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

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 63162/2020

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

23/11/2022
DATE SIGNATURE

M B M Plaintiff

and

J P M Defendant

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] Customary law is mostly unwritten. Where it is written, there are sometimes

gaps and somehow questions arise whether the original custom as practiced by people who subscribe to it should be followed and/or whether such original custom has evolved and needs to be considered and applied based on the modern way of life.

[2] This is a divorce matter emanating from a disputed customary marriage between the Plaintiff and the Defendant. On the one hand, the Plaintiff believes that a customary marriage exists between herself and the Defendant. On the other, the Defendant denies the existence of such marriage based on the non-handing over of the Plaintiff to the Defendant's family, and the absence of celebration or rituals thereafter.

[3] I presided over this case on 21-22 July 2022. Post the hearing, Counsel for the Plaintiff undertook to submit their written heads of argument on 29 July 2022. Counsel for the Defendant undertook to submit their heads of argument on 3 August 2022. I then reserved the judgment.

[4] Both counsels subsequently fulfilled their undertakings and submitted their written heads of argument on the aforesaid dates. This judgment sets out my reasons for the order that I make at the end of this decision.

THE PARTIES

[5] The Plaintiff is B M, an adult female person residing at […] […] Street, Doornpoort, […], Pretoria.

[6] The Defendant is P M, an adult male statistician residing at […] […] Street,

Doornpoort, […], Pretoria.

JURISDICTION

[7] The Plaintiff and the Defendant are both domiciled within the jurisdiction of this Court. Therefore, this Court has the power and competency to adjudicate this matter.

THE ISSUE

[8] The issue to be determined by this Court is whether there exists a customary marriage between the parties.

THE FACTS

[9] According to the Plaintiff's particulars of claim, on or about 4 of July 2009, the Plaintiff entered into a customary marriage with the Defendant at Hammanskraal.

[10] The Plaintiff asserts that the marriage was in accordance with customary law as provided for in section 3 of the Recognition of Customary Marriages Act 120 of 1998 ('the Customary Marriages Act") and *lobola* was paid over to her family.

[11] Three children namely ZN, KY, and PM were born into the aforementioned customary marriage.

[12] The Plaintiff issued summons against the Defendant *inter alia* seeking a decree of divorce dissolving the customary marriage entered into between herself and the Defendant including the division of the joint estate on the basis that the

marriage has irretrievably broken down and that there *inter alia* were no prospects in saving it.

[13] The Defendant filed his plea and counterclaim disputing the validity of the customary marriage and sought a declaratory order to the effect that no valid customary marriage existed between the parties because (a) the Plaintiff was not accompanied by and delivered by her family to the Defendant's family, and that (b) no ceremonial rituals took place.

[14] In response to the counterclaim, the Plaintiff stood her ground and contended that a customary marriage was entered into between the parties in accordance with custom and/or that the conduct of the Defendant and its delegates waived certain tenets and rituals.

[15] It is important to highlight that at the commencement of the trial, the parties agreed that the only issue to be determined by this Court is the validity of the customary marriage as the Family Advocate has dealt with the issue of the children and has made recommendations and that both parties have accepted the contents of the report. This Court has considered the report of the Family advocate and is satisfied with its contents.

[16] Therefore, the only issue to be considered by this Court pertains to the validity of the customary marriage.

FACTS COMMON BETWEEN THE PARTIES

[17] This Court deems it necessary to highlight what the Defendant regards as facts

that are common cause between the parties. I will deal with the relevance of this later in the discussion. According to counsel for the Defendant, the facts that are common cause between the parties are reproduced below as follows:

> "4.1. The Plaintiff and the Defendant met each other on or around the year 2007 and started a love relationship.
>
> 4.2. Out of this love relationship the first born child of the parties was born in the year 2009.
>
> 4.3. On or about July 2009 (the first lobolo meeting), the Defendant sent a delegation to the family of the Plaintiff to see the first born child and to commence with the *lobolo* negotiations.
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> 4.4. Both parties were represented by their respective emissaries, which included the two further witnesses that testified in court, that is the mother of the Plaintiff and the uncle of the Defendant.
>
> 4.5. In this meeting the respective emissaries agreed on the amount of money for lobolo in the amount of R 12 000.00 of which R 6 000.00 was already paid.
>
> 4.6. In addition to the above, the parties agreed on the items and/ or gifts that were supposed to be given by the Defendant's family to the Plaintiff's family.
>
> 4.7. These gifts included, two (2) blankets, male coat, axe, knife, snuff tobacco, firewoods and doek.
>
> 4.8. It is further common cause that these gifts (items) were

specified and laid down by the family of the Plaintiff.

4.9. It is common cause that the above items were to be delivered on the wedding ceremony and/ or during the performance of the ritual ceremony.

4.10. The agreement in relation to the above was reduced into writing and signed by all the emissaries present in the negotiations and admitted into evidence under the Caseline Bundle.

4.11. It is also common cause that the above agreement also makes clear mention that the above gifts (items) were outstanding at that stage.

4.12. On or about July 2010 (Second lobolo meeting) the Defendant's family returned to the Plaintiff's family to finalise the payment of lobolo.

4.13. Pursuant to the agreement on the first lobolo meeting the Defendant's emissaries paid the amount of R 9 000.00 to finalise the agreed amount of lobolo.

4.14. It is common cause that the items and gifts mentioned above were not delivered and/ or exchanged between the parties, this is evident from the minutes of the second meeting wherein it is stated that the said items were still outstanding.

4.15. It is also common cause that the representative of the Defendant inquired as to when the handing over ceremony and rituals would take place.

