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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

Appeal Case no. A36/2023

Case No. 2358/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 26/04/2024

SIGNATURE

In the matter between:

J[...] E[...]

First Appellant

(Executrix in the Estate of the late M[...] W[...] T[...])

MINISTER OF HOME AFFAIRS

Second Appellant

THE MASTER OF THE HIGH COURT

Third Appellant

Y[...] B[...] M[...]

Fourth Appellant

A[...] B[...] M[...]

Fifth Appellant

B[...] C[...] M[...]

Sixth Appellant

and

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

Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the Parties and/ or the Parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 26 April 2024 at 14h00.

PICK, AJ with VUKEYA, J and GREYLING-COETZER, AJ concurring.

Introduction

- [1] This is an Appeal against the whole of the judgment of the Court *a quo*. This appeal was decided pursuant to this court invoking Section 19(a) of the Superior Courts Act, 10 of 2013.
- [2] This matter concerns the validity of a customary marriage concluded between the Respondent and the deceased, Mr. W[...] T[...] M[...] in 2007. The Respondent was the Plaintiff in the Court *a quo*. The first Appellant Ms J[...] E[...], the executrix of the estate of the late Mr. M[...] was the Third Defendant in the Court *a quo*.
- [3] The Court *a quo* declared the customary marriage between the Respondent and the deceased, entered into on 4 November 2007 valid and ordered the Second Appellant to register the customary marriage accordingly.
- [4] The Appellants seek condonation for the belated filing of the Court *a quo*'s judgment, the complete record of proceedings and their heads of argument. The Respondent opposed the Condonation Application.

The Application for Condonation

- [5] On 15 May 2023 the parties' legal representatives completed a Form F, which regulates the readiness of the appeal for hearing as provided for in the Practice Directives of this Division. The Appellants failed to adhere to the time frames

agreed to therein. In the Form F they agreed that the Appellants would file the judgment and the full record of proceedings by 22 September 2023 and their heads of argument by 16 October 2023. The Respondent filed her heads which dealt with the merits of the appeal on the 2nd of November 2023. The Appellants filed the record and their heads of argument on 08 November 2023. The Application for Condonation and the Affidavits in support thereof were served separately on the Respondent on the 08th and 10th of November 2023 respectively.

- [6] The Appellants aver that the Respondent delayed them from timeously filing the agreed papers, as the Respondent brought an *ex parte* application on the 25th of May 2023. On that application being dismissed after a reconsideration hearing on the 06th of July 2023, the Respondent sought leave to appeal, well-knowing that the presiding Judge was on long leave. The First Appellant believed that the content of the *rule nisi* at the time prohibited her from dealing with the affairs of the estate. On 30 October 2023 after having been advised that the Appellants ran the risk of the Appeal being struck off the roll or dismissed as a result of their non-compliance on 24 November 2023, the First Appellant set the wheels in motion to secure funds to prosecute this Appeal, file the outstanding documents and have the leave to appeal in respect of the *rule nisi* attended to.
- [7] The Respondent argues that the Application for Condonation is not proper, as it was not brought in the form of 'a Notice of Motion' and does not afford the Respondent an opportunity to oppose the Application. It is further contended that the content of the *rule nisi* did not curtail the First Appellant's powers to deal with the estate. The Respondent opines that the Appellants' reasons as set forth in the Application for Condonation are not sufficient. Further that the Appellants did not deal with the prospects of the success of the Appeal and as such its Application should not succeed. In support, opposing the Application the Respondent placed reliance on amongst others, *Melane v Santam Insurance*

*Co Ltd*¹, *Nair v Telkom SOC Ltd and Others*² and *Brummer v Gorfil Brothers Investments (Pty) Ltd*³.

[8] In *Brummer* the Constitutional Court stated that an Application for Condonation should be granted where it would be in the interest of justice to do so and refused if it was not. The interest of justice must be determined with consideration of the factors as set out in *Melane* as well as consideration of the nature of the relief sought; the nature and cause of any other defect in respect of which condonation is sought and the effect of the delay on administrative justice. The Respondent avers that this Court should not grant the Appellants condonation as such order will not be in the interest of justice.

