

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Appeal case no: **A3096/2022**

Date of Appeal: 7 May 2024

1.REPORTABLE : YES/NO

2.OF INTREST TO OTHER JUDGES: YES/NO

3.REVISED

In the matter between:

B[...] S[....] E[...] S[...]

Appellant

and

P[...] R[...] M[...]

Respondent

SUMMARY

Customary Law - When customary law is applicable to a dispute the court is obliged to apply customary law, subject to the Constitution and any legislation that deals with customary law in accordance with section 211(3) of the Constitution.

Recognition of Customary Marriages Act 120 of 1998 – Compliance with section 3(1) of the Recognition Act is a prerequisite for the validity of a customary marriage concluded after commencement of the Act.

Pleadings – Pleading compliance with section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 is necessary in the absence of a customary marriage certificate rendering *prima facie* proof of such marriage in terms of section 4(8) of the Recognition Act.

JUDGMENT

Van Vuuren AJ (Dlamini J concurring)

Introduction

[1] Ms S[...] instituted divorce proceedings against Mr M[...] in the Regional Court, Randburg, but conclusion of the customary marriage was disputed. Ms S[...] and her siblings gave detailed evidence about the conclusion of the marriage with reference to their understanding of the requisites under Xitsonga (Tsonga) custom. The court *a quo* granted absolution from the instance at the end of the plaintiff's case.

[2] On appeal, Mr Segage, counsel for Ms S[...], argued that the order be set aside to enable the action to proceed in the court *a quo*.

[3] The evidence revealed that Mr M[...] and Ms S[...] were introduced by a common friend who considered his Christianity and her position as pastor a match. They first met in person during November 2016. Mr M[...] told her that he was the father of seven children with different mothers, but from their conversations and an email exchange Mr M[...] confirmed his status as a singleton to her. Ms S[...] testified that she was not in favour of a polygamous marriage for reasons of personal dignity.

[4] Their relationship developed and Mr M[...] made a marriage proposal to Ms S[...] at Mount Grace near Magaliesburg in March the following year. Ms S[...] accepted the proposal and provided her brother's contact details to enable their respective families to meet.

[5] On 27 April 2017 the S[...] family received the M[...] family at the S[...]’s residence at Nkowankowa, Tzaneen, where the customary negotiations between the families concluded in a written recordal of the items and sum comprising the agreed *lobola*. The process was agreed to be completed on 22 July 2017. On this occasion the M[...]’s returned to the S[...]’s residence and delivered and paid most of what was agreed which was accepted by the S[...] family.

[6] Ms S[...], as a token of her consent to the customary marriage so negotiated, took a sum of money from the paid *lobola* as *umbeja*, and was thereafter handed

over by her family and received by the M[...] family. Celebrations and ceremonial song preceded Mr M[...]’s and Ms S[...]’s departure for the Ranch Hotel in Polokwane. The next day they went to church where Mr M[...] introduced Ms S[...] to his pastor as his new young wife.

[7] Ms S[...] announced their marriage on various platforms and for example saw to the addition of Mr M[...] as a beneficiary under her medical aid.

[8] Although they frequently visited each other, free to come and go as it suited them, Ms S[...] continued to work and stay in Johannesburg whilst Mr M[...] remained in Polokwane. No children were born from their relationship.

[9] By August 2020 their relationship had broken down and Ms S[...] instituted action proceedings in the Regional Court in Randburg, Gauteng, claiming a decree of divorce and division of the joint estate. It was only upon receipt of Mr M[...]’s plea in the divorce proceedings that she learnt of the existing customary marriage between Mr M[...] and Ms MF N[...] concluded in 2007, a decade earlier.

The pleadings

[10] In her particulars of claim Ms S[...] alleged conclusion of a customary marriage and their community of property in terms of section 7 of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act). The sum of the allegations in her particulars of claim regarding conclusion of the customary marriage, the applicable customary law, compliance with its prescripts, and the legal effect of conclusion of the alleged customary marriage comprise the following:

“4. The Parties hereto were married in accordance to customary rite to each other on or about the 27th of April 2017 at ... Nkowankowa, Tzaneen, Limpopo Province and the marriage still subsists. In terms of section 7 of the Recognition of Customary Marriages Act 120 of 1998 such marriage is treated as parties who were married in community of property.”

