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**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 43882/2017

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

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DATE

\_\_\_\_\_  
SIGNATURE

In the matter between:

**MAKOBO CATHERINE MOKGALAOTSE**

Applicant

and

**SAMUEL MATOME MANGENA**

First Respondent

**MINISTER OF HOME AFFAIRS**

Second Respondent

***Delivered:*** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 25 September 2025.

**Summary:** Application seeking to rescind a default order. A customary marriage that does not meet the requirements of section 3 of the Recognition

of Customary Marriages Act (RCMA) is invalid and unenforceable in law. Had the Court known that a customary marriage was not validly concluded, it could not have issued the default order on 17 September 2014. Accordingly, the order was issued in error and invalidly and falls to be rescinded and set aside. Since the customary marriage was registered and certified at the back of an invalid order, the registration falls to be cancelled by the Department of Home Affairs. It is declared that no valid customary marriage came into existence. The parties were never married to each other customarily. Held: (1) The draft order uploaded by the applicant marked X and annexed to this judgment is made an order of this Court.

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## JUDGMENT

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**MOSHOANA, J**

### *Introduction*

- [1] This is an application effectively seeking a rescission of an order made by this Court on 17 February 2014 per the learned Justice Kollapen, whilst serving in the Division of this Court, as well as other ancillary and declaratory orders. The application first served before Acting Judge Antulat as an opposed motion. On account of serious and genuine disputes of fact, particularly the dispute over the conclusion of a customary marriage, the learned Acting Justice referred the entire application for oral evidence. The application emerged before me as a trial matter.
- [2] On 11 November 2024, the parties concluded a pre-trial agreement. Therein, various issues relevant to this matter were streamlined. At the trial before me, the parties refined the pre-trial agreement on 11 September 2025. For the purposes of this judgment, amongst other things, the parties agreed that:

“The parties agree that the court proceeds to hear the evidence regarding the validity of the marriage and make a finding on whether the customary marriage in dispute was validly concluded.”

- [3] Ordinarily, when a Court rescinds an order, an aggrieved party would be granted leave to oppose. If this approach was taken, it would have meant that several years later, the same parties would have returned to this Court to tender the same evidence. The interests of justice dictated that the issue of the validity of the customary marriage be tackled without delay. The Minister of Home Affairs, although cited as a party to the present proceedings, chose not to defend the administrative action of registering a customary marriage as ordered by the learned Kollapen J in 2014. Additional to the rescission order, the applicant seeks an order to have the registration of a customary marriage cancelled.

*Background facts and evidence led*

- [4] It is common cause that the applicant, Ms Makobo Catherine Mokgaloatse and the first respondent, Mr Samuel Matome Mangena had a romantic relationship. The *duo* ended up residing under the same roof. At some point in time, the first respondent left the common residence. Following an order obtained by the first respondent by default, the Department of Home Affairs (DoHA) was ordered to register a customary marriage between the applicant and the first respondent. Indeed, the customary marriage was registered by the DoHA. The applicant was unaware of the existence of the customary marriage. Upon gaining knowledge of the existence of the customary marriage, she then laid a charge of fraud against the first respondent. The charge was investigated but the Prosecution declined to prosecute the first respondent.
- [5] The applicant approached this Court to firstly seek a rescission of the order that declared her to be customarily married to the first respondent and secondly other ancillary orders alluded to earlier. In the main, the applicant alleged that the order was obtained fraudulently. In my considered view, there was no factual or legal basis to support the assertion that the order itself was obtained fraudulently. On the conspectus of the evidence tendered, it is apparent that the alleged fraud goes to the conclusion of the customary marriage itself. Put differently, the alleged customary marriage itself, on the applicant's version is blighted by fraud. That notwithstanding, it is common cause that the order was made in the absence of the applicant.

