

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 3235/2025

In the matter between:

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

FIRST APPLICANT

(Identity number 8[...])

M[...] A[...] M[...]

SECOND APPLICANT

(Identity number 7[...])

and

T[...] L[...] L[...]

FIRST RESPONDENT

(Identity number 7[...])

MINISTER OF HOME AFFAIRS

SECOND RESPONDENT

DIRECTOR GENERAL OF HOME AFFAIRS

THIRD RESPONDENT

Neutral citation: *N[...] and Another v L[...] and Others (3235/2025) [2025] ZAFSHC 292 (14 May 2026)*

Coram: MAJOSI AJ

Heard: 27 November 2025

Delivered: 15 May 2026

Summary: Customary marriage concluded by applicants – requirements for a valid customary marriage- principles restated - second applicant's subsequent civil marriage to the first respondent null and void – first respondent's counter application of a putative marriage – referred for oral evidence.

ORDER

1 It is declared that the customary marriage entered into by the applicants on 15 September 2012 is a valid customary marriage as envisaged in terms of s 3 (1) of the Recognition of Customary Marriages Act 120 of 1998;

2 The second and third respondents are directed to register the customary marriage as concluded on 15 September 2012;

3 The civil marriage concluded between the second applicant and first respondent on 17 August 2015, is declared null and void.

4 The first respondent to pay the cost of the application on a party and party scale which costs shall include counsel fees, scale B.

5 The first respondent's counterclaim is referred for oral evidence on the issue of whether or not the first respondent was ignorant of the impediment to her marriage.

JUDGMENT

Majosi AJ

[1] The applicants herein seek a declaratory order that their customary marriage entered into on 15 September 2012 is a valid one in terms of the Recognition of Customary Marriages Act 120 of 1998 (the Act) and that the second and third respondents be authorized and directed to register their customary marriage. A further order is sought that the civil marriage concluded between the second applicant and first respondent be declared null and void and the second and third respondents be directed to deregister the later civil marriage concluded on the 27 August 2025 with the first respondent.

[2] The second and third respondent did not oppose the applications or participate in the proceedings. The first respondent is opposed to the relief sought and launched a conditional counter application in that, should the court declare that a valid customary marriage was been concluded between the applicants, her latter civil marriage be declared a putative marriage, alternatively as a civil union with the proprietary consequences attached thereto to take effect. The main application and conditional counterclaim form the basis of my adjudication.

[3] A brief background is as follows. The applicants met early in the year 2008 in

Smithfield, Free State. They started a romantic relationship in August 2008 which became serious as they opted to cohabit and purchased an immovable property together situated in Raceway Park, Bloemfontein (the property) in anticipation of marriage. It was agreed that children would be born after marriage. A letter from the second applicant family was sent to hers, requesting a meeting to discuss same. On 17 March 2012, the second applicant sent a delegation to the first applicants family home in Zastron, Free State to commence lobola negotiations in terms of Sesotho customs. An amount representing cows for lobola was agreed upon. On 15 September 2012, his family returned again to Zastron and paid a portion of the lobola in an amount of R 5000.00 representing 2 of the total amount of cows agreed upon.

[4] The first applicant's family prepared a meal and served it to both families and their respective representatives. In line with Sesotho customs, a sheep was made available to the second applicants' family, slaughtered and a part thereof was gifted to the second applicant's family as a symbol of unifying the two families. She was presented with a Sesotho traditional dress and headscarf by the second applicant's family to welcome her into the M[...] family. Her family released her to the second applicant as his wife and they continued to stay together but now as husband and wife. This customary marriage was not registered with the Department of Home Affairs.

[5] On 1 July 2013, the second applicant was promoted at work and moved to Trompsburg and she remained in Smithfield. Their marriage continued long distance until she obtained a work transfer to Bloemfontein in February 2014. Their marriage took strain and she separated from him. She eventually found out that he was involved in an extra marital affair with the first respondent. Despite his customary marriage to the first applicant, the second applicant entered into a civil marriage with the first respondent in August 2015 without dissolving their marriage first or him obtaining her consent to taking a second wife as allowed in their customs nor was she consulted thereon. Had either of the two options been brought to her attention, she would have refused. She was later informed that they moved into the immovable property that she had vacated after their separation and the first respondent gave birth to twins in July 2015.

[6] In the year 2019, the second applicant proposed reconciliation and she agreed.

From February 2020, they resumed living together and have done so for the past five years as he had assured her that his relationship with the first respondent was over and was to ensure that their twins not be born out of wedlock. The second applicant confirmed this in his confirmatory affidavit. He also admitted that due to their customary marriage, his subsequent civil marriage was unlawful. To that end, an application was made for their customary marriage to be declared a valid one and his second marriage null and void as he averred that the first respondent knew that he was married to the first applicant in terms of customary law.

