

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

CASE NUMBER: 2024-081612

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

DATE: 29/9/2025

In the matter between: -

S[...] P[...] M[...]

Applicant

and

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

First respondent

THE MINISTER OF HOME AFFAIRS

Second respondent

**THE DIRECTOR-GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS**

Third respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 29 September 2025.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] The applicant approached this Court by way of motion proceedings for, *inter alia*, an order declaring that no valid customary marriage was concluded between the applicant and the first respondent pursuant to lobola negotiations held on the 19th of February 2022. The first respondent seeks a dismissal of the application with costs.
- [2] The second and third respondents filed a notice to abide by the decision of this Court on the 22nd of August 2024.

THE APPLICANT'S CASE

- [3] During late 2015 the applicant and the first respondent became romantically involved. During August 2016 the first respondent moved in with the applicant and the parties cohabitated.
- [4] On the 19th of February 2022 a delegation of the applicant's family was despatched to the residence of the family of the first respondent who then tendered to hold a gathering with the delegation of the family of the first respondent. The gathering was convened for the purposes of initiating the marriage process, which culminated in the payment of lobola.
- [5] The terms of the lobola negotiations were reduced to writing and were in summary as follows: -
- [5.1] The total agreed amount sounding in money was R65 000.00;

[5.2] Each family would buy a cow on their own for the purpose of the contemplated celebration;

[5.3] The family of the first respondent was to provide a list of gifts to be exchanged.

[6] The applicant contends that he only paid R25 000.00 of the sum of R65 000.00, that there was never a celebration conducted in terms of the customary law or any form of marriage and that the first respondent's family never provided a list of gifts and that these gifts were never exchanged.

[7] The applicant and the first respondent continued to share a home and two minor children were born of their relationship. These children were conceived before the applicant paid lobola.

[8] The applicant contends that both him and the first respondent are Zulu and that there was no marriage celebrated or concluded in terms of Zulu custom.

[9] In the conclusionary paragraph to his founding papers the applicant states as follows: -

"27. I have not expressed my intention to conclude nor enter into the marriage in terms of the customary law nor did I abide by the provisions of the Recognition of Customary Marriages Act after partial payment of lobola money."

THE FIRST RESPONDENT'S CASE

[10] The first respondent contends that a valid customary marriage was concluded between her and the applicant in that the requirements of the Recognition of Customary Marriages Act, 120 of 1998 ("the RCM") were met. In this regard the first respondent states that both her and the applicant consented to be married, which is demonstrated by the following: -

[10.1] The applicant proposed to the first respondent expressing his desire for her to become his wife;

[10.2] The applicant sent his delegation to negotiate lobola with the first respondent's family;

[10.3] The applicant informed his delegation of his intentions and a letter was sent to the first respondent's family to arrange the lobola date;

[10.4] The first respondent's family responded with a letter and a date was set;

[10.5] The applicant's delegation and the first respondent's delegation agreed on the lobola sum of R65 000.00;

[10.6] The applicant made payment of the amount of R25 000.00 towards the lobola.

[11] At paragraphs 11 and 12 of the answering papers, the first respondent

states as follows: -

"11. I concede that the marriage between the applicant and me was not celebrated according to customary law; however, I will demonstrate below that this does not affect the validity of our marriage.

*12. I will also demonstrate below that even if it is found that my marriage to the applicant was not conducted in accordance with customary law, non-compliance with this requirement **alone** does not invalidate the marriage."*

[12] The first respondent claims that the parties' intention to be married can be inferred from their cohabitation. The applicant and the first respondent had been residing together at their matrimonial home since 2022 after their marriage. Neither of the families objected to the parties living together and therefore, according to the first respondent, the marriage should be presumed.

[13] The first respondent also states that the applicant referred to her as his wife and she referred to him as her husband. She enjoyed all the rights associated with being his lawful wife, for example since she was unemployed, the applicant had been supporting her and during 2022 he purchased a vehicle for her for the purchase price of R198 000.00 which was registered in her name.

[14] According to the first respondent, she and the applicant were content with their marriage as it was and it was never an issue between them that they needed to solemnise their marriage according to Zulu customary law.

