REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40344/2018

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

30/11/2018
DATE

SIGNATURE

In the matter between:

SENGADI, LERATO ROBERTA Applicant

and

TSAMBO, ROBERT Respondent

In re

TSAMBO, JABULANI Deceased

The Reasons for the Order granted on 3 November 2018.

MOKGOATHLENG J

[1] In this urgent application, the applicant seeks the following relief:

(a) a declarator confirming that she is the customary law wife of the deceased;

(b) an order interdicting the respondent from burying the deceased;

(c) a declarator entitling her to bury the deceased; and

(d) a spoliation order against the respondent to restore to her the matrimonial house and other effects;

[2] Generally in motion proceedings a court is enjoined to apply the principles enunciated in *Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 634 H-I* where Corbett JA stated that: "it is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (See in this *regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D-H).* If in such a case the respondent has not availed himself of his right to apply for the dependents concerned to be called for cross examination under *Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164)* and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (See *eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E-H).* Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

[3] The *Plascon- Evans* approach is not entirely satisfactory in such an extremely urgent application and in my considered view, due to the fact that the burial of the deceased is scheduled for tomorrow in Mahikeng in the North West Province an extremely robust approach had to be adopted in order that the relief prayed for should be granted depending on whether there was sufficient cogent clarity predicating the issues to be resolved and if the granting of such orders was justified. As was pointed out in *Trollip v Du Plessis en Ander 2002 (2) SA 242 (W) 245E- F,* a more practical and robust approach was required and the court after consideration of the papers and argument is persuaded that there was sufficient proof regarding the contentions and issues to be resolved andwhich enabled this court to arrive at a just, fair and equitable decision.

THE FOUNDING AFFIDAVIT

[4] The applicant and the deceased met at university during 2009 and became lovers. She and the deceased cohabited together for approximately three years before marrying in terms of *section 3(1) of the Recognition Act 120 of 1998.* On 6 November 2015 in Amsterdam the deceased proposed marriage She accepted the marriage proposal and both decided to enter into a customary law marriage.

[5] On 20 January 2016 the respondent dispatched a letter written by the deceased's uncle to the applicant's mother requesting that the deceased's and the applicant's families should meet "*to discuss the union of their son and her daughter*". On 28 February 2016 the two families met at the applicant's family home. The lobolo agreed to was R45 000.00. Upon signature of the lobolo agreement, the deceased deposited R30.000.00 into the applicant's mother's bank account as part of payment of the lobolo with the balance to be paid in two instalments of R10 000.00 and R5000.00 respectively at future agreed dates.

[6] During the celebration after the lobolo negotiations were completed, the applicant noticed that the deceased had changed his clothing and was now dressed in formal wedding attire. She also noticed that the deceased's aunts had emerged from outside into the house bearing a covered clothes hanger. The deceased's aunts requested her to accompany them into one of the

bedrooms whereat they revealed an attire from the clothes hanger, and informed her that this attire was her wedding dress and then proceeded to dress her up therein.

[7] The applicant states that when the she emerged from the bedroom, she noticed that her wedding dress matched the deceased's wedding outfit, she then realised that not only was this day in respect of their families negotiating the lobolo and she and the deceased thereafter entered into their customary law marriage, but the deceased and his family had also planned that the customary law marriage between herself and the deceased should be celebrated on the same day. The family representatives introduced her to all persons present as the deceased's customary law wife and they thereafter welcomed her into their family as their customary law daughter-in-law.

[8] The respondent who was present at the lobolo negotiations celebration approached her, embraced her and congratulated her on her customary law marriage to the deceased. This encounter was captured by way of a video recording which depicts the respondent embracing her, and also depicts the deceased's family and the applicant's family celebrating together as evidenced in the annexed photos *F12, 12.1and 12.2* which also depict the applicant and the deceased in their marriage garments. The video recording was shown in court, and depicts the families in a joyous celebratory mood ululating and uttering the words "*finally, finally*"

[9] The applicant contends that the lobolo negotiations and the customary law marriage ceremony were celebrated on the same day as attested to by the confirmatory affidavits deposed to by her family representatives, Dorah Gladys Smith and Puleng Ann Sengadi respectively. The applicant further contends that a lawful and binding customary law marriage came into existence between herself and the deceased on 28 February 2016 because they have complied with the prescriptions of *section 3(1) of the Recognition Act 120 of 1998. After their customary law marriage she and the deceased lived in the matrimonial home as husband and wife.*