4.16. The mother of the Plaintiff advised them that it would take place at a later stage and requested that she be given time to

renovate her house for the ceremony and would advise on the date for the ceremony.

4.17. The purpose of the various gifts mentioned above is not disputed by any of the parties.

4.18. It was common cause between the parties that the exchange of the gifts and the slaughtering of the cow were to unite the two families and inform the ancestors of the union between the Defendant and the Plaintiff.

4.19. It is common cause that the slaughtering of the cow did not take place.

4.20. It is also common cause that as at 2018, the mother of the Plaintiff was still engaged and concerned with the planning and preparations of the ceremony

4.21. It is common cause that the wedding ceremony and/ or rituals did not take place."[1]

APPLICABLE LAW

[18] The new constitutional dispensation ushered in a system that affords everyone the protection of the law and further empowers the courts to interpret, apply and/or develop customary law.[2]

[19] The Customary Marriages Act is a key legislation that was promulgated to give effect to the constitutional provisions dealing with customary law. The Customary Marriages Act contains most, if not all, of the answers to the present

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1 Defendant's heads of argument at para 4.
2 See sections 39(2) and 211(3) of the Constitution.

matter.

[20] For a customary marriage to be valid, prospective parties to the customary marriage must both be over the age of 18 years, and consent to be married to each other under customary law.[3] Further, the marriage must be negotiated and entered into or celebrated in accordance with customary law.[4]

[21] The above first and second requirements (age and consent) as provided for in the Customary Marriages Act appear to be straightforward. However, the third requirement is not clear-cut. The Customary Marriages Act is silent on the style of celebration of customary marriage and does not specify, for example, the process of the handing over and/or integration of the bride to the bridegroom's family.

[22] It is apparent that the Customary Marriages Act requires that all the requirements that are provided for in section 3(1) of the Customary Marriages Act must be complied with to validate a customary marriage. The question, which now needs to be confronted is whether the customary law permits the waiving of the integration or performance of rituals/celebration of the bride as a requisite. The courts have made several pronouncements[5] on the evolving nature of customary law and has provided guidance on whether customary law must be followed as is and/or whether there is a need to develop it to adapt to the changing needs of modern society.

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[3] Recognition of Customary Marriages Act 120 of 1998 section 3(1)(a) (i) and (ii).

[4] *Ibid* section 3(1)(b).

[5] See, for example, *Mabuza v Mbatha* 2003 (4) SA 218 (C); *Moropane v Southon* (SCA) (unreported case no 755/122, 24-5-2014); *Mabuza v Mbatha* 2003 (4) SA 218 (C); *LS v RL* 2019 (4) SA 50 (GJ); *Tsambo v Sengadi* [2020] ZASCA 46 (30 April 2020).

[23] For example, the Supreme Court of Appeal in *Moropane v Southon*[6] found that the handing over of the bride is the most crucial aspect of marriage as the bride is integrated into her new family.[7] In a subsequent decision in *Mbungela & another v Mkabi* & others[8], the Supreme Court of Appeal stated that:

> "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 marital consortium. Here, the deceased and Mr Mkabi had an intimate relationship and cohabited for three years before Mr Mkabi started the marriage process. After the lobola negotiations, the deceased immediately resumed her life with Mr Mkabi without censure from her family. According to J C Bekker, the handing over need not be a formal ceremony; for example, upon delivery of lobola or a fine for seduction only, the subsequent thwala i.e. the abduction of the maiden to the groom's home without her guardian's consent, consummates the customary marriage, if her guardian then allows her to remain with her suitor on the understanding that further lobola will be paid due course. And proof of cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has raised no objection nor showed disapproval, by, for example, demanding a fine from the groom's family.
>
> No objection at all was raised here. Instead, there is overwhelming evidence that the families, including the deceased's 'guardian', considered the couple as husband and wife for all intents and purposes. <u>The evidence ineluctably leads to the conclusion that the bridal transfer ritual was waived</u>. This

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6 (SCA) (unreported case no 755/122, 24-5-2014). See also *Mxiki v Mbata, In Re: Mbata v Department of Home Affairs and Others* [2014] ZAGPPHC 825 at paras 10 and 11, *Ndlovu v Mokoena* [2009] ZAGPPHC 29.

7 Para 39-41.

8 (820/2018) [2019] ZASCA 134 (30 September 2019) at paras 25-26.

> finding, in my opinion, does not offend the spirit, purport and objects of the Bill of Rights and recognises the living law truly observed by the parties and the actual demands of contemporary society (own emphasis added, footnotes omitted)."

[24] The above two cases indicate that this is not a crystal-clear case. Notwithstanding this, I am of the view that they are relevant in the present matter and can provide a solution to the legal issue. In other words, this is a matter that requires a holistic approach and consideration of all various circumstances present in the case.

[25] I now turn to consider the circumstances of this case considering the submissions of the parties, the testimony of the witnesses, and evidence before this Court to ascertain whether a valid customary marriage exists between the parties.

EVIDENCE

[26] There were two witnesses called to testify in respect of the Plaintiff's case. It was the Plaintiff herself, and her mother, Ms. Ruth MMakgobudi Maloka.

Ms. B M (Plaintiff)

[27] The Plaintiff testified that she met the Defendant at Statistics South Africa around 2007 wherein they were working in the same department. They then fell in love. During the love affair, the Plaintiff and the defendant conceived their first child in 2008. According to the Plaintiff, she informed the Defendant that she was pregnant. The Defendant was excited to learn that he was going to be

a father. The Plaintiff gave birth to the Defendant's first-born on 15 […] 2009.

