negotiations. If her version is correct that negotiations did not take place and lobola was not paid, it will then follow that the money has not attained the status of lobola yet, therefore nothing could have precluded them to take the money back home. Strange enough they did not take the money back home instead they left the money and the whiskey with the plaintiff's mother. Further her version and that of the defendant's brother that negotiations did not take place and lobola was not paid are at odds with the defendant's plea wherein he stated that the R20 000 his delegates paid to plaintiff's mother included damages and advance payment towards lobola.

[44.4] Thirdly, the substantial and the exact amount they brought, supports plaintiff's version that the defendant's delegates were send by Mrs P. not to negotiate but merely to deliver the amount of lobola agreed in the meeting that preceded the one on 3 May 2014.

[44.5] Fourthly, the contents of exhibit D are clear and capable to no other construction save that lobola was paid. The defendant's version that exhibit D signifies the agenda of the day is in my view, nothing else but a fabrication and ought to be rejected.

[44.6] Fifthly, the fact that the defendant's delegates has left a substantial amount with plaintiff's mother and since May 2014 to date, no attempt whatsoever, has been made

by them to remind her of the pending negotiations. Their inaction raises more questions than answers.

[44.7] Finally, the belated assertion by the defendant that he never lived with the plaintiff is in conflict with the contents of exhibit A and cannot be accepted as the truth.

[45] In view, of the above, I am satisfied that the network of events around the defendant's version, supports the plaintiff's version that lobola was indeed negotiated in the earlier meeting and paid on 3 May 2014, hence the handing over of the whiskey, that signified the whip to guard and drive the cattle.

[46] I pause at this juncture to address the issue of handing over of the bride. Defendant contends that the plaintiff was not handed over to his family and the required ceremonies were not observed. To support his contention, Mr Loubser relies on the Motsoatsoa judgment mentioned above. In contrast, the plaintiff contends that she was handed over to the defendant's family and with the knowledge and blessings of her mother she continued to live with the defendant. For his contention, Adv Van Aswegen relies on the judgment, *Mamuteane Hloka'moni Mmutle v Dibuseng Mary Thinda and Department of Home Affairs*, supra.

[47] The facts of the above cases are briefly set out hereunder.

[47.1] MOTSOATSOA CASE

On 10 August 2008 the deceased through his parents sent emissaries to the applicant's parents to inform them of their wish to enter into negotiations for lobola. A date of 4 October 2008 was agreed upon. On that date and following upon negotiations an amount of R18 000, 00 was agreed upon as lobola. Of this amount the deceased's emissaries handed over R5000, 00 to the applicant's emissaries and the balance remaining was R13000, 00 unfortunately the deceased died on 21 July 2009 before he

could pay the outstanding balance. The applicant's guardian insisted that handing over of the bride will only take place once the whole lobola as agreed has been handed over.

On page 7 para 14 of his judgment, Matlapeng AJ said:

"The reality is that in most instances the customary law embodied in statutes, academic writings and case law does not reflect the correct and genuine customary law"

On page 11 para 20 with reference to T W Bennet, Customary Law in South Africa 18th Edition at page 217, he said: "Until the bride has formally an officially handed over to the groom's people there can be no valid"

[47.2] MAMUTEANE HLOKA'MONIMMUTLE

“The deceased and the First Respondent had lived together as man and wife since the 1990's in Mafikeng. On 28 March 1997, the parties decided to formalise their cohabitation. The deceased sent representatives to the First Respondent's parental home in Botshabelo to negotiate and pay lobola for the First Respondent Lobola was agreed upon in the sum of R 2300.00 of which an amount R1000.00 was thereupon paid leaving a balance of R1300.00. A receipt for lobola was issued by the First Respondent's father to the deceased representatives. No arrangement was made with regard to the payment of balance. After payment of Lobola the deceased and First Respondent returned to their home in Mafikeng and continued to live together as husband and wife. On the 4th August 2000 the First Respondent gave birth to their child. During 2006 deceased and First Respondent sold their house in Mafikeng and relocated to Callinan. In January 2007 the First Respondent had the customary union registered at the offices of the Second Respondent in terms of the Recognition of

Customary Marriages Act, 98 of 2000."

[48] In the present case lobola was paid and was accepted by the plaintiff's mother. Plaintiff was not accompanied and delivered by her family to the defendant's parental home instead with the knowledge of her mother she continued to live with the defendant at his place. Mrs C. did not sue for seduction as she had resigned to the fact that her daughter was married in accordance with customary law.