- [6] In terms of Rule 42(1)(a) of the Uniform Rules of this Court, a Court may also *mero motu* rescind an order erroneously granted in the absence of another affected party. At the commencement of the trial, both legal representatives submitted that they are *ad idem* that the order is rescindable and the remaining issue was the validity or otherwise of the customary marriage. As indicated above, the application in its entirety was referred for oral evidence. In support of her case, the applicant tendered her own testimony as well as the testimony of the police officer who investigated the fraud charge. The first respondent tendered his own testimony without calling any other witnesses.
- [7] Briefly, the oral testimony before this Court may be summarised as follows:
- [8] The applicant, aged 55 at the time, testified that she is employed as an educator, having been so employed since July 2012. She placed in dispute a customary marriage, to which the availed marriage certificate recorded that she is party to. She never married the first respondent by custom. She contends that the marriage certificate was fraudulently obtained. She met the first respondent in 2009 and they both fell in love. That romantic relationship ended in 2012. She was never married nor engaged to be married to the first respondent. There was an intention to marry, but that intention never materialised.
- [9] With regard to the existence of the alleged customary marriage, which was allegedly consummated on 25 December 2009, she bore no knowledge of such. On the day in question, she was at her home with her then 10 year old son. The first respondent and his alleged delegation never came to her home on the day in question. Her parental home is Mmidinyeni and not Tzaneen. She is unaware of a R20 000 *lobola* (dowry) that was paid towards her marriage by custom. Her then 10 year old son could not have been part of a delegation that allegedly negotiated her dowry. Her father, after whom her son was named, as well as her uncle passed on.
- [10] Her uncle, who had since passed on was never at her parental home on 25 December 2009. At some point, her father informed her that a delegation allegedly dispatched by the first respondent, came to her parental home

wanting to give his father R700 towards her dowry. Her father turned the delegation back and did not accept that money. She started residing at 6[...] M[...] village in 1994. The place belonged to her uncle who had passed on. She had stayed with the first respondent at that place during the currency of their romantic relationship. When the relationship turned sour, they each obtained protection orders against each other. She disputed an allegation made by the first respondent in his founding affidavit, in support of her 2014 application, that she tore up a “lobola letter”.

[11] She admitted that at some stage she took out a policy for members of her “extended family”. Since she was staying with the applicant at that time, under the same roof, she listed him as part of the extended family. However, when the policy document was issued, the first respondent was recorded as a spouse. She was not bothered by that recordal because she was staying with him and she carried the risk of what may happen to the first respondent whilst staying under the same roof with her. She disputed the contents of affidavits used by the first respondent to support his application in 2014. She disputed that she is related to Mr James Morabe Mohlala, one of the alleged delegates and deponent of the affidavits used in support of the 2014 application which culminated to a default order.

[12] She never became aware of the 2014 application that served before Kollapen J. In 2015, the first respondent attempted and failed to obtain a spousal maintenance order against her. In 2016, she became aware that she was married to the first respondent by custom. She then sought legal advice and laid a charge of fraud at Bolobedu Police Station. The first respondent produced the impugned marriage certificate to the Maintenance Court and managed to obtain a spousal maintenance order against her. In the course of the investigation of the fraud charge, statements were obtained, contents of which she agreed with. She disputed some of the signatures alleged to be those of one Ms Violet Ramaila. She accepted one signature and stated that since she never met Ms Ramaila, she never influenced her to state under oath what she stated before the Investigating Officer (IO).

- [13] According to her *Pedi* custom, a marriage by custom is consummated if two families (the groom's and the bride's) meet and negotiate the payment of *lobola* and delivery of other items. Whereafter, at the homestead of the bride, there will be a celebration and a pastor will be present to bless the marriage. Thereafter, the bride will be handed over to the family of the bridegroom. Those steps, as she knows them to be the components of a *Pedi* customary marriage, did not happen in her case. She actually met with the first respondent in February 2009 and only had a romantic relationship with him. She agreed with the contents of the statement obtained from her late father by the IO and confirmed her father's signature. Her father statement disputes an existence of a customary marriage. She asked this Court to cancel the marriage certificate.
- [14] During cross-examination, she disputed payment of R1200 as part payment of an agreed amount of *lobola* of R20 000. She also testified that the steps she outlined regarding a *Pedi* customary marriage do not happen in one day.
- [15] Mr Sello Solomon Mosoma (Mr Mosoma) is a retired police officer. He retired in April 2021. He was a police officer for a period of about 36 years. He retired at the rank of a Captain. During 2016, he was stationed at Bolobedu Police Station. He was the IO in the fraud case opened by the applicant. The applicant complained that she was married without her knowledge. Mr Mosoma detailed the steps he took to investigate the complaint of the applicant. He met with potential witnesses and obtained written statements after interviewing them. He also interviewed the first respondent who told him that he had sent a delegation to the homestead of the applicant to only introduce him and not to pay *lobola*. He also interviewed Mr Mohlala, who did not appear to be of a sound mind and was incoherent. He could not obtain a statement from him. After completing his investigations, he submitted the investigation docket to the prosecutor for a decision. To his surprise and utter disappointment, the prosecutor issued a *nolle prosequi* certificate. He disputed in cross-examination the version that he failed to obtain a statement from a sound minded Mr Mohlala because he corroborated the version of the first respondent. He placed in dispute a version that he resided at the same street as the first respondent.