[11] Mr M[...] denied the customary marriage on several grounds which included: a denial that he was married to the plaintiff in accordance with any marital regime; an assertion that whilst he did send emissaries to the plaintiff's family to initiate *lobola* negotiations, he could not complete the customary marriage process "*as prescribed in section 3 of the Recognition Act*"; and that he was married to Ms MF N[...] (as evidenced by the customary law agreement concluded and executed during February and July 2007) who had not given consent to Mr M[...] to enter into a further customary marriage.

[12] In her replication Ms S[...] denied these allegations and specifically pleaded that there was no customary marriage between Mr M[...] and Ms N[...]

Ms S[...]’s views on polygamy and her learning of the existing marriage

[13] Although Ms S[...] in her pleadings denied the existence of a customary marriage between Mr M[...] and Ms N[...] - her testimony was that she did not know about Mr M[...]’s first marriage. He had not disclosed the fact of his prior marriage to her and instead represented that he was unmarried. This, she said, he conveyed verbally and was borne out by a printout obtained from the Department of Home Affairs which recorded his marital status as 'single'. During her oral evidence *a quo* Ms S[...]’s position moved from firm pleaded denial of the existing marriage to an acceptance that she had not known of the marriage between Mr M[...] and Ms N[...]

[14] Considering Ms S[...]’s views on polygamous marriages, one could appreciate that it would have been difficult for her to testify: "*I did not know, your worship, that my husband has another wife.*" She denied prior knowledge of that marriage and reluctantly accepted that the minutes of the *lobola* negotiations and agreement (also recorded in Tsonga) attached to Mr M[...]’s plea related to a marriage between Mr M[...] and Ms N[...] concluded in 2007.

[15] Whilst Ms S[...] persisted that a customary marriage between her and Mr M[...] was duly concluded, she was unable to express a view on whether Tsonga

customary law required the consent of a prospective spouse's first wife before a second marriage could validly be entered into.

[16] Cross-examination of the plaintiff and her witnesses focussed specifically on the absence of consent to a further marriage by Ms N[...], Mr M[...]'s existing spouse, and her rights in that regard. Far less was said in evidence regarding the equally important rights of a prospective spouse to be informed of any existing marriage or marriages of her suitor before she consents to be married to him under customary law.

[17] Ms S[...] did not know of the existing customary marriage at the time that she consented thereto. It is not ascertainable from the evidence whether Ms N[...] even knew of the proposal and alleged customary marriage between Mr M[...] and Ms S[...].

[18] Counsel appearing before us confirmed that no certificate, as would render *prima facie* proof of the conclusion of a customary marriage, provided for in section 4 of the Recognition Act, formed part of the discovered or evidentiary material before the court *a quo*. Further, there is no evidence that an application was brought to seek a court's approval of the future matrimonial property system of any further marriages as provided for in section 7(6) of the Recognition Act.

[19] It should be noted that the court *a quo*, before the plaintiff elected to proceed with the leading of evidence, invited the plaintiff to consider her position with respect to obtaining a certificate of registration of the alleged customary marriage. The plaintiff declined and elected to proceed to trial.

The judgment and reasons *a quo*

[20] The learned regional magistrate granted absolution from the instance. The sum total of the court *a quo*'s judgment was the following:

“*In Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H:*

If absolution from the instance sought at the end of Plaintiff's case, the test to be applied is, not whether the evidence led by the Plaintiff establishes what would finally be required/established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the Plaintiff.

The Plaintiff's Particulars of claim under paragraph 4 state:

'The Parties hereto were married in accordance to customary rite to each other on or about the 27th of April 2017 at 1086A at Nkowankowa, Tzaneen, Limpopo Province and the marriage is still in existence. In ... terms of Section 7 of the Recognition of Customary Marriages Act 120 of 1998 such marriage is treated as parties who were married in community of property.'

