

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2020/28304

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |

..... SIGNATURE	18/11/2022 DATE
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In the matter between:

M Q S

(Identity Number:)

APPLICANT

and

DEPARTMENT OF HOME AFFAIRS

1st RESPONDENT

THE MASTER OF THE HIGH COURT

2nd RESPONDENT

LESIBA FRANS MAKGAKGA

3rd RESPONDENT

JUDGMENT

MANOIM J:

- [1] This is an application for the first respondent to register a customary marriage between the applicant and the late Makgaka Bella Sebethi (“the deceased”).
- [2] Customary marriages are regulated by the Recognition of Customary Marriages Act 120 of 1998 (“the Act”). The legal basis for this application is to be found in section 4(7) of the Act which states that a court may upon application order the registration of any customary marriage.
- [3] The applicant alleges that he married the deceased in 2009 according to customary tradition. The marriage was never registered. The deceased died in a motor car accident on 26 October 2018. Ever since that date there has been a dispute between the applicant and her family about the legality of the ceremony.
- [4] The third respondent is the only respondent who opposes the relief sought. The third respondent is the father of the deceased. He alleges there was no ceremony that accorded with tradition and that he has never regarded the appellant as his daughter’s husband and consequently he opposes the relief sought by the applicant.
- [5] Although I am not called to decide this issue in the present litigation what really is at stake is who is appointed as the executor of the deceased Bella Sebethi’s estate. By all accounts the deceased had more income and assets than either her putative spouse or her father who is a pensioner. Initially the second respondent the Master the High Court had appointed an attorney nominated by the appellant to be the executor. After overtures from the father this appointment was rescinded by the Master who appointed the third respondent as the executor.

- [6] These proceedings were brought by way of motion. There are numerous disputes of facts on the record. Ordinarily that would lead to either a dismissal of the application or a referral to oral evidence. Neither party was in favour of any via media by way of referral to trial or oral evidence. Mr Manaka who appeared for the third respondent urged me to dismiss the application because he argued the applicant should have anticipated these disputes and not instituted motion proceedings. But Ms Moyo who appeared for the applicant argued that I could still decide the matter on the undisputed facts as they would suffice to demonstrate that a marriage in terms of customary law had indeed taken place.

Factual history

- [7] According to the applicant he and the deceased began a relationship in 2003. She already had a child, a boy called Lesego, with another man who was born in 2003. The applicant states he and the deceased commenced living together but the date of this co-habitation is not clear from the record. In November 2009, he, together with a delegation from his family, went to the home of her father, the third respondent, to discuss a marriage proposal from the applicant. According to tradition his family first had to pay a door fee or the equivalent of an engagement fee to the deceased's family. This it is common cause they paid in the amount of R 1000. Thereafter on the applicant's version negotiations commenced on the same day and culminated in a document recorded the same day as follows.

“The Makgakga family and the Seleme family:

The Seleme family requests for a wife from the Makgakga family. They are paying R1000 introduction fee. (This fee is paid to ward off any interest from anyone else wanting the same woman). They request the amount for the bride price. The Makgakga family sets the fee at R20 000. A live cow, a coat for the father-in-law, a blanket for the mother-in-law and a blanket for the bride. The Seleme family pays R2000. Jane Makgakga. The Makgakga family: Lesiba Makgakga. The Seleme family: Moshikoane. Seleme The family of Edward Malesa (Translated

by assumption as the beginning of the phrase is cut off and the name as it appears to me).¹

- [8] The document is in manuscript and is written on the torn out pages of a diary on the date the meeting took place, 28 November 2009. The content of the document, and its translation from Sepedi into English are common cause.² It is also not disputed that the applicant (or his family) paid the R 3000 mentioned. It is also common cause that the balance of R 18 000 (assuming that the R 1000 was not part of the bride price but an engagement fee) was never paid. The applicant says he was unable to afford it.
- [9] Thereafter on the applicant's version he and the deceased resumed co-habitation. They had a child together a girl called Lesedi. Strangely the founding papers say nothing about this child, when she was born and whether she lived together with applicant and the deceased. It is only through the answering papers that I became aware of this child.
- [10] In 2018 the deceased, Lesedi, and the deceased's mother were involved in a fatal motor collision. The deceased died intestate. Since then, the applicant and third respondent have been in dispute over several issues they are.; an RAF claim for both the applicant and Lesego, the executors of the estate, and the occupation of a home registered in the deceased's name. Central to the applicant's claims in respect of all of these is whether he was married to the deceased in terms of customary law.

