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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

17 May 2023
DATE SIGNATURE

CASE NUMBER: A3067/2022

In the matter between:

KHETHA MLAMBO Appellant

and

SIBONGILE MOKOENA 1st Respondent
CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY 2nd Respondent

Neutral Citation: *Khetha Mlambo v Sibongile Mokoena & Another* (Case No: A3067/2022) [2023] ZAGPJHC 498 (17 May 2023)

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an appeal against the decision of the Johannesburg Regional Court in respect to an opposed motion in which the Court *a quo* granted an eviction in terms of s4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998 ('the PIE Act'), in favour of the first respondent.

[2] The appellant alleges that the Court *a quo* incorrectly admitted hearsay evidence in deciding the matter on motion. Furthermore, in light of a dispute of fact arising in respect of the existence of a customary marriage between the parties, that the matter should have been dismissed.

[3] The first respondent was the applicant in the Court *a quo* and the appellant was the first respondent. For purposes of this appeal this Court will refer to the applicant in the Court *a quo* as the first respondent and the first respondent in the Court *a quo* as the appellant. The appeal is opposed by the first respondent.

BACKGROUND

[4] It is common cause that:

(a) Both parties were above the age of 18 years when arrangements were made to enter into this alleged customary marriage.
(b) The appellant and the first respondent lived together for nine years at […] K[…] Street, […], Zone […], Soweto, Gauteng ('the property') and two children were born out of this relationship who bear the appellant's surname.
(c) It appears that lobola negotiations were paid in part.

(d) Following their break-up in 2019, the first respondent resided at the appellant's parental home as the appellant changed all the locks to the property.

[5] The issue to be determined is whether the eviction was correctly granted by way of motion proceedings and whether a customary marriage was in fact completed.

[6] The appellant alleges that both parties consented to be married to each other under customary law and that their respective families concluded lobola negotiations on 9 July 2011. A handwritten lobola letter was referred to in the Court *a quo*, which reflects that a certain amount was paid in respect of lobola and that a remaining amount of R17 000.00 was outstanding. The letter was signed by Lucas Motloung, Mona Calmen, Pulane Mthembu, Petrus Masango, Pholisile Nzimande and Alfred Mambo.

[7] The first respondent alleges that the commencement of lobola negotiations held on 9 July 2011 did not fulfil the requirements for a customary marriage as envisioned in s3(1) of the Customary Marriages Act. Accordingly, it was argued by the first respondent, in the Court *a quo*, that a customary marriage did not exist between the parties.

[8] The first respondent contends that she bought the property on 30 April 2010. The deed of transfer reflects the first respondent as the owner of the property. The first respondent contended in the Court *a quo* that the appellant was residing illegally at the property.

[9] Despite the service of the notice of eviction upon the appellant by the first respondent, the appellant refused to vacate the property.

[10] In the appellant's answering affidavit, the appellant alleged that he intended to bring an application to the High Court to seek an order that he and the first respondent had entered into a valid customary marriage on 9 July 2011 as envisaged in terms of s3(1) of the Customary Marriages Act.

[11] In the replying affidavit, the first respondent raised the following issues which

the Court *a quo* accepted as correct, thereby granting the eviction order. Paragraph 8

of the replying affidavit states the following:

"8.1 At no stage did the Applicant and Respondent enter a customary marriage because according to their cultural regime, rituals and practices had to be performed prior to the conclusion of their marriage.

8.2 During the lobola negotiations which were held on 9 July 2011, it was found that the Respondent had not paid damages which were due to the Applicant's family for impregnating the Applicant out of wedlock. An amount of R5000 was agreed upon for damages, of which was paid.

8.3 The family representatives of the family agreed to an amount of R23000.00 for the amount

to be paid by the Respondent for damages. The Respondent's family paid an amount of R6000.00 and a balance of R17000.00 was outstanding.

8.4 It was understood then by both families that following the completion of the lobola, *umembeso* which involves the groom, together with his family going to the bride's family with gifts had to take place for the customary marriage to have come into place.

8.5 According to the cultural regime of the parties, after the conclusion of lobola, *umembeso* will take place then a ritual will be performed whereby, the bride's family will slaughter a goat after the ancestors have been told that she is getting married. The goat is used in a ceremony known as *umncamo* for the ancestors to protect their daughter in marriage.

8.6 The groom's family will then slaughter a goat to welcome the bride into the family. The bile of the goat is then poured over the bride's head as a ritual to accept her into the family. This process is an essential custom which must be performed in order to enter a customary marriage.

8.7 At no stage did the Respondent's family perform *unembeso*, welcome or celebrate the welcoming of a bride into their marriage. As part of the cultural regime and celebration of the marriage, the bride and groom families will have a singing battle between the two families about who the bride belongs to. *Umakoti ngowethu* is often sung by the groom's family as part of the welcoming of the bride.

