REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 46316/09

DATE: 1/11/2010

In the matter between:

BOIKHUTSO BERNICE MOTSOATSOA Applicant

and

JOHANNA RORO 1st Respondent

MATTHEWS RORO 2nd Respondent

DEPARTMENT OF HOME AFFAIRS 3rd Respondent

J U D G M E N T

MATLAPENG, AJ:

INTRODUCTION

[1] The applicant approached this Court for an order in the following terms:

1.1 that it be declared that a customary marriage existed between the applicant and the late Sandile Roro (the deceased); alternatively

1.2 that the third respondent be directed to register the customary marriage between the applicant and the late Sandile Roro in

terms of the provisions of s 4(7) of the Recognition of Customary Marriages Act 120 of 1998 (the Act).

The application is brought against the parents of the deceased (first and second respondents) and the Minister of Home Affairs (the third respondent). The Minister is not opposing the application and has filed a notice to abide by the decision of the court. The parents of the deceased are opposing this application.

FACTUAL BACKGROUND

[2] It is common cause that the applicant and the deceased were lovers. In 2005 the deceased bought a house at Kempton Park where he resided with the applicant until his death on 21 July 2009. In 2007, the deceased introduced the applicant to his parents and informed them of his intention to marry her.

[3] Pursuant to his declared intention to marry the applicant, on 10 August 2008 the deceased through his parents sent emissaries to the applicant's parents to inform them of their wish to enter into negotiations for lobolo. A date of 4 October 2008 was agreed upon. On that date and following upon negotiations an amount of R18 000,00 was agreed upon as lobolo. Of this amount the deceased's emissaries handed over R5 000, 00 to the applicant's emissaries and the balance remaining was R13 000, 00. Unfortunately the deceased died on 21 July 2009 before he could pay the outstanding balance.

[4] The applicant approached the Department of Home Affairs with a request to have the customary marriage between herself and the deceased registered posthumously. She did not succeed. She approached this Court for help.

THE ISSUE

[5] The issue to be decided herein is whether there existed a valid customary marriage between the applicant and the deceased.

SUBMISSION BY THE PARTIES

[6] It was submitted on behalf of the applicant that all the requisites for the coming into existence of the customary marriage were met and that there is no reason for the marriage not to be registered and recognised.

[7] On behalf of the first and second respondents it was submitted that not all the requirements for the coming into existence of a customary marriage were met. The contention was that one of the crucial prerequisites of a valid customary marriage namely, the handing over of the bride to the bridegroom's family, is amiss.

THE LEGAL POSITION

[8] It is trite that customary marriage is an age-old institution deeply respected and embedded in the social-cultural fabric of all indigenous people of South Africa. However, over a long period of time during the apartheid era, customary marriage became an object of serious distortions. Regrettably we have now reached a stage where there is a serious and all-pervasive confusion regarding the true nature of customary marriage. With the advent of our new democracy, the Recognition of Customary Marriages Act was passed in an attempt to clarify the legal status of customary marriages. The preamble thereof states the following as the purpose of the Act:

> "*To make provision for the recognition of customary marriages, to specify the requirements for a valid customary marriage, to regulate the registration of customary marriages ...*"

[9] Section 3(1) of the Act deals with the requirements for the validity of customary marriages. It provides 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.*"

[10] Whilst the requirements mentioned in paragraph (a) subparagraphs (i) and (ii) are self-explanatory and clear, the requirements that the marriage must be negotiated and entered into or celebrated in accordance with customary law is vague as it does not specify the actual requirements for a valid customary marriage. A factual determination still has to be made in order to reach a finding as to whether this requirement has been complied with.

[11] The Act defines customary marriage as "a marriage concluded in accordance with customary law" and customary law as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". This statement simple as it may sound creates serious problems regarding how to ascertain the applicable customary law. This is compounded by the fact that some customary and cultural practices among the indigenous people are not homogeneous. This is further exacerbated by the fact that there are many sources of customary law in existence.

[12] This problem was identified in **BHE AND OTHERS v MAGISTRATE, KHAYELITSHA, AND OTHERS (COMMISSION FOR GENDER EQUALITY AS *AMICUS CURIAE*); SHIBI v SITHOLE AND OTHERS; SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND ANOTHER v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND**

ANOTHER 2005 (1) SA 580 (CC) where Ngcobo J (as he then was) in a dissenting judgment indentified three ways in which customary law can be established. This is by (i) taking judicial notice of it where it can readily be ascertained with sufficient certainty, (ii) where it cannot be readily ascertained expert evidence may be adduced to establish it and (iii) by having recourse to text books and case law. See par [150] of the report.

[13] As Ngcobo J correctly remarked in **BHE**, in ascertaining customary law, caution should be exercised when relying on case law and text books. The same cautious approach was spelled out as follows in **ALEXKOR LTD AND ANOTHER v THE RICHTERSVELD COMMUNITY AND OTHERS** 2004 (5) SA 460 (CC) par [51] footnote 51:

> "*Although a number of textbooks exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people*."

See too the **BHE**-case.

