

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCA31&32/2025

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED
DATE: <u>4/08/2026</u> SIGNATURE: 	

In the matter between:

MAKHUBELE BOTANA MAURICE

FIRST APPELLANT

MASINGE SOPHIE REBECCA

SECOND APPELLANT

And

MABASA WINNIE SASAVONA

RESPONDENT

JUDGMENT

KGANYAGO J

- [1] The respondent (Sasavona) has instituted divorce proceedings against the first appellant (Botana) alleging that she and Botana were married to each other by customary union on 24th June 1989. As proof of lobolo Sasavona has attached to her particulars of claim a confirmatory letter from Hlaneki Traditional Council dated 7th February 2023 and also an affidavit deposed by her. In her divorce papers she is seeking orders for a decree of divorce; division of the joint estate; 50% of Botana's pension interest; and R5 000.00 spousal maintenance for a period of six months or until she remarry, whichever comes first.
- [2] Botana is defending Sasavona's action. Botana has raised two special pleas. The first one he is challenging the validity of the alleged customary marriage between him and Sasavona. The grounds of Botana's first special plea are that there was no customary marriage that was entered into by him and the Sasavona; no lobolo was paid, and there was no celebration in terms of customary law; the documents which Sasavona has attached to her particulars of claim as confirmation of the customary marriage do not serve as proof of the existence of customary marriage; and the lobolo letter from Hlaneki Traditional Council has names that cannot be identified as witnesses for both Sasavona and him.
- [3] The second special plea is that of non-joinder. Botana is alleging that he is married to another woman who has 50% share in his estate. Botana therefore, plead that the Sasavona is claiming the share of the joint estate between him and his wife.
- [4] Sasavona had filed a replication. In her replication Sasavona is alleging that the lobolo letter which was signed by the emissaries during lobolo negotiations was misplaced at the time of the institution of the divorce summons and has now

been found. Sasavona had attached an alleged lobolo letter dated 24th June 1989. As per the lobolo letter the emissaries that attended the lobolo negotiations were Khosa Mbazima, Khosa Makhachane Daniel, Chavani Khubane Mana and Maluleke Misowa Patracia. From the lobolo letter it is not clear which family were the emissaries representing as they all signed as witnesses on the lobolo letter.

- [5] The second appellant (Sophie) has joined the proceedings on allegations that she is the lawful wife of the Botana. Sophie has also raised a special plea. According to Sophie's special plea, there was never any marriage contract between Sasavona and Botana. There was no payment of lobolo by Botana family to Sasavona's family, and there was no handing over made by the family of Sasavona to Botana's family. Sophie has therefore pleaded that there was no existence of a valid customary marriage that was concluded by the parties.
- [6] At the commencement of the trial in the court *a quo* the parties agreed to dispose the special pleas first. The parties further agreed to dispose the special pleas by leading oral evidence. As Sophie has joined to the proceedings, Botana has abandoned his special plea of non-joinder. The remainder of Botana and Sophie's special pleas had the effect of achieving the same results. The court *a quo* made an order that the onus was on the Botana and Sophie and were therefore required to lead their witnesses first.
- [7] Botana was the first witness to testify for his case. He disputed that he and Sasavona were married to each other by customary union. He disputed that he paid lobolo for Sasavona and also disputed knowing the emissaries that appears as witnesses on the lobolo letter. He also disputed knowing the lobolo letter attached to Sasavona's pleadings. Botana disputed having send

emissaries to Sasavona's family to negotiate lobolo for him. He stated if he had sent emissaries, in Tsonga culture, they should have sent people to deliver her, and not to write a letter as in their culture that shows disrespect. If there was exchange of money, the lobolo letter serves as evidence. The names of the people who have attended the negotiations will be written on lobolo letter and would have also signed it.

[8] Botana conceded that he was called to Hlaneki Traditional Council for a meeting regarding their customary marriage. At that meeting Sasavona, her mother and brother were present. During the meeting Botana disputed the existence of the customary marriage between him and Sasavona. Later the council informed them that it was no longer necessary to interrogate them further as the first people whom the council held a meeting with have conceded that they have lied to the council when it issued the first lobolo letter. The council informed them that it had taken a decision to write a letter renouncing the first lobolo letter. He stated that he was shocked when he read the affidavit deposed by Chabane Maria that stated that he had passed away, and that it was Sasavona who had informed Maria that he had passed away. Botana conceded that he is married to Sophie.

[9] Botana was cross-examined and it was put to him that according to the affidavit of Rebecca Masinga the lobolo negotiations of him and Sophie was held on 19th March 2016. The celebration was held on the same date of lobolo negotiations, and Sophie was handed to the Makhubele family on 21st March 2016. However, according to the affidavits of Maluleka Grace and Dabula, the lobolo negotiations were held on 19th August 2016 and the handing over was done on 21st August 2016. Botana stated that

there were lot of things that can make a person to forget, but the fact of the matter is that lobolo negotiations between him and Sophie have taken place. He denied that he had brought Sophie into the court proceedings in order for her to assist him in fighting his special plea.