[7] The first respondent is opposed to the relief sought by the applicants on the basis that she entered into a valid civil marriage with the second applicant on 27 August 2015. She also disputes that the two entered into a valid customary marriage due to contradictory versions provided in the founding affidavit and confirmatory affidavit of the second applicant, on what allegedly transpired on 17 March 2012 and or 15 September 2012, when part of the lobola amount was allegedly paid.

[8] She indicated that she and the second applicant met in Botshabelo, Free State in the year 2007 where both of their parental homes are based and have been in a relationship since then. At no point was she informed by the second applicant that he had entered into a customary marriage previously and they remained committed to each other until she bore him twins in 2015. They opted to get married that very same year on 17 of August 2015 at Thaba Nchu Home Affairs. This was also after they opted to live together once he was transferred to Trompsburg where they, at the time were both employed. She averred that she and the second applicant lived together continuously, utilizing the Raceway property on weekends until their eventual separation in the year 2019 and his eventual departure in September 2021. Moreover, she only learned in the year 2016 that the second applicant had fathered a child with the former as it was kept a secret.

[9] She further indicated that the notion customary marriage between the two applicants never existed as from their own affidavits and annexures thereto, their version is ambiguous. It was indicated that though parties indicated that lobolo was negotiated, their affidavits indicated that same was done on the 17 March 2012 but their supporting documentation as signed family representatives of both applicants indicate

that an amount of R 5000. 00 lobola was paid on 15 September 2012. Nor were there any minutes of a meeting on 17 March 2012 to confirm the amount of cows and their agreed monetary value upon their return to conclude same in September 2025. To make matters worse, the annexures are written in Sesotho without any sworn translation in English to confirm the contents thereof and for that matter, a proper context.

[10] The first respondent also took issue with the fact the second applicant's late father's surname was incorrectly spelt on the receipt which may be a clear indication that the annexures pertaining to lobolo have not only been falsified but is a deliberate attempt on the part of the applicants to make out a case for a customary marriage where none exists. Moreover, the fact that the first applicant was handed over to her alleged in-laws at her parental place in Zastron and counselled and presented with attire is against Sesotho customs as same traditionally, takes place at the groom's family, which would have been the second applicants' home.

[11] In stark contrast, the second applicant indicated that the first respondent was aware of his customary marriage and has presented a version that not only supports the version of the first applicant, but radically controverts the version of the first respondent. It is for that reason that the first respondent indicated that should the court find that a valid customary marriage existed under these dubious circumstances that the civil marriage to the second applicant not be declared null and void but rather a putative marriage as she, as a one of the parties to the marriage, was not aware of the impediment that existed customary marriage, her marriage was duly solemnized and that the marriage was a lawful one of the parties or of that party (first respondent) who alleges bona fides.

[12] Section 3 (1) of the Act sets out the requirements for a valid customary marriage namely that both prospective spouses must be above the age of 18 years, they must consent to enter into a marriage under customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law. Section 3(2) also provides that no spouse in a customary marriage shall be competent to enter into another marriage under the Marriage Act 25 of 1961 during the subsistence of such

customary marriage save for under s 10(1) of the Act.¹

[13] Courts over the years have accepted that customary law is a practice of culture but it evolves in the context of its values, norms, consistency with the Constitution so as to meet the needs of the people that live in accordance with those norms. It is also not unusual to find variances in practices or ambiguities.² The Constitutional court in *Shilubana and Others v Nwamitwa*³ as far back as 2009 indicated that courts should be cognizant of the fact that customary law regulates the lives of people and the need for flexibility must promote the values enshrined in our constitution and the vulnerability of parties affected by such changes.⁴

[14] A putative marriage departs from the general rule that a void marriage has no legal consequences provided it is shown that both or one of the parties must have been ignorant of the impediment to the marriage, that it was solemnized and considered lawful in the estimation of the parties or of that party who alleges bona fides.⁵ The purpose of a putative marriage is thus to soften certain consequences of a marriage that is null and void as it protects innocent parties who were unaware of an impediment to their marriage.⁶

[15] Counsel for the applicants argued that a valid customary marriage had been concluded as the applicants were above the age of 18 when they consented to the marriage, it was negotiated in terms of customary law as a delegation was sent to the bride's family, an agreement was reached pertaining to lobolo and the very same delegation returned and paid R 5000.00 towards the agreed outstanding amount. Furthermore that representatives from both families signed off on in writing confirming

¹ Section 10 Change of marriage system

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect of any marriage which is in community of property as contemplated in subsection (2).

(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.

² *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA).

³ *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC), para 46 - 47.

⁴ *Ibid* para 47.

