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**IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE**

**CASE NO: 8467/2021**

(1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED: YES/NO  
Date: 09/12/2025  
Signature

**IN THE MATTER BETWEEN:**

**NKHENSANI MASHELE**

**AND**

**NTSAKO NWAMITWA**

**MASTER OF THE HIGH COURT**

**THE DEPARTMENT OF HOME AFFAIRS**

**APPLICANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

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**JUDGMENT**

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**NGOBENI J**

- [1] *"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"* This is taken from paragraph 17 of the judgment in *Mbungela & another v Mkabi & others (820/2018) [2019] ZASCA 134 (30 September 2019)*.
- [2] The applicant is Nkhensani Mashele, an adult female person, born on 18 January 1988, residing at Robeni village. The 1<sup>st</sup> respondent is Ntsako Nwamitwa, an adult female person, residing at Tarentaalrand, Tzaneen, Limpopo Province. The 2<sup>nd</sup> respondent is the Master of the High Court, Polokwane, a person appointed as such in terms of the laws of the Republic of South Africa, with its principal place of business at the High Court Building, Biccard street, Polokwane. The third respondent is the Department of Home Affairs, a Ministry established in terms of the Constitution of the Republic with its principal place of business at Hallmark building, 2[...] J[...] R[...] street, Pretoria.
- [3] The applicant seeks an order for the following prayers:

- (i) that the customary marriage between her and the late Doctor Given Mathebula (the deceased) concluded on 29 November 2014 be confirmed and declared valid,
- (ii) that the marriage between the 1<sup>st</sup> respondent and the deceased entered into on 01 August 2020 be declared invalid and be nullified,
- (iii) alternatively, in the event the court finds that the customary marriage between the 1<sup>st</sup> respondent and the deceased is lawful and valid, that it be found that such marriage is out of community of property,
- (iv) that the 1<sup>st</sup> respondent be barred from acting as executor of the estate of the deceased pending the granting of the final order in this matter,
- (v) that the 1<sup>st</sup> respondent pays costs of this application.

[4] The applicant alleges that she fell in love with the deceased in the year 2002. A child was born out of that relationship on 11 Marh 2005. She had moved to stay with the deceased after falling pregnant at his parental home and continued to do so. On 29 November 2014, the deceased paid *lobola* for her, in the presence of her family members and the deceased had sent six emissaries to her home. The two families agreed on an amount of R19 500-00, but only R8000-00 was paid, and the balance remaining was R11 500-00. Her aunt informed her that the *lobola* negotiations were concluded and the families reached an agreement.

[5] There was food which was cooked. Neighbours and other relatives came and celebrated with them. Around 20h00 on that day the deceased came to fetch her and went to the parental home of the deceased where they were staying. At the parental home of the deceased, she was welcome, and a report was given to the family of the deceased, and food was served. In the year 2019 they experienced marital problems which even led to physical abuse, and she eventually left back to her parental home, but left her child at the home of the deceased. The deceased died on 07 March 2021.

[6] Their customary marriage was not registered. Around June 2020 she received information that the deceased was paying *lobola* for the first respondent. She was eventually issued with a marriage certificate posthumously. The first respondent appears to have also obtained a marriage certificate posthumously and the letters of executorship have been issued to her. The applicant further states that the first respondent and her child are not entitled from benefiting from the estate of the deceased as she is the lawful wife of the deceased and also that the child of the first respondent is not the biological child of the deceased.

[7] Olma Nurse Makabinge, is according to the confirmatory affidavit a male unemployed person who is the brother to the deceased, but the copy of the identity document attached shows that she is a female person born on 06 March 1976. The confirmatory affidavit of Tshepo James Mamorobela is also attached which describes that the deponent is an adult female person, and the copy of the identity document that was attached show that it is a male person born on 10 November 1968. I believe that due attention and diligence was not exercised when the said affidavits were prepared. The confirmatory affidavit of the father of the deceased Shaniseka Shadrack Mashele is attached. The confirmatory affidavit of the mother of the applicant is also attached.

[8] The first respondent on the other hand states that as she was in a romantic relationship with the deceased, his family and her family convened at her home on 01 August 2020 for *lobola* negotiations. Her family asked R50 000-00 as *lobola* price, but the family of the deceased managed to pay only R34 500-00. There was a celebration, food and drinks were served. The first respondent attached pictures of the celebration. The pictures clearly depict a wedding celebration. The first respondent was after the celebration accompanied by her aunts to the parental home of the deceased. There was a feast prepared at the home of the deceased, where she was welcome with a celebration.

