



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

CASE Number: 2023 / 080241

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/NO
(3) REVISED: YES/~~NO~~

28 March 2025

In the matter between:-

MPHO BRIDGETTE TLHALE

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

MASTER OF THE HIGH COURT OF

SOUTH AFRICA

Second Respondent

NOKUZOLA SWEETNESS MGQUBA N.O.

Third Respondent

NONTUTUZELO CYNTHIA NANGU

Fourth Respondent

JUDGMENT

SNYMAN, AJ

Introduction

[1] A conspectus of the case law has left me quite surprised as to how many cases there exist where a party to an alleged customary marriage only seeks to assert the marriage after the other party has become deceased. I find this perplexing, as the Recognition of Customary Marriages Act¹ (RCMA) specifically provides for such marriages to be registered, and if this is done, it would render applications such the application *in casu* mostly unnecessary. I venture to say that what one has in these cases is not really about asserting the marriage, but rather an instance of laying hands on some of the spoils emanating from a deceased estate.

[2] Having said the above, I must make it clear that I am not, by any stretch of the imagination, seeking to detract from the importance of recognising customary marriages in our law. As authoritatively stated in *MM v MN and Another*²:

'The Recognition Act represents 'a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country'. Past law accorded marriages under customary law recognition only as customary 'unions' and this 'grudging recognition of customary marriages prejudiced immeasurably the evolution of rules governing these marriages'. The Recognition Act is legislation 'specifically deal[ing] with customary law', as envisaged in terms of s 211(3) of the Constitution. Its enactment was inspired by the dignity and equality rights and the normative value system of the Constitution. It is an adaptation of customary law which 'salvage[s] and free[s] customary law from its stunted and deprived past'.'

¹ Act 120 of 1998.

² 2013 (4) SA 415 (CC) at para 26. See also *Gumede v President of Republic of South Africa and Others* 2009 (3) SA 152 (CC) at para 16.

- [3] What I am saying is that the importance of registering such marriages cannot be countenanced, lest disputes like these *in casu* prevail, in circumstances where one of the parties to the relationship is no longer there to offer a version. This is a rather undesirable state of affairs in highly personal relationships, which is what marriages are. In illustration, reference is made to the following *dictum* in *TM v NM and Others*³:

‘... the registration certificate issued to the appellant in 1991 constitutes, at the very least, *prima facie* proof of the existence of the appellant's marriage. Thus, in the absence of countervailing evidence impugning its authenticity, it establishes the truth of the fact stated therein.’

- [4] The above being said, the current matter concerns an application brought by the applicant on 14 August 2023, in terms of which the applicant seeks an order that the first respondent, being the Minister of Home Affairs, be directed to register a customary marriage between the applicant and one Sonwabo Nangu (Nangu) in terms of the RCMA. The application has been opposed by the third respondent, who describes herself as ‘*the legal widow*’ of Nangu. It was common cause that Nangu became deceased on 12 January 2023.
- [5] The application came before me for argument on 18 February 2025. After hearing argument from the applicant and the third respondent, I reserved judgment. I will now hand down judgment, by first setting out the relevant background facts.

The relevant background facts

- [6] I will commence with those facts that were at least common cause between the parties. First and foremost, both the applicant and Nangu were major persons⁴ and had consented to be married to one another. As a result, and on 19 November 2006, delegates from Nangu’s family met with delegates from the applicant’s family, to ask for her hand in marriage, and lobola (dowry)

³ 2014 (4) SA 575 (SCA) at para 14.

⁴ The applicant was born on 10 April 1982, and Nangu was born on 14 June 1977.

negotiations then ensued. The applicant herself, and Nangu, were not present in these negotiations. In the negotiations, the applicant was represented by G Mabulatse, F Tlhale and Mrs Mtlala, whilst Nangu's family was represented by M Nangu, N Mofokeng, M Xeloza and L Nangu. In the course of these negotiations, a sum of R4 000.00 was handed over by Nangu's family to the applicant's family.⁵ A written note was prepared of such meeting, listing the names of the parties representing the two families, recording that R4 000.00 was handed over by Nangu's family to the applicant's family, and reflecting the words '*Balance R10 000.00*'. It was also common cause that no customary marriage was registered between the applicant and Nangu in terms of the RCMA.

- [7] In the founding affidavit, the applicant stated that she met Nangu in 2004 whilst they were working together at Edgars in Randfontein. They embarked upon a relationship, and as a result, the applicant gave birth to a daughter on 29 November 2006. Nangu had earlier proposed to her, and the customary marriage process commenced, by way of a lobola letter sent by Nangu's family to the applicant's family, proposing a meeting date on 19 November 2006. This gave rise to the meeting on 19 November 2006, referred to above.
- [8] According to the applicant, and in the meeting of 19 November 2006, lobola in the sum of R14 000.00 was actually agreed upon between the parties. Following the meeting on 19 November 2006, the balance of her lobola of R10 000.00 was paid on 24 November 2007. In this regard, she relies on a letter, which was dated 24 November 2007, which letter recoded that an amount of R10 000.00 was received from the Nangu family as the balance of lobola which was R14 000.00. The letter contains the signatures of two unidentified persons.
- [9] Next, the applicant states that on 29 March 2008, there as a celebration at the Nangu family where she was handed over by her family to the Nangu family, she was named 'Nobantu', and a sheep was slaughter as per custom. The

⁵ It is in dispute whether a final amount in lobola was agreed upon, and this will be dealt with below.

applicant however never stated that she and Nangu cohabitated at any time, after the ceremony was concluded.