It is not in the Particulars of claim that Section 3 of Recognition of Customary Marriages Act 120 were complied with.

Absolution is granted."

[21] Following a request for reasons in terms of Magistrates Court Rule 51(1), the learned regional magistrate added the following to the narrative:

"Parties stand and fall by their papers. It is not in the Particulars of claim that the prospective spouses was above the age of 18 years, nor, that both consented to be married. It was not alleged what the customary law require for there to be a valid customary marriage nor how it is was complied with."

The value of the system of registration of customary marriages

[22] Although the Recognition Act has been at the centre of much legal debate, which we do not intend to essay here, the system whereby customary marriages can be registered and the proprietary consequences flowing therefrom approved by a court (in the case of further contemplated customary marriages) enhances certainty, transparency and the availability of a public record of the important information about the conclusion of customary marriages.

[23] The Recognition Act defines¹ *customary law* as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples” and *customary marriage* as “a marriage concluded in accordance with customary law”. The provisions of the Act provide that “[a] customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage”² - and on multiple customary marriages: “[i]f a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages”.³ Notably, both latter sub-sections require compliance with the Recognition Act.⁴

[24] Section 3 of the Act sets out the requirements for the validity of customary marriages as follows:

“3(1) For a customary marriage entered into after the commencement of this Act to be valid –

(a) the prospective spouses:

(i) must be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”

[25] Parties to a customary marriage concluded after the commencement of the Recognition Act must, in terms of sub-sections 4(1) and 4(3)(b) thereof, register their marriage within 90 days of the conclusion thereof.⁵ Either spouse may apply and must provide the required information to enable registration.⁶ The benefits of the

¹ Recognition Act: Section 1

² Recognition Act: Sub-section 2(2)

³ Recognition Act: Sub-section 2(4)

⁴ The proviso to sub-sections 2(2) and 2(4) read: “which complies with the requirements of this Act”.

⁵ The period within which customary marriages entered into before the 15 November 2000 commencement of the Recognition Act were to have been registered is one year in terms of sub-section 4(3)(a).

⁶ Recognition Act: Sub-section 4(2)

imposition of a duty for early registration becomes apparent when the extent of information to be captured in the process is considered.

[26] The value of such recorded information gathered in the certification process is often underscored when questions arise when marriage is contemplated, in divorce proceedings, and when proprietary questions and inheritance need solving at the passing of a person married under customary law. When divorce or death calls for clarity years or decades later, it may be too late to find the necessary witnesses and evidence.

[27] The features of the Recognition Act and the Regulations⁷ thereunder aimed at such certainty, transparency and public recordal relevant in the context of the present matter are *inter alia* demonstrated by the following:

[27.1] Section 4(4)(a) provides that: “A *registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobola agreed to and any other particulars prescribed*” – and if the officer is not satisfied that a valid *customary marriage was entered into by the spouses*, she or he must refuse to register the marriage.⁸

[27.2] Section 4(7) provides that: “[a] *court may, upon application made to that court and upon investigation instituted by that court, order ... (a) the registration of any customary marriage*”. In the event of such an order made on application to a court, the registering officer should register the customary marriage in accordance with the prescripts of the Recognition Act.

[27.3] Once registered and certified in terms of the Recognition Act, in addition to the valuable recordal of various facts concerning the marriage, it also brings about an evidentiary benefit - section 4(8) provides:

⁷ Regulations in terms of the Recognition of Customary Marriages Act 120 of 1998 published under GN R1101 in GG 21700 of 1 November 2000 [with effect from 15 November 2000] as amended by GN R359 in GG 25023 of 14 March 2003.