- [16] The first respondent threw tantrums and became dramatic when he was about to commence tendering his testimony. He demanded that Mr Mosoma must vacate the courtroom before he can tender his testimony. Since there was no proper application for the holding of an in-camera proceedings, this Court did not accede to his demand. This Court must state that it was far from being impressed with the first respondent as a witness. He did not fare well. He was evasive, not answering questions directly. He was not, in the Court's view a credible witness.
- [17] He lived at Mesopotamia at Ga-Kgapane. He met the applicant in 2008 at Tzaneen Pick n Pay. He struck a love relationship with her. Whereafter, he started visiting her at 6[...] M[...] village. He was employed at the Post Office from 2002-2008. He took an early retirement. He used his retirement benefits to start a business. At some point he introduced the applicant to his family, likewise, the applicant introduced him to her family. At the end of 2008, he moved in with the applicant at her house at 6[...] M[...] village.
- [18] As they lived together, the applicant suggested to her that he must visit her family and pay "something" to them. He agreed with the suggestion and discussed it with her sister, after he and the applicant visited the sister. At the sister's place, the applicant repeated the suggestion she made. He engaged Mr Mohlala who then suggested a process. In due course, Mr Mohlala and his sister came to 6[...] M[...] village. He gave them money to go to the homestead of the applicant which was about 100 metres away from 6[...] M[...] village. He gave them R1200. He gave them instructions to go there and marry the applicant. They indeed went and left the applicant and him at 6[...] M[...] village.
- [19] Later, Mr Mohlala and the sister returned and reported to him that the applicant's father has taken the money and that meant that he and the applicant are henceforth husband and wife. They then celebrated that him and the applicant are now husband and wife. He disputed that a R600 or R700 was ever given by him for any purpose as suggested in the statement of her sister and the version of the applicant. He knew nothing about a fraud case. He testified that this Court must not rescind the 2014 order which he had obtained by default. During cross-examination he was pointed to various contradictions

which appears on some affidavits and transcripts. He nevertheless disputed such glaring contradictions. He confirmed that he also ascribes to a *Pedi* custom. During the alleged celebration of the concluded customary marriage there was only one member of his family present. From the family of the applicant there were 5 members. All the people who attended the celebration were plus minus 10 in number. He confirmed that the *lobola* price was R1200. Chickens were slaughtered in order to comply with the *Pedi* custom of *go hlabisha* (slaughtering of an animal).

[20] With regard to the handover, although the applicant was at the same place with him, at some point she left to her homestead so as to enable her to be handed over as required by the *Pedi* custom. Gifts including a wedding ring were handed over during the alleged celebration and he was also gifted with a brand new expensive mobile phone. He also testified that *lobola* was not paid in full as it was still being negotiated at that time. His instructions to the delegates were, (a) ask the hand of the applicant into a marriage. He used the *Pedi* custom, *go kgopela sego sa meetsi* (loosely translated to mean something to serve water for drinking purposes); (b) to let them know that he lives with their child under the same roof. Although he earlier testified that his delegation changed those instructions, he later somersaulted and testified that the instructions were not changed. He testified that what had happened as narrated by him accorded with the *Pedi* custom regarding consummation of a customary marriage.

### *Analysis*

[21] It is common cause that the order of 17 January 2014 was made in the absence of the applicant. It is clear that Kollapen J was unaware of the fact that the applicant was not aware of the application. Of significance, Kollapen J was unaware that the applicant disputes the validity of the customary marriage. This Court is satisfied that had Kollapen J become aware of the above an order would not have been made. The submission that the applicant is bereft of prospects of success is without merit. On the available evidence, it is clear that a valid customary marriage was not concluded.

