

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



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

CASE NO: 2021/36333

(1)	REPORTABLE
(2)	OF INTEREST TO OTHER JUDGES
23/5/2022	SIGNATURE
DATE	

In the matter between –

THUSHENI, NONHLANHLA VERONICA
(IDENTITY NUMBER: [...])

APPLICANT

AND

MINISTER OF HOME AFFAIRS

First Respondent

THE MASTER OF HIGH COURT JOHANNESBURG

Second Respondent

**ESTATE LATE: DLAMINI, SHADRACK MFANA (IDENTITY
NUMBER: [...])**

Third Respondent

DLAMINI, MELUSI RONALD

Fourth Respondent

MAGUBANE, ABRAHAM

Fifth Respondent

PHIKE, ELIZABETH

Sixth Respondent

PHIKE, NTHOMBIKAYISE ANGELINE

Seventh Respondent

ANY OTHER INTERESTED MEMBER(S)

Eight Respondent

OF THE DECEASED'S FAMILY

JUDGMENT

MOORCROFT AJ:

Summary

The applicant seeks an order for the late registration of a customary marriage entered into by herself and the late Mr. Dlamini. It is common cause that there were negotiations between the two families and that part of the agreed labola amount was paid over. The performance of the marriage celebrations are in dispute. There are many disputes of facts incapable of resolution on the papers.

The application is dismissed.

Order

[1] In this matter I make the following order:

1. *The application dismissed;*
2. *The applicant is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant seeks an order condoning the late registration of the customary marriage between herself and the deceased Mr. Dlamini who passed away in July 2021, and that the Minister of Home Affairs (the first respondent) be ordered to register the customary marriage concluded on 2 May 2021, issue a customary marriage certificate, and to reflect the deceased marital status as 'married' on his death certificate.

[4] The Master,¹ the deceased estate,² the deceased's relatives (including his brother³) and his daughter,⁴ and the mother⁵ of his daughter are also cited as respondents. The application is opposed by the sixth respondent, the daughter of the deceased.

The case for the applicant

[5] The applicant states that she married the deceased in 2020 in the course of a relationship that started in 2018. He proposed marriage in 2019 and she accepted. In April 2020 his family sent a letter to hers, confirming that a meeting would be held in May 2020. The applicant was by then already living with the deceased at his place of residence in Duduza.

[6] On about 2 May 2020 a delegation consisting of the fourth and fifth respondents attended at the house of the applicant's parents to negotiate Labola and to conclude a customary marriage in the Xhosa tradition. Labola was agreed in the amount of R50 000 of which R20 000 was subsequently paid. The meeting was attended by representatives of the Thusheni family and by the fourth and fifth respondents, Messrs A Magubane and MR Dlamini, on behalf the deceased's family.

[7] In the application the fifth respondent purported to confirm both the founding and the answering affidavits, thus perjuring himself.

1 Second respondent.

2 Third respondent.

3 Fourth respondent.

4 Sixth respondent.

5 Seventh respondent.

[8] The applicant avers that the marriage was celebrated at this meeting on 2 May 2020. It would seem therefore that no guests were invited – it was an impromptu wedding. In terms of the agreement between the applicant and the deceased the marriage celebration was simplified in view of the Covid19 pandemic and restrictions imposed by the President. After the celebrations the couple continued to cohabit at the Duduza residence until he passed away in the N17 Hospital in Springs on _____
6 July 2021.

[9] The marriage was never registered. The applicant explains that she and the deceased were lay people and were not aware of the registration requirement. The application was therefore launched after her attorneys informed her of the requirements imposed by law.

[10] After his death disputes arose between the applicant and the deceased's family. They denied that there was a valid customary marriage.

The sixth respondent's evidence

[11] The sixth respondent is the daughter of the deceased. She denies that a customary marriage between her father and the applicant was ever concluded. She points out that the applicant's evidence in respect of the celebrations on 2 May 2020 are bald and sketchy.

[12] She states that when her late father moved into a room in March 2020 she often went to visit him, taking her child with so that the child could have contact with the grandfather. She bought his furniture and other belongings and did his laundry and cleaned and cooked for him, and there was never any sign that the applicant lived with her father. While it is so that the lobola letter expressed the intention of getting married, no customary marriage was ever concluded. She would have known of any marriage celebrations and there were none. She criticises the fact that marriage negotiations

apparently took place in the absence of the deceased, the groom who was then a man in his fifties. She concludes that they were, for want of a better term, no more than boyfriend and girlfriend.

