

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

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2024/150152

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED:
_____	_____
DATE	SIGNATURE

In the matter between:

MSIPHA EMILY DORAH

Applicant

And

**TJAITJAI PONTSO ANNA
MINISTER OF HOME AFFAIRS
MASTER OF THE HIGH COURT JOHANNESBURG
PONTSO ANNA TJAITJAI N.O.**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

(In her capacity as Executrix of the Late Estate of
Musa Reuben Tjaitjai with Estate Number 007886/2024)

JUDGMENT

MOTHA, J

Introduction

- 1) Facing this court is a perennial predicament for many black South Africans, torn between what is colloquially called Umshado wephepha and Umushado wesintu. Due to financial constraints, only a few of these cases reach our courts. Consequently, many black South African marriages may be *null and void ab initio*. To me, the *fons et origo mali* is the practice of writing judgments on customary marriages and chieftaincy disputes in our colonizers' languages.
- 2) This, *ipso facto*, leads to linguicide and, more broadly, advances the colonial project of epistemicide – the erasure of African knowledge. Words rich in meaning and deeply embedded in black South African customs, such as imvula mlomo, have been anglicized to mean “opening of the mouth”; go gorosa ngwetsi has been simplified to “bride-transfer”; and umembeso has been altered to mean clothing. Further buttressing this view is the use of the incorrect but widely accepted term “bride-price,” which refers to ilobolo. Black women are not commodities. Ilobolo is neither a price nor a sale but a practice steeped in black African customs of ukwakha ubuhlobo obuhle nokuhlanganisa izithunywa.
- 3) This culturicide is deliberately engineered to sound the death knell for imishado yesintu. In the matter of *Alexkor Ltd and Another v Richtersveld Community and Other*¹, the Constitutional Court cautioned against the obvious dangers of “looking at indigenous law through the prism of common law.” Already, there is so much confusion about what constitutes a customary marriage that it is only a matter of time before the next generation completely turns its back on its heritage, abandons customary marriages and indigenous South African languages in droves, and mimics the colonizers' ways of life, in appearance and speech. When dealing with customary marriages, our colonizers' languages should be used as a last resort. Having confirmed counsel's fluency in the language of uMageba, this court pens this judgment in that language.

¹ (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003)

Isiqalo

- 4) Umshado wesintu uyimpicabadala ezinkantolo zakulelizwe. Sekuyinsakavukela umchilo wesidwaba ukuthi uma kucubungulwa umthetho okumele ulandelwe phakathi komshado wesintu nomshado wesilungu kuba ongaphansi ongaphezulu, wena owabona kushikisha ufudu!
- 5) Nakulelicala kunjalo. Umbuzo obhekene nalenkantolo uthi wabe eshadile ngesintu na umufi uMusa Reuben Tjaitjai (umufi) noEmily Dorah Msipha (Emily)? Mangabe kunjalo, chithekiyani amasi igula ligcwele emshadweni wesilungu phakathi kuka Pontso Anna Tjaitjai (Pontso) nomufi uReuben.

Abaquli balelicala.

- 6) Ummangali uEmily Dorah Msipha othi wayeshade nomufi uReuben ngokwesintu.
- 7) Ummangalelwa wokuqala uPontso Anna Tjaitjai naye othi wayeshade nomufi uReuben ngokwesilungu.
- 8) Ummangalelwa wesibili ungqongqoshe woMnyango Wezasekhaya.
- 9) Ummangalelwa wesithathu iNhloko yeNkantolo Enkulu.
- 10) Ummangalelwa wesine ngu Pontso Anna Tjaitjai omele ifa likamufi uReuben.

Amanqampunqampu alelicala, kanye nohlangothi luka Emily

- 11) Ummangali wokuqala uEmily uthi washada nomufi uReuben ngomhla zinga mashumi amabili nanye ngenyanga ka Ndasa ngo nyaka wezinkulungwane zamakhulu ayisishiyagalolunye namashumi ayisishiyagalolunye nambili². Ubufakazi bokuthi wayeshadile ngesintu, uthi uEmily, butholakala encwadini yama lobolo ebhalwe ngalendlela elandelayo:

“ IsivumeLwane Samalobola Phakathi Kwa Msipha Nabakwa Tjaitjai

² 21 March 1992.

Namahla 21 March 1992 abakwa Tjaitjai Bakhipe imali engu R2200,00 yokuLobola u Emely Msipha.

Abakwa Msipha Bayavuma, izinkomo ezisele zingu 4 inkomo eyodwa ingu R550.00. Bakwa Tjaitjai bayavuma ukuthi kusele izinkomo ezingu 4.

Msipha Family

June Msipha

Tjaitjai Family

John Khoza”

12)Kusigaba samashumi amathathu nanye kwincwadi yakhe efungelwe, uEmily uthi yena nomufi uReuben babengaphezulu kweminyaka eyishumi nesishiyagalombili mhlazane begena emendweni wabo.

13)Akuphikiswa ukuthi uEmily wahlala nomufi uMusa Reuben Tjaitjai endaweni ebizwa ngokuthi iLangaville, Extension 3, Brakpan, 1[...] N[...] Street, E[...]. Umshado wabo wabusiwa ngezingane ezimbili, uTinyiko Daniel Msipha owazalwa ngomhlaka 21 September 1995 kanye no Sbongakonke Msipha owazalwa ngomhlaka 23 May 2008.

14)Bahlala njalo kwaze kwaphela iminyaka engamashumi nambili, ngokusho kukaEmily. Izivunguvungu zempilo zawudubaduba umshado wabo, baze bahlukana ngonyaka ka 2015, ngokombhalo wencwadi efungelwe ka Emily. Okumqoka ngokwahlukana kwabo ukuthi abazange baye enkantolo kaMantshi³ noma enkantolo Enkulu yaseMajajini⁴ ukuyo hlukanisa umshado wabo wesintu. Yaqala laphoke inkathazo.

³ Magistrate’s court.

⁴ High court.

- 15) Umufi uReuben waqhubeka nempilo kwathi ngomhla ka 13 April 2004 wangena emshadweni wesilungu nesiinqandamathe sakhe esisha uThembi Mary Tjaitjai (Thembi).
- 16) Phela uma abantu beshada ngesilungu (noma ngomshado wabokufika) umshado wabo ulandela umgomo othi: “okwakhe kungokwami no kwami kungokwakhe,”⁵ ngaphandle mangabe abashadi bangene esivumelwaneni⁶ phambi kommeli wemishado⁷ ngaphambi kokuba bashade.
- 17) Umufi wahlala noThembi iminyaka eyishumi nesishiyagalolunye. Umdali wababusisa ngezingane ezimbili, uBongiwe Tracy Tjaitjai, owazalwa ngomhlaka 26 February 2003 kanye no Lifalakhe Blessing Tjaitjai, owazalawa ngomhlaka 01 May 2008.
- 18) Kwamphinda lokho umufi uReuben. Inkosikazi yakhe uThembi wathi usewushiya phansi umendo wabo. Waqonda ngqo enkantolo kaMantshi yase Nkomazi, uThembi, eyofaka icala lokwehlukanisa umshado wabo. Umufi uReuben waphendula ngencwadi yo kuphikisa isicelo sokwahlukanisa umshado. Kuthe la isibambene ngezihluthu, umufi uReuben wase phenduka njengotshwala esiswini wafaka isicelo sokuguqula amaphepha akhe asenkantolo.
- 19) Kwisicelo sakhe wageqa amagula umufi esho ukuthi yena wayesashadile ngokwesintu noEmily, ngakhoke umshado wakhe noThembi wawufana nenyoka efile.
- 20) Ngalesikathi behambisana ezinkantolo oThembi nomufi kwase kusebenza uMthetho Wokuqashelwa Kwemishado Yendabuko wango-1998 (Act 120 of 1998), obizwa phecelezi ngeRecognition of Customary Marriage Act (RCMA). Lomthetho iRCMA uqinisekisa ukuthi imishado yendabuko ibhekwa njengokusemthethweni njengemishado yezakhamuzi, futhi umshado wesintu ubekwa ezingeni elilinganayo nemishado yabokufika noma yesilungu.

⁵ In community of property.

⁶ Antenuptial contract.

⁷ Notary public.

21) Phela ngokomthetho iRCMA, kwingxenye yesishagalombili⁸ umuntu akavunyelwe ukuthi ashade ngokwesintu aphinde ashade nomunye umuntu ngesilungu engazange afaka incwadi yokwahlukanisa umshado wesintu enkantolo kaMantshi noma enkantolo Enkulu yaseMajajini. Okusho ukuthi umangabe ngempela umufi wayesashade uEmily ngesintu, futhi bengahlukanisanga umshado wabo enkantolo, kwase kuxabene ubende.

22) Ikhuluma ngalomgomo weRCMA, inkantolo Ephakeme yaseMajajini⁹ yakusho kwagcwala umlomo lokhu kwicala lika *Rudzani Netshituka v Joyce Munyadizwe Netshituka*.¹⁰Kwingxenye yesithathu yeRCMA ifundeka kanjena ngolwimi luka George:

“Section 3(2) of the Act provides that:

"Save as provided in section 10 (1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act. 1961(Act No. 25 of 1961, during the subsistence of such customary marriage".

23)Lelicala, lika Thembi nomufi uReuben, lase libikwe enkundleni Enkulu yaseMajajini eMpumalanga. Ngomhlaka 17 Kamasingana (*January*) 2022, kwaphuma isinqumo senkantolo esibiza uEmily kwinkundla Enkulu yaseMajajini eMpumalanga. Lesinqumo sasibhalwe ngolwimi luka George:

“AFTER HAVING HEARD BY COUNCIL OF THE APPLICANT AND HAVING READ THE PAPERS FILED OF RECORD, THE FOLLOWING ORDER IS MADE:

⁸ 8 Dissolution of customary marriages

(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

⁹ SCA

¹⁰ *Netshituka v Netshituka and Others* (426/10) [2011] ZASCA 120; 2011 (5) SA 453 (SCA); [2011] 4 All SA 63 (SCA) (20 July 2011) para 15 “In *Thembisile v Thembisile* Bertelsmann J held that a civil marriage contracted while the man was a partner in an existing customary union with another woman was a nullity.¹⁴ It was not argued in this court that Thembisile was wrongly decided. It follows that the civil marriage between the deceased and the first respondent, having been contracted while the deceased was a partner in existing customary unions with Tshinakaho and Diana, was a nullity.

1. Matter is removed from the roll

2. The matter should not be re-enrolled without:

2.1. Ms Msipha joined as a party to the application

2.2. Unless the settlement agreement between the applicant and the first respondent is attached to the proceedings

3. No order is to costs”

24)Kubalulekile ukusho ukuthi umufi uReuben kwakunguyena umngenisicala (applicant), kanti uThembu kwakungu mngeniswacala wokuqala (first respondent) enkantolo Enkulu yaseMajajini eMpumalanga. Ngomhlaka 18/07/2022, icala laphinde lasulwa ezincwadini zenkantolo ngesizathu esilandelayo:

“Having read the documents filed on record, heard Counsels for the applicant and the Respondent, and considered the matter, it is ordered that:

1. The matter is removed from the roll for personal service on Ms Msipha.

2. No order is to costs.”

25)Kuthe angatholakala uEmily, wase efakwa ezincwadini zenkantolo Enkulu yaseMajajini eMpumalanga njengomunye wabaquli becala kwicala elaliphakathi kukaThembu nomufi. Ngomhlaka 26 kuNhlaba (May) 2023, inkantolo Enkulu yaseMajajini eMphumalanga yakhipha isinqumo esithi:

“IT IS ORDERED THAT –

1. The civil marriage between Musa Reuben Tjaitjai (the applicant) and Thembi Mary Tjaitjai (the second respondent) contracted on 13 April 2004- ("civil marriage") is declared null and void;

2. The Minister of Home Affairs (third respondent) is directed to expunge the civil marriage between Musa Reuben Tjaitjai (the applicant) and Thembi Mary Tjaitjai (the second respondent) from the marriage register; third respondent).”

26)Ngomhlaka 22 kuNdasa (*March*) 2024, uReuben wasishiya lapha emhlabeni. Wathi ukuzwa ngesifo sika Reuben, uEmily wagijima washiya isithunzi eqonde ehovisi leNhloko yeNkantolo Enkulu eyobika ukubhubha kuka Reuben.

27)Wahlangana nezimbila zithutha ziholwa emhlophe phambili, ngoba wathola ukuthi uReuben ushone eshadile ngokwesilungu noPontso Anna Tjaitjai. Okusho ukuthi lona kwakungumushado wesithathu kamufi uReuben. Yingakho uEmily elapha enkantolo. Ufuna umshado kamufi noPontso uchithwe, noma ususwe ezincwadini. Nakhu okunye okumqoka, umufi uReuben uhamba emhlabeni engenayo incwadi yefa.

28)Ngokusho kukaEmily umshado wakhe noMusa wawungazange uhlukaniswe ngokuya ngomthetho wesishiyagalombili weRCMA.

Uhlangothi luka Pontso

29)Inkosikazi kamufi uPontso uphikisana nenkulumo ethi umufi wayeshadile ngesintu noEmily. Okunye futhi uPontso useqokwe njengo muntu ozohlukanisa ifa likamufi. Encwadini ephikisa uEmily, uPontso ume ngezizaba ezimbalwa. Ngizozibiza kanje:

Iminyaka ka Emily mhlazana engena emendweni noReuben

30)Impica badala ukuthi uEmily waye neminyaka eyishumi nesikhombisa mhlazana eshada uReuben. Lokhu, kusho uPontso, kuchaza ukuthi akazange ashade ngesintu uEmily, noma umshado wakhe wawungekho emthethweni. Ngonyaka ka 1992, imishado yesintu yayi ngaphansi komthetho wamabhunu owawubizwa ngo kuthi iBlack Administration Act 38 of 1927.

31)Ngaleyo minyaka kwakubekwe amashumi amabili nanye njengo nyaka wokuba mdala ngonkomthetho. Ngamafuphi uPontso uthi kwakufanele kube nemvumo yabazali ngaphambhi kokuba bashade uEmily noReuben. Futhi ngokusho kweRCMA, ubudala ngokomthetho yiminyaka elishumi

nesishiyagalombili. Kuyo yomibili lemithetho uEmily wayengeke angene emshadweni ngoba wayesaseyingane emehlweni omthetho, kusho uPontso.

Ubufakazi bomgcagco.

32) Okwesibili, uPontso uthi uEmily akazange abonise ukuthi washada ngempela ngesintu ngoba abukho ubufakazi ezincawdini zasenkantolo obubonisa umcimbi nokubungazwa komshado wabo wesintu. Eqhubeka uPontso uthi uEmily akakhulumi ngamasiko alandelwa mhlazane eshada. Amasiko afana nomembeso, umabo noma ukuhlabisa abakhwenyana, kusho uPontso.

33) Eggizelela uPontso uthi bekufanele bufakwe nobufakazi ezincwadi ezifungelwe obuphuma kulabo ababekhona mhlazane kukhokhwa amalobolo. Ukungabikhona kwalezincwadi kusho lukhulu.

Incwadi yamalobola.

34) Uma sekuza encwadini yama lobolo ehamba namaphepha kaEmily, uthi uPontso lencwadi uhubhu lukabhejane.

35) Uyabuza uPontso ukuthi eminyakeni engaphezulu kwamashumi amathathu, kungani uEmily angazange ake acabange ukubhalisa umshado wakhe noma afake isahlukaniso enkantolo?

36) Lapho esegeqa amagula uthi uzoibhalisa izingane zikamufi ezincwadini zokwahlukaniswa kwefa likamufi.

Impendulo kaEmily

37) Esephendula uEmily, umile kwelokuthi ushadile ngesintu nomufi. Futhi uthi iRCMA ize emuva kweminyaka eyisishiyagalombili ashada, ngakhoke isiqephu sesibili¹¹ seRCMA siyaweseka umshado wakhe. Uyaqhubeka uEmily

¹¹ S2(1) of RCMA

uveza incwadi efungelwe kamufi. Lencwadi umufi wayifungela ngenkathi ehlukana enkantolo noThembi. Uthi lencwadi isho ukuthi umufi wayeshadile ngesintu naye. Ekugcineni ukhuluma ngencwadi efungelwe ebhalwe ngumama wakhe.

Isimosomthetho mayelana nemishado yesintu.

38)Ngaphambi kokuphela kombuso wobandlululo, imishado yobomdabu yayi bukelwa phansi, futhi ingekho ezingeni elilingana nemishado yabokufika. Yayibukwa njengenhlanguanisela imishado yesintu. Guqukiyani izinto lapho kungena uMthethosisekelo omusha kanye nentando yeningi. UMthethosisekelo we Ningizimu Afrika oka 1996 uthi kwingxenye yamashumi amathathu:

“Ulimi namasiko

30. Wonke umuntu unelungelo lokusebenzisa ulimi aluthandayo futhi abambe iqhaza empilweni yamasiko awathandayo, kodwa akekho ovunyelwe ukusebenzisa lawo malungelo ngendlela engahambisani nanoma yisiphi isimiso soMqulu wamaLungelo.”

39)Uphinde kwingxenye yamashumi amathathu nanye uthi:

“Imiphakathi yamasiko, izinkolo kanye nezilimi ezithile

31. (1) Abantu abangamalungu emiphakathi yamasiko, izinkolo noma izilimi ezithile abanakuphucwa ilungelo, kanye namanye amalungelo alowo mphakathi –

(a) lokuthokozela amasiko abo, ukuqhuba inkolo yabo nokusebenzisa ulimi lwabo; kanye

(b) nokubumba, bajoyine futhi bagcine izinhlangano zamasiko, zenkolo nezezilimi kanye nezinye izinhlaka zomphakathi wezakhamuzi.

(2) Amalungelo esigatshana sesi (1) akufanele asetshenziswe ngendlela engahambisani nanoma yisiphi isimiso esikuMqulu wamaLungelo.”

40)Ngamafuphi, kusho ukuthi imishado yendabuko isemthethweni ngaphandle mangabe ingahambisani noMthethosisekelo. Mayihlaziya lendaba, inkantolo yoMthethosisekelo¹² kwicala lika *Mayelane v Ngwenyama and Another*¹³yathi, ngawami amagama, kufanele imishado yesintu ingabhekwa ngehlo lemithetho yabokufika. Kodwa kumele ibukwe njengomthetho ozimele geqe.

41)Inkantolo ku *Mayelane*¹⁴ yachaza ukuthi umthetho iRCMA iqiniseka umgomo okwingxenye 211(3)¹⁵ yoMthethosisekelo. Kusakela umthetho iRCMA iba semthethweni yonke imishado yendabuko eyasungulwa ngaphambi noma ngemuva konyaka ka2000 yabekwa emthethweni ngokugcwele, futhi inikezwa amalungelo alinganayo nemishado yezakhamuzi.

42)Ngokuya ngengxenye yesithathu yeRCMA umshado wendabuko uba semthethweni umangabe uhlangabezane nezidingo ezintathu:

Izidingo ezinqala zoMshado wesintu ukuze ubesemthethweni:

- a) Abashadayo kumele babe neminyaka eyishumi nesishiyagalombili.
- b) Kumele kube nemvume yabo bobabili abashadayo.

¹² Constitutional court.

¹³ (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013) [24] at para 24 "This Court has, in a number of decisions, explained what this resurrection of customary law to its rightful place as one of the primary sources of law under the Constitution means. 28 This includes that: a) customary law must be understood in its own terms, and not through the lens of the common la..."

¹⁴ At para 26 the court held: "The Recognition Act represents "a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country."32 Past law accorded marriages under customary law recognition only as customary "unions" and this "grudging recognition of customary marriages prejudiced immeasurably the evolution of rules governing these marriages."33 The Recognition Act is legislation "specifically deal[ing] with customary law", as envisaged in terms of section 211(3) of the Constitution. Its enactment was inspired by the dignity and equality rights and the normative value system of the Constitution.34 It is an adaptation of customary law which "salvage[s] and free[s] customary law from its stunted and deprived past."

¹⁵ The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

- c) Kumele kube nemithetho yendabuko elandelwayo (isibonelo: ukukhishwa kwelobolo, ukubonisana kwemindeni).

43) Okumqoka ukuthi akusavumelekile ukungena kumshado we silungu mangabe usashadile ngesintu.

44) Mangingakushiya lokhu, ngokwengxenye yesine yeRCMA abashadi bayagqugquzelwa ukuba babhalise imishado yabo ezinyangeni ezintathu ngemuva kokuba usunguliwe umshado wabo wesintu, kodwa ukungabhalisi akusho ukuthi umshado wesintu awukhosemthethweni¹⁶.

45) Ngowami umbono lokhu kuyisisusa sezinkinga eziningi emishadweni yesintu.

46) Uma sezihlaziya futhi zichaza lomthetho iRCMA, izinkantolo zakulelizwe zenze izinqumo ezininingi ezingafani. Ekucubunguleni lezidingo inkantolo Ephakeme yaseMajajini eBloemfontein ecaleni lika *Mbungela and Another v Mkabi and Others*¹⁷ yakubeka kwakhanya ukuthi iRCMA¹⁸ ayichazi ngokuphelele ukuthi kuyini okufuneka kufezuke ukuze umshado wesintu kuthiwe usemthethweni. Yathi inkantolo lokhu kwenziwa ngoba amasiko ayaguquguquka, ngakhoke abashaya umthetho (iPhalamende) bakushiye ezandleni zezinkantolo ukuhlulela ukuthi amasiko alesosizwe alandelwe ngendlela eqondile ukuze kuthiwe umshado wesintu usunguliwe futhi usemthethweni.

47) Okumqoka ukuthi inkantolo kulelicala yala ukubhekana nombuzo omayelana nokuhambiswa kukankosikazi emzini. Inkantolo yavumelana nombono ka Professor Bennett othi abomdabu sebethathe izenzo, nezinkolelo zabase ntshonalonga¹⁹ kanye nenkolo yobukrestu bazifaka kumasiko. Lokhu kubonakala ngokuthi bangabe basathela abashadi ngenyongo kodwa bafake

¹⁶ 4(9) Failure to register a customary marriage does not affect the validity of that marriage.

¹⁷ (820/2018) [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) (30 September 2019)

¹⁸ But s 3(1)(b) does not stipulate the requirements of customary law which must be met to validate a customary marriage.

¹⁹ Westernized

indandatho emunweni. Uthi futhi abasahlabi, esikhundleni salokho baya esontweni lapho umshado ubanjelwa khona. Inkantolo Ephakeme yaseMajajini eBloemfontein yamukele imibono ka J C Bekker. Ekugcineni inkantolo yathi kubalulekile ukuqeda ubandlululo, futhi kumqoka ukulandela uMthethosisekelo, ngakhoke ukungahambiswa emzini akusona isihibe esingenza umshado womdabu ungabisemthethweni.

48)Kwicala lika *Tsambo v Sengadi*.²⁰ Inkantolo Ephakeme yaseMajajini ese Bloemfontein yakusho kwagcwala umlomo ukuthi ukungenziwa koku 'go gorosiwa'²¹ (o leng karolo ya botlhokwa ya lenyalo la Setswana) akusona isihibe sokuthi umshado ubesemthethweni. Ivumelana nenkantolo Enkulu yaseMajajini eGoli, inkantolo Ephakeme yaseMajajini eBloemfontein yaqhubeka yathi amasiko ayaququka ngakhoke ukungalandeli imithetho yesintu ngqo njengothi lukamentshisi akungeze kwavimbela ukuba umshado ubesemthethweni.

49)Kulelicala ubaba kamufi uTsambo wayekhala ngokuthi kwakungazange kuhlatshwe isilwane, futhi umakoti wayengazange athelwe ngenyongo. Inkantolo yakuphebeza konke lokho yavumelana nomakoti uSengadi, owathi emva kwamalobolo emali ezinkulungwane ezingamashumi amathathu nanhlano kwasala izinkulungwane ezinhlanu. Futhi umalumekazi kamufi wamugqokisa ingubo athi ingubo yakhe yomshado. Uma bephumela ngaphandle kwegumbi ababekulo wabona ukuthi nomufi wayegqoke izambhatho ezifana nengubo awayeyigqokile, wena owabona amawele. Uthi bamanga bemtshela ukuthi bayamhalalisela ekwendeni umufi.

50)Uma ubuka ukuthi uSengadi wayemubhalisile umufi ezincwadini zokunyangwa ngodokotela, phecelezi medical aid, futhi basebehlale bobabili isikhathi, inkantolo Ephakeme yaseMajajini eBloemfontein yathi umshado wabo wesintu wawusemthethweni.

²⁰(244/19) [2020] ZASCA 46 (30 April 2020)

²¹ The courts call it handing over of the bride.

51)Nayo lenkantolo yawugwema umbuzo omayelana nokuhambiswa komushadikazi emzini. Lombuzo uyimpicabadala ngoba uthi kungani kungabesifazane bodwa abahambiswayo emzini. Ababuzalombuzo bathi lenqubo iphikisana nengxenye yesishiyagalolunye yoMthethosisekelo. Abanye babuza ukuthi kungani amalobolo akhokhwa abesilisa bodwa, qhude manikiniki mnike isongo lakhe!

52)Yona futhi inkantolo Ephakeme yaseMajajini eBloemfontein kwicala lika *Manwadu v Manwadu and Others*²²yathi ngaphambi kokuba umshado wesintu kungathiwa usemthethweni kubalulekile ukulandela amasiko anjengokuhlaba nokwenza imikhuba yalabo bantu abasuke beshada.

53)Inkantolo kwicala lika *Tsambo* yathatha izaluleko zika Professor Bennett owayezibhale kudala eminyankeni endlula amashumi amathathu. Lena yinkinga esibhekene nezinkantolo. Ngenkathi lemibhalo yenziwa ubandlululo lalushisa bhe. Kuyihlaya ngempela ukuthi yiyo imibhalo esetshenziswayo manje ezinkantolo.

54)Kodwa inkantolo yoMthethosisekelo ecaleni lika *Alexkor Ltd and Another v Richtersveld Community and Others*²³yaxwayisa izinkantolo zonke ukuthi ziqaphele imibhalo kanyenongoti bakudala. Iqiniso liyababa, cishe iningi lababhala ngemishado yesintu abantu abangakaze babesezinyaweni zabomdabu.

²² (799/2023) ((799/2023)) [2025] ZASCA 10; [2025] 2 All SA 27 (SCA); 2025 (3) SA 410 (SCA) (10 February 2025) “Before a customary marriage can be recognised as valid and registered it must satisfy certain requirements. As is evident from s 4(4)(a) of the RCMA, and the customary law requirements referred to above, before registering the marriage, the registering officer had to be satisfied that the marriage must have been concluded in accordance with customary law, meaning that the customs and usages traditionally observed among the indigenous African peoples of South Africa, which form the culture of those people, must have been adhered to. The marriage negotiations, rituals and celebrations must be according to customary law

²³ (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003)

55)Ecaleni lika *Manwadu* inkantolo izaluleko zayo yazithatha kuNkuna-Mavutane ME and Jamneck J.²⁴

56)Inkantolo yoMthethosisekelo kwicala lika*Mayelane v Ngwenyama and Another*²⁵ igcizelela ukuthi okubalulekile ukundlula amasiko ukuba kugcinwe imigomo yoMthethosisekelo.