[28] The Plaintiff further testified that on or about July 2009, a first meeting took place at her home where the Defendant sent a delegation to her family to see the firstborn child and to commence with the *lobola* negotiations. It was agreed that the amount to be paid for lobolo is R 12 000.00 of which R 6 000.00 was already paid. She further testified that her and the defendant lived separately pending the finalisation of payment of lobola.

[29] Furthermore, the Plaintiff testified that on or about July 2010 the Defendant's family returned to her family to finalise the payment of lobola. To this end, the Defendant's emissaries paid an amount of R 9 000.00 to finalise the agreed amount of lobola. The R9000.00 was made up of R6000.00 for lobola and the R3000.00 was for the cow. She testified that it was after the payment of the outstanding amount for the *lobola* that her mother, upon the request from the emissaries of the Defendant, released her to reside with the Defendant. The Defendant's family asked for the handing over ceremony of the bride, but the Plaintiff's mother indicated that she was renovating her house and such a celebration would most likely take place at a later stage. This is something that the Defendant's family understood.

[30] The Plaintiff further testified that there was no celebration. She further indicated that a celebration can be postponed or not performed but the parties can live together. She also testified that the celebrations were waived.

[31] The Plaintiff also testified that the two families supported each other during funerals. In addition, the Plaintiff testified that the Defendant was always

regarded as a son-in-law by her mother and was allowed to visit his in-laws because of being a son-in-law. According to the Plaintiff, the Defendant and her could not have visited each other's homesteads as boyfriend and girlfriend as it is not permissible to do so.

[32] The Plaintiff further stated that the Defendant always treated her as her wife and even took a family package policy (Greenlight) with Old Mutual wherein *he inter alia* insured the Plaintiff and her mother, Ms. Ruth MMakgobudi Maloka.

[33] Finally, the Plaintiff testified that after the birth of one of their children, the Defendant completed the Notice of Birth form and answered in the affirmative where the form sought to know whether the parents of the child are married or not. Further, the Plaintiff indicated that the Defendant also marked the customary marriage box where various forms of marriages were provided. The Plaintiff also indicated that for one of their houses situated in Montana, the Defendant is aware that the Deed of Transfer states that they are married in community of property.

[34] Overall, the Plaintiff submitted that they got married in line with the *lobola* negotiations and that she was handed over to the Defendant's family as a wife and resided with the Defendant as husband and wife.

Ms. Ruth MMakgobudi Maloka

[35] Ms. Maloka testified to the effect that the Plaintiff is her daughter, and the Defendant is her son-in-law. She further testified that the second *lobola* negotiations took place and that all the money for the *lobolo* and the cow were

paid.

[36] Ms. Maloka also indicated that the Defendant's family during the second meeting indicated they had paid the full *lobola* and were now asking the Plaintiff to be handed over to them. This is something that she did, by releasing her to go with the Defendant's delegation. Post the handing over, the Plaintiff attended to *makoti* duties, and both families supported each other. In addition, Ms. Maloka testified that the Defendant at times performed church rituals at her homestead including her main bedroom because he was welcomed as a son-in-law. According to her, this is something that the Defendant could not have done if he was not officially welcomed as a son-in-law. Further, Ms. Maloka stated that she never objected to her daughter getting married to the Defendant.

[37] Ms. Maloka also indicated that the gifts also had to be exchanged but that did not materialize. According to her, the absence of gifts does not prevent the marriage. Therefore, if lobola is paid in full, there is a marriage. She further testified that she approached both the Plaintiff and the Defendant about plans for the celebration and the exchange of gifts.

Mr. M (Defendant)

[38] Mr. M has stated that as far as he knows, the lobola agreement has not been complied with as the issue of handing over was still pending. According to him, he was shocked to hear the Plaintiff state that she was handed over to his family. The Defendant testified that handing over is important and usually done by an uncle who will accompany the bride to hand her over to the groom's

family. He indicated that the purpose of such was to indicate that they are handing over their daughter as an appreciation.

[39] The Defendant further gave testimony about the important roles played by each item such as *selele* (an axe) for cutting wood to make fire and *thipa* (knife) that would slaughter the big animal such as a cow as an indication that the M's and M A's have met and reached an agreement and lobola has been paid up etc.

[40] The Defendant testified that the slaughtering of the cow and spilling of the blood was important as it also invites the ancestors to join them in the celebration. Both families had to feast from the same cow and honour the process of handing over the bride.

[41] The Defendant testified that none of the above has been complied with and/or been done up to date. The Defendant testified that he was shocked to learn that the wedding celebration was waived.

[42] The Defendant also indicated that he lived with the Plaintiff but not as a husband and wife. He further stated that when he completed the Notice of Birth form, he did not understand the questions that were asked in those forms.

[43] He further testified that he did not correct the marriage information on the Deed of Transfer stating that he is married in community of property because of an oversight on his part.

[44] The Defendant testified that the Plaintiff's uncle had to hand her over and inform the M's that he was giving them their well-raised daughter and that he

assured them that they were going to enjoy their new family. According to him, it was strange to learn that there was a handover when this had not occurred.

[45] The Defendant submitted that there was no handing over of the bride and that to date, he is still waiting for the same to happen.

Mr. Komape

[46] Mr. Komape testified that a cow had to be slaughtered and the exchange of gifts had to take place. He referred to *hohlabisa* (slaughter) as important to unite the two families. According to him, this did not happen as the Defendant's family kept informing them that they would provide an update when they are ready. Consequently, he denied that a customary law marriage existed.

[47] Mr. Komape denied that post the payment of full the *lobola* he asked for the handing over of the Plaintiff. According to him, they only left with the Defendant in a form of giving her a lift. Therefore, it was not a handing over. According to him, the amount of R6000.00 was for damages and not lobolo.