[13] The sixth respondent claims that the reason for the application is really the fact that she had demanded that the applicant return the deceased's motor vehicle.

[14] In Netcare hospital records created at the time of his death the applicant is referred to as a daughter of the deceased. It is not known how this information ended up in the records but it is worth noting that there is no explanation for this in the replying affidavit.

[15] It is common cause on the papers that there were negotiations. The sixth respondent's evidence is however that these never went beyond lobola negotiations. There were no final wedding negotiations, no handing over of the bride, and no celebrations on the day of the discussions.

The Recognition of Customary Marriages Act

[16] In section 1 of the Recognition of Customary Marriages Act, 120 of 1998 customary law is defined as "*customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples*" and a customary marriage as "*a marriage concluded in accordance with customary law*".

[17] In terms of section 3 of the Act parties who have reached the age of eighteen may consensually enter into a valid customary marriage provided that the marriage is "*negotiated and entered into or celebrated in accordance with customary law*."

[18] Customary marriages must be registered within a prescribed period and a certificate of registration is then issued.⁶ A court may on application⁷ made to the court, enquire into a customary marriage and order registration, cancellation of registration, or rectification.

⁶ S 4 of the Recognition of Customary Marriages Act, 120 of 1998.

⁷ S 4(7).

⁸ (4) SA 415 (CC) paras 23 to 25.

[19] The important role of customary law as a living system of law was discussed by the Constitutional Court in *MM v MN*.⁹ It was not the intention of the legislature to regulate every facet of a customary marriage. The Constitutional Court said:

[32] the Recognition Act does not purport to be — and should not be seen as — directly dealing with all necessary aspects of customary marriage. The Recognition Act expressly left certain rules and requirements to be determined by customary law, such as the validity

requirements referred to in s 3(1)(b). This ensures that customary law will be able to retain its living nature and that communities will be able to develop their rules and norms in the light of changing circumstances and the overarching values of the Constitution.

[20] In a living system of law, customs will undoubtedly evolve so that it is now “*probably practised differently than it was centuries ago.*”⁹ Age-old customs such as the handing over of the bride may be waived by agreement, or perhaps performed very differently in a modern society where the bride and groom are already living together at the time of the marriage in an urban environment. One simply cannot expect strict adherence to old traditions in an urban environment. In *Mbungela v Mkabi*, Maya P said:¹⁰

[27] The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present, could yield untenable results.

*[28] Thus, for example, a woman could consent to a customary marriage, followed by payment of lobola, after which she cohabited, built a home with her suitor, and bore him children, with the full knowledge of his family. When the man died, she and those children could be rejected and disinherited by his family simply on the basis she was not handed over or properly introduced to his family and was therefore not his lawful wife, and that the children were illegitimate. Needless to say, that consequence would be incongruous with customary law's inherent flexibility and pragmatism, which allows even the possibility of compromise settlements among affected parties (contemplated in cases such as *Bhe*),¹¹ in order to safeguard protected rights, avoid unfair discrimination and the violation of the dignity of the affected individuals.*

9 Hlope JP in *Mabuza v Mbatha* 2003 (4) SA 218 (C) para 25. See also *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) and Bennett *A Sourcebook of African Customary Law for Southern Africa* p 494.

10 2020 (1) SA 41 (SCA) paras 27 and 28.

11 Footnote 19 in the judgment refers to *Bhe v Magistrate, Khayelitsha*, (*Commission for Gender Equality as Amicus Curiae*); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

[21] A Court must therefore be careful not to insist on exact compliance with what any party to litigation regards as the appropriate celebrations in a specific case. The key is spousal consent.

Evaluation

[22] There are fundamental disputes of fact on the papers. These were foreseeable as the dispute between the parties to the present litigation was evident already prior to the application.

[23] The question whether a customary marriage was concluded cannot be answered with reference to the affidavits. Similarly the question whether the applicant and the deceased ever lived together as husband and wife, as opposed to being simply 'boyfriend and girlfriend' cannot be resolved on the papers.¹²

Conclusion

[24] For all these reasons I made the order quoted in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **23 MAY 2022**.

COUNSEL FOR THE APPLICANT:

M D MATSETELA

12 Rule 6(5)(g) of the Uniform Rules; Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* RS 17, 2021, D1-70; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162 and 1168; *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) paras 9 and 10.

INSTRUCTED BY:

OKAFOR MA ATTORNEYS INC

COUNSEL FOR 6th RESPONDENT:

S F SIBISI

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DATE OF THE HEARING:

5 MAY 2022

DATE OF JUDGMENT:

23 MAY 2022