Legal provisions.

- [11] It is not necessary for a customary marriage to be registered to have legal validity. However, if it is not, then in terms of section 3(1) of the Act, the following requirements must be met.

“3 Requirements for validity of customary marriages

(1) For a customary marriage entered into after the commencement of this to be valid

¹ The comment in bold type parentheses is that of the translator.

² At my request, the applicant had the document translated from Sepedi into English by a court interpreter who verified his translation.

(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".

[12] There is no dispute that the applicant has made out a case on the first two requirements set out in section 3(1)(a). The question is whether the third, in terms of section 3(1)(b), has been met. For this reason, I have underlined it.

[13] Initially Ms Moyo, who appeared for the applicant, had argued that the applicant in these circumstances needed to prove a ceremony as well as co-habitation. However, given the factual disputes over co-habitation she now argues that the case can be decided on the letter alone. For this reason, I first consider the facts concerning the ceremony.

The document as sufficient proof of a customary marriage

[14] I now turn to the issue of whether the document on its own constitutes sufficient proof the customary marriage.

[15] The following facts about the letter are common cause. It was written by the deceased's parents and signed by them as well as a member of the applicants' family. The letter sets out the bride price (R 20 000) plus certain gifts to be bestowed on family members of the deceased (a blanket for the mother-in-law, a coat for third respondent and a cow. It is also not disputed that as recorded by the document that the applicant had paid R 30000. Also not disputed is that the applicant never paid the balance of the bride price.

[16] The third respondent argues that the document does not suffice to constitute proof of a customary marriage. First it is argued that the balance of the bride price was never paid. Next is that there were deficiencies in following proper

custom. The third respondent states that the delegation from the applicant had arrived “*uninvited*” and “*without prior arrangement*”. As he put it:

“I informed them that I had no capacity to welcome and negotiate with them, except to explain the process and requirements. I explained that my custom and culture dictates that a specific uncle and aunt of the deceased must head the delegation, whilst my wife and I join other elders for the final decision.”

- [17] The second deficiency which pointed to non-compliance with the cultural practice was that there was no celebration afterwards. This was impossible to have happened, the third applicant contends, because not only were the required relatives not there, but also given the surprise nature of the event, no arrangements could have been made for the celebration, which would have included a ritual slaughter and the handing over of the bride. None of this he contends happened.
- [18] The applicant does not dispute that these steps were not taken, although he says a celebration followed at the home of one of his relatives. Nevertheless, he concedes the third applicant was not in attendance.
- [19] But the main argument advanced by Ms Moyo for the applicant is based on the terms of the agreement reached between the two families. Since that is the case, I must first consider the reasons the third respondent offers for agreeing to the terms of the document. On his version despite the apparent finality of the language in the document, negotiations remained inconclusive, and it was contemplated that the families would meet again to finalise issues. The reason he offers for setting out the terms in the document was to “*...avoid any possible duplication on the return date for the lobola negotiations.*”
- [20] No such reservation or suggestion that there would be a “*return date*” are contained in the text. *Ex facie* this document, an agreement had been reached if this was a mere matter of an interpretation of a contract. However, it is not. This is a matter of determining the legal status of the applicant and

the deceased. The Act requires, *inter alia*, a determination of whether the marriage was “(...) *negotiated and entered into or celebrated in accordance with Customary Law*”. This means the enquiry cannot end after a mere perusal of the text of the arrangement.

[21] Ms Moyo has argued that the failure to pay the full bridal price does not invalidate the marriage in terms of customary law. In *Fanti v Boto & others*

[2008] JOL 21238 (C) Dlodlo J (as she was then) dealt with the opposite contention. Here the issue was whether payment of lobola sufficed to prove a customary marriage. She held:

“Regard being had to the above requirements for the validity of a customary marriage, payment of lobolo remains merely as one of the essential requirements. In other words, even if payment of lobolo is properly alleged and proved that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements (see Gidya v Yingwana 1944 NAC (N&T) 4; R v Mane 1947 (2) PH H328 (GW); Ziwande v Sibeko 1948 NAC (C) 21; Ngcongolo v Parkies 1953 NAC (S) 103).”

