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REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-120095

(1) REPORTABLE: YES/NO

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

(3) REVISED: YES/NO

DATE: 20 February 2025

SIGNATURE:

In the matter between:

T[...] S[...] N[...]

Applicant

And

J[...] K[...] M[...]

First Defendant

Minister of Home Affairs

Second Defendant

JUDGMENT

NTLAMA-MAKHANYA AJ

Introduction

[1] This was an application for a declaratory order in recognition of the validity and existence of the customary marriage between the Applicant and the First Defendant. The parties entered and celebrated their marriage on 01 April 2012 as envisaged in section 3 of the Recognition of Customary Marriages Act 120 of 1998 (Customary Act). However, the marriage was not registered with the Department of Home Affairs (Second Defendant). The marriage had irretrievably broken down and the First Defendant has since passed on as well. The matter proceeded unopposed, and the Second Defendant would abide by the decision of this Court. I issued the order for the declaration of the validity of the marriage *ex tempore* and herein I provide the basis for granting the declaratory order.

[2] The prayer that was sought by the Applicant was for:

[2.1] the declaration of the existence and validity of the customary marriage between him and the First Defendant.

[2.2] the Second Defendant to register the customary marriage.

[3] I am not going to classify this application as a dispute other than a needed affirmation from this Court for the declaration of the said marriage to ensure its registration with the Department of Home Affairs. A brief background is also essential that provides a foundation to the application.

Background

[4] The brief facts are presented herein with the First Defendant having passed away on the 09th April 2024. At the time of her death, this application was already in motion. The facts, therefore, are presented as they appeared on the files of records and during oral submission. The focus is on the facts as filed before the First Defendant's passing. This application did not raise intricacies about the validity of the customary marriage between the parties. The main issue which was also not contentious was for this Court to grant an order for the registration of the customary marriage with the Department of Home Affairs (Second Defendant). Further, for the parties to be able to deal with the proprietary consequences of their marriage. The only bar to what appeared to be the challenge to the validity of the marriage was its non-registration with the Department of Home Affairs as required by section 4(1) of the (Customary Act). This section obligates the spouses in a customary marriage to ensure that their marriage is registered.

[5] The brief facts of this application were that the parties were married in terms of customary law. The two families met and negotiated the marriage on 26 November 2011 and R20 000.00 was agreed upon as an *ilobola* amount which was paid the by Applicant to the First Defendant's family. The marriage was celebrated according to custom on 01 April 2012 and the parties stayed together as husband and wife thereafter. Supporting confirmatory affidavits were included in the application that confirmed the payment of *ilobola*, parties that were in attendance at the ceremony; celebration of the wedding, photos of the wedding day except for the signed letter during the negotiations relating to the agreed *ilobola* agreement. The parties also shared a common immovable property which they bought at an amount of R200 000 wherein they jointly contributed to its purchase. The seller submitted a confirmatory affidavit including the proof of payment in this regard. It is also worth to mention that the marriage had irretrievably broken down and due to the strained relations between the parties, the First Defendant had moved out of the common home without having reconciled with the Applicant. The parties envisaged to have their marriage declared valid so that they can properly divorce in

terms of the Divorce Act 70 of 1979. The background facts regarding the status and validity and existence of the marriage as celebrated and enjoyed by the parties was not in doubt before this Court.

[6] However, due to the uniqueness of the area of the law that regulate customary marriages, this Court could not merely issue a declaration on the status of the marriage. It had to put a constitutional law lens without exhausting the supporting voluminous jurisprudence on the status of customary law itself that influences the framework in the regulation of customary marriages.

Legal framework

[7] Following the adoption of the Constitution of the Republic of South Africa, 1996 (Constitution), customary law has been enabled to occupy a constitutional space in its own context. There are various provisions in the Constitution which include amongst others:

- (i) section 15(3) which recognises any marriage that is concluded under any system;
- (ii) section 30 that protect the cultural life of each person;
- (iii) section 31 that protects the enjoyment of cultural rights and
- (iv) intersection of sections 211 and 212 that protects the overall scheme of traditional status; roles, rights and responsibilities.

[8] These provisions reinforce the occupation of the constitutionalised status of customary law in its own context and is enabled to address matters that emanate from it through the lens of the Constitution. The said context is now given effect by the adoption of the Customary Act as Moseneke DCJ in *Gumede v President of Republic of South Africa* 2009 (3) BCLR 243 (CC) held that the said Act is meant to:

“... introduce 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 the 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 and the inscrutable jurisprudence of colonial ‘native’ divorce and appeal courts,” (*para 23*).

[9] This Court is not to reproduce the voluminous jurisprudence that has since been developed to give substance on the constitutionalised status of customary law. It acknowledges amongst others the judgment of the Constitutional Court in *Alexkor Ltd v Richtersveld Community* 20023 (12) BCLR 1301 (CC) when it held:

“While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights”, (*para 51*).

[10] The relevance of the constitutional status which is endorsed by the Court is the central question on the effect of section 4(9) of the Customary Act that does not invalidate the customary marriage due to its non-registration. The rationale, as I reiterate, section 4(9) gives due recognition to the constitutionalised ‘living’ status that does not have to be made rigid by statute. Section 4(9) serves as an acknowledgment of the dynamic nature of the system of customary law with its practices. The effect of section 4(9) appears to be ‘double-edged’. First, it gives due recognition to the ‘living’ status of customary law. On the other hand, it appears not to effect as a source of law in

addressing issues that emanate from customary marriages if the marriage was not certified through registration as prescribed by section 4(1) of the Customary Act.

