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

Case Number: 169238/25

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES
DATE 09/02/26
SIGNATURE

In the matter between:

MONYELEOTE, MOHLEIWANA MAXWELL

Applicant

and

DEPARTMENT OF HOME AFFAIRS

First Respondent

MASTER OF THE HIGH COURT, PRETORIA

Second Respondent

Customary marriage — Registration — Sections 4(4)(a), 4(4)(b) and 4(7) of the Recognition of Customary Marriages Act 120 of 1998 — Failure by Department of Home Affairs to register marriage — Whether court may order registration without proper evidentiary foundation.

Administrative law — Administrative action — Failure to take a decision — Review under PAJA — Sections 6(2)(g) and 6(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 — Applicant seeking substitutionary relief without bringing a PAJA review.

Customary law — Proof of valid customary marriage — Living customary law — Need for evidence of cultural group, applicable customs, and compliance with those customs — Lobola letter insufficient on its own.

Citation of state parties — State Liability Act 20 of 1957 — Incorrect citation of Department instead of Minister.

JUDGMENT

VAN NIEKERK, N, AJ:

SUMMARY: The applicant sought an order compelling the Department of Home Affairs to register a customary marriage with his late wife and issue a marriage certificate. The marriage had never been registered. The applicant relied primarily on a lobola letter and confirmatory affidavits that added no substantive detail. Application dismissed.

Held: The applicant failed to comply with **s 2(1) of the State Liability Act 20 of 1957** by citing the Department instead of the Minister.

Held: The relief sought amounted to a **substitution order** based on an alleged failure by the registering officer to take a decision, which should have been pursued through a **PAJA review** under **ss 6(2)(g) and 6(3)(a)**. No such review was brought.

Held: Under **s 4(4) of the RCMA**, a registering officer must be *satisfied* that a valid customary marriage exists. This requires an **investigation**, which the applicant did not enable.

Held: Without adequate evidence, the court could not conduct the investigation Without adequate evidence, the court could not conduct the investigation required by **s 4(7) of the RCMA**.

Held: The applicant provided **no evidence** of:

- the **cultural group** of the parties,
- the **customs and usages** applicable to that group,
- **which customs were followed**, as required by **MM v MN, Manwadu, Shilubana, and EMK v EMB**.

Held: A lobola letter alone is **insufficient** to prove a customary marriage; collateral evidence is required. The confirmatory affidavits were bare and did not corroborate the contents of the lobola letter.

Held: Given the **separation of powers** (per **Trencon Construction**), the court could not substitute the registering officer's decision in the absence of a review under **PAJA** and exceptional circumstances.

INTRODUCTION:

[1] This matter came before me as an unopposed application in the Family Court on Tuesday, the 27th of January 2026.

[2] The applicant approached the Court for an order in the following terms:

- “1. That the first respondent be ordered to register the customary marriage entered into between the applicant and the late Amukelani Amanda Ndlovu of identity number: 9[...], in accordance with the provisions of section 4(4)(a) of the Recognition of Customary Marriages Act, 120 of 1998, within a period of eight (8) weeks from the date of being served with a copy of this court order;

2. That the first respondent be ordered to issue to the applicant, a certificate of registration, in accordance with the provisions of section 4(4)(b) of the Recognition of Customary Marriages Act, 120 of 1998, within a period of eight (8) weeks from the date of being served with a copy of this court order;
3. The costs of this application on attorney and own client scale, only in case of opposition of this application by the first respondent;
4. Further and/or alternative relief."