[14] It is regrettable that over the years, serious divergence has emerged between the living customary law (customs as practised by the people in their communities) and customary law as written by academics and also that which is contained in case law. As traditional customary law is not written, the tendency was to make it subservient to the one written in statutes, by academics or in case law. The reality is that in most instances the customary law embodied in statutes, academic writings and case law does not reflect the correct and genuine customary law. The institution of customary marriage is a perfect example of this distortion as I will demonstrate hereunder. It also has to be realised that customary law is not static but vibrant and dynamic in the communities practising it. Despite years of neglect and suppression, it has developed on its own and adapted itself to the changing needs of the communities as they evolved and developed. This phenomenon is admirably captured by Ncgobo J in the **BHE**-case at par [152] where he stated:

> "*It is now generally accepted that there are three forms of indigenous law: (a) That practised in the community; (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for teaching purposes. All of them differ. This makes it difficult to identify the true indigenous law. The evolving nature of indigenous law only compounds the difficulty of identifying indigenous law*."

[15] Ascertaining customary law from text books and case law does not present problems. The difficulty lies in determining the current customary law as practised in the communities. This is stated as follows at par [154] in the **BHE**-case:

> "*The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result, may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version*."

Therefore true customary law as currently practised in the communities has to be separated from the distorted version. One also has to be alive to the changes brought about by the Act.

[16] Proving the existence of a customary marriage should not present many problems as the formalities for the coming into existence of marriage have crystallised over the years. The reasons for these are not hard to find. The institution of customary marriage is an age-old and well respected one, deeply embedded in social fabric of Africans. The formalities relating thereto are well known and find application even in the marriages of the majority of Africans who marry by civil rites as the two marriages are celebrated side by side. Any distortions and

deviations to the formalities can easily be identified, particularly by those who are well-versed with the real and true customary law.

[17] As described by the authors Maithufi I.P. and Bekker J.C., *Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa* CILSA 182 (2002) a customary marriage in true African tradition is not an event but a process that comprises a chain of events. Furthermore it is not about the bride and the groom. It involves the two families. The basic formalities which lead to a customary marriage are: emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage (this of course presupposes that the two parties man and woman have agreed to marry each other); a meeting of the parties' relatives will be convened where lobolo is negotiated and the negotiated lobolo or part thereof is handed over to the woman's family and the two families will then agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration (wedding). See also **FANTI v BOTO AND OTHERS** 2008 (5) SA 405 (C)**, CHAKALISA v MMEMO** (CACLB 04106) [2008] BWCA 11 (30 January 2008).

[18] Reverting to the facts of the matter at hand, the applicant put much reliance on the handing over of lobolo to her family by the respondent's emissaries. Although the handing over of lobolo is in terms of the Act not listed as a requirement for the coming into existence of a

customary marriage, it is intrinsically linked with its existence. It is one of the pillars and an important one in the concatenations of processes leading to marriage. It is difficult to imagine a customary marriage existing in the true African context where any lobolo or part thereof has not been handed over to the bride's family. Thus lobolo or handing over thereof to the bride's family will form part of the evidentiary material to prove the existence of marriage. However, the mere fact that lobolo was handed over to the applicant's family, significant as it is, is not conclusive proof of the existence of a valid customary marriage.

[19] One of the crucial elements of a customary marriage is the handing over of the bride by her family to her new family namely that of the groom. As the man's family gained a daughter through the marriage, from her family, the bride is invariably handed over to him at his family's residence. Handing over of the bride (*go gorosa ngwetsi (Tswana)/ ukusiwa ko makoti e mzini e hamba noduli (Xhosa)*) is not only about celebration with the attendant feast and rituals. It encompasses the most important aspect associated with married state namely *go laya/ukuyala/ukulaya* in vernacular. There is no English equivalent of this word or process but loosely translated it implies "coaching" which includes the education and counselling both the bride and the groom by the elders of their rights, duties and obligations which a married state imposes on them. This is the most important and final step in the chain of events happens in the presence of both the bride

and the groom's families. One can even describe this as the official seal in the African context, of the customary marriage.

[20] The handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially handed over to the groom's people there can be no valid customary marriage. T.W. Bennett, *Customary Law in South Africa 18th Edition* states at 217 that:

> "*Hence, when the Recognition of Customary Marriages Act provides that, in order to qualify as customary, a marriage must be 'negotiated and entered into or celebrated in accordance with customary law', the form of negotiations, the handing over of a bride and the wedding are all relevant to giving the union the character of a customary marriage. It may then be distinguished, on the one hand, from an informal partnership and, on the other, from a marriage according to other cultural or religious traditions*."

In terms of practised or living customary law the bride cannot hand herself over to the groom's family. She has to be accompanied by relatives.

[21] The applicant is putting much emphasis on the fact that the two were residing together after lobolo was handed over. She states further that the deceased's family acquiesced in this arrangement. This is denied by the deceased's family. The mere fact that the deceased and applicant stayed together does not transform their cohabitation into a valid customary marriage. She is also silent on the question of handing

over with its attendant responsibilities and who handed her over to the deceased's family.

[22] It is also crucial to accord proper weight in the consideration of this matter to the averments by first and second respondents that the applicant's guardian insisted that the handing over of the bride will only take place once the whole lobolo as agreed upon during negotiations has been handed over. In my judgment even if the deceased's parents acquiesced to the living arrangement between the applicant and the deceased, that in itself could not have transformed what was primarily a mere cohabitation into a valid customary marriage. This would be an unfortunate perversion of customary law.

[23] I am satisfied that on the fact placed before me, no customary marriage was shown to have existed between the applicant and the deceased.

ORDER

[24] In the circumstances I make the following order:

The application is dismissed with costs.

D.I.MATLAPENG

ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG