THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 244/19

In the matter between:

ROBERT TSAMBO **APPELLANT**

and

LERATO RUBETA SENGADI **RESPONDENT**

In re:

TSAMBO, JABULANI **DECEASED**

Neutral citation: *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020)

Coram: MAYA P and MBHA, ZONDI and MOLEMELA JJA and MOJAPELO AJA

Heard: 6 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 30 April 2020.

Summary: Customary law – s 3(1)*(b)* of the Recognition of Customary Marriages Act 120 of 1998 – whether handing over of bride occurred – whether a valid customary marriage came into existence.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokgoathleng J, sitting as a court of first instance): judgment reported *sub nom Sengadi v Tsambo; In re: Tsambo* [2018] ZAGPJHC 666; 2019 (4) SA 50 (GJ); [2019] 1 All SA 569 (GJ)
The appeal is dismissed with no order as to costs.

JUDGMENT

Molemela JA (Maya, P and Mbha and Zondi JJA and Mojapelo AJA concurring)

[1] The central issue in this appeal is whether on 28 February 2016 a customary law marriage came into existence between the deceased, Mr Jabulani Tsambo whose stage name was HHP ("Jabba"), and the respondent, Mrs Lerato Rubeta Sengadi. Ancillary to that issue is whether, pursuant to the conclusion of the lobola negotiations, a handing over of the bride ensued in satisfaction of the requirement that the marriage be negotiated and entered into or celebrated in accordance with customary law in terms of s 3(1)*(b)* of the Recognition of Customary Marriages Act 120 of 1998.

[2] The appeal is directed at the decision of the Gauteng Division of the High Court, Johannesburg (Mokgoathleng J), which found that a valid customary marriage was concluded between the respondent and the deceased. The appellant, Mr Robert Tsambo, is the biological father of the deceased.

[3] In support of relief she sought from the high court, the respondent relied on the following facts. The deceased proposed marriage to her on 6 November 2015 in Amsterdam. She immediately accepted the marriage proposal. The deceased considered African culture to be important and insisted that the couple conclude a

marriage in terms of customary law[1] with the blessings of their respective parents. The respondent agreed. On 20 January 2016 the appellant dispatched a letter written by the deceased's uncle, Mr Tutu Mokgatle, to the respondent's mother. The letter requested that the families of the respondent and the deceased meet 'to discuss the union' of the deceased and the respondent. On 28 February 2016 the two families met at the respondent's family home. Although the appellant and the respondent's mother were present at the respondent's home, they did not participate in the lobola negotiations, as is the custom. Upon the successful conclusion of the lobola negotiations, a lobola agreement was concluded, reduced to writing and signed. It stipulated that the lobola agreed upon was an amount of R45 000. It further recorded that the deceased would pay a deposit of R30 000 upon signature of the agreement and that the balance would be paid in two instalments. As a postscript to the agreement, it was recorded that 'the final amount at our next meeting shall be R10 000. It is agreed that the remaining R5000 will follow at some later stage.'

[4] At the conclusion of the lobola negotiations, the women from the respective families attended to the preparation of a meal. At this time, the deceased left the respondent's home for a short while. In the intervening period, the respondent's mother received a payment notification on her phone, advising that the deceased had transferred an amount of R35 000 into her bank account.

[5] When the deceased returned, the respondent noticed that he had changed into formal attire. She also noticed that the deceased's aunts, Ms Nomvula and Ms Minky, had emerged from outside and entered the house bearing a covered outfit on a clothes hanger. The deceased's aunts requested the respondent to accompany them into one of the bedrooms. Once in the bedroom, the deceased's aunts revealed an outfit from the clothes hanger, and informed her that the attire was her wedding dress. They then proceeded to dress her up in that attire. When she emerged from the bedroom, she noticed that her attire matched the deceased's. She then realised that not only was that day reserved for lobola negotiations, but the deceased and his family had also planned that a customary law marriage between her and the deceased should be celebrated on the same day. The deceased's aunts introduced

[1] '[C]ustomary law' is defined in s 1 of the Act as 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.

the respondent to all persons present as the deceased's wife and thereafter welcomed her to the Tsambo family. The appellant approached the respondent, embraced her and congratulated her on her marriage to the deceased.

[6] The celebration that ensued after the lobola negotiations was recorded on video camera by one of the attendees. Photographs described as screenshots were obtained from the recording and introduced into evidence. In one of the photographs, the appellant is depicted with the deceased and the respondent, who are dressed in matching attire. In another, the appellant can be seen embracing the respondent. The video recording was introduced into evidence and viewed at the high court. The high court recorded that the video depicted the two families in a joyous celebratory mood ululating and uttering the words 'finally, finally'. The respondent averred that a lawful customary marriage came into existence between the deceased and herself on that day. She asserted that later that day when she and the deceased returned to their place of abode, they did so as husband and wife. Consequently, their place of abode became the matrimonial home, so she asserted. It is common cause that the customary marriage was not registered with the Department of Home Affairs.

[7] According to the respondent, she and the deceased continued to live together as husband and wife until sometime during 2018, when their relationship went through a rough patch, apparently because of the deceased's infidelity and drug addiction for which he refused to undergo rehabilitation. This caused the respondent to leave the matrimonial home although she did not take all her personal belongings with her. Due to the deteriorating health and depression of the deceased, during April 2018, the respondent convened a meeting of the two families. She reported the deterioration in the deceased's health. The deceased, however, stalked out in a huff before any resolution could be reached. During August 2018, the couple reconciled but did not resume their cohabitation as the respondent had insisted that she would return to the matrimonial home only if the deceased agreed to submit himself to a rehabilitation programme. Unfortunately, the deceased committed suicide on 23 October 2018. The respondent returned to the matrimonial home on 24 October 2018 in order to mourn the passing of her husband. On 27 October 2018, the appellant informed the respondent that he did not acknowledge her as the deceased's wife and barred her from making funeral arrangements for him. He

subsequently changed the locks of the matrimonial home, thereby depriving the respondent of access thereto.

[8] The respondent launched an urgent application, essentially seeking recognition of what she asserted to be a customary marriage between her and the deceased and all rights consequent upon that marriage. The salient orders sought in terms of the notice of motion were couched as follows:

'2. It is declared that the customary marriage between [the respondent] and the deceased is a customary marriage entered into validly on 28 February 2016, and as envisaged in terms of section 3 of the Recognition of Customary Marriages Act, 120 of 1998.

3. The [respondent] is declared to be the lawful customary wife of the deceased . . . who died on the 23rd of October 2018.'

The rest of the relief sought in terms of the notice of motion is not the subject of the appeal before us and need not detain us.

[9] The appellant opposed the application. The main thrust of his opposition was that the respondent had no right to the relief sought, as no customary law marriage had been concluded between her and the deceased on 28 February 2016. The appellant argued that 'at best for the deceased, the necessary customs, rituals and procedures required for the conclusion of a customary marriage may have commenced, but were not proceeded with or completed.' The appellant averred that the meeting that took place on 28 February 2016 was confined to lobola negotiations and what happened thereafter merely constituted a celebration of the successful conclusion of the lobola negotiations. He asserted that it was clear from the terms of the lobola agreement that the families intended to have a further meeting thereafter.

[10] The appellant also averred that '[t]he two families would have [had] to agree on the formalities and the date on which the [respondent] would be "handed over" to the [deceased's] family'. He contended that in terms of custom, subsequent to the initial payment of lobola, a date is set on which the bride's family will hand over the bride to the husband's family, 'go gorosiwa',[2] and upon arrival a lamb or goat is slaughtered and the bile therefrom is used to cleanse the couple. He contended that the performance of that ritual would signify the union of the couple and the joining of

[2] A Setswana phrase meaning integration of the bride into the bridegroom's family.

the two families. That ritual would be followed by a celebration, during which the lamb or goat that was slaughtered would be consumed. The appellant contended that because that ritual was not observed, the handing over of the bride, which he considered as the most crucial part of a customary marriage, did not take place.[3] Thus, so it was contended, no customary marriage came into existence between the deceased and the respondent.

[11] The high court found that the handing over was not a strict requirement for a valid customary marriage and could be waived. It found that there was a tacit waiver of the custom of the handing over of the bride because a symbolic handing over of the respondent to the deceased's family had occurred after the conclusion of the customary marriage. It rejected the appellant's contention that the most crucial part of a customary marriage is the handing over of the bride and that the absence thereof would result in no valid customary marriage coming into existence. The high court, inter alia, granted the following orders:

'1. It is declared that the customary marriage between the [respondent] and the deceased is a customary marriage entered into validly on [the] 28th February 2016, and as envisaged in terms of Section 3 of the Recognition of Customary Marriages Act, 120 of 1998.

2. The [respondent] is declared to be the lawful customary wife of the deceased, JABULANI TSAMBO . . . who died on the 23rd of October 2018.'

[12] Before us, it was contended on behalf of the respondent that the requirement of handing over of the bride is not determinative of a customary marriage. As authority for that proposition, the respondent relied on the writings of Professor Bennett and Professor Bekker with specific regard to the evolution of the customary marriage practices of the Batswana people, which is the customary law that is

[3] In support of the averment that the handing over of the bride to the bridegroom's family was an important element of a customary marriage, the appellant relied on the dictum in *Motsoatsoa v Roro and Another* 2010] ZAGPJHC 122; [2011] 2 All SA 324 (GSJ) where the high court stated that the bride is invariably handed over to the bridegroom's family at the husband's family's residence. *Motsoatsoa* was cited with approval in *Mxiki v Mbata*, In re: *Mbata v Department of Home Affairs and Others* [2014] ZAGPPHC 825, where the court found that there can be no valid customary marriage until the bride has been formally and officially handed over to her bridegroom's family. Those judgments predate *Mbungela v Mkabi Mbungela and Another v Mkabi and Others* [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA), where this Court found that the ritual of the handing over of the bride was important but not a key determinant of a valid customary marriage.

applicable in the present case. Professor Bekker[4] in *Seymour's Customary Law in Southern Africa*, argued that amongst the Sotho-Tswana people, the wedding is celebrated at the bride's family home, where the lobola negotiations take place. In some of the communities, the handing over of the bride takes a physical form on the day of the wedding.[5] Professor Bekker proceeds to observe as follows:

'On the completion of the lobolo agreement, the bride's guardian provides a beast for slaughter, each party receiving half the meat; certain ceremonies are performed with the entrails. This slaughter signifies not only the completion of the lobolo agreement, but also the consummation of the customary marriage, which is not rendered less effective if the bride does not leave with the bridegroom's party on that occasion, and usually she does not.'[6]

[13] It is clear from the preceding discussion that historically, significance was paid to the conclusion of the lobola agreement, and not necessarily the full payment of lobola. Therefore, the appellant's contention that a marriage could not have been concluded as it was agreed that part of the outstanding balance on the lobola would be paid 'at the next meeting' is devoid of any merit. In my view, it simply does not follow that the completion of the customary marriage process on the same day was precluded because it was not pertinently discussed during the negotiations. As mentioned above, the crisp question in this matter is whether, on the facts of this case a customary marriage came into existence.[7] The handing over of the bride is an issue that was raised by the appellant as proof that the existence of a customary marriage had not been established. The facts must be considered against the backdrop of relevant authorities.

[14] Section 3(1) of the Recognition of Customary Marriages Act provides:

'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.'

---

[4] J C Bekker *Seymour's Customary Law in Southern Africa* Juta (1989) at 113-114.
[5] Ibid at 109.
[6] Ibid at 113-114.
[7] See *Moropane v Southon* [2014] ZASCA 76 para 56.

[15] When dealing with customary law, it should always be borne in mind that it is a dynamic system of law.[8] In *Ngwenyama v Mayelane and Another*[9] this Court stated as follows:

'The Recognition Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when the customary law celebrations are *generally* in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence.' (Own emphasis.)