[9] Condonation is not merely for the asking⁴. A useful summary is found in *ADCORP Fulfilment Services (Pty) Ltd v Prodigy Human Capital Architects (Pty) Ltd*⁵, where the Court, with reference to other precedents (which I quote in the footnotes) held:

[41] The Court may grant condonation upon application on notice and on good cause shown⁶. The application for condonation seeks an indulgence and Court has a discretion whether to grant condonation⁷. The Court will grant condonation when it is in the interest of justice to do so⁸. The basic principle is that the Court has a discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides and any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at C - F

² *Nair v Telkom SOC Ltd and Others* (JR59/2020) [2021] ZALCJHB 449 (7 December 2021)

³ *Brummer v Gorfill Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC)

⁴ *Uitenhage Transitional Local Council v South African Revenue Services* [2003] 4 All SA 37 (SCA), 2004 (1) SA 292 (SCA) at 6

⁵ *ADCORP Fulfilment Services (Pty) Ltd v Prodigy Human Capital Architects (Pty) Ltd* (2018/17932) [2023] ZAGPJHC 579 (26 May 2023) at 41 to 52

⁶ Rule 27(1)

⁷ *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 20

⁸ *Grootboom supra*. *Moluele and Others v Deschatelets* NO 1950 (2) SA 670 (T)

facts⁹. In other word, “whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case”¹⁰.

[10] Consideration of the factors qualifying the interest of justice cannot be seen in isolation and a piece-meal approach is not proper. Each factor must be weighed and depending on the circumstances of the particular case, a certain factor may weigh heavier than the other.¹¹

[11] The complaint of the Respondent in respect of the ‘Notice of motion’ is unsound. The Application for Condonation did contain a short form Notice of Motion (Form2). It has become the norm that condonation application are brought on the long form notice (Form 2A). That said condonation can also be sought orally from the bar in circumstances where the application is purely procedural, or the objection thereto is technical. It is trite that condonation can be sought at any time. In the present instance the Appellants did not seek condonation for the failure to adhere to the Rules of Court, but their failure to adhere to the time period set by agreement between the parties.

[12] The Respondent enjoyed ample time to oppose the Application. She served her Notice to Oppose on 14 November 2023. She then elected to file a ten page Notice in terms of Rule 6(5)(d)(iii), opposed to an answering affidavit. In addition, the parties were provided a further opportunity by the Appeal panel to file written submission in re the Condonation Application by 9 of January 2024, if they so wished. The Respondent has not been prejudiced. She was given sufficient time to oppose, and an-opportunity to properly ventilate the issue of condonation before this Court.¹²

[13] It is trite that the *rule nisi* would have been operational, pending the outcome of the Application for leave to appeal against its dismissal. Without an order finally

⁹ Melane v Santam Insurance (Pty) Ltd *supra* 532C – F; United Plant Hire (Pty) Ltd v Hills and Others

1976 (1) SA 717 (A) at 720E

¹⁰ Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae) [2007] ZACC 24; 2008 (2) SA 472 (CC) at 20

¹¹ United Plant Hire v Hills and Others *supra* at 720G; Gumede v Road Accident Fund 2007 (6) SA 304 C at 7

¹² F v Minister of Safety and Security and Others 2012 (1) SA 536 (CC) at [34]

dismissing the *rule nisi*, the Appellants were still bound to the terms of the *rule nisi*. The reasons for the delay in the Appellant's actions are conceivable. The *Rule Nisi* reads:

‘

[2.4] The First and Second Respondents are ordered not to wind up the deceased estate of the late W[...] T[...] M[...], Master's reference number 004727 pending finalisation of the appeal.

...’

[14] In the absence of any action being taken by the Respondent, the Appellants enrolled the leave to appeal before the Judge on 17 November 2023. There can be no clearer indication that the Appellants wanted to bring the matter to finality. Acting in the interest of finalising the matter, the Appellants after having been advised thereto, exhausted every avenue to have this Appeal ready to be heard on the date it was so set down for, being 24 November 2023.

[15] The degree of lateness is not of such an extent that administrative justice was sacrificed in the process. On the contrary and without generally condoning non-adherence to time constraints, the Appellants in this case furthered the ends of justice by ensuring the matter was ready to be heard on the date so dedicated. The prejudice the Respondent purportedly suffered due to the Appellants' late filing is always curable by a suitable cost order. It was further cured by the Appeal panel affording the parties a further opportunity to file a written oral arguments as provided for in the Practice Directive of this Division.

