



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT**

Case no: 567/2023

In the matter between:

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

and

N[...] B[...] M[...]

MINISTER OF HOME AFFAIRS

THE MASTER OF THE HIGH COURT: MAKHANDA

First Respondent

Second Respondent

Third Respondent

JUDGMENT

APPELS AJ:

Introduction

[1] This is an application for an order directing the second respondent to register the customary marriage concluded between the applicant and N[...] M[...] ("the deceased") in terms of section 4(7) of the Recognition of Customary Marriages Act 120 of 1998 ("the Act") and declaring the marriage between the deceased and

the first respondent (“the civil marriage”) concluded in terms of the Marriage Act 25 of 1961 (“the Marriage Act”), void *ab initio*.

[2] The relief is sought on the basis that at the time the civil marriage was concluded, the deceased was already in an existing valid customary marriage with the applicant and was therefore precluded from marrying the first respondent.

[3] The application is opposed by the first respondent on the basis that:

(a) The customary marriage between the deceased and the applicant had dissolved prior to the civil marriage;

(b) The applicant waited until after the deceased passed away to register the customary marriage; and

(c) There is a factual dispute which cannot be resolved on the papers.

[4] The issues to decide in this matter are whether the deceased and the applicant concluded a valid customary marriage and if so, whether the customary marriage still subsisted at the time when the deceased entered into the civil marriage with the first respondent. Since the deceased had already passed away at the time when this application was brought, I will also consider whether there is any impediment to registering the customary marriage posthumously.

The facts

[5] During about June 1988, prior to the commencement of the Act, a delegation representing the deceased approached the applicant’s family to request her hand in marriage and to negotiate her lobola on behalf of the deceased. At the time, the deceased was 25-years of age and the applicant 17-years old. The applicant’s parents granted permission for the applicant to conclude a marriage with the deceased.

[6] Lobola negotiations were initiated between the families of the deceased and the applicant during which the parties agreed upon the lobola payable in the form of two cows. On conclusion of the negotiations and the lobola agreement, payment of the agreed lobola was made and accepted by the applicant’s family. Thereafter, the

applicant was presented to the deceased's family where she was welcomed and addressed as a bride. Traditional proceedings followed, whereafter the applicant was given the name N[...] M[...] as her bridal name in accordance with the norm in isiXhosa customary marriages. The aforesaid factual allegations were confirmed in supporting affidavits deposed to by deponents who were, during the lobola negotiations, members of the deceased's delegation and the applicant's family's delegation, respectively.

[7] It is alleged that the applicant and the deceased lived together as a married couple and two children were born of their marriage, S[...] M[...] who is 23-years old, and L[...] M[...] who is 17-years old.

[8] The applicant and the deceased were separated some time after their marriage was concluded. During their separation, on 13 January 2020, the deceased concluded a civil marriage with the first respondent.

Disputed Facts

[9] The exact date on which the applicant and the deceased were separated is not clear, and the nature and duration of the separation are disputed. The applicant alleges that they were separated for a temporary period while the first respondent alleges that the separation was of a permanent nature. In this regard the first respondent alleges that she met the deceased in 2018 and at the time, he referred to the applicant as his ex-wife and said that the applicant had left him after she was found to have been engaged in an extra-marital affair. It is further alleged by the first respondent that at the time she met the deceased, the applicant was not involved in his life, nor was she playing any role as a customary wife.

[10] The first respondent does not allege that the customary marriage was dissolved by decree of divorce. Instead, she refers to the custom that applies to the dissolution of marriages in accordance with customary law. In this regard it is alleged that after the separation of the deceased and the applicant, the deceased chose not to "*puthuma*"¹ the applicant as he regarded the alleged breakdown of the customary

¹ "The practice is resorted to by a husband whose wife has left the marital home, for example, as a result of ill-treatment by her husband. *Ukuphuthuma* takes place when the husband, either alone or

marriage as irreparable as a result of the applicant's extra-marital affair. Therefore, accordingly to the first respondent, the applicant and the deceased were permanently separated from at least 2018.

[11] The applicant however disputes that the customary marriage had irreparably broken down or that it had been dissolved and states that she and the deceased were only temporarily separated at the time when the deceased met the first respondent.

[12] There are also other factual disputes which have no direct bearing on the issues which the court has to determine in this matter. These factual disputes relate to whether the first respondent and the deceased lived together after their marriage, whether she was introduced to the deceased family, how frequently she had contact with the deceased during the civil marriage or whether she forced the deceased to accompany her to the offices of the second respondent to conclude the civil marriage. It is not necessary to provide any further detail in this regard.