RELEVANT FACTS ALLEGED BY THE APPLICANT:

- [3] The applicant was married to the late Amukelani Amanda Ndlovu (hereinafter referred to as "the deceased") in community of property and in accordance with the terms of the Recognition of Customary Marriages Act 120 of 1998 (hereinafter referred to as "RCMA") on 24 September 2023 at Mkhuhlu, Mpumalanga Province.
- [4] All the requirements of section 3 of the RCMA were complied with in that:
- 4.1 the applicant and the deceased were both above the age of 18 at the time of the conclusion of the marriage;
 - 4.2 the applicant and the deceased had consented to be married to each other under Customary Law;
 - 4.3 the marriage was negotiated and entered into and celebrated in accordance with Customary Law.
- [5] A certified copy of the Lobola letter is attached to the application as Annexure "MM2". The document attached as Annexure "MM2" reads as follows:

“Minuets (*sic*) of Lobola negotiations (*sic*) held at Mkhulu between Ndlovu (bride) and Monyeleote (groom)

1. Mvulamolomo at the value of R1 000.00 (one thousand rands) was paid by the Monyeleote (*sic*) family.
2. Amukelani (bride) identified the Monyeleote (*sic*) family; she confirmed that she knows them and she gave the elders permission to negotiate lobola on her behalf.
3. An agreement of 15 cattle, including 2 live cattle and 13 which will determine in cash, was reached by the two families.
4. Each cattle (of the 13) are valued at R6 975.00 (six thousand nine hundred and seventy five rands) which culminates to a total of R90 675.00 (ninety thousands (*sic*) six hundred and seventy five rands).
5. Traditional practices were observed to unite the two families and the union.
6. The traditional practice of exchanging gifts between the two families was observed.
7. Gifts that were received by the Monyeleote (*sic*) family:
 - Suit, ya manana + shoes + doek
 - Suit ya kokwani + shoes + doek
 - Nkumba
 - Brandy
 - One case of cold drink
 - One of beers
 - Snuff *2
8. The Monyeleote (*sic*) family paid R28 500.00 (twenty-eight thousand five hundred) in cash as part of the payment on the agreed lobola price.
9. The balance will be settled on the date to be announced.
10. The balance is R62 175.00.”

[6] The document was signed on the 24th of September 2023 and it records that the delegates present at the negotiations were Dumisani Mabuza; Vincent Malabela; Allen Mabuza; Phillies Mokoena; Molatelo

Monyeleote; Reuben Monyeleote; Isiah Monyeleote; Coster Mokgalapa; and Lizzy Seerane.

- [7] The deceased died on 18 April 2025, without the marriage being registered.

- [8] As the deceased's surviving spouse, the applicant approached the second respondent on 2 June 2025 to report the death of the deceased.

- [9] On the same date the second respondent issued a query sheet requesting to be furnished with a certified copy of the applicant's marriage certificate, indicating his inability to accept a certified copy of the Lobola letter.

- [10] Upon receipt of the query sheet from the second respondent the applicant approached the first respondent for the first respondent to register the marriage to the deceased and issue the applicant with a marriage certificate, without any success.

- [11] The applicant is the only beneficiary of the deceased's estate and at this stage the deceased's estate remains unreported and unattended to.

- [12] The applicant attached confirmatory affidavits by his delegates at the time of the lobola negotiations. It needs to be noted that in those confirmatory affidavits no further information is placed before the court except for a paragraph contained in each of the confirmatory affidavits stating:

"I have read the founding affidavit of Mohleiwana Maxwell Monyeleote and hereby confirm the content thereof is both true and correct in as far as it relates to me."

RELEVANT LEGAL PRINCIPLES:

[13] Section 2(1) of the State Liability Act 20 of 1957 stipulates that:

“In any action or other proceedings instituted against a department, the executive authority of the department concerned must be cited as nominal defendant or respondent.”

[14] Section 3 of the RCMA provides the following:

“3. Requirements for validity of Customary Marriages

- (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, 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”.

[15] Section 4 of the RCMA provides that:

“4. Registration of Customary Marriages

- (1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.
- (2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering office with the prescribed information and any

additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

(3)

(4) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobola agreed to and any other particulars prescribed.

(b) The registering officer must issue to the spouses a Certificate of Registration, bearing the prescribed particulars.

(5)

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(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”.

[16] The Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives effect to section 33 of the Constitution, ensuring administrative action is lawful, reasonable and procedurally fair. It mandates that decisions affecting the public be transparent, justifiable and subject to review, empowering citizens to request reasons for administrative decisions.

