

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 1789/21P

In the matter between:

MANDY MALINDA NDULI

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

BERTINA KHUMALO

Third Respondent

MASTER OF THE HIGH COURT PMB

Fourth Respondent

ORDER

1. It is declared that the customary marriage entered into between the applicant, Mandy Malinda Ntuli, with identity number [...] and the deceased, Thokozani Praise-God Khumalo, with identity number [...], on 12 December 2020, is a valid customary marriage in compliance with the Recognition of Marriages Act 120 of 1998 (the Act).
2. The first and second respondents are directed to register such marriage and to issue the required certificate in terms of section 4(8) of the Act, confirming such registration.
3. The third respondent is directed to pay the costs of the application

JUDGMENT

E Bezuidenhout J

Introduction

[1] The applicant, Ms Mandy Malinda Nduli, applies for an order that the customary marriage entered into between her and the late Mr Thokozani Praise-God Khumalo with identity number [...], on 12 December 2020, was done in accordance with the prescripts of the Recognition of Marriages Act 120 of 1998 (the Act).

[2] She also seeks an order directing the first respondent, the Minister of Home Affairs, and the second respondent, the Director General of Home Affairs, to register the marriage and to issue a certificate confirming such marriage in terms of section 4(8) of the Act. These parties played no role in these proceedings.

Background

[3] The present application came before PC Bezuidenhout J who granted the above orders on 7 April 2021. On 12 May 2021 the third respondent, Mrs Bertina Khumalo, the mother of the late Mr Thokozani Khumalo (the deceased), brought an application to rescind the order granted on 7 April 2021. She also brought an urgent application seeking *inter alia* that pending the final determination of the rescission application, the

relief granted on 7 April 2021 be stayed. Mr Thalente Hopewell Khumalo, the deceased's eldest son born off his marriage with the late Sharon Nomthandazo Khumalo, also attested to affidavits in support of the applications.

[4] The order of 7 April 2021 was subsequently rescinded by consent and the parties filed further affidavits to complete the main application. On 15 November 2021 the matter was referred for the hearing of oral evidence but such hearing never materialized and the matter came before me as an opposed motion.

The applicant' case

[5] The applicant alleges that she brings the application on behalf of the deceased's three minor children.

[6] The applicant and the deceased started a love relationship during 2015. Unfortunately, the deceased passed away on 15 February 2021.

[7] The applicant alleges that the deceased had always intimated his intention to marry her. During March 2020 he introduced her to his four children, whom were living with him. T K was the eldest, born on [...] April [...]. S S K was born [...] February [...]. N S K born on [...] June [...] and M S K was born on [...] November [...].

[8] During October 2020 the deceased asked Mr Thembalihle Andile Sikhakhane and Prince Mutwana Mbonise Zulu (known as 'Abakhongi') to act as his emissaries and to negotiate and finalise the payment of lobolo with the applicant's family as well as the immediate handing over of the wife.

[9] The applicant alleges that the deceased's emissaries were not from his family as he did not have a relationship with his family or communicated with them, he had renounced them and lived as if they did not exist. The deceased did however have a relationship with his uncle, Mr Bhekinkosi Khumalo, whom he informed of his intention to conclude a customary marriage with the applicant.

[10] The applicant's father, Dr Kwazi Henry Nduli, was contacted by the deceased and informed of the deceased's intentions. A date was set for 12 December 2020 for the deceased's emissaries to start negotiations. On 12 December 2020 the lobolo negotiations commenced with the applicant's family and an amount of R85 000 together with 5 live cows were agreed upon as lobolo. The cash amount was paid on the same date in the presence of the Induna, Mr Alfred Zamisa, who signed a letter to the effect. The applicant also annexed a handwritten note setting out the amount of lobola paid as well as the 5 live cows to be delivered.

[11] The applicant stated that after lobolo negotiations, celebrations took place at her father's home. A sheep was slaughtered and the deceased's emissaries were given a crate of beer and whiskey as gifts. People danced until late in celebration of the union. The deceased had also bought a cow which was slaughtered at his home and the meat was cooked for those who were at his home when lobolo was being negotiated and also for the hand over celebrations.

[12] On 13 December 2020 the applicant was taken to the deceased's home by her family and she was handed over to the deceased in the presence of deceased's emissaries, his uncle, his aunt, Mrs Shongane Khumalo, friends and colleagues. The deceased's aunt was involved in the preparation of food and the marriage preparations.

