

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



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

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

SIGNATURE

DATE

CASE NO: 47848/2021

DATE: 16-08-2022

In the matter between

10

K[...] C[...] T[...]

Applicant

and

H[...] S. M[...]

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

J U D G M E N T

RANDERA, AJ

In this matter, the Applicant seeks to register a customary union between himself and the deceased, M[...] M[...]. Further, that this Court condone such late registration, and that the second and third Respondents be ordered to affect such registration.

10 The Applicant is a consultant business analyst and lives in Centurion. The deceased was a senior data governance manager for Absa Bank. The Applicant met the deceased at the University of Johannesburg, where they both resided in the university residence, and were both reading for a BCom degree.

 They started a relationship in and during 2009, and have been together since then. In 2011, the Applicant and the Deceased had their first child, and after conceiving of the first child, the Applicant and the deceased sought the
20 blessings of their respective families, and decided to conclude a customary marriage.

 During September 2012, a meeting was held at which Lobola negotiations were conducted and the respective families concluded a Lobola agreement. This was reduced to writing. The Lobola agreement reads as follows;

“On this day, 22 September 2012, at [...]

N[...] S[...], Daveyton,

We the M[...] family received an amount of R8 700 from the T[...] family as a deposit for the total amount of R46 500 for dowry.

Amount R46 500,

deposit R8 700,

R37 800.

The balance of R37 800 is acknowledged.”

10 It is then signed by witnesses for each family. It is witnessed by M T[...] and S[...] T[...] and L[...] E[...] T[...] on behalf of the T[...] family. The witnesses for M[...] family are FR K[...], and A[...] Z[...].

The Lobola negotiations culminated in an amount of R46 500 being agreed to as a dowry.

An amount of R14 900 was then paid by the T[...] family, and which amount was accepted by the M[...] family. The amount of R14 900 is made up as follows: The amount was paid in two parts. The first part being R6 200 in
20 damages for having a child out of wedlock. The second part of R8 700 in respect of the Lobola.

The Applicant states in his affidavit that the deceased was then handed over to his family, and that since then they had been living together as husband and wife in Centurion, Pretoria.

The Respondent, the deceased's father, opposes the Application, and in his affidavit, he states the basis for his opposition being that there was no valid ceremony, as the deceased was not handed over as is required in terms of the customary law, and that the amounts paid pursuant to the negotiations were in respect of damages only, and not in respect of the Lobola.

In addition, thereto, I am referred to paragraph
10 11(13) wherein the Applicant states that in addition to the marriage by customary law, they would also enter into a civil marriage in due course. That, however, did not come to pass.

I am required to determine whether or not the parties were married in terms of the customary law and if so then to order "Condoning the late registration of the customary marriage entered into between the Applicant and his late wife, **M[...]** **M[...]** ("the deceased")."

After the deceased's death, the Applicant called a meeting
20 of the families, and advised the families that it was required by the ABSA pension fund, with whom the deceased had a pension and insurance policy, to obtain an order declaring the Applicant to be the husband, and to validate his customary marriage.

He would thereafter be able to obtain the pension

benefits accruing to the deceased. The Applicant states that he seeks to do so for the benefit of the children.

A number of members of both the M[...] family and the T[...] family were present at the meeting. They agreed that they would assist the Applicant, and to this end, the Applicant was provided with a letter signed by the Respondent, and which reads as follows;

10 “I H[...] M[...] agree that K[...] C[...] T[...],
 ID no [...] got married to my daughter M[...]
 M[...], ID no [...] on the 22 September 2012.
 It was a customary marriage. Signed below
 are witnesses.”

The letter is then witnessed by HS M[...] (the Respondent), SV M[...], S[...] T[...], and M[...] Y[...] N[...].

After this meeting, the Respondent returned home and advised his wife. He then called the Applicant, and advised that his wife was objecting to the letter, and that she gave him a very difficult time. As a result, the Applicant was not to use the document.

20 It turns out that the Respondent's wife had, at some point after the deceased's death, applied to the pension fund for the pensions benefits accruing to her daughter to be paid to her notwithstanding the fact that the children of the deceased were living with their father, the Applicant.