[17] As per the definitions in section 1 of PAJA an administrative action is defined as:

“Any decision taken or any failure to take a decision by

- a. an organ of state when:
 - i. exercising a power in terms of the Constitution or a provincial Constitution; or
 - ii. exercising a public power or performing a public function in terms of any legislation; or
- b. ...”

[18] If regard is had to section 4(4) of the RCMA, it is clear that in terms of sections 4(4)(a) and (b) the obligation placed on a registering officer to, if satisfied register a customary marriage and issue the spouses a certificate of registration, is an administrative action as defined in PAJA and specifically in section 1(a)(ii).

[19] Section 6 of PAJA determines:

“Judicial review of administrative action.

- (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicially review an administrative action if
 - (a)
 - (g) the action concerned consists of a failure to take a decision;
 - (h)”
- (3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where-
 - (a)(i) an administrator has a duty to take a decision;
 - (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
 - (iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the

failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or
(b)(i) ...”

[20] *In casu* it is clear that the applicant is relying on the allegation that the first respondent failed to take a decision as contemplated in section 6(2)(g) read together with section 6(3)(a) of PAJA.

[21] The remedies in proceedings for judicial review, as set out in PAJA, relevant to this matter are those in section 8(2) indicating that the court or tribunal in proceedings of judicial review in terms of section 6(3) may grant an order that is just and equitable, including orders –

- 21.1. directing the taking of the decision;
- 21.2. declaring the rights of the parties in relation to the taking of the decision;
- 21.3. directing any of the parties to do, or to refrain from doing, any act or thing, the doing or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
- 21.4. as to costs.

[22] The Constitutional Court in the matter of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* 2015 (5) SA 245 (CC) emphasised that where a court replaces an administrator’s decision with its own it is a serious intrusion into the domain of the executive. The Constitutional Court held that:

- 22.1 Courts must be avoid usurping that role;¹
- 22.2 Judicial deference is not a weakness, but it is a Constitutional requirement flowing from the separation of power and deference “ought to be shaped by a conscious determination

¹ *Trencon Construction* as referenced in paragraph [22], para [44], p 257.

not to usurp the functions of administrative agencies; not to cross over from review to appeal”.²

22.3 The separation of power does not prevent courts from granting effective relief;³

22.4 When considering exceptional circumstances, courts must adopt and approach ‘consonant with the Constitution’ and must afford appropriate preference to the administrator. This is explicitly linked to the doctrine of separation of powers;⁴

22.5 “given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as a good position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Therefore, a court should still consider other relevant factors... The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances”.⁵

22.6 Substitution is an extraordinary remedy and remittal is almost always the prudent and proper course. This reflects the constitutional principle that administrators, not courts, are the primary decision makers.⁶

[23] It needs to be mentioned that the “exceptional circumstances enquiry” referred to by the Constitutional Court refers to applying section 8(1)(c)(ii)(aa) of PAJA which section in exceptional circumstances affords a court the discretion to make a substitution order pursuant to an administrative review.

² *Trencon Construction supra*, para [44], p 257.

³ *Trencon Construction supra*, para [45], p 258.

⁴ *Trencon Construction supra*, para [43], p 257.

⁵ See *Trencon supra*, para [47] p 258 and 259.

⁶ See *Trencon supra*, para [42], p 257.

[24] In the matter of *EMK v EMB*⁷, the High Court, Gauteng Division, Pretoria, was confronted with a similar application before court of parties requesting the court to declare that the customary marriage between them is valid and to order the second respondent (correctly cited as the Minister of Home Affairs and not the Department of Home Affairs as in *casu*) to register the marriage in terms of section 4 of the RCMA.

[25] In *EMK*, supra, the court, explains the complexity of determining “living customary law” and why evidence is essential,⁸ and found, to my mind correctly so, that:

- 25.1 Customary law is defined as customs and usages traditionally observed by a specific group;⁹
- 25.2 Referring to the Constitutional Court’s judgment in *MM v MN*¹⁰, the party alleging the marriage bears the *onus* to prove that the marriage was negotiated, entered into or celebrated according to the relevant customs;¹¹
- 25.3 Referring to *MM v MN*¹², courts must apply “living customary law”, meaning the actual, evolving practices of the community rather than rigid or codified versions. This flexibility is both a strength and a challenge: the real difficulty lies in determining the content of the living law and ensuring it aligns with constitutional values;¹³
- 25.4 Customary law may impose additional validity requirements for a customary marriage beyond those listed in the RCMA. To determine these requirements, a court must look to the

⁷ 2024-094190; 2023-010767 (2025) ZAGPPHC 289 (18 March 2025).

