

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: 2998/2020

In the matter between:

M[...] C[...] M[...]1

Plaintiff

And

B[...] P[...] M[...]2

Defendant

CORAM: HEFER AJ

HEARD ON: IN CHAMBERS (Heads filed on 23 February 2024)

DELIVERED ON: 23 MAY 2024

[1] The Applicant (the Defendant in the Court *a quo*) seeks leave to appeal against an order granted by Mahlangu AJ which reads as follows:

"In the circumstances, I therefore make the following order:

- (i) The customary marriage entered into between the parties on 27 December 2014 is declared to be valid and of effect in terms of the Recognition of Customary Marriages Act 120 of

1998;

(ii) The Defendant is ordered to pay costs."

[2] For sake of convenience, the parties will be referred to as Plaintiff and Defendant respectively.

[3] The order sought to be appealed against was made in a divorce action instituted by the Plaintiff against the Defendant wherein, by agreement between the parties and by order of Court, the issue pertaining to the existence or otherwise of a customary marriage between the parties was adjudicated separately in terms of Rule 33(4) of the Uniform Rules of Court.

[4] The Plaintiff alleged in her Particulars of Claim that she and the Defendant were married to each other in community of property during a traditional wedding ceremony which took place on 27 December 2014 and that the lobola negotiated in terms of Annexure "H" to the Particulars of Claim was paid on the same date.

[5] The translated version of the Setswana worded Annexure "H" provided at trial, reads as follows:

"The M[...]1 family accept / welcomes the intention of the M[...]2 family to complete magadi. R15,000.00 was counted and was paid. Both families agree to a request that the children become espoused however, only after they have a holy matrimony. The M[...]1 family takes full responsibility to arrange the church service and thereafter revert with a date and the necessary preparation. Both families agreed."

[6] The Defendant denied that he married the Plaintiff. He denied that there was a traditional wedding ceremony on 27 December 2014. According to him, on the 27th of December 2014 the family representatives negotiated "*magadi*" (lobola) in respect of the Plaintiff. These negotiations were then reduced to

writing, which is Annexure "H" referred to. The Defendant further alleged that both families agreed that the Plaintiff and Defendant will enter into holy matrimony on a date and time to be arranged and announced by the M[...]1 family and that until such time the parties have entered into holy matrimony they are not married.

[7] According to the Defendant, whereas the M[...]1 family has failed to execute and provide a date to the Defendant in the commitment (to arrange a church service for the holy matrimony and the exchange of gifts) and the conditions set by the families, the parties were not married to each other.

[8] The graveman of the Defendant's contention in his application for leave to appeal is that the trial court has erred in not finding that in the absence of the "*holy matrimony*" agreed upon and recorded in the lobola agreement, no valid customary marriage came into existence. All the grounds of appeal contained in the leave to appeal boil down to this contention.

[9] The Defendant's application for leave to appeal, as it appears from Mr *Moret/we's*, on behalf of the Defendant, Heads of Argument, with reference to Section 17(1) of the Superior Courts Act 10 of 2013, is that another Court will indeed come to a conclusion different to that of the Court *a quo*.

[10] It is now accepted that the Superior Courts Act has indeed raised the bar for granting leave to appeal in that the use of the word "*would*" in Section 17(1)(a) indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against.¹

[11] Mr *Moret/we* submitted that the findings of the Court *a quo* are at odds with

¹ *Mont Chevaux Trust v Goosen* 2014 JDR 235 LCC at par. [6];

the evidence presented. In particular he submitted that Mahlanga AJ's finding that holy matrimony is not an essential element for a customary marriage, *"induces a sense of shock that is not supported by any evidence"*. The finding goes, he submitted, against the unchallenged evidence presented on behalf of the Plaintiff to the effect that holy matrimony is part of their custom / culture.

[12] According to the judgment of Mahlanga AJ, Mr Shonyane, the uncle to the Plaintiff and who was the lead negotiator of the M[...]1 family testified that *"it is their custom that the parties should be married at church as is their custom whereafter the Plaintiff would be released to the Defendant"*. He further testified, as per the judgment, that according to him the parties got married to each other after the final lobola payment was made.

[13] The Defendant criticized the Court a *quo* for making adverse credibility findings against him and his father. In the absence of having the full record of proceedings before me, I am not able to make a finding at this stage. It can however be adduced from the judgment that the trial court was faced with mutually destructive versions of factual issues. It had to, as per the instructive principles laid down in **Stellenbosch Farming Winery Group Ltd v Martell et Cie & Others**², make certain credibility and reliability findings in order to prefer one version over the other on the disputed issues.

[14] In deciding whether leave to appeal should be granted the facts which are common cause and the basis for the Court a *quo*'s finding should now be considered.

[15] Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 (**"the Act"**) provides as follows:

"Requirements for the validity of customary marriages.

(1) For the customary marriage entered into after the

² 2003 (1) SA 11 (SCA) at 14 I- 15 E

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."