8.8 Furthermore, both families are of the understanding that the above-mentioned rituals and

customs first had to be carried out in order for a customary marriage to take place, as well

as a union of both families to come out.

8.9 It is my submission that the Respondent's opposition to the application is without merit and the Respondent is only raising this point for purposes of trying to raise an ownership claim into the property of the Applicant, where a claim does not exist."

[12] In paragraph 8 of the replying affidavit, the first respondent alleges numerous

reasons why the customary marriage was not concluded. There was an objection by the appellant as to the first respondent's hearsay evidence as contained in paragraphs 8.2, 8.3, 8.4 and 8.8 of her replying affidavit. The Court *a quo* dismissed the appellant's objection to the respondent's hearsay evidence. The Court *a quo* ruled as follows: "Ruling: …For present purposes, the paragraphs 10 as regards the hearsay it, is not hearsay, she may not have been present at that time when these occurrences took place but there are other ways of learning of things and during the course of the exercise which spans probably some years, it just seems wrong to suggest that the first respondent knew nothing about anything subsequently. She would have known, and any uncertainties would have been clarified and someday people would have spoken, the family would have discussed, and she would have gathered that information in that fashion. So that is how she comes to know. She can testify about that. Again, the respondent would be at liberty to have a different version but on the question of whether they are in or out, they are in. So, those points insofar as they are dismissed, then dismissed"

LEGAL PRINCIPLES

[13] A decision on the admissibility of hearsay evidence is one of law. An appeal court may overrule a decision of a lower court if it considers it wrong.[1]

[14] The purpose of section 3(1) of The Law of Evidence Amendment Act 45 of 1988 ('The Law of Evidence Act'), is to allow for the admission of hearsay evidence

[1] see C W H Schmidt & H Rademeyer *Law of Evidence* [issue 17 Lexis Nexis] 18.4.3 and the cases cited therein; *McDonald's Corporation v Joburger Drive-Inn Restaurant (Pty) Ltd and Another* 1997 (1) SA 1 (A); *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA), at 521.).

in circumstances where justice dictates its reception.[2] Hearsay evidence that is not admitted in accordance with the provisions of this section is not evidence at all.[3]

[15] Section 3(1) of the Law of Evidence Act states as follows:

"3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

…

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice."

[16] It is clear that the Court *a quo* relied on the alleged knowledge of the first respondent in respect to agreements reached between the parties' families, as regards the formalities for the celebration of the customary marriage. The Court *a quo* did not apply the provisions of s3(1) of the Law of Evidence Act. There is no confirmatory affidavit in respect to the allegations made in paragraph 8 of the replying affidavit. No reason is placed on record why there was no confirmatory affidavit in respect to the allegations made by the first respondent in the replying affidavit and neither was any reason given by the first respondent why no evidence was given by the respective family members upon whose credibility the probative value of such evidence depends.

[17] It is clear there were at least six people who signed the lobola letter. Failure to have any confirmatory affidavit in this regard seriously prejudices the first respondent's case. On the other hand, the acceptance of the contents of paragraph

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[2] see *Metadad v National Employers General Insurance Co Ltd* 1992 (1) SA 494 (W) 498 I-499 G.

[3] see *S v Ndhlovu and Others* 2002 (6) SA 305 (SCA) para 17.

8 of the replying affidavit severely prejudices the appellant and should not have been admitted by the Court *a quo* in the interests of justice.

[18] The allegations of the first respondent, regarding the shortfall pertaining to the

conclusion of the customary marriage, also falls foul of the provisions of s34(1)(a)(i), (b) and 34(4) of The Civil Proceedings Evidence Act 25 of 1965 ('the Civil Proceedings Evidence Act').

[19] Section 34(1) of the Civil Proceedings Evidence Act states as follows:

"34. (I) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-

(a) the person who made the statement either-

(i) had personal knowledge of the matters dealt with in the statement; or

...

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success."

[20] Section 34(4) of the Civil Proceedings Evidence Act states as follows "(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible."

[21] The first respondent was never called to confirm whether she had personal knowledge of the contents of the lobola letter, and neither does her signature or initial appear on the letter. No witnesses were called to support the version of the first respondent that a customary marriage had not been entered into.

[22] The Court *a quo* made a finding that the agreements reached between the parties' families were within the first respondent's knowledge, yet failed to adhere to

the provisions of both s34(1)(a)(i), (b) and 34(4) of the Civil Proceedings Evidence Act.

[23] Failure by the first respondent to file a confirmatory affidavit and failure to lead evidence herself that she was present at the lobola negotiations, which is central to the issue in this case, results in the fact that the Court *a quo* should have been slow to admit it.

