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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 6035/22

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 24/10/24

SIGNATURE:

In the matter between: -

KGALEMA RICKY SEPONYE

Applicant

and

DEPARTMENT OF HOME AFFAIRS

First Respondent

THE DIRECTOR GENERAL: HOME AFFAIRS

Second Respondent

CAROLINE LEBEA

Third Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives via email and by uploading it to the electronic file of this matter on Caselines. The date of judgment is deemed to be 24 October 2024.

JUDGMENT

Summary: Customary law – – late registration of a customary marriage - s3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 – whether a valid customary marriage came into existence - interpretation of sec 4(5) of the Recognition of Customary Marriages Act.

MOGAGABE AJ

INTRODUCTION

[1] At the heart of this matter is the question whether a valid customary marriage was concluded or came into existence between the applicant and the deceased, Refilwe Maboyane during December 2011, in consequence of which the applicant seeks the following orders:

- 1.1. Condonation of the late registration of the customary marriage between the applicant and the deceased.
- 1.2. An order directing first and second respondents to register the said customary marriage between the applicant and the deceased, in terms of the provisions of sec 4(7)(a) of the Recognition of Customary Marriages Act 120 of 1998. (the Customary Marriages Act)

- 1.3. An order that first and second respondents be directed to issue to the applicant a marriage certificate in respect of the said customary marriage between the applicant and the deceased, within thirty (30) days of the granting of this order.
- 1.4. An order that the applicant be vested with the responsibility to provide primary care and residence in respect of the minor children born between the applicant and the deceased.

[2] The first and second respondents (State respondents) are not opposing this application and abide the decision of this Court, having elected not to file opposing affidavits or at least explanatory affidavits pertaining to the matter for the benefit of the Court. The third respondent (the mother of the deceased) is strenuously opposing the matter, contending that no customary marriage came into existence between the applicant and the deceased. I outline hereafter the background facts in order to appreciate the context that triggered this application.

CONTEXT

[3] The background facts of this matter fall within a narrow compass. The salient features thereof are as follows. The applicant and Refilwe Maboyane (the deceased) had a romantic relationship. In 2008 a son KK ... was born out of this relationship. In September 2011 applicant's family approached the family of the deceased requesting a date to commence magadi/lobolo¹ negotiations. The date of the 3rd December 2011 was fixed by the Maboyane family for such magadi/lobolo negotiations, including providing the applicant's family with a list of "Dinyakwa"². The word "Dinyakwa" is a Sepedi word meaning within the

¹ Lobolo/magadi is defined in sec 1 of the Customary Marriages Act to mean "the property in cash or kind which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage"

² A copy thereof is annexure "RSK3" to the founding affidavit, caselines 0.05-1

context of magadi/lobolo negotiations, items/gifts required by the Maboyane family to be furnished by the Kgalema family as part of the magadi/lobolo negotiations, as is the custom among not only the Bapedi people but Indigenous African people of our country.

[4] As so arranged, on 3 December 2011 a delegation from the applicant's family attended at the family home/residence of the deceased for purposes of negotiating magadi/lobolo for the marriage of the deceased, comprising of eight persons.³ This delegation was welcomed by the deceased's family. The magadi/lobolo negotiations then ensued. The upshot being that both families agreed that the sum of R25 000 would constitute the lobolo payable for the marriage of the deceased. In addition thereto and as per African or Bapedi culture and/or custom, applicant's family, as so requested provided the following items and/or gifts to the deceased's family:

- 4.1. six blankets;
- 4.2. jase (long coat);
- 4.3. patla (walking stick);
- 4.4. thipa (knife);
- 4.5. selepe (axe);
- 4.6. dituku (five women's head scarves).

[5] On the same day, the sum of R25 000 as payment for magadi/lobolo for the deceased was paid in full including providing the said items/gifts so requested by the Maboyane family. This is confirmed or corroborated by the lobolo letter

³ CaseLines 0.02-6 Founding Affidavit para 5.4.

dated 3 December 2011, a copy of which is annexure “RSK5” to the founding affidavit.⁴ This letter written in the Sepedi language is reproduced as follows:

“Ba Maboyane re amogetse dikgomo tse dilekanago R25000.00 go tswa gaKgalema.

Dikobo tse tshelela (6) (6 blankets)

Dituku tse hlano (5) (5 female headscarves)

Khiba le tuku tsa Makoti (traditional dress and head scarf for the bride)

Jase Background

Patla Walkingstick

Thipa (knife)

Selepe (axe)

Bo Mmaditsela

1.M J Maboyane

2. ...”

Loosely translated it means that “ the family of Maboyane received magadi/lobolo in the sum of R25000.00 from the Kgalema family” including the items listed above including a traditional dress for the makoti (bride). It is

⁴ CaseLines 0. 07-1, copy of Lobolo letter annexure “RSK5”.

signed by the “Bo Mmaditsela” meaning the emissaries from both sides of the family. The first one recorded or written as MJ Maboyane is said to be that of the third respondent’s father⁵ representing the Maboyane family, and the second one is probably that of the emissary representing the Kgalema family.

[6] Thereafter the Kgalema family and friends were dined by the Maboyane family. Subsequent thereto after singing, ululations and jubilation in celebration of the customary marriage, as is the African custom, culture and tradition, representatives of the Maboyane family accompanied the deceased to the Kgalema family home in Soshanguve where the applicant and members of his family were waiting for the handing over ceremony of the deceased as the makoti (bride/daughter-in-law) of the Kgalema family in accordance with the customs and/or culture of the African/Bapedi people.

[7] At the Kgalema family house, representatives of the Maboyane family formally handed over the deceased as a makoti (bride/daughter-in-law) to the Kgalema family in accordance with the customs, culture and traditions of the African/Bapedi people. A goat was slaughtered as a symbol and ceremony of welcoming the deceased as makoti (daughter-in-law) of the Kgalema family. In accordance with African/Bapedi culture and/or custom the deceased was welcomed by the Kgalema family as a makoti (bride/daughter-in-law) of the Kgalema family and given the name of Mmasetshaba (i.e. mother of the nation). Such handover ritual or ceremony of the deceased as makoti of the Kgalema family, accompanied by ululations and singing, was followed by celebrations by the two families at the Kgalema family home until late at night on 3 December 2011.

