

**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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

**CASE NO: 2025-240295**

**(1) REPORTABLE: NO**

**(2) OF INTEREST TO OTHER JUDGES: NO**

**(3) REVISED.**

**DATE: 04/06/2026**

**SIGNATURE**

**In the matter between**

**EMELINAH LINDIWE NHLAPO**

Applicant

(Identity Number: 8[...])

**and**

**TSHEDISO THEKWANE**

First Respondent

(Identity number: 8[...])

**NONTOBEKO MICHELLE THEKWANE**

Second Respondent

(Identity number: 8[...])

---

## JUDGMENT

---

*Summary; Application to declare customary marriage and subsequent civil marriage null and void based on alleged prior customary marriage. Held; Applicant's version not to be accepted. Applicant failed to prove a customary marriage between herself and First Respondent. Application dismissed.*

*The judgment and order are published and distributed electronically.*

### **PA VAN NIEKERK, J**

#### **INTRODUCTION:**

- [1] In the notice of motion Applicant seeks an order in the following terms:
- “1. That the customary marriage concluded between the First and the Second Respondent on 18 March 2023 be declared null and void *ab initio*.
  2. That the civil marriage concluded between the First and the Second Respondent on 11 May 2023 at Randfontein be declared null and void *ab initio*.
  3. That the customary marriage concluded between the Applicant and the First Respondent is declared valid, effective from 19 February 2023.
  4. That any party opposing this application pay the costs of this application; alternatively, that each party pays their own costs”.
- [2] It is common cause that the First Respondent and the Second Respondent are presently married in terms of a duly registered civil marriage which was concluded on 11 May 2023 after the parties were previously married in terms of a customary marriage concluded on the 18<sup>th</sup> of March 2023. This follows after a long-standing relationship between the First Respondent and the Second Respondent which commenced during 2014 and from which there are presently four children born.
- [3] Applicant seeks an order to declare both the customary marriage as well as the civil marriage concluded between First Respondent and Second Respondent to

be null and void *ab initio*, and further to declare an alleged customary marriage entered into between Applicant and first Respondent to be “*valid*”. The Applicant’s claims are based on an allegation that the Applicant and the First Respondent entered into a customary marriage on 19 February 2023 and that the Applicant “... *recently learnt that on 18 March 2023, while married to me, my husband convened a delegation to visit and indeed visited the family home of the Second Respondent to initiate Lobola discussions with the intention of entering into a subsequent customary marriage with the Second Respondent*”.

[4] In the founding affidavit the Applicant avers that she “*further learnt*” (without disclosing when, where or from whom) that on 11 May 2023 the First- and Second Respondents approached the Department of Home Affairs’ offices in Randfontein and entered into a “*.....putative (sic) civil marriage*”. Applicant concludes that, because the customary marriage entered into between the first Respondent and Second Respondent as well as the civil marriage entered into between the First Respondent and Second Respondent were preceded by the alleged customary marriage entered into between the Applicant and the First Respondent, that those marriages are void. This contention is based on the Applicant’s averment that she did not provide consent for the customary marriage entered into between the First Respondent and Second Respondent<sup>1</sup> and by virtue of the provisions of section 3(2) of the Recognition Act<sup>2</sup> which reads as follows:

“... *no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961, during the subsistence of such customary marriage*”.

[5] On a proper interpretation of section 3 of the Recognition Act, spouses who are married to each other in terms of customary law may convert such a marriage to a civil marriage but may not enter into another customary marriage and spouses

---

<sup>1</sup> *Mayelane v Ngwenyama and Another* [2013] ZACC 14.

<sup>2</sup> Recognition of Customary Marriages Act 120 of 1998.

who have entered into more than one customary marriage are prohibited to enter into a civil marriage.

- [6] First Respondent filed an answering affidavit, admitting all the facts upon which the Applicant relies and concedes the relief which is claimed. In my view this is not surprising when the Second Respondent's answering affidavit is read, which contains the following allegation:

*"It is my submissions (sic) that the Applicant and the First Respondent are colluding with each other to declare our marriage invalid as the First Respondent is aware that I am preparing for divorce, and he does not wish to divide the joint estate. In fact, he has already started moving assets around, which I will deal with in a separate application or in the correct forum".*

- [7] The Second Respondent denies that the Applicant and First Respondent entered into a customary marriage. The Second Respondent specifically challenged the Applicant and the First Respondent to provide proof that the customary marriage took place on 19 February 2023 and denies that the "*Lobola letter*" on which the Applicant rely constitutes proof of that marriage because, as stated by Second Respondent, "*... a letter can easily be manipulated*". It is common cause that the alleged customary marriage entered into between Applicant and First Respondent is not registered, and it is also common cause that the customary marriage between First Respondent and Second Respondent is not registered. The Second Respondent further avers that a material factual dispute should have been foreseen by the Applicant and that the application, on that basis, should be dismissed.

#### **ANALYSIS OF FACTUAL DISPUTE**

- [8] On an analysis of the respective affidavits, it is common cause that a customary marriage was entered into between the First Respondent and the Second Respondent. The Applicant avers that she became aware of such a customary marriage in her founding affidavit and the First Respondent avers in paragraph 14 of his answering affidavit that on even date (18 March 2023) he "*had entered into a second customary marriage with Nontobeko (Second Respondent) as my second wife, without the knowledge or consent of Lindiwe (Applicant)*." It is

further common cause that First Respondent and Second Respondent thereafter entered into a civil marriage, and a copy of the marriage certificate is annexed to the Applicant's founding affidavit.

