

Summary: Lerato Sengadi v Robert Tsambo

Customary law — Customary marriage — Validity — Section 3(1) of the Recognition of Customary Marriages Act 120 of — Valid customary marriage concluded but not registered — Handing over of the bride not a requirement for a valid customary marriage — customary law customs have to be consistent with the spirit and purport objects of the Constitution

This is an urgent application in terms of which the applicant sought a declaratory order confirming that she is the customary law wife of the deceased; an order interdicting the respondent from burying the deceased; a declaratory order entitling her to bury the deceased; and a spoliation order against the respondent to restore to her the matrimonial house and other effects.

The applicant, Lerato Sengadi and the deceased, Jabulani Tsambo met at university during 2009 and became lovers. On 6 November 2015 in Amsterdam the deceased proposed marriage to the applicant. The applicant accepted the marriage proposal. On 20 January 2016 the respondent dispatched a letter to the applicant's mother requesting that the deceased's and the applicant's families should meet to discuss the union of the deceased and the applicant. 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 bank account of the applicant's mother as part of payment of the lobolo with the balance to be paid in two instalments of R10 000.00 and R5 000.00 respectively at future agreed dates.

After the lobolo negotiations were completed, the deceased changed his clothing and dressed himself in formal wedding attire. At the same time, the deceased's aunts emerged from outside into the house bearing a covered clothes hanger. The deceased's aunts requested the applicant to accompany them into one of the bedrooms whereat they revealed an attire from the clothes hanger, and informed her that the attire was her wedding dress and then proceeded to dress her up. The family representatives then introduced the applicant to all persons present as the deceased's wife and they thereafter welcomed her into their family as their daughter-in-law. The respondent approached the applicant, 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.

The respondent disputed that the applicant is the deceased's customary law wife or that she has the right to bury the deceased. He stated that funeral arrangements have been made at great expense with the participation of the Mahikeng Municipality and the North West Province Government. The respondent denied that the applicant and the deceased concluded a valid customary law marriage. The respondent contended 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. Accordingly, no customary law marriage was concluded or came into existence between the deceased and the applicant. The respondent further contended that it is clear the families intended to have a subsequent meeting as part of the on-going 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 deciding on the matter, the court stated that the respondent's submission that the custom of handing over of the bride is an indispensable sacrosanct *essentialia* 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. The court found that 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 and, 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 of Customary Marriages Act 120 of 1998 cannot be sustainable. The court stated that 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. The court stated that the handing over custom as practised in the pre- colonial era has evolved and adapted to the changed socio economic and cultural norms practised in the modern era.

The court went on to state that 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. Accordingly, 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.

In conclusion, the court held that the applicant was the customary wife of the deceased. The court further held that the applicant is entitled to bury her customary law marriage husband, the deceased. Having said that, the court was alive to the 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 the principle of fairness, equality, equity, the interests of justice, the balance of convenience and the exigency that the deceased was a public figure of national importance. On this basis, the court concluded it was obliged to exercise a practical common sense approach which prompted the it 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 the urgent application was been argued. Accordingly, the court held that the deceased should be buried in Mahikeng and the deceased family must allow the applicant to attend the funeral unhindered.