- [10] Also in the founding affidavit, the applicant relies on confirmatory affidavits by persons identified as Margaret Motoung, Buti Elias Mlangeni, Ntswakeleng Paula Tlhale, Johannes Ratau Tlhale and Mongameli Nangu. It is significant that none of these persons were party to the negotiations. Nonetheless, a consideration of what is set out in these affidavits is important. First, Buti Elias Mlangeni, who is the father of Nangu, baldly stated that Nangu was married to the applicant on 29 March 2008 at 382 Protea North. Johannes Ratau Tlhale and Ntswakeleng Pauls Tlhale made similar statements. No further particularity as to any customary marriage rites are provided. Margaret Motoung stated that she was one of the elders performing the customary marriage for the applicant, that the celebration was held at Protea North on 28 March 2008, and the new name of '*Nobantu*' was given to the applicant. Again, no specificity of other customary marriage rites is given.
- [11] Turning next to the answering affidavit and supplementary answering affidavit filed by the third respondent, it was contended that the lobola (referring to the sum of R4 000.00) that had been paid was returned to Nangu's family before any celebrations were concluded, which indicated that no marriage ultimately took place. The third respondent further pointed out that lists were already 'out' to family members that were supposed be given gifts, but this exchange never happened. The third respondent took issue with the fact that none of the deponents to the confirmatory affidavits relied on by the applicant were party to the negotiation delegation or had knowledge of what transpired there.
- [12] According to the third respondent, the lobola negotiations were not completed, and any '*balance*' reflected in the meeting note of 19 November 2006 was never agreed nor paid. The third respondent further contended that there were no celebrations or any rituals conducted to celebrate the marriage because, before any of this could happen, the relationship between the applicant and Nangu irretrievably soured as a result of an affair the applicant had with a third party, with whom she later conceived a child, which was born in 2016, called

'Amahle'. According to the third respondent, there as an absence of '*customary rites and ceremonies*'.

- [13] As to the letter relied on by the applicant dated 24 November 2007 to establish that a second meeting was held between the two families in which the balance of R10 000.00 as lobola was paid, the third respondent disputed the veracity of this letter. According to the third respondent the two main delegates presenting Nangu in the negotiations, being L Nangu and N E Mokokeng, have no knowledge of any such a meeting and never attended the same. Their signatures are also not attached to the letter. The third respondent did rely on confirmatory affidavits by these two persons. The third respondent further states that it is not even clear where the date of 24 November 2007 came from, as the date for a second meeting would have been stipulated in the first meeting and would have been recorded in the meeting note. And finally, the third respondent complains that this letter does not even identify the delegates that attended, but simply contains two unknown and unverified signatures.
- [14] The third respondent also dealt with contention of the applicant that the marriage with Nangu was celebrated on 29 March 2008. The third respondent disputed this ever happened. In addition, the third respondent states that there were no customary marriage celebrations conducted at the applicant's home, as would ordinary be the case. In this context, the third respondent explains that such a celebration has an '*esteemed connotation*' and the taking of photographs of the occurrence throughout the day would be common practice. The third respondent emphasises the fact that the applicant has not produced a single photograph of such alleged celebration. It is also suggested that the applicant was not handed over to Nangu as part of concluding the marriage ceremony, as is the custom. The third respondent adds that no sheep was slaughtered, and no gifts were exchanged. And finally, it was stated that the applicant and Nangu never cohabitated, as the relationship broke down before this could even happen.
- [15] The third respondent also refers to the fact that at the funeral of Nangu, whilst the applicant did attend, she in fact distanced herself from all the Nangu family

members and acted in a manner showing she was not part of the family. And finally, the third respondent complains that it took the applicant fifteen years to come forward to assert the marriage. In this context, the applicant's motives were questioned, it was said she was acting *mala fide*, and it was pertinently suggested that she only now sought to assert the marriage so she could lay her hands on Nangu's estate, once he passed away on 12 January 2023.

- [16] The applicant did file a replying affidavit, however this affidavit did not add anything to the factual exposition set out above. In particular, the applicant never even addressed several of the pertinent statements made by the third respondent, as referred to above.

Analysis

- [17] Inexplicably, the applicant has chosen to bring the current dispute before Court by way of motion proceedings. I find this perplexing, because surely the applicant must have anticipated material factual disputes. This is the kind of case that is very difficult to resolve in motion proceedings. But once brought, and the answering affidavit had been filed, it must have been apparent to the applicant that there existed the kind of material factual dispute that could jeopardise her case in continued motion proceedings. Yet the applicant pushed on and never sought a referral to oral evidence. In the end, therefore, the applicant must stand or fall on the basis of how these kinds of factual disputes are ordinarily resolved in motion proceedings, as enunciated in *Plascon Evans Paints v Van Riebeeck Paints*⁶, where the Court held:

‘... These principles are, in sum, that the facts as stated by the respondent party together with the admitted or facts that are not denied in the applicant party's founding affidavit constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or

⁶ 1984 (3) SA 623 (A) at 634E-635C.

so clearly untenable, that the court is justified in rejecting that version on the basis that it obviously stands to be rejected ...'

- [18] In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*⁷, the Court added another dimension to the enquiry in applying the *Plascon Evans* principle, where the Court said:

'Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where, however, a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant.'

- [19] As to when a denial (factual dispute) by the respondent party may not be considered to be real or genuine, the Court in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*⁸ provided the following guidance:

'... the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected ...'

And in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁹ the Court explained:

'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 because

⁷ 2005 (2) SA 359 (CC) at para 53.

⁸ 2009 (3) SA 187 (W) para 19.

⁹ 2008 (3) SA 371 (SCA) at para 13. See also *Minister of Home Affairs and Others v Jose and Another* 2021 (6) SA 369 (SCA) at para 20.

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 ambiguous denial the court will generally have difficulty in finding that the test is satisfied. ...'

[20] What makes it worse is that there are judgments in which the Court made it clear that disputes relating to the validity of customary marriages being brought by way of motion proceedings, would attract the application of the *Plascon Evans* principles.¹⁰ In *Mawandu v Manwadu and Others*¹¹ the Court was critical of a case concerning the validity of a customary marriage being brought by way of motion proceedings where there were several material factual disputes. The Court had the following to say:¹²

'Bearing in mind that there are a vast number of disputes of fact in this case, and that there are two mutually exclusive versions, this Court must weigh the probabilities to determine which version is most probable. This case falls squarely within the ambit of the *Plascon-Evans* rule. The respondent, being the original applicant, had the onus to prove her case that she and the deceased were married by customary law. ...

If the appellant's version was not clearly untenable (which it was not), the application must be determined on her version. Not only did the appellant raise genuine and bona fide disputes of fact, but her version was more probable. It was corroborated by numerous members of both her and the deceased's family, whereas the respondent's version is filled with inaccuracies and patent nondisclosures and failures to provide admissible evidence and/ or corroboration. ...'

¹⁰ See *Malatjie v Sekgobela and Others* 2025 JDR 0295 (GP) at para 29; *Tsambo v Sengadi* [2020] JOL 47138 (SCA) at para 19; *Sikhosana v Kabini and Others* 2023 JDR 2964 (GJ) at paras 22 – 25.

¹¹ 2025 JDR 0586 (SCA) at para 56.

¹² *Id* at paras 61 – 62.

[21] Nonetheless, the applicant chose her course of action, and must live with the consequences thereof. When considering the answering affidavit filed by the third respondent, I do not believe it can be said that the factual disputes raised are not real or not genuine. The factual averments made were also supported by confirmatory affidavits by persons directly involved in the negotiation and in the know, as part of the Nangu family delegation. There is nothing obviously fictitious, palpably implausible, far-fetched or untenable in what the third respondent had to say in the answering affidavit. Considering all the warnings already dispensed, as discussed above, I do not believe there is any reason why this matter should not be decided on the basis of the admitted facts, together with the version as contained in the answering and supplementary affidavits of the third respondent. In the end, as held in *TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight and Another*¹³:

‘... Credibility is only capable of being addressed on paper when the assertions are palpably absurd or demonstrably false. The threshold that had to be cleared is ‘wholly fanciful and untenable’. Moreover, the appetite to resolve paper contests by reference to the probabilities, though ever present, is not appropriate. ...’

[22] The above being said, the determination of this matter starts with setting out the relevant statutory framework. The recognition of customary marriages is regulated by the RCMA. Section 3(1) sets out the requirements for a valid customary marriage as follows:

‘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.’

¹³ (2017) 38 ILJ 2721 (LAC) at para 29.

[23] It is clear that section 3(1) sets three requirements that must all be met, before a customary marriage can be considered valid. The first two requirements are statutorily circumscribed, being that both parties must be adults (over 18 years of age), and they must both consent to a customary marriage. If these two requirements are not first met, then it simply does not matter what may have happened in terms of customary law between the parties in the context of a possible marriage relationship. But once these two initial requirements are met, then the third requirement, in section 3(1)(b), is not statutorily circumscribed. Instead, it must be shown the marriage was negotiated and entered into or celebrated, as determined by customary law. The RCMA does not stipulate what qualifies under section 3(1)(b) as basis for determination, for the very reason that customary law is determined by way of what is practiced in particular communities on a day to day basis, and is therefore live, flexible and constantly changing and evolving.¹⁴ The Court in *Mbungela and Another v Mkabi and Others*¹⁵ described it as thus:

‘... But s 3(1)(b) does not stipulate the requirements of customary law which must be met to validate a customary marriage. 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. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned. 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. Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.’