[8] The successful conclusion of the lobolo negotiations culminating in the formal handover and welcoming ceremony of the deceased as the Makoti of the

⁵ Caselines 0.50-19 relying affidavit para 53

Kgalema family, signified that a customary marriage in accordance with African/Bapedi customs and/or traditions was concluded between the parties.

- [9] Subsequent thereto, the applicant and the deceased cohabited together as husband and wife at the applicant's residence in Soshanguve. During such marriage, the deceased gave birth to a son, LK ... on 25 January 2017, followed by the birth of a daughter, LM ... on 11 January 2019, as evidenced by their respective birth certificates, copies of which are annexed to the founding affidavit.⁶ It is noteworthy to point out that both LK and LM's birth certificates indicate that their births were registered under the surname of "Kgalema", being the applicant's surname. Further, LK's birth certificate records the endorsement in terms of which the applicant declares that he is the biological father of LK.
- [10] After the birth of their third child, LM, the deceased experienced medical complications, in consequence of which the relationship between the applicant and the third respondent (his mother-in-law) deteriorated, as she blamed him as the cause of the deceased's illness.
- [11] On 9 May 2021 the deceased succumbed to her illness and was buried on 22 May 2021.
- [12] Subsequent thereto, the applicant and the third respondent were embroiled in some bouts of litigation relating to the third respondent seeking access to the minor children LK and LM, as K[...] was at all material times hereto, living with the third respondent. This then in essence constitutes the background facts of this matter.
- [13] Insofar as it relates to the failure to register the customary marriage within the period of three months after the conclusion thereof or such longer period as

⁶ CaseLines 0.15-1 to 0.05-3

the Minister may from time to time prescribe by notice in the Gazette, the applicant has shown good cause for such failure to the effect that as a layperson he was not aware of the requirement to do so, which assertion is not disputed by the third respondent. In the interest of justice failure to do so, is in the circumstances condoned.

THIRD RESPONDENT'S DEFENCE

- [14] The third respondent is the applicant's mother-in-law and the deceased's mother. She does not dispute that the applicant is the biological father of the three minor children. She also does not dispute that the two minor children LK and LM were since birth residing together with their parents (i.e. the applicant and the deceased) at the residence of the applicant. She also does not dispute or contest the applicant's parental rights and responsibilities as the biological father of the three minor children.
- [15] The third respondent oppose or resists the relief sought by the applicant herein on the basis that no customary marriage was concluded or came into existence between the applicant and the deceased. She disputes by way of "bare denials" the entire version or narration by the applicant, from the time the Kgalema family approached the Maboyane family to commence magadi/lobola negotiations, the magadi/lobolo negotiations that occurred on 3 December, payment of the magadi/lobolo by the applicant in the sum of R25000.00 including the provision of the "dinyakwa" items listed above, culminating in the handover and welcoming ceremony of the deceased as the Makoti by the Kgalema family as outlined above. However, save for such bare denials, the third respondent has failed to furnish or tender any evidence, documentary or otherwise, corroborating or supporting her bare assertions or denials, except for two confirmatory affidavits as more fully dealt with below. So much then for context. I deem it apposite, prior to dealing with the merits of

the matter to deal with certain preliminary issues relating to the matter as outlined hereafter.

AD ABANDONMENT OF PRAYER 4 OF NOTICE OF MOTION

[16] In terms of prayer 4 of the notice of motion as set out in paragraph 1.4 above, the applicant seeks an order to the effect that he be vested with the responsibility to provide primary care and residence for his minor children namely, KK, LK and LM. At the hearing of the matter applicant's counsel, Mr Ntjana indicated that the applicant is no longer persisting with such relief and as such applicant is abandoning such relief. Having regard to the nature of these proceedings, the election or decision on the applicant's part not to persist with such relief, is in the circumstances prudent and wise. Accordingly, having been so correctly abandoned, such abandonment disposes of the need on the part of the Court to deal therewith.

CONDONATION BY THE RESPONDENT FOR THE LATE FILING OF HER ANSWERING AFFIDAVIT.

[17] The second preliminary issue that arose at the hearing of the matter relates to condonation by the third respondent for the late filing of her answering affidavit in non-compliance with the 30-day time limit stipulated by the applicant in the notice of motion, calling upon her to file or deliver her answering affidavit within such period, after notifying the applicant of her notice of intention to oppose the application. It is trite that a court is endowed with the discretion to grant condonation if the interest of justice warrants or permits such indulgence. The granting thereof depends on the particular facts and circumstances of each case. The factors that a court considers when determining the grant of condonation include: the extent of the delay; the explanation therefor; the effect thereof on the administration of justice and other litigants; the importance of the issues raised in the matter; the prospects

of success; and the nature of the relief sought⁷. In determining such condonation, I consider, amongst others, the following factors. The delay is unreasonable, in the order of about three months. The explanation furnished by the third respondent is to the effect that after service of the application papers on her, she engaged the services of her attorney of record to oppose the application. Her attorney of record advised her that this being a High Court matter this will require the engagement of the services of a counsel to among other things, consult and draft the necessary answering affidavit and as such will require her to make substantive monetary payment to cover such legal expenses. The third respondent is a pensioner. As a pensioner coupled with the fact that she had to incur legal expenses regarding the legal proceedings, she brought against the applicant in the Magistrate's Court and the opposition of the rescission application launched by the applicant, she had no funds to pay her attorney to oppose the present application. It took her some months to raise such funds to cover legal expenses in opposing the matter, hence the answering affidavit was filed about three months late. The applicant has advanced no substantive reasons or grounds in resisting the condonation application. The prospects of success appear to be evenly balanced. In the absence of any material prejudice raised by the applicant in this regard and having regard to the nature of the matter, I am of the considered view that condoning the late filing of the answering affidavit will enable the Court to consider the full conspectus of the evidence in these proceedings with the attendant consequences of curing any prejudice that could be suffered by the third respondent in the determination of this matter. In the circumstances, despite the unreasonable delay, it is in the interests of justice to condone the late filing of the answering affidavit, to attain a fair and proper ventilation of the matter. Accordingly, the condonation application is granted, and the answering affidavit is admitted. Prior to dealing with the points *in limine* so raised by the third respondent herein, I deem it apposite to

⁷ *Liesching and Others v S and Ano* [2016] ZACC 41; 2017 (4) BCLR 454 (CC) para 14; *Aurecon SA (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) para 17, endorsed by the Constitutional Court in *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) para 18.

set out the regulatory framework governing the recognition and registration of customary marriages as set out hereinafter.