[16] The reasons for delay and the importance of the Appellants' case overshadow the Appellants' not comprehensively dealing with the prospects of success in their Application for Condonation. The full record was in any event now before this Court. Where a matter turns on customary law, the outcome thereof is always of great importance to the community. This Court is bound to consider whether there is real prejudice to the Respondent, should condonation be

granted.¹³ The reasons set forth by the Respondent in her opposition do not implicate prejudice, are purely academic in nature and do not validate the dismissal of the Application for Condonation.

[17] In conclusion, I quote from *Steenkamp and Others v Edcon Limited*:¹⁴

[36] Granting condonation must be in the interest of justice. This Court in *Grootboom* set out the facts that must be considered in determining whether or not it is in the interest of justice to grant condonation:

‘The standard for consideration of an application for condonation is the interest of justice. However, the concept ‘interest of justice’ is so elastic that it is not capable of precise definition.

....

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interest of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success,

¹³ TLE (Pty) Ltd v The Master of the High Court and Others 2012 (1) SA 502 (GSJ) at 12
¹⁴ Steenkamp and Others v Edcon Limited (CCT29/18) [2019] ZACC 17 (30 April 2019)

condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive, but should all be taken into account to arrive at a conclusion as to what is in the interest of justice.' ¹⁵ (my emphasis)

[18] I am satisfied that the Appellant's non-compliance stands to be condoned in the interest of justice.

The Appeal

[19] The crisp issue in this Appeal is whether the deceased and the Respondent entered into a valid customary marriage in 2007. The Appeal turns on s3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 ('Customary Marriages Act'). The Appellants challenge the Court *a quo*'s finding that the marriage was negotiated and entered into or celebrated in accordance with customary law. The Appellants strongly rely on s1(3) of the Law of Evidence Amendment Act 45 of 1988 and contend that there was no evidence before the Court *a quo* as to the customary law applicable to the marriage between the Respondent and the deceased.

[20] Section 1(3) of the Law of Evidence Amendment Act states the following:

'(3) 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 of 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”.

The case before the Court *a quo*

[21] The Respondent approached the Court *a quo* for an Order declaring that she and the deceased were married to each other. The Respondent’s pleaded case before the Court *a quo* was that the deceased’s emissaries and her parents negotiated lobolo of 15 cows valued at R1000, 00 each on the 04th of November 2007. An amount of R 6000, 00 was paid on the day and payment of the remainder of the amount was undertaken in due course. Various gifts were handed over to the Respondent’s family. At the time the Respondent was 26 years of age and the deceased 32 years of age and they agreed to marry each other. Accompanied by her siblings and her aunts, she was driven to Bushbuckridge the next day, where they found a celebration. She was handed over and introduced to the M[...]’s as ‘*makoti*’ by the deceased and her aunts. In her founding affidavit to the later notice of motion, it is written that she was introduced on the same day.¹⁶ In evidence she explains that there was a “confusion with the dates”.

[22] The Respondent testified that she and the deceased started living together in 2006. Following a motor vehicle accident on 01 December 2007, she resided with her parents to recuperate after she was discharged from the hospital. In 2009 the Respondent and the deceased moved to White River where they resided together as husband and wife. During this period the deceased bought a house in Barberton. The Respondent and the deceased did not enter into an Antenuptial Agreement, and their marriage was never registered. In her amended declaration, the Respondent added that she moved out of the communal home in February 2011, after having a disagreement with the deceased.

[23] The Respondent's case was largely supported in evidence before the Court *a quo* by the deceased's brother, Mr S[...] M[...] and the deceased's aunt, Ms T[...] M[...]. Both witnesses formed part of the emissaries who negotiated lobola with the Respondent's family. Mr S[...] M[...] says that it is not within their culture to pay lobola in full. Ms T[...] M[...] testified that once the negotiations are done and "*... money is paid into the family, that maiden becomes the wife of the guy...*"¹⁷

[24] During cross-examination of the Respondent before the Court *a quo* it came to light that a '*bigger ceremony*' was planned for the 16th of December 2007. Ms T[...] M[...], supporting the evidence of the Respondent, testified the ceremony was planned to say '*.. now Welcome has a wife from the day of lobola negotiations*'¹⁸ The Respondent and her witnesses maintained that the customary marriage was concluded during 04 and 05 November 2007 and the later ceremony was purely to celebrate and introduce the Respondent to the community and the remainder of the family. The introduction of the Respondent as '*makoti*' to the elders and the deceased's family took place on 05 November 2007 already.

