



**IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MIDDELBURG LOCAL SEAT)**

CASE NUMBER: A62/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED YES/NO
DATE 30 APRIL 2026
SIGNATURE

In the application between:

B[...] L[...] N[...]

APPELLANT

AND

N[...] F[...] N[...]

RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. The date of hand down is deemed to be 10:00 on April 2026.

JUDGMENT

FOURIE AJ, PHAHLAMOHLAKA J CONCURRING

INTRODUCTION:

- [1] The crisp issue in this appeal is whether the Appellant, **Mr B[...] L[...] N[...]**, and the Respondent **Ms N[...] F[...] N[...]**, complied with S3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 (“the Act”), and concluded a valid customary marriage.
- [2] The Court *a quo*, the Regional Court at Volksrust, held that they did. The Court *a quo* is challenged by the Appellant, who persists in contending that, although Lobolo was negotiated and paid between the parties and their respective delegates, and certain ancillary steps taken, a customary marriage did not come into effect.
- [3] The Appeal remained unopposed by the Respondent for whatever reason, and this Court, due to the crisp nature of the issues, directs that the Appeal shall be adjudicated on the papers filed.

BACKGROUND FACTS:

- [4] It is largely common cause between the parties that the Appellant and the Respondent met in 2007 and shortly thereafter became romantically involved in a relationship akin to that commonly referred to as a boyfriend-girlfriend relationship. On 26 September 2008, the parties' first child was born. Since 2011, the Appellant and the Respondent have been residing together in the

same property together with their first minor child. Although there might have been short periods where the parties were not residing together, these periods were not unusual in nature to the degree that the romantic engagement between the Appellant and the Respondent was terminated.

- [5] On 4 October 2013, the second child of the Appellant and the Respondent was born, and thereafter the Appellant, the Respondent, and their two minor children resided together in the same property whilst the relationship between the Appellant and the Respondent continued.
- [6] It is uncontested that in the early part of December 2018, Lobola negotiations between the Respondent's and Appellant's families were successful, culminating in the payment of the negotiated Lobola.
- [7] I hasten to remind that *mokgonyana ga a fetše go nyala or umfazi a kaqedwa*, a son-in-law never stops paying lobola, and never stops marrying. It is perhaps in this sentiment that much is to be derived. The customary processes followed to constitute a commitment between two families are continual and fluid.
- [8] After the Lobola negotiations were successfully completed and finalised, the Appellant, the Respondent and their two children returned home and continued living together as a family from which a third child was born on 26 January 2021.
- [9] The contentious issue is that the Appellant contends the custom of *Umembeso* was scheduled for 26 September 2020, but the celebration did not take place. The reasons, as stated in the respective versions of the parties, range from the pregnancy at the time of the Respondent to the COVID-19 pandemic and marital turmoil experienced from time to time.
- [10] A further contentious issue between the parties is that, in February 2022, the Appellant purchased a ring for the Respondent, which, according to the Appellant, was the result of the parties having foregone the idea of a customary

marriage and deciding to enter into a civil marriage. The Respondent contests this notion and states that the ring was simply for external parties to be able to see that the parties were married to one another.

[11] From the evidence led, it would seem as if the Appellant's actions in celebrating the purchasing of the ring and the abundant consuming of alcohol to celebrate this position were the last straw that broke the proverbial camel's back for the Respondent and which led to the current divorce proceedings.

[12] As in most litigious matters, the facts and actions of the parties are to a great degree common cause, but the meaning of such actions is interpreted differently by the respective parties.

[13] In the current matter, for instance, the Respondent submits that certain gifts were handed over that symbolise the Respondent being accepted as *Umakoti*, being the bride or the new stepdaughter in the Appellant's family. The existence of the gifts is not necessarily disputed by the Appellant, but the Appellant and his family interpret the gifts rather as gifts and snacks to be utilised by the parties while they were driving back to their homes, and that these gifts are not to be interpreted as fulfilling customary obligations to conclude a customary marriage.

[14] Similarly, in the Court *a quo*, much was stated about how the parties referred to one another when they formally corresponded with external parties. For instance, on 20 September 2021, the Appellant nominated the Respondent as the beneficiary of a Sanlam Policy in which the Respondent was noted as the Appellant's spouse or wife, by the Appellant himself. The Appellant says this to be resultant from the instructions he received from his broker to ensure that the policy is ultimately paid out whilst the Respondent states this to be proof that the Appellant regarded her as his wife.