⁸ Recognition Act: Sub-section 4(6)

“A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.”⁹

[27.4] The required extent of the various facts concerning the customary marriage sought to be registered appear from the questions posed in the forms required in the registration process. The information required includes various facts that are pertinent to the rights of parties to existing and contemplated customary marriages. These include:¹⁰

[27.4.1] A declaration by the husband: that he consented to the customary marriage; that the marriage was contracted in accordance with the laws and customs of a specific traditional community, which must be identified (an example would be Tsonga customary law); that he was not a partner in a civil marriage when he contracted the said customary marriage; and, whether at the time of the said customary marriage he was married by customary law to another/other woman/women, disclosing the names and the dates of such marriages.

[27.4.2] A declaration by the wife: that she consented to the customary marriage; and that she was not a partner in a civil or customary marriage when she contracted the said customary marriage.

[27.4.3] A declaration by the traditional leader or his or her delegate, where possible: *that the customary marriage was legally contracted in accordance with the laws and customs of the specified traditional community and that several particulars in the completed form are to the best of her or his knowledge and belief true and correct.*

[27.4.4] A similar declaration to the latter by representatives present at the marriage.

[27.4.5] Particularity of the *lobola* agreement and the date of celebration of the marriage.

⁹ Own emphasis

¹⁰ Form A to the Regulations in terms of the Recognition of Customary Marriages Act 120 of 1998

[27.4.6] A copy of the matrimonial property system contract and court order in instances of a second or further marriage. Form A reminds:

“Take note:

If a husband enters into a second or consecutive marriage after 15 November 2000, the written contract which will regulate the future matrimonial property system of his marriage, together with the order of court which approved such contract, must be annexed to this form. A further customary marriage cannot be registered if the aforementioned contract or order of court is not attached.”

[28] Lastly, for present purposes, the Regulations make provision for enquiries into the existence of customary marriages. Regulation 3(1) provides:

“An application in terms of section 4(5) of the Act to a registering officer to enquire into the existence of a customary marriage must be in the form and contain substantially the information set out in Form A of the annexure.”

Further features of the Recognition Act

[29] The further features and virtues of the Recognition Act that aim to ensure and enhance certainty, equality, transparency and recordal relating to the conclusion of customary marriages and the rights that flow therefrom include:

[29.1] Section 7 of the Act deals with the proprietary consequences of customary marriages and the contractual capacity of spouses.

[29.1.1] Section 7(2) provides that: *“A customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.”*

[29.1.2] Section 7(6) provides that: *“A husband in a customary marriage who wishes to enter into a further customary marriage*

with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.”

[29.1.3] In Section 7(8) provision is made for protection of the rights of existing spouses as follows: *“All persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of sub-section (6).”*

[29.2] The dissolution of customary marriages is dealt with in Section 8 of the Recognition Act. Section 8(4) provides:

“A court granting a decree for the dissolution of a customary marriage ...
(b) must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 7(4), (5), (6) or (7) and must make any equitable order that it deems just;
(c) may order that any person who in the court’s opinion has a sufficient interest in the matter be joined to the proceedings”

[30] The obligations brought about by the Recognition Act and the Regulations promulgated thereunder for the registration of customary marriages and adherence to the approval of matrimonial property system contracts by the appropriate court promote a system whereby the rights of spouses in customary law marriages are enhanced, not only in recognition of prospective and existing spousal rights in the context of their rights to equality and dignity, but also with reference to the procedural advantages that follow a process of registration. Compliance can play a significant beneficial role in the lives of spouses, prospective spouses, and families - especially at the time of conclusion of customary marriages, their dissolution, in commercial transactions such as finance and bond applications, and upon the passing of a spouse.

The absence of customary marriage certificates and any matrimonial property system contract or court order

[31] In the present matter no evidence was presented that shows the existence of customary marriage certificates or court approval of any matrimonial property system contract and court order approving such proprietary system.

[32] Moreover, when Ms S[...] was invited by the court *a quo* to obtain a customary marriage certificate, she declined and elected to proceed to trial. This decision had an effect on the nature and extent of evidence that was required to prove the alleged customary marriage between her and Mr M[...].