¹⁴ In *MM v MN* (*supra*) at para 24, the Court said: ‘This court has, in a number of decisions, explained what this resurrection of customary law to its rightful place as one of the primary sources of law under the Constitution means. This includes that ... (c) customary law is a system of law that is practised in the community, has its own values and norms, is practised from generation to generation and evolves and develops to meet the changing needs of the community; (d) customary law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life; (e) customary law will continue to evolve within the context of its values and norms consistent with the Constitution ...’

¹⁵ 2020 (1) SA 41 (SCA) at para 17.

[24] Whilst the flexible, dynamic and constantly evolving nature of customary law is one of its strengths, it could also be one of its weaknesses, in particular where there exists a dispute as to whether a customary marriage was negotiated and entered into or celebrated. So, and for example, what would need to be negotiated and then entered into, in order to establish a valid customary marriage, may not only change from time to time, but may well be different from community to community.¹⁶ This makes it highly problematic for a Court to determine exactly what the particular customary law requirements in each particular case of a contested customary marriage would be, so as to ascertain whether, on the facts, they have been met. In *MM v MN supra* the Court held:¹⁷

‘Paradoxically, the strength of customary law — its adaptive inherent flexibility — is also a potential difficulty when it comes to its application and enforcement in a court of law. As stated by Langa DCJ in *Bhe*, ‘(t)he difficulty lies not so much in the acceptance of the notion of living customary law . . . but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights.’

[25] The aforesaid difficulty is aptly illustrated by the following *dictum* in *MM v ES*¹⁸:

‘The requirement in s 3(1)(b) that ‘the marriage must be negotiated and entered into or celebrated in accordance with customary law’ is clear and unambiguous. Even the Legislature did not consider it necessary to define it. This is understandable as customary law is as diverse as the number of different ethnic groups we have in this beautiful country. Although Africans in general share the majority of customs, rituals and cultures, there are some subtle differences which, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, VhaVenda and the Vatsonga. This is due to the pluralistic nature of African societies.

Furthermore, African law and its customs are not static but dynamic. They develop and change along with the society in which they are practised. This

¹⁶ Compare *Sikhosana v Kabini and Others* 2023 JDR 2964 (GJ) at paras 36 – 40.

¹⁷ *Id* at para 25.

¹⁸ 2014 JDR 1085 (SCA) at paras 35 – 37.

capacity to change requires the court to investigate the customs, cultures, rituals and usages of a particular ethnic group to determine whether their marriage was negotiated and concluded in terms of their customary law at the particular time of their evolution. This is so particularly as the Act defines 'customary law' as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those people.

It follows that it would be well-nigh impossible and undesirable to attempt an exhaustive and all-inclusive definition of a phrase which is susceptible to variations depending on which particular ethnic group it relates to. The most salutary approach to ascertaining the real meaning of this requirement is by examining the current cultural practices and customary law of that particular ethnic group ...'

- [26] So, and considering that the Court would be duty bound to establish the tenets of customary law on each occasion the validity of a customary marriage under section 3(1)(b) of RCMA is in question, what would be the source of such establishment. An answer is found in *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*¹⁹ where the Court had the following to say:

'There are at least three ways in which indigenous law may be established. In the first place, a court may take judicial notice of it. This can only happen where it can readily be ascertained with sufficient certainty. Section 1(1) of the Law Evidence Amendment Act 45 of 1988 says so. Where it cannot be readily ascertained, expert evidence may be adduced to establish it. Finally, a court may consult text books and case law.

Caution, however, must be exercised in relying on case law and text books ...'

¹⁹ 2005 (1) SA 580 (CC) at paras 150 – 151.

[27] And finally, even where the requirements of a customary marriage in a particular case have been determined, those requirements must always be measured and tested against the values of the Constitution.²⁰

[28] Once concluded, and in terms of section 4(2) of the RCMA, either spouse may apply for the registration of the customary marriage. However, and in terms of section 4(3)(b), a customary marriage must be registered within a period of three months after the conclusion of the marriage. The benefit of registration, as touched on earlier in this judgment, is that a certificate of registration is issued, which certificate constitutes *prima facie* proof of the existence of the customary marriage and of the particulars contained in the certificate.²¹ In *Mawandu supra*²² the Court held:

‘The question is whether the person alleging that a customary marriage took place and that it was registered possesses a certificate which was issued in terms of the law providing for the registration of customary marriages. If a person does have such a certificate, then such a person is relieved of the duty to prove the existence of the customary marriage by way of the normal rules of evidence ...’

[29] Nonetheless, the failure to register a customary marriage does not affect the validity of that marriage.²³ However, and all considered, these administrative processes under the RCMA cannot be just ignored, as they serve a particular purpose, described in *Khashane v Minister of Home Affairs and Others*²⁴ as follows:

‘This subsection imposes a duty on both spouses of a customary marriage to ensure that their marriage is registered. It signifies the importance placed on formalising customary marriages through the official registration process.’

