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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

DATE : 2 March 2026

SIGNATURE

CASE NO: 022752/2025

HEARD ON: 5 December 2025
JUDGMENT: 2 March 2026

In the matter between:

B[...] T[...] M[...]

Plaintiff

And

T[...] N[...] H[...] M[...]2

Defendant

JUDGMENT

Strijdom J

Introduction

1. The plaintiff is, B[...] T[...] M[...], an adult female, 37 years of age, employed as a Tele- sales clerk at Makro, Centurion and residing at 0[...] S[...] Place, Extension 5, Danville, Pretoria.
2. The defendant is, T[...] N[...] H[...] M[...]2, an adult male, 39 years of age, employed as a public prosecutor with the National Prosecuting Authority, working at 3[...] S[...] H[...] Street, Braampark Johannesburg.
3. The plaintiff seeks a decree of divorce on the basis that a customary marriage allegedly exists between the parties. The plaintiff, however, did not ask a declaratory order confirming the alleged customary marriage, despite the defendant disputing its existence. The defendant denies that any valid customary marriage was concluded and submits that the proceedings are defective for non-joinder of the civil spouse of the defendant and fatally flawed as the relief sought, (divorce) presupposes a marriage that has not been legally established.

Background

4. On 6 August 2016, the families of the plaintiff and defendant convened a meeting in accordance with customary practices. At this meeting lobola negotiations were concluded, and the parties

agreed upon an amount of R40 000,00. Pursuant to this agreement, the defendant's family paid the sum of R18 000,00 to the plaintiff's family as part payment of the lobola.¹

5. A lobola letter was drafted and signed by the families, recording that an amount of R18 000,00 had been paid by the defendant's family to the plaintiff's family, with a remaining balance of "R22 000,00 still outstanding." The letter further stipulates that in accordance with customary practice, the defendant's family would in future deliver a live cow for slaughtering as part of the marriage rituals. Subsequent to the lobola negotiations and partial payment, the plaintiff and defendant commenced cohabitation.

Issues for Determination

6. The issues for determination by this Court are:
 - (a) whether a valid customary marriage existed between the parties in terms of Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998.
 - (b) Whether the plaintiff has discharged the burden of proving the essential customary requirements, particularly handover, celebration and integration.
 - (c) Whether the plaintiff's failure to seek a declaratory order renders the prayer for divorce uncomplete.

¹ See lobola letter Exhibit "A"

(d) Whether the failure to join the defendants civil spouse renders the proceedings defective.

Common Cause Facts

7. The following facts are either common cause or not in dispute between the parties:

7.1 The parties have been in a relationship since 2009;

7.2 On or about March 2016, the defendant purchased for the plaintiff an engagement ring, a necklace, and earrings, signifying his commitment to the relationship.

7.3 A letter dated 10 April 2016, authorized by the father of the defendant Mr. MS M[...]2 was sent to the plaintiff's family requesting the hand in marriage."²

7.4 On or about 6 May 2016, a response letter was authored and signed by Mr M[...], and was sent to the M[...]2 family accepting that they can come on 6 August 2016.³

7.5 On 6 August 2016, the families of the plaintiff and defendant convened a meeting in accordance with customary practices.

² See exhibit "B"

³ See exhibit "D"

- 7.6 During the meeting of 6 August 2016 lobola negotiations were conducted and an amount of R40 000,00 was agreed upon as lobola. The defendant's family paid a sum of R18 000,00 in cash to the plaintiff's family as part payment of the agreed lobola.
- 7.7 The two families reached an agreement and the lobola letter was drafted and signed by delegates acting on behalf of the two families, recording the partial payment of R18 000,00, the outstanding balance of R22 000,00, and stipulating that the defendant's family would in future deliver a live cow for slaughtering as part of the marriage rituals.⁴
- 7.8 The defendant registered the plaintiff on his medical aid scheme as a beneficiary, effective from 1 September 2016 and that she enjoyed the benefits thereof.
- 7.9 The minor child has, since birth, being 17 March 2017, been using the defendant's surname.
- 7.10 Defendants paid the plaintiff's school tuition fees, thereby contributing to her education and personal development.
- 7.11 The plaintiff was collected by the defendant after the conclusion of the lobola negotiations.

⁴ See Lobola letter Exhibit "A"

7.12 The alleged customary marriage was not registered.

Plaintiffs Case

8. The evidence tendered by the plaintiff can be summarised as follows:

8.1 The plaintiff testified that she met the defendant in 2008 and a romantic relationship only started early in 2009. She testified that the defendant expressed his intention to marry her. The defendant then informed his family and requested the plaintiff to inquire from her parents if they will be open to meet the parents of the defendant for the purpose of introducing themselves to her parents.