REGULATORY FRAMEWORK

[18] The recognition, requirements, and registration of customary marriages are regulated by the Recognition of Customary Marriages Act 120 of 1998 (the Customary Marriages Act) which came into operation on 15 November 2000. For present purposes, the relevant parts thereof are set out hereinafter.

[19] The purpose of the Customary Marriages Act is stated in the preamble to inter alia “make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages ...”

19.1. In terms of sec 1 a “*customary marriage*” is defined as “*a marriage concluded in accordance with customary law*”. “customary law” is in turn defined 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”. “*Lobolo*” is defined as “*the property in cash or in kind, whether known as Lobolo, Bogadi, Bohali, Xuma, Lumalo, Thaka, Ikhazi, Bogadi, Emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage*”.

19.2. Sec 2 which deals with the recognition of customary marriages provides in subsection (2) thus:

“2(2) 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”.

- 19.3. Sec 3 dealing with the requirements for a valid customary marriage provides in subsection (1) thereof 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 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.”

- 19.4. Sec 4 dealing with the registration of customary marriage provides thus:

“4(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his/her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

(3) *A customary marriage –*

(a) *...*

(b) *entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette;*

(4)

(a) *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 lobolo agreed to and any other particulars prescribed.*

(b) *the registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.*

(5)

(a) *If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.*

(b) *If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).*

(6) *If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.*

(7) *A court may, upon application to that court and upon investigation instituted by that court, order –*

(a) *the registration of any customary marriage; or*

(b) *cancellation or rectification of any registration of a customary marriage effected by a registering officer.”*

[20] In terms of sec 4(9), a failure to register a customary marriage does not affect the validity of that marriage. I turn now to deal with the points in limine so raised by the third respondent in resisting the application.

[21] In terms of sec 11, the Minister of Justice, in consultation with the Minister of Home Affairs, is empowered to make regulations, relating to inter alia, the requirements to be complied with and information to be furnished to a registering officer in respect of the registration of a customary marriage.

THIRD RESPONDENT’S POINTS *IN LIMINE*

Applicant’s failure to comply with section sec 4 5(a) of the Customary Marriages Act read with regulation 2(1) made thereunder

[22] The third respondent challenges the application on the basis of prematurity, contending that the applicant had prematurely launched the present application before exhausting or utilising the internal remedy provided for in sec 4(5)(a)⁸ read with regulation 2(1) of the Regulations framed under the

⁸ The provisions of sec 4(5)(a) are set out in para 19.4 above.

Customary Marriages Act. Regulation 2(1) provides that an application for the registration of a customary marriage must substantially correspond with Form A of the Annexure contained in the Regulations and be duly confirmed and signed before – (a) a registering officer or (b) designated person, who has been designated as such by the Director General to perform functions in terms of the Regulations. Such application must be lodged with a registering officer or designated person who must then issue the applicant with an acknowledgment of receipt which substantially corresponds with Form B of the Annexure. A registering officer is defined in the Customary Marriages Act as “any person appointed as registering officer for purposes of this Act by the Minister or an officer acting under the Minister’s written authorization”

- [23] In developing this argument, third respondent asserts that instead of launching the present application, the applicant ought first to have initiated the application to the registering officer in terms of sec 4(5)(a) in the manner prescribed by Regulation 2(1) as aforementioned, to enquire into the existence of a customary marriage between him and the deceased, who if satisfied that a valid customary marriage existed between the spouses, must register the customary marriage and issue a certificate of registration recording the prescribed particulars i.e. the identity of the spouses, the date of the marriage, any magadi/lobolo agreed to and any other particulars prescribed, as so contemplated in sec 4(4)(a) of the Customary Marriages Act. Furthermore, so the argument goes, this is the first step that the applicant should have taken, entailing that only in the event that the registering officer rejected such application, then was the applicant entitled to launch an application to review and set aside such decision by the registering officer rejecting his application and seek an order directing the registering officer or the Department to register the customary marriage and issue the requisite certificate of registration. The net effect thereof being that making an application to the registering officer for the late registration of a customary marriage constitutes in the circumstances a compulsory or obligatory step or condition precedent to

launching an application to court for such relief. Given that the applicant has failed to do so, the present application is, so contends the third respondent falls to be dismissed with costs, on the basis of prematurity

[24] The challenge raised in this regard is to the effect that it was premature or impermissible for the applicant to institute the present legal proceedings seeking the late registration of the customary marriage so concluded between himself and the deceased, without first initiating the application so contemplated in sec 4(5)(a) to the registering officer to enquire into the existence of such customary marriage. In essence, the assertions on the part of the third applicant challenging the propriety of the procedure employed by the applicant for the late registration of the said customary marriage, without first invoking the procedure contemplated in sec 4(5)(a), is that such conduct was in the circumstances fatal to launching the present legal proceedings, with the attendant consequences that the present application (legal proceedings), should be dismissed solely on this score. This being so, the key question for determination is whether it is permissible in law for the applicant to institute these legal proceedings without first initiating or invoking the application procedure so contemplated in sec 4(5)(a) to the registering officer to enquire into the conclusion or existence of the customary marriage between himself and the deceased. Put otherwise, was the applicant obliged in law to first initiate or invoke the procedure contemplated in sec 4(5)(a) to apply to the registering officer to enquire into the existence of such customary marriage, before launching the present application? I disagree with such contention for the following reasons.