[25] In a nutshell, the Appellants' case before the Court *a quo* may best be summarised by quoting paragraph 19 of the (then) Third Respondent's (now First Appellant's) Answering Affidavit¹⁹:

'From the facts it appears that there were some negotiations, but the requisite requirements, such as the full payment of lobola and the transfer and/or handing over of the Applicant as the "makoti" never occurred. I respectfully, submit that in the event of the honourable Court finding that there was such a marriage, which remains denied, then and in that event the honourable Court is urged to find that the Applicant and the deceased, subsequently, divorced. I am, however advised that if a marriage cannot

¹⁷ Page 376 of the Record
¹⁸ Page 375 of the Record
¹⁹ Page 75 of the Record

be proven, there can, in law, be no order for the dissolution of the marriage, of a marriage that never existed.’

[26] On trial before the Court *a quo*, the Appellant’s legal team only lead the evidence of the First Appellant, Ms Erasmus. She did not bear any personal knowledge of the pleaded and testified to lobola negotiations on 04 November 2007. Neither did she have any personal knowledge of the introduction or handing over of the Respondent to the M[...] family on 05 November 2007. In answer to a question by the Respondent’s counsel, Ms Erasmus testified that the deceased told her that he part-paid lobola for the Respondent and that the marriage was not registered. Ms Erasmus testified that the deceased portrayed his marital status as single throughout the period of 12 years she acted as his financial advisor. She came into possession of a copy of the deceased’s will, bequeathing 25% of his estate to “his wife” the Respondent, identified by name and identity number, months after the will was initially drafted in 2009. Ms Erasmus interpreted the relationship between the Respondent and the deceased as “*a promise to marry*” and labelled the Respondent’s status in the estate as an “*ex-fiancé type of thing*”.

[27] During cross examination and under the auspices that evidence to that effect would be led by the other Appellants and or by other members of the M[...] family, the witnesses on behalf of the Respondent were confronted with statements on the content of the Tsonga culture. No such witnesses were called.

The Law

[28] The requirements for a binding customary marriage is settled. It was aptly stated in *ND v MM*,²⁰ with reference to *Motsotsoa v Roro and Others*.²¹

[16] Proving the existence of a customary marriage should not present many problems as the formalities for the coming into existence of

²⁰ ND v MM (18404/2018) [2020] ZAGPJHC 113 (12 May 2020)
²¹ Motsotsoa v Roro and Others [2011] 2 All SA 324 (GSJ)

marriage has crystalised over the years. The reason for these are not hard to find. The institution of customary marriage is an age old and well-respected one, deeply embedded in social fabric of Africans. The formalities relating thereto are well-known and find application even in the marriages of the majority of Africans who marry by civil rites... ’

[29] The three essential elements to a valid customary marriage, as codified in the Customary Marriages Act are that (i) the bride and the groom must be over the age of 18 years, (ii) they must consent to the marriage and (iii) the marriage must be negotiated and entered into or celebrated in accordance with customary law.²² The Customary Marriages Act further states that a customary marriage may only be dissolved by a decree of divorce on the basis of irretrievable breakdown of the marriage.²³ The Customary Marriages Act does not define “negotiated”, “entered into” or “celebrated”. The reason is simply that no two cultures have the same rituals or customs and as closely as they might be intertwined, thus far they may differ. “Negotiated”, “entered into” and “celebrated” are unique to every culture.

[30] All the necessary allegations were made by the Respondent in her pleaded case²⁴ and evidence was lead before the Court *a quo* concerning all three the pleaded elements.