8.2 She testified that on 6 August 2016, she was in her room facing the gate to the entrance of her parents' house when she saw four delegations from the defendant's family standing at the gate. She then informed her parents that the M[...]2's had arrived. She was always in her bedroom when negotiations were taking place. The delegation from the defendant consisted of the parents of the defendant and two uncles. The delegation from the plaintiff's side consisted of two uncles from her father's side and two aunts, one from the mother's side and one from her father's side.

8.3 The plaintiff testified that after the negotiations she was then summoned by one of her delegations into the negotiations room, wearing traditional clothes when the father of the defendant said to her that she was now a Makoti in the M[...]2 family and she was welcome into the M[...]2 family as a daughter-in-law. She was then informed by her

family that the defendant's family asked permission for her to go and stay with the defendant at his house situated at 1[...] H[...] v[...] S[...] Street, The Orchards in Pretoria-North.

- 8.4 After she was accepted as a Makoti by the family of the defendant festivities ensued where people ate and drank in celebration of the conclusion of a customary marriage between her and the defendant. It was only the following day after the negotiations that the defendant took her from her parent's house to his place of residence wherein, they lived together as husband and wife.
- 8.5 She testified that her aunts performed a ritual of giving gifts to the defendant's family as a sign that lobola was paid to her family.
- 8.6 She further testified that the defendant chased her out of their house and moved in with a girlfriend whom the defendant has two children with. She testified that the defendant's parents coached the defendant to end the relationship and that defendant was abusive towards her.
- 8.7 **Mr. E[...] M[...]** testified that he is the brother of the plaintiff's father. He was requested by the father of the plaintiff to be part of the delegation and the lobola negotiations.

- 8.8 He testified that on the day in question, the M[...]2 family arrived in the morning and announced themselves in accordance with the Ndebele customs by standing at the gate and calling out to the family of the plaintiff. The delegation from the M[...]2 family indicated who they were and what they wanted from the M[...]2 family.
- 8.9 Mr M[...] testified that he received the M[...]2 delegation at the gate and led them to the delegation room. Present in the negotiation room from the plaintiff's side was him and two other males. The defendants' delegation introduced themselves and explained the purpose of their visit. Lobola negotiations started and both parties reached an agreement on the price of R40 000,00.
- 8.10 Mr. M[...] testified that he wrote the lobola letter which was signed by two members from each delegation. After conclusion of lobola, Mr. M[...]2, the father of the defendant, requested to see his Makoti. Mr. M[...]2 told the plaintiff that she was now welcome into the M[...]2 family as his daughter-in-law. Mr. M[...]2 then asked permission for plaintiff to live with the defendant. Mr. M[...] further testified that gifts were given to the defendant's delegation by the aunts of the plaintiff and thereafter celebrations of having concluded a customary marriage.
- 8.11 **Mr. B[...] M[...]** testified that he was present during the lobola negotiations, together with his two brothers. He was one of the people who signed the lobola agreement.

8.12 Mr. M[...] testified that the delegation of the defendant stood at the gate for 45 Minutes to an hour calling out the family of the plaintiff to open and repeatedly stating their reasons for being at the parents of the plaintiff's house.

8.13 He further testified that the defendant was introduced to the plaintiff's delegations during the lobola negotiations. He testified that the cow which was requested as per the lobola agreement was not important and did not affect the conclusion of the customary marriage.

Defendant's Case

9. The evidence tendered by the defendant can be summarised as follows:

9.1 Defendant testified that he was in a romantic relationship with the plaintiff and in May 2016, he asked the plaintiff to marry him. The marriage proposal was accepted by the plaintiff. His parents requested him to ask the plaintiff if a meeting could be arranged with her parents. The family of the plaintiff insisted on a formal letter wherein the purpose of the meeting would be communicated. A letter was written by the father of the defendant and in return the father of the plaintiff wrote a letter agreeing to meet.

9.2 The defendant testified that the purpose of the meeting was never to enter into a marriage but rather to request permission to marry and to know what the family of the plaintiff will

require from the defendant for a marriage to come into existence. The plaintiff's family accepted the marriage proposal and indicated what requirements needed to be met as per the lobola letter.

9.3 It was the testimony of the defendant that apart from what was contained on the lobola letter, the family of the plaintiff also required gifts from the defendant, and that was an undertaking by the plaintiff's family to provide a cow and the two cows will be slaughtered for "Ukhuhlatswa". A process that would have involved the sharing of half of each cow from both families as a sign of joining the two families. It was supposed to happen on the return of the defendant's family on a date which was still to be determined.