[25] The starting point is the statutory provision in question. The relevant provisions of sec 4(5)(a) are set out in paragraph 19.4 above. In interpreting a statutory provision, the appropriate starting point is the language of the provision itself; the context in which the relevant provision appears; having regard to the purpose of the provision and the background to the preparation

and enactment of the statute. This approach to statutory interpretation is enunciated in **Endumeni**⁹ in the following terms:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contextual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

- [26] This approach was neatly encapsulated by Unterhalter AJ in **Betterbridge (Pty) Ltd v Masilo & Others NNO**, as “a unitary endeavour requiring the consideration of text, context and purpose”.¹⁰ i.e. the interpretation exercise is no longer a process that occurs in phases but is in essence one unitary

⁹ **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) para [18].

¹⁰ [2015] JOL 33113, 2015 (2) SA 396 (GNP) para [8].

exercise. It is trite that in ascertaining the intention of the legislature the words and expressions used in a statutory provision should be given their ordinary grammatical meaning in the light of their context, unless to do so would lead to an absurdity the legislature would not have contemplated and whilst according such words and expressions their ordinary grammatical meaning, sight should not be lost that a contextual and purposive construction of legislation and the provision of a statute is paramount. In doing so, the purpose stated in the preamble as outlined above, can be realised by giving effect to sec 39(2) of the Constitution, commanding that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.¹¹ The provisions of sec 4(5)(a) must be construed in the context of the scheme of the Customary Marriages Act in its entirety, whose chief purpose is to reform customary law in several important ways, as propounded by Moseneke DCJ in **Gumede**¹², as follows:

“the facial extent of the reform is apparent from the extended title of the Recognition Act. The legislation makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses. It specifies the essential requirements for a valid customary marriage and regulates the registration of marriages.

In this way, it introduces certainty and uniformity to the legal validity of customary marriages throughout the country. The Recognition Act regulates proprietary consequences and the capacity of spouses and governs the dissolution of marriages, which now must occur under judicial supervision. An additional and significant benefit of this legislative reform is that it seeks to salvage the indigenous law of marriage from the stagnation of official codes

¹¹ **Ngwenyama v Mayelane** [2012] ZASCA 94; 2012 (4) SA 527 (SCA) paras [14] , [15] and [35]

¹² **Gumede v President of the Republic of South Africa & Others** 2009 (3) SA 152 (CC) para 24

and the inscrutable jurisprudence of colonial 'native' divorce and appeal courts". It is within this context and scheme that sec 4(5)(a) should be purposively construed.

[27] The plain reading and interpretation of sec 4(5)(a) indicate that in instances where a customary marriage is or was for any reason not registered, any person that can prove or demonstrate that he/she has a sufficient interest in the matter, is permitted to make an application to the registering officer in the prescribed manner to enquire into the existence of such a marriage. In other words, it accords a right to any person able to show "sufficient interest" in the matter, to make an internal application by completing the standard Form A set-out or contained in Annexure A to Regulation 2(1), to a registering officer to enquire into the existence or conclusion of such marriage, in cases where such customary marriage was for any reason not registered within a period of three months after the conclusion thereof or within such longer period as the Minister may from time to time prescribe by notice in the Gazette, as so contemplated in sec 4(3)(b). A proper construction of sec 4(5)(a) shows that it does not expressly preclude or impose a moratorium on the institution of legal proceedings by any person with a "sufficient interest", for the late registration of the customary marriage, where such "interested person" did not first initiate the application so contemplated in sec 4(5)(a) to the registering officer. Nor does the scheme of the Customary Marriages Act or for that matter of sec 4(5)(a) contain an express provision to the effect that non-compliance with the provisions of sec 4(5)(a), would render defective or invalid, the institution of legal proceedings for the registration or late registration of a customary marriage, for failure to initiate or utilise the internal remedy or procedure so contemplated in sec 4(5)(a).

[28] In my view, the analysis and interpretation of sec 4(5)(a), reveals that having regard to its text, context and purpose, there is no exclusion or preclusion of any person able to demonstrate or show sufficient interest in the matter (i.e.

late registration of a customary marriage), from instituting or launching legal proceedings for such relief i.e. late registration of customary marriage, before first initiating or invoking the internal remedy or procedure envisaged in sec 4(5)(a). In my view, it seems overly technical and formalistic to insist on the invoking or utilisation of an internal remedy or application which is required to be made in the form of a standard form A as so prescribed in Annexure A to Regulation 2(1)(a). A court should be too slow to interpret a statutory provision so as to unnecessarily fetter its own power to do justice, having regard to the fact that in certain instances, as in casu, the resistance to the institution of legal proceedings, is self-evidently an exercise in empty formalism, tantamount to elevating form over substance, designed to delay the registration of the customary marriage.

[29] It would in my view, be impractical and insensible to require or oblige an applicant to first initiate the internal standard form application so contemplated in sec 4(5)(a) to the registering officer to enquire into the existence of the customary marriage and thereafter (in the event of the registering officer declining to register the customary marriage), to launch legal proceedings seeking the same relief. It would be impractical, illogical and inequitable in such cases, to lay down a rigid or inflexible rule or requirement that the approval or acceptance by a registering officer of an application for the late registration of a customary marriage should first be sought and obtained by way of an internal remedy or procedure, which (in the event of the registering officer refusing to do so) should thereafter be followed by the launching of legal proceedings for similar relief. It is not a matter of an inflexible and rigid one-size-fits-all approach.

[30] The provisions of sec 4(5)(a) must be construed in a manner that is less restrictive on a litigant's constitutional right of access to court and if possible, a court seized with such a matter should in the circumstances adopt a purposive construction over a merely textural or legalistic one in order to afford the

spouse(s) or “interested persons” the fullest possible protection of such right of access, having regard to the chief purpose of the legislation to reform customary marriages and give recognition to customary marriages and make provision for the registration thereof by the courts as contemplated in sec 4(7) of the Customary Marriages Act.