[11] This Court finds difficulty that section 4(1) could be interpreted independently of the 'living version' envisaged in section 4(9) that acknowledges the practices that are not infused and made stagnant by statutory requirements. Such difficulty is borne by the requirement for the certification of the said marriages before they could be regulated through the lens of the law where they emanate from.

Discussion

[12] This Court is limiting the analysis of the law and facts to the quest for the declaration of the validity and existence of the customary marriage between the parties only. It does not go beyond the after-effects and implications relating to the death of the First Defendant. It also considered the facts 'holistically' as interdependent to each other within the framework of the relief sought of the existence of the customary marriage. This means that I am not to dispute the authenticity of the submitted documents as they were not in dispute before this Court and the First Defendant even before her passing, did not challenge them including the existence of the marriage.

[13] This case raises what I refer to as the 'living' status of customary law. The 'living status' entails the flexibility of the practice of marriage to have the force and effect of the law even if they are not registered to address the matters that originate from it. This Court acknowledges that customary law and its practices and principles are dynamic and respond to the social and economic changes. The dynamism which is fundamental in the new dispensation is now centralised for inclusion in section 4(9) of the Customary Act. Recently, Weiner JA in *Manwadu v Manwadu* (799/2023) [2025] ZASCA 10 gave effect to the uniqueness of the living status with reference to registration of customary marriages as meaning 'adherence to the customs and usages traditionally observed among the indigenous people which form the culture of those people which means [and] the marriage negotiations, rituals and celebrations must be according to customary law'

(para 46). I am of the view with the progress and acknowledgment of the constitutionalised identity of customary law practices presents an opportunity for its evolution without hindrance and distinction from other legal systems.

[14] In this matter, the party's marriage was not registered, and it is my considered view that it captured the content of the 'living' version of the practice of marriage within the system of customary law. The non-registration was also in line with exercise of their constitutional rights to have the regulatory framework that governs their marriage to be applied in regulating the proprietary consequences of their marriage. The marriage is now being regulated by principles that are imported from another regulatory system which require registration and certification by the Divorce Act 70 of 1979 before its validity could be determined. The importation of prescripts from another regulatory system undermines not just customary marriages but the general system of customary law as a legitimate source of law in addressing matters that originates from its own context. Particularly, the constitutionalised customary law is left hanging in the balance.

[15] Let me reiterate that the 'living status' of customary law is deduced from section 4(9) of the Customary Act. This is designed to consolidate the flexible nature of customary law and its practices in giving meaning to its influence on issues that originate from it. This is an acknowledgment of the originality and distinctiveness of customary law that is given due recognition by the Constitution, (*Alexkor* para 56). The quest for certification of customary law marriage that is celebrated according to custom downplays the constitutional progress made in developing the principles of customary law as a legal system itself. The certification undermines the 'fabric' of customary marriages. It is a travesty of justice to have a statute that recognises the living version of customary law, and its legal status cannot be translated into reality. The certification is an import of official codes that undermines the gist of indigenous law of marriage as argued in *Gumede* above, (para 23).

[16] It is my further conviction that the Second Defendant (Department), as an executive sphere of government seem to entrench commonality in the regulation of the

consequences of customary marriages with those that are regulated by other legal frameworks. It appears to lose sight of the constitutional role in extending its administrative processes in giving content to the 'living principle' of customary law in relation to the registration of customary marriages. The Department waters down its constitutional commitment to extend the basic values and principles that regulate the governance of public service as envisaged in section 195 of the Constitution. In this instance, public service entails the extension of the quality of basic service on matters that regulate the system of customary law as well. Such extension would ensure the parallel development of customary law principles, which in this case, the recognition of the 'living status' in addressing proprietary consequences of a customary marriage, to be on par with others that developed from other legal systems. It is my firm belief that the living status of customary law does not need certification to determine its validity and dealing with the proprietary consequences of customary marriages.

[17] The Department fails to acknowledge that section 4(9) is the creation of the statute that is designed to capture the living content of customary marriages. This means that the Department is the treasurer and custodian of the Customary Act, and it turns around and fails to uphold the very same instrument that is under its administration and authority. The requirement for certification that should serve as a determinant of the validity and address the consequences of customary undermines South Africa's diversity and pluralistic character as envisaged in the preamble of the Constitution.

[18] For the order to be issued below, this Court finds difficulty to 'toe the line' whilst customary law has an independent constitutional status that is meant to regulate its own affairs through the lens of the Constitution. The Department is now required to review its regulatory processes relating to non-registration of customary marriages and give effect section 4(9) of the Customary Act which endorses the living status in regulating the said marriages.

[19] Another consideration in this application is the costs issue. Since the application was not contested, normally, the costs follow the results and, in this matter, the order relating to costs will be indicated as reflected below.

[20] Accordingly, the following order is made:

[20.1] The customary marriage concluded between the Applicant and First Respondent entered on 01 April 2012 is declared valid.

[20.2] The Second Respondent: Minister of Home Affairs is ordered forthwith within 30 days on receipt of this order to register the above marriage on its relevant database and take all consequential steps ancillary steps including thereto the issuing of the marriage certificate.

[20.3] There is no order as to costs.

N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 20 February 2025.*

Date of Hearing: 12 February 2025

Date Delivered: 20 February 2025

Appearances:

Plaintiff:

Tshivhumilo Attorneys
Vhulenda Tshivhumilo

First Respondent:

Not Represented

Second Respondent:

Not Represented