Analysis

The Legal Framework

[13] A marriage which is a valid customary marriage in customary law and exists at the commencement of the Act is for all purposes recognised as a valid marriage.² Failure to register a customary marriage does not affect the validity of that marriage.³

[14] In terms of section 4(3)(a) of the Act, a customary marriage entered into before the commencement of the Act, must be registered within a period of 12 months after the commencement of the Act or within such longer period as the Minister may from time to time prescribe by notice in the Government Gazette. The period for the registration of customary marriages has been extended by the Minister

accompanied by his kinsmen, proceeds to the kraal of his father-in-law in order to negotiate the return of his wife. Her return is usually discussed by a family group meeting." (I P Maithufi, "A Civil Marriage and the Custom of Phuthuma", published in De Rebus, August 1986)

² Section 3(1) of the Act.

³ Section 4(9) of the Act

to 31 August 2026 as published under Government Notice No. 5483 in Government Gazette 51462 of 29 October 2024.

[15] A spouse in a valid customary marriage is not permitted to enter into a marriage under the Marriage Act during the subsistence of such customary marriage. The only exception is that a man and a woman between whom a valid customary marriage subsists are competent to marry each other under the Marriage Act if neither of them is a spouse in an existing customary marriage with any other person.⁴

[16] Furthermore, section 8(1) of the Act further provides that:

‘...a customary marriage may only be dissolved by a court of a decree of divorce on the ground of the irretrievable breakdown of the marriage.’

[17] Therefore, unless a customary marriage has been dissolved in terms of customary law prior to the commencement of the Act, it may only be dissolved by decree of divorce. This means that if the customary marriage between the applicant and the deceased still existed at the commencement of the Act, it remained valid until a decree of divorce has been issued by the court.

[18] Section 4(7) of the Act empowers a court to order the registration of a customary marriage, as well as the cancellation or rectification of any existing registration. This authority is exercised following an application and a subsequent investigation by the court.

[19] In this regard, Section 4(7) of the Act reads as follows:

‘4(7) A court may, upon application made to that court and upon investigation instituted by that court, order –

- (a) the registration of any customary marriage; or*
- (b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.’*

⁴ Section 3(2) read with section 10(1) of the Act.

[20] In *EMK v EMB*,⁵ the following was said regarding the duty of the court to apply customary law:

‘A Court is enjoined by virtue of the provisions of Section 211(3) of the Constitution to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.’

[21] More importantly for this matter is that the court held that in terms of section 4(7) of the Act, a court is enjoined to investigate whether a valid customary marriage was entered into before an order can be made for registration thereof.⁶ Therefore, the applicant bears the onus to prove that there was a marriage between her and the deceased and that that marriage was “*negotiated and entered into or celebrated*” in accordance with the custom and usages traditionally observed among the isiXhosa.⁷

[22] In the matter of *Shilubana and Others v Nwamitwa*, Van der Westhuizen J emphasised the need that evidence must be led where necessary to determine customary law. In this regard, the following was held:

‘Living’ customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.’

[23] I have also carefully considered the following dictum in *EMK v EMB*:⁸

‘... where a Court is faced with the challenge of determining the validity of an alleged customary marriage, it is imperative that a Court should carefully consider and evaluate customary law in order to make provision for its diversity, adaptability and specific application to different groups of African peoples in order to avoid customary law being morphed into a formal form of law, established through de facto judicial

⁵ *EMK v EMB* (2024-094190; 2023-010767) [2025] ZAGPPHC 289 (18 March 2025) at paras 32

⁶ *EMK v EMB*, *supra* at para 33

⁷ *MM v MN* 2013 (4) SA 415 (CC) at para 108

⁸ *EMK v EMB*, *supra* at para 33

notice of customary law by Judges not familiar with customary law, without due regard to the origin, content and diversity of such customary law.'

Has the Applicant and the Deceased entered into a Valid Customary Marriage?"

[24] Having considered the authorities stated above, I have taken into account that in this matter, the applicant adduced evidence of the applicable customary law that was applicable to the alleged customary union with the deceased. Evidence was adduced that in accordance with the isiXhosa custom, the applicant's parents granted permission for the applicant to conclude a marriage with the deceased following negotiations regarding the amount of lobola to be paid. Furthermore, according to the evidence, upon conclusion of the negotiations, a lobola agreement was concluded, and payment of lobola was made and accepted by the applicant's family. Thereafter the applicant was presented to the deceased's family where she was welcomed and addressed as a bride. Traditional proceedings followed, whereafter the applicant was given the name N[...] M[...] as her bridal name in accordance with the isiXhosa tradition. Supporting affidavits of the delegates of each family who were involved in the lobola negotiations were filed.

[25] I have also taken into account that the first respondent has not disputed that the applicant entered into a valid customary marriage with the deceased in accordance with the customs and usages of the isiXhosa. She has not placed any of the evidence related to the customs of the isiXhosa tradition in dispute. In fact, it is common cause that the applicant and the deceased were in a valid customary marriage. In this regard the first respondent admitted that when she met the deceased, he informed her that he was married but advised that the applicant had left him. There is consequently no dispute that the deceased and the applicant were validly married in terms of the customs and usages of the isiXhosa tradition.