- [31] The internal mechanism or procedure so envisaged in sec 4(5)(a) is, in my view, intended to serve as an informal, non-expensive and expeditious procedure for the late registration of a customary marriage for the benefit of the spouses and any “person who can show sufficient interest” in the registration of the customary marriage, and does not constitute a bar in itself to the institution of legal proceedings seeking the same relief. As such, the internal mechanism or remedy so envisaged in sec 4(5)(a), does not in the circumstances constitute a jurisdictional fact or condition precedent for such legal proceedings, taking into account that the legislature did not in the absence of an express sanction for non-compliance with the provisions of sec 4(5)(a), intend to invalidate or nullify the institution of legal proceedings, without first initiating or invoking the internal procedure or mechanism so envisaged in sec 4(5)(a). As such, the provision of sec 4(5)(a) should not be utilised or invoked as a shield by third parties or ‘interested persons’ designed to ward off legal proceedings by “interested persons” including spouses, in enforcing their constitutional right of access to court and vindicate their statutory right for the late registration of their customary marriages. Applying a purposive and contextual interpretation to the language used in the provision of sec 4(5)(a), I concluded there is nothing in the provisions of sec 4(5)(a), which precludes or excludes the institution of legal proceedings for seeking relief for the late registration of customary marriages, without first initiating or invoking the internal procedure or mechanism contemplated in sec 4(5)(a). To require an applicant to do so would have the effect of placing unnecessary formalistic obstacles or skittles in the path of an applicant seeking leave of a

court for the late registration of a customary marriage. On this score, this point in limine is misguided and accordingly, falls to be dismissed.

[32] In any event, the text of the provision of regulation 4(5)(a) is not couched in peremptory or mandatory, terms enjoining or making it obligatory for “*any person who satisfies or establishes to a registering officer that he or she has a sufficient interest in the matter*”, to apply to the registering officer to enquire into the existence of a customary marriage. On the contrary, these provisions are couched in directory or permissive language, having regard to the use of the word “*may*”, signifying that any such “*interested persons*” including the spouses or any of the spouses are not obliged, in the event of failure “*for any reason*” to register a customary marriage within a period of three months after the conclusion thereof or within such longer period as the Minister may by notice prescribe in the Gazette¹³, to apply to the registering officer to enquire into the existence of such customary marriage and if satisfied to register same.

[33] It is apposite to quote the pronouncement of O'Regan J in **South African Police Service v Public Servants Association**¹⁴, to the following effect:

“ In many circumstances, where a provision provides that a person ‘may’ do something, it means not that the person is obliged to do something, but that the person is permitted to do it, if she or he chooses. In other circumstances, the fact that a person ‘may’ do something means that they have the power to do something (that they might ordinarily have the power to do) and that they have a duty to exercise the power in certain circumstances.”

¹³ In terms of sec 4(3)(b) of the Customary Marriages Act.

¹⁴ [2006] ZACC 18, 2007 (3) SA 521 (CC) para 86

[30] The question for consideration is what does the word “may” connote or denote i.e. mean within the context of sec 4(5)(a). Sec 4(5)(a) forms an integral part of sec 4 dealing with registration of customary marriages. Sec 4(1) imposes a duty on the spouses to a customary marriage to take steps to ensure that their customary marriage is registered. The application by the spouses to so register their customary marriage, must be done in the prescribed manner i.e. in the manner prescribed by regulation 2(1) as outlined above. In terms of sections 3(2), 4(a) and 4(5)(a) and(b), the power to register a customary marriage or late registration thereof is granted or accorded to a registering officer. In terms of subsec (6), the registering officer is empowered to refuse registration of a customary marriage, if not satisfied that a valid customary marriage was concluded between the spouses. These provisions provide an informal bureaucratic procedure or mechanism for the registration of their customary marriage by a registering officer specially appointed by the Minister for such purposes.

[31] The issue for consideration is whether sec 4(5)(a) within this context allows an “interested person” as is the applicant in casu, the choice of whether to apply to the registering officer for the late registration of the customary as so contemplated in sec 4(5)(a) in the prescribed manner of completing a standard Form A to the Annexure set out in regulation 2(1), or institute legal proceedings seeking registration of the customary marriage. The answer simply lies in the provisions of sec 4(7), which empowers a court upon application and upon investigation to inter alia, grant an order for the registration of a customary marriage. This entails that an “interested person” as is the applicant in casu, is having regard to the text, context and purpose of the Customary Marriages Act and in particular of the provisions of sec 4, is not obliged to first initiate or invoke the informal bureaucratic procedure or mechanism envisaged in sec 4(5)(a) for the late registration of the customary marriage, before instituting legal proceedings for similar relief. Furthermore, the provisions of sec 34 of the Constitution are applicable and relevant herein. Sec 34 enshrines the right of access to court. As such the provisions of sec 4(5)(a) being couched in such

permissive language, should be construed as permitting an “interested person” as is the applicant herein, the choice to decide whether to invoke the procedure contemplated therein or launch legal proceedings for the registration or late registration of a customary marriage.

[34] The nett effect thereof is that the failure by the applicant to make such application to the registering officer is not fatal to the launching by the applicant of the present application seeking relief for the late registration of the customary marriage so concluded between the applicant and the deceased. Put otherwise, the failure by the applicant to utilise the internal remedy provided in terms of sec 4(5)(a) of the Customary Marriages Act, for the late registration of the customary marriage, does not in the circumstances constitute a barrier precluding a spouse or any “person with sufficient interest” in the matter, from approaching a court of law for the registration or late registration of such customary marriage. On this score, this point in limine is not only misguided but also misconceived and accordingly falls to be dismissed.

[35] In any event, the prescribed manner in terms of which the application contemplated in sec 4(5)(a) should be made, is in the form of a Form A as so prescribed in Regulation 2(1). This Form A as so contained in the Annexure, is a standard form, which requires to be completed by any “interested person”, including a “spouse” or “spouses”, by providing certain personal information or particulars of such spouse(s), eg names, surnames, identity numbers, names of their respective parents, date of marriage and celebration of marriage, place of customary marriage, particulars of lobolo agreement, signatures of both spouse. It also requires the personal particulars of the spouses' respective representatives and their signatures, etc. In this regard, the applicant contended that given that there is no longer any communication or relationship between the Kgalema family and the Maboyane family, it would have been an exercise in futility to require or expect him to obtain the co-operation of a

representative from the Maboyane family to accompany her to the offices of the Department furnish the said personal particulars and sign the form, thus rendering it impossible or futile to have the application successfully processed. As such, to require or compel the applicant to first make such an application to the registering officer, would not only be tantamount to requiring him to perform the impossible or an exercise in futility, but tantamount to depriving him of the constitutional right of access to court. On this score too, the point in limine must fail. I turn now to deal with the second point in limine raised by the third respondent.