[16] In *Mabuza v Mbatha*[10] the court, stated that there was no doubt that the custom of *ukumekeza*[11] had evolved so much so that it is probably practised differently than it was centuries ago. It went on to endorse the view that it was inconceivable that *ukumekeza* had not evolved and that it could not be waived by agreement between the parties and/or their families in appropriate cases.[12] That dictum was approved by this Court in *Mbungela and Another v Mkabi and Others*.[13] Having reviewed several authorities, this Court concluded that the handing over of the bride, though important, is not a key determinant of a valid customary marriage. It aptly stated as follows:

'The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results.'

[17] The appellant's contentions pertaining to the rituals observed during the handing over of the bride ceremony fail to take into account that customary law is by

---

[8] *Moropane v Southon* [2014] ZASCA 76 para 153.
[9] [2012] ZASCA 94; 2012 (4) SA 527 (SCA); 2012 (10) BCLR 1071 (SCA); [2012] 3 All SA 408 (SCA) para 23.
[10] 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C).
[11] Described as 'the formal integration of the bride into the bridegroom's family' amongst Swati people in *Mabuza v Mbatha* para 9.
[12] *Mabuza v Mbatha* para 25. Also see *C v P* (1009/2016) [2017] ZAFSHC 57 (6 April 2017).
[13] [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) para 27.

its nature, a constantly evolving system.[14] That customary law has always evolved is evident from the following observation made by Professor Bennett almost three decades ago and approved in many judgments:

'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. Aside from this, the indigenous rituals might be supplanted by exotic ones: a wedding ring may now be used in place of the traditional gall bladder of a slaughtered beast and for many a church ceremony has become indispensable.'[15]

[18] It is evident from the foregoing passage that strict compliance with rituals has, in the past, been waived. The authorities cited by the respondent, mentioned earlier in the judgment, also attest to that. Clearly, customs have never been static. They develop and change along with the society in which they are practised.[16] Given the obligation imposed on the courts to give effect to the principle of living customary law,[17] it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law.

[19] Before analysing the facts of this case, it is appropriate to address the appellant's contention that there was a dispute of fact pertaining to the question whether the events of 28 February 2016 established a customary marriage. The appellant submitted that in the light of a material factual dispute regarding the nature of the celebrations after the conclusion of the lobola negotiations, the high court ought to have referred the dispute to trial or for the hearing of oral evidence in accordance with the principle established in *Plascon-Evans Paints Ltd v Van*

---

[14] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) para 45.
[15] T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (2004) at 194, cited in *Mbungela v Mkabi* para 24.
[16] *Moropane v Southon* [2014] ZASCA 76 para 36.
[17] *Shilubana and Others v Nwamitwa* para 81.

Riebeeck Paints (Pty) Ltd.[18] A brief consideration of the *Plascon-Evans* rule is required. The principle laid down in that seminal judgment is that an applicant who seeks final relief using motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. The nub of the issue is whether on the facts, and bearing in mind the *Plascon-Evans* rule, the handing over of the bride was established.

[20] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*,[19] this Court clarified the effect of factual disputes in motion proceedings as follows:

'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

---

[18] 1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634E-635C.

[19] [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 para 13. Also see *Malan v City of Cape Town* [2014] ZACC 25; 2014 (6) SA 315; (CC); 2014 (11) BCLR 1265 (CC) para 73.

[21] It is evident from the foregoing passage that a bona fide dispute of fact only arises when the party raising it seriously addresses the facts that are disputed, especially where the disputing party is in a position to be aware of the facts. The difficulty for the appellant in this matter is that he provided no answer to some of the respondent's crucial allegations. He did not engage with the respondent's assertions pertaining to specific events that were said to have happened in his presence, such as her being dressed in a wedding attire as described by the deceased's aunts, being introduced to the witnesses by them as the deceased's wife and welcomed to his family and being congratulated by the appellant on the marriage. These allegations were not gainsaid despite the fact that they related to aspects that lay within his personal knowledge and for which he could provide an answer.