Was the Customary Marriage Dissolved Prior to the Civil Marriage?

[26] Having found that the applicant and the deceased concluded a valid customary marriage, the issue which should be resolved is whether the customary marriage had dissolved prior to the conclusion of the civil marriage. The applicant admitted that she and the deceased were separated but alleged that it was only a

temporary separation and that the marriage still subsisted at the time when he met and married the first respondent.

[27] The first respondent has made vague allegations that the deceased and the applicant separated after the applicant entered into an extra-marital affair. These allegations are entirely hearsay in nature. She has not clearly alleged exactly when the customary marriage had irreparably broken down. The date of the alleged dissolution of the marriage is important because unless the customary marriage of the deceased and the applicant had dissolved prior to the commencement of the Act, it remains valid until such time as it had been dissolved by a decree of divorce.

[28] Furthermore, it was held in *Thembisile and Another v Thembisile and Another*⁹ that:

'It is consequently not lightly to be assumed that a customary union has been terminated by divorce. Proof on a balance of probability must be adduced to support such a contention.'

[29] I have considered that the first respondent only met the deceased in 2018, many years after the commencement of the Act. Even if she is correct that the marriage had irreparably broken down, she has no personal knowledge of whether the customary marriage dissolved prior to the commencement of the Act. I therefore must accept that the customary marriage still subsisted at the time of the commencement of the Act.

[30] As a result, whether or not the customary marriage was dissolved at the date of the civil marriage has to be determined according to the Act and not in terms of customary law. Therefore, reference to customary law regarding the dissolution of the marriage such as the custom of "*puthuma*", does not assist the first respondent, as a marriage which still subsisted at the commencement of the Act could only be dissolved in accordance with a decree of divorce issued by the court. Since the marriage was not dissolved in accordance with a decree of divorce issued by the court, the customary marriage still subsisted at the time when the first respondent and the deceased entered into the civil marriage.

⁹ *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T) at para 26

Factual Disputes

[31] The first respondent alleges that there are genuine disputes of fact which compels the court to reject the applicant's version and to determine the application on the first respondent's facts. These factual disputes to which the first respondent refers are however not central when it comes to the determination of the legal issues that the court is enjoined to determine and it is not necessary for the court to resolve them in order to determine the matter.

[32] It is ultimately of no consequence whether the first respondent and the deceased lived together after their marriage, whether or not she was introduced to the deceased family, how frequently she had contact with the deceased during the civil marriage or whether she forced the deceased to accompany her to the offices of the second respondent to conclude the civil marriage. It is the customary marriage that is under scrutiny, not the civil marriage. If the court finds that the customary marriage is valid and subsisted at the time when the civil marriage was concluded, it must find in favour of the applicant. The validity of the civil marriage is therefore only under scrutiny insofar as it is alleged that it was concluded when the deceased was in a valid customary marriage.

[33] What matters therefore is that the applicant and the deceased concluded a customary marriage, which although not registered, was valid and in existence, and precluded the deceased from entering into a civil marriage with the first respondent.

Posthumous Registration of Customary Marriage

[34] The death of one of the spouses does not mean that the issue of registration becomes moot, as registration is still important for matters such as inheritance, custody of children, and other legal rights that depend on marital status. While the Act recognises customary marriages and makes provision for registration, it does not stipulate whether a customary marriage may be registered subsequent to the death of one of the spouses. Since the Act does not specifically proscribe posthumous registration of the customary marriage, there is no lawful impediment which precludes the second respondent from registering the customary marriage.

Conclusion

[35] There is no genuine factual dispute regarding the validity of the customary marriage nor is there a genuine factual dispute regarding whether the customary marriage still subsisted at the time when the first respondent and the deceased entered into their civil marriage.

[36] Sufficient factual evidence was placed before the court that a valid customary marriage was concluded between the deceased. No evidence was adduced that the customary marriage was dissolved in terms of a decree of divorce issued by a court. The court must therefore accept the applicant's version that despite their temporary separation, their customary marriage still subsisted at the time the deceased married the first respondent.

[37] Accordingly, by virtue of the provisions of section 3(2) of the Act, the deceased was precluded from entering into a civil marriage with the second respondent and the civil marriage is as a consequence null and void *ab initio*.

The Order

[38] Accordingly, the following order shall issue:

- 1) The second respondent is hereby ordered in terms of section 4(7) of the Recognition of Customary Marriages Act 120 of 1998 to register the customary marriage entered into in June 1988 between the applicant (T[...] S[...]) and the late N[...] N[...].
- 2) The marriage entered into between the deceased and the first respondent on 13 January 2020, is hereby declared null and void.
- 3) The first respondent is ordered to pay the costs of the application on a party and party scale.

G APPELS
ACTING JUDGE OF THE HIGH COURT

Heard: 24 July 2025
Delivered: 11 November 2025

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