[48] Mr. Komape testified that there was no way in which the handing over could have been waived as it meant that the marriage was not completed. In addition, Mr. Komape stated that the Plaintiff was not accompanied by anyone on the day of the said handing over. He said that this was contrary to tradition. He indicated that the bride had to be accompanied by someone to her in-laws, the Defendant's parents.

[49] Finally, Mr. Komape indicated that they are still waiting for the handing over of

the bride.

SUBMISSION OF THE PARTIES

[50] This section deals with the submissions of counsels about the validity and/or invalidity of the customary marriage in question.

Plaintiff

[51] Counsel for the Plaintiff contended that the issue of age and consent were complied with when the negotiations for the customary marriage took place. To this end, counsel contended that the main issue in dispute was the compliance with the requirements of section 3(2) of the Customary Marriages Act which requires the marriage to be "negotiated and entered into or celebrated in accordance with customary law".

[52] Counsel further contended that all the aspects relating to the payment of lobola were fulfilled. According to counsel, the only outstanding item of the aspect of lobolo is the gifts that had to be handed over to Plaintiff's family.

[53] Counsel further contended that it was "common cause between the parties that a substantial amount of lobola was paid to the Plaintiff's family"[9]. In addition, the counsel for the Plaintiff argued that it was only the gifts of the *lobola* that were never handed over to the family of the bride. Counsel contended that such a failure to hand over the gifts, *"does not stand in the way of the marriage to come to existence"*.[10]

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[9] Plaintiff's heads of argument para 60.
[10] *Ibid* at para 61.

[54] Counsel argued that the main issue concerned the handing over of the bride and that this Court must make a factual investigation about how *"the parties conducted themselves to ascertain if the handing over of the bride in actual fact did happen"*.[11]

[55] Counsel argued that the Defendant placed more emphasis on the grounds that the gifts were not handed over as per the lobola agreement and that there was no formal ceremony for the handing over of the bride. Consequently, counsel argued that a holistic approach had to be followed over the surrounding circumstances such as the long period of co-habitation, documents declaring that parties are married in community of property, the exercising of *makoti*-duties and the duties of a son-in-law, and the purchase of a wedding band.

[56] About co-habitation, counsel for the Plaintiff relied on various cases such as *Mbungela and Another v Mkabi and Others*[12] and argued that cohabitation between parties especially where the bride's family never objected to it may raise a presumption that a customary marriage exists between the parties if there is no other evidence to the contrary. Based on this, counsel submitted that the extended duration of the parties living together, their purchase of properties together, the children born whilst living together and the sharing of the main bedroom is sufficient for this Court to conclude that a customary marriage existed.

[57] Concerning documents, counsel contended that the Deed of Transfer in respect of the Doornpoort property reflected that the Plaintiff and the Defendant

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11 *Ibid* at para 63.
12 2020 (1) SA 410 (SCA).

are married in community of property. Furthermore, counsel submitted that in the Notice of Birth form, the Defendant submitted he was married to the Plaintiff in terms of customary law. Counsel argued that the Defendant indicated that based on his qualification he understood the importance of submitting the correct information. Therefore, counsel contended that the Defendant could not later allege that he did not understand the information that was required from him when he completed the information on Notice of Birth form and/or that other documents did not make classification that would have enabled him to make a proper selection of his marital status. Counsel further submitted that the Defendant conceded during the trial that he understands that classification can only be either one is married or not married. Consequently, counsel argued that the Defendant's explanation that he did not understand what was required of him when he completed the forms was not plausible.

[58] Counsel further submitted that the Defendant had purchased two wedding bands for the Plaintiff and that this was never denied or disputed by the Defendant.

[59] Ultimately, counsel argued that both the Plaintiff and the Defendant performed their duties as children-in-law of both families even though the Defendant denied doing the same as a son-in-law.

[60] Counsel concluded that taking into consideration the totality of the circumstances of this case the court should conclude that a customary marriage existed between the parties because the Plaintiff succeeded in proving on a balance of probabilities that the lobola negotiations were

concluded in an agreement and that the total amount of R12 000.00 has been paid for lobolo and the R3 000-00 in respect of the cow, and that the only outstanding items were the gifts, and therefore a significant portion of the requirements was complied with, and the Plaintiff proved that she availed herself for *"release to the defendant's family, and that she was in fact so handed over"*.[13]

Defendant

[61] The Defendant's case is that there is no valid customary marriage that exists between the parties on the basis that the Plaintiff was not accompanied and delivered by her family to the Defendant's family. Further, Counsel argued that no ceremonial rituals such as the exchange of gifts, animal slaughtering, or handing over did not took place as per the lobola agreement.

[62] Counsel submitted that from the totality of the evidence that the celebration and handing over of the bride were intended by both parties in terms of the lobola agreement. According to counsel, these never occurred because when they enquired about same, the Plaintiff's mother indicated that they would be done at a later stage due to renovations at her house.

[63] According to counsel, around the year 2018, the Plaintiff's mother conceded *"she was in the process of planning and making preparations for the wedding ceremony and handing over"*.[14]

[64] To persuade this Court, counsel for the Defendant relied on several cases

[13] Plaintiff's heads of argument at para 80.
[14] Defendant's heads of argument at para 8.6.

including the matter between *Fanti v Boto and Others*[15] where it was held that one of the essential requirements for a customary marriage is the handing over of the bride.