[15] Several other instances of parties referring to themselves by their maiden names, referring to themselves in another way than their husband and their wife, and small details were nitpicked during the leading of the evidence. These facts and

the interpretation thereof are to be expected in a matter of this nature, where one party tries to convince a Court of the existence of a customary marriage and the other tries to convince the Court of its non-existence.

- [16] When faced with disputes over whether a customary marriage was concluded, the Court is not, as in civil marriages, confronted with a rigid set of rules by which a marriage is proven. The Court needs to look not only at the true facts and their intentions but also at the implications of those facts when ultimately coming to a conclusion.

APPLICABLE LEGAL PRINCIPLES:

- [17] In matters where Customary Law applies, and where a party seeks to prove or disprove the existence of a customary marriage, it has become the norm to evaluate academic statements on the applicable traditions and customs to determine whether a customary marriage was ultimately concluded in a specific customary union. In the current matter, it is not contested that the customary marriage, whether concluded or not, was concluded under the Zulu customs and traditions.
- [18] In the initial Heads of Argument by the respective parties, much reference was made to scholars and academic evaluations on what would ultimately constitute a valid Zulu customary marriage. Although it remains a helpful tool to decipher the conundrum, Courts ought to be mindful not to rigidly apply the sentiment of an academic when evaluating matters of this nature.
- [19] I express the aforesaid sentiment as the customary law and traditions are not static, nor can they be said to be rigidly applied consistently, without deviation in each respective culture. The wonderful nature of the Customary Law is that parties to a great degree regulate their own customs, traditions, and processes, all functioning within the broader cultural environment of our lovely country.

- [20] The essence of the conclusion of a customary marriage can not be anything else than an evaluation of whether, after the respective parties and their respective families engaged one another in whatever way they deemed appropriate in respect of their own customs, whether the parties were satisfied that their actions so taken constituted enough for them to be regarded as husband and wife and for that to be accepted by their respective families.
- [21] Even in certain circumstances where the respective families did not accept either party as a husband or wife and new induction into their families, if those families took no steps in the days, weeks, months, and years after the conclusion of such a union to object and take steps to rectify that position, I find no reason to believe that even through a lapsation of time, such tacit consent or acceptance was indeed obtained.
- [22] The rigid application of what constitutes customary law stands in direct contrast to justice if the facts of a matter scream for a deviation from such rigid application.
- [23] The digitalisation and modernisation of the world we live in have no doubt brought significant changes to the customary traditions and actions of parties binding themselves thereto. There would have been a time, for instance, not too long ago, when a family would send someone to speak with another family to arrange a meeting to negotiate Lobola. The world has evolved to the point where this can easily be replaced by sending a digital message, exchanging emails, or holding negotiations and discussions via internet platforms regularly used for business activities, such as Zoom or Microsoft Teams.
- [24] The evolution of Customary Law cannot stagnate without considering that the eventualities of life force parties to be open-minded when Customary Law is applied.

- [25] The aforesaid sentiment is echoed in the matter of **Mabuza v Mbatha**, [1] where the Court, although in that case dealing with Siswati bridal transfer and Ukumekeza, held:

“[T]here is no doubt that ukumekeza, like so many other customs, has somehow evolved so much that it is probably practised differently than it was centuries ago . . . As Professor De Villiers testified, it is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.

Further support for the view that African customary law has evolved and was always flexible in application is to be found in T W Bennett A Sourcebook of African Customary Law for Southern Africa. Professor Bennett has quite forcefully argued (at 194):

“In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man’s second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters [because of a pregnancy or elopement].”

- [26] **Prof TW Bennet [2]** has expressed the sentiment that Western and Christian innovations have been combined with traditional rituals, where, for instance, wedding rings may be used in place of the traditional gallbladder or slaughtered beasts, and for many, a church ceremony is now regarded as the main event of a customary marriage.

- [27] In the current matter, the only real issue is the failure to observe the *Umembeso* ceremony. None of the other matters is seriously contested.

- [28] If regard is had to whether or not there was compliance with the tradition, the reason for the tradition is to be evaluated. Surely the reason for this tradition can only be to introduce the proposed bride to the proposed husband's family and to integrate her into the proposed husband's family.
- [29] It is important to bear in mind that the ritual of handing over a bride is simply a means of introducing a bride to her new family and signifies the start of the marital consortium [3].
- [30] According to **J C Bekker**[4], the handing over need not be a formal ceremony; for example, upon delivery of lobola or a fine for seduction only, the subsequent *thwala* i.e. the abduction of the maiden to the groom's home without her guardian's consent, consummates the customary marriage, if her guardian then allows her to remain with her suitor on the understanding that further lobola will be paid due course. And proof of cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has raised no objection nor shown disapproval, by, for example, demanding a fine from the groom's family [5].
- [31] ".....The purpose of the ceremony of the handing over of a bride is to mark the beginning of a couple's customary marriage and introduce the bride to the groom's family. It is not important, but not necessarily a key determinant of a valid customary marriage. Thus, it cannot be placed above the couple's clear volition and intent where, as happened in this case, their families, who come from different ethnic groups, were involved in, and acknowledged the formalisation of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer."[6].