[9] When she started staying with the deceased, she found the deceased staying with his daughter, and he had informed her that he was in a love relationship with the mother of his child and they had since broken up. She was responsible for taking care of the deceased together with his family members as he was wheelchair bound. She denies that she obtained the letter of executorship fraudulently.

[10] She denies that the applicant was married to the deceased at the time that she entered into a marriage relationship with the deceased. If the court finds that a valid customary marriage was concluded between the deceased and the applicant at the date when she concluded a valid customary marriage with the deceased, her submission is that consent was not required or could not be obtained because the deceased and the applicant never stayed together as husband and wife or have not stayed together as husband and wife years prior to her customary marriage being concluded.

[11] Ngomana Mujaji Martha, Dala Lawrence Nwamitwa, Elias Mkhubele and Ngomana Velly were the emissaries of the first respondent (although in their affidavits it is mentioned that they were representing the second respondent- which is clearly not correct). The confirmatory affidavit of Kgapane Abel Sebola is attached although it does not bear a date on which it was commissioned.

[12] It was clarified in the replying affidavit that the deceased was actually involved in an initial accident on 11 August 2012 which resulted in injuries that made him to be wheelchair bound.

[13] The issue in dispute between the applicant and the first respondent is whether the appellant was by law required to give consent to the deceased to marry the first respondent as she was still married to the deceased as of 01 August 2020, as they were never divorced.

[14] On 15 November 2000 the Recognition of Customary Marriages Act<sup>1</sup> came into operation. The recognition of customary marriages is governed by the Recognition of Customary Marriages Act 120 of 1998 (RCMA or Act 120 of 1998). It governs the recognition of customary marriages which were entered into after the said Act came into operation. The requirements for the validity of a customary marriage are the following in terms of section 3(1) of Act 120 of 1998:

- (1) 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

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<sup>1</sup> 120 of 1998.

- (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.

[15] Customary marriages are in their nature mostly not monogamous and because of that it is necessary that proprietary consequences of each marriage in a polygamous set up be clearly determined. Section 7 of RCMA states the following with regard to proprietary consequences:

**7. Proprietary consequences of customary marriages and contractual capacity of spouses-**

"...

*(6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve written contract which will regulate the future matrimonial property system of his marriages,*

... "

[16] The court must also mention for the sake of completeness that section 7(2) of Act 120 of 1998 states that a customary marriage entered into after the commencement of the said Act 120 of 1998 in which a spouse is not a partner in any other existing customary marriage, is a marriage in

community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property of their marriage.

## **8. Dissolution of customary marriages-**

*"(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage, ... "*

[17] This court must firstly determine if there is an existence of a valid customary marriage between the applicant and the deceased and also determine if there is a valid customary marriage that was concluded between the first respondent and the deceased. The court has to go through that exercise first because on each side there is a dispute that a valid customary marriage was concluded with the opponent. I will therefore start by determining if there is a valid customary marriage concluded between the applicant and the deceased.

[18] The conclusion of customary marriages may be concluded according to practices of different ethnic groups, but what remains is that for the court to declare its validity it must fall within what has been mentioned in the

provisions of section 3 of the RCMA, which is the basic determination of a fundamental framework of what a customary marriage is. My understanding is that the RCMA when formulating the requirements of a valid customary marriage took into account what all the different ethnic groups or tribes subscribe to in the conclusion of their customary marriages and came to these common practices to determine the requirements thereof.

[19] The applicant in her founding affidavit states that emissaries were sent to her home by the family of the deceased on 29 November 2014. She also mentioned the names of six emissaries from the family of the deceased who were amongst the people who came to her home to pay lobola for her. Olma Nurse Makabinge, Tshepho James Mamorobela deposed to confirmatory affidavits to say that they were part of the emissaries that went to pay lobola for the applicant. Shaniseka Shadrack Mashele and Mthavini Selinah Mashele confirmed that they are the parents of the applicant and that the deceased married their daughter by customary rites when he paid lobola for her on 29 November 2014, and the applicant and the deceased were already staying together at that time.

[20] There is a *lobola* letter which has been attached to the founding affidavit of the applicant. The date on the document is not visible, and the document was not translated to the language of record, which is English

in this case<sup>2</sup>. The applicant states in her founding affidavit that at the time of the conclusion of their customary marriage she was already 26 years of age, which means that she was above the age of 18 which is a requirement for a valid customary marriage in terms of the RCMA. The court could see from the founding affidavit that her identity number shows that she was born on 18 January 1988. The court cannot say as to what is stated in the letter, for the reasons that I have stated, but the court is satisfied as that is not disputed that it is a *lobola* letter stating the terms of the negotiations between the families.