[65] To bolster the case, counsel further relied on the case of *Matsoaso v Roro*[16] where it was held that "*the mere fact that lobola was handed over to the bride's family, significant as it is, is not conclusive proof of the existence of a valid customary marriage.*"

[66] Counsel contended that the requirement of handing over of the bride is part of the "customs traditionally observed by indigenous people in South Africa" and were not erased in the new constitutional dispensation.[17]

[67] Counsel submitted that the celebration and handing over the bride were intended by both parties in terms of the lobola agreement but never took place. Counsel submitted that the contents of the *lobolo* agreement that was not disputed by any of the parties reveals "crucial points" such as:

> "Both parties and parties' emissaries agreed that the validity of the negotiated customary marriage would be determined by the African customary law.
>
> Both parties agreed that the exchange of gifts, rituals and slaughtering of the beast was an important step in the process of the conclusion of the parties' customary marriage.
>
> Both parties, especially the Plaintiff's family was aware of the essential items and gifts that were required to be exchanged

[15] 2008 (5) SA 405 (C).
[16] 2011 (2) All SA 324 (GSJ) at para 18.
[17] Respondent's heads of argument at para 58.

> between the parties for the conclusion of the customary marriage, hence the Plaintiff's family was the one who requested and enlisted the items and gifts contained in the agreement."

[68] Consequently, counsel argued that there is no valid customary marriage between the Plaintiff and the Defendant as the above conditions were never fulfilled.

[69] Counsel submitted that the recent decisions[18] of the Supreme Court of appeal which found that customary law was valid albeit in different circumstances did not eradicate the requirements of bridal transfer, ritual ceremony and/ or celebrations in terms of customary law as requirements for the validity of a customary marriage contemplated in section 3(1)(b) of the Customary Marriages Act.

[70] Furthermore, counsel contended that the said judgments do not establish themselves as *"authority for the proposition that the rituals, exchange of gifts and the wedding ceremony are not necessary or required for purposes of concluding a valid customary marriage".*[19] Counsel proceeded to state that the two judgments were different from the present case in that the court in *Mbungela*[20] found that the exchange of gifts between the two families and the subsequent church wedding was sufficient to conclude a valid customary marriage in compliance with section 3(1)(b) of the Customary Marriages Act. With regards to *Tsambo v Sengad*[21] matter, counsel argued that the court found

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[18] *Tsambo v Sengadi* ZASCA 46 and *Mbungela and Another v Mkabi* and Others 2020 (1) SA 41 (SCA).

[19] Defendant's heads of argument para 6.10.

[20] *Supra* fn 12.

[21] *Supra* fn 18.

that there was a handing over and/ or bridal transfer because of the celebrations that ensued thereafter were sufficient to conclude a valid customary marriage as provided for in section 3(1)(b) of the Customary Marriages Act.

[71] Ultimately, the Defendant asked this court to dismiss the Plaintiff's claim and declare that there was no valid customary marriage entered into between the parties.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[72] The Plaintiff's is adamant that there was a customary marriage that was entered into between her and the Defendant. On the contrary, the Defendant is of the view that there was no customary marriage concluded between himself and the Plaintiff. It has become clear that this Court is faced with two mutually destructive versions. These versions cannot co-exist and therefore one version is more probable and must prevail.

[73] In the matter between *National Employers' General Insurance Co Ltd versus Jagers*,[22] the court provided guidance on how to determine issues in cases where there are mutually destructive versions as follows:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where

[22] 1984(4) 437 (ECD) 440 D-G. See *also Stellenbosch Farmers' Winery Group Ltd. and Others v Martell & Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

> there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

[74] Based on the above, I now consider whether the Plaintiff has, on a balance of probabilities established, having due regard to the credibility and reliability of the witnesses, that her evidence is true and accurate, and therefore acceptable and that the version of the Defendant falls to be rejected.

[75] Regarding the requirements relating to the age of 18 years and consent, these have been complied with as both the Plaintiff and the Defendant had attained the age of majority at the time of the negotiations of the customary marriage. Furthermore, both parties had consented to being married in terms of customary law. Consequently, the said requirements have been complied with as per section 3(1)(a) of the Customary Marriages Act.

[76] The only outstanding requirement is that the "marriage must be negotiated and entered into or celebrated in accordance with customary law" as per the provisions of section 3(1)(b) of the Customary Marriages Act. This requirement does not set out the guidelines on how exactly the marriage should be negotiated and entered into or celebrated presumably because of the diversity of the South African population. Therefore, the legislature left it open to the people to decide their preferred manner of compliance taking into account the customary law that is applies to them.

[77] Both the parties in this matter have had the benefit of receiving a tertiary education and opted to follow their customary route when seeking to get married to each other. The Defendant, a statistician by profession, on various documents post the payment of the full amount of *lobola*, that being R12 000.00 and the R3000.00 for the cow, participated in the purchase of a house on 25 August 2015.[23] The Deed of Transfer of the said property indicates the Defendant as married to the Plaintiff in community of property. Under cross-examination, the Defendant stated that it was a mistake. In addition, in the Hollard Policy Schedule, the Defendant is the principal policyholder listed the Plaintiff as his "spouse".[24] Moreover, the Defendant treated the Plaintiff and children as his "family" in important discussions regarding insurance policies.[25]

[78] Further, approximately 7 months post the Deed of Transfer incident, which indicates that the parties as married in community of property, the Defendant

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[23] Deed of Transfer available on CaseLine 4:11.
[24] Hollard Policy Schedule on CaseLine 4:5.
[25] Communication between the Parties on CaseLine 4:3.

on 13 March 2016 personally completed the Notice of Birth[26] form on behalf of his child wherein he indicated that he was married in terms of customary law. Assuming that this Court is in agreement with the Defendant about his alleged mistake on the Deed of Transfer and about his marriage to the Plaintiff, I find it difficult to comprehend how the Defendant could repeatedly make the same mistake in that he indicated he was married to the Plaintiff on at least three significant documents. Similarly, the court in *Mabuza v Mbatha*[27] was faced with a similar situation when it rejected the Defendant's version when it said:

> "… In this document the defendant stated that he was married and gave the particulars of the plaintiff as his wife…The third document which starts on page 16 of Bundle "A" is headed "Investment Application Form" (Old Mutual). In this document, again the defendant gave the full names of the plaintiff as his wife. He stated clearly and unequivocally that the plaintiff was his wife. In all three documents, he referred to the plaintiff as his wife. Upon being asked as to why he referred to the plaintiff as his wife in circumstances where on his own version he was not married to her, he was unable to proffer any sensible explanation. I got a firm impression that the defendant was being economical with the truth."