- [15] The first respondent further alleges that the applicant and she did not agree that their marriage needed to be conducted strictly according to Zulu custom for it to be valid. She states as follows at paragraph 23 of the answering papers: -

"... I always believed that our marriage was properly and validly conducted because both families were involved, I consented to the marriage, lobola was paid and I was tacitly handed over to the applicant's family when he collected me the day after the lobola payment to take me to our matrimonial home without anyone objecting to that."

- [16] The first respondent asserts that the fact that full lobola was not paid, no gifts were exchanged and no cows were bought for the contemplated celebration does not affect the validity of the marriage which was properly concluded according to the RCM.

- [17] The applicant alleges that ceremonial rituals, such as the exchange of gifts, may be dispensed with in appropriate cases by mutual agreement between her and the applicant *"which was the case in our circumstances"*.¹

- [18] The first respondent states further that: -

"While the exchange of gifts and celebration are important aspects of customary marriage, they are not necessarily key determinants of its validity. These aspects cannot override our clear volition and

¹ Answering affidavit, paragraph 25.

intent."²

- [19] When the lobola was negotiated by the respective families, the first respondent informs the Court that she was at the same house in a different room. She was called into the negotiation room with two of her cousins so that the applicant's family could identify her. Before the negotiations, the first respondent was wearing a mini blanket that her family had bought for her symbolising that she was not yet married. After the lobola negotiations and payment, the applicant's family placed *umhezo* on the first respondent replacing the blanket she was wearing symbolising that she was now a bride of the family of the applicant according to their culture.
- [20] Both the families ululated after the *umhezo* was placed on the first respondent.
- [21] The first respondent states that the applicant's family bought and gave her late mother a blanket and a traditional dress (*iphinifa*). She states that her family bought an *incansi* (grass mat) and a broom as a gift for the applicant's mother. After the negotiations were concluded, the applicant was called inside to meet the first respondent's family and share a meal.
- [22] Once both families had eaten, they went outside and both families began to ululate while the applicant and the first respondent performed a dance step side by side.

² Answering affidavit, paragraph 30.

[23] On the Sunday the applicant collected the first respondent and they went to their matrimonial home in Brakpan.

[24] In the circumstances, so the first respondent argues, the essential requirements for a valid customary marriage were met and she is the wife of the applicant.

THE APPLICANT'S REPLY

[25] The applicant contends that the mere partial payment of the lobola presupposes that there would be at least two rounds of negotiations. The first round of negotiations held on the 19th of February 2022 was for the exchange of pleasantries and for the delegation of his family to see the prospective *makoti* formally with their naked eyes for the determination of the lobola price, for the declaration of expectations and to outline the process going forward.³

[26] It is furthermore standard practice, according to the applicant, that the partial payment of lobola is made to follow the old adage that "*Moya-mahlong-a-tau o ya a swere serumula*" – meaning that when the prospective groom's family first made proposals for the marriage negotiations of their son to the daughter of the family of the prospective bride, they shall not do so emptyhanded.

[27] Once the first round was done, then the crucial outstanding second round of negotiations for the payment of the balance of the lobola would follow.

³ Replying affidavit, paragraph 12.1.1.

In the second round it would have been expected that the lobola price would remain the same and payment would be made in full. It would have been in the second round of negotiations where the applicant's family delegation would have confirmed the outcome of the first round of negotiations and concluded negotiations, agree on the date of the outstanding rituals and celebrations / ceremonies and pronounced on the next step and/or considerations for any formal requests from any side according to the new mandate.⁴

[28] According to the applicant, subsequent to the first round of negotiations his father did not give his family delegation a fresh mandate for the second round of negotiations. The first respondent and the applicant did not implement the process stipulated in the RCM and did not follow through with the outcomes of the first round of negotiations that would have led into customary marriage, but instead the first respondent and the applicant opted not to proceed due to irreconcilable differences.⁵

APPLICABLE LEGAL PRINCIPLES

[29] Where final relief is sought on motion and material disputes of fact arise as is the case in this matter, the version of a respondent prevails, unless the denials are palpably implausible, farfetched or clearly untenable.⁶

[30] The question is whether the Court in this instance, has any basis to reject the first respondent's version as being such.