[24] It is trite in motion proceedings that when an applicant seeks final relief, as was the case in the court *a quo*, the rule established in the matter of Plascon-Evans Paints Ltd v Van Riebeeck Paints[4] applies. Plascon-Evans[5] states that when in motion proceedings a dispute of fact arises on the papers, a final order may only be granted if the facts averred by the applicant, which have been admitted by the respondent, together with the facts averred by the respondent justify such an order[6]. A real, genuine, and *bona fide* dispute of fact can exist only when the court is satisfied that the party who purports to raise the dispute has in his affidavits seriously and unambiguously addresses the facts said to be disputed.[7]

[25] In terms of the Magistrates' Court Rule 55(1)(k)(i) "where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision". In terms of Rule 55(1)(k)(ii) "The court may in particular, but without affecting the generality of subparagraph (i) direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for that person or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise." This Court finds the Court *a quo* did not do that. It is clear the Court *a quo* overlooked the fact that the parties were living together as husband and wife for nine years and that they had two children which clearly raised a genuine and *bona fide* dispute that a customary marriage had been entered into.

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[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 632 (A).
[5] *Ibid*.
[6] *Ibid* page 634 H-I.
[7] See 2008 (3) SA 371.

[26] Even if this Court is wrong in this regard, a customary marriage may be concluded where there has not been strict compliance with the full payment of lobola or the handing over of the bride to the groom's family.

[27] According to the Recognition of Customary Marriages Act 120 of 1998 ('Recognition of Customary Marriages Act'), the definition of lobola means: "the property in cash or in kind, whether known as ***lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka*** or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage."

[28] Although the word lobola is defined in the Recognition of Customary Marriages Act, it is not made a compulsory requirement for the validity of the marriage.

[29] The learned author Professor TW Bennet[8] stated that:

"Many couples live together in close relationships that may not be in the process of becoming

marriages. When should such a relationship be deemed marriage? If a woman's father took no action to claim seduction damages, it could be argued that he, at least had accepted the parties' union as a marriage…If the guardian did not object to the couple's relationship – which had to be deduced from his accepting lobolo or from not suing for seduction damages – a marriage was presumed, irrespective of where the matrimonial home happened to be or how the parties came to be living together."[9] [my emphasis]

[30] The sentiments expressed by the learned Professor Bennet have been reaffirmed in the case of *Mbungela and Another v Mkabi and Others*[10]. In this matter lobola had also not been paid in full and no demand had been made for the balance. The Supreme Court of Appeal held that: "…if her guardian then allows her to remain with her suitor on the understanding that further lobola will be paid [in] due course…proof of cohabitation alone may raise a presumption that a marriage exists, especially where the

[8] Professor TW Bennet in *Customary Law in South Africa*, Juta, 2004.
[9] *Ibid* page 216.
[10] *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA).

bride's family has raised no objection nor showed disapproval, by, for example, demanding a fine from the groom's family."[11]

[31] According to s3(1) of the Recognition of Customary Marriages Act, for a customary marriage to be valid the following is required:

"(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."

[32] In the matter of *Moropane v Southon*[12], the Supreme Court of appeal held that:

"It is clear from the above section that these are the only three basic statutory requirements for the validity of a customary marriage, the so-called jurisdictional requirements."[13]

[33] The Supreme Court of Appeal in the matter of *Moropane*[14] added further that:

"The requirement in s 3(1)(b) that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law' is clear and unambiguous. Even the Legislature did not consider it necessary to define it. This is understandable as customary law is as diverse as the number of different ethnic groups we have in this beautiful country. Although Africans in general share the majority of customs, rituals and cultures, there are some subtle differences which, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, VhaVenda and the Vatsonga. This is due to the pluralistic nature of African societies." [my emphasis]

[34] In terms of s9 of the Recognition of Customary Marriages Act "Failure to register a customary marriage does not affect the validity of that marriage". This has been confirmed in the decisions of *Kambule v Master of the High Court and Others* (85) [2007] ZAECHC 2; [2007] 4 All SA 898 (E); 2007 (3) SA 403 (E) (8 February 2007) as well as *MG v BM and Others* (10/37362) [2011] ZAGPJHC 173; 2012 (2) SA 253

[11] *Ibid* para 25.
[12] *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014).
[13] *Ibid* para 34.
[14] *Ibid* para 35.

(GSJ) (22 November 2011). This is because both parties have a duty in terms of s4 of the Recognition of Customary Marriages Act to ensure that the marriage is registered and neither can blame the other if this is not done.

[35] In the matter of *Maluleke v The Minister of Home Affairs*[15] it was not in dispute that the lobola negotiations were complete. What was in dispute was whether a valid marriage had been entered into and been celebrated. The validity of the marriage was challenged on the ground that *imvume* did not take place. The Court held that: "As a result of the evolution in customary practices and because the Act does not define the term 'entered into' the court in my view has to look at several factors which might assist to determine whether the parties have 'entered into' a customary marriage. The term 'entered into' is normally used to denote a contract. The question therefore is whether the second defendant and the deceased agreed that they were married. Such an agreement may either be explicit or tacit."[16] [my emphasis]

[36] *Imvume* is a form of integration of the bride into the bridegroom's family.

