THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 820/2018

In the matter between:

PIET MBUNGELA	**FIRST APPELLANT**
THOBILE CAROL MKHONZA NO	**SECOND APPELLANT**
and	
MADALA PHILEMON MKABI	**FIRST RESPONDENT**
THE MINISTER OF HOME AFFAIRS	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT, (NELSPRUIT)	**THIRD RESPONDENT**

Neutral citation: *Mbungela & another v Mkabi & others* (820/2018) [2019] ZASCA 134 (30 September 2019)

Coram: Maya P and Zondi, Molemela, Mokgohloa and Dlodlo JJA

Heard: 12 September 2019

Delivered: 30 September 2019

Summary: Customary law – s 3(1)(*b*) of the Recognition of Customary Marriages Act 120 of 1998 – requirements for a valid customary marriage – customary law dynamic, continuously evolving, flexible and pragmatic – ceremony of handing over of bride not necessarily a key determinant of a valid customary marriage - its waiver of permissible and does not invalidate a customary marriage – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Twala AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Maya P: (Zondi, Molemela, Mokgohloa and Dlodlo JJA concurring):

[1] The crisp issue in this appeal is whether the first respondent, Mr Madala Philemon Mkabi, and the late Ms Ntombi Eunice Mbungela (the deceased) complied with s 3(1)(*b*) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) and concluded a valid customary marriage, where the deceased's family did not hand her over to the first respondent's family in terms of custom. The Gauteng Division of the High Court, Pretoria (Twala AJ) held that they did. The decision is challenged with leave of this Court and only the first respondent opposed the appeal.

[2] The first respondent launched action proceedings in the court a quo. He sought an order declaring that he and the deceased concluded a valid customary marriage, and further orders compelling the second respondent, the Minister of Home Affairs, to register[1] and issue a certificate of registration of that customary marriage.[2] He also sued (a) Mr Piet Mbungela, the deceased's elder brother and head of her family, who is cited in this appeal as the first appellant, (b) the second appellant, Ms Thobile Carol Mkhonza, the deceased's daughter and executrix of her estate, and (c) the third respondent, the Master of the High Court, Nelspruit, who issued the second appellant's letter of executorship.

[3] The Minister and the Master abided the court a quo's decision and only the appellants opposed the litigation. The appellants contended that Mr Mkabi and the deceased did not conclude a customary marriage because the deceased was not handed over to the Mkabi family and lobola was not paid in full with the result that not all the requirements of s 3(1)*(b)* of the Act were met. At the commencement of the trial, Mr Mkabi withdrew the action against the first appellant, by agreement, in terms of which each party would pay his own costs. In the circumstances, the first appellant is not a party in this appeal. For convenience, however, I will refer to him as the first appellant in the judgment.

[4] Mr Mkabi testified in support of his case and the appellants and Mr Jabu Troyed Mbungela, who was raised by the deceased as her own child, testified for

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[1] In terms of s 4(7)(*a*) of the Recognition of Customary Marriages Act 120 of 1998 (the Act).
[2] In terms of s 4(8) of the Act.

the defence.[3] The background facts as gleaned from their evidence are simple. Mr Mkabi and the deceased, who were respectively 59 and 53 years old, started dating in 2007. They each owned immovable property. They regularly visited each other at their respective properties, ie the deceased's house in Kanyamazane, Nelspruit, which she shared with Ms Mkhonza and Jabu when they returned from work on some days, and Mr Mkabi's home in Pienaar. The latter, however, spent significant amounts of time at the deceased's home and had his washing done there on a permanent basis.

