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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2529/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
DATE	SIGNATURE

In the matter between:

THEMBA MABENA

Applicant

and

THANDI RAMONAKA

First Respondent

PETER RAMONAKA

Second Respondent

THE MINSTER OF HOME AFFAIRS

Third Respondent

THE MASTER OF THE HIGH COURT

Fourth Respondent

JUDGMENT

MINNAAR AJ:

[1] In terms of section 4 of the Recognition of Customary Marriages Act 120 of 1998 (“the Act”), the applicant seeks the following declaratory relief:

- a. Declaring the customary marriage between the applicant and the late Ms Masaku Ramonaka, with identity number 9[...] (“the deceased”) to be valid for all intents and purposes and to be in community of property, profit and loss.
- b. In terms of section 4 of the Act, ordering the third respondent to posthumously register the customary marriage between the applicant and the deceased and to issue a marriage certificate within seven days from the date of the order.
- c. Declaring the applicant to be the widower of the deceased in terms of the customary marriage.
- d. Declaring the applicant to be the heir to the deceased’s estate, which estate is to be administered by the fourth respondent.
- e. Ordering the respondents to recognize the applicant as the widow and heir to the estate of the deceased.
- f. Costs in the event of opposition on the scale as between attorney and own client.

[2] The second and third respondents are the parents of the deceased. They delivered an answering affidavit and the applicant delivered a replying affidavit.

[3] In 2012, the applicant and the deceased met, and they started a romantic relationship. They started living together on 11 May 2014. They were blessed with two children, born on 16 November 2016 and 4 June 2020. Jointly, they have also purchased a property in Randburg in 2014 and another property in Nooitgedacht in 2021. The deceased passed away on 25 November 2021. It is common cause that the applicant and the deceased lived together until the date of her passing.

[4] On 10 March 2014, a meeting was held between the respective families. The applicant’s delegation paid an amount of R3 000.00 as “*goitsibisha*” introduction. A

second meeting was held on 11 May 2014 when a payment of R30 000.00 was made towards lobola for the deceased. A third, and final meeting was held on 27 June 2021 and a final payment of R10 000.00 was paid towards lobola. The lobola was paid in full. This is all common cause between the applicant and the first and second respondents.

[5] According to the applicant, at the second meeting on 11 May 2014, the deceased was handed over to the applicant's family. The first and second respondent denies that such handing over was performed. According to them, the handing over could only have been completed after the required cultural rituals, as is custom in the Sepedi culture, were completed. These rituals were never performed and therefore the marriage between the applicant and the deceased never came into existence.

[6] It is the case of the applicant that according to his Ndebele culture, the payment of lobola is sufficient to constitute a customary marriage and there is no obligation to perform any further rituals.

[7] According to the first and second respondents, there was a quarrel about the lobola at the last meeting. The aspect of lobola was settled between the families and they served the applicant's family lunch as a sign of hospitality. It is however their case that the applicant's family was advised at this meeting that lobola is not the only cultural act that needed to be performed. A date had to be set for the cultural rituals for the applicant and the deceased to be deemed husband and wife.

[8] The second and third respondents deny the applicant's assertion that they accepted him as their son-in-law during the deceased's lifetime. They further deny that they have recognised the customary marriage whilst their daughter was still alive. This is improbable. From the obituary, the applicant is referred to as the spouse of the deceased and the applicant's family was included in the order of service to deliver tributes. The first and second respondent further allowed the applicant to contribute to the casket as the casket the applicant wanted was more expensive and was not covered by the funeral policies.

[9] It is common cause that the customary marriage was not registered as required by section 4(1) of the Act. Section 4(7) of the Act empowers the court, upon application and investigation, to order the registration of a customary marriage.

[10] Section 3(1) of the Act sets out the requirements for a valid customary marriage:

'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.'

[11] 'Customary law' is defined in section 1 of the Act as 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.

[12] There is an obligation on courts to be cognisant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights.¹ The courts must strive to recognise and give effect to the principle of living, actually observed customary law, as this constitutes a development in accordance with the 'spirit, purport and objects' of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.²

¹ *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (2008 (9) BCLR 914; [2008] ZACC 9) paras 110 – 113 and 130

² *Shilubana* above at par49

[13] The jurisdictional factors in section 3(1)(a) are not in dispute. What is in dispute herein is whether the marriage between the applicant and the deceased met the requirements of section 3(1)(b).

[14] No direction is given in s 3(1)(b) as to what requirements of customary law must be met to validate a customary marriage. It is not stipulated that there must be a bridal transfer ceremony or that certain cultural rituals must be met before the customary marriage will be valid. The aspect of a bridal transfer as a requirement was discussed in *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA). In paragraph 17 of this judgment, the Supreme Court of Appeal stated:

‘The reason for this is not far to seek. It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms.³ The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned.⁴ As this court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society.⁵ Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.’

And in paragraph 21, the Supreme Court of Appeal further elaborated on the bridal transfer ceremony:

‘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*⁶ the court considered whether non-compliance with the siSwati custom of bridal transfer, *ukumekeza*, invalidated a customary marriage. The court held:

³ *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at paras 52-53; *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) at paras 81 and 86 – 87.