The issue revolves around whether or not the

requirements of a customary marriage have been met,
Section 3(1) of the Act sets out the requirements as follows;

“[3] Requirements for validity of customary
marriages

(1) 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;

10 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.”

The Respondent contends that no valid marriage had been
entered into as the deceased was not ‘handed over’ to the
Applicant’s family. Our Courts have held the view that this
‘requirement’ was not necessary for the purposes of a valid
20 customary marriage. This requirement was dealt with in the
judgment of *Mbungela and Another v Mkabi and Others* 2020
(1) SA 41 (SCA), the Court has noted at paragraph 18;

“The Constitutional Court has cautioned
courts to be cognisant of the fact that
customary law regulates the lives of people,

and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights.^[8] The courts must strive to recognise and give effect to the principle of living, actually observed customary law, as this constitutes a development in accordance with the ‘spirit, purport, and objects’ of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.^[9]”

10

The Court further drew attention to *LS v RL* [2018] ZAGPJHC 613; [2019] 1 All SA 569 (GJ); 2019 (4) SA 50 (GJ), which dealt with the question of the handing over of a bride;

“[19] There, the High Court held that the custom is unlawful as it unfairly and unjustly discriminates against the gender of the Applicant as a woman, and denies her the constitutional right to dignity and equality, ‘because only women, after consenting to enter into a customary law

20

marriage, are subject to this unequal treatment by the custom of handing over.’”

And at paragraph [21], the Court further quotes from *Mabuza v Mbatha* 2003 (4) SA 218 (C) paras 25-26 as follows;

10 “There is no doubt that *ukumekeza*, like so many other customs, has somehow evolved so much that it is probably practised differently than it was centuries ago. As Professor De Villiers testified, it 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.

Further support for the view that African customary law has evolved and was always flexible in Application is to be found in TW Bennet *A Sourcebook of African Customary Law for Southern Africa*. Professor Bennett
20 has quite forcefully argued (at 194):

‘In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity,

nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters [because of a pregnancy or elopement.]”

At paragraph 25 of *Mbungela*, Honourable Maya states that;

10 “It is important to bear in mind that the ritual of handing over of a bride is simply a means of introducing a bride to her new family and signify the start of the matrimonial consortium.^[16]”

Justice Maya continues at [27];

20 “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 Section 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the

present ones, could yield untenable results.”

The Court continued at [30];

10 “[30] To sum up: the purpose of the ceremony of the handing over of a bride is to mark the beginning of a couple’s customary marriage and introduce the bride to the groom’s family. It is an important, but not necessarily a key determinant of a valid customary marriage. Thus, it cannot be placed above the couple’s clear volition and intent where, as happened in this case, their families, who come from different ethnic groups, were involved in, and acknowledge the formalisation of their matrimonial partnership, and did not specify that the marriage would be validated only upon bridal transfer.”

20 In the present matter, the parties lived together prior to the date of the Lobola negotiations and customary marriage and thereafter as husband and wife. They had a second child, and continued to live together until the deceased’s death. Their actions, clearly indicate that the intentions were at all times to be married.

The Respondent raises further issues in argument, and

states that the Applicant, on his version, intended to be married by civil law, and not customary law, however the evidence in this regard in the affidavits are contrary to this new defence raised by the Respondent in argument.

The Respondent does not dispute the contents of the letter marked LCL1, but merely states his wife objected to him giving the letter and that the Applicant should not use it.

The fact that they lived together, bore two children, and together with the Respondent's letter confirming the
10 marriage of the Applicant to the deceased leads one to the overwhelming conclusion that the parties intended to be married to be each other, and did in fact do so at the marriage ceremony on 22 September 2012

Accordingly, the marriage between the two parties is valid. In the instance, I make the following order:

[1] Condoning the late registration of the customary marriage entered into between the Applicant and his late wife, M[...] M[...], the deceased.

[2] That the Respondent is to pay the costs of the
20 Application.

[3] The second and third Respondent are hereby ordered to register the customary marriage of the Applicant to the deceased.

- - - - -

.....

RANDERA AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

DATE:

CASE NUMBER-initials
YEAR-MONTH-DAY

0

JUDGMENT