²⁰ In *MM v MN (supra)* at para 83, the Court held: ‘*The Recognition Act is thus premised on a customary marriage that is in accordance with the dignity and equality demands of the Constitution ...*’. See also paras 23 – 24 off the judgment. Also refer to *Bhe (supra)* at paras 44 and 46; *MLZ v STZ* 2025 JDR 0555 (GJ) at para 21.

²¹ Section 4(8).

²² *Id* at para 56. See also *Mgenge v Mokoena* 2021 JDR 1020 (GJ) at para 12.

²³ Section 4(9).

²⁴ 2024 (5) SA 242 (GP) at para 12.

- [30] The applicant would bear the onus to prove the requirements of a customary marriage have been satisfied in this case.²⁵ How would this onus then be discharged? In my view, two considerations are paramount. First, the applicant would need to establish the tenets of the customary law that regulate her particular customary marriage. It is important to establish this first, because of the very nature of customary law as discussed earlier in this judgment. Second, the applicant would need to provide proper and acceptable evidence that what had transpired between the parties is consistent with these customary law tenets.
- [31] My difficulty with the case of the applicant is that it was simply not established or proven what the principles of the customary law would be that would need to me met, in order for this Court to find that there existed a valid customary marriage between her and Nangu. Whilst it is true, as said in *Bhe supra*, that the Court could take judicial notice of it, this is a very slippery slope. To be honest, whilst one would hope that Judges are all-knowing where it comes to all issues of law that they are called on to decide, this is expectation is not realistic where it comes to customary law. It would be impossible for Judges to be familiar with all the principles of customary law in all communities at all times, when called upon to decide whether a customary marriage is valid.²⁶ That is why the Court in *Bhe* warned that judicial notice requires sufficient certainty that is readily ascertainable. In my view, the very nature of customary law principles applicable to customary marriages, in particular, would make judicial notice on the basis of sufficient certainty a dubious prospect. And as the case law illustrates, as I will discuss below, it is hardly readily ascertainable.
- [32] In my view, what is needed in a case such as one *in casu* is that the tenets of customary law applicable to deciding whether a particular customary marriage

²⁵ *Manwadu (supra)* at para 56; *Tlou v Matlala* 2025 JDR 0317 (GP) at para 55.

²⁶ As said by the Court in *MM v MN (supra)* at para 48: '... a court is obliged to satisfy itself, as a matter of law, on the content of customary law, and its task in this regard may be more onerous where the customary-law rule at stake is a matter of controversy. With the constitutional recognition of customary law, this has become a responsibility of the courts. It is incumbent on our courts to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule ...'.

is valid needs to be ascertained by presenting evidence of an expert nature that establishes this. That is the only way a Court can be sure that what it decides is correct, and in line with the prevailing customary law in a particular circumstance at a particular time. This kind of evidence can be presented by an elder, headman, community leader or similar person that is the custodian of the customary law in a particular community. For example, and in *MM v MN supra*, the Court considered the evidence of an elder and advisor to traditional leader, a number of traditional leaders, and an expert anthropologist with extensive research experience customary law to decide a particular requirement for a valid customary marriage under customary law.²⁷ Of course, the Court would have to satisfy itself of the expertise of that person. Without that evidence which conveys to the Court what would satisfy the provisions in section 3(1)(b) that the marriage must be negotiated and entered into or celebrated, the doing of justice will be at risk, especially in a close personal relationship such as a marriage. It not difficult to appreciate the injustice that may result in for example forcing two parties into a marriage relationship that is not valid or for that matter terminating a relationship by a declaration of invalidity when there is in reality no proper foundation for doing so, based on principles that are not certain.

- [33] And this is what is absent from the applicant's case from the outset. The applicant does not establish what the principles of customary law are that would apply to her particular customary marriage in her particular community. She simply sets out rituals and formalities she contends have been met, but she does not establish whether these rituals and formalities are what is required and is all that is required. In my view, it was imperative for the applicant to have provided evidence from an independent person in the know, so to speak, as custodian of customary law for her community, of what was necessary to have been fulfilled to make her customary marriage a valid one. One can hardly take her word for it, being a party to the dispute, not being an expert, and having a direct interest in a particular outcome. Absent the aforesaid evidence, there are no principles proven to which the evidence can be applied. That, I believe, is a material obstacle to the success of the applicant's case.

²⁷ See paras 57 – 59 of the judgment.

[34] But accepting that I may be criticised for being overly cautious, and because there is no expert evidence in this case, that leaves judicial notice as the source of establishing the principles of customary law applicable to the applicant's alleged customary marriage. I have not been enlightened with what community the applicant is from, so a broad conspectus of customary law principles applicable to customary marriages in general would be appropriate. There is fortunately some depth of case law to draw this from. All considered, and in general, I believe the principles that I summarize below would serve to inform as to whether a valid customary marriage has been concluded.