[13] After the applicant was handed over by her family, the deceased performed certain rituals which included the burning of 'impepho' and talking to his ancestors about the customary union. The applicant was smeared with cow bile or 'inyongo' as part of the rituals and traditions as part of the deceased's process to accept her as umakoti at his home. He formally introduced her as his wife to everyone present at the celebrations.

[14] After the celebrations, the applicant and the deceased commenced living together as husband and wife and did so until he passed away.

[15] The applicant stated that the deceased was content to only have his aunt and uncle involved in the process of getting married because of the strained relations with his family. It was therefore impractical if not impossible to take her as his bride to his family home.

[16] The marriage was concluded with both the applicant and the deceased's consent and they were both over the age of 18 years at the time. They did not get around to formally registering the marriage with the Department of Home Affairs because of the conditions surrounding the Covid-19 pandemic and in order to avoid exposure to the risk of contracting Covid-19. Unfortunately, the deceased nonetheless became sick and succumbed to the illness on 15 February 2021.

[17] The applicant arranged and attended the deceased's funeral which took place on 20 February 2021. The program included an item where someone from her family would speak.

[18] The applicant filed confirmatory affidavits by Thembalihle Sikhakane, her father, Dr Ntuli and Mrs Shongane Khumalo.

The third respondent's case

[19] The third respondent's opposition to the relief being claimed centres around the validity and/or existence of the applicant's marriage to the deceased. She alleges inter alia that there was no celebration of the customary marriage, there was no delivery of gifts, referred to as 'ingqibamasondo', by the applicant, no delivery of gifts by the deceased to the bride's family, referred to as 'izibizo', and that there was only the payment of lobola. There was furthermore no handing over of the applicant to the deceased's family.

[20] The third respondent alleged that according to the applicant she was handed over to their family on the 13 December 2020 and that she was received by Mr

Bhekinkosi Khumalo, the deceased's uncle. This is however not what the applicant stated in her affidavit. She stated that she was handed over to the deceased in his uncle's presence as well as in the presence of his emissaries.

[21] The third respondent placed reliance on an affidavit made by Mr Bhekinkosi Khumalo. He stated *inter alia* that on 11 December 2020 the deceased requested to see him. He confirmed that the deceased had sent a delegation to Estcourt to negotiate lobolo for him. He mentioned the names of Prince Mbonisi Zulu and Thulasizwe Ntenga. He stated that he attended on the deceased's home again on 12 December 2020 and was informed that half of the lobola had been paid in cash and the balance would be paid later. He alleges that the deceased told him that he was not in a hurry to finish lobolo. He confirmed that from the document put up by the applicant it is clear that the live cattle were not delivered. He was clearly mistaken about the payment of lobola as it is clear that the full amount was paid in cash.

[22] Mr Khumalo denied that the applicant was brought to the deceased's house on 13 December 2020. He does not say whether he was there the whole day into the evening or when he left. He denied that the Nduli family came to the funeral and he stated that the Khumalo family has not met the Nduli family. He denies that there was a handing over ritual of the bride and the customary celebration of the customary union. He also stated that there had not been the delivery of the gifts (*ukuhambisa kwezibizo*) where the family of the bride supply a list of people who must be given gifts by the bridegroom.

[23] Mr Khumalo also pointed out that Mrs Shongane Khumalo was not a blood relative of the deceased but merely someone employed by him to look after his children. Mr Khumalo stated that he had read the applicant's founding affidavit and that from what is stated relating to the applicant and the handing over of the bride, such averments are false and not true. It amounts to a bare denial of the majority of the allegations made by the applicant.

[24] The third respondent also placed reliance on an affidavit by Mr Thulasizwe Ntenga, which was filed in the urgent application. He admitted that he attended the lobolo negotiations at the Nduli home. He stated that the applicant's statement that the lobolo was determined at R85 500.00 was incomplete as there was also five live cows to be delivered. He clearly did not read the applicant's affidavit properly because she clearly states that lobolo was determined in the amount of R85 500.00 and five live cows. He confirmed however that an amount of R89 500 was paid on 12 December 2020. The cows were not delivered.