⁸ See *EMK* supra paras [27] to [31].

⁹ See *EMK* supra para [16].

¹⁰ 2013 (4) SA 415 CC.

¹¹ See *EMK* supra paras [28] to [29].

¹² Supra at 8.

¹³ See *EMK* supra paras [28] to [29].

customary practices of the specific cultural community involved;¹⁴

- 25.5 Referring to Supreme Court of Appeal's judgment in *Manwadu v Manwadu and others*¹⁵, the alleging party must show all legal and customary requirements were adhered to by advancing collateral evidence;¹⁶
- 25.6 Courts are constitutionally obliged under section 211(3) to apply customary law whenever it is relevant, but because living customary law is often difficult to establish, they must rely on evidence of the actual practices of the community concerned, as emphasised in *Shilubana v Nwamitwa*¹⁷, where the Constitutional Court held that parties must place evidence of present customary practices before the court and that courts must recognise developments where they have occurred.¹⁸
- 25.7 Customary law is often difficult to determine because it is rooted in the diverse practices, usages, and traditions of different African communities, varies across time and place, and must be applied by courts in its living, evolving form.¹⁹
- 25.8 Proving a customary marriage requires more than asserting the lobola was negotiated. The litigant must prove the applicable customary law, including which cultural group the parties belong to; which usages, customs and traditions apply to that specific group and which were followed by the parties;²⁰
- 25.9 Factual compliance with those customs will include evidence of lobola negotiations, payment or part payment thereof, handing over or integration of the bride, observance of rituals

¹⁴ See EMK supra paras [28] to [29].

¹⁵ (2025) ZASCA 10 at para 45.

¹⁶ See EMK supra paras [23] to [25].

¹⁷ 2009 (2) SA 66 (CC)

¹⁸ See EMK supra paras [32] to [34].

¹⁹ See EMK supra para [31].

²⁰ See EMK supra paras [8] and [9].

or ceremonies, participation of family representatives.²¹ The lobola letter on its own does not prove a customary marriage;²²

- 25.10 Corroborative evidence is essential, because customary law varies across communities and evolves. The court requires collateral evidence such as testimony from family members, evidence from traditional leaders, expert evidence, affidavits from community members;²³
- 25.11 The court must not simply accept a bare allegation of a customary marriage. The court must examine the law in the context of the community and require evidence of present practice. Under section 4(7) of the RCMA courts must investigate before ordering registration of a marriage;
- 25.12 Section 4(4) and 4(5) of the RCMA requires the registering officer to be satisfied that a valid customary marriage was entered into before registering same. Both the registering officer and the court must therefor conduct an “investigation” in order to be satisfied that the marriage meets the requirements of the RCMA and the relevant customs and traditions of the parties involved;²⁴
- 25.13 The aforesaid investigative duty entails a process that demands careful evaluation of the diversity and adaptability of customary law and caution against relying on judicial notice, which risks freezing living law into rigid, formalised rules, which may stifle its natural evolution;²⁵
- 25.14 Courts can only adjudicate matters within the boundaries set by the parties’ pleadings, which means a litigant relying on customary law must properly define the cause of action and clearly plead the applicable customary law.²⁶

²¹ See EMK supra paras [27] to [31].

²² See EMK supra paras [4] and [8].

²³ See EMK supra paras [38] and [39].

²⁴ See EMK supra para [20].

²⁵ See EMK supra paras [32] to [34].

²⁶ See EMK supra paras [32] to [34].