⁴ Replying affidavit, paragraphs 12.1.4 and 12.1.5.

⁵ Replying affidavit, paragraph 12.2.

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (SCA).

[31] The corroboratory evidence on both sides is scant. Apart from the applicant's own translation, an independent sworn translation, as is required by the uniform rules, of the lobolo letter, has not been included in the papers. Although the applicant included two confirmatory affidavits deposed to by delegates who purportedly attended the lobolo negotiations, these affidavits, other than confirming the correctness of the founding papers insofar as it relates to them, provide no particulars whatsoever regarding the circumstances surrounding the lobolo negotiations and they certainly do not confirm that a customary marriage was not concluded.

[32] The first respondent attaches photographs of herself wearing traditional clothing and blankets, but she does not provide any corroboratory evidence from her family delegates who can attest to the lobolo negotiations and confirm that a customary marriage was in fact concluded. The first respondent relies on waivers of certain customs and the applicant simply denies any waiver.

[33] Factual disputes cannot be avoided simply by relying on the strength of one's own version.⁷

[34] Where the respondent's denials are not demonstrably false or illogical, the Court is bound to accept them. When the Court declines to accept an applicant's affidavit as determinative, it must assess the dispute within the confines of the *Plascon-Evans* framework.

⁷ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA).

[35] 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.⁸ In *Manwadu*⁹ the Supreme Court of Appeal ("SCA") 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 SCA stated as follows:-

*"[61] 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 more probable..."*¹⁰

[62] If the appellant's version was not clearly untenable (which it was not), the application must be determined on her version.."

[36] Both parties relied on facts that require testing during oral evidence which is unavailable in motion proceedings.

[37] Given the weight of the evidentiary shortcomings and the factual disputes, I am not persuaded that the applicant has made out a *prima facie* case to

⁸ *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.

⁹ *Manwadu v Manwadu and Others* 2025 (3) SA 410 (SCA) para 56.

¹⁰ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) ([1984] 2 All SA 366; [1984] ZASCA 51), as confirmed by the Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others*; *Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) (2008 (2) SACR 421; 2008 (12) BCLR 1197; [2008] ZACC 13) para 10.

obtain the declaratory relief sought.

[38] Rule 6(5)(g) of the Uniform Rules of Court provides:-

*'Where an application cannot properly be decided on affidavit the court may dismiss the application **or make such order as it deems fit with a view to ensuring a just and expeditious decision.** In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'* (emphasis added)

[39] On the limited evidence before me, I am not able to make a final determination of the disputes between the parties. Hence, to ensure the most just and expeditious decision in this matter, the matter should be referred to trial where both parties' versions can be tested by a trial court, which is of crucial importance when disputes concern the status of parties and the outcome will impact on any patrimonial consequences flowing from the findings made by the trial court.

[40] Accordingly, I find that the disputes are not merely bare denials, they are mutually exclusive and go to the heart of the applicant's claim. It is not a matter capable of resolution through affidavits alone, as it requires a thorough evidentiary inquiry, which motion proceedings do not ordinarily

allow. In light of the material disputes of fact and the evidentiary deficiencies in the applicant's case, the matter has to be referred to trial.

COSTS

[41] It is a trite principle of our law that a court considering an order of costs exercises a discretion which must be exercised judicially.¹¹

[42] Both parties ought to have foreseen the factual dispute but neither raised this. Since the veracity of the evidence and the credibility of the witnesses are yet to be tested, it would be prudent to reserve the issue of costs.

ORDER

I accordingly grant an order in the following terms: -

1. The matter is referred to trial.
2. The notice of motion and founding affidavit will stand as simple summons.
3. The answering affidavit will stand as the notice of intention to defend.
4. The applicant will deliver his declaration within 20 days of this order.
5. The costs of this application are reserved for determination at trial.

¹¹ *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC); *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A.

F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 15 May 2025

DATE OF JUDGMENT: 29 September 2025

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