57)Inkantolo yoMthethosisekelo kwicala lika *VVC v JRM and Others*²⁶ yathi noma abashadile beguqula umshado wabo wesintu ukuze ube umshado wabokufika (wesilungu)²⁷, imigomo emayelana nezimali emshadweni wesintu ayilaxazwa phansi. Ngalokho, inkantolo yayikhombhisa ukuthi imishado yesintu isisezingeni elifanayo nomhlado wesilungu

58)Awuthi ngicaze lenkulumo. Kulelicala abashadi bangena emshadweni wesintu ngomhlaka 5 kuNtulikazi (*August*) 2011. Kwathi emuva kweminyaka eyisishiyagalombili emshadweni wesintu, ngomhlaka 19 kuNhlojanja (*February*) 2019, bavela phambili kommeli wemishado beguqula isimo sezimali ngaphambi kokuguqula umshado wabo wesintu ukuze ubengumshado wabokufika noma wesilungu, ngomhlaka 10 kuNhlangulana (*June*) 2021.

59)Njengoba sonkesazi ukuthi umshado awuzimele gelekeqe, ufakela nezamafa (izimpahla, izindlu nezimali). Nizokhumbula ukuthi ngike ngakusho ukuthi imishado yesilungu makuza kwezamafa ilandela umgomo othi “okwami okwakho nokwakho ngokwami,”²⁸ngaphandle mangabe ngaphambili komushado kunesivumelwano²⁹ esenziwe phambi kommeli wemishado.³⁰

²⁴ ‘An Appraisal of the Requirements for the Validity of a Customary Marriage in South Africa, Before and After the Recognition of Customary Marriages Act 120 of 1998(2023) (26) PER/PELJ 1 at 8.

²⁵ [76] Section 3(1)(b) provides that one of the requirements for a valid customary marriage entered into after the commencement of the Recognition Act is that "the marriage must be negotiated and entered into or celebrated in accordance with customary law." The application of customary law is subject to the Constitution" and its development must promote the spirit, purport and objects of the Bill of Rights. The achievement of human dignity and equality is one of the founding values of the

²⁶ (CCT202/24) [2026] ZACC 2; 2026 (3) BCLR 234 (CC); 2026 (3) SA 1 (CC) (21 January 2026

²⁷ Section 10(2) of RCMA.

²⁸ Phecelezi in community of property

²⁹ Antenuptial contract

60)Ngokwengxenywe yesikhombisa³¹ yeRCMA yonke imishado yesintu iyimishado ehamba ngomgomo othi: “okwami okhwakho nokwakho ngokwami”, ngaphandle makuwumushado wesithembu noma kwenziwe lesivumelwano engisishilo ngaphambili.

61)Mangikusho ukuthi abashadi noma bengazange benza isivumelwano phambi kommeli wemishado ngaphambi kokuba bashade, bavumelekile ukuguqula isimo sezimali ekubeni “okwami okwakho nokwakho ngokwami” kube “okwami ngokwami nokwakho ngokwakho”. Ukwenza lokho kudingeka balandele imigomo yengxenywe yamashumi ambili nanye yeMatrimonial Property Act 88 of 1984 (MPA).

62)Kwicala lika VVC, inkinga kwaba ukuthi umabewuguqula umshado wabo, abashadi benza isivumelwano ngaphambi kommeli wemishado. Ngakhoke babese belawulwa yimigomo emibili:

- Ngaphansi komshado wabo wesintu kwakungu: “okwami ngokwakho nokwakho ngokwami.”
- Ngaphansi komshado wesilungu kwakungu: “okwami ngo kwami okwakho ngokwakho.”

63) Njengoba sazi izinkunzi ezimbili azihlali esibayeni esisodwa. Umbuzo kwaba imuphi umgomo ozolandelwa? Inkantolo yoMthethosisekelo yathi kulandelwa umgomo womshado wesintu, ngoba ngokuya kweRCMA lowomshado usezingeni elilinganayo nomshado wabokufika.

64)Inkantolo yoMthethosisekelo yachaza ukuthi noma abashadi bengena emshadweni wesilungu njengoba ibavumela inxenywe yeshumi³² yeRCMA akusho ukuthi uphelile umshado wesintu.³³

³⁰ Notary Public

³¹ S7(2) of RCMA.

³² 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

65)Eqinisweni ngikuthola kunzima ukuthi umshado wesintu ungaguqulwa uqhubeke futhi ume mpo. Ngombono wami isende indlela ngoba kuvumelekile ukuguqula umshado ube owesilungu kodwa ayikho indlela yokuguqula owesilungu ube owesintu. Okusho khona ukuthi ukhalo luselude.

66)Ekuphetheni lenkulumo, kusho ukuthi uma abashadi befisa umshado wabo ube ngaphandle kokuhlanganisa izimali namafa kufanele bangene esivumelwaneni phambikwegqwetha (ummeli) lemishado ngaphambi kokuba kuphume incwadi ehlongoza amalobolo. Yinkinga lena. Umuntu ubacela kanjani omalume ukuthi bayomkhongela kodwa ebese wukhethile umshado azongena kuwo?

67)Kuwo wonke lamacala angikaze ngizwe bekhuluma ngengoduso. Lokuhluleka ukwahlukanisa phakathi kwabantu abashadile nengoduso kungumsusa wezinkinga eziningi. Izingoduso zithathwa njengabashadikazi ngalokho izinkantolo zifaka abantu emshadweni wesintu abangakashadi ngokuphelele ngokwesintu.

Izicelo zabameli

68)Ekuphethweni kwecala inkantolo yalayela ukuba bobabili abameli bangezelele kwizinhloko zezindaba³⁴ ngoba kuningi okumqoka ababengakushongo.