Allegations necessary to establish the existence of a customary marriage

[33] The absence of a certificate of registration with which to prove a customary marriage, albeit *prima facie*, may affect the extent of the allegations necessary to establish the conclusion thereof. The extent of evidence required in the present matter was more extensive owing to the absence of a certificate. Sufficient allegations should be made in the plaintiff's particulars of claim that would fairly bring the case to be made out to the notice of the court and the defendant.¹¹ In doing so, consideration should be given to both the prerequisites set out in section 3(1) of the Recognition Act and the content of the applicable customary law.¹²

[34] Allegations regarding fulfilment of the requirements set forth in section 3(1) of the Recognition Act are essential to establishing the existence of a customary marriage in the absence of a certificate rendering *prima facie* proof. It would, when pleading, in addition be necessary to identify the system of customary law that applies to the marriage/s concerned. In the present instance it should, for example, have been pleaded that the customary marriage was concluded in terms of Tsonga customary law.

¹¹ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H

¹² In this regard, and more specifically when it is necessary to determine the true content of living customary law, see *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission For Gender Equality As Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) at [109].

[35] Section 1 of the Law of Evidence Amendment Act *inter alia* provides that:

“(1) Any court may take judicial notice ... of indigenous law in so far as such law can be ascertained readily and with sufficient certainty, Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

(2) The provisions of subsection (1) shall not preclude any part(y) from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.”¹³

[36] With reference to the Law of Evidence Amendment Act, the court in *Maisela*¹⁴ set out the requisites of pleading customary law - and the consequences of not establishing the relevant principles thereof as follows:

“Principles differ from tribe to tribe. Section 1 of Act 45 of 1988 requires of a litigant who wishes to have an action determined according to indigenous law to prove that indigenous law is applicable in the case. Unless judicial notice can be taken of the principles thereof, it is for the litigant to allege and prove those principles. If he fails to establish that, the common law applies.

In this matter the respondent, in order to rely on the principles of indigenous law, had to allege, firstly, the tribal connection of the two litigants. That is a factual question which can be admitted or denied by the other party in the pleadings. Secondly, he had to allege the particular system of indigenous law which he alleges is applicable. Again it is a factual question which can be admitted or denied. Thirdly, he had to allege what the relevant principles applicable are. If the appellant denied the respondent's exposition of the tribal law it was for the respondent to prove those principles. Where the respondent failed to raise any one of these issues in the pleadings it was not competent for it to maintain that indigenous law applies.”¹⁵

¹³ Law of Evidence Amendment Act 45 of 1988

¹⁴ *Maisela v Kgolane* NO 2000 (2) SA 370 (T)

¹⁵ *Maisela* at 376H-377A

[37] In *Maisela*, the court, with emphasis on the obligations of litigants, warned of the consequence that a failure to establish indigenous law would have. *Maisela* was however decided without specific reference to Section 211(3) of the Constitution.

[38] Section 211(3) of the Constitution places the following obligation on courts:
“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

[39] On *Alexkor*¹⁶ the Constitutional Court held:
*“While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law.”*¹⁷

[40] Whilst a failure by litigants to show applicability of customary law to a dispute will likely render common law principles applicable, we disagree with the dictum in *Maisela* that a failure to prove the applicable customary law principles will render common law applicable.

[41] The primary question is thus whether customary law applies to a particular dispute. Once it applies, courts are obliged to apply customary law.

[42] The factual matrix in the present case required application of the relevant customary law to establish whether a customary marriage had legally been entered into. It was thus important that both the parties and the court contribute to its application.

¹⁶ *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC)

¹⁷ *Alexkor* at [51]

See further, with reference to the sources of customary law: *Alexkor* at [52] – [54]

[43] Pleadings drawn with the necessary particularity as set out in *Maisela* will assist both courts and litigants to narrow the enquiry and assist in establishing the content of customary law applicable to the matter at hand.¹⁸ In doing so, parties and the court should be alive to the dynamic nature and constant evolvement of customary law.

[44] In *Tsambo*¹⁹ the Supreme Court of Appeal reminded:

*“When dealing with customary law, it should always be borne in mind that it is a dynamic system of law.”*²⁰

*“...customs have never been static. They develop and change along with the society in which they are practised.”*²¹

[45] In *Alexkor*²² the Constitutional Court gave the following guidance:

“In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.

Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. ...”

¹⁸ See: *MM v MN* 2013 (4) SA 415 (CC) at [44] to [51] where guidance is given on establishing what the relevant customary law prescribes.

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

²⁰ *Tsambo* at [15]

²¹ *Tsambo* at [18]

²² *Alexkor* at [53] to [54]

[46] In *Mbungela*²³ Maya P provided guidance on the manner in which content is to be given to section 3(1)(b) of the Recognition Act:

“It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned. As this court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society. Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.”

The pleadings a quo

[47] An analysis of the plaintiff's allegations in paragraph 4 of the appellant's particulars of claim²⁴ renders the following:

[46.1] First, the system of customary law that is asserted to govern the averred customary marriage has not been identified. The plaintiff should, for example, have asserted that she was married under Tsonga customary law.

[46.2] Second, the connection between the parties and the specific customary law system was not pleaded. This is necessary because an issue could arise whether, for example, Tsonga customary law would regulate the customary marriage between a Venda man and a Tsonga woman. Consideration should further be given to the provisions of subsection 1(3) of the Law of Evidence Amendment Act.²⁵

²³ *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA)

²⁴ Quoted in paragraph 8 above

²⁵ Law of Evidence Amendment Act 45 of 1988

[46.3] Third, the essential requirements for conclusion of a valid customary marriage under the applicable customary law and compliance with the prescripts of section 3 of the Recognition Act were not pleaded. Essential allegations of the requisites and compliance with the customary law prescripts are of particular importance in the absence of a customary marriage certificate constituting *prima facie* proof thereof.

[48] It was of course also open to the defendant *a quo* to complain about the lack of particularity or to call for further particularity in terms of the Magistrates Court Rules, but he did not avail himself thereof.

[49] The defendant, however, clearly placed conclusion of the alleged customary marriage in dispute. He pleaded that he was in an extant customary marriage and that absent spousal consent, a subsequent marriage would be invalid. Although he did not plead which customary law would render the subsequent marriage invalid, it became apparent during cross-examination that his existing marriage was concluded under Tsonga customary law.

[50] The issue of an absence of spousal consent to a further customary marriage in Tsonga customary law was central to the Constitutional Court's judgment in *MM*.²⁶ The Constitutional Court's analysis of Tsonga customary law was thus a rich source readily available to the parties.

MM v MN and Another 2013 (4) SA 415 (CC)

Sub-section 1(3) provides: "*In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.*"

²⁶ See footnote

[51] In *MM*, in the majority judgments penned by Froneman J, Khampepe J and Skweyiya J, the Constitutional Court concluded that Tsonga customary law had to be developed to include a requirement that “*consent of the first wife is necessary for the validity of a subsequent customary marriage.*”²⁷ The Court’s reasoning included that “*this conclusion is in accordance with the demands of human dignity and equality.*”²⁸

[52] The Court further held that:

“[85] *The finding that the consent of the first wife is a necessary dignity – and equality component of a further customary marriage in terms of section 3(1)(b) of The Recognition Act means that, from now on, further customary marriages must comply with that consent requirement. A subsequent marriage will be invalid if consent from the first wife is not obtained.*”²⁹

[53] In order thus to prove a valid further customary marriage under Tsonga customary law, it would be necessary prove spousal consent by the prospective husband’s existing wife.

Was absolution from the instance appropriate?

[54] In the present matter the extent of this burden was brought to the notice of the plaintiff *a quo* in the defendant’s plea. The plaintiff did not attempt to prove the absence of an extant customary marriage between Mr M[...] and Ms N[...] as partly evidenced by their *lobola* agreement dealt with during cross-examination. Nor did she attempt to prove consent to the customary marriage by Ms N[...] The high-water mark of Ms S[...]’s evidence was that Mr M[...] told her that he was single - she did not know about the prior marriage.