⁵ *Ramatshimbila v Phaswana* [2014] ZASCA 117, para 60.

⁶ *MS v Executor, Estate late NS and Others* 2021 (6) SA 483 (FB)

this arrangement and that, lobola had indeed been paid in part.

[16] It was submitted that though the handing over of the bride was done at her home and not the grooms, this does not invalidate undisputed facts as averred in the founding affidavit and confirmatory affidavit. In that after the money was paid, the bride was given traditional attire by the groom's family, counselled by elders and a sheep was slaughtered in preparation of a meal, shared a feast prepared by the bride's family and that a portion of the sheep was gifted to the groom's family. The bride was released to live with the groom.

[17] To that end, I was specifically referred to Mbungela supra where the supreme court held that the handing over of a bride though important can be waived and is not an indispensable custom which will result in the customary marriage not being a valid one. It was submitted that bridal transfer herein did take place and as is evident from the Tsambo and Sengadi⁷ wherein the bridal transfer took place at the bride's home and lobola was also not paid in full but the court still concluded that there was a valid customary marriage and non-observance thereof did not result in invalidity the customary marriage.

[18] It was lastly submitted that the counterapplication of the first respondent ought to fail as the second respondent's answering affidavit explicitly states that he and the first respondent began dating in November 2013 and that he informed her that he is customarily married to the first applicant with whom he shares a child with. Put differently, she knew that an impediment to her civil marriage exists and was thus not *bona fides*. This inadvertently, created a material dispute of fact if there was ignorance of the impediment to the civil marriage. A dispute, which could not be determined on affidavits.

[19] Transversely thereto, counsel for the first respondent argued that it is doubtful that a valid customary marriage was concluded as there is no clear indication if an amount of R 5000.00 was paid on the grooms initial visit to the brides family on 17 March 2012 or if as the per the founding affidavit which indicated which members of the N[...] family was present and it was agreed with the M[...] family the lobola would be R

⁷ Tsambo and Sengadi paras 25- 27.

25 000.00 of which the M[...] paid R 5000.00 and the balance to be paid later on 15 September 2012. It was argued that this discrepancy is a clear indication of a fundamental inconsistency where the marriage negotiations are concerned.

[20] Furthermore, the lack of minutes of the meeting held by the families on 17 March 2012 may suggest that no such meeting occurred and the applicants are making such an allegation to fabricate and account for inconsistencies in their version. Moreover, the fact the second applicant late father's surname was misspelt in the receipt and may be an indication it is not only defective but also inconsistent with the applicants own evidence. This read together with the affidavit of the first applicant which initially indicated that an amount of R 5000.00 was paid on 17 March 2012 and the balance was due to be paid on the 15 September 2012 is irreconcilable in the absence of evidence of the second applicant's aunt confirming this aspect who was also present during these negotiations

[21] Although it was conceded that the legal principals pertaining to the handing over of the bride is not a strict compliance anymore as stated in *Mbungela and C v P*⁸, it was thus submitted that this court cannot find that a valid customary marriage was concluded in light of the various discrepancies in the version presented by the applicants and it urged the court to dismiss the application on this basis and apply the *Plascon Evans* rule.

[22] Lastly it was submitted in the event this court finds that the applicants concluded a valid customary marriage, the later civil marriage ought to be declared a putative marriage as their marriage is void *abinitio* and duly solemnized. The first respondent's ignorance to the existence of an impediment (customary marriage) was bona fide as it was never disclosed to her. Alternatively, that their union ought to be considered a universal partnership as summarized by the Supreme Court in *Ponelat v Schrepfer*⁹ to be three essentials namely that each of the partners bring something into the partnership, whether it be money, labor or skill, that the business should be carried on for the joint benefit of the parties and that the object should be to make a profit that the contract should be a legitimate one.

⁸ C v P [2017 ZAFSHC 57.

⁹ *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA), para 19.

[23] Counsel for the parties have indeed provided this court with relevant case law and legal principals as pronounced on by the supreme court of appeal and the constitutional court. There is however a very distinguishable fact from all the case law. In casu, the applicants are both still alive and have jointly brought this application after proper notice to the respondents, and more importantly, the first respondent who has a substantial interest in the outcome of this case as it will affect her civil marriage and conditional counterclaim which has been lodged which will, effectively deal with the proprietary consequences of the civil marriage that she would have entered into on 15 August 2015 with the second applicant. More on this aspect later.

[24] In my view, a valid customary marriage was concluded between the applicants on 15 September 2012 for several reasons. Firstly, it is clear from the identity numbers cited herein that the applicants were both above the age of 18 years when they consented to their customary marriage. It was also their intention to get married according to Sesotho customs which they practice hence their respective families got together to negotiate lobola at the bridal home in Zastron and not their private residences used in Trompsburg, Smithfield or Raceway.