[5] On 2 April 2010, Mr Mkabi sent emissaries from his family to the deceased's home in Bushbuckridge to ask for her hand in marriage in terms of custom. The deceased's representatives were led by the first appellant in the lobola negotiations which ensued. The proceedings were successful and the two families concluded an agreement in terms of which Mr Mkabi would pay lobola in the sum of R12 000 and a live cow. He immediately paid R9 000, which was accompanied by various gifts for the deceased's family, namely a man's suit, shirt, tie, socks and a pair of shoes for her guardian, a woman's suit for her mother, a blanket, a headscarf, two snuff boxes, brandy, whisky, a case of beers and a case of soft drinks. The deceased's family also gave gifts to the Mkabi emissaries. In the first appellant's words, the exchange of gifts 'symbolised the combination of a relationship between the bride and the groom and the[ir] families'. Mr Mkabi subsequently delivered the cow to the deceased's family.

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[3] Expert evidence was not led in the matter. But that is of no moment in light of the direct evidence adduced by the affected parties who actually observe the 'living law' and the caution by the courts against unquestioning reliance on textbooks, case law and expert views, which may yield conflicting views, where the custom in issue may be readily ascertained from direct, reliable evidence. See, for example, *Richtersveld Community & others v Alexkor Ltd & another* 2003 (6) SA 104 (SCA) para 54.

[6] The deceased remained at her family home for a few days after the lobola negotiations and returned to Mr Mkabi in the following week. They did not register their customary marriage[4] although they once visited the relevant Traditional Council, in 2013, to obtain an official letter confirming their union as they considered themselves married. The Traditional Council secretary was, however, absent from the office on that day.

[7] According to Mr Mkabi, who is a Swati, he was not familiar with the customs of the deceased, who was a Shangaan. During the lobola negotiations no mention was made of a handing over or a bridal transfer ceremony, which is not an absolute requirement to complete a customary marriage in Mr Mkabi's own culture. (According to him, payment of lobola may suffice in Swati culture, depending on the negotiations.) Nor was he informed that the marriage would be complete only when the entire lobola amount was paid. There was no demand for the balance of R3 000 which he intended paying in due course despite his understanding that lobola is never paid in full. In due course, he and the deceased had a white wedding at the deceased's church and they continued living as a married couple. To that end, he handed into evidence an extract of the deceased's diary in which she listed her emergency contact persons as Ms Mkhonza and Mr Mkabi, whom she respectively described as her daughter and husband.

[8] When his mother died in 2012 the deceased's family attended her funeral at his ancestral home in Umkomaas. Likewise, when the deceased's mother passed away in October 2013 members of his family attended the funeral. These

[4] As contemplated by s 4 of the Act.

attendances were an acknowledgement by the two families of their relationship as in-laws and a corresponding show of respect in accordance with African culture.

[9] After the funeral of the deceased's mother, which was conducted on a Saturday, Mr Mkabi returned home and left the deceased with her family. The deceased returned to her marital home on the following Wednesday. She fell ill on the very next day whereupon he took her to a traditional healer. According to Mr Mkabi, the deceased's family objected to this form of treatment, fetched her from the traditional healer and had her admitted to the Mediclinic Hospital in Nelspruit. Ms Mkhonza corroborated Mr Mkabi's version in this regard, which the first appellant strenuously denied, and confirmed that she and a friend were the ones who fetched the deceased from the traditional healer and took her to hospital because she was a professional nurse and had medical aid insurance.

[10] Mr Mkabi stated further that he visited the deceased in hospital a few times until 3 February 2014. On that day he received a hostile telephone call from the first appellant who forbade him from making any contact with the deceased until she recovered from her illness. He was deeply hurt by this turn of events and even reported the matter to his traditional authority. But he obeyed the first appellant's instruction out of fear and stayed away from the deceased until he learnt of her death from the first appellant's brother-in-law, Mr Fanie Makabela. The deceased's family thereafter ignored him, as he described it, and did not allow him to participate in the arrangements for her funeral, which he ultimately did not attend for fear of his life, and the administration of her affairs.