[9] The existence of a customary marriage between the Applicant and First Respondent is in dispute. A factual finding on the existence or not of such an alleged customary marriage is determinative of the relief claimed by the Applicant. It therefore follows that the only issue to be determined is the existence of the alleged customary marriage entered into between the Applicant and First Respondent on 19 February 2023.

[10] In my view that Applicant's version of a customary marriage allegedly entered into between herself and the First Respondent on 19 February 2023, and which version is supported by the affidavit filed by the First Respondent, should be regarded with circumspect when the following facts are considered:

[10.1] In the replying affidavit the Applicant does not dispute the Second Respondent's averment that she is "*preparing for divorce*" and that the First Respondent is aware of that fact. The Second Respondent deposed to her answering affidavit on 20 February 2026 which was filed on Caselines on 26 February 2026. The First Respondent deposed to his answering affidavit on 17 March 2026, at a time when he was aware of the Second Respondent's answering affidavit, but fails to deny the Second Respondent's averments in relation to the preparations for a divorce. The First Respondent's preparation for a divorce was thus a fact known to the Applicant and First Respondent, who both clearly joined issue in the matter, and the fact that this application was instituted after the Second Respondent manifested her preparation for divorce is, in my view, significant as it provides a compelling motive for the relief sought.

[10.2] The Applicant's founding affidavit contains a "*lobola letter*" which discloses that a certain Mr Joseph Thekwane, a family member of the First Respondent, participated in the alleged Lobola negotiations on 19 February 2023 when the customary marriage which allegedly

exists between the Applicant and the First Respondent was negotiated. Second Respondent points out in her answering affidavit that the same Mr Joseph Thekwane was present on 18 March 2023 and participated in the Lobola negotiations on behalf of the First Respondent during the conclusion of the customary marriage ceremonies between the families of the First Respondent and Second Respondent. Mr Joseph Thekwane at no stage during the negotiations between the respective families of First Respondent and Second Respondent which preceded their customary marriage, mentioned that the First Respondent had entered into another customary marriage or lobola negotiations some three months earlier, where he was present. This fact is not explained in the replying affidavit. Considering the important role of the first wife in customary marriages, and the fact that Mr Thekwane was allegedly present at the earlier lobola negotiations between the families of Applicant and First Respondent when she allegedly became the first wife, this fact is remarkable.

- [10.3] First Respondent does not even attempt to provide an explanation why he did not disclose the existence of an alleged prior customary marriage between himself and the Applicant at the time when the First Respondent entered into the admitted customary marriage with the Second Respondent. Absent any plausible disclosed motive for this deceit, it is in my view improbable that any reasons existed why it should have been necessary to conduct himself in this manner. It leads to the probable conclusion that there was in fact no other existing customary marriage in existence of which he was a partner and which he was obliged to disclose.
- [10.4] At the time when the First Respondent and the Second Respondent entered into the civil marriage, First Respondent was required by

virtue of the provisions of section 30 of the Marriage Act<sup>3</sup> to declare that there was no impediment to the intended marriage between himself and the Second Respondent. The fact that the marriage officer concluded the marriage between First- and second Applicants, implies that First Respondent made no such declaration. First Respondent thus either made a false declaration at that time and committed an offence by virtue of the provisions of section 36 of the Marriage Act or is committing perjury in the affidavit filed on behalf of the First Respondent. However, in my view these objective facts illustrate that the Court can place no reliance on the contents of the First Respondent's answering affidavit.

- [11] Considering the aforesaid, and bearing in mind that the Applicant bears the onus of proof in relation to the existence of the customary marriage entered into between herself and the First Respondent, I am of the view that the version advanced by the Applicant is inherently improbable compared to the version advanced by the Second Respondent and for the reasons as set out *supra*, that the preferred version is that of the Second Respondent.
- [12] However, in my view that is not the end of the matter. The Applicant's founding affidavit fails to disclose the existence of a customary marriage, save for a bold allegation that they participated in lobola negotiations and the production of an alleged lobola letter. The affidavit contains no information on the applicable customs, or compliance with the customs which informs the customary law applicable to that group of peoples to which the Applicant and First Respondent belong. The requirements to plead and prove a customary marriage was set out in the judgment of *EMK v EMB and Another*<sup>4</sup> where it was held that, when faced with the issue to determine the existence of a customary marriage the Court should apply living customary law and be provided with corroborative evidence of the specific applicable customary law upon which the party relies. This

---

<sup>3</sup> Marriage Act, 25 of 1961.

<sup>4</sup> *EMK v EMB (2024/094190; 2023/010767) [2025] ZAGPPHC 289 (18 March 2025)*.

judgment refers to various Constitutional Court judgments which informs the principles enunciated in the judgment of *EMK v EMB supra*.

[13] In conclusion, the Applicant failed to prove the existence of a customary marriage entered into between the Applicant and the First Respondent.

[14] **In the result, the following order is made:**

1. The application is dismissed.
2. Applicant is ordered to pay the Second Respondent's costs, taxed on Scale B.

---

**P A VAN NIEKERK  
JUDGE OF THE GAUTENG DIVISION,  
PRETORIA**

APPEARANCES

**FOR APPLICANT**  
INSTRUCTED BY  
ATTORNEYS

Adv S G Skosana  
SHONGWE NM

**FIRST RESPONDENT**

No appearance

INSTRUCTED BY

**SECOND RESPONDENT**

N Otrebski

OTREBSKI

ATTORNEYS