[22] However, the case Ms Moyo relies on was also decided in the same year and takes a different approach to the lobola payment issue.

[23] In *Maloba v Dube* 2008 ZAGPPHC 434 (23 June 2008) the court explained that:

“It is trite in African Customary Law that there is no rigid custom governing the time stipulation within which lobolo has to be fully paid. What is sacrosanct is the undertaking to pay the agreed lobolo. Consequently, the non-payment of the lobolo balance as alleged by the applicant is not decisive of the ultimate question, which is whether, was a valid customary marriage negotiated or concluded and that in pursuance of such negotiations lobolo was fixed. In my view whether lobolo was fixed at R6 000.00 or

R4 000.00 is not decisive, the fact of the matter is that lobolo was fixed and agreed upon. The outstanding question is whether or not the marriage was entered into or celebrated in accordance with customary law.”

[24] For the purpose of this case, I will follow the approach suggested in *Maloba v Dube*. I will accept that payment of the lobola agreed upon or in this case the balance of the lobola, is not an essential requirement for validity. However, this does not mean that it cannot be weighed up in the considerations together with other evidence. Failure to pay the balance of the lobola without an explanation for why this was the case, could lead to an inference that the applicant was insufficiently committed to the relationship. For this reason, I go on to consider whether the non-observance of the other cultural practices, namely the presence of the elders, and the celebration would lead me to a different conclusion.

[25] Here Ms Moyo argued that customary law is not static. It evolves with the times. This approach in principle find support in a decision of the Supreme Court of Appeal where Maya JA in *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) held that:

“no hard and fast rules can be laid down, this is because ‘customary law is a flexible, dynamic system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms’ ... because of variations in the practice of rituals and customs in African society, the legislature left it open for the various communities to give content to section 3(1)(b) in accordance with their lived experiences”³

[26] I accept that I must follow a flexible approach. The problem judges face is that they have to decide on an ad hoc basis which practices can be said to have evolved, and which remain sacrosanct. In this matter I do not have the benefit of this evidence. I accept that on certain issues courts can take notice

³ At paragraph 17.

of changing norms without evidence. A customary practice that might suppress a right a party has otherwise in terms of the constitution, for instance a practice that might subjugate women. I accept as well that modernisation may also come into play. Ms Moyo gave as an example of lobola payments being made by electronic transfer. But the two customary practice here do not slot easily into either of these categories so I cannot conclude that their non-adherence represents some changing norm or denial of another constitutional right. Both practices that were not adhered to have in common the recognition that the involvement of both families and extended families in sanctioning a couple's relationship is essential. But even if it is not considered an essential it is further symptomatic of the non-adherence to tradition when considered against the casual way the deceased's family were treated and the failure to pay the balance of the lobola without explanation.

[27] There are thus deficiencies in both elements required in terms of section 3(1)(b). The absence of the deceased's senior relatives suggests that the 'negotiation' was not done in accordance with tradition. The absence of joint celebration suggests that it was not 'celebrated' in accordance with tradition.

[28] I find therefore that notwithstanding the text of the document customary practice has not been adhered to. Since these customary practices are important and still adhered to, I cannot adopt a 'flexible approach' and ignore them.

Co-habitation

[29] I will still nevertheless consider the issue of co-habitation because co-habitation has been recognised in the case law as a factor that might serve to confirm the existence of a customary marriage. In *Tsambo v Sengadi* [2020] JOL 47138 (SCA) the court quoted the work of Professor Bennett who had stated:

"long cohabitation raises a strong suspicion of marriage, especially when the woman's father has taken no steps indicating that he does not so regard it".