⁴ *Shilubana* at paras 44 – 46.

⁵ See, for example, *Moropane v Southon* [2014] ZASCA 76 paras 35 – 36.

⁶ *Mabuza v Mbatha* 2003 (4) SA 218 (C) (2003 (7) BCLR 743; [2003] 1 All SA 706) paras 25 – 26.

'(T)here is no doubt that ukumekeza, like so many other customs, has somehow evolved so much that it is probably practised 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.

Further support for the view that African customary law has evolved and was always flexible in application is to be found in T W Bennett *A Sourcebook of African Customary Law for Southern Africa*. Professor Bennett has quite forcefully argued (at 194):

"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, the 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 [because of a pregnancy or elopement]."

In my judgment, there was a valid siSwati customary marriage between plaintiff and defendant.'

[15] In the application before the court, the applicant and the deceased lived together since 11 May 2014. They were blessed with two children and acquired immovable property together. In doing so, they projected to the world that a marriage exists. There is no evidence before the court that the deceased's family, at any stage, or at least until June 2021, objected to this projection that the applicant and the deceased behaved, and lived, as a married couple.

[16] According to the answering affidavit, at the third meeting held on 27 June 2021, the applicant's family was informed that a date must be set for cultural rituals and that the payment of lobola was insufficient. Reference is further made in the answering affidavit that the deceased's aunts called her in November 2021 to come and collect live cattle and sheep for the minor children as the deceased was regarded as being unmarried with children. It is not explained why this was not done after the children were born in 2016 and 2020. It would appear as if the deceased's

family had no difficulty with the way the applicant and the deceased conducted their relationship until June 2021.

[17] In terms of section 4(1) and (2) of the Act, there was a duty on the applicant and the deceased to ensure that their marriage is registered. This duty applied to either of them and not just to the applicant. No evidence is presented that the deceased made any attempt in this regard.

[18] From the obituary, it is evident that the deceased obtained tertiary qualifications, and she ended up with a B Com Honors in Business Administration and Management General from the University of South Africa. She had a long professional career at FNB and later joined Cisco where she was employed until her passing. Although highly qualified, the voice of the deceased is silent in the application before this court. Therefore, the court must consider how the deceased and the applicant portrayed their relationship and what they intended. Living together for more than seven years, starting a family with their two children and building a joint estate by investing in immovable properties, indicate two consenting adults cohabitating and building a life together. This would reflect a husband and a wife in the sense of a traditional marriage. It is improbable that the deceased would have insisted on a bridal transfer ceremony to regulate her life with the applicant.

[19] The overwhelming evidence before this court is that the applicant and the deceased considered themselves as husband and wife for all intents and purposes.

[20] The conclusion in *Mbungela* is contained in paragraph 30, and it reads:

‘To sum up: The purpose of the ceremony of the handing-over of a bride is to mark the beginning of a couple's customary marriage and to introduce the bride to the groom's family. It is an important but not necessarily a key determinant of a valid customary marriage. Thus, it cannot be placed above the couple's clear volition and intent where, as happened in this case, their families, who come from different ethnic groups, were involved in, and acknowledged, the formalisation of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer. I am

satisfied in all the circumstances that the essential requirements for a valid customary marriage were met.'

[21] In the application before this court, the court is satisfied that the essential requirements for a valid customary marriage were met.

[22] The relief claimed by the applicant in prayers 3, 4 and 5 of the notice of motion (declaring the applicant to be the widower of the deceased, the heir to the estate of the deceased and to order the respondent to recognize the applicant as such) will be a consequence of the customary marriage. It is not provided for in section 4(7) of the Act. The relief claimed in these prayers becomes academic once it is declared that there is a valid customary marriage between the applicant and the deceased. In the premises, the court will not grant prayers 3, 4 and 5 of the notice of motion.

[23] In terms of section 7(2) of the Act, the marriage is regarded as being a marriage in community of property. There is no evidence before the court that the consequences of a marriage in community of property were specifically excluded by the spouses in an antenuptial contract.

[24] It is only the first and second respondents that opposed the application. Awarding of costs is at the discretion of the court. There is no basis to deviate from the general principle that costs should follow the outcome. I can see no justification for punitive costs. Costs will be awarded on Scale B.

ORDER:

The following order is made:

1. The customary marriage between the applicant and the late Me Masaku Ramonaka, identity number 9[...] is declared valid for all intents and purposes and is to be in community of property, profit and loss.
2. The Third Respondent is ordered to register the customary marriage between the applicant and the late Me Masaku Ramonaka, identity number 9[...] in terms of section 4 of the Recognition of Customary Marriages Act 120

of 1998 posthumously and to issue the marriage certificate within 20 (twenty) days from the date of service of this order.

3. The first and second respondents, jointly and severally the one paying the other to be absolved, to pay the costs of this application, such costs to be

Date of Hearing: 14 November 2024

Date of Judgment: 13 February 2025

taxed on Scale B.

MINNAAR AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv M J Ranala instructed by M L Mateme Incorporated

For the First and Second Respondents: Adv J M V Malema instructed by A M Nduna
Attorneys