[11] The attitude of the deceased's family prompted him to take steps to assert his rights as her husband. Before launching the action proceedings, he first obtained a letter confirming the customary marriage from the Amashangana Traditional Council, in whose area of jurisdiction the deceased's family fell. The letter was issued on the basis of a written agreement, which was prepared and signed by the lobola negotiators. The document fully recorded the terms of the agreement, the amount paid towards lobola and the outstanding balance, the gifts that were exchanged and the identities of the representatives.

[12] The essence of the evidence adduced by the defence witnesses was that Mr Mkabi and the deceased were merely lovers because essential customary marriage rituals were not performed; they never lived together as man and wife and merely visited each other occasionally; the romantic relationship fizzled out when the deceased fell ill as Mr Mkabi abandoned her for other women whom he drove around in her car while she lay in hospital; and he did not attend her funeral for reasons unknown to them although he was quick to seek her death certificate, presumably to access her estate.

[13] Ms Mkhonza disputed Mr Mkabi's version, which was not denied by Jabu, that the couple started their romantic relationship in 2007. According to her, the relationship started only in 2009 when the deceased introduced her to Mr Mkabi and never developed into a permanent union. Strangely though, when asked during her examination how she knew Mr Mkabi, her answer was '[h]e was my mom's husband'. Although Ms Mkhonza did not live with the deceased as she worked in a different province, in Witbank and then Ermelo from 2009, she was adamant that the couple visited each other only sporadically even after the payment of lobola.

She alleged to have heard the deceased telling friends who had visited her in hospital that she wanted nothing to do with Mr Mkabi anymore. The deceased also instructed her to fetch one of her vehicles, which was being used by Mr Mkabi so that it could be sold, which she did.

[14] The first appellant alleged to have met Mr Mkabi for the first time on the day of lobola negotiations. But he subsequently had to retract that version when confronted with his own affidavit in the proceedings in which he stated that the deceased had previously introduced Mr Mkabi to him as her boyfriend even before the lobola negotiations. He insisted that he advised Mr Mkabi that for the marriage to be completed he would have to pay the balance of the lobola, obtain confirmation thereof from their traditional council, whereupon a ceremony would be performed to hand over the deceased to his family. He did not tell Mr Mkabi when he had to settle the balance of lobola and the deceased died before the outstanding rituals were performed. Interestingly, when asked during his cross-examination if it was true that he prevented Mr Mkabi from attending the deceased's funeral as alleged, his answer was 'I did not stop him, all what I did was to report to him that his wife has passed away'.

[15] As mentioned earlier, the court a quo found in Mr Mkabi's favour. It found his testimony reliable and truthful and made adverse credibility findings against the defence witnesses. This was particularly so in the case of the first appellant, whom it found evasive and unreliable and believed to have 'tailored his evidence and answers to questions as the case was proceeding'. In the court's view, a valid customary marriage could be concluded without the full payment of lobola in light of the evolution of customary law if other requirements of a customary marriage

were met, such as the payment of a portion of the lobola and the exchange of gifts by the two families in the instant matter. Regarding the question of bridal transfer, the court took into account that couples usually postpone the ceremony as it is costly, and that Mr Mkabi and the deceased already lived together when lobola was negotiated. The court concluded that the bridal transfer ritual was condoned or waived by the parties in light of Mr Mkabi's evidence that he was not informed that it was necessary.

[16] Section 3(1) of the Act sets out the requirements for a valid customary marriage as follows:

'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.'

[17] As pointed out above, the appeal revolves around s 3(1)*(b)* of the Act; the jurisdictional factors in s 3(1)*(a)* are not in issue. '[C]ustomary law' is defined in s 1 of the Act as 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'. But s 3(1)*(b)* does not stipulate the requirements of customary law which must be met to validate a customary marriage. The reason for this is not far to seek. It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its

norms.[5] The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned.[6] As this Court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society.[7] Thus, the legislature left it open for the various communities to give content to s 3(1)*(b)* in accordance with their lived experiences.