9.4 The defendant testified that no marriage came into existence nor were there any marriage celebrations that took place on 6 August 2016. It is his evidence that he was not present during the alleged celebrations.

9.5 It was the evidence of the defendant that the plaintiff would visit him from time to time and never lived with him as husband and wife. These visits did not only start after the lobola negotiations but throughout the existence of the romantic relationship between them. The defendant would fetch the plaintiff at her parent's house and at the end of the visit, the defendant would return the plaintiff to her parent's house.

- 9.6 The defendant gave evidence that the plaintiff was registered on the defendant's medical scheme as a partner and not a life partner or spouse. The plaintiff was only registered in June 2016 and only became effective on the medical aid in September 2016 after the three-month mandatory period.
- 9.7 He testified that he registered the minor child on the medical aid in his surname not because he was married to the plaintiff but because he sought permission from the plaintiff's father which was granted. He further testified that he has been taking care of the minor child's finance needs and never stopped even after institution of these proceedings.
- 9.8 **Mrs. R[...]** **M[...]** **M[...]**², the mother of the defendant, testified that the defendant expressed his intention to marry the plaintiff. A letter was written by her husband to the plaintiff's family to request permission on behalf of the defendant for the hand-in marriage of the plaintiff.
- 9.9 Mrs. **M[...]**², her husband and two-family representatives arrived at the plaintiff's house and waited at the gate. A young person came to open and took them into the living room. It was her evidence that the purpose of the meeting was not to enter a marriage but to enquire from the **M[...]**² family what would be required by the **M[...]** family for a marriage to come into existence between defendant and plaintiff.

- 9.10 She testified that R40 000,00 was requested by the M[...] family as bride price, gifts and a living cow which was to be slaughtered. The family of the plaintiff also gave an undertaking to slaughter a cow. Half of the cows slaughtered would be shared amongst the two families which will be a sign of joining the two families.
- 9.11 Mrs. M[...]2 testified that the plaintiff was called into the lobola negotiations at the start of the meeting wherein the plaintiff was asked if she knew the defendant's family, which the plaintiff confirmed that she knew them. That was the only time she saw the plaintiff. She testified that at no stage was the plaintiff introduced to them as a Makoti nor did Mr. M[...]2 utter words that the plaintiff was his daughter-in-law and that she is welcomed into the M[...]2 family. It was further her evidence that there was never a request from the M[...]2 family for the plaintiff to go live with the defendant.
- 9.12 The witness gave evidence that there was never a marriage that was entered or celebrated on 6 August 2026, according to her the lobola letter was nothing more than an agreement on what both parties agreed to or a marriage to come into existence.
- 9.13 **Mr. S[...] M[...]2**, father of the defendant, testified that he was the author of the letter that was sent to the plaintiff's family. According to Mr. M[...]2 the purpose of the letter was to request a meeting with the parents of the plaintiff and to request permission on behalf of the defendant for the hand-in-marriage of the plaintiff.

9.14 Mr. M[...]2 gave evidence that he never said that the plaintiff was his Makoti and that the plaintiff was now welcomed into the M[...]2 family as his daughter-in-law. He testified that a woman would be required to be handed over to the M[...]2 family accompanied by another woman. He testified that the lobola letter was only an agreement on what parties had to comply with and that there was no agreement that a marriage was entered and concluded.

9.15 He testified that no gifts were given by the plaintiff's family to the defendant's family on the meeting of 6 August 2016. It is his evidence that the lobola agreement is silent on the request for gifts from the M[...]2 family and there was no marriage entered into and celebrated on 6 August 2016.

Evaluation of the Evidence

10. Stellenbosch Farmers Winer Group Ltd v Martel & Cie Sa and Others, 2003 (1) SA 11 (SCA) (6 September 2002) and National Employers General Insurance Company Ltd v Jagers 1984 (4) SA 437 (E), sets out principles of evidence to determine whether the party bearing the onus has discharged it on a balance of probabilities.

11. Factors to consider to be the following:

11.1 Credibility of a witness

11.2 Reliability of the evidence

- 11.3 Probabilities
- 11.4 Onus of Proof
- 11.5 Corroboration (or lack thereof)
- 11.6 Mutually destructive version principle
- 11.7 Evaluations as a whole

12. The plaintiff did not impress me as a reliable witness. Throughout her cross-examination she was evasive, often providing indirect or inconsistent answers with material contradictions between her and her witnesses.

13. The evidence of the plaintiff contradicts the evidence of her two witnesses. She testified that she was picked up by the defendant on Sunday. Mr. E[...] M[...] and Mr. B[...] M[...] testified that the family informed them that the plaintiff was picked up on the Monday after the lobola negotiations took place.

