



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Case 2024-101585

Date: 06 September 2024

WJ du Plessis

In the matter between:

SIBUSISO BRIAN MANZINI

Applicant

and

**KHULULEKANI WELCOME DLALISA
AMATHOLE FUNERAL SERVICES**

First Respondent
Second Respondent

Coram: Du Plessis AJ

Heard on: 6 September 2024

Decided on: 6 September 2024, reasons on 11 September 2024

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by e-mail to the attorneys of record of the parties. The deemed date of delivery is 6 September 2024.

JUDGMENT

DU PLESSIS AJ

[1] Late on Friday afternoon, 6 September 2024, the court was approached with an urgent application to prevent the respondent from burying his high school sweetheart, Victoria Ntombifuthi Tshabalala, in Soweto on 7 September 2024. After hearing submissions from counsel for both parties, I reserved the order to consider the submission, after which I handed down the order as set out at the end of this judgment as a matter of urgency. The applicant's family requested reasons for the order. These are the reasons.

[2] The deceased passed away on 31 August 2024. It is disputed whether she was married to the first respondent. She is otherwise survived by her parents, siblings, four children (one predeceased) and four grandchildren.

[3] Her son instituted the application on the basis that the first respondent is not a family member of the deceased, and their relationship was merely based on informal cohabitation. Thus, as the first respondent is unrelated to the deceased, he has no legal burial rights in civil or customary law to make the burial arrangements and exercise the burial rights.

[4] The applicant sets out that the deceased's family has a long-standing tradition of burial rites, and that all the family members are buried in the family's burial site next to their ancestors. He states that that is where the deceased wanted to be buried. They do not want to bury the deceased in an ancestrally unknown site, in the absence of her "real family", far away from them. During the hearing, counsel said that should she not be buried with her family, the family would experience bad luck and they would not be able to perform the necessary rituals. They have planned her funeral for 7 September 2024 in Bergville, KwaZulu Natal.

The first respondent states that the deceased has never mentioned to him that she wants to be buried with her biological family. The first respondent and the deceased were high school sweethearts in 1989; from that relationship, twins were born. After some time, they separated, and the applicant was born from another relationship. The deceased then separated from the applicant's father and had another child from another relationship. In 2008, the deceased and the first respondent reconciled. He approached her family to ask for her hand in marriage. He avers that this request was accepted.

[5] The lobolo negotiations seem to be at the heart of the dispute regarding who may bury the deceased. The applicant asserts that the negotiations remain incomplete as the first respondent only paid two of the nine cows required. The applicant said he promised to continue the negotiations, which he never did. Thus, he cannot be the customary law spouse of the deceased. There was also never a celebration that took place. Two years after these negotiations, another child was born.

[6] The first respondent states that he was required to pay damages for the twins – he paid two cows and two goats, and the money for damages was accepted. In 2009 he paid two cows and money for lobolo, and in the same year they conducted a ceremony of exchanging gifts (*umembeso*) where the bride was handed over to him by her family at her homestead. Due to her giving birth to two children with other men, the lobolo was reduced. He paid the lobolo in full. It is not clear if this is indeed the case. A lobolo letter was uploaded to CaseLines, indicating that *some* payment was made. In light of the discussion below, the case does not turn on whether full payment was made.

[7] The first respondent states that the Tshabalala family accepted him as their son-in-law. He and his wife moved to Johannesburg, where they stayed together as husband and wife and where another child was born. They were married, and she was handed over to him and the Dlalisa family as his wife; he has a right to bury her. The deceased resided with him until her death (thus approximately 15 years). She “belongs” to the Dlalisa family traditionally, her ancestors became that of her husband.

[8] The respondent also sets out that he visited the deceased in the hospital when she was sick after returning from Bergville in July. She passed at the Bheki Mlangeni Hospital in Soweto. Upon her passing, the Tshabalala family went to the house of the deceased and, according to the first respondent, forcefully collected her clothes. He took her body to the funeral parlour, and he started making funeral arrangements the day after her passing. They knew from 1 September 2024 that he wanted to bury the deceased.