[31] Before the Court *a quo*, the Respondent testified that she was of Pedi origin. She was unsure of what specific culture the deceased was. She however denied that the deceased was Tsonga. Mr S[...] M[...], the deceased’s brother testified that the M[...]’s were originally Sotho, although they spoke Shangaan by virtue of their grandmother’s tongue. Since his grandfather passed away in 1970, most family things were Tsonga-dominated. He testified that the M[...]’s were trying to restore their Sotho culture and, in accordance with the Sotho culture, sent some boys to traditional school in 2022.²⁵ The lobola letter was written in Siswati. Ms T[...] M[...], the deceased’s aunt testified that, in their

²² S3(1) of the Recognition of Customary Marriages Act.

²³ S8 of the Recognition of Marriages Act

²⁴ Refer paragraph 19 above.

²⁵ Pages 355 – 356 of the Record

culture, thus Tsonga, the deceased and the Respondent were considered married from the day of the lobola negotiations when payment was made to the M[...]’s.

[32] As to the applicable culture and customs of the Tsonga culture the Court *a quo* thus only had the uncontroverted evidence of the brother and the aunt of the deceased before it. The evidence lead by the Respondent’s witnesses in respect of the requirement of the negotiation, payment of lobola and the conclusion of the marriage in terms of what they understood remained uncontested before the Court *a quo*.

[33] In respect of the Appellants argument that the Court *a quo* was bound to s 1(3) of the Law of Evidence Amendment Act, the following is relevant. There was indeed no agreement as envisages in s 1(3) Law of Evidence Amendment Act. This is plainly impossible as the Mr W[...] T[...] M[...] has since died. The Respondent is Pedi and resides in Mbombela. The deceased resided in Barberton. The deceased brother, Mr S[...] M[...] testified that the surname M[...] is Sotho, yet they practice the Tsonga culture and speak the Shangaan language at home. Mrs T[...] M[...], the aunt of the deceased testified that in their culture or custom, thus the family of the deceased once you pay lobola for a person (i.e. a wife) that respond is now considered your wife.

[34] The textbook approach as to what constitutes the customs of a specific culture was warned against by the Constitutional Court in *Alexkor Ltd and Another v Richtersveld Community and Others*,²⁶ *MM v MN and Another*²⁷ and the Supreme Court of Appeal in *Moropane v Southon*.²⁸ The Court *a quo* can accordingly not be faulted in relying on the evidence placed before it, which was per s1(3) the “law of the tribe” being that of the M[...] family and applied same. The court *a quo* correctly found that there exists a valid customary marriage.

²⁶ Alexkor Ltd and Another v Richtersveld Community and Others [2003] ZACC 18; 2004 (5) SA

²⁷ MM v MN and Another 2013 (4) SA 415 (CC)

²⁸ Moropane v Southon [2014] ZASCA 76

[35] It is clear from the Customary Marriages Act, that a customary marriage must either be negotiated and entered into according to the applicable customary law or negotiated and celebrated according to the applicable customary law . The Appellants' version, that lobola must be paid in full is not a validity requirement in terms of the Customary Marriages Act. Nor was it, per the evidence before the Court *a quo*, a requirement of the customs or culture the M[...]’s practice. The Respondent and her witnesses’ version that she was handed over and introduced to the M[...]’s on the 05th of November 2007 and this concluded the marriage ceremony stands uncontested. The evidence of Mrs T[...] M[...] renounced the need for the celebration, according to their custom, at all. A celebration of some sort is not a validity requirement on its own.

[36] Further, the contention by the Appellant in the Court *a quo* that if the Court find that there was a valid marriage, the Court should find that the Respondent and deceased, subsequently divorced, is untenable. As set out above, section 8 of the Customary Marriages Act regulates dissolution of customary marriages. There was no evidence before the Court *a quo* to substantiate a finding as contended by the Appellant. The evidence by Mrs Erasmus that the deceased represented himself as single to her does not establish a basis to conclude that he was subsequently divorced.

[37] In *Mayelane v Ngwenyama and Another*²⁹ the Court held:

‘[61] ... it must be emphasised that, in the end, it is the function of a Court to decide what the content of customary law is, as a matter of law, not fact. It does not depend on rules of evidence: a court must determine for itself how best to ascertain that content.’