14. Nowhere on the evidence of the plaintiff does she confirm that the family of the defendant stood at the gate announcing their presence and purpose of their visit for 45 minutes to an hour. She only saw the M[...]2s at the gate and informed her parents that the M[...]2s had arrived. The M[...] brothers testified that the M[...]2s stood at the gate announcing the purpose of their visit for 45 minutes to an hour.

15. The plaintiff testified that gifts were given to the defendant's family. This aspect was never pleaded by the plaintiff.

16. She further testified that the defendant asked permission from her to give the minor child his last name. It is highly improbable that a married man who know that he is married will ask permission from his father-in-law to give his own child his surname.
17. The plaintiff testified that she was registered as the wife of the defendant on his medical aid. In cross-examination by plaintiff's counsel it was put to the defendant that the plaintiff was registered as a life partner on his medical aid.
18. The plaintiff and her two witnesses distanced themselves from the fact that the defendant's family was to return on a further date which was yet to be determined with a living cow for a specific purpose, which was for joining the two families as one at the request of the plaintiff's family. Mr. E[...] M[...] conceded during cross-examination that a living cow was important and necessary for the purposes of joining the two families.
19. The plaintiff and her two witnesses contradicted each other on the people who were present in the negotiation room who represented the plaintiff. She gave evidence that two of her aunts took part in the negotiations but played a secondary role. The M[...] brothers testified that no women represented the plaintiff in the negotiations.
20. The plaintiff testified that she did not receive gifts at the celebration of the wedding from both families. It is improbable in my view that a newly wedded bride will receive no presents from her family. She further conceded that she had no evidence of the celebration of the alleged marriage.

21. Paragraph 10 of the combined summons read as follows: “The celebrations were held at the plaintiff’s home and thereafter the plaintiff was handed over as Mokoti and they lived together at Orchards Ext 24 as husband and wife.” The plaintiff gave evidence that she was first handed over and thereafter celebrations began.
22. The plaintiff testified that she considered herself married on 6 August 2015. No explanation was given why it took her 7 (seven) years to institute the divorce action. The relationship was terminated on 8 September 2018. It is improbable that if a valid marriage was entered into, the plaintiff would wait 7 (seven) years to institute this action.
23. The plaintiff did not testify whether the defendant was present during the celebrations, Mr. E[...] M[...] testified that the defendant came when everyone was eating. He later changed his version and testified that the defendant arrived just before the eating started.
24. Mr. E[...] M[...] testified that the slaughtering of the cow was insignificant. During cross-examination the witness conceded the importance of the cow and what it meant, which was the joining of the two families. He conceded that further discussions were to be held between the two families regarding what was to happen with the slaughtered cow. He further conceded that the family of the plaintiff were at the return of the defendant’s family going to slaughter their animal wherein the parts of the animal will be shared amongst the two families.
25. Mr. B[...] M[...] was cross-examined on the discrepancies on the names and signatures he claimed to have been his on the lobola letter. He identified himself on the lobola letter as A[...]. In his supplementary affidavit he identifies himself as B[...] M[...] M[...]. He signatures on the one

signed on the lobola letter and the signature appearing on his supplementary affidavit. The witness was evasive and blamed the Department of the Home Affairs.

26. Mr. M[...] testified that the slaughtering of the cow was insignificant and did not affect the conclusion of marriage owing to the vastness of the Ndebele customs.

27. The defendant made a favourable impression on me as an intelligent witness whose account was truthful and reliable. He gave a detailed and thorough account of the incident in a straightforward manner. Under cross-examination he was able to logically substantiate his evidence thereby reinforcing it. He impressed me as a good witness and there is nothing to cast doubt on his veracity concerning this matter. His evidence was credible and free from contradictions and discrepancies concerning the details.

28. The evidence of the defendant is corroborated by his parents on material aspects. The witnesses for the defendant corroborated each other on all material aspects. There are no material contradictions in their evidence and no improbabilities.

29. The defendant testified that the families made no attempts to intervene in the breakup of the defendant and the plaintiff as custom will have dictated that both families will sit and try to resolve the issues which may have led to the breakup of the plaintiff and defendant. It is more probable that the families would have made attempts to intervene if a valid customary marriage was concluded.

Legal Framework

The Recognition of Customary Marriage Act 120 of 1998

30. Section 1 defines a customary marriage as “a marriage concluded in accordance with customary law”.

Section 1 describes customary law as customs and usages traditionally observed amongst the indigenous African people of South Africa and which form part of the culture of those people.