[21] The evidence by the applicant is that she was not formally handed over to the family of the deceased by her family but was fetched by the deceased from her home after the lobola negotiations were concluded. That has been a sticky issue in our courts for some time as to whether in *lieu* of formal hand over one can say that a valid customary marriage was concluded. That led to decisions such as *D.R.M. v D.M.K.*<sup>3</sup>, penned by Makgoba JP (as he then was), a judgment of this Division, where it was decided that one of the crucial elements of a customary marriage is the

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<sup>2</sup> *Oosthuizen and Another v S* (Appeal) (CA&R 248/2021; CA&R 45/2023) [2024] ZAECKMHC 101;2024 (2) SACR 600 (ECMK) (19 September 2024); [17] In February 2003 the Heads of Courts established a committee to prepare and report on the use of various official languages in Courts and make recommendations in connection therewith. The Committee recommended that:

‘... , for reasons of practicality, English should be regarded as the language of record for all courts. This should not deny the litigant, witness or legal practitioner the right, where practicable, to address the court in the language of his or her choice.... Where contemporaneous translation is not available, the court record or portions of the court record in a language other than English, must be translated into English.’

<sup>3</sup> (2017/2016) [2018] ZALMPPHC 62 (7 November 2018), *Motsotsoa v Roro & Others* (46316/09) [2010] ZAGPJHC 122; [2011] 2 All SA 324 (GSJ) (1 November 2010).

handing over of the bride, and because that requirement was not fulfilled, the court found the customary marriage entered into to be invalid.

[22] That issue has now been settled by the Supreme Court of Appeal in the *Mbungela* case, *supra*, which I have quoted in the opening paragraph of this judgment, and also in the case of *Tsambo v Sengadi*<sup>4</sup>, where it was confirmed that customary law is not static but living traditions and customs that change with times, and that the handing over ceremony of a bride is an important but not necessarily a key determinant of a valid customary marriage. I am therefore satisfied with the evidence of the three emissaries and that of the parents of the applicant that indeed a valid customary marriage was concluded between the applicant and the deceased.

[23] The determination of whether existed a valid customary marriage between the deceased and the first respondent must follow the same process as in the marriage of the applicant and the deceased. There is also a *lobola* letter that was attached to the answering affidavit. There are confirmatory affidavits of Ngomana Mujaji Martha, Dala Lawrence Nwamitwa, Elias Makhubele and Ngomana Velly who were emissaries during the *lobola* negotiations of the first respondent and the deceased. The first respondent went further by even attaching photographs of the

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<sup>4</sup> (244/19) [2020] ZASCA 46 (30 April 2020).

celebration of the marriage between her and the deceased. The first respondent was even handed over to the family of the deceased by her aunts where there was even a celebration. The requirements for a customary marriage were also concluded between the first respondent and the first respondent.

[24] I have already made a finding that a valid customary marriage was concluded between the applicant and the deceased on 29 November 2014. A customary marriage was also entered between the first respondent and the deceased as it has been illustrated above on 01 August 2020. The issue that the court has to decide in this case is whether the customary marriage that was entered into between the first respondent and the deceased is invalid by virtue of the fact that the consent by the applicant was not granted to the deceased before he entered into a customary marriage with the first respondent.

[25] The issue that this court has to decide is not a *novel* issue because the Constitutional Court has decided the question of whether the consent by the first wife is necessary to validate the subsequent marriage. That question was answered in the positive by the Constitutional Court in *Mayelane v Ngwenyama and Another* (Mayelane case)<sup>5</sup>. The

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<sup>5</sup> (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013).

Constitutional Court basically found that the consent of the first wife is a requirement for the validity of a customary marriage.

[26] The constitutional guarantees that are enshrined in the Constitution of the Republic of South Africa, 1996 (Constitution), guaranteeing for instance the right to dignity and the right to life must be considered in determining as to whether the consent of the first wife must be given before a subsequent valid customary marriage can be entered into<sup>6</sup>. The facts and customs of the parties in the *Mayelane* case, *supra*, are not farfetched from the case at hand as the parties in the case at hand are also of Tsonga descent. The central issue in the *Mayelane* case, *supra*, was whether the existing wife gave consent for the customary marriage of Ms. Ngwenyama to be concluded. That is precisely the issue in the case at hand as well.

[27] On paragraph 23 of the High Court judgment by Bertelsmann J of *Mayelane v Ngwenyama & Another*<sup>7</sup> (same case quoted above while in the High Court as the court of first instance), that court had already raised concerns about the proprietary consequences of a subsequent customary marriage, where one was already concluded by saying the following:

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<sup>6</sup> *Ibid* footnote 5, *supra*.

<sup>7</sup> (29241/09) [2010] GNDP (24 March 2010).