[10] Botana denied that he was married to Sasavona but conceded that she and Sasavona are having two children together and that both children are currently majors. Botana stated that during 1990 he had sent a person to Sasavona family to go and pay damages for having impregnated Sasavona, but that he did not pay lobolo. Botana stated that during 1993 Sasavona brought the two minor to stay with him. He stayed with these children until they left on their own. He had stayed with the children without Sasavona. Botana denied that he had instructed the traditional council to write a letter revoking his marriage with Sasavona. According to Botana, the traditional council wrote the revocation letter after they realised that they have been lied to regarding him been married to Sasavona.

[11] Mokajane Daniel Khosa (Daniel) testified as Botana's first witness. He testified that he knows Sasavona. Sasavona came to his homestead and requested him to accompany her to the tribal royal family as her husband has passed away. At the tribal royal family they needed relatives so that they can be able to pay her money for the passing of her husband. Sasavona had told Daniel that the money will not be paid if one of the Khosa family member was not present.

- [12] On arrival at the tribal council they found people waiting for them. The chief asked Daniel how he was involved in the issue of lobolo and whether he knew the people who were at the tribal council. Daniel told the chief that he did not know them, and he is not even related to them. He was involved because Sasavona came to his homestead and requested him to accompany her to the tribal council. The brother to Sasavona was the first person to come and talk to him requesting him to go with them to the tribal council. He did not know the name of the brother of Sasavona, but they attended church together and only knew him by his surname of Khosa.
- [13] Sasavona had first gone to Mbasima Khosa the brother to Daniel, and when she could not find him, she went to Daniel. Daniel had asked Sasavona whether she was not going to put him in trouble as he knew nothing about the matter. Sasavona told him that a person could be convicted or put into jail without having committed an offence. Daniel stated that he was told to sign the lobolo letter which he signed despite not knowing anything about the lobolo. He stated that during 1989 he was not at his home village but came back during the year 2000. He was surprised by all these, and how his name happens to be involved in this matter. He is not related to Sasavona, he does not know her, and she also does not know the names of the witnesses that appears on the lobolo letter. Daniel disputed knowing Chabane Khubane Maria. He did not know Botana and that he was seeing him for the first time at court.

- [14] Under cross-examination Daniel stated that he was not present when the lobolo was paid. He stated that he was able to write his name, but sometimes he appends his thump-print. Daniel stated that Sasavona does not even know his name. He stated that he did not remember whether in the year 2023 he went to the police station to make an affidavit, and that he knew nothing about the matter. He could have made the affidavit as he knew nothing about the matter and did not know the contents of the affidavit. He stated that the first document that he had signed, he was told that it was for the royal family, and the second document that he had signed was for him to get out of trouble as he was told that he will be arrested.
- [15] He was fetched by the police officers from the tribal council to meet Botana, he was scared and he signed so that he can get out of trouble. On arrival at the tribal council, they showed him Botana and asked him whether he knew him, and he said he did not know him. The tribal police told him that he was under arrest because he had signed documents which he knew nothing about. He told the tribal police that he had signed because it was indicated to him that it was for the royal family.
- [16] Khubani Maria Chavani (Maria) testified as Botana's second witness. She testified that Chavani is her marital surname. She does not recall the year in which she got married. Her maiden surname is Maluleke. She stated that she started knowing Sasavona at court when she started attending court proceedings. Before the court case she never came across

Sasavona. She denied attending Sasavona's lobolo negotiations on 24th June 1989. She denied knowing Patracia Musola and Mkatjane Daniel Khosa. She cannot read and write.

[17] Maria conceded that she went to Hlaneki tribal council, and the reason for that was to receive her old age social grant. On arrival at the tribal council, her late son who was a police officer at Hlaneki told her that there was a letter which it is alleged that she had signed. Her son did not show her the letter or document that she had signed but told her that she was under arrest. She told her son that she wanted to write an affidavit to clear her name because she did not do it. She requested her son to write that affidavit to indicate that she knew nothing. After her son had written the affidavit, she signed it by placing her thumb print without her son reading back to her the affidavit that he had prepared. However, what her son had written in the affidavit is what she had told him.

[18] She at no stage talked to Sasavona and had seen her for the first time at court. Maria stated that the first time she went to the tribal council was when her niece Musola asked her identity document as she wanted to use it. She did not give her niece her identity document, but she went to the tribal office. On arrival at the tribal office, they asked her to give them her identity document. They took her identity document together with that of Musola and they started writing. After writing they gave back her identity document and did not make her to sign any document. She stated that she had changed her maiden surname to Chavani during 2018 when

she changed her old identity document to the smart card. She stated that during 1989 she was still using her maiden surname. She stated that she did not know Botana or any of his family members around Hlaneki village.