Section 3(1) of the Act sets out the requirements for a valid customary marriage:

“For a customary marriage entered into after the commencement of this Act to be valid –

(a) The prospective spouse –

(i) Must be above the age of 18 years; 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..”

31. The plaintiff bears the onus to prove there was a marriage between her and the defendant and that the marriage was negotiated and entered into or celebrated in accordance with customary law.⁵

32. In *MM v MN* the Constitutional Court held that:

32.1 Customary law must be interpreted in line with the Constitution ensuring equality and dignity;

32.2 Customary marriages are legally recognized once the requirements of section 3 are met, even if some cultural practices are omitted and

⁵ See *MM v MN* 2013 (4) SA 415 (CC)

32.3 The Court rejected rigid formalism stressing that living customary law involves with community practices.

Failure by Plaintiff to Call Relevant Witnesses

33. The father of the plaintiff was in my view a relevant witness for the following reasons: The father received the letter from the M[...]2 family and in turn wrote a letter to the M[...]2 family. He interpreted the letter from the M[...]2's to the plaintiff. It was the father who gave permission for the minor child to use the last name of the defendant. According to Mr. B[...] M[...], the father was part of the delegation that prepared their demands to the M[...]2 family a day before 6 August 2016. The father was given at all material times updates of what was happening during the negotiations and nothing would have been agreed upon without the approval of the plaintiff's father. In the absence of any reasonable explanation why the father was not called as a witness the only reasonable inference to be drawn is that the father did not consider the plaintiff married to the defendant.

34. The plaintiff testified that one of the aunts passed away but tendered no explanation why the remaining aunt who gave gifts to the defendant's' delegation was not called to give evidence.

35. The defendant testified that a person known as Gregory (also known as Gongi) was the person who received the M[...]2 delegation at the gate. The plaintiff failed to give reasons why this witness was not called.

36. A reasonable inference can be drawn that the failure to call the said witnesses is that they would not corroborate the evidence of the plaintiff.

Plaintiffs failure to join the civil spouse of the Defendant

37. The plaintiff in this matter is aware of the civil marriage together with her legal team as this aspect was pleaded in the defendant's plea and that the plaintiff availed the minor child to participate in the civil marriage of the defendant that took place in 2022.
38. Any determination regarding the alleged existence and validity of a customary marriage, particularly where a subsisting civil marriage is on record, has the potential to materially affect the rights, marital status and proprietary interest of the civil spouse.
39. The test for non-joinder assesses whether a party has a direct and substantial interest in the subject matter of the litigation, such that their exclusion might result in prejudice to them.
40. In **Gordon v Department of Health⁶ Kwa-Zulu-Natal**, the Court held that "if the order or "judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests" of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined'. The practical effect of validating the customary marriage is that the civil marriage of the defendant would be null and void.

Conclusion

41. The plaintiff contends that the marriage was negotiated and celebrated in accordance with Ndebele customary practices, which satisfies the requirements of section 3(7)(b) of Act 120 of 1998.

⁶ [2008] ZA SCA 99; 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA); 2009 (1) BCLR 44 (SCA)

42. It was submitted by the plaintiff that the negotiations between the two families, the consent of the parties and the handing over of the plaintiff to the M[...]2 family collectively demonstrate compliance with Act 120 of 1998.
43. It was further argued by the plaintiff that the failure to slaughter a cow and the handing over of the bride, while culturally significant, is not an absolute requirement for validating of the marriage.
44. On a conspectus of all the evidence presented in the matter, I conclude that the defendant's version, as corroborated by his patents, presents a more coherent and credible account of events than that of the plaintiff.
45. In this matter the plaintiff failed to plead the applicable customs and traditions which informs the customary law relied on.
46. The plaintiff failed to call relevant witnesses, which could have corroborated her version.
47. The plaintiff failed to join the spouse of the defendant who has a direct and substantial interest in this matter.
48. I conclude that the plaintiff has not discharged the burden of proving that the marriage was "negotiated and entered into or celebrated in accordance with customary law" as required by section 3(1)(b).
49. The Court is particularly concerned by the plaintiff's delay in bringing this action. The plaintiff waited 7 (seven) years after separating from the defendant to file this action. She took no legal

action to assent her claimed marital status after becoming aware of the defendant's civil marriage in 2022.

50. In the result, the following order is made:

1. The action is dismissed.
2. The plaintiff is ordered to pay the costs of this action, which costs are to be taxed in accordance with Scale B.

Strijdom JJ

Judge of the Hight Court, South Africa

Gauteng Division, Pretoria

Appearances:

For the plaintiff: Adv Mafanele

Instructed by: Sibanyoni Attorneys, Matlalo MM Attorneys

For the defendant: In person