*"Both the existing spouse and the intending further spouse have a vital interest in having their relative proprietary positions safeguarded by the procedure that is laid down in sub-section (6)"*

[28] The High Court as a court of first instance was also already aware that the constitutional guarantees that are to be applicable to each and every person, are also applicable to spouses in customary marriages, and that was expressed as follows on paragraph 27 of the said High Court judgment:

*"The most persuasive consideration must however be the gross infringement of the first or earlier spouses' fundamental rights. To respect of their dignity, physical and emotional integrity, their right to protection from abuse-in this instance both emotional and economic or material;- their right to be treated on an equal footing with their husband as decreed by the Act; their right to equal status as marriage partners arising from the Act; their right to marital support from their husband; their right to marital intimacy and trust, which rights flow naturally from those guaranteed by the Act and the Constitution. A gross infringement of these rights would be committed if the husband were to be allowed to enter into a further marriage without their knowledge and acquiescence"*

[29] The Constitutional Court as well emphasised the right to equality and dignity as being fundamental. That court went further to express that even though witnesses and experts testified with regard to the customs and practices of the Xitsonga culture, the court still had the task to bring customary law in line with the values of the Constitution.

[30] I have already made a finding that a valid customary marriage existed between the applicant and the deceased, and that customary marriage was never dissolved. I have also made a finding that the requirements as envisaged in the provisions of section 3(1) of the RCMA have been complied with in as far as the entering into a customary marriage with regard to the first respondent is concerned, with the issue of validity being the only last aspect that I have to decide.

[31] The notice of motion has a prayer in the alternative which states that if the court finds that a valid customary marriage existed between the first respondent and the deceased, then the court must declare that marriage to be out of community of property. In the written argument by the applicant, that prayer was abandoned. In the *Mayelane* case, which is a guiding case in the case at hand, no mention is made of the creation of two estates to try and accommodate the two spouses. It is so that the Supreme Court of Appeal (SCA) in the *Mayelane* case, found the second marriage to be valid as all the requirements for a valid customary

marriage were met, and its reasoning was based on the fact the interpretation of the provisions of section 7(6) of the RCMA should be about property and not the validity of the marriage.

[32] The Constitutional Court in reasoning against the interpretation by the SCA in the *Mayelane* case on the interpretation of section 7(6) of the RCMA and the right to equality and dignity, had the following to say on paragraph 72, which I will quote verbatim, so that the context is not lost in my interpretation, which is:

*"Second, where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent"*

[33] Paragraph 74 of the same judgment reads as follows:

*"Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent"*

[34] In the case at hand the first respondent admits that indeed consent of the applicant was not obtained, because in her view that could not be necessary because there was no valid customary marriage that was concluded between the applicant and the deceased. I have already made a finding that such a valid customary marriage existed. In the light of the *Mayelane* case and the reasoning of that judgment, which I align my reasoning with, I find that it was necessary to obtain consent of the applicant before the deceased entered into a customary marriage with the deceased. That consent was not obtained, and the customary marriage between the first respondent and the deceased falls to be declared null and void.

[35] There is nothing untoward about the first respondent opposing this application, because the customary marriage that she entered into with the deceased is rendered invalid by operation of the applicable legal principles, and she cannot be faulted to challenge what she believed was a valid customary marriage. It is for those reasons that the court will order that each party bears its own costs.

[36] The points in limine that were raised by the first respondent had no substance, because there was no need for oral evidence to be led, and as rightly put by the applicant, she had direct interest in bringing this application before court, and both points in *limine* are devoid of merit and stand to be dismissed.

[37] In the result the following order is made:

- (i) the points in *limine* raised by the first respondent are both dismissed,
- (ii) it is declared that there was a valid customary marriage which was entered into between Nkhensani Mashele (Applicant) and Doctor Given Makabinge (the deceased),
- (iii) the customary marriage entered into between Ntsako Nwamitwa (first respondent) and Doctor Given Makabinge (the deceased), is declared null and void,
- (iv) each party to bear its own costs.

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**J.T. NGOBENI**

**JUDGE OF THE HIGH COURT**

### **Appearances**

|                    |   |                                        |
|--------------------|---|----------------------------------------|
| For the Applicant  | : | Adv. G. Ramawela                       |
| Instructed by      | : | Shiviri Manzini Masetla Inc. Attorneys |
| For the Respondent | : | Mr. A. Sebola                          |
| Instructed by      | : | Maloka Sebola Attorneys Inc.           |
| Date of hearing    | : | 27 August 2025                         |
| Date of judgment   | : | 09 December 2025                       |

**Judgment transmitted electronically**