- [30] The applicant states that he became acquainted with the deceased in 2003 when they started what he terms a “*romantic relationship*.” At the time he says he was living with her in Tembisa. Her father he says had chased her from the parental home in 2007. The applicant and the deceased then moved in together in her grandparents’ home elsewhere in Tembisa. The applicant says he built a home for them both at the grandparents. Thus, the applicant’s case is that he and the deceased cohabited prior to the customary ceremony (28 November 2009) and continued to do so thereafter until her death. Subsequent to her death he continues to reside at the premises where they had co-habited prior to her death.
- [31] The third respondent disputes this version. The only fact about co-habitation that is common cause is that he agrees that the applicant now resides in what was the deceased’s last home. He makes no mention of the deceased being forced to leave her parental home in 2003 and this allegation is met with a bare denial. However, he does put up his own narrative of the events. He states that in 2003 the deceased was in a relationship with another man. In 2003 she had a child called Lesego from this relationship. The third respondent then explains how the deceased came to be living with her grandparents. On his version she came to live with them in 2008 because she was then working for Shoprite Checkers in Kempton Park. This required her to work till late. For safety reason her parents encouraged her to stay with her grandparents who lived in Tembisa which was closer to her work.
- [32] In 2014 the deceased purchased a home in Clayville in Midrand. This home is close to where the third respondent lives. The Deeds Office records the deceased as the owner but describes her status as “unmarried”. The third respondent makes much of this fact. Why he asks did the deceased describe herself as unmarried in 2014, if on the applicant’s version they had entered into a customary marriage in 2008. The third respondent denies that the applicant lived with the deceased either in Tembisa or at her new home in Clayville. Rather he states the applicant lived in another part of Tembisa in a home owned by his employer. He also relies on another document; a credit application the deceased had submitted to purchase a motor vehicle. In the

section on the form where she was required to give details of “*spouse next of kin*” she inserts the third respondent’s name as next of kin. There is no mention made of the applicant. The block on the form next to ‘spouse’ is left blank.

- [33] He says the applicant frequently visited her when she moved to Clayville but did not stay there. The reason he visited her there was that they had minor child together born in 2010. This child died in the same accident as the deceased.

- [34] The third respondent then says that in 2017 the deceased had indicated to him that she wanted to end her relationship with the applicant because he had been abusive towards her. At that time Lesego, the child of the deceased’s first relationship, was living with her. Because of the threats made by the applicant the third respondent arranged to have Lesego go with him to Limpopo where they could “... *safely stay without the risk of being harmed by the applicant.*”

- [35] On 26 October 2018, the deceased, her minor child with the applicant, Lesedi, her mother, and other family members were killed in a motor accident. After the funeral Lesego was sent to stay with an aunt. It is unclear from the record whether this was a different relative to whom he had gone previously. What is common cause is that from December 2018 Lesego went to stay with the applicant. From correspondence attached to the founding affidavit it is apparent that Lesego was having personal problems adjusting to the death of his mother. A letter from a social worker addressed “*To whom it may concern*” indicates these problems and states that he is staying with his “*biological father*” at the Clayville home although this is referred to as being in Tembisa. It is also incorrect as the applicant was not Lesego’s biological father. For whatever reason the applicant had misrepresented this fact to the social worker.

- [36] The third respondent denies that Lesego came to live with the applicant in 2018. I cannot resolve this dispute of fact between the two of them.

However, Lesego who is now over 18 years has provided an affidavit confirming the third respondents' version. He goes on in his affidavit to state:

"I further confirm that the Applicant, Makhosine Quintin Seleme, did not stay with my mother Bella Sebethi Makgakga, nor is he my guardian or primary care giver."

[37] According to the third respondent Lesego is now residing in Daveyton with his other daughter. The third respondent does concede that the applicant now resides in the Clayville home but contends this only happened after the deceased passed away.

[38] The facts concerning co-habitation are insufficient for me to consider them evidence that the applicant and deceased had a customary marriage. Whilst both versions have their lacunae applying *Plascon Evans* I cannot find in favour of the applicant on this issue. Moreover, to the extent that the third respondent might not have direct knowledge of the co-habitation, on the applicant's version Lesego would. But Lesego's affidavit is entirely destructive of the applicants' version on this point.

Conclusion.

[39] I conclude that the applicant has failed to make out a case that a customary was entered into that met the requirements of section 3(1)(b) of the Act. The facts on co-habitation do not favour his version either. The application is dismissed. The applicant is liable for the third respondent's costs.

ORDER:-

[40] In the result the following order is made:

1. The application is dismissed.
2. The applicant is liable for the third respondent's costs on a party and party scale.

**N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

Date of hearing: 19 August 2022

Date of judgment: 18 November 2022

Appearances:

Counsel for the Applicant:

S Moyo

Instructed by.

Mashabela Attorneys Inc.

Counsel for the First Respondent:

M G Manaka

Instructed by:

JM Cornelius Attorneys