[35] First, it must be appreciated that a customary marriage is not just a transaction, for the want of a better description, between the two spouses. It is effectively a transaction between two families.²⁸ Accordingly, it needs to be established, in the context of '*negotiated*' under section 3(1)(b), that there is a transaction between two families, where the marriage is negotiated. In these negotiations, which are conducted by emissaries / delegates of both families, an agreement must be reached between the two families as to the payment and quantum of the lobola (dowry) for the prospective wife. There are differing views as to whether the lobola must actually be paid in full for the marriage to be valid, or whether part payment or only an agreement is necessary.²⁹ Be that as it may, it is in my view clear that at the very least, there must be consensus on the quantum of the lobola to be paid. As succinctly held in *MB v TM*:³⁰

‘A customary marriage is not concluded by two parties only. In its conclusion there is participation by the couple themselves, their respective families and this participation extends to their blood relations. The nature of its participatory model, the family as well as blood relations orientation, has the result that it is not constituted by a single event. A series of negotiations, festivities and rituals officiate it into a marriage.’

²⁸ *Motsoatsoa v Roro* 2010 JDR 1392 (GSJ) at para 17; *Mabaso and Others v Manyathela* 2021 JDR 2488 (GJ) at para 13.

²⁹ See *Tlou (supra)* at para 56; *Makhosine v Department of Home Affairs and Others* 2022 JDR 3317 (GJ) at para 24; *Mathunyane v Bapela* 2015 JDR 2489 (GP) at para 10.

³⁰ 2019 JDR 2316 (WCC) at para 28. See also *MM v ES* 2014 JDR 1085 (SCA) at para 39; *Fanti v Boto and Others* 2008 (5) SA 405 (C) at paras 19 – 20.

[36] Next, and what follows the conclusion of the negotiations is best described as a number of essential rituals. This includes the exchanging of gifts to specific family members, a marriage ceremony (celebration), the slaughtering of livestock, and the handing over of the bride to the family of the groom.³¹ Whilst it is true that in *LS v RL*³² the Court had definitively decided that the failure to hand over the bride to the family of the groom cannot serve to invalidate a customary marriage *per se*, it remains one factor to be considered when deciding whether a customary marriage has been concluded.³³ As explained in *Mbungela supra*:³⁴

‘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 signifies the start of the marital consortium. ...’

[37] Further, there is the issue of cohabitation and what results (flows) from it. As suggested in *Tsambo v Sengadi*³⁵: ‘... *long cohabitation raises a strong suspicion of marriage ...*’. In this context, it must be considered, for example, whether the parties, immediately following or shortly after the marriage ceremony, cohabited together, for how long, how the new bride is integrated into the family of the groom, and whether any children were born from the marriage. In simple terms, it is considered whether the couple behaved as a married couple would, and has been considered by the families to be married. As described in *Mathunyane v Bapela*:³⁶

‘The subsequent living together of both parties, which was not disputed by the applicant, demonstrate acceptance of the parties that they are united in wedlock. ...’

[38] There is a further consideration that I believe has not received sufficient attention. This is the issue of the registration of the customary marriage. Even

³¹ *Motsoatsoa (supra)* at para 17; *Mgence v Mokoena and Another* 2023 JDR 0741 (GJ) at paras 48 – 49.

³² 2019 (4) SA 50 (GJ) at para 35.

³³ See *Mokoena (supra)* at para 42.

³⁴ *Id* at para 25.

³⁵ [2020] JOL 47138 (SCA) at para 27.

³⁶ 2015 JDR 2489 (GP) at para 11.

though the failure to register the marriage does not affect its validity, it simply cannot be ignored that the RCMA prescribes that the marriage must be registered in three months. It is not a choice. It is a legislative prescript. The question must then be asked, especially if registration is sought by one party long after the fact, why this did not happen earlier, and for that matter, in time. In the whole equation of deciding the validity of a customary marriage, this cannot be ignored as if it does not exist. Why would the legislature prescribe registration, in a specified time, if it meant nothing. In my view, and where one spouse seeks registration or declaration of validity, no matter how one may call it, long after the conclusion of the alleged marriage ceremony, that spouse must explain why registration did not happen as prescribed, and this explanation would weigh into the equation when deciding whether a valid customary marriage exists. The case *in casu* actually illustrates the reason why I say this, which I will deal with later.

[39] But it has to be emphasised that none of all the customary marriage principles I have discussed above must be considered to be individually decisive. It must all be considered in the balance, all factors applying. So, and for example, the failure to pay the lobola where all the other requirements are satisfied, could be seen not detract from the validity of the customary marriage. The same would for example apply to the ritual of handing over of the bride.³⁷ As held in *Tsambo supra*³⁸:

‘It is evident from the foregoing passage that strict compliance with rituals has, in the past, been waived. The authorities cited by the respondent, mentioned earlier in the judgment, also attest to that. Clearly, customs have never been static. They develop and change along with the society in which they are practised. Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably 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.’

³⁷ Compare *Tsambo (supra)* at paras 25 – 26.