ANALYSIS OF THE FACTS OF THIS MATTER BASED ON THE LEGAL PRINCIPLES

- [26] The applicant failed to correctly cite the first respondent and did not comply with Section 2(1) of the State Liability Act 20 of 1957.
- [27] In the present matter this court was effectively approached to grant a substitution order pertaining to an alleged failure by the first respondent to take an administrative decision, without approaching court on the premise of a review application under PAJA.
- [28] The application before court is not a review application to review the first respondent's failure to take an administrative action and failed to provide any particularity on the process followed by the applicant to apply for the registration of the customary marriage with the first respondent. No information is provided as to the date upon which application was made to the first respondent and/or the information and documentary proof provided to the first respondent, which would have enabled the first respondent to investigate the validity of such marriage and come to an informed decision whether or not the first respondent is "satisfied" that a valid customary marriage was entered into.
- [29] The RCMA provides the first respondent with an obligation to investigate the validity of the customary marriage, in that it stipulates that the registering officer must be satisfied that a valid customary marriage has been entered into. If regard is had to the legal principles set out above, it is clear that for such a determination to be made the registering officer has to be placed in possession of information pertaining to *inter alia* the following:
- 29.1 The cultural group the parties belong to;
 - 29.2 Which usages, customs and traditions apply to that specific group; and

29.3 Which usages, customs and traditions were followed by the parties.

[30] In my view the only manner in which the applicant could have obtained relief in this matter was to approach court with a review application under PAJA, requesting the review of the first respondent's failure to take administrative action. In such a review application the court would then have been empowered, if grounds for the review existed, to grant an order that is just and equitable as provided for in Section 8(2) of PAJA, including orders –

- 30.1 directing the taking of the decision;
- 30.2 declaring the rights of the parties in relation to the taking of the decision;
- 30.3 directing any of the parties to do, or to refrain from doing, any act or thing, the doing or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
- 30.4 as to costs.

[31] If regard is had to the doctrine of the separation of power, the court cannot simply ignore the administrative process required by the RCMA to be followed by the first respondent and proceed to grant an order without being satisfied that exceptional circumstances exist for such interference.

[32] Even if an argument can be made that the applicant was entitled to come directly to court under Section 4(7) of the RCMA for the registration of the customary marriage without first approaching the first respondent for the registration of the marriage, and/or without such an application being a review application, which I strongly believe is not the correct procedure, the applicant failed to provide any information to enable the court to investigate whether or not a valid customary marriage was entered into;

- [33] The applicant did not indicate which cultural group the parties belong to; which usages, customs and traditions apply to that specific group and which were followed by the parties;
- [34] The applicant relies solely on the lobola letter, which is, if regard is had to the authorities referenced above, not enough to proof the existence of a valid customary marriage;
- [35] Even in respect of the lobola letter the evidence before court is lacking;
- [36] The applicant failed to provide any reasons why the original lobola certificate was not provided to the second respondent and why the original lobola certificate was not provided to court;
- [37] The applicant failed to confirm the correctness of what is contained in the lobola letter in his founding affidavit and did not even request the court to incorporate the information contained in the lobola letter as part of the allegations before court;
- [38] The confirmatory affidavits attached to the founding affidavit, do not take the matter further and provide no information that assist the court to investigate the validity of the customary marriage. In fact, these confirmatory affidavits only serve to confirm that the deponents were the applicant's "emissaries". The affidavits do not even go as far as to confirm that the deponents' signatures appear on the lobola letter.
- [39] *In casu*, the necessary relevant information was not provided to court and even if the court was in a position to interfere with the first respondent's failure to take administrative action, in terms of section 4(7) of the RCMA, without a proper review application before it, the court has not been provided with sufficient information so as to "investigate" whether or not a valid customary marriage was entered into between the applicant and the deceased;

[40] In the premises the application stands to be dismissed.

I make the following order:

- 1. The application is dismissed.**
- 2. No order as to costs.**

Acting Judge **Van Niekerk, N**
In The High Court of South Africa
Gauteng Division, Pretoria

This judgment was handed down electronically by circulating to the parties and the parties' representative by email and by being uploaded to CaseLines.

Date of hearing: 27 January 2026

Date of judgment: 9 February 2026

Appearance:

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