- [22] The lack of prospects was predicated on the fact that the applicant was not bothered by the fact that the policy document identified the first respondent as a spouse. Counsel for the first respondent correctly conceded that that identification is meaningless in law if the statutory requirements of a valid customary marriage were not met. On account of the above, this Court is satisfied that the order of Kollapen J is rescindable and liable to be set aside.
- [23] On the version of the first respondent, the customary marriage was consummated on 25 December 2009. It however took the first respondent five years to apply to Court for the registration of that marriage. Section 4(1) of the **Recognition of Customary Marriages Act (RCMA)**<sup>1</sup>, the spouses, in this instance the applicant and the first respondent, of a customary marriage have a duty to ensure that their marriage is registered. In terms of section 4(2) either spouse may apply for the registration of a customary marriage. In terms of section 4(3)(b) the marriage entered into in 2009, must be registered within a period of three months after conclusion of the marriage or within such longer period as the Minister may from time to time prescribe. It is perplexing that neither the applicant nor the first respondent, in particular, attempted to register the alleged customary marriage during the prescribed three months period.
- [24] Having not attempted to register the alleged customary marriage and the absence of any refusal to register the customary marriage in terms of section 4(6) by the registering officer, the first respondent elected to apply to Court within the contemplation of section 4(7). Section 4(7)(a) requires an investigation instituted by the Court before an order for the registration of any customary marriage may be made. Nowhere in the papers filed in support of the 2014 order is it apparent why that application was launched. In my considered view, a section 4(7) application must be prompted by a refusal of registration by the registering officer within the contemplation of section 4(6). It seems incongruent with the scheme of the RCMA for a customary spouse to simply launch an application without first attempting the DoHA registration process. Since it is required that the registration has to happen within a three

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<sup>1</sup> Act 120 of 1998 as amended.

months period, it is expected, in my considered view, for a spouse who seeks a registration of the customary marriage five years later to provide a cogent and acceptable explanation of the delay to seek a registration order. Sadly, this Court was not provided with reasons or a written judgment by Kollapen J so as to establish whether an investigation contemplated in subsection (7) was instituted before an order directing the registration of the marriage was made.

[25] It seems to me that institution of an investigation is a jurisdictional requirement before a Court may order registration. Absent an investigation, it seems to me that an order for registration of a customary marriage cannot issue. This Court does accept that in terms of section 4(9) failure to register a customary marriage does not affect the validity of that marriage. What this Court is alluding to is, in effect, the validity of the order of Kollapen J as opposed to the validity of the customary marriage, plausibly issued in the absence of the institution of the legislated investigation. There is simply no evidence that the legislated investigation was conducted before an order of registration was issued. For this reason too, this Court takes a view that the order was obtained in error.

[26] Having reached a conclusion that the order of Kollapen J is rescindable within the contemplation of rule 42(1)(a) of the Uniform Rules, I now turn to the question whether a valid customary marriage was consummated. Section 3 of the RCMA spells out the requirements of a valid customary marriage. In terms of section 3(1)(a)(ii) the prospective spouses must both consent to be married to each other under customary law. With regard to consent, this Court is faced with two contradictory versions. The onus is on the first respondent to prove the requirements of a valid customary marriage. The version of the first respondent is that the applicant had suggested that he must pay something to her family. This suggestion was repeated to her sister. The difficulty with this version is twofold. Firstly, it is not explicit that the applicant suggested a customary marriage when she allegedly stated to the first respondent and the sister that something must be paid to her family. Secondly, this version only emerged when the first respondent testified in chief. At no stage was the version put to the applicant.

- [27] The first respondent was legally represented throughout the legal proceedings. This version ought to have been put to the applicant, who steadfastly, disputed any consent to marry the first respondent by custom. Failure to put such a version is fatal to the first respondent's case of alleged consent to marry by customary law<sup>2</sup>. Absent consent, the alleged customary marriage fails to meet the legal requirements. Thus, this Court rejects the version of the first respondent and accepts, without hesitation, the version of the applicant on this score. The version of the first respondent is not credible and is infested with improbabilities. It is improbable that the applicant, who is clearly clued with the *Pedi* custom, can make such a perfunctory suggestion.
- [28] In terms of section 3(1)(b), the marriage must be negotiated and entered into or celebrated in accordance with customary law. Section 1 defines customary law to mean the customs and usages traditionally observed among indigenous African peoples of South Africa and which form part of the culture of those peoples.
- [29] In *casu*, indisputably, both parties observe the *Pedi* custom. The applicant testified about the steps required for a customary marriage in terms of the *Pedi* custom. Her version that those steps did not occur and are incapable of being met in one day was not disputed at all. On the first respondent's version, which is improbable, the consummation of the customary marriage was a matter of few hours. His delegation was given a cash amount of R1200, to effectively deliver to the parents of the applicant, and when they returned, they informed him that since the father took the money, him and the applicant are henceforth pronounced husband and wife. Such, is too simplistic a process and in actual fact a mockery to the *Pedi* custom.
- [30] It is not clear on the version of the first respondent that any negotiations took place. It is apparent that the delegates simply handed over money to the applicant's father. Such is far from meeting the meaning of the word negotiations. Negotiations means discussions aimed at reaching an agreement.