[19] Maria was cross-examined and she stated that she did not know where the homestead of Sasavona was. She denied that she was part of the emissaries that have negotiated Sasavona's lobolo. Maria stated that she went to the tribal council in order to receive her old age social grant, and that is when she met the police officer who told her that she was under arrest. She disputed that she is the one who had signed with a mark on the letter of confirmation of the marriage between Botana and Sasavona.

[20] She stated that she only signed an affidavit to clear her name. It was put to Maria that Botana had threatened her to come and testify at court, her response was that it was not possible as she did not know Botana and also did not know where he stays. It was put to Maria that she had deposed her affidavit under duress because she was told that she will be arrested, she conceded to that and stated that she was afraid to come and be in trouble for something that she did not know. That concluded the evidence for the first appellant.

[21] The second appellant Sophie Rebecca Masingi (Sophie) testified under oath. She testified that she and Botana were married to each other customarily during 1996. Lobolo was paid for her by the Makhubele family. There were people who were present from her family and Makhubele family to witness the transfer of the lobolo. A lobolo letter was

prepared and signed by those who attended the lobolo negotiations. She was handed to the Makhubele family on 21st March 2016. When the Makhubele family accepted her, Botana did not have any other wife. She started knowing Sasavona in court but knew that she was having children with Botana. She was at no stage informed that Botana was married to Sasavona.

[22] Sophie was cross-examined and she stated that she and Botana were married to each other on 19th March 2016. She conceded that she went to Hlaneki tribal council in order to obtain the confirmation letter of their customary marriage, and that the reason for that was to supplement the lobolo letter. She stated that R22 300.00 was paid as lobolo for her. Sophie stated that the dates of the 19th and 21st August 2016 as stated in the affidavits of Grace Maluleke and Dora Tsakani Lily were incorrect. However, Grace and Dora knew that she and Botana were married to each other. Sophie stated that she and Botana are having one child together.

[23] Octavia Twala (Octavia) testified as Sophie's first witness. She testified that Sophie is her sister-in-law child. She knows about the marriage between Sophie and Botana. She was present when the Makhubele family came to pay lobola for her. After payment of the lobolo there was a ceremony which was held, and they even danced. The lobolo amount that was paid for Sophie was R20 000.00. Thereafter Sophie was handed to the Makhubele family. She was not aware that Botana had another

wife at the time he was getting married to Sophie. The lobolo negotiations were held on 19th March 2016. The date of the 19th August 2016 as it appears in her affidavit was an error from her side.

- [24] Octavia was cross-examined and when asked to explain the discrepancy in relation to whether it was R22 300.00 or R20 000.00 which was paid as lobolo for Sophie, she stated that she is an elderly person and it is easy for her to forget. She denied that she was coached of which evidence to come and testify about.
- [25] Sasavona Grace Maluleke (Grace) was Sophie's second witness. She testified that she knows Botana, they are cousins. She knows that Botana is in a relationship with Sophie, and that she was part of the delegation of their lobolo negotiations during 2016. After the negotiations they enjoyed food, drank alcohol and they also danced on the beach. Sophie was not handed to them on the same day of the lobolo negotiations, but at a later date. She does not know Sasavona. She is aware that Botana had other children, but do not know their mother.
- [26] Grace was cross-examined and she stated that the lobolo negotiations were held on 19th March 2016, and the handing over of Sophie was done on 21st March 2016. In her affidavit that she had deposed she had made a mistake in relation to dates as she was not in possession of the lobolo letter. She stated that the people who were present during the lobolo negotiations of Sophie were Lazarus Makhubele, Elias Makhubele, Malai Mavundla, Basani Twala, Nico Makhubele, Rendani Dabula, Gift

Makhubele and herself. The lobolo that was paid including damages amounted to R22 300.00.

[27] Jameson Chabalala (Jameson) was Sophie's third witness. He testified that he was employed at the tribal council as a tribal clerk. His duties entail issuing letters. He is the one who authored the confirmatory letter of the customary marriage between Botana and Sasavona. He issued the letter after Sasavona had requested it. However, before he issued that letter, he had requested Sasavona to come along with two females from the Makhubele family and two from her own family. Further that she must come with both of her parents if they are still alive, and she told him that it was only her mother who was still alive. After some time Sasavona came back with those members and with the proof that he had requested. Based on that he issued the letter and also made them to sign the letter as proof that they were witnesses. After that they left.

[28] After they have left, Botana came to the tribal council complaining about the letter that he had issued to Sasavona. Jameson escalated the complaint to the council and the chief. Sasavona, her relatives together with the witness whom she brought when the letter was issued were called to the tribal council and they all came. Botana who was present disputed that the witnesses that were brought were Sasavona's family members. However, those witnesses stated that they knew Botana. Botana asked these witnesses whether they knew him as he did not know them. These witnesses changed their statements and said that Sasavona had just

invited them to come and be her witnesses. That made the chief to realize that the letter that was issued to Sasavona was not valid. The chief then wrote a letter revoking the letter of confirmation that was issued to Sasavona.

[29] Jamesson stated that he wrote the confirmation letter to Sasavona on the basis that Sasavona was having a copy of the identity document of Botana, and she had also told him that Botana was not around and has given her permission to obtain the letter. When he issued that letter, he was under the impression that Botana had given Sasavona permission to obtain the confirmation letter.

[30] Jameson was cross-examined and he stated that Sasavona had told him that Khosa Mbazima and Khosa Mkhachane were from the Makhubele family, and that Shabani Maria and Maluleke Patracia were from Mabasa's family. Jameson stated that Sasavona was also in possession of a lobolo letter dated 24th June. Jameson stated that Sasavona did not tell him about the passing away of Botana, and that he could not tell whether Daniel has misled the court when he testified that Sasavona told him that Botana has passed away, as he did know what she told Daniel. Jameson stated that Daniel had told the chief that he did not know Botana but had just been called by Sasavona. When it was put to Jameson that Botana has used his influence that come from the relationship he had with the chief to influence Jameson to testify and mislead the court, he stated that he did not know about the relationship which Botana had with

the chief, he did not know Botana and only saw him in relation to the dispute about the confirmation letter.

- [31] Jameson stated that when chief wrote the revocation letter, he was in his office with the parties, and he (Jameson) was not present and will not know what transpired in that office. Jameson disputed that he came to court to testify because Botana had threatened him by telling him that his money was been taken by Sasavona, but that he was sent by his office to come and explain about the letter that comes from the tribal office. That concluded the evidence for the second appellant.
- [32] Sasavona testified under oath and stated that she knows Botana and he is her husband. They were married to each other customarily on 24th June 1989. They are having two children together and both children have reached the age of maturity. She was residing at Makhubele homestead at Gonongo village with both children. When there was a breakdown in their marriage relationship, she left the children at the Makhubele homestead as Botana had stabbed her with a knife. She left after she had opened a case of assault GBH against Botana. She does not remember the year that she left the Makhubele homestead. When she left these children, they were old enough to be responsible.
- [33] When she instituted the divorce proceedings against Botana, she gave her attorneys a confirmation letter of her marriage from Hlaneki traditional council, and her lobolo letter was at her home. During their marriage Botana was abusing and assaulting her, and she decided to run to her

parental homestead. On 12th March 1993 Botana wrote a letter to Sasavona's parents demanding that she return to their common home on 13th March 1993. The contents of the letter were in such a way that it was a command as he was telling her to return home. In their culture if one has been assaulted, she will run to her homestead, and both families will come together and he will apologise. With the way Botana had written his letter it was a command that she be brought back.

[34] With regard to the confirmatory letter from Hlaneki tribal council, she was at the magistrate court when she learnt that Botana was going on pension. When she made enquiries, she was referred to the tribal council and told to go there with her identity document, two witnesses from her family side and two witnesses from the husband's side. That is when she called the witnesses who accompanied her to the tribal office. The witnesses that she called were Mamaka Anna Mabasa who is her mother, Patricia Maluleke whom they are not related, Mbazima whom they are not related, Daniel Khosa whom they are not related and Kubane Maria Chabane whom they are not related.

[35] Sasavona stated that the witnesses that she had called to be her witnesses at the tribal council were the same witnesses that were present during her lobola negotiations. Even if they were not related, it was not a must that during lobola negotiations one must call his/her relatives, it depends on the preference of the family. Daniel Khosa was present

during lobola negotiations but was being threatened by Tenico and his brother (Botana).

- [36] Later she received a letter from the tribal council inviting her to a meeting. In that invitation letter, she was requested to come along with her witnesses but did not specify the witnesses she must come with. She went to the tribal office in the company of her mother and brother. On arrival at the tribal office, she was told that the letter that was issued to her confirming the customary marriage was fraudulent and that she must go and fetch the other witnesses. She was able to find Daniel Khosa only as other witnesses were not at their homesteads.
- [37] The chief arrived and a meeting was held between the Mabasa and Makhubele families. The chief told them that the Makhubele family was alleging that the confirmation letter was fraudulent. Before her mother could respond, Botana looked at her mother and asked her whether she knows him and has ever seen him at her homestead. Daniel was also threatened in Sasavona's presence. (Counsel for Sasavona placed on record that he was not going to call a witness to corroborate her on the issue threats. The court *a quo* made a ruling that the evidence of threats against witnesses amounted to hearsay evidence and will be scrapped from the record). Botana told them that Sasavona should not have opened a case, if she wanted money she should have asked him and he would have given her the money. Thereafter Botana commanded the chief to write a letter that there was no marriage at all, and that the

marriage Sasavona was claiming to exist was fraudulent. The chief did not write the letter immediately but said he will think about it. The meeting was then adjourned.

[38] Sasavona stated that she knew nothing about the marriage between Botana and Sophie. If it was a formal marriage, Botana would have informed her and the children that he was going to marry another wife. Botana was not truthful when he testified that him and her were not married. They have stayed together for a long time at the Makhubele family. One on their child when she got married Botana had enjoyed the lobolo money. When Botana's aunt went to Lamana, she remained with the aunt's children at their home.

[39] Sasavona stated that she started staying with Botana during 1986 at his homestead, and it was because she was pregnant. After she fell pregnant with her second child Botana made a payment of R700.00 to her family which was to show that he was staying with Sasavona, and for her family if they were looking for her they will know where to find her. That Botana paid lobolo during 1989. She stayed at Botana's homestead together with their children.

[40] Sasavona was cross-examined and she stated that Botana had told his witnesses that she and him were not married to each other which is not the truth. She stated that the letter that Botana has written to her family was commanding her to return to their common homestead by Saturday, and proofs the existence of customary marriage between her and Botana.

She stated that the R700.00 that was paid by Makhubele family was for damages for Botana having impregnated her, and that payment was made during 1989 before the lobola payment of R2 786.00 was paid that same year.

[41] It was put to Sasavona that during 1989 Maria had not yet assumed her marital surname of Chavani but was still using her maiden surname of Maluleke and therefore could not have signed on the lobola letter as Chavani. Her response was maybe she was using two surnames as she had two identity books. It was put to Sasavona that Maria's old identity document was issued on 9th February 2004, and her response was that she did not know how to answer that question. She stated that during her lobolo negotiations the witnesses from the Makhubela family were Khubani Chavani and Daniel Khosa, and from the Mabasa family were Mbazima Khosa and Patricia Maluleke. She conceded that none of these witnesses were related her.

[42] Sasavona stated that after Botana had assaulted her, she ran to her homestead and Botana wrote a letter to her people pleading with them that she return to their common home so that she can be allowed to stay with him again, and to take care of the children. Sasavona stated that Botana knew the witnesses that represented the Makhubele family during lobolo negotiations. Sasavona stated that she stayed with Botana at Gonono village from 1986 until 2012 when she left their common home. She further stated Botana was also staying at section A Giyani with the

children. It was put to Sasavona that the people who attended her lobolo negotiations were from the same family, her responds was that it depends on how people prefers whether it is members of the same family or not, but this is about preference of that family. She stated that she started staying with Botana before he paid lobolo, and that he only paid R700.00 which was for damages, and she stayed with him until he paid lobolo. She stated that after the lobolo was paid, there was no handing over ceremony as she was already staying with Botana, and that the issue of lobolo was done as a normal practice.

[43] Vuthlari Makhubele (Vuthlari) testified as Sasavona's first witness. She testified that Botana and Sasavona are her parents. She was staying with both of her parents, sibling and grandmother at Gonono village. It is not true that Botana was not staying with Sasavona. She was born in 1987.

[44] Vuthlari was cross-examined and she stated that when she grew up, she was staying at Makhubele homestead with both of her parents. They were having two homes, one in Gonono village and the other in section A Giyani, but that Sasavona was staying at Gonono village and she never went to Giyani. When asked whether Botana was currently staying with another woman, her response was that she knew nothing about that. She further stated that when she visited Botana, she never found her with another woman. She stayed with both her parents until she got married during 2012. When she got married both of her parents were involved in preparations for her wedding.

- [45] Anna Mabasa (Anna) testified as Sasavona's second witness. She testified that she does know her age. She was born a long time ago. Sasavona is her daughter, and Botana is her son-in-law. Botana has married Sasavona and had also paid lobolo.
- [46] The witness was cross-examined and she could not tell when Botana had paid lobolo but stated that it was long time ago. She did not know the emissaries that came from Makhubele's family to negotiate the lobolo. Those who represented the Mabasa family during lobolo negotiations were her children including her son Eddy Mabasa. The emissary from the Mabasa family who was taking messages to the Makhubele family was Philemon Khosa but did not know the one from Makhubele family. She takes Philemon as her grandson. She did not know Maria Kubane.
- [47] She does not remember how much lobolo amount did Botana pay, but he had paid everything and do not owe her anything. Everything was recorded in a book. Herself and Eddy had signed that book, and do not remember the others who have signed. On the day the lobolo was paid she handed over Sasavona to Botana. That concluded the evidence of Sasavona.
- [48] The court *a quo* had found in favour of Sasavona and dismissed the appellants' special plea. The court *a quo* further held that there was a valid customary marriage between Botana and Sasavona. In dismissing the appellants' special plea, the court *a quo* has held that the evidence illustrate that both of the appellants witnesses were threatened with arrest

on allegation that that they involved themselves in other people's affairs. It concluded that the evidence and demeanours of these two witnesses pointed to the probability that their renouncement of involvement in the lobolo negotiations was not done freely and voluntarily, but under threat or undue influence.

[49] The appellants are appealing against the whole of the judgment and order of the court *a quo* to dismiss their special plea. Amongst the grounds of their appeal are that the court *a quo* erred in finding that the appellants witnesses who have signed the lobolo letter at Hlaneki Tribal Authority were threatened and dragged to court; the court *a quo* erred in disregarding the testimony of the witnesses that they did not know Botana, and that they were never emissaries for the Makhubele family, and never paid lobolo on behalf of Botana; the court *a quo* erred in accepting the testimony of Sasavona that Khubani Maria Chabane was having two identity documents at the time of lobolo negotiations; and that the court *a quo* erred in finding that there was a valid customary marriage between the Botana and Sasavona notwithstanding that Sasavona had produced a document that was clearly fraudulent.

[50] Before this court counsel for the appellants submitted that the judgment of the court *a quo* is factually unsustainable as it relies on documentary evidence (lobolo book) that is demonstrably fabricated. Forensic evidence established that the witness Chabani only adopted that surname during 2018, rendering her signature under that name in a 1989

document historically impossible. Sasavona's evidence regarding the identity of Botana's emissaries is that of a single witness, and her testimony was materially contradicted by her own mother regarding the family relationship of the witnesses. The finding that independent witnesses were threatened was unsupported by the record; conversely, the record shows they were tricked by Sasavona who claimed Botana was deceased. During the trial the court *a quo* ruled that the evidence by Sasavona that the witnesses of Botana were threatened to come and testify favourably to Botana was hearsay and therefore inadmissible. However, in its judgment the court *a quo* relied on that evidence it had ruled inadmissible. The requirements of a valid customary marriage were not met.

- [51] Sasavona through her counsel submitted that the 1989 lobolo letter was sufficient to conclude that there was a valid customary marriage between Botana and Sasavona. Sasavona never gave consent to Botana to marry Sophie. Therefore, the marriage between Botana and Sophie was null and void *ab initio*. The record shows that the two witnesses who testified for Botana were threatened and were under duress when they changed their earlier positions. These witnesses were elderly people, and whatever made them to change their minds was as a result of threats on them. These witnesses were also threatened to attend court. The witness Chavani was popularly known as Chavani though she only changed her identity document during 2018. Chavani did not recall when she got married to her husband.

[52] The questions which this court must determine is whether lobolo negotiations were held. If it is found that lobolo negotiations have been held, it must be determined whether it has been established that Botana and Sasavona were married to each other by customary union. The onus rest on Sasavona to establish the two issues, and not on Botana and Sophie as held by the court *a quo*.

[53] It is trite that customary marriage is not an event, but a process that comprise of a chain of events, and it also involves the two families of the parties intending to marry each other. That marriage must also be concluded in terms of the customs and usages traditionally observed by the parties involved.

[54] Section 3(1) of the *Recognition of Customary Marriages Act*¹ (Recognition Act) provides:

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

(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law”.

[55] In *Tsambo v Segadi*² Molemela JA said:

¹ 120 of 1998

² [2020] ZASCA 46 (30 April 2020) at para 15

"When dealing with customary law, it should always be borne in mind that it is a dynamic system of law. In *Ngwenyama v Mayelane and Another* this Court stated as follows:

'The Recognition Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put it differently, this requirement is fulfilled when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence".

[56] Botana and Sasavona were allegedly married to each other before the coming into operation of the Recognition Act. Before the coming into operation of the Recognition Act marriages of black people were regulated by the *Black Administration Act*³. In *Manwadu v Manwadu and Others*⁴ Weiner JA said:

"[17] According to Nkuna-Mavutane ME and Jamneck J, under customary law, the following were accepted as essential elements for a customary marriage to be viewed as concluded and binding: consent of the bride and bridegroom (spouses), consent of the bride's father or guardian (parents), payment of lobolo, and the handing over of the bride.

[18] The RCMA added further requirements which address formal and customary law requirements. Both prospective spouses must have consented to getting married in terms of customary law. These requirements are peremptory. The customary law requirements relate to the negotiation and celebration of such marriage".

[57] Before a customary marriage is celebrated it should have been negotiated and when agreement is reached, payment of lobolo will be made which will be in the form of money or live cattle. Normally this process would have started after the bride and bridegroom have agreed to be married to each other in accordance with customary law. The bridegroom will notify his parents about

³ 38 of 1927

⁴ [2025] ZASCA 10; [2025] All SA 27 (SCA); 2025 (3) SA 410 (SCA) (10 February 2025) at paras 17 and 18

the person he intends to marry. The bridegroom's parents will introduce themselves to the bride's family. After the two families have met, the bridegroom's parents will call a meeting of their close family members of which the uncles (brothers of bridegroom's mother) and aunts (sisters of bridegroom's father) play a crucial role. During that meeting a date will be set for lobolo negotiations and it will also be decided who will represent the family as emissaries. After that a letter or a messenger will be sent to bride's family to inform them of the date they will be coming for lobolo negotiations. The bride's family on receipt of the letter or message will call a meeting of close family members in the same way the bridegroom has done. In culture, a child is not that of his/her biological parents only, but also belongs to the extended family members, hence close family members will be involved in his/her lobolo arrangements. It will be uncles and aunts who take charge of negotiations reporting to the biological parents, as in terms of culture, parents of both the bride and bridegroom are not directly involved in lobolo negotiations.

- [58] According to the alleged lobolo letter by Sasavona, her lobolo negotiations were held on 24th June 1989. The lobolo payment was coming from the Makhubela family to Mabasa family. What has been recorded in the letter are the following: (a) opening of the mouth R20.00; (b) two containers of snuff R10.00; (c) the father's coat R50.00; (d) the blanket for the mother R50.00; (e) we are asking for surname R30.00; (f) the cattle are coming back to the kraal R100.00; (g) money for the maidens R150.00; we are asking for water R200.00; money coming from Makhubele is R2 786.00. Thereafter the witnesses who allegedly signed the lobola letter were Khosa Mbazima, Khosa Makhachane Daniel, Chavani Khubane Mana and Maluleke Misowa Patracia. From the signed letter it has not been specified which family were these witnesses representing, but

all have signed under one heading titled 'witness'. When Sasavona testified she stated that Khubani Chabani and Daniel Khosa were emissaries from the Makhubela family whilst Mabasa family was represented Mbazima Khosa and Patracia Maluleka. Sasavona conceded that Mbazima and Patricia are not related to Mabasa family.

[59] It is not in dispute that Botana had impregnated Sasavona twice and they are having two children who are now all majors. When the second child was born, Botana paid damages in the amount of R700.00 to Mabasa family for having impregnated their daughter and also to know where she was staying. At some stage Botana and Sasavona were living together in one of their homesteads in Gonono village whilst sometime Botana will stay with their children in their other homestead in Giyani.

[60] The first question to be determined is whether the lobolo negotiations were held which would have culminated into lobolo money being paid. On this issue the facts of this case are somehow unusual. The witnesses whom it is alleged were emissaries from the Makhubele family dispute having attended the lobolo negotiations and also dispute knowing Botana. According to the evidence of Daniel the alleged emissaries from the Makhubele family, Mbazima Khosa who allegedly represented the Mabasa family is his brother. When Sasavona instituted her divorce action, the lobolo letter was not attached to her particulars of claim but only came into picture after Botana had filed his special plea. Maria Chavani testified that during 1989 she was still using her maiden surname of Maluleke, and that she assumed her marital surname of Chavani during 2018. It could not be explained how it came about that she signed as Chavani during 1989 before she could assume that surname.

[61] Sasavona has conceded that the witnesses whom it is alleged were representing the Mabasa family, were not related to her and her family. It has not been explained how it came about that the Mabasa family were being represented by strangers during this important cultural event which brings two families together. This court is alive to the fact that customary law is by its nature, a constantly evolving system. However, it is not being explained which custom was the Mabasa family following when it chose strangers to represent them during lobolo negotiations, or whether it was the current custom that was been practiced and observed by the community they live in at the time.

[62] The two witnesses for Botana whom it is alleged by Sasavona that were emissaries from the Makhubele family are disputing that. Sasavona was not part of the lobolo negotiations. Sasavona's mother Anna when she testified did not state that she was part of the lobolo negotiations and that she knew how the lobolo letter came into existence. All that she has stated was that Botana was her son-in-law, has paid lobolo and was married to Botana. Sasavona did not call any of the witnesses who were representing the Mabasa family and were part of those who have signed the lobolo letter. No explanation was given why she did not call any of those witnesses since the alleged emissaries from the Makhubele family were disputing knowing Botana and also being part of the lobolo negotiations on 24th June 1989.

[63] According to Sasavona, the witnesses who were allegedly emissaries from the Makhubela family were threatened by Botana to change their version and state that they were not part of the emissaries from the Makhubele family and did not know Botana. During the trial the court *a quo* had dealt with this issue, ruled it to be hearsay evidence which was not admissible, and scrapped it from the

record. By scrapping that part of the evidence from the record it means that piece of evidence no longer exists and therefore could not form part of the record.

[64] However, in its judgment, the court *a quo* held that the evidence illustrate that both witnesses were threatened with arrest on allegation that they involved themselves in other people's affairs. It therefore came to the conclusion that the evidence and demeanours of these two witnesses pointed to the probability that their renouncement of involvement in the lobolo negotiations was not done freely and voluntarily, but under threat or undue influence. The court *a quo* by relying on the evidence which it had scrapped from the record had erred. Even if the court *a quo* has not scrapped that part of the evidence from the record, during questions by the court *a quo*, Maria had clarified why she had submitted an affidavit disputing having attended lobolo negotiations and also why she came to court to testify. Her reasons for submitting the affidavit and coming to court to testify was that they have lied about her and she wanted to clear her name. All these she did out of her own free will without been threatened, but with the sole purpose of clearing her name.

[65] The court *a quo* in dismissing the appellants' special plea relied also on the lobolo letter of 24th June 1989 by finding that it was original, Sasavona and her mother Anna had testified about it, their evidence illustrate that both were present during the negotiations, and therefore the lobolo letter was within their personal knowledge. That there was no acceptable evidence to challenge the authenticity or reliability of the lobolo letter except for the surname of Ms Chabani. It further found that the appellants' argument that the lobolo agreement was fraudulent could not be sustained by evidence. Therefore, the

letter remains prima facie proof of the negotiated agreement between the two families paving the customary marriage between Mr Makhubele and Ms Mabasa.