69)Abameli baka Emily bagcizelele loludaba lokuthi wayeshadile ngesintu ngoba incwandi yamalobolo yaphuma. Futhi bathi ngaphambili kweRCMA umthetho wawungasho ukuthi abashadi kumele babeneminyaka engakanani. Bema

³³ [45] It must be accepted that the later civil marriage subsumes the customary marriage.[43] However, this does not mean that, factually, the customary and traditional way of life that the parties had, ceases to exist. This must be distinguished from the legal consequences that flow. The civil marriage must be interpreted to replace the customary marriage as a dual marriage is a legal impossibility.[44] But it is important to emphasise that this does not mean that the customary marriage is terminated as some commentators appear to suggest.[45] It can, in terms of section 8(1) of the Recognition Act, only be terminated through a decree of divorce

³⁴ Heads of argument

ngecala lika *Gumede*.³⁵Kulelicala inkantolo yoMthethosisekelo yageqa amagula isho ukuthi umthetho wabomdabu wawu bhekela phansi njenge nhlanguanisela hayi njengomshado.

70)Mayelana nokwahlukaniswa kwamafa emshadweni abammeli bakaEmily bakhuluma ngecala lika *Gumede v President of the Republic of South Africa and Others*.³⁶

71)Abameli baka Pontso bavika ngecala lika *Mayelane*, kakhulukazi lapho likhuluma ngokulandelwa kosiko. Izikhalo ezinohlonze zabammeli bakaPontso zine. Bakhala ngokungabikhona kobufakazi bokuthi wayeshede ngaluphi usiko uEmily nomufi. Uma bekuchaza lokhu, abameli bakaPontso, bathi isiqephu sokuqala seRCMA sigcizelela ukuhlonishwa kwesiko lalabo abashadayo. Okwesibili bama ngecala *NDPP v Zuma*.³⁷Kulelicala inkantolo yakuchaza ngokugcwele ukuthi akufuneki inkulumompikiswano emacaleni ezincwadi ezifungelwe. Beqhuba abameli bakaPontso bathi inkulumo kaEmily iphikisana nenkulumo kaMufi.

72)Bekuchaza lokhu bamile kwelokuthi lelicala kwakungafanele lize kumacala ezincwadi ezifungelwe. Kodwa kwakumele liye kwinkantolo yobufakazi obufungelwe ukuze bezohloma imibuzo ofakazi. Okwesithathu bathi umshado kaEmily awuzange wabakhona ngoba wayeyingane. Ngokomthetho iChildren's Act³⁸ iseqephu seshumi nesikhombisa ubudala ngokomthetho kwaguqulwa kwaba ishumi nesishiyagalombili. Lomthetho waguqula umthemtho iAge of Majority Act³⁹ owawubeke ubudala ngokomthetho kwiminyaka engamashumi amabili nanye. Ekugcineni bathi incwadi kaEmily yomshado iyinzwabethi efana namahemuhemu ngenxa yokusweleka kobufakazi balabo ababekhona mhlazane kuhambiswa amalobolo.

Imibono nemicabango yenkantolo

³⁵ Gumede (born Shange) v President of the Republic of South Africa and Others 2009(3) SA 152 (CC) ku 16

³⁶ (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (8 December 2008)

³⁷ National Director of Public Prosecutions v Zuma 2009 ZASCA 1(12 January 2009) para 26.

³⁸ No 38 2005.

³⁹ 1972(Act 57 of 1972)

- 73) Umbuzo oqandisa ikhanda obhekene nalenkantolo othi wabe eshadile na uEmily nomufi uReuben ngokwesintu? Umile uEmily ekutheni mangabe umshado kaThembi wachithwa njengongakaze wabakhona nasejudeni, kanjaloke nomshado kaPontso kumele ubenjongongakaze wabakhona.
- 74) Masesijula ngokwengqondo, kukhanya bha ukuthi uEmily unqike ngamaphuzu amabili. Elokuqala, ukuthi umufi uReuben wathatha isifungo mhla ebhala incwadi esho ukuthi wayeshadile noEmily ngesintu. Okwesibili, ume ngepheshana elisho ukuthi amalobolo akhishwa kwasala izinkomo ezine.
- 75) Mangihlaziya iphuzu lokuqala, kuvela inkulumompikiswano enkulu phakathi kobufakazi bakhe uEmily. Umufi uReuben uthi wagana uEmily ngonyaka ka1998. Lokhu kuphikisana nobufakazi bukaEmily obuthi bashada ngonyaka ka1992. Lempambano imqoka ngoba uPontso ume ngelithi wayeyingane uEmily ngenkathi eshada ngo1992. Uma ubala ngokuya ngamagalelo kamufi, uEmily waye sehlanganise iminyaka engamashumi amabili nambili, noma ngaphezulu mhlazane bengena emendweni.
- 76) Njengoba ngishilo ngaphambili kwisigaba samashumi amathathu nanye kwincwadi kaEmily efungelwe, uthi yena nomufi babengaphezulu kweminyaka eyishumi nesishiyagalombili mhlazane beshada. Akulona iqiniso lelo mangabe umuntu ebala iminyaka yakhe kusukela kunyaka ka1992. Phela uEmily wazalwa ngo1975. Lokho kusho ukuthi wayengaphansi kweshumi nesishiyagalombili. Lenkulumo ivumelana no kuthulwe umufi uReuben uma ethi bashada ngo 1998.
- 77) Lenkulumompikiswano ihlala obala lapho umufi ethatha isifungo ethi wayecabanga ukuthi wahlukana kudala noEmily. Kodwa abammeli bakhe bathi wayesashadile ngesintu. Lokhu kutholakala kwisigaba seshumi kwincwadi yakhe efungelwe. Eqhubeka uthi yonke incazelo ikwi"FA1". Masiyakuyo i"FA1", ithi ngonyaka ka 1998 izinkulumo nokukhishwa kwa malobolo kwenzeka phakathi komdeni womufi noEmily Dorah Msipha womazisi 7506030747082. Uthi bahlukana ngonyaka ka2017.