[22] There was a bare denial regarding the material aspect of what the change of clothes and the words uttered signified. Whereas the respondent supported her evidence with the confirmatory affidavits of her relatives who were present during the lobola negotiations, the appellant did not support his bare denials with any confirmatory affidavit. I find it odd that the deceased's aunts, who played a crucial role in the events, did not depose to any affidavit. One of the aunts, Ms Nomvula, was reportedly present at the deceased's house before his burial. This was not denied by the appellant. Surprisingly, not even an unsworn statement was presented as her account of events. Instead, an unsworn statement, allegedly authored at the instance of the deceased's mother after the deceased's death, was attached to the appellant's papers. While it is trite that hearsay evidence may be admitted in urgent applications, the note prepared by the deceased's mother cannot carry much weight as she was not part of the lobola negotiations and the celebrations that followed.

[23] Notably, no reason was given for not obtaining affidavits from those who were present. In my view, the same effort expended to procure an unsworn statement from the deceased's mother could have been spent on obtaining a statement from Ms Nomvula. The very fact that the appellant was able to procure a statement from the deceased's mother actually puts paid to the appellant's contention that he was not provided with sufficient opportunity to interrogate the factual disputes. When all is said and done, the appellant's bald denials did not create a bona fide dispute of fact

necessitating the referral of the matter for oral evidence or trial, or even the dismissal of the application.

[24] The appellant contended that the fact that both the respondent and the deceased considered culture to be of significance cast doubt on whether they could have intended to conclude a wedding without observing such a crucial aspect of their culture like the handing over of the bride. I disagree. In my view, there is sufficient undisputed evidence from which it can be inferred that the deceased, a successful musician who had a busy schedule,[20] had decided to expedite the conclusion of the customary marriage. The letter requesting a meeting for the lobola negotiations was dispatched relatively soon after he had proposed marriage to the respondent. After the conclusion of the lobola negotiations, the deceased transferred more than the amount he was required to pay as a deposit for the lobola. It is also significant that the deceased and the appellant were in attendance at the respondent's home even though the family had nominated emissaries that would represent him during the lobola negotiations.

[25] While rituals associated with the handing over of the bride, like the slaughtering of the sheep and the consumption of its bile were indeed not observed, there are some features that bear consideration. It is quite striking that the deceased's aunts are the ones who provided the respondent with an attire matching that of the deceased and who actually dressed her up in it. That they described it as her wedding dress is quite telling. These are customary practices that are undoubtedly compatible with an acceptance of the respondent by the deceased's family.

[26] The clearest indication of her acceptance as the deceased's wife is evidenced by the actual utterances that were made: the respondent was formally introduced as the deceased's wife and welcomed to the Tsambo family. Thereafter, the appellant embraced her and congratulated her on her marriage to the deceased. Bearing in mind that the purpose of the ceremony of the handing over of a bride is simply to mark the beginning of a couple's customary marriage and introduce the bride to the

[20] On the appellant's own account, the reason the respondent and the deceased gave for not arranging another meeting after the lobola negotiations was that it was due to 'clashing schedules'.

bridegroom's family,[21] I am inclined to agree with the respondent's assertion that a handing over, in the form of a declared acceptance of her as a *makoti* (daughter-in-law), satisfied the requirement of the handing over of the bride.

[27] That the couple continued to cohabit after that celebration and that the respondent registered the deceased as a beneficiary and spouse on her medical aid scheme[22] are features that cannot be dismissed as insignificant, as they are consonant with the existence of a marriage. I am fortified in this view by Professor Bennet's argument with regards to the handing over requirement. He argued that the parties' intention could be inferred from cohabitation. According to him, where the parties were cohabiting, the gravamen of the enquiry was the attitude of the woman's guardian. If the guardian did not object to the relationship, a marriage would be presumed, irrespective of where the matrimonial home happened to be or how the 'spouses' came to be living there.[23] Professor Bennett placed reliance on a case in which the Court had remarked that "long cohabitation raises a strong suspicion of marriage, especially when the woman's father has taken no steps indicating that he does not so regard it".[24] In this matter, the respondent averred that her mother had not instituted any action for seduction or demanded payment of a fine, well knowing that the respondent cohabited with the deceased. She accepted that the respondent and the deceased had entered into a valid customary marriage.