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

[19] Although we were not asked to develop customary law by outlawing the requirement of the handing over of a bride as a requirement for a valid customary law marriage, we were nevertheless referred to the recent judgment in *LS v RL*,[10] which dealt with that question. There, the high court held that the custom is

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[5] *Richtersveld Community* fn 3 paras 52-53; *Bhe & others v Magistrate, Khayelitsha, & others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & others; South African Human Rights Commission & another v President of the Republic of South Africa 2005* (1) SA 580 (CC) paras 81 and 86-87.
[6] *Shilubana & others v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) paras 44-46;
[7] See, for example, *Moropane v Southon* [2014] ZASCA 76 paras 35-36.
[8] *Shilubana*,fn 6 para 47; *Bhe* fn 5 paras 110-113 and 130.
[9] *Shilubana* fn 6 para 49.
[10] *LS v RL* [2018] ZAGPJHC 613; [2019] 1 All SA 569 (GJ); 2019 (4) SA 50 (GJ).

unlawful as it unfairly and unjustly discriminates against the gender of the applicant as a woman and denies her the constitutional right of dignity and equality 'because only women, after consenting to enter into a customary law marriage are subject to this unequal treatment by the custom of handing over'.

[20] Here, reliance was placed on this decision merely to support Mr Mkabi's argument that the first appellant's stance that bridal transfer is an absolute prerequisite for a valid customary marriage is rigid, formalistic and inconsistent with the spirit, purport and objects of the Constitution. The argument was simply that the requirement of bridal transfer was waived or condoned in the circumstances of the case. Furthermore, the parties did not proffer any substantive arguments on the correctness or otherwise of the decision, including the reasons for distinguishing the requirement of bridal transfer from lobola, which also applies to women only, but is considered to have valuable social functions, including strengthening marriage relationships.[11] I, therefore, reserve my comments on its merits at this stage.

[21] The question whether non-observance of the bridal transfer ceremony invalidates a customary marriage has been decisively answered by our courts. In *Mabuza v Mbatha*,[12] the court considered whether non-compliance with the siSwati custom of bridal transfer, *ukumekeza*, invalidated a customary marriage. The court held:

'[T]here is no doubt that ukumekeza, like so many other customs, has somehow evolved so much that it is probably practised differently than it was centuries ago . . . As Professor De Villiers

[11] See, for example, C R M Dlamini *A Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society* (1983) at 90-93; T W Bennett *Customary Law in South Africa* (2004) at 221.
[12] *Mabuza v Mbatha* 2003 (4) SA 218 (C) paras 25-26.

testified, it is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.

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

"In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters [because of a pregnancy or elopement]."

In my judgment, there was a valid siSwati customary marriage between plaintiff and defendant.'

[22] Turning to the present matter, there is a dispute around the central issue as to whether the first appellant told Mr Mkabi that the customary marriage would be complete only upon full payment of lobola and the transfer of the deceased to his family. Therefore, it must be ascertained whether Mr Mkabi, as plaintiff, established on a balance of probabilities, having due regard to the credibility and reliability of the witnesses, that his evidence is true and accurate, and therefore acceptable, and that the defence is false or mistaken and therefore stands to be rejected.[13] As I remarked above, the court a quo made credibility findings, which on a consideration of the record, are well supported by the evidence.

[23] There is, in my view, sufficient evidence before us to resolve the issue with relative ease. As indicated, the first appellant, in his own words, described the successful lobola negotiations, the payment of a significant portion of the amount agreed upon and a live cow and the exchange of gifts by both families as a combination of the two families. It is, therefore, not surprising and of great

[13] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-441A; *Stellenbosch Farmers' Winery Group Ltd & another v Martell ET Cie & others* 2003 (1) SA 11 (SCA) para 5.

significance that the couple's families subsequently sent representative delegations to each other's burial ceremonies, as in-laws. Furthermore, it is striking that both the first appellant, who was rightly found an evasive and unreliable witness, and Ms Mkhonza referred to the couple as husband and wife during unguarded moments as they testified. These were patent Freudian slips that truthfully indicated that they accepted that the couple was indeed married. And it is not insignificant too that the deceased recorded Mr Mkabi as her husband in a valuable document which informed the world of her important next of kin.