[10] The applicant states that because the deceased was addicted to cocaine and suffered from depression, she as his customary law wife subscribed to a

Discovery Medical Health Scheme on 1 May 2016 in order to pay for the medical costs of the deceased's rehabilitation. Due to the deteriorating health and depression of the deceased caused by his substance addiction, during April 2018 she invited the respondent as the father of the deceased and his family to a meeting at Rockville Soweto at the deceased's aunt's house to convince the deceased to submit himself to a medical facility for rehabilitation from his substance addiction.

[11] The applicant states that because of the deceased's infidelity she left the common home and insisted that she would only return if the deceased had submitted himself to a rehabilitation facility. On 24 October 2018 after the deceased's death she returned to the matrimonial home. On 27 October 2018 whilst mourning the deceased's death the respondent informed her that she was not welcome at the matrimonial home because he did not recognise her as the customary law wife of the deceased, consequently that she was not entitled to arrange the burial of the deceased.

[12] The applicant states that the respondent thereafter changed and replaced all the locks of the matrimonial home and she was thereby deprived access thereto. Further the respondent has taken control of the deceased's body, and same is in Mahikeng for the burial arranged for the 3 November 2018. The respondent has also taken possession of other effects and he refuses to return same to her. The applicant contends that as the customary law wife of the deceased she is entitled to arrange the burial of the deceased in Johannesburg in accordance with the deceased's wishes.

THE ANSWERING AFFIDAVIT

[13] The respondent disputes the applicant's claim that she is the deceased's customary law wife or that she has the right to bury the deceased. He states that funeral arrangements have been made at great expense with the participation of the Mahikeng Municipality and the North West Province Government. The deceased's funeral is scheduled to take place on 3 November 2018. The Premier of the North West Provincial Government is scheduled to deliver the eulogy at the funeral.

[14] The respondent denies that the applicant and the deceased concluded a valid customary law marriage and states that in order for a valid customary law marriage to occur the following formalities and procedures should have been complied with:-

(i) emissaries must have been sent by the deceased's family to the applicant's family to indicate interest in a possible marriage of the parties;

(ii) an agreement must have been sent by the deceased's family to the applicant's family to indicate interest in the possible marriage;

(iii) an agreement must have been reached between the families to the effect that a meeting of the parties relatives would take place where at the question of lobolo would be negotiated;

(iv) payment or part payment of the lobolo would have to be made to the applicant's family; and

(v) the two families would have to agree on the formalities and the date on which the applicant would be "handed over" to the deceased's family and the handing over of the bride to the family (normally accompanied by a ceremony) would have to take place.

[15] The respondent contends that the "*handing over*" of the bride to the deceased's family which is the most crucial part of the customary law marriage did not take place. In the premises, no customary law marriage was concluded or came into existence between the deceased and the applicant.

The respondent confirms that the families agreed on R45000.00 as the amount of lobolo, that an amount of R30 000.00 was paid immediately and "the balance was to be paid when the families next met in instalments of R10 000.00 and of R 5000.00 respectively.

[16] The respondent contends that it is clear the families intended to have a subsequent meeting as part of the ongoing marriage process, but that this meeting did not take place, because the deceased and the applicant broke up before the marriage rituals, formalities and procedures could be concluded.

In terms of custom, subsequent to the initial payment of lobolo a date is set whereby the bride's family will hand over the bride to the husband's family "go gorosiwa" and upon arrival a lamb or goat is slaughtered and the bile therefrom is used to cleanse the couple. This ritual signifies the union of the couple and the joining of the two families and the couple who are thereafter considered to be married. A celebration will then ensue, where the lamb or goat will be consumed by the families. Because this did not take place, the applicant cannot be accepted as a bride or *"makoti"* of the Tsambo family.