²⁷ *MM* at [75]

²⁸ *MM* at [75]

²⁹ *MM* at [85]

See also: *MM* at [89.5] where the following order was made:

“*Xitsonga customary law is developed to require the consent of the first wife to a customary marriage for the validity of a subsequent D customary marriage entered into by her husband.*”

[55] The court *a quo*, upon the request for reasons for the judgment, only pinned the basis of the judgment on the absence of allegations on section 3 of the Recognition Act in the plaintiff's particulars of claim. The brevity of the reasons provided warrants comment. The plaintiff gave extensive evidence and called two witnesses in presenting her case. Evidence was led on the witnesses' views on Tsonga marital customs and the extent to which they believed the customary marriage process to have been complied therewith. There was specific focus and cross-examination on the existence of an extant customary marriage and an absence of spousal consent. It would have been valuable to the parties to have received a brief analysis that reaches the conclusion that the absence of spousal consent to a subsequent customary marriage renders the purported subsequent marriage invalid.

[56] Further considerations central to the matter before the court *a quo* relate to the rights of an identified interested party. Ms N[...] was identified as Mr M[...]’s existing spouse in the defendant’s plea filed more than two years prior to the hearing of the matter. The provisions of section 8(4)(b) of the Recognition Act compel a court hearing divorce proceedings where the husband is a spouse in more than one customary marriage to take any contract in terms of section 7(6) into consideration and make an equitable order. Section 8(4)(c) specifically empowers the court to order that any person who in its opinion has a sufficient interest in the matter be joined to the proceedings. Counsel before us both submitted that Ms N[...] ought to have been joined to the proceedings on account of her potential patrimonial and other interests in the action. Their submission is of particular relevance in view of Ms S[...]’s prayer for division of the joint estate in which Ms N[...] may have a specific interest seeing that no section 7(6) (read with 7(8)) matrimonial property system court approval had been obtained. It was incumbent on both the plaintiff and the defendant *a quo* to see to the joinder of Ms N[...] to the divorce action which they failed to do.

[57] The action however proceeded without Ms N[...]

[58] In the final analysis, considering the available evidence before the court *a quo*, the development of Tsonga customary law on a point central to the dispute, and the absence of a party that ought to have been joined to such proceedings for her possible patrimonial and other interests, we hold that the court *a quo*'s finding of absolution from the instance was correct.

Dignity, equality, and observance of the law

[59] Having considered the broader issues and rights at stake in matters of this nature, it is necessary to add the following reminder and remarks.

[60] The Constitutional Court's judgment in *MM*³⁰ applied spousal rights to dignity and equality to develop Tsonga customary law requiring spousal consent for a valid further customary marriage.

[61] The considerations of the rights to dignity and equality³¹ that apply to a consenting existing spouse seem to have equal force when consideration is given to the rights of a prospective spouse in the position of Ms S[...]. Consent to be married would only be duly informed consent if disclosure of all extant marriages have been made. If the existence of such marriages have not been disclosed, the section 3(1)(a)(ii) consent requirement in the Recognition Act seems similarly not to have been fulfilled. The rights and remedies of women in Ms S[...]'s position deserve further consideration, but will require full ventilation of the relevant facts.

[62] Observance of the prescripts of the Recognition Act and the Regulations thereunder (as partly discussed in this judgment) should ensure the continuous enhancement of a system where information on the existence and particularity of customary marriages should be readily available.

³⁰ *MM* at [70] to [84]

³¹ *MM* at [70] to [84]

[63] Observance of the Recognition Act and the Regulations thereunder may have changed the costly course of this matter.

Costs

[64] Having considered the nature of the issues at stake for the parties, we agree with the submission by Mr Ramoshaba, counsel for the respondent, that the appropriate order should be that each party should bear their own costs of the appeal.

Order

1. The appeal is dismissed.

Van Vuuren AJ
Acting Judge of the High Court
17 May 2024

For the Appellant:	Adv T Segage
Instructed by:	Macbeth Incorporated
For the Respondent:	Adv PM Ramoshaba
Instructed by:	NG Dlamini Attorneys Inc
Date heard:	7 May 2024
Date delivered:	17 May 2024