[25] Mr Ntenga admitted that they were given a crate of beer and three bottles of cognac. He denied that there were celebrations 'in their presence' or that a sheep was slaughtered in their presence. He also denied that the deceased had brought a cow that was slaughtered. It was however alleged by the applicant that the deceased had bought a cow which was slaughtered at his home. Once again it appears that Mr Ntenga did not read the applicant's affidavit properly.

[26] Mr Ntenga also states that he was at the deceased's home on 13 December 2020 and that the applicant was not brought at all to the deceased's house and that no handing over was done. He goes further to state that because the five live cows had not been delivered, no handing over could take place. He stated that the applicant's statement that there was a handing over and a celebration of a customary union or marriage is false. He did not state until what time he was at the deceased's home.

[27] The third respondent also stated that her house and deceased's house are opposite each other and that she knows 'as a fact' that the applicant was not handed over.

[28] The third respondent in her specific responses to particular paragraphs in the applicant's founding affidavit responded in various instances with a bare denial. In paragraphs 14 to 22 of her affidavit, the applicant set out in detail the events leading up to the lobolo negotiations and what followed thereafter, such as that the applicant and

deceased commenced living together as husband and wife. The third respondent's response to all these paragraphs were simply that save for admitting the deceased paid R85 500 as part of lobola, she denied 'all other averments'.

[29] In paragraphs 23 to 25, the applicant deals with the deceased's illness, the Covid-19 pandemic and the nonregistration of their marriage. It also contains the allegations by the applicant that she arranged the deceased's funeral and that there was an item on the program that someone of her family will speak at the funeral. These allegations were similarly met with a bare denial or a statement that the third respondent did not have knowledge of the facts.

[29] It's difficult to understand how the third respondent would have no knowledge of who arranged and attended the deceased's funeral unless, of course she was not there. It is even more concerning that when it comes to an allegation by the applicant that she and the deceased commenced living together as husband and wife after the events of 13 December 2020, that the third respondent chose not to respond to this important allegation in particular.

[30] The applicant also stated that the four children of the deceased 'were staying with us and we were financially responsible for their livelihoods'. She attached copies of school accounts addressed to Mr and Mrs T Khumalo or to herself. Once again the third respondent choose not to respond to these crucial allegations, leaving it unchallenged.

[31] The deceased eldest son, T H K attested to an affidavit in the urgent application as the second applicant. He made much of the fact that he should have been cited as a respondent by the applicant as he is a major and as such would have an interest in the relief being sought. This is so but his non joinder in the original application is in my view not fatal as he has ultimately been able to address the issues and raise all the concerns he had, and of which I will take note. It is uncertain why he did not also file a further affidavit in the main application. The applicant attached a number of messages sent by Thalente to her, referring to her as 'Ma', providing payment details for his tuition to be

paid and also requesting permission from her to 'dip' into the 'rainy day fund' to pay for electricity and petrol. These matters were not addressed at all.

[32] T likewise alleges that the applicant's claim of a marriage are predicated on a falsity, repeating the exact same issues raised by the third respondent and Mr Bhekinkosi Khumalo, who he refers to as his grandfather.

[33] T, as the deceased's son would have been in the ideal position to state whether the applicant and the deceased commenced living together as husband and wife after the lobolo negotiations and only 'part payment' by his father. He stated that there are witnesses who attended the lobolo negotiations who say that lobola was not paid in full, that there was no celebration at the applicant's home and that the applicant 'was not brought to our home and handed over' as she claimed. The third respondent's influence is clear to see.

[34] Thalente however does not state whether he was present at the deceased's home during this time. He does not comment on whether the applicant and the deceased lived together as husband and wife in what he refers to as 'our home'. He does not comment about whether the applicant assumed responsibility for his siblings. These issues would have been within his knowledge yet there is no affidavit by him in the main application and he does not raise these issues in the urgent application, where he easily could have done so.

The applicant's reply

[35] The applicant dealt with the main issue which became apparent from the third respondent's answering affidavit, namely whether there was delivery of the bride at the deceased's home where after they lived as husband and wife, and not whether there was a celebration at the deceased's family home as the third respondent would have it. The applicant maintained that she was delivered to the deceased's house so as to live as husband and wife and that they lived so until the deceased passed away. She also stated that the third respondent's house was three houses away from the deceased's

house and that she would therefore not have seen what happened at his house. With reference to a number of the Zulu customs and traditions described by the third respondent, she stated that despite being of Zulu origin, her family did not follow some of these practices. She denied that the practices set forth are formal processes or practices followed by all Zulu people. She also stated that parties to a marriage or the families involved can decide to waive certain practices. In the present instance, the deceased sought her delivery as his wife to his home.