[9] The applicant states that upon the news of the deceased's passing, he telephoned members to inform them. The elders gathered from the deceased and the first respondent's family to discuss burial arrangements. He states there was agreement that it would be at her birthplace in Bergville. However, on 2 September 2024, the first respondent demanded that he and his family bury the deceased in Johannesburg because he cohabited with the deceased for a very long period. The applicant states on 4 September 2024, the first respondent again agreed to burial in Bergville, but on 5 September 2024, he refused the body to be collected by anyone but himself. This is when the applicant sent a letter of demand warning that they would approach the court, and this is how the matter eventually ended up on my roll on a Friday afternoon at 15:00.

[10] Often reading through urgent applications relating to burials, CS Lewis' words, "I sat with my anger long enough until she told me her real name was grief", seem apt. The time after the passing of a loved one, which should be a time of solidarity in grief, often gets transformed into angry demands. Once legal practitioners get involved, these demands are converted into affidavits, packaged in the legal language of rights and claims, to be adjudicated by a judge who only gets to see a short glimpse into the lives and relationships of the deceased's loved ones. Considering these rights and claims while showing the necessary sympathy for the ones remaining when deciding the issues that often do not have a straightforward answer is not ideal. Especially not in urgent court. However, that is what I was called upon to do.

[11] This being an urgent application in which final relief is sought, *Plascon Evans*¹ applies. With difficult cases like this, it might be easier to stick to strict formal rules of law, but I do regard the approach as set out in *Sengadi v Tsambo; In Re: Tsambo*² more apt in cases such as these. In that case, the court stated that in such extremely urgent applications, and because the burial is often the next day, a robust approach should be adopted to arrive at a just, fair and equitable decision.

[12] This approach was also followed by Wilson J in *D.M v B2P Funeral Services*³ when he stated

11 It seems to me that this sort of flexibility is well-suited to decision-making in these types of cases, the aim of which must be to try to do the least harm. Ideally, a Judge should not be making decisions about how a deceased person is buried and memorialised. That is primarily a decision for those who knew and loved that person. But where a Judge must decide, it seems to me that the law ought to do no more than take into account the right sorts of considerations, and come to a decision that is likely to cause the least aggravation of grief. This approach is, I think, consistent with the constitutional requirement that the law promote the inherent dignity of all persons. In this context, that means the dignity of the living and the dead (see section 10 of the Constitution, 1996).

[13] In this framework of a robust approach to arrive at a just, fair and equitable decision, I consider the facts and the applicable legal principles.

[14] All indications are that in the absence of a will or a clear indication about the wishes of the deceased, the heir of the deceased's estate is the person who decides on the burial.⁴ Due to the nature of these disputes, I would be careful to establish it as an absolute principle, but it is undoubtedly one of the factors that will guide the court in making a fair decision.

¹ *Plascon-Evans Paints (Tvl) Ltd v Van Riebeeck (Pty) Ltd* [1984] ZASCA 51.

² [2018] ZAGPJHC 666 para 3.

³ [2023] ZAGPJHC 856.

⁴ *Gabavana and Another v Mbetse* [2000] 3 ALL SA 561 (Tk).

[15] The deceased did not leave behind a document in which she indicated how and by whom she wished to be buried. The family said she expressed a strong wish to be buried back home, but her partner of almost 15 years, whom she has known for around 35 years, does not know of this wish. Without a more concrete indication that it was indeed her wish, this consideration did not weigh too much in the ultimate decision. Since she died intestate, who her heirs are will depend on whether she was married.

[16] Section 3(1) of the Recognition of Customary Marriages Act⁵ deals with the requirements for the validity of a customary marriage and provides that:

“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”

[17] Through case law, two core validity requirements for a customary marriage emerged: lobolo and the integration of the wife into the husband's family.⁶ Of course, customary law is not stagnant, and there are examples of marriages that were regarded as valid despite not following all the rituals. Courts in the past often focused on the parties' intentions, and in some instances, if parties cohabitated, it could be regarded as a marriage.⁷ That being said, if one claims that a valid marriage took place in terms of customary law, the expectation is that at least some of the customs are followed, even if they are adapted to the modern and urban setting.