[79] If the Defendant knew that the customary marriage was not yet concluded as he claims, he could have not proceeded in my view with the transaction of the property, which identifies him as married to the Plaintiff and/or indicate that he was married in terms of customary law in the Notice of Birth of his child. Again, he would not have referred to the Plaintiff as a spouse in the policy documents

[26] Deed of Transfer available on CaseLine 4:7.
[27] 2003 (4) SA 218 (C) para 20.

and/or family in correspondence. It is interesting to note that during all these incidents, the Defendant's tradition did not matter as it now appears to be his main defence. These *"are features that cannot be dismissed as insignificant, as they are consonant with the existence of a marriage".*[28] I agree with counsel for the Plaintiff that the Defendant's explanation is far from the truth.

[80] Concerning the celebration and handover of the bride, counsel for the Defendant argued that the requirement of handing over as stipulated in various cases such as *Fanti*[29], *Matsoaso*[30]*,* and *Moropane*[31] had to be observed which was not done in this case. This is something that counsel for the Plaintiff highlighted in her submissions.[32] Indeed, I am also in agreement with the parties that this formed an integral part of customary law to introduce the bride to her new family and welcome her to her new home. However, we should be mindful of the fact that various courts have pronounced that customary law is not rigid. In *Shilubana and Others v Nwamitwa,*[33] the Constitutional Court said:

> "…[Wh]here there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights."

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[28] *Tsambo v Sengadi* at para 27.

[29] *Supra* fn15.

[30] *Supra* fn 16.

[31] *Supra* fn 6.

[32] Plaintiff's heads of arguments at paras 36-36.

[33] 2008 (9) BCLR 914 (CC).

[81] Similarly, the Supreme Court of Appeal in, *Tsambo*[34] held that:

> "Having reviewed several authorities, this Court concluded that the handing over of the bride, though important, is not a key determinant of a valid customary marriage. It aptly stated as follows: 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."

[82] The above cases are a clear demonstration that customary law is not static but flexible and evolving. Further, they are evidence that the development of customary law is unavoidable in the current constitutional order to bring it in line with the spirit of the Constitution. For example, the substitution of cattle to be paid in monetary form in *lobola* is one of the things that shows the flexibility of modern customary law.

[83] I agree with the counsel for the Defendant only to the extent that the cases of *Tsambo*[35] and *Mbungela*[36] are different from the present one in that the bride was not physically handed over (released) by anyone in the two cases. In this case, I am persuaded by both the Plaintiff's and Ms. M's testimony that there was a handing over of the bride post the payment of the full *lobola*. This

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[34] *Supra* fn 18, at para 16.

[35] *Supra* fn 18.

[36] *Supra* fn 12.

occurred after the second *lobola* meeting when the Plaintiff's mother released the Plaintiff and she left together with the Defendant's emissaries in a vehicle. Her mother did not release her to random strangers but to the delegates of the Defendant. In my view, the only aspects that are outstanding from the parties are the celebration and/or rituals and/or the exchange of gifts post-handover. In fact, to a large extent, the Defendant's case cantred around the celebrations and rituals. I am of the view that if these were essential aspects for the validity of a customary marriage, they could have been performed by now. On the contrary, a decade has passed, and two children were born since the full payment of *lobola*. I am alive to the fact that at some stages, the Defendant sought to perform the aforesaid rituals but could not do so because of the renovations that were taking place at Ms. M's home. However, this Court is of the view that living together post the full payment of *lobola*, acquiring residential properties together, and continuing with their lives under one roof by both parties is an indication that these aspects in the context of this case are not essential and/or mandatory. Further, they are not capable of rendering a marriage invalid. Consequently, I find myself persuaded by the decision of the Supreme Court of Appeal in *Tsambo*[37] where it said:

> "Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law" (footnotes omitted).

[84] It cannot be permissible that a person can live with another in the context of this

[37] *Supra* fn , at para 1.

case and enjoy all the benefits that accrue to spouses and thereafter make a U-turn and claim that the validity of the marriage was conditional on a handover when the facts of the case dictate otherwise. Litigants should be slow to cherry-pick aspects of customary law and/or rituals that are only favourable in advancing their interests to the detriment of others. If the courts were to allow such, this could have dire consequences. The Supreme Court of Appeal *Mbungela*[38] had this to say:

> "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), in order to safeguard protected rights, avoid unfair discrimination and the violation of the dignity of the affected individuals" (footnotes omitted).

[85] I find the above example relevant and applicable in this case. Unsuspecting women would find themselves unaware that they have committed themselves in marriages of convenience where they have invested their time and emotions for what may later be regarded as a mere informal arrangement that has no legal consequences even though full *lobola* and the cow were paid. It is the duty bestowed on courts to give effect to living customary law and safeguard all

[38] *Supra* fn 12, at para 28.

the interests of the parties taking into account all relevant factors in each given case.