THE EVALUATION OF THE EVIDENCE

[17] It is undisputable that the applicant and the deceased with the full knowledge and approval of their respective families cohabited together for a period of approximately three years before concluding their customary law marriage on 28 February 2018, and after the said customary law marriage was entered into and celebrated they continued cohabiting together as husband and wife at the matrimonial home. The respondent in his answering affidavit did not dispute the veracity of the couples cohabitation after the conclusion of the customary law marriage on the 28 February 2016 because the Tsambo family accepted that a valid customary law marriage had come into existence on 28 February 2016.

[18] The applicant's submission that the custom of handing over of the bride is an indispensable sacrosanct *essentiallia* for the lawful validation of a customary law marriage and that without the handing over of the bride. No valid customary law marriage comes into existence is not correct because the validity of the customary marriage comes into being after the requirements of section 3(1) of the Recognition Act 120 of 1998 have been complied with.

[19] In this particular case there was a tacit waiver of this custom because a symbolic handing over of the applicant to the Tsambo family occurred after the

of the conclusion of the customary law marriage. Because the deceased's aunts after the conclusion of the customary law marriage and indeed the respondent himself, congratulated the applicant on her customary law marriage to the deceased, thereafter they welcomed and accepted the the applicant as the customary law wife of the deceased as evidenced by the fact that after the customary law marriage was concluded the deceased and the applicant continued to cohabit as husband and wife at the matrimonial house.

[20] The respondent's insistence that the most crucial part of a customary law marriage is the handing over of the bride to the bridegrooms family, that if this did not occur no valid customary law marriage comes into existence despite the couple having complied with the requirements of *section 3(1)* of the Recognition Act cannot be sustainable because the respondent. incorrectly assumes that customary law custom of the handing over since its original conceptualisation has not changed, that customary is rigid, static, immutable and ossified. On the contrary African Customary Law, it's a living law because, its practices, customs and usages have evolved over the centuries. The handing over custom as practised in the pre- colonial era has also evolved and adapted to the changed socio economic and cultural norms practised in the modern era.

[21] The respondent's rigid incantation of the custom of handing over as legitimising and validating the legal existence of a customary law marriage has been adapted to suit the existential reality and the evolution of African communities. It is indisputable that since the advent of European or Western cultural influences in South Africa living customary law which denotes the practices, customs, rules, usages and conduct in African communities has evolved, is dynamic, pragmatic and constantly adapting to the interactive social and economic imperatives which infuse living customary law with flexibility in content and application of the custom of handing over hence the waiver of or symbolic handing over which does not entail the physical handing over of the bride to the husband's family.

[22] *The existential reality that customary law is dynamic and adaptive finds resonance. Sipho Nkosi's De Rebus Article issue- Archive 25 2015 Jan/Feb*

DR67 wherein he states; "Regarding the handing over of the bride, there is no hierarchy of requirements where customary marriages are concerned. The application of the provisions of s3(1)(b) of the Recognition Act particularly if one considers the several decisions from the Constitutional Court, are a study in judicial flexibility (see Shilubana and Others v M+Nwamitwa 2009 (2) SA 66 (C) at para 49 – 55; see also Mabena v Letsoalo 1998 (2) SA 1068 (T) at 1074-5 and also Mabuza v Mbatha 2003 (4) SA 218 (C) at 226). " "the notion that the physical (virilocal) handing over the bride to the bridegroom's family as being the be-all and end-all of all customary marriages is not correct, because the handing over can also take a symbolic or uxorilocal form."

Section 31(1)(b) provides that a customary marriage must be 'negotiated and entered into or celebrated in accordance with customary law' (my emphasis). The italic words indicate that The Legislature acknowledges that there are many different communities in South Africa whose marital matters are regulated by some or other body of customary law and that there exists many different strands of customary law. Each community is governed by a set of customs and usages that change and develop all the time and the Constitution has been a major catalyst in this regard (see the Shilubana case at 54 – 55). These developments have not left the handing over of the bride – as a requirement of a customary marriage – untouched. It is also true that the adherence to this ritual has never been monolithic. (My underlining) Different communities practise it differently, and execute it differently (see Mabuza case at 226, where the court condoned the non-performance of ukumekeza (a siSwati version of handing over which also involves the bride appearing naked in front of the female elders of the groom's family), and it was also accepted that where the bride had cohabitated with the groom for about eight years, and had regarded herself as the groom's 'lawful wife'; see also Letsoalo case at 1072 - 1074). In some of the communities, the handing over of the bride takes a physical form, manu in manum, on the day of the wedding (My underlining) (JC Bekker Seymour's Customary Law in Southern Africa (Cape Town: Juta 1989) at 109 and 114), and in others, the ritual is symbolic or uxorilocal in nature. The uxorilocal handing over may involve the slaughtering of a beast by the father or guardian of the bride, to signify the acceptance of the groom by