[25] Secondly, in accordance with their intentions, their respective families met after a letter had been dispatched to the first applicants family and agreed on lobola in the amount of R 25 000.00. As correctly identified by the first respondent, no minutes of such meeting exists or were noted and the first applicant's founding affidavit initially gave the impression that an amount of R 5000.00 was paid towards lobola. A further reading of the founding affidavit however contextualizes the fact that no money was exchanged but rather an agreement was reached that the groom's family would return on 15 September 2012 to formally conclude negotiations.

[26] In this particular context, it makes sense why there are no minutes of the meeting on 17 March 2012 as no money had been paid, no celebration had taken place nor had the bride's family prepared a meal, slaughtered a sheep or formally released her to reside with the groom. There was nothing of meaning to note as customs dictates that lobola ought to be paid in full or in part before any type of celebration takes place. The affidavits of the applicants ought to have been meticulous in that regard. This however does not mean that the version presented is fictitious or false given their positive attestation of what would have occurred on 15 September 2012.

[27] Thirdly, the first respondent cannot dispute the events of the 15 September 2012 as averred by the applicants. She bears no personal knowledge thereof as per her answering affidavit. The applicants unequivocally state that on this day, the negotiations were concluded, an amount R 5000.00 was paid to the bride's family towards lobola and both were individually counselled by the elders which is an accepted customary practice to ensure that bride and groom understand the life change that has taken place and what their respective duties and responsibilities in the marriage will be.

[28] In *casu*, the handing over did not take place at the groom's residence as per Sesotho customs. Instead, the bride was gifted and clothed in traditional attire, a meal was shared and a portion of the slaughtered sheep was handed over to the groom's family and it is there where she (first applicant) was released and permitted to formally join the second applicant as his wife due to the conclusion of the lobola negotiations and celebrations. It must be remembered that the purpose of the custom of handing over the bride is to ensure that the bride is properly introduced to her in laws. This indeed occurred and I find the actual venue to be irrelevant. The principles laid down in Tsambo and Mbungela reveal that there is no merit in the argument that handing over of the bride did not take place just because it occurred at the bridal home.

[29] In any event, the first respondent cannot dispute that a customary marriage was concluded as she correctly stated in her answering affidavit that she bears no knowledge of same but yet, most opportunistically, takes issue with when amounts were paid, who was present, and contests language contents of the handwritten letters annexed to the founding affidavit and the signature of the late father of the second respondent without a handwriting expert.

[30] Lastly, s 3(2) of the Act is prescriptive. No spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act 25 of 1961. This effectively means that after the second applicant entered and concluded a customary marriage with the first applicant, he could not have entered into another civil marriage with anyone for that matter let alone the first respondent. I am persuaded on a balance of probabilities that the applicants are entitled to the relief sought and they did conclude a valid customary marriage as envisaged in the Act on 15 September 2012 and that such marriage still subsists and the remainder of the respondents are to register the

customary marriage. It stands to reason that the second applicant was not competent to enter into a subsequent civil marriage with the first respondent and such marriage is null and void.

[31] The only terse issue that remains is the counterclaim and if the first respondent makes out a case for a putative marriage, alternatively, a universal partnership. The second applicant and first respondent versions on this aspect are worlds apart. They disagree as to where they first met, when the relationship started, if it was before or after the relationship between the applicants came into existence, if his child with the first applicant was a secret, if the customary marriage was disclosed or in fact known to the first respondent before the civil marriage was entered into. In my view, due to the material dispute of fact, this is an aspect that cannot be adjudicated upon on affidavits. Furthermore, I cannot even at this stage determine if the version of the first respondent is untrue or farfetched. The only possible way to resolve this issue is to refer the issue of whether or not the first respondent was ignorant of the impediment to her marriage to the second applicant for oral evidence.

[32] It is trite that costs follow the result. The applicants are successful in the main application and will order that the first respondent pays costs on a party and party scale, including counsel fees at scale B.

[33] Accordingly, it is ordered:

- 1 It is declared that the customary marriage entered into by the applicants on 15 September 2012 is a valid customary marriage as envisaged in terms of s 3 (1) of the Recognition of Customary Marriages Act 120 of 1998;
- 2 The second and third respondents are directed to register the customary marriage as concluded on 15 September 2012;
- 3 The civil marriage concluded between the second applicant and first respondent on 17 August 2015, is declared null and void.
- 4 The first respondent to pay the cost of the application on a party and party scale which costs shall include counsel fees, scale B.
- 5 The first respondent's counterclaim is referred for oral evidence on the issue of whether or not the first respondent was ignorant of the impediment to her marriage.

O R MAJOSI
ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicants:

Instructed by:

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For the first respondent:

Instructed by:

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