[24] Professor Bennett has, in citing examples of traditional wedding ceremonies that were simplified or abridged without affecting the validity of a marriage, pointed out that 'Western and Christian innovations have been combined with the traditional rituals … [h]ence a wedding ring may be used in place of the traditional gall bladder or slaughtered beast, and, for many, *a church ceremony is now the main event*'.[14] (Emphasis added.) This seems to be precisely what happened here. To my mind, there can be no greater expression of the couple's consummation of their marriage than their undisputed church wedding.[15]

[25] 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.[16] 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

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[14] T W Bennett fn 11 at 215.
[15] It is regrettable that the legal representatives omitted to properly explore critical aspects of the parties' conduct at various stages, including the details of the wedding ceremony eg who attended it, which would have shone a brighter light on the state of mind and attitude of the respective families towards the couple's union. Nevertheless, that does not detract from the weight of available evidence.
[16] T W Bennett fn 11 at 213.

with Mr Mkabi without censure from her family. According to J C Bekker,[17] the handing over need not be a formal ceremony; for example, upon delivery of lobola or a fine for seduction only, the subsequent *thwala* ie 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.[18]

[26] 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. The evidence ineluctably leads to the conclusion that the bridal transfer ritual was waived. This 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.

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

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[17] J C Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) at 108-109.
[18] J C Bekker ibid, at 116.

[28] Thus, for example, a woman could consent to a customary marriage, followed by payment of lobola, after which she cohabited, built a home with her suitor, and bore him children, with the full knowledge of his family. When the man died, she and those children could be rejected and disinherited by his family simply on the basis she was not handed over or properly introduced to his family and was therefore not his lawful wife and that the children were illegitimate. Needless to say, that consequence would be incongruous with customary law's inherent flexibility and pragmatism which allows even the possibility of compromise settlements among affected parties (contemplated in cases such as *Bhe*),[19] in order to safeguard protected rights, avoid unfair discrimination and the violation of the dignity of the affected individuals.

[29] Professor Bennett argues in *Customary Law in South Africa*,[20] that the bridal transfer ceremony should be treated as an optional element of a customary marriage, which the parties would be free to observe if they chose to celebrate their marriage according to a particular tradition. He places reliance for this view on a suggestion made by the South African Law Commission's Special Project Committee on Customary Law in its Report on Customary Marriages,[21] which considered the effect of wedding ceremonies and transferring the bride, and found that the variations in local practice and the ambiguities inherent in them suggested that neither should be deemed essential for the creation of a customary marriage. This opinion, to my mind, is not constitutionally reprehensible or repugnant to 'living' customary law of marriage as actually practised by the continuously

[19] *Bhe* fn 5 paras 110-111.
[20] T W Bennett fn 11 at 216.
[21] Marriages and Unions of Black Persons; Working Paper 10 Project 51 Government Printer, 1986 Pretoria para 4.4.10.

evolving society, as the Law Commission itself clearly determined. Its recognition would constitute a development of the system and protect the interests of vulnerable affected parties, in the appropriate case, in accordance with the spirit, purport and objects of the Constitution.

[30] To sum up: The purpose of the ceremony of the handing over of a bride is to mark the beginning of a couple's customary marriage and introduce the bride to the groom's family. It is not an important but not necessarily a key a determinant of a valid customary marriage. Thus, it cannot be placed above the couple's clear volition and intent where, as happened in this case, their families, who come from different ethnic groups, were involved in, and acknowledged the formalisation of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer. I am satisfied in all the circumstances that the essential requirements for a valid customary marriage were met. The appeal must accordingly fail.

[31] In the result, the following order is made:
The appeal is dismissed with costs.

MML Maya

President of the Supreme Court of Appeal

APPEARANCES:

For Appellants:	M Joubert
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