the family; or as an indication that she is free to join him and his people, if she so wishes (ibid). This is very much in line with the view that, in customary law, 'scrupulous attention to the rule is seldom vital', particularly where a man is already married or where there is a pregnancy and elopement involved, and the intending parties seek to expedite matters for themselves (see W Bennet Customary Law in South Africa (Cape Town: Juta 2004) at 214 – 216).

Cohabitation is another factor that needs to be considered in these circumstances, particularly where the bride's family never objected to it, or did not display any opprobrium by, for example, exacting a fine from the groom's family. Bekker makes this point, concisely, when he says: '[P]roof of cohabitation … may raise presumption that a customary marriages exist' (Bekker op cit at 116). And, if there is no cogent evidence in rebuttal of that presumption, the court will definitely conclude that a valid customary marriage exists (or existed) between the parties (ibid).(My underlining)…

Most of the women who are involved in these patriarch rituals are adult; they are not chattels to be shunted around at the whim of their families. They are entitled to all the fundamental rights as enshrined in the Constitution, which customary law should always conform to (see s 211(3)).(My underlining)

Customary law is not just an infrangible continuum of rituals and usages. It is also not frozen in time. It is very malleable. And, in dealing with matters of this nature, the courts have to take cognisance of whatever developments and changes which might have taken place within a particular community, provided the process is consonant with the 'spirit' purport and object of the Constitution' (see Pilane and Another v Pilane and Another 213 (4) SA BCLR 431 (C) at para 35; see also the Shilubana case at para 49 – 55). This is because these developments represent the 'living law' which is 'actually observed by African communities' in this regard (Mabena at 1074). It is also the preserve of any community (and its constituent family groups) to regulate and simplify the rituals and requirements that pertain to customary marriages; or to abridge them as they see fit(my underlining) (see Bennet op it at 194). As the Constitutional Court put in Alexkor Ltd and Another v The Richtersveld Community and Others 20040(5) SA 460 (CC) at para 53: 'Throughout its

history [customary law] has evolved ... to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistent with the Constitution' (see also in this regard, the Shilubane case at para 54 – 55; the Pilane case at para 35 and Letsoalo case at 1075).

If South African women (or mothers) an now perform all the juristic acts mentioned above, then surely fathers can, as a corollary accept their sons' intending spouses into their homes, as their daughters in law' – as a species of the handing over? Moreover, there is nothing constitutionally reprehensible about this deviation, particularly where there was cohabitation between the bride and groom after the payment of lobolo – or a portion thereof. This would ensure that the dignity of the women involved in these seemingly inchoate marriages is protected;(My underlining) and that the children are not rendered extramarital. After all, there is no universal, rigid, catechismal formula that exists for all customary marriages, and the handing over of the bride is not the sine qua non that it is made out to be.(my underling)

[23] In MMN v MFM and Minister of Home Affairs (474/11) [2012] delivered on 1June 2012 the SCA held that:

"The requirements for validity of a customary marriage in s 3(1) are simply that:

(i) the spouses must be above the age of 18 years; and

(ii) both must consent to be married to each other under customary law; and

(iii) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The Recognition Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence."

[24] In the present constitutional era customary law customs have to be consistent with the spirit and purport objects of the Constitution and values of freedom, equality, and dignity in an open transparent and democratic South Africa. In the case of Mabuza v Mbatha 2003 (4) SA 218 (C) JP Holphe was confronted with an analogous and similar contention that, Isiswati custom of Ukumekeza the handing over of a bride was not done (the formal integration of bride's family the bride into the bridegroom's family). The expert evidence was that without complying with custom of Ukumekezwa, no valid customary marriage came into existence. JP Hlophe held that African Customary Law has evolved and that African customary law has to be consistent with the dictates of the Constitution, further that courts have a constitutional obligation to develop customary law and should not be slow in doing so. JP Hlophe determined that the Isiswati custom of Ukumekeza was no longer rigidly applied and that over time it has been adapted in application.JP Hlophe consequently held that the ukumekezwa custom was not an indispensable sine qua non for the existence of a customary law marriage.

[25] In the pre-constitutional era customary law marriages were based on the notion of patriarchal supremacy. African males negotiated and consented to customary law marriages on behalf of the bride and the bridegroom. African males were the principal interlocutors and interpreters of customary law, traditions, practises, usages, cultural norms, standards and procedures.

[26] *Section 3(1) of the Recognition Act* provides that:

> *"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."*

IS THE CUSTOM OF HANDING OVER THE BRIDE TO THE BRIDEGROOM'S FAMILY CONSTITUTIONALY COMPLIANT

[27] Moseneke DCJ stated: in Gumede v President of the RSA and Others 2009 (3) SA 152 (CC)…Further on in Gumede Moseneke DCJ states:

"Beyond the Constitution, the Recognition Act is the starting point of this equality analysis. It must be understood within the context of its legislative design. Its avowed purpose…is to transform spousal relations in customary marriages. The legislation not only confers formal recognition on the marriages but also entrenches the equal status and capacity of spouses and sets itself the task of regulating the proprietary consequences of these marriages. In doing so, the Recognition Act abolishes the marital power of the husband over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise."

This grudging recognition of customary marriages prejudiced immeasurably the evolution of the rules governing these marriages. For instance, a prominent feature of the law of customary marriage, as codified, is male domination of the family household and its property arrangements. Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage.

The Recognition Act is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes. It is also necessitated by our country's international treaty obligations, which require member states to do away with all laws and practices that discriminate against women. On the other hand, the Recognition Act gives effect to the explicit injunction of the Constitution that courts must apply customary law subject to the Constitution and legislation that deals with customary law. Courts are required not only to apply customary law but also to develop it.

Section 39(2) of the Constitution makes plain that when a court embarks on the adaptation of customary law it must promote the spirit, purport and objects of the Bill of Rights.

The adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution. In this regard we must remain mindful that an important objective of our constitutional enterprise is to be "united in our diversity." In its desire to find social cohesion, our Constitution protects and celebrates difference. It goes far in guaranteeing cultural, religious and language practices in generous terms provided that they are not inconsistent with any right in the Bill of Rights.

[28] *Section 2 of the Constitution* provides: The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled. The Bill of Right which applies to all law including the common law and customary law binds the legislature, the executive, the judiciary and all organs of state. The Bill of Rights is the cornerstone of democracy in South Africa it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom

Section 211(3) of the Constitution states that" Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. "Section 39(2) provides that when developing customary law a court "*must promote the spirit, purport and objects of the Bill of Rights."* The Constitution thus "*acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system*" such that customary law "feeds into, nourishes, fuses with and becomes part of the amalgam of South African constitutional law regime.

[29] The Constitutional Court has held that:

"When *section 3(1)(b)* thus speaks of customary law marriage, it necessarily speaks of marriages in accordance with human dignity and fundamental equality rights upon which our Constitution is based. "*It is no answer to state that the definition of customary law and customary marriages in the Recognition Act does not expressly state this. Those definitions must be read together with the Constitution and this Constitutional Court's jurisprudence.*"

The Recognition Act is inspired by the dignity and equality and non-discrimination rights that the Constitution entrenches and the normative value systems it establishes."

[30] The Constitutional Court has held that "the Recognition Act does not purport to be – and should not be seen as – directly dealing with all necessary aspects of customary marriage. The Recognition Act expressly left certain rules and requirements to be determined by customary law, such as the validity requirements referred to in section 3(1)(b). This ensures that customary law will be able to retain its living nature and that communities will be able to develop their rules and norms in the light of changing circumstances and the overarching values of the Constitution. The Constitutional Court has held that that the Constitution's recognition of customary law as a legal system that lives side-by-side with the common law and legislation requires innovation in determining its 'living' content, as opposed to the potentially stultified version contained in past legislation and court precedent."

[31] The Constitutional Court has engaged in an incremental development of customary law as contemplated by section 39(2) of the Constitution. In *Bhe* and Otherts v Magistrate Khayalitsha and Others2005 (1) BCLR 1 CC the Court invalidated the customary rule of succession regarding male primogeniture. The Constitution demands equality in the personal realm of rights and duties as well. In the present constitutional era, it is undeniable that there are still certain customary law customs which in essence discriminate against women on the basis of their gender and other customs which infringe women's constitutional rights to equality and dignity and freedom. The customs which are inconsistent with the spirit, purport and objects there are still of the Bill of Rights because such customs can be said to have not kept pace with the development of living customary law which has to be

consistent with the Constitution as influenced and adapted to the changing norms of African communities.

[32] The rights to equality, dignity and freedom are the most rights in an open, transparent democratic state like South Africa because of our past history of inequality and hurtful discrimination based on race and gender.

In Alexkor Ltd and Another v Richtersveld Community and Others 2004(5) SA 460 (CC) at paragraph 53, the Constitutional Court noted that "indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life." It has throughout history "evolved and developed to meet the changing needs of the community."

[33] The custom of handing over in customary law have not been given the space to adapt and keep pace with the changing socio economic conditions and constitutional values. The rights to freedom, equality and dignity include the right-bearer's entitlement to make choices and to take decisions that affect his or her life-the more significant the decision, the greater the entitlement. The autonomy and control over one's personal circumstances is a fundamental aspect of human dignity. However, a customary law marriage wife effectively 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 customary law marriage inspite of the fact that she and her customary law husband have complied with section 3(1) of the Recognition Act.

[34] The primary question which is arises is:

Does the handing over custom to which a female spouse is subjected discriminate against her because of her gender that she is a woman. Another associated question is whether it would be appropriate for the court to develop the customary law custom of handing over the bride with regard to the validation of a customary marriages in order to make the custom consistent with the equality, dignity and non- discrimination prescriptions of the Constitution.

When appropriate, courts have a constitutional obligation to develop the living customary law in order to align it with constitutional values. The question of developing customary law in this particular instance does arise. An important consideration is that the custom of handing over the bride as a prerequisite in validating the existence of a customary law marriage is inconsistent with the Constitutionally guaranteed values of equality, dignity and non-discrimination. The development of the custom of handing over would bring legal certainty in that the handing over custom would not necessarily be a prerequisite which legalises a customary law marriage and which supersedes the compliance with section 3(1) requirements of the Recognition Act as validating the existence of a customary law marriage.

[35] The conceptualisation and rigidity of the custom of handing over the bride to the bridegroom's family legally validates the coming into existence of a customary law marriage entrenches a system of customary law that discriminates against and is oppressive against women because it institutionalises gender inequality and infringes the dignity of the female spouses, it also infringes the female spouse's freedom of opinion and control over her marital status because the assumption implicit in the intractable customary law custom that if the bride is not handed over there cannot have been a valid customary law marriage adumbrates the patriarchal nature of the pre constitutional customary law when the consent and opinion of women was not solicited and was irrelevant because then women were regarded as perpetual minors with no rights. In the present constitutional era customary law the customs of handing over as an indispensable requirement to validating a customary law marriage cannot pass constitutional muster because it is inconsistent with the spirit, purport and objects of the Constitution.

THE ORDER

[36] It is declared that the customary law custom of handing over the bride to the bridegroom's family as an essential pre-requisite for the lawful validation and the lawful existence of a customary law marriage declared to be not a lawful requirement for the existence of a customary law marriage when section 3 (1) of the Recognition Act have been complied with.

[37] The customary law custom of handing over the bride is self-evidently discriminatory on the ground of gender and equality as between the prospective wife and the prospective husband. Because only women, after consenting to enter into a customary law marriage are subject to this unequal treatment by the custom of handing over which overrides the statutory requirements of section 3(1) of the Recognition Act as the essential requirements for a valid customary marriage.

[38] In my view the customary law custom of the handing over has to be developed to the extent that the requirement of the handing over of the of the bride as an essentialia for the lawful existence of a customary law marriage and that the failure to comply with such custom despite having complied with the section 3(1) statutory requirements of the Recognition Act invalidates the validity and existence of the customary law the spouses consented to and had celebrated. In my considered view the requirement of handing over the bride to bridegroom's family does not pass Constitutional muster as it is not in accordance with the Bill of Rights and it does not promote the spirit, purport and objects of the equality and dignity clauses in the Constitution because this handing over custom as a determinative prerequisite for the existence of a customary law marriage unfairly and unjustly discriminates against the gender of the applicant as a woman and denies her constitutional right of equality and dignity.

THE PRINCIPLE OF UBUNTU

[39] Ubuntu has been identified as a constitutional value. *S v Makwanyane and Another (CCT3/94) [1995] (6) BCLR 665 (3(; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SA* from the judgment it appears that '*Ubuntu*' encapsulates communality and the interdependence of the members of a community, a respect for life and human dignity, humanness, social justice and fairness, and an emphasis on reconciliation rather than confrontation. In Sachs J to advocate a more inclusive approach to the national legal system. He declared that:

> *'the secure and progressive development of our legal system demands that it draw the best from all the streams of justice in our country.... It means giving*

long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice'.

He added the caveat, however, that:

'we do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law. Thus we reject the common law traditions which are inconsistent with freedom and equality, and we uphold and develop many aspects of the common law, which feed into and enrich the fundamental rights enshrined in the Constitution. [Similarly] there are many aspects and values of traditional African law which will also have to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order.'

THE BURIAL

[40] Normally the right to bury a deceased customary law husband reposes on his customary wife (widow) who is normally the heiress to the deceased's estate, See *Nzaba v Minister of Safety and Security and Others an (unreported judgment delivered in case No: 0535/ 2005.)* In customary law the male head of the family of the deceased is the person who decides the arrangements concerning the burial of the body of the deceased. This authority of the male head of the family or the father of the deceased was predicated on the principle of primogeniture. The Constitution has decreed that the principle of primogeniture regarding the law of intestacy violated the right of women to human dignity guaranteed in section 10 of the Constitution. In our new constitutional dispensation these traditional cultural customary law practices were reconsidered in the light of our constitutional development pursuant to *section 39(2) and 111 (2) of the Constitution, Act 108 of 1996* and See *Bhe and Others v Magistrate Khayelitsha and Others; Shibi v Sithole and Others* where the principle of primogeniture was abolished; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 560 (cc) 2005 (1) BCRL (1).*

[41] The applicant as the customary law wife of the deceased Jabulani Tsambo pursuant to the customary law marriage concluded between herself and the deceased on the 28 February 2016 is entitled to bury her customary law marriage husband, the deceased. But in this matter there are competing claims predicated on the principle of Ubuntu vis-à-vis the deceased's family and the applicant's rights as the deceased customary law widow, the considerations of public, the principle of fairness, equality, equity and the interests of justice and the balance of convenience and the exigency that the deceased was a public figure of national importance and was to be accorded a civil funeral by the provincial Government of the North West, which was funding the costs of the funeral burial of the deceased, at the Community Hall which was already booked that, as this urgent application was being argued a second memorial service was being held in Mahikeng and was attended by large numbers of the public, and further that large numbers were said to be travelling from all over the country to attend the funeral of the deceased which was already scheduled for the following day and that the premier of the North West Province on behalf of the citizens and government was to deliver the main eulogy.

[42] These multiple competing and practical considerations cannot be governed and resolved strictly on the basis of the principles governing the granting of interdicts at this very late hour to interdict the respondent from proceeding with the funeral and the deceased. The court was obliged to exercise a practical common sense approach which prompted the court to subsume the legitimate burial rights of the applicant as the customary law wife of the deceased to the greater equally competing rights of the public interests, and the deceased's family rights more especially where the deceased's body was lying in the state in Mahikeng as this urgent application was been argued. The applicant sought an order to bury the deceased in Johannesburg but because r the respondent gave an undertaking on behalf of himself and his family that the applicant could attend the deceased's funeral unhindered. The court taking into consideration the competing interests and balancing same on the principle of proportionality was obliged to apply the principles of Ubuntu and decided to issue an order declining to

accede to the applicant's interdict to prevent the funeral of the deceased not being held on 3 November 2018.

This made and signed in Johannesburg on 30 November 2018.

MOKGOATHLENG J

JUGDE OPF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

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Date of Hearing: 02 November 2018

Date of Judgment: 02 November 2018