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<sup>2</sup> See *President of the Republic of South Africa and Others v SARFU and Others* 1999 (10) BCLR 1059 (CC).

No shred of evidence was led to demonstrate discussions aimed at reaching an agreement. The affidavit of the applicant's father who has since passed away stated that no negotiations took place. According to the *Pedi* customs a marriage (*lenyalo*) involves symbolic gifts, preparation of a feast with traditional foods, dances, the bride's ritualistic arrival at the groom's home with specific rituals, and the slaughter of an animal for communal sharing. The ceremony formalises the status of the couple.

[31] There is no shred of evidence to support the alleged celebration. On the alleged day of celebration, the first respondent received a brand new phone. There is not a single picture taken using the camera of that phone. Generally, significant celebrations of that nature are photographed using a professional photographer or cell phone cameras. The explanation proffered by the first respondent for the absence of photography is too flimsy to be accepted by this Court. There was only one member of his family and the people who attended the celebration were less than 20. The celebration took place not at the groom's or bride's homestead. It happened at a place where the couple resided. All of that is at odds with the *Pedi* customs. On the first respondent's own contradictory version the *lobola* was negotiated and fixed at R20 000. There is no credible evidence to support this alleged negotiated amount. The version that the applicant tore up the *lobola* letter is not only unbelievable it is also, with respect, laughable. The applicant disputed this version. Generally, when *lobola* is negotiated and agreed to by both families, each delegation would retain a copy of the "*lobola* letter". It must follow that the delegation of the first respondent must have been provided with a copy of the *lobola* letter. There is no clear evidence as to when would the *lobola* letter have been torn up by the applicant.

[32] Since the negotiations allegedly happened in one day – 25 December 2009, it must follow that as at that time the *lobola* letter was generated. That being a possibility, could the applicant whilst celebrating her customary marriage tear up a document that would assist her to register her marriage she was celebrating? Clearly not. This version that a *lobola* letter once existed is improbable and it is nothing but a figment of the first respondent's own

imagination. This Court concludes that there was no such letter that came into existence.

[33] The evidence that a customary marriage existed is that of a single witness. Evidence of a single witness is acceptable only if it is credible. The evidence of the first respondent is not credible at all. It emanated from an evasive witness. The evidence leaves much to be desired. This Court fails to understand why the evidence of the alleged negotiators was not tendered. Contrary to the evidence of Mr Mosoma, the first respondent confidently testified that although Mr Mohlala is blind, he is of sound mind. One of the alleged negotiators is the sister of the first respondent. She failed to heed a *subpoena* issued out of this Court. This Court must draw an adverse inference against the first respondent for his inexplicable failure to call available and relevant witnesses. He must have feared that they will not corroborate his manufactured version of a consummated customary marriage. On the available evidence, it is improbable that a customary marriage according to the *Pedi* customs was negotiated or entered into. Accordingly, this Court must declare that no valid customary marriage existed between the applicant and the first respondent.

[34] Even though the purported customary marriage was registered on the strength of a Court order, the alleged marriage was not supposed to be registered. There was no valid customary marriage between the applicant and the first respondent. Section 4(7)(b) empowers this Court to cancel the registration of a customary marriage. Upon investigation instituted by this Court, by having regard to the evidence tendered, it is appropriate for this Court to order the cancelation of the registration of a customary marriage involved herein. The provisions of section 4(6) are explicit, only valid customary marriages are to be registered. If a registration officer is not satisfied that a valid customary marriage was entered into by the spouses, registration must be refused. Similarly, if the investigations reveals, as they did in *casu*, that a valid customary marriage did not come into existence, any registration of such a customary marriage falls to be cancelled. Such a step is congruent with the rule of law.

[35] Because of all the above reasons, I make the following order:

*Order*

1. The draft order uploaded by the applicant marked X and affixed to this judgment is made an order of this Court.

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**GN MOSHOANA**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

**APPEARANCES:**

|                                     |                                             |
|-------------------------------------|---------------------------------------------|
| For the Applicant:                  | Mr D Mphahlele                              |
| Instructed by:                      | Mphahlele & Masipa Inc Attorneys, Pretoria. |
| For the 1 <sup>st</sup> Respondent: | Ms S Mathonsi                               |
| Instructed by:                      | Legal Aid South Africa                      |
| Date of Hearing                     | 10, 11 and 22 September 2025                |
| Date of judgment:                   | 25 September 2025                           |