[28] To sum up: the respondent's evidence of the events that took place on the day of the lobola negotiations is supported by several confirmatory affidavits. The appellant's bare denials did not refute the respondent's evidence. Clearly, the correct application of the *Plascon-Evans* rule did not preclude the high court from granting final relief on the papers, where the evidence put up by the appellant did not constitute a bona fide factual dispute.

[29] Despite the high court's misgivings about the application of the *Plascon-Evans* rule in the context of an urgent application, it is evident that, in reality, it

---

[21] *Mbungela and Another v Mkabi and Others* para 30.
[22] The respondent's assertion that she registered the deceased as a beneficiary and spouse on her medical aid scheme on 1 May 2016 was not disputed.
[23] T W Bennett *A Sourcebook of African Customary Law for Southern Africa* (2004) at 195.
[24] Ibid at 219, where the case of *Kgapula v Maphai* 1940 NAC (N&T) 108 (Hammanskraal), is discussed.

applied the same rule and came to the correct decision regarding the waiver of some of the rituals associated with the handing over of the bride. It is therefore not necessary to determine whether a more robust approach was necessary. To the extent that the high court stated that the *Plascon-Evans* rule was not satisfactory in the context of urgent applications, it erred.

[30] Having considered all the facts and circumstances of this case, I am persuaded that on 28 February 2016, the respondent and the deceased concluded a customary marriage that complied with all the requirements for a valid customary marriage as contemplated in s 3(1) of the Act. It follows that the appeal against that order of the high court must fail.

[31] Despite the finding that the appeal against the order of the high court ought to fail, there is an aspect that this Court is constrained to pronounce itself on. Having correctly found on the facts of this case that the physical handing over of the bride was waived in favour of a symbolic handing over, the high court, in the process of giving reasons for its order, proceeded to declare that the custom of the handing over of the bride was unconstitutional.

[32] In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*,[25] the Constitutional Court laid down that a court may raise, of its own accord, the unconstitutionality of a law that it is called upon to enforce.[26] It pointed out that it may do so where (a) the constitutional question arises on the facts; and (b) a decision on the constitutional question is necessary for a proper determination of the case before it or it is in the interests of justice to do so.[27] It pointed out that it was neither necessary nor desirable to catalogue circumstances in which it would be in the interests of justice for a court to raise, of its own accord, a constitutional issue, because that would depend on the facts and circumstances of the case.[28] It stressed that the parties must be afforded an adequate opportunity to deal with the issue.[29]

---

[25] [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC).
[26] Ibid para 33.
[27] Ibid para 42.
[28] Ibid para 40.
[29] Ibid para 42.

[33] It must be borne in mind that it was never the respondent's case that the requirement of the handing over of the bride was unconstitutional. The issue of the handing over of the bride became relevant in so far as establishing whether a customary law marriage came into existence. Given the pleaded case, a decision on the constitutionality of the custom of the handing over of the bride simply did not arise. During the exchange with the bench, both counsel assured this Court that the constitutionality issue was not canvassed during argument before the high court. They bemoaned the fact that the declaration was made without the benefit of full argument. Since prerequisites laid down by the Constitutional Court in the afore-mentioned judgment have not been met, I am inclined to agree that there was no basis for the high court to declare that the handing over custom was unconstitutional.

[34] With regard to costs, counsel for the appellant informed us that he was representing the appellant on a pro bono basis. He submitted that if this Court was inclined to find against the appellant, it should grant an order in terms of which the costs of the appeal are borne by the deceased estate, as the appellant was cited in his personal capacity as well as in his capacity as the head of the Tsambo family. The respondent's counsel indicated that it left the issue of costs in the Court's discretion. All things considered, it would be appropriate not to make any order as to costs.

[35] The appeal is dismissed with no order as to costs.

_____

M B MOLEMELA

JUDGE OF APPEAL

Appearances:

For appellant:	D Mahon (with him C Marule)
Instructed by:	Lawtons Inc, Sandton
	Symington De Kok Attorneys, Bloemfontein
For respondent:	A Bester SC (with him F Bezuidenhout)
Instructed by:	Ngoqo Sithole Inc, Johannesburg
	Honey Attorneys, Bloemfontein.