[18] I am aware that different communities emphasise different requirements of customary marriages. Therefore, a court cannot simply take one case and apply it as precedent in another case. For instance, these parties lived according to isiZulu

⁵ 120 of 1998.

⁶ Himonga, C. (2015). *Reform of customary marriage, divorce and succession in South Africa*. 59.

⁷ Bennett *Customary law in South Africa* (2004) 216. See *Cele v Radebe* 1939 NAC (N&T); *Nyembe v Mafu* 1979 AC 186 (NE).

customary law. The case law relied on, however, sets out general legal principles that I deem applicable in this case.

[19] A letter from the traditional leader dated 6 September 2024 clarified that in terms of the deceased's customary law, for a woman to legally belong to a man, he has to pay 11 cows, which can be reduced to six, after which they need to go to Home Affairs to get a letter indicating that they are married in terms of customary law. The traditional council asked me not to consider the parties to be married. I have considered this request, but because neither the full payment of lobolo nor the registration of the marriage at Home Affairs is an absolute requirement for a valid marriage, I have come to a different conclusion.

[20] The court in *Mankayi v Minister of Home Affairs*⁸ relating to a marriage concluded in terms of isiXhosa, found that the marriage was concluded after the lobolo negotiations were held, part of the lobolo paid, and the parties started staying together as husband and wife. Case law is clear.⁹ The full payment of lobolo is not an absolute requirement for a valid marriage to exist, but it is one of the factors to consider.

[21] It is unclear whether the applicant's assertion was that the payment made was only the start of the negotiations. Even if it were so, in *Southon v Moropane*¹⁰ (Sepedi) the court stated that payment and cohabitation are enough for a court to infer that the parties were married.

[22] In *Sengadi v Tsambo; In Re: Tsambo*¹¹ Mokgoathleng J was also faced with a dispute regarding the validity of a customary marriage and the respondent's contention that the handing over of the bride did not take place, which means that no valid

⁸ [2021] ZAKZPHC 43.

⁹ *Maloba v Dube* [2008] ZAGPHC 434 para 24.

¹⁰ [2012] ZAGPJHC 146.

¹¹ [2018] ZAGPJHC 666 para 3.

customary marriage was concluded. I provide a lengthy quote of the judgment here, as I think similar principles come into play.

[18] The applicant's submission that the custom of handing over of the bride is an indispensable sacrosanct *essentialia* for the lawful validation of a customary law marriage and that without the handing over of the bride. No valid customary law marriage comes into existence is not correct because the validity of the customary marriage comes into being after the requirements of section 3(1) of the Recognition Act 120 of 1998 have been complied with.

[19] In this particular case there was a tacit waiver of this custom because a symbolic handing over of the applicant to the Tsambo family occurred after the conclusion of the customary law marriage. Because the deceased's aunts after the conclusion of the customary law marriage and indeed the respondent himself, congratulated the applicant on her customary law marriage to the deceased, thereafter they welcomed and accepted the applicant as the customary law wife of the deceased as evidenced by the fact that after the customary law marriage was concluded the deceased and the applicant continued to cohabit as husband and wife at the matrimonial house.

[20] The respondent's insistence that the most crucial part of a customary law marriage is the handing over of the bride to the bridegrooms family, that if this did not occur no valid customary law marriage comes into existence despite the couple having complied with the requirements of *section 3(1)* of the Recognition Act cannot be sustainable because the respondent. incorrectly assumes that customary law custom of the handing over since its original conceptualisation has not changed, that customary is rigid, static, immutable and ossified. On the contrary African Customary Law, it's a living law because, its practices, customs and usages have evolved over the centuries. The handing over custom as practised in the pre- colonial era has also evolved and adapted to the changed socio economic and cultural norms practised in the modern era.