[38] It was held in *Mbungela and Another v Mkabi and Others*:³⁰

²⁹ *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC)

³⁰ *Mbungela and Another v Mkabi and Others* (820/2018) [2019] ZASCA 134; 2020 (1) SA 41 (SCA)

[21] The question whether non-observance of the bridal transfer ceremony invalidates a customary marriage has been decisively answered by our Courts. In *Mabuza v Mbatha* 2003(4) SA 218 (C) the Court considered whether non-compliance with the siSwati custom of bridal transfer, 'ukumekeza', invalidated a customary marriage. The Court held:

' [25] ... *There is no doubt that ukumekeza, like so many other customs, has somehow evolved so much that it is probably practiced differently than it was centuries ago As Professor de Villiers testified, it is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.*

[26] Further support for the view that African Customary law has evolved and bridal transfer ceremony as always flexible in application is to be found in TW Bennett A Sourcebook of African Customary Law for Southern Africa. Professor Bennet has quite forcefully argued: '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, a 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.'

[39] This matter is not one of those which Courts are all so often faced with where one party's family alleges that a marriage was concluded, and the other's family denies same. Before the Court *a quo*, two witnesses from the deceased's family confirmed the marriage between the Respondent and the deceased, and the Respondent being the wife of the deceased.

[40] The Court *a quo*'s reasoning and its evaluation of the applicable Customary law cannot be faulted. Its interpretation thereof is supported in *Tsambo v Sengadi*.³¹

'[18] ...Clearly customs have never been static. They develop and change along with the society in which they are practiced. Given the obligation imposed on Courts to give effect to the principle of living customary law, it follows ineluctably that the failure to comply strictly with all the rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law.' (footnotes omitted)

[41] It was held in *Shibi v Sithole and Others*³² with reference to *Alexkor Ltd and Another v Richtersveld Community and Others*:

'[43] ...

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 laws 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.

This approach avoids the mistakes which were committed in the past and which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of common law and other systems of the law. That approach also led in part to the fossilisation and codification of customary law which in turn led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances...'

[42] Customary law is an ever evolving system of laws which the majority of people in South Africa live by. These laws may be adapted from generation to generation in accordance with the needs of the community within which these

³¹ Tsambo v Sengadi (244/19) [2020] ZASCA 46 (30 April 2020)

³² Shibi v Sithole and Others (CCT 50/03), (CCT 69/03, CCT 49/03) [2004] ZACC 18

laws are practiced, always subject to the values of the Constitution. Courts should be cognisant of the flexible nature of Customary Law when making finding thereon. These findings are factual and influence the lives of people and are always of great public value. It was held in *Mayelane v Ngwenyama and Another*.³³

‘[50] ...There is an untapped richness in customary law which may show that the values of the Constitution are recognised, or capable of being recognised, in a manner different to common law understanding.’

[43] The innuendo relied upon be the Appellants as to the *mala fide* motive of the Respondent for bringing the Application before the Court *a quo* is irrelevant.

Conclusion

[44] For the reasons set out above the Appeal stands to be dismissed.

Costs

[45] There are no circumstances justifying a deviation from the normal order that costs should follow the event. The Respondent utilised two counsel. Although the subject matter can generally be regarded as important, it was not of such a complex nature that it justifies this Court to order that the Appellants pay the cost of two counsel.

Order

[46] The following order is proposed:

1. The Appellants’ failure to timeously file the record and their heads of argument is condoned;

2. The Appeal is dismissed;

3. The Estate of the late Mr W[...] T[...] M[...] is ordered to pay the Appellant's costs of appeal and the Respondent's costs of opposition to the Condonation Application, on a party and party scale, limited to the cost of one counsel.

PICK, AJ

Acting Judge of the High Court of South Africa
Mpumalanga Division, Mbombela Main Seat

I agree

GREYLING COETZER, AJ

Acting Judge of the High Court of South Africa
Mpumalanga Division, Mbombela Main Seat

I agree and it is so Ordered

VUKEYA, J

Judge of the High Court of South Africa
Mpumalanga Division, Middelburg Local Seat

HEARING DATE: 24/11/2023

ORAL WRITTEN SUBMISSIONS RECEIVED: 01/12/2023

CONDONATION SUBMISSIONS RECEIVED: 09/01/2024

DATE OF JUDGMENT: 26/04/2024

Appearance for the Appellants:

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