78)Kungani amagqwetha angazange anikeza incazelo kulenkinga esemehlweni? Bakhethe ukuthula cwaka. Ngisho noma sengibanike ithuba lokufaka izinhloko zezindaba. Kwinkantolo Enkulu yaseMajajini eMpumalanga angitshelwa ukuthi bathini ngalenkinga. Okwesibili abacacisi ukuthi benzenjani ngendaba yokuthi uEmily wayeyingane mhlazane elotsholwa. Yonke lemibuzo ayinazo izimpendulo. Ngamafuphi, uEmily uyaziphikisa kwincazelo yakhe. Kuyimpica badala ukuthi kungani umufi uReuben anikeza unyaka ongafani nencwadi yamalobolo kodwa wayeyiphethe lapho eya enkantolo eMpumalanga.

79)Anginikwanga incazelo ukuba kungani uEmily wavumela umufi ashade uThembu Mary Tjaitjai ngo2004 ngoba, ngokusho kukaEmily, bahlukana ngo2015. Kanti futhi noma esebuya enkantolo Enkulu yaseMajajini eMpumalanga kungani engafakanga isahlukaniso ngoba wayengasahlali nomufi. Ngisho nezingane zikamufi no Thembu, imbala zazalwa ngaphambi kokuhlukana kukamufi uReuben no Emily.

80)Okwenzeka enkantolo Enkulu yaseMajajini eMpumalanga ngomhlaka 17/01/2022 umfowethu, ijaji, uRatshibvumo wakhapha isinqumo esingumnqamulajuqu. Nomangike ngakusho ngaphambili, angikuphinde, wathi ngelika George ulimi:

“2. The matter should not be re-enrolled without:

2.1. Ms Msipha joined as a party to the application

2.2. Unless the settlement agreement between the applicant and the first respondent is attached to the proceedings.”

81) Okumqoka ukuthi wathi kumele kube nesivumelwano phakathi kukamufi uReuben noThembu. Lokhu kuchaza ukuthi lelicala aliqulwanga ngokugcwele. Yingakho ngo26 May 2023, uAJ Roelofse wathi ukhipha isinqumo emuva kokumamela abammeli bakaReuben. Lokhu kusho ukuthi uThembu wayengaphikisananga nesicelo sika Reuben. Yinkinga ke lokhu ngoba yonke

lemibuzo azange icubungulwe. Ngakho angeke ngikusho ngingangabazi ukuthi uEmily wayeshadile noRueben ngesintu ngokusemthethweni.

82) Kwinkantolo emamela izincwadi ezifungelwe, abufuneki ubufakazi obuphikisanayo. Uma inkantolo inquma ukuthi kunobufakazi obuphambanayo ngakhoke bekufunakala ofakazi bafungiswe bese behlonywa imibuzo, ingalichitha icala. Ngokomgomo wesithupha⁴⁰ kwimigomo yaseMajajini mangabe kuvela inkulumompikiswano emaphepheni inkantolo ingenza okukodwa kuzinto ezintathu:

- Ingalichitha icala umangabe ummangali wabe efanele ukubona ukuthi kuzovela inkulumompikiswano.
- Ingathumela icala ukuthi kuyolalelwa lengxenye okuphikiswana ngayo.
- Ingathumela lonke icala ukuthi kuyolalelwa bonke ofakazi bafungiswe bese baphinde bahlonywe ngemibuzo.

83) Ubufakazi bukaEmily buqhubuzana bubodwa. Angazi kungani kungena bufakazi balabo ababehola amathimba amalobolo. Lapha ngisho uJune Msipha kanye no John Khoza. Lelicala engibhekenenalo ngizolichitha ngoba kwakumele abammeli bakaEmily bekubona ukuthi izobakhona inkulumompikiswano. Kakhulukazi mangabe umufi esho okungafani no kushiwo uEmily. Kwicala *iPlascon Evans Paints v Van Riebeeck Paints*,⁴¹ inkantolo yakubeka obala ukuthi inkulumompikiswano ayifuneki mangabe kusetshenziswa izincwadi ezifungelwe enkantolo. Inkantolo ayinayo indlela yokucubungula ukuba ubani othembekileyo enkulumeni mangabe ibhekene nezwincwadi ezifungelwe zodwa. Icala elinjalo kumele liye ekuqulweni lapho ofakazi bezofakwa imibuzo enohlonze.

84) Sengigeqa amagula, akwazeki ukuthi uEmily wayengaphezulu kweminyaka engu18 mhlazane eshada ngokusho kwakhe, futhi aphinde abe ngaphansi kwaleyminyaka ngokuya ngencwadi yamalobolo. Kanti ngokusho kukamufi

⁴⁰ Uniform rule 6(5)(g) of the uniform rules of court.

⁴¹ 1984 (3) SA 623 (A)

bahlukana ngo2017 kodwa washada uThembu ngo 2004. Zinqunywa amakhanda ziyekwe.

Isiphetho

85)Ngikhethe ukubhala ngolimi lalona olahlwe yicala ukuze azi ukuthi limlahla ngamagama athini. Ngiyathemba lokhu kuphedula umbuzo wabameli bakaPontso. Kanti futhi ngithemba ukuthi kuzoba usizo kubantu abansundu ukufunda ngolimi lwabo imigomo yemishado yesintu sabo.

Izindleko

86)Kuyinjwayelo ezinkantolo ukuthi lowo olahlwe yicala akhokhele izindleko zonqobile. Angiboni kungani kufanele ngiguqule lenqubo kulelicala.

Isinqumo

1. Isicelo sika Emily siyachithwa.
2. Izindleko zizoba ngesisindo sika B.

MP MOTHA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicants : Att Gwebu
Instructed : Madlela Gwebu Mashamba Inc.

For the Respondent : Adv Dlamini
Instructed : TTS Attorneys

Date of hearing : 11 May 2026
Date of Judgement : 17 June 2026