[16] The parties were both over the age of 18 and intended to get married to each other in terms of Customary Law. This can be adduced from the fact that lobola negotiations (or magadi as the Defendant wishes to call it), have taken place on the 27th of December 2014, the terms of the lobola negotiations were reduced to writing and signed by the respective family members on behalf of both Plaintiff and Defendant and the final lobola payment was made on the same date.

[17] After the lobola negotiations and conclusion of the lobola agreement, two children had been conceived by the parties.

[18] The Court *a quo* also accepted the evidence led on behalf of the Plaintiff, that after the lobola negotiations had been concluded and the lobola paid:

(a) there was a celebration at the Plaintiff's home;

(b) the Plaintiff was presented to the Defendant's family by her aunt;

(c) some members of the two families including the parties, gave speeches inside the garages where lunch was served and there was

singing and ululation during the celebrations;

(d) that the Plaintiff was allowed to move in with the Defendant in Johannesburg during March and April 2015, and that when she fell pregnant, she had to go home in Thaba Nchu; and

(e) the Plaintiff regarded herself as the wife to the Defendant and also the family of the Defendant regarded her as such.

[19] It was already mentioned above that during the negotiations, the family of the Plaintiff indicated to the Defendant's family that it is their custom that the parties should be married at church whereafter the Plaintiff would have been released to the Defendant.

[20] Both parties as well as the Court relied upon the matter of **Mbungela and Another v Mkabi and Others**³, the relevant portion which reads as follows:

"Buts 3(1)(b) does not stipulate the requirements of customary law which must be met to validate a customary marriage. The reason for this is not far to seek. 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 challenging 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 observed the same customs and rituals, it is not unusual to find variations and even an unambiguous 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 the lived experiences."

³ 2020 (1) SA 41 (SCA) at par. [17]

[21] The following portions of the judgment of Maya P (as she then was) in the **Mbungela**-matter are also of importance:

"[24] Professor Bennet has, in citing examples of traditional wedding ceremonies that were simplified or abridged without affecting the validity of a marriage, pointed out that –

'Western and Christian innovations have been combined with the traditional rituals ... hence a wedding ring may be used in place of a traditional gall bladder or slaughtered beast and, for many, a church ceremony is now the main event'.

This seems to be precisely what happened hereto. To my mind, there can be no greater expression (own emphasis) of the couple's consummation of the marriage than the undisputed Church wedding.

[27] The importance of the observance of traditional customs and usages that constituted 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 section 3(1) of the Act, especially spousal consent have been met, in circumstances such as the present, could yield untenable results.

[30] To sum up: The purpose of the ceremony of the handing-over of a bride is to mark the beginning of a couple's customary marriage and to introduce the bride to the groom's family. It is an important but not necessarily a key determinant of a valid customary marriage. Thus, it cannot be placed above the couple's clear volition and intent where, as happened in this case, their families, who came from different ethnic groups, were involved in, and acknowledged, the formulation of the marital

partnership and did not specify that the marriage would be validated only upon bridal transfer."

[22] Although the family of the Plaintiff expressed the "*condition*" that the parties will only be espoused with holy matrimony, it does not mean that such custom is appears that it is not the case of the Defendant that such custom is indeed part of that particular ethnic group. In the absence of evidence to that effect it must therefore be accepted that this "*condition*" was merely a custom of the M[...]1-family. The wishes of a particular family (although agreed upon) cannot disregard or nullify the legal consequences of Section 3(1) of the Act had been met. The "*condition*" of holy matrimony can merely be regarded as an expression but not a requirement of the consummation of the couple, as per the words of Professor Bennet referred to.

[23] The evidence which served before the Court *a quo* indicates that the requirements of Section 3(1) of the Act had been met. They were both above the age of 18 years; there are no indications that they did not consent to be married to each other under customary law and the marriage had been negotiated as well as entered into and/or celebrated in accordance with customary law according to the evidence of the Plaintiff, which the Court *a quo* has accepted.

[24] In addition to those reasons as provided by the Court *a quo*, it appears that the "*condition*" in regards to holy matrimony which was imposed by the Plaintiff's family, had in any event been waived by allowing the Plaintiff to live with the Defendant, albeit for a limited period of time.

[25] Based on the facts which served before the Court *a quo*, I am not convinced that another Court will come to a different conclusion that the requirements of Section 3(1)(b) of the Act had been met and that a valid customary marriage had been concluded on the 27th of December 2014.

[26] As indicated, according to the authorities, the bar has been raised in regards to the test to be applied in applications for leave to appeal in that the Applicant has to show with a certain measure of certainty that another Court will

come to a conclusion different from that of the Court *a quo*, which the Defendant in the present matter has not done. Therefore, the application for leave to appeal must fail.

Therefore, I make the following order:

Order:

The application for leave to appeal is dismissed with costs.

HEFER AJ

Appearances on behalf of the Plaintiff:	Adv M Mazibuku
Instructed by:	Honey Attorneys Bloemfontein

On behalf of Defendant:	Adv T Mortlwe
Instructed by:	Mphahlele - Matentji Inc Attorneys c/o Phatshoane Henney Attorneys Bloemfontein