[37] In the matter of *Maluleke*[17], the Court held that due to the fact that the parties
permanently resided in the same house and the fact that the families regarded the one
party as the husband's wife, even in the absence of holding an *imvume,* it did not detract from the fact that a customary marriage had taken place.

[38] It has been decisively answered in the matter of *Mabuza v Mbatha*[18] that non-
compliance with the siSwati custom of bridal transfer, namely, *Ukumekeza*, does not invalidate a customary marriage.[19] The Court stated that: "…there is no doubt that *ukumekeza*, like so many other customs, has somehow evolved so much so that it is probably practised differently than it was centuries ago… As Professor de Villiers testified, it

[15] *Maluleke v The Minister of Home Affairs* 2008 JDR 0426 (W).
[16] *Ibid* para 13.
[17] *Ibid*.
[18] *Mabuza v Mbatha* 2003 (4) SA 218 (C).
[19] *Ibid* para 25 to 26.

is inconceivable that *ukumekeza* has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases."[20]

[39] The Supreme Court of Appeal in *Mbungela*[21] stated further that: "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 ones, could yield untenable results."[22] [my emphasis]

[40] The learned author Professor Bennett[23] states "the bridal transfer ceremony should be treated as an optional element of a customary marriage, which the parties would be free to observe if they chose to celebrate their marriage according to a particular tradition."[24]

[41] The learned Professor Bennet places his reliance for this view on a suggestion made by the South African Law Commission's Special Project Committee on Customary Law in its Report on Customary Marriages,[25] which considered the effect of wedding ceremonies and transferring the bride, and found that the variations in local practice and the ambiguities inherent in them suggested that neither should be deemed essential for the creation of a customary marriage.

[42] The Supreme Court of appeal in *Mbungela*[26] stated that:

"…the ceremony of the handing over of a bride …is not an important [nor] …necessarily a key …determinant of a valid customary marriage."[27] [my emphasis]

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[20] *Mabuza v Mbatha* (note 18 above) para 25.
[21] *Mbungela* (note 10 above).
[22] *Ibid* para 27.
[23] Professor Bennet (note 8 above).
[24] *Ibid* page 216.
[25] see *Marriages and Unions of Black Persons; Working Paper* 10 Project 51 Government Printer, 1986 Pretoria para 4.4.1.
[26] *Mbungela* (note 10 above).
[27] *Ibid* para 30.

[43] It is clear that from the decision of *Mbungela*[28], to insist upon a bridal transfer

would be incongruent with customary law's inherent flexibility and pragmatism.[29]

[44] From the facts in the matter *in casu* presented in the Court *a quo*, it is clear that the parties resided permanently for nine years and had two children. When the first respondent was locked out by the appellant she went to live at the house of the appellant's parents, which further indicates that the appellant's parents regarded the first respondent as the appellant's wife. The fact that there was:

(a) no completion of payment of the lobolo, or

(b) handing over of the bride; or

(c) no registration of the marriage;

does not mean there was not a customary marriage. The Court *a quo* should have dismissed the application based on a genuine dispute of fact.

[45] Even if this Court is wrong in this regard, a Court of Appeal may only interfere

with a decision of the Court *a quo* when:

(a) it appears that the lower Court has not exercised its discretion judicially, or,

(b) that it had been influenced by wrong principles or a misdirection on the facts, or,

(c) that it had reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.

[46] The Court *a quo's* reliance on the first respondent's hearsay evidence amounted to a material misdirection that vitiated its ultimate finding on the outcome of the application that was before it. Once the first respondent's hearsay evidence is excluded, the appellant's version that he is half owner of the immovable property by virtue of his customary marriage to the first respondent stands undisputed.

ORDER

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[28] *Mbungela* (note 10 above).

[29] *Ibid* para 28.

[47] In the premises the following order is made:

(1) The appeal is upheld;

(2) The first respondent is to pay the costs of the appeal;

(3) The order of the Court *a quo* is set aside and substituted with the following:

'The application is dismissed with costs'

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D DOSIO
JUDGE OF THE HIGH COURT

I agree, and it is so ordered

_____

B WANLESS
ACTING JUDGE OF THE
HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 12h00 on 17 May 2023

Appearances:

On behalf of the Appellant:	S. Twala
Instructed by:	S. TWALA ATTORNEYS INCORPORATED
On behalf of the 1st Respondent:	Adv. S Nkosi
Instructed by:	Ncube Incorporated Attorneys
On behalf of the 2nd Respondent:	Unknown
Instructed by:	Unknown