AD NON-EXISTENCE OF THE CUSTOMARY MARRIAGE BETWEEN THE APPLICANT AND THE DECEASED.

[36] The second point in limine is based on the alleged non-existence of the customary marriage between the applicant and the deceased. In support thereof, the third respondent asserts that the highwater mark of the relief sought by the applicant in this application “*rests on whether the applicant and deceased were married or not*”. As such, the third respondent contends that no customary marriage was concluded or entered into between the applicant and the deceased, disputing inter alia, the occurrence of lobola negotiations between the two families; the payment of the agreed sum of R25000.00 as lobolo for the marriage of the deceased; the handing over of the deceased by the Maboyane family as a makoti to applicant’s Kgalema family, asserting that as such, the applicant seeks in the present application to “*register that which does not exist*”, contending that reliance by the applicant on a “non-existent” marriage is fatal to the application, entailing that the application falls to be dismissed on this basis.

[37] I hasten to point out that such contention does not in law constitute a point *in limine*, entitling or requiring the Court to dispose or dismiss the application on this basis, without the need to traverse or consider the merits of the

application. This is so in that a point *in limine* is in essence a technical legal point raised by one of the parties which is argued and decided without the need for the court to traverse or deal with the merits of the matter, the upholding thereof being dispositive of the entire matter. As such, a finding whether a valid customary marriage was concluded or entered into between the applicant and the deceased, in compliance with the provisions of sec 3 of the Customary Marriages Act, is in essence not a matter entailing a consideration of purely a technical legal point but is intricately intermingled with issues of both fact and law. This is so in that such a finding requires a court to embark on a factual enquiry or investigation of the facts and circumstances placed before the Court, in order to make a finding or reach a conclusion that in law a valid customary marriage was indeed entered into by the parties in compliance with the legal requirements set out in sec 3(1) of the Customary Marriages Act.

[38] In the circumstances, a finding whether a valid customary marriage was concluded between the applicant and the deceased, does not constitute the consideration of solely a purely technical or preliminary legal point, that can be disposed of without the need to traverse the merits of the case.

[39] Accordingly, this so-called point *in limine* is likewise misguided, cannot succeed or hold sway, and falls to be dismissed too.

AD DISPUTE OF FACT AND APPLICATION OF THE PLASCON-EVANS RULE

[40] Counsel for the third respondent submitted that by virtue of the bare denials by the third respondent disputing the conclusion of the lobola negotiations; the celebrations that ensued thereafter; the handing over of the deceased as the makoti (daughter-in-law/bride) of the applicant's family and the cohabitation by the applicant and the deceased subsequent thereto, there existed a material dispute of fact relating to the question whether the events of 3 December

2011, established the conclusion of a valid customary marriage between the applicant and the deceased, there existed a factual dispute on the material issues, entailing that I should either dismiss the application or refer the dispute to trial or the hearing of oral evidence in accordance with the well-known Plascon-Evans principle.¹⁵ This principle is to the effect that in motion or application proceedings, an applicant seeking final relief must, in the event of the existence of a dispute of fact, accept the version set up by her/his opponent unless such version or allegations by the opponent are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are in the circumstances so remote, far-fetched or clearly untenable that the court seized with the matter is justified in rejecting them merely on the papers as they stand. In this regard, it should be borne in mind that the crisp issue for determination is whether on the facts and circumstances of this case, and bearing in mind the Plascon-Evans rule, the events as so narrated by the applicant of 3 December 2011, on a balance of probabilities proved or established that a valid customary marriage was concluded between the applicant and the deceased, in compliance with the requirements prescribed in sec 3(1) of the Customary Marriages Act.

[41] It is apposite in the circumstances, to refer to the pronouncements by the Supreme Court of Appeal in **Wightman t/a JW Construction v Headfour (Pty) Ltd & Another**, regarding the effect of factual disputes in motion proceedings, as encapsulated in the following terms:¹⁶

“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

¹⁵ **Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-635C.

¹⁶ 2008 (3) SA 371 (SCA) para 13; see also **Malan v City of Cape Town** 2014 (6) SA 315 (CC) at para 73; **Dihomo and Others v Chalwa NO and Ano** 2024 (4) SA 161 (KZP) para [93]; **SAHRA v Mandela** 2024 (4) SA 264 (GP) para [67]

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 unambiguous 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."

- [42] It is manifestly clear from the passage aforequoted, that a *bona fide* dispute of fact only arises when the party raising it seriously and sufficiently addresses the facts so disputed, particularly in instances where such disputing party is in a position to be aware or ought to be aware of the facts concerned. This being so, I point out that the hurdle confronting the third respondent herein, is that she provided bare denials to most if not all of the applicant's material allegations. She failed to engage or deal squarely with the applicant's assertions relating to crucial and material events that were said to have occurred at her family home on 3 December 2011. These for instance concern or relate to the successful conclusion of the lobolo negotiations

culminating in the sum of R25 000.00 being agreed to or fixed for the marriage of the deceased; the payment thereof, the recordal thereof as per the lobolo letter and the signing thereof by her father Mr M J Maboyane (as an emissary on behalf of the Maboyane family), the slaughtering of a sheep, the feasting and sharing thereof between the two families, followed by a joyous and celebratory mood accompanied by signing and ululating; the deceased being introduced to both family and friends as the wife of the applicant. The third respondent (save for bare denials) did not seriously and sufficiently engage with these material assertions, even though they related to events that occurred at her family home on 3 December 2011 and in respect of which she could or ought to have so sufficiently responded thereto, save for resting her case on bare, general or ambiguous denials, avoiding making a real attempt to grapple with such relevant and material factual assertions by the applicant.