[36] The applicant also stated that it was a common cause that the deceased had paid the lobola but that the live cows had not yet been handed over. She stated that the delivery of the cows had been waived given that her hand over had taken place subsequent to the payment of the lobola. A valid marriage could in any event still be concluded even if lobola had not been paid in full. The applicant also stated that with reference to 'ukulethwa kwezibizo', the delivery of gifts to her family, her mother did not request any gifts from the deceased. The practice of ingqibamasondo, the gifts to the groom, was furthermore unknown to her family and not a custom they followed. The deceased's emissaries made no mention of this and if the deceased wanted to follow this practice he would surely have instructed his emissaries to ensure that it was followed.

[37] The applicant dealt with the allegations of Mr Bhekinkosi Khumalo with reference to the so called failure to finalise the payment of lobola by stating that it was clear that the lobolo was paid in full by the deceased. The live cows were not delivered but this was waived.

[38] The applicant denied the assertions by Mr Bhekinkosi Khumalo that she was not handed over in his presence at the deceased's home describing it as far-fetched. She persisted that she travelled to the deceased on that day and annexed cell phone message exchanges between her and the deceased on 13 December 2020 as well as a printout depicting her cell phone location on the day. She left Estcourt at around 17h39 and arrived at the deceased's home at 21h31, having had to drop off a few people on

the way. She was accompanied by her family members, one being her cousin, Hlengiwe Mnyanane, who attested to a confirmatory affidavit.

[39] With reference to the deceased's funeral and her attendance, which was met with a bare denial by the third respondent, the applicant added that she sat in the front row, next to the coffin with the rest of the family, as the deceased's wife. She was dressed in black as the widow of the deceased and partook in rituals such as pouring soil in the grave of the deceased. A video recording was available, depicting what happened at the funeral.

Discussion

[40] The Recognition of Customary Marriages Act 120 of 1998 (the Act) defines a customary marriage as a marriage concluded in accordance with customary law. The requirements for a valid customary marriage are set out in section 3(1) of the Act:

'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; 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.'

[41] From the papers it has emerged that the third respondent in essence disputes the validity of the marriage on two fronts namely that the lobolo was not paid in full and that there was not a handing over of the bride to the deceased's family. The author of *Seymour's Customary Law in Southern Africa*¹ listed the essentials of a customary marriage as follows:

- (i) The consent of the bride's guardian.
- (ii) The consent of the bride.
- (iii) The consent of the bridegroom.
- (iv) The payment of lobolo . . .
- (v) The handing over of the bride to the bridegroom.'

¹ JC Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) at 105 – 109. See also C Himonga and E Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) at 59.

[42] Despite lobolo not being mentioned in the section 3(1) of the Act, lobolo is regarded as ‘the rock on which the customary marriage is founded’.² The type of property given as lobolo may be determined by agreement between the parties. Traditionally livestock was the preferred commodity but in modern times payment of lobolo in cash has become acceptable with a portion to be paid in livestock, if so agreed.³ This is also borne out by the definition of lobolo in the Act where it is defined as ‘property in cash or in kind’.

[43] Bennett⁴ discusses whether the payment of lobolo is a legal or essential requirement for a marriage:

‘In practice, however, the courts can hardly insist on full and immediate payment of lobolo . . . The Natal and KwaZulu codes went even further. In the section governing essentials of customary marriage, no mention is made of lobolo . . . When the Law Commissions’ Special Project Committee on Customary Law came to consider the essential requirements for a valid marriage, the role of lobolo in constituting marriage was over shadowed by a debate about its effect on the status of women . . . The Committee noted that the great majority of people – both men and women – were strongly attached to lobolo as an institution. Nevertheless, central though lobolo may be . . . full payment is seldom necessary’. (footnotes omitted)

[44] In *Southon v Moropane*⁵ Saldulker J held, with reference to authorities that part payment of lobolo is sufficient to constitute a customary marriage and need not be paid in full, as long as there is an agreement that lobolo will be paid.