³⁸ *Id* at para 18.

[40] I venture to say that the application of the principles of customary law paints the picture of a marriage transaction negotiated, agreed upon, and then perfected by two families. Whilst a colour may be missing from the picture, the picture may still present as such a marriage, and overall considered, must be treated as such. This was aptly illustrated in *Mbungela supra* as thus:³⁹

‘... for example, a woman could consent to a customary marriage, followed by payment of lobola, after which she cohabited, built a home with her suitor, and bore him children, with the full knowledge of his family. When the man died, she and those children could be rejected and disinherited by his family simply on the basis she was not handed over or properly introduced to his family and was therefore not his lawful wife, and that the children were illegitimate. Needless to say, that consequence would be incongruous with customary law's inherent flexibility and pragmatism, which allows even the possibility of compromise settlements among affected parties ...’

[41] Therefore, all the above said, and in terms of the evidence, properly considered and determined, what do we have *in casu*? On the common cause facts, there was indeed a negotiation between two families about lobola to be paid for the applicant. But it remained in dispute as to whether consensus was achieved in this regard. There is also a dispute as to whether lobola was actually paid. When one then gets to the rituals, there are irreconcilable factual disputes. The applicant says that the rituals took place, and there was a ceremony, pursuant to which she was accepted into the family of Nunga. The third respondent says the opposite, and contends there were no rituals, no exchange of gifts, and no marriage ceremony.

[42] Then there is the issue of cohabitation. There is no evidence that this ever happened. The applicant has not even said in her founding affidavit that after the ceremony, she moved in or remained cohabiting with Nangu, and they resided together as husband and wife thereafter.⁴⁰ There is no indication of what came from this marriage, and how the applicant was treated by or

³⁹ Id at para 28.

⁴⁰ Compare *Makhosine (supra)* at para 38; *Songo v Minister of Home Affairs* 2011 JDR 1386 (GNP) at para 23.

integrated into the family of Nangu. It is true that the applicant and Nangu had a child, but this child was born prior to the negotiations even started. In addition, in this context, the third respondent has specifically said that the relationship between the applicant and Nangu irretrievably soured before any negotiations concluded and rituals happened, as she entered into a relationship with another party, pursuant to which she conceived and gave birth to a child in 2016. The third respondent also said that at the funeral of Nangu, which the applicant did attend, she distanced herself from Nangu's family. In her replying affidavit, the applicant did not deal with any of these contentions by the third respondent.

[43] And finally, there is no explanation by the applicant as to why she took in excess of 15 years to seek to validate / assert the alleged customary marriage with Nangu. As opposed to this, the third respondent did proffer an explanation. That explanation brought into question the applicant's *bona fides*. The third respondent contended that the applicant only became interested in asserting her alleged customary marriage when Nangu became deceased, so she could lay her hands on part of his estate. The timing of the bringing of the application does support this view. The applicant, in my view, needed to explain why it took her fifteen years to seek to assert her marriage, and she certainly needed to answer the concerns raised by the third respondent about her motives, on reply. The point is that this conduct of the applicant is inconsistent with a couple that was living together and conducting themselves as husband and wife.

[44] This only leaves the disputed facts about the conclusion of the lobola negotiations, and the completion of the marriage rituals. Unfortunately for the applicant, and as I have discussed above, this is where the application of the *Plascon Evans* principles shipwrecks her case. Applying these principles, it is my view that there is no reason why this matter should not be decided based on the version offered by the third respondent. I must say that the applicant's version in her founding affidavit is somewhat bald and lacking in specificity. In response to this kind of lacking version, the denials of the third respondent cannot be paid to be bald and uncreditworthy to the extent that it should not be accepted. In any event, as to the issue of the failure to conclude the lobola negotiations and the lobola not being paid, the exposition offered by the third

respondent is motivated, and makes sense. It cannot be rejected on the basis of being palpably false or completely lacking in credibility. I must also mention that the third respondent explained that a marriage ceremony is of 'esteemed' importance, yet the applicant has not produced a single photograph of the same as would be expected, a contention the applicant never dealt with in reply.

[45] It is true that R4 000.00 was handed over by Nangu's family to the applicant's family on 19 November 2006 at the negotiation on that date. But it remains questionable whether the amount in lobola was finally agreed to. The third respondent explained that the sum of R4 000.00 was a deposit handed over pending final negotiation. The third respondent's version is supported by two confirmatory affidavits deposed to by two the Nangu family delegates that attended and were directly involved in the negotiation. As opposed to this, the applicant has offered no similar confirmatory affidavits by anyone involved in this process. I must confess that I also find some substance in the third respondent's contention that the letter dated 24 November 2007 which supposedly serves as proof that the balance of R10 000.00 of the alleged agreed lobola of R14 000.00 was paid, was a fabrication. I say this because I find it unlikely that the payment of the balance of lobola, where on the applicant's own version part payment had already been made on 19 November 2006, would take more than a year. It simply appears too long a period, especially where there is pending marriage, and I believe this needed an explanation from the applicant.⁴¹ Ordinarily, there is a relatively close temporal nexus between even a part payment of the lobola and the actual marriage ceremony, which is absent in this case. Then there are also the deficiencies in the content of the letter, as explained by the third respondent, whose version, as I have also said, must prevail. In the end, and as said in *Makhosine v Department of Home Affairs and others*⁴²:

'... Failure to pay the balance of the lobola without an explanation for why this was the case, could lead to an inference that the applicant was insufficiently committed to the relationship. ...'