- [43] In contrast to such bare and general denials by the third respondent, the applicant's version or assertions were corroborated by confirmatory affidavits of seven of his relatives who were emissaries representing the Kgalema family and participated in the lobolo negotiations on 3 December 2011¹⁷. It is in the circumstances intriguing that the said Mr M J Maboyane (third respondent's father) the signatory and emissary on behalf of the Maboyane family to the lobolo letter¹⁸, evidencing the successful conclusion of the lobolo negotiations and the payment of the sum of R25 000 agreed to as lobolo for the marriage of the deceased, did not depose to any affidavit, refuting the occurrence of the events that transpired at her family home on 3 December 2011, and more importantly, refuting being signatory to the Lobolo letter. Not even an unsworn by him was annexed to the third respondent's answering affidavit to this effect. Furthermore, the admission or concession by the third respondent to the effect that if she "did not know about the marriage"¹⁹, then the deceased sister and

¹⁷ Caselines 0.50-16 replying affidavit paras 44 -45, founding affidavit annexure "RSK17" 0.19-3 to 0.19-18

¹⁸ Caselines founding affidavit 0.07-1 copy of lobolo letter, replying affidavit 0.50-19 para 53.

¹⁹ Caselines answering affidavit 0.27-10 para 36.3.1

aunt would have known about it, cast doubt about her presence at the family home in Block K Soshanguve on the day when the lobola negotiations took place, having regard to the fact that it is common cause that she was at all times material hereto resident at her matrimonial home in Block TT, Soshanguve, whereas these lobolo negotiations and the conclusion of the customary marriage took place at Block K, Soshanguve. The confirmatory affidavits of the deceased's sister and aunt cannot in the circumstances carry much weight, more particularly by virtue of the fact that neither of them confirmed having been present at the family home on 3 December 2011, coupled with the fact that according to the applicant their veracity or lack of candour was exposed during the proceedings in the Magistrate's Court in terms of which third respondent sought to be given access to the minor children. On this basis, the third respondent's bare and general denials do not create a real, genuine or *bona fide* dispute of fact, necessitating the dismissal of the application or the referral of the matter for the hearing of oral evidence or to trial.

[44] I turn now to deal with the ceremony or ritual of the handing over or bridal transfer of the deceased as a makoti (daughter-in-law/bride) to the Kgalema family.

[45] The applicant says that after the successful conclusion of the lobola negotiations at the deceased's family home, followed by feasting and celebration as is the custom, the deceased accompanied by her family attended at the applicant's family home in Soshanguve, where the applicant was awaiting the outcome of the lobola negotiations. Upon arrival at the applicant's family home and amid joyous celebratory mood, accompanied by signing and ululating, the Maboyane family handed over the deceased as the makoti (bride/daughter-in-law) of the Kgalema family, whereupon she was welcomed and given the name Mmasetshaba as is the custom and/or tradition, and introduced to the Kgalema family as the wife of applicant and/or

makoti of the Kgalema family, in accordance with the custom and traditions of the Bapedi people, it being common cause that both families were Bapedi people. Thereafter a goat was slaughtered as a ritual of being welcomed to the Kgalema family and introduced to the Kgalema ancestors. The applicant asserted that the performance of such ritual signified the marriage of the couple and the joining of the Maboyane and Kgalema families. This ritual was followed by celebrations as part of the tradition of connecting the ancestors and the two families, which celebrations continued well into the night. These events which occurred at the applicant's family home, are of significant cultural and traditional importance, regarding an enquiry into the conclusion or existence of a valid customary marriage. However, the third respondent did not engage seriously and sufficiently with important such assertions, save for the usual bare or general denials. This is compounded by the fact that the third respondent in doing so does not state whether she was present on 3 December 2011 at the applicant's family home/residence where such events of cultural and traditional significance are said to have occurred.

- [46] The handing over of the makoti (bride/daughter-in-law) is a ritual or an issue that was pertinently raised by the applicant as proof or corroboration that a valid customary marriage was concluded or existed between him and the deceased. It is trite that the primary purpose or objective of the ritual or ceremony of the handing over of a makoti (bride/daughter-in-law) is simply to mark the beginning of a couple's customary marriage and introduce the makoti to the bridegroom's family.²⁰ In this regard, it is imperative to highlight that sec 3(1)(b) does not specify the prerequisites which must be complied with to validate a customary marriage. The reason being that customary law is a pragmatic, dynamic and flexible system, continuously evolving within the

²⁰ **Mbungela & Another v Mkabi & Others [2019] ZASCA 134; 2020 (1) SA 41 (SCA) para [30].**

context of its values, traditions and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms.²¹

[47] In **Ngwenyama v Mayelane & Another**, the Supreme Court of Appeal, when dealing with the dynamic system of customary law said the following:

*“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 those requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence”.*²²

[48] It is important to highlight the fact that in **Mbungela**, the Supreme Court of Appeal concluded that the handing over of the bride, though important, is not a key determinant of a valid customary marriage. This entails 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. *In casu* it cannot be gainsaid that the customary marriage between the applicant and the deceased was concluded or celebrated in accordance with the applicable customary law more particularly observing the ritual pertaining to the handover by the Maboyane family of the deceased to the Kgalema family, signifying her integration and introduction as a makoti to the Kgalema family and the commencement of the marital consortium.²³

²¹ **Shilubana and others v Nwamita** [2008] ZACC 9, 2009 (2) SA 66 (CC) paras [44] – [46], **Mbungela** para [17]

²² [2012] ZASCA 94; 2012 (4) SA 527 (SCA) at para 23.

²³ **T W Bennett** fn 14 p213.

[49] It is imperative in the circumstances to highlight that the version or narrative of the applicant regarding the events that occurred at his family home on 3 December 2011 and in particular the handing over by the Maboyane family of the deceased as the makoti of the Kgalema family, the ritual of the slaughtering of a goat for purposes of accepting and welcoming her into the Kgalema family and the celebrations that ensued thereafter, stand uncontroverted or unrefuted, having regard to the fact that save for the bare denials, neither the third respondent nor the deceased's sister and aunt, who were not present at the applicant's family home on the day in question, cannot bear testimony regarding the correctness of events of which they were not privy to, during the occurrence thereof nor participated in such events or rituals. As such, in the absence of providing or tendering countervailing evidence regarding the occurrence of such events at the applicant's family home, the uncontroverted version of the applicant in this regard stands and is accepted. Accordingly, I am constrained to find that such bare denial regarding the events that occurred at the applicant's home relating to the handing over of the deceased as a makoti to the Kgalema family does not create a real, genuine and *bona fide* dispute of fact and is clearly untenable, justifying the rejection thereof on the papers as they stand. Such handing over of the makoti and the slaughtering of a goat constitutes traditional practices, rituals or ceremonies, customarily or culturally compatible with the acceptance of the deceased as a wife to the applicant and as a makoti of the Kgalema family and her integration into the Kgalema family as such.