[45] In *Mankayi v Minister of Home Affairs and others*⁶ Mngadi J held that some traditional communities, after an agreement on lobolo and part payment thereof,

² *Mbanga v Sikolake* 1939 NAC (C & O) 31, and JC Bekker *Seymour’s Customary Law in Southern Africa* 5ed (1989) at 151. See also C Himonga and E Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) at 89 – 92.

³ TW Bennet *Customary Law in South Africa* (2004) at 224ffg.

⁴ TW Bennet *Customary Law in South Africa* (2004) at 234 – 235. See also C Himonga and E Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) at 60 and 89 – 92.

⁵ *Southon v Moropane* [2012] ZAGPJHC 146 para 82. The Supreme Court of Appeal agreed with the court a quo’s conclusion in *Moropane v Southon* [2014] ZASCA 76. See also *Tsambo v Sengadi* [2020] ZASCA 46 para 13.

⁶ *Mankayi v Minister of Home Affairs and others* [2021] ZAKZPHC 43 para 28.

slaughter a beast celebrating the event, 'which effectively recognises the bride and bridegroom as husband and wife'. The other customs and rituals relating to the customary marriage including its celebration may remain outstanding.

[46] As far as the handing over of the bride is concerned, Mngadi J held further that an agreement on lobolo and staying together of the bride and the bridegroom as husband and wife 'with knowledge of her people' means the existence of a customary marriage. The failure to formally hand over the bride or to celebrate the union 'are of no consequence'.⁷

[47] In *LS v RL*⁸ Mokgoathleng J dealt with the question as to whether the handing over of the bride to the bridegroom's family was 'the most crucial part' of a customary law marriage, without which, no valid customary marriage came into existence. It was held that

'African customary law is a living law because its practices, customs and usages have evolved over the centuries. The handing-over custom as practised in the precolonial era has also evolved and adapted to the changed socioeconomic and cultural norms practised in the modern era'.

[48] After referring to a number of authorities and considering whether the custom of handing over passes constitutional muster, the judge held that a customary law wife has no freedom of opinion, autonomy or control over her marital life if her customary husband's family insists that her family should hand her over in order to validate the existence of her marriage, in spite of the fact that she and her customary law husband have complied with section 3(1) of the Act.⁹ The judge concludes that the custom of handing over the bride to the bridegroom's family cannot pass constitutional muster *inter alia* because it infringes on the female spouse's freedom of opinion and control over her marital status.¹⁰ The judge proceeded to make an order declaring that the

⁷ *Mankayi v Minister of Home Affairs and others* [2021] ZAKZPHC 43 para 28. See also C Himonga and E Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) at 92 – 93.

⁸ *LS v RL* [2018] ZAGPJHC 666; 2019 (4) SA 50 (GJ); [2019] 1 All SA 569 (GJ) para 20, also referred to as *Sengadi v Tsambo: In re: Tsambo*.

⁹ *LS v RL* [2018] ZAGPJHC 666; 2019 (4) SA 50 (GJ); [2019] 1 All SA 569 (GJ) para 33.

¹⁰ *LS v RL* 2019 (4) SA 50 (GJ) para 35.

customary law custom of handing over the bride was not an essential prerequisite or requirement for the existence of a lawful marriage in terms of the Act. Although on appeal the Supreme Court of Appeal in *Tsambo v Sengadi*,¹¹ as per Molemela JA, criticized the finding of unconstitutionality, it did not interfere with the declaratory relief granted.

[49] In *Mbungela v Mkabi*,¹² which preceded *Tsambo*, supra, Maya P considered whether the handing over of the bride was a requirement for a valid marriage. She held as follows:

‘[27] The importance of the observance of traditional customs and usages . . . 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 . . . could yield untenable results.

[28] Thus, for example, a woman could consent to a customary marriage, followed by payment of lobola, after which she cohabited, built a home with her suitor, and bore him children, with the full knowledge of his family. When the man died, she and those children could be rejected and disinherited by his family simply on the basis she was not handed over or properly introduced to his family and was therefore not his lawful wife . . . Needless to say, that consequence would be incongruous with customary law's inherent flexibility and pragmatism’.

[50] Bennett, supra, stated that when the Law Commissions’ Special Project Committee on Customary Law considered the effect of wedding ceremonies and transferring of the bride, ‘it found that variations in local practice and ambiguities inherent in them suggested that neither should be deemed essential for the creation of a customary marriage’.¹³

[51] Returning to the present application, it is common cause that lobolo was paid by the deceased, although the third respondent tried to make something out of the failure

¹¹ *Tsambo v Sengadi* [2020] ZASCA 46

¹² *Mbungela and another v Mkabi and others* [2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA).