[86] Regarding cohabitation, I find that the Defendant's conduct (cohabitation) to live with the Plaintiff prior to the absence of exchange of gifts and the handing over contradicts his declared deeply rooted traditional values. How can a man who strictly adheres to his tradition reside with a woman for close to 10 years when he is aware that he is not married? This is also against his own testimony in that he respects his ancestors and would ensure that he follows protocol before concluding a customary marriage. All this information directs me to one conclusion, the Defendant knew what he was entering into with the Plaintiff.

[87] In my view, the parties' conduct is an indication that they willingly considered the rituals and/or the celebration not mandatory. The basis for the conclusion is because at no stage did the Defendant's uncle object to the Defendant's staying with the Plaintiff when the process of rituals post being released or handed over by her mother was still pending. Equally, the Plaintiff's mother never objected to her daughter's residing with the Defendant whilst the celebration and/or performance of rituals of the bride were outstanding. Furthermore, when Mr. Komape was asked under cross-examination whether in terms of his custom parties can stay together if there is no valid marriage. His response was that it depended on the parties whether they wanted to stay together or not. In my view, if the custom is mandatory, it must be adhered to and there will be no option for the parties concerned to choose anything else but to conform to the custom. In my view, this level of flexibility further shows

that customary law has evolved and that the handing over, celebration and/or rituals may be waived or performed at a later stage should the parties so decide. In this instance, both the Plaintiff and the Defendant opted to live together immediately post the payment of the full *lobola* and the cow.

[88] Therefore, I found myself bound by the Supreme Court of Appeal's decision where it correctly found in *Tsambo*[39] that:

> "That the couple continued to cohabit after that celebration and that the respondent registered the deceased as a beneficiary and spouse on her medical aid scheme are features that cannot be dismissed as insignificant, as they are consonant with the existence of a marriage. I am fortified in this view by Professor Bennet's argument with regards to the handing over requirement. He argued that the parties' intention could be inferred from cohabitation. According to him, where the parties were cohabiting, the gravamen of the enquiry was the attitude of the woman's guardian. If the guardian did not object to the relationship, a marriage would be presumed, irrespective of where the matrimonial home happened to be or how the 'spouses' came to be living there. Professor Bennett placed reliance on a case in which the Court had remarked that "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". In this matter, the respondent averred that her mother had not instituted any action for seduction or demanded payment of a fine, well knowing that the respondent cohabited with the deceased. She accepted that the respondent and the deceased had entered into a valid customary marriage (footnotes omitted)."

[39] *Supra* fn 18, at para 27 and 31.

[89] In my view, counsel for the Plaintiff was correct when she submitted that this matter required a holistic consideration. The parties have been residing together for a period of approximately 10 years, during which two children were born, and they shared the main bedroom. There were no attempts whatsoever to challenge this information from the Defendant. In finding that a customary marriage existed between the parties in *Mabuza*[40] the court considered the fact that:

> "…[T]hat they lived together with the plaintiff for some eight (8) years, that a child was born of the relationship between them…"

[90] This Court is persuaded by the authority in that the Plaintiff regarded herself as the Defendant's wife. The Defendant also regarded the Plaintiff as his family and consulted with her when making important decisions such as insurance policy options. Further, two children were born from the marriage. I also need to mention that when the Defendant sought traditional land of a stand in respect of the property in Polokwane, he had to first indicate to the traditional authority that he has a wife. Again, this was not disputed by the Defendant.

[91] The purchase of a wedding band also came into the fore, but this also went unchallenged by the Defendant. It is unusual that one can randomly purchase a wedding band for someone that they are living with and have paid full *lobolo* for just for the sake of it. In confirming the existence of a customary marriage albeit, in a different context, the Supreme Court of Appeal in *Maropane*[41] also

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[40] *Supra* fn 28, at para 20.
[41] *Supra* fn 6, at para 17.

took into consideration the fact that the appellant there had also purchased a wedding band for the respondent. In light of this, I am of the view that the wedding bands, in the circumstances of this case, shows that the Defendant for all purposes was further confirming his customary marriage to the Plaintiff.

[92] This Court is of the view that Mr. Komape failed to take it into his confidence. He denied the existence of the marriage and claimed that he did not know whether the Defendant and the Plaintiff lived together in Pretoria. This is astonishing, to say the least given the fact that Mr. Komape is the Defendant's uncle who has also been to all the *lobola* negotiations. His evidence to the effect that they are still waiting for the handover is hard to believe. How can he wait for the handing over of the people that he is not even certain whether they live together or not. Again, it was Mr. Komape's version that they had left together with the Plaintiff post the payment of the full *lobola* and the cow as they gave the Plaintiff a lift. The question then arises. Where did Mr. Komape and other people that were in the vehicle drop off the Plaintiff? The only possible answer is that they dropped her off where the Defendant was. Mr. Komape also indicated that payment of the first *lobola* money R6000.00 included damages for the first pregnancy of the Plaintiff. This was the first time that this Court was alerted about the damages. In summary, Mr. Komape's testimony portrays a picture of the M's as strong followers of tradition but at the same time indicated that parties to a marriage may decide whether to adhere to a tradition or not. This is contradictory. His testimony was not helpful to this Court. Therefore, it falls to be rejected in its entirety.

[93] The Plaintiff's testimony including that of her mother, Ms. M to a large extent

echoed the same occurrence of events. Ms. M' corroborated the evidence of the Plaintiff in almost every material respect especially in so far as when the Plaintiff was released and/or handed over to the Defendant's family after the second meeting where *lobola* was paid in full. Even though the Plaintiff's mother, Ms. M, under-cross examination contradicted the Plaintiff when she said that there was no waiver of celebrations. In my view, this is inconsequential as the overwhelming evidence such as the act of being released by her mother to the Defendant's delegation, the extended cohabitation of the parties post the payment of full *lobola*, the indication of marriage in terms of customary law in the Notice of Birth form, reference to spouse in the Hollard Policy, and the signal of marriage in community of property in the Deed of Transfer dictates otherwise. Counsel for the Plaintiff eloquently took this Court through the said documents, something that the Defendant unsuccessfully tried to refute by indicating that he *inter alia* made a mistake or that he was not sure what was required from him. I, therefore, find the version of the Plaintiff and Ms. M coupled with supporting documents reliable and acceptable.

[94] Under-cross examination, the Defendant was evasive and failed to answer simple questions. For example, when he was asked about why he indicated that he was married when completing the Notice of Birth form, he responded that he did not understand what was being asked of him. Furthermore, when asked about why he did not go back to the attorneys to correct the Deed of Transfer referring to him as married in community of property to the Plaintiff when he is aware that he is not married, he responded that it was an oversight.

At times, the Defendant struggled to answer a straightforward question such as whether he was single or married. Instead, he was incoherent and tried to avoid the question. In addition, in one of the documents submitted to his employer, the Defendant indicated *lobola* instead of choosing single or married. In my view, the Defendant's testimony lacked credibility and ought to be rejected.

[95] I need to also indicate that most of the Plaintiff's key evidence contained in the Deed of Transfer, and the Notice of Birth went unchallenged. Further, a plain reading of the *lobola* agreement[42] does not in any way indicate that the customary marriage of the parties was conditional[43] on the exchange of gifts and/or handing over of the pride. Instead, the letter reads *("….Se se saletseng morago ke dithoto tse di latelang…"*) which is loosely translated to mean, "the outstanding items are the following". Furthermore, the submission by counsel for the Defendant that the validity of the negotiated customary marriage would be determined by the African customary law is not entirely correct. The *lobola* agreement contains no such wording and does not indicate that the items to be exchanged were essential things. In my view, if the parties intended to record such conditions as now rigorously contended so by the Defendant, they would have easily done so because Mr. Komape was part of the *lobola* delegation in both instances.

[96] Concerning submission by the defendant's counsel that the decisions of the Supreme Court of Appeal did not set authority for the proposition that *"the rituals, exchange of gifts and the wedding ceremony are not necessary or*

[42] Lobola letters CaseLines 4:6.
[43] *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) at para 30.

required for purposes of concluding a valid customary marriage", I think that counsel misses the point. Both the *Tsambo*[44] *and Mbungela*[45] decisions are a precedent in that certain rituals, depending on the facts of each case, may be deemed to have been waived, and/or that a failure to strictly comply with all rituals and ceremonies cannot invalidate a marriage.

[97] In the present case, all the requirements of section 3(1) of the Customary marriages Act have been complied with, such as the age of the parties, consent, payment of full *lobola* price (R12 000.00 and the cow (R3 000.00). I have already found that the Plaintiff was released by her mother or handed over to leave with the Defendant's delegation post the payment of full *lobola* and the cow. The only outstanding aspect is the celebration or rituals. I align myself with the findings of the Supreme Court of Appeal where it held in *Mbungela*[46]*,* that this *"is not an important but not necessarily a key a determinant of a valid customary marriage".*[47] This requirement cannot be the only factor that extinguishes a clear intention and commitment of the parties whose delegation met, negotiated a marriage, and the mother released the Plaintiff post the payment of full *lobola* and the cow to live together with the Defendant.

[98] In light of the above exposition, I am of the view that the Plaintiff has adduced evidence on the balance of probabilities that there exists a customary marriage in community of property[48] between herself and the Defendant. Her version is

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[44] *Supra* fn 18, at para 18.
[45] *Supra* fn 12, at para 30.
[46] *Ibid.*
[47] At para 30.
[48] See section 7(2) of the Customary Marriages Act which provides that in the absence of an antenuptial contract, a customary marriage entered into after the commencement of the Act is a

more probable as compared to that of the Defendant.

[99] Therefore, there exists a valid customary marriage in community of property entered into between the Plaintiff and Defendant. This answers the legal issue. The Defendant's version that there was no such marriage between the parties has no merit and falls and is rejected.

COSTS

[100] The Plaintiff asked for a cost order against the Defendant. I earlier indicated that this is a unique case where the overwhelming evidence before this Court including the documents that were signed by the Defendant himself showed that the Defendant had entered into a customary marriage with the Plaintiff. Regrettably, the Defendant sought to challenge his own commitments as indicated in the documents that he had signed including indicating that he was married in terms of customary law and in community of property.

[101] The Defendant has in any event been the successful party in these proceedings. Accordingly, the general rule that the costs should follow the results must apply.[49]

ORDER

[102] I, therefore, make the following order:

(a) A decree of divorce is granted.

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marriage in community of property and of profit and loss between the spouses.

[49] *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC) at para 15.

(b) The recommendations contained in the report of the Family Advocate in respect of the minor children are made an order of court.

(c) Division of the joint estate.

(d) The issue of the maintenance is referred back to the Maintenance Court.

(e) The Defendant is ordered to pay the costs of this action from the portion of his joint estate.

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M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the 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 for hand-down is deemed to be 23 November 2022.

APPEARANCES:

Counsel for the Plaintiff:	Adv N Erasmus
Instructed by:	Shapiro & Ledwaba INC
Counsel for the Defendant:	Adv MG Skhosana
Instructed by:	Theuns Hurter INC
Date of Hearing:	21 July 2022
Date of Judgment:	22 November 2022