[50] It is in the circumstances important to highlight that on the facts of the present case, the clearest indication of the deceased's acceptance as the wife of the applicant and makoti of the Kgalema family, is manifested by the Kgalema family giving her the name of Mmasetshaba, as is the custom or culture among the African indigenous people of this country in accepting, introducing and integrating a makoti into the family of the bridegroom.²⁴ This being so, I

²⁴ **Mbungela & Another v Mkabi & Others** para 30.

am inclined to accept the applicant's version or narrative that the ritual or ceremony of the handing over of the deceased as a makoti did occur or was observed on the day in question, which ceremony or ritual is or constitutes a manifestation of the acceptance and introduction of the deceased as the wife of the applicant and makoti of the Kgalema family, signifying or establishing that a valid customary marriage was concluded between the applicant and the deceased on 3 December 2011. I am fortified in such finding by the dicta in **Mbungela** to the following effect:

"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".²⁵

- [51] The aspect of the couple cohabiting together subsequent to the conclusion of the customary marriage during which cohabitation the minor children LK and LM were born, constitutes in the circumstances irrefutable presumption that the couple was married, taking into account that the third respondent did not object thereto nor evinced any disapproval, by for instance demanding a fine from the applicant's family, but on the contrary admitted such cohabitation, albeit contending or asserting that they did so as boyfriend and girlfriend. This view is fortified by Professor Bennett to the effect that in instances where the couples were cohabiting, the gravamen of the enquiry was the attitude of the woman's guardian, in that if the guardian did not object to the cohabitation, a marriage would be presumed, despite the location of the matrimonial home or how the 'spouse' came to be living there.²⁶ This is so in that (a) "*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*".²⁷ The assertion by the third respondent whilst admitting such cohabitation, to the effect that the couple lived as '*boyfriend and girlfriend*', without any

²⁵ **Mbungela** para 27.

²⁶ **TW Bennett**: "A Sourcebook of African Customary Law for Southern Africa (2004) p195.

²⁷ *Ibid* at page 219, **Kgapula v Maphai** 1940 NAC (NT) 108 (Hamanskraal).

countervailing evidence is clearly untenable, having regard to the fact that according to the applicant, they so lived together as husband and wife since the marriage in 2011 until the deceased left in 2019 due to her medical complications after the birth of LM, constituting a period of about eight years.

- [52] The registration by the applicant of the deceased as a spouse on his medical aid scheme, coupled with both operating a joint bank account; making an application for the allocation of a residential stand as spouses, and the recordal by the family advocate in her report of the deceased as the applicant's spouse²⁸, constitutes in the circumstances factors or features in tandem or consonant with the existence of a valid customary marriage between the couple.
- [53] All of the aforementioned show that there is overwhelming evidence that the couple to all intents and purposes, were living together as husband and wife.
- [54] In the light of the fact that the applicant's version or assertions regarding the conclusion or entering of a customary marriage with the deceased as outlined above, is corroborated by seven members of the delegation that participated in the lobola negotiations on 3 December 2011, as per their respective confirmatory affidavits annexed to his founding affidavit²⁹ and having regard to the fact that the third respondent's bare, general, and ambiguous denials did not controvert or refute such evidence, nor create or constitute a real or *bona fide* dispute of fact, I conclude that the correct application of the Plascon-Evans rule entitles the applicant to the relief sought herein.
- [55] In the light of the foregoing, taking into cognisance all the facts and circumstances of the present matter, I conclude that the applicant and the deceased entered into a valid customary marriage on 3 December 2011,

²⁸ Caselines 0.02-9 Founding affidavit paras 5.13 – 5.15

²⁹ Caselines founding affidavit 0.19-3 to 0.19-18

which customary marriage complied with or satisfied all the requirements for the conclusion of a valid customary marriage as so contemplated in sec 3(1) of the Customary Marriages Act, namely that both were at the time of the conclusion of the customary marriages above the age of 18 years; and consented to marry each other under customary law and that such marriage was negotiated, entered into or celebrated in accordance with customary law.

COSTS

[56] The third respondent is cited and acting herein in her personal capacity as biological mother of the deceased and in her capacity as the maternal grandmother of the minor children of the applicant and the deceased. The third respondent states that she is a pensioner, albeit there are question marks surrounding her eligibility for pension, which in any event are irrelevant for present purposes. The applicant sought costs on an attorney and client scale against the third respondent, without advancing cogent and material evidence substantiating such punitive costs order. The third respondent is resisting the relief sought by the applicant herein, in a misguided but *bona fide* endeavour to protect the interests of the deceased, her late daughter and those of her grandchildren. Having regard to the facts and circumstances of this case, I deem it fair, proper and appropriate not to make an order of costs.

CONCLUSION

[57] In the light of the foregoing, the applicant has established that the essential requirements for the conclusion of a valid customary marriage between him and the deceased were met entitling the applicant to the relief sought.

ORDER

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

- 58.1. The late registration of the customary marriage entered into between the applicant and the deceased, Refilwe Maboyane, be and is hereby condoned.
- 58.2. The first and second respondents are hereby ordered in terms of the provisions of sec 4(7) of the Recognition of Customary Marriages Act 120 of 1998, to register the customary marriage entered into between the applicant and the deceased, Refilwe Maboyane.
- 58.3. First and second respondents are ordered to issue to the applicant a marriage certificate within thirty (30) days of the granting of this order.
- 58.4. There is no order as to costs.

S J R MOGAGABE AJ

Acting Judge of the High Court
Gauteng Division, Pretoria

Counsel for the applicant: Adv Ntjana
Instructed by LMK Attorneys, Pretoria

Counsel for respondent: Adv A Maluleka
Instructed by Savage Jooste & Adams Inc, Pretoria

Date of Judgement: 24 October 2024