[66] I do not agree with the analysis by the court *a quo* of the evidence placed before it and its findings. From the entire record, there is no evidence showing that Sasavona and Anna were part of the lobolo negotiations. I have already pointed out in paragraph 62 above that in terms of customs and usages, the bride and her mother do not form part of the lobolo negotiations. As there is no evidence that both Sasavona and Anna were part of the lobolo negotiations, the lobolo letter was not within their personal knowledge. The two witnesses whom Sasavona had alleged were part of the lobolo negotiations have disputed that, and Sasavona failed to call the two witnesses from the Mabasa family without offering any explanation. There was no evidence presented that two witnesses were no longer available to come and testify. The only inference to be drawn is that Sasavona was afraid that should she call them to testify, they were going to contradict her version. The court *a quo* has therefore erred in finding that the lobolo letter was within personal knowledge of Sasavona and Anna.

[67] The evidence of Daniel was that when Sasavona asked him to accompany her to the tribal office, she told him that it was because her husband has passed away, and at the tribal office they wanted one of the deceased relatives so that money can be released. Further that he had signed the lobolo letter after Sasavona had assured him that he was not going to be in any trouble, and thereafter he signed the lobolo letter despite not knowing anything about the lobolo. Maria also disputed been part of the lobolo negotiations. None of the witnesses from the Mabasa family who were allegedly part of the lobolo

negotiations were called to rebut Daniel and Maria's versions which they are corroborating each other. Maria went further to testify that during 1989 she was still using her maiden surname of Maluleke, and she only changed to her marital surname of Chavani during 2018. Even if Maria does not remember when she got married to the Chavani family, there is no evidence that she was married before 1989 and has been using the Chabani surname even though she had not yet formally assumed it. There is sufficient evidence to challenge the authenticity or reliability of the lobolo letter, and the court *a quo* erred in finding the opposite.

- [68] The court *a quo* has ruled that the confirmatory letter of the alleged customary marriage between Sasavona and Botana issued by the council amounted to hearsay evidence. The second appellant Sophie has called Jameson the tribal clerk as her witness. Jameson confirmed that he is the author of the confirmatory letter issued by the council. Therefore, that letter would not amount to hearsay evidence since its author was called to testify about it. The court *a quo* has therefore erred in holding that the confirmatory letter amounted to hearsay evidence.
- [69] Even though the council had later revoked that letter, the circumstances under which Sasavona had obtained it and the circumstances in which it was revoked by the council are vital to this case and cannot be simply overlooked. This is the letter which forms the basis of Sasavona's cause of action when she instituted the divorce action against Botana. Jameson had told Sasavona to come along with two female persons from the Makhubele family, and two from her own family before he could issue that letter. Further that she must come with both of her parents if they are still alive. Sasavona left and came back with people

that she pretended to Jameson that they were from the Makhubele family, whilst they were not and also knew nothing about the alleged lobolo negotiations of the 24th June 1989. Sasavona has therefore deliberately misled Jameson in issuing the confirmatory letter of the customary marriage between her and Botana.

[70] The misrepresentation of the witnesses to Jameson by Sasavona is what led to the revocation of the confirmatory letter when the two witnesses disavow what they earlier attested to. Sasavona was therefore not honest with Jameson. This in itself proves that Sasavona had fraudulently obtained the confirmatory letter from Jameson. The only conclusion to reach is that Sasavona devised some means to obtain the fraudulent letter as there were no lobolo negotiations which were ever held, hence during the trial in the court *a quo* she was unable to call a single witness who was representing her family during the alleged lobolo negotiations. Without lobolo negotiations been held and no lobolo money could have been paid to the bride's family by the bridegroom. A customary marriage will not come into existence without lobolo negotiations been held. The court *a quo* has therefore erred in finding that the alleged lobolo letter of the 24th June 1989 remains *prima facie* proof of the negotiated agreement between the two families paving the customary marriage between Mr Makhubele and Ms Mabasa.

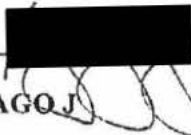
[71] The alleged lobolo letter of the 24th June 1989 only surfaced after the Botana had filed his special plea disputing the existence of the customary marriage between him and Sasavona. In my view, the lololo letter of the 24th June 1989 was just created to try and supplement the one that was revoked by the council. Sasavona has therefore failed to discharge the onus to prove the existence of

the customary marriage between herself and Botana. The appeal must therefore succeed.

[72] Accordingly the following order is granted:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and substituted with the following:

'The defendants' special plea regarding the non-existence of a customary marriage between Botana and Sasavona is upheld with costs'


KGANYAGO J.

JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE

I AGREE


BURNETT AJ

ACTING JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO DIVISION,
POLOKWANE

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