APPLICATION OF FACTS:

- [32] The respective parties resided together for a considerable amount of time in a relationship that can only resemble that of a marriage relationship, being that of husband and wife, and in this instance, also completing the picture of three

children. The respective families negotiated and concluded Lobola, and such Lobolo was ultimately paid. The Lobola negotiations being completed, the parties returned to their lives residing together in a relationship resembling that of husband and wife, and at least to a certain degree, and in certain instances, referring to one another as their husband and wife respectively.

[33] Where it mattered most, the policy that paid out upon the Appellant's death, he nominated the Respondent as the beneficiary of his life policy as his spouse. Irrespective of the reason why the Appellant did this, the Court finds it to be a significant concession. Of greater importance is the fact that, for the entire period during which the Appellant and the Respondent resided together, neither the Appellant's nor the Respondent's family approached the parties and indicated their dissent from the arrangement between the parties. The Respondent was not removed from the communal home by her family, nor was there any evidence led to indicate that the Appellant's family took issue with the status of their relationship and the manner in which the cohabitate in a relationship as husband and wife, at least after the conclusion of the Lobola negotiations.

[34] The evidence presented in the Court *a quo* indicates that the Appellant seeks a rigid application of Customary Laws and traditions.

[35] It accordingly begs the question why, if the Customary Laws are to be applied rigidly by the Appellant and the Appellant's family, no steps were taken to rectify the position of the Appellant and the Respondent residing together, seemingly as husband and wife, whilst non-compliance with the customary norms persisted. It would have been expected that, since 2011, when the parties began residing together and remained so until their ultimate separation in 2022, if the respective families took issue with the notion that they were indeed married, certain steps to rectify the position would have been taken.

- [36] Even if the Court is to accept that the Respondent was not formally introduced into the family of the Appellant, which I hesitate to say is not the case in the current matter, the tacit and implied consent by the Appellant and his family in acting towards the couple, and specifically the Respondent, after the Lobola negotiations were concluded, imply that the Respondent was accepted as Umakoti into the Appellant's family.
- [37] A rigid application of the non-compliance the Appellant seeks to convince this Court of would have led either to the Respondent's family coming to collect her from the communal home, removing her from the Appellant, or alternatively, the Appellant's family chasing away the Respondent, taking issue with the fact that she resided with the Appellant as his wife.
- [38] It unfortunately seems rather to be a situation that, when it was suitable to the Appellant to regard the Respondent as his wife, that narrative was pursued, yet when certain implications of a customary marriage faced the Appellant when ultimately a divorce was sought, that narrative changed and in order to secure the Appellant's own assets and to safeguard them from the eventualities of a divorce, a different narrative, being the non-conclusion of a customary marriage was pursued. To apply the Customary Law in this fashion would be a travesty of justice.
- [39] All the facts in the current matter justify the Order that was made by the Court *a quo*.

COSTS:

- [40] Even though the Appellant is unsuccessful in the appeal, the appeal remains unopposed and as such, a cost order is not warranted.

ORDER:

[41] As such, I propose the following Order:

[31.1] The appeal is dismissed.

**H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MIDDELBURG**

I agree, and it is so ordered

**PHAHLAMOHLAKA J
JUDGE OF HIGH COURT, MIDDELBURG**

Counsel for the Appellant:	Adv JJ Mbhele
Instructed by:	
Tel:	079 891 5058
Email Address	mbhelejabulane@gmail.com

Counsel for the Respondent: No Appearance

Judgment reserved on:
Date of delivery:

-
- [1]** Mabuza v Mbatha 2003 (4) SA 218 (C) at paragraphs 25 and 26
- [2]** Prof TW Bennet - Customary Law in South Africa (2004) at 213
- [3]** T W Bennett fn 11 at 213.
- [4]** C Bekker Seymour's Customary Law in Southern Africa 5 ed (1989) at 108-109.
- [5]** Bekker ibid, at 116.
- [6]** Mbungela and Another v Mkabi and Others (820/2018) [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) (30 September 2019) at paragraph 30