[21] The respondent's rigid incantation of the custom of handing over as legitimising and validating the legal existence of a customary law marriage has been adapted to suit the existential reality and the evolution of African communities. It is indisputable that since the advent of European or Western cultural influences in South Africa living customary law which denotes the practices, customs, rules, usages and conduct in African communities has evolved, is dynamic, pragmatic and constantly

adapting to the interactive social and economic imperatives which infuse living customary law with flexibility in content and application of the custom of handing over hence the waiver of or symbolic handing over which does not entail the physical handing over of the bride to the husband's family. [own emphasis]

[23] The judge referenced an article by Siphon Nkosi¹² where he indicates that a customary marriage is a process and not an event and that while lobolo is an essential element of a customary marriage, it need not be paid in full. He also stated that there is no hierarchy of requirements of customary marriages. Importantly, after discussing case law on the nature of the requirement of handing over of the bride, he writes:

“Cohabitation is another factor that needs to be considered in these circumstances, particularly where the bride's family never objected to it, or did not display any opprobrium by, for example, exacting a fine from the groom's family. Bekker makes this point, concisely, when he says: ‘[P]roof of cohabitation plus the receipt by the woman's guardian of a substantial number of cattle ... may raise presumption that a customary marriages exists’.

[...]

Customary law is not just an infrangible continuum of rituals and usages. It is also not frozen in time. It is very malleable. And, in dealing with matters of this nature, the courts have to take cognisance of whatever developments and changes which might have taken place within a particular community, provided the process is consonant with the ‘spirit’ purport and object of the Constitution’.”

[24] Recently the Supreme Court of Appeal in *Mbungela v Mkabi*¹³ per Maya AJ stated

[25] It is important to bear in mind that the ritual of handing over of a bride is simply a means of introducing a bride to her new family and signify the start of the marital consortium. Here, the deceased and Mr Mkabi had an intimate relationship and cohabited for three years before Mr Mkabi started the marriage process. After the

¹² Nkosi, S. (2015). *Customary marriage as dealt with in Mxiki v Mbata in re: Mbata v Department of Home Affairs and Others (GP)(unreported case no A844/2012, 23-10-2014)(Matojane J): opinion*. De Rebus, 2015(549), 67-68.

¹³ [2019] ZASCA 134.

lobolo negotiations, the deceased immediately resumed her life with Mr Mkabi without censure from her family. [...] the handing over need not be a formal ceremony; for example, upon delivery of lobolo or a fine for seduction only, the subsequent *thwala* ie the abduction of the maiden to the groom's home without her guardian's consent, consummates the customary marriage, if her guardian then allows her to remain with her suitor on the understanding that further lobolo will be paid due course. And proof of cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has raised no objection nor showed disapproval, by, for example, demanding a fine from the groom's family.

Based on all this, there is sufficient information before me to find that the balance of probabilities favours that the parties were married. There were lobola negotiations, and some lobola were paid. After that payment, on the respondent's version, there was a handing over of the deceased to his family. The fact that they cohabitated for such a long period tips the scale in favour of an interpretation that they were married. There was no request to make a declaration that they were married. This determination is thus made to determine who can make the decision to bury the deceased.

[25] I have taken into account the applicant's contention that his mother should be buried with her ancestors, and I have taken into account that the respondent stated that since she is married to him, she should be buried with his family. I have indicated that whether they were married plays an important role in applications like this. However, I must indicate that even if I am wrong on the issue of the marriage, the fact that the first respondent and the deceased have been together for a significant part of their lives, the fact that they had three children together, and the fact that they stayed together until her last days, all weighed into the decision that I have made to let the first respondent determine how the deceased should be buried.

[26] I am aware that my decision caused pain to the already grieving applicant and the family in KwaZulu Natal, who wanted the deceased buried close by in their family graveyard. This almost impossible decision was not taken lightly. Still, I made it based

on the test set out above, on the evidence available on a Friday afternoon in the urgent court, with considerations of fairness.

Kalale ngoxolo, Victoria Ntombifuthi Tshabalala.

Order

[27] The following order is made:

1. The application is dismissed, with costs.



WJ du Plessis
Acting Judge of the High Court

For the Applicants:

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For the Respondents:

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