⁴¹ I mention that the third respondent stated that R4 000.00 was refunded.

⁴² 2022 JDR 3317 (GJ) at para 24.

- [46] In the end, the applicant's case must fail for several reasons. First, she did not establish the tenets of the customary law that would regulate her customary marriage. Second, and even if the matter is considered on the basis of general tenets established by judicial notice (as undesirable as this may be), the applicant has failed to prove these requirements have been met. This is because on the facts, as must be accepted, the lobola negotiations had not been concluded, lobola had not been paid, and no marriage rituals, and in particular a marriage ceremony, had taken place. Third, I am also convinced that the applicant took up a relationship with someone else before the end of the process, and she and Nangu never cohabited as husband and wife and were never seen as such. And finally, the applicant's lack of explanation why it took her fifteen years to seek to assert the alleged customary marriage is telling, especially considering it immediately followed the death of Nangu.
- [47] It is perhaps appropriate, in the context of providing an illustration to the contrary where it comes to the applicant's case *in casu*, to refer to the following *dictum* in *Mbungela supra*, where the Court held as follows, in finding that a valid customary marriage was concluded:⁴³

'There is, in my view, sufficient evidence before us to resolve the issue with relative ease. As indicated, the first appellant, in his own words, described the successful lobola negotiations, the payment of a significant portion of the amount agreed upon and a live cow, and the exchange of gifts by both families as a combination of the two families. It is, therefore, not surprising and of great significance that the couple's families subsequently sent representative delegations to each other's burial ceremonies, as in-laws. Furthermore, it is striking that both the first appellant, who was rightly found an evasive and unreliable witness, and Ms Mkhonza referred to the couple as husband and wife during unguarded moments as they testified. These were patent Freudian slips that truthfully indicated that they accepted that the couple was indeed married. And it is not insignificant too that the deceased recorded Mr Mkabi as

⁴³ Id at para 23.

her husband in a valuable document which informed the world of her important next of kin. ...'

- [48] And then, to provide a comparable example that is more akin the applicant's situation *in casu*, I believe the following extract from the judgment in *Manwadu supra* is appropriate, where the Court decided that a valid customary marriage was not proven:⁴⁴

'In summary, the respondent failed to adduce any admissible evidence of the marriage ceremony and traditional customs having been observed. No confirmatory affidavits were produced to confirm that the requirements of the customary marriage were met. Her reference to many people who were involved in the proceedings necessary for a customary marriage were not confirmed by those people. Confirmatory affidavits were not attached to confirm her version of the *ufhelekedza*, when she went to stay at the deceased's family's house, or the *dzipheletshedzi* when the unnamed young girls attended to her, whilst she stayed at the deceased's family. None of the deceased's family members confirmed any of her allegations relating to the admission by the deceased that he had impregnated her, or that a customary marriage or lobola negotiations took place. They denied these allegations. It is common cause that a customary union is between two families, not only the 'bridal couple'. ...'

- [49] Consequently, the applicant has failed to make out a case for the relief sought in her notice of motion. The applicant has failed to establish a proper factual foundation for her case, which case in any event has no legal basis to support it. The applicant's application falls to be dismissed.

Costs

- [50] This only leaves the issue of costs. The applicant was not successful. Accordingly, and as a general principle, the third respondent should be entitled to costs. The fact remains that the applicant pursued an ill-advised course of action where material factual disputes were always a real risk, and even when

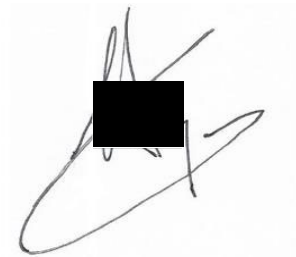
⁴⁴ Id at para 57.

this manifested itself, the applicant pushed on, nonetheless. And as discussed above, the applicant, in my view, did not take the necessary proper steps to substantiate her case, considering all the different nuances applicable to customary marriages. I thus consider that a costs award against the applicant, on the party and party scale B, is justified.

[51] In the premises, I make the following order:

Order

1. The applicant's application is dismissed.
2. The applicant is ordered to pay the third respondent's costs, on the party and party scale B.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a series of loops and a final vertical stroke. A black rectangular redaction box is placed over the middle of the signature.

SNYMAN AJ

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Appearances:

Heard on:	18 February 2025
For the Applicant:	Ms S Nxumalo of SN & Associates Attorneys
For the Third Respondent:	Advocate V Masinga
Instructed by:	Chimeramombe Attorneys
Judgment:	28 March 2025