[49] As much as there are some salutary customary law aspects raised and addressed by Matlapeng AJ, in the *Motsoatsoa* judgment, unfortunately, his facts are distinguishable from the facts at hand. Firstly, in the *Motsotsoa* case part of lobola was paid and the handing over of the bride was specifically delayed until such time the outstanding lobola is paid in full. In the present matter although disputed by the defendant, the plaintiff's was handed over to the defendant's representatives after lobola was paid. With the knowledge of her mother she lived with the defendant at his place. Secondly, in the *Motsoatsoa* case it is not clear what the customs and usages of the respective families were with regard to the handing over and to what extent they had evolved and developed. For instance, in the Tswana custom the handing over had evolved significantly from its original version and it is practiced differently in other communities. However, Matlapeng AJ, adopted a one size fits all approach and concluded that there was no handing over. This approach, with respect, is in my view, quite rigid and in conflict with the flexible and pragmatic nature that customary law. See in this regard *Mabuza v Mbatha* 2003 (4) SA 218 (C) where Hlophe JP condoned the non performance of *ukumekeza*, a siSwati version of handing over of the bride. See also *Fanti v Boto and Others* 2008 (5) SA 405 (C), where Dlodlo J recognised the position of the mother as head of the family in the absence of the father. Thirdly, in the same judgment, Matlapeng AJ, cautioned about the unreliability of the works of academics, however, in the same

judgment he relied on the works of the same academics to support his conclusion that there was no handing over. See paragraph 14 of the judgment. In view of the above, I cannot follow the *Motsoatsoa* judgment on the facts of the present case.

[49] In the *Mamuteane Hloka'moni Mmutle v Dibuseng Mary Thinda and Department of Home Affairs*, and the facts of the present case, there are some significant parallels. Firstly, in both cases negotiations were concluded and the handing over of the bride either constructive or informal is present. Secondly, in both cases the Tswana customs and usages are applicable. Therefore the judgment of Vilakazi AJ has in my view, some persuasive force with regard to the application of the customary law in the present case.

[50] In the *Mamuteane Hloka'moni Mmutle v Dibuseng Mary Thinda and Department of Home Affairs supra*, both the deceased and the first respondent had lived together before lobola was paid and after lobola was paid in part they returned to their home and continued to live together as husband and wife without the first respondent being handed over to the deceased or his representatives. On these facts, Vilakazi AJ, held that the handing over of the First respondent to the deceased or his representatives would have amounted to a symbolic gesture and the absence of the formal handing over was therefore a non event with no legal consequences. See also *Customary Law in South-Africa, 2004, T W Bennett, Kgapula v Maphai* 1940 NAC (N&T) 108 (Hamanskraal) and *Seymour's Customary Law in Southern Africa supra*.

[51] In the present case, the version of Mrs C., substantially corroborated by the plaintiff and her son, is that she handed over the plaintiff to the defendant's representatives. I have no basis not to accept this version. It is common cause that the plaintiff was not physically delivered to the defendant's parental home in North- West and no ceremonial rituals were observed. However, informed by the above-cited authorities, it is quite evident that the

handing over of the bride need not be a formal ceremony. In view of the fact that the plaintiffs mother had accepted lobola and did not institute an action for seduction, knowing that the plaintiff lives with the defendant, I am satisfied that the plaintiff was handed over to the defendant's family, notwithstanding the fact that the ceremonial rituals were not observed.

[52] If I am wrong and for whatever reason, it is accepted that there was no handing over due to the fact that the plaintiff was not formally accompanied and delivered by her family to the defendant's parental home, it would still be my finding that since the plaintiff and the defendant were living together after lobola was paid, "constructive delivery" is present. The formal ceremonial handing over under these circumstances would, in my view, be a mere a ceremonial gesture with no adverse consequences on the validity of the customary marriage. See in this regard, *Mamuteane Hloka'moni Mmutle v Dibuseng Mary Thinda and Department of Home Affairs and Msutu v Road Accident Fund* supra.

[53] The defence version that there was no customary marriage between the plaintiff and the defendant is in direct conflict with the contents of exhibit "A", wherein both the plaintiff and the defendant, despite the non-observance of certain ceremonial rituals, lived together and regarded themselves as married by customary law. On their own say so, the existence of a customary marriage is incontrovertible. See *Kgapula v Maphai* 1940 NAC (N&T) 108 (Hamanskraal), authoritatively followed in *Mamuteane Hloka'moni Mmutle v Dibuseng Mary Thinda and Department of Home Affairs* supra.

[54] The views of both Mrs M. and the defendant's mother, that they would accept plaintiff as the defendant's wife only upon production of a marriage certificate issued by either Home Affairs or a Pastor, are in my view, nothing else but a distortion of the customary law. In conclusion, I am satisfied that all the requirements of a valid customary marriage have been complied with.

K: COSTS

[55] Adv. Van Aswegen argued that in the event I make a decision favourable to the applicant, I should make an order with regard to costs. Mr Loubser conceded that the granting of such an order will be fair under the circumstances.

[56] In the result, I make the following order:

- (i) A valid customary marriage was concluded between the plaintiff and the defendant.
- (ii) The defendant to pay the costs.

M.C. MOKGOBO, AJ

On behalf of Plaintiff: Adv Van Aswegen

Instructed by:

McINTYRE VAN DER POST ATTORNEYS

BLOEMFONTEIN

On behalf of Defendant: Mr J H Loubser

Instructed by:

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