¹³ TW Bennet *Customary Law in South Africa* (2004) at 216.

to deliver the live cattle. It is clear that both the applicant and the deceased consented to the marriage and were over the age of 18 years.

[52] The third respondent denied that there were celebrations at the applicant's home and that the applicant was brought to the deceased's home, relying on the affidavits by Bhekinkosi Khumalo and Thulasizwe Ntenga. Neither of these two gentlemen however state until what time they were at the deceased's home or at the applicant's home, for that matter.

[53] It is further clear from the papers the neither the third respondent nor any of the deponents who attested to affidavits in support of her case, dealt with the applicant's allegation that she and the deceased commenced living together as husband and wife after she arrived at his home on 13 December 2020. The third respondent's bare denial does not suffice as it has been held that a respondent cannot contend himself in his answering affidavit with bare or unsubstantiated denials.¹⁴

[54] The allegation that the applicant attended the deceased's funeral as his widow was likewise met with a bare denial.

[55] Counsel for the applicant, Mr K Nondwangu, in his heads of argument referred to *Wightman t/a JW Construction v Headfour (Pty) Ltd*¹⁵ where it was held that a 'real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.' A duty is furthermore imposed to engage with the facts disputed and reflect such disputes fully and accurately in the answering affidavit. In my view this was clearly not done in the present matter.

[56] Even if I only consider the version of the third respondent and the basis upon which she claimed that there was no valid customary marriage, namely that there was no handing over of the applicant to the deceased's family or to the deceased himself for

¹⁴ *Plasco –Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635A.

¹⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) para 13.

that matter, bearing in mind the authorities referred to above, it is difficult to find that a valid customary union was not concluded.

[57] Counsel for third respondent, Mr M N Xulu, valiantly tried to persuade me to consider the disputes of fact and the contradictions between the version of the applicant and that of Mr Bhekinkosi Khumalo and Mr Thulasizwe Ntenga. It is clear that the applicant on her version arrived at the deceased's home late in the evening. It is of course possible that by that time neither Mr Khumalo nor Mr Ntenga were still present at the deceased's home. It was submitted on behalf of the third respondent that if the applicant lied about this issue, she could also have lied about the 'living together' portion of her evidence. This is not borne out by the papers and does not explain the third respondent's failure to deal with this issue, which was readily conceded.

[58] In the end the only relevant fact in my view is that after the payment of lobolo, on the applicant's version, she commenced living with the deceased as husband and wife from 13 December 2020 until his death. Neither the third respondent nor Mr Khumalo or Mr Ntenga or the deceased's eldest son dealt with this crucial aspect where they could easily have done so.

[59] Not surprisingly, applicant's counsel relied on *Mankayi* and *Mbungela* as authority in support of the applicant's case. Counsel for the third respondent could not offer any authorities relevant to the matter at hand which offered a different view.

[60] I can find no reason to differ from what was held in *Mankayi* and I agree that the fact that a bride was not formally handed over to the bridegroom's family or to the bridegroom himself for that matter,¹⁶ is not an impediment to a valid customary marriage and further that by living together as husband and wife, the applicant and deceased had clearly concluded their customary marriage. This also takes into account the evolving

¹⁶ JC Bekker *Seymour's Customary Law in Southern Africa* 5ed (1989) at 108: 'the handing over need not be a formal ceremony'.

nature of customary law and how certain elements are influenced by changing social and economic conditions.¹⁷

[61] The issue of costs was not addressed in particular. I see no reason to deviate from the general rule that costs should follow the result.

[62] I grant the following order:

1. It is declared that the customary marriage entered into between the applicant, Mandy Malinda Ntuli, with identity number [...], and the deceased, Thokozani Praise-God Khumalo, with identity number [...], on 12 December 2020, is a valid customary marriage in compliance with the Recognition of Marriages Act 120 of 1998 (the Act).
2. The first and second respondents are directed to register such marriage and to issue the required certificate in terms of section 4(8) of the Act, confirming such registration.
3. The third respondent is directed to pay the costs of the application.

E. Bezuidenhout J

¹⁷ C Himonga and E Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) at 73.

Date reserved: 26 October 2022
Date delivered: 3 March 2023

Appearances:

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