

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 23299/19

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ✓
04/07/2019	
DATE	SIGNATURE

In the matter between:

ULRIKE MANSE

Applicant

and

**FORENSIC DEPARTMENT OF HEALTH
GERMISTON
GLADNESS MAKHOSAZANA LEBOGO**

1ST Respondent

2nd Respondent

J U D G M E N T

MABESELE, J:

I. Introduction

[1] This matter came before me on an urgent basis for an order to declare the Applicant to be the customary wife of the late Desmond Dada and to give

the Applicant the right to bury the deceased in the manner that she deems appropriate. The matter was opposed.

[2] After I engaged both counsel and considered the arguments and the submissions made by them, I granted the order in favour of the Applicant and reserved the reasons. I now provide the reasons.

II. Background

[3] The Applicant began a romantic relationship with the deceased in October 2007. In December 2007 both the Applicant and deceased moved to Reiger Park in Boksburg and later moved to Windmill Park.

[4] In 2010 the deceased expressed his wish to formalise his relationship with the Applicant. To that effect the deceased sent his uncles and aunt to the family of the Applicant to negotiate lobolo and marriage on his behalf. At the meeting both the families of the Applicant and deceased agreed on the amount of R30 000 lobolo, which was paid over to the family of the Applicant. Subsequently both families gave the Applicant and deceased permission to live together as husband and wife.

[5] The reason for the deceased to mandate his aunt and uncles to negotiate lobolo on his behalf was that his father was late and his mother was unwilling to participate in the negotiations and accept the Applicant as her makoti or ngwetsi for reasons only known to her.

[6] Sadly, on the 16th June 2019, the deceased was shot and killed when he was robbed of his motor vehicle. He left behind the Applicant and three minor children.

III. The case for the Applicant.

[7] The Applicant was above the age of 18 years when lobolo and marriage was negotiated by her family and the family of the deceased. She consented to the marriage. Her argument was that since lobolo was paid in full and both families blessed the marriage between the deceased and her after the mother of the deceased refused to participate in the negotiations, she had satisfied the requirements of Section 3(1) (b) of the Recognition of Customary Marriages¹.

IV. The case for the second Respondent.

[8] In contrast to the Applicant's case, the second Respondent, being the mother of the deceased, argued that the marriage between the Applicant and deceased fell short of the requirements of customary marriage in terms of the law which require, amongst others, family participation, lobolo agreement and integration of the bride into the husband's family (handing over of makoti to the husband's family). She argued that she never participated in the negotiations, neither did she receive the Applicant as her makoti. Therefore, she should be permitted to bury the deceased as there was no valid

¹Act 120 of 1998.

customary marriage between the Applicant and deceased. She conceded that she was not in good terms with the Applicant before the lobolo and marriage of these two parties were negotiated.

V. The requirements for validity of customary marriage.

[9] Section 3(1) (b) provides as follows:

‘(1) 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] Both parties agreed that the provisions of section 3(1) (a) were complied with by the Applicant. The issue was whether section 3(1) (b) was complied with.

- [11] Section 3(1) (b), in my view, should be understood in the context of the origin and **development**² of customary marriages. This will also address the concerns raised by Matlapeng AJ, in his well-reasoned judgement of

² Emphasis added

*Motsoatsoa v Roro*³ that section 3(1) (b) is vague as it does not specify the actual requirements for a valid customary marriage. Matlapeng argues that section 3 (1) (b), simple as it may sound, creates serious problems regarding how to ascertain the applicable customary law. He argues that the problem is compounded by the fact that some customary and cultural practices among the indigenous people are not homogenous.

[12] Contrary to Matlapeng's argument, section 3(1) (b), as correctly argued in *Mohau Moropane V Elizabeth Southon*,⁴ is clear and unambiguous. This will also be demonstrated in this judgement.

VI. The origin of customary marriages

[13] Customary marriage has always been a relationship between the families of the bride and bridegroom. In the Basotho tribe, the man expressed his intention to marry by deliberately neglecting to milk the cattle in the morning⁵. After his parents had noticed that incident the man would suggest to them the woman he wanted to marry. Depending on the discussions, the parents, particularly the mother, may suggest another woman. After the conclusion was reached the parents would then send delegation to the family of the woman to inform them of the intended visit to them by the man's family to negotiate lobolo⁶. Once the date on which these two families agreed upon had been set, the man's father would then make herd of cattle available as

³ 2010 JDR 1392 (GSJ).

⁴ (755/2012) [2014] ZASCA 76 (29 May 2014).

⁵ ho raha moritshwana

⁶ Ho kopa mohope wa metsi

lobolo. Once the two families have agreed on the amount of cattle to be paid as lobolo, the cattle would be delivered to the woman's family⁷, followed by celebration which included slaughtering an animal which was shared between the two families to signify the new union between the families.⁸ In other tribes this procedure signified also, the release of the woman to the man's family⁹. **That is why some families preferred taking the woman (ngwetsi) with them when they returned home after celebration¹⁰** which was preceded by coaching or counselling¹¹. In such instances the woman was accompanied by her family members to spend a day or two with her at her husband's family. The other tribes on the other hand preferred to formally and physically hand over the woman to the family of the man.

[14] The woman belonged to the man's family on the grounds that the family and not the man, paid lobolo for her. It was for that reason that the man could not divorce his wife. Upon the death of the man his family organised another man for her in that family¹². As a result there were no widows in customary marriages.

VII. The development of customary marriages

[15] Due to growth of industries in the urban areas, some people in the rural communities migrated with their children to the urban areas for employment

⁷ hence the phrase: 'mosadi wa dikgomo tsa ntate'

⁸ see, Mohau Moropane, *supra*

⁹ handing over of the bride to the man's family

¹⁰ Emphasis added

¹¹ ho lauwa

¹² hence the idiom: 'ngwetsi e shwela bohading'

opportunities and better lives. On arrival, some young men and women secured employment and subsequently became financially independent. This change in status of the young men had a significant impact on customary marriages in that young men began to pay lobolo for the women of their choice, thus creating conflict between some young men and their mothers who were reluctant to recognise their son's wives as their daughters,¹³ simply because the mothers no longer had a say in the marriages of their sons. This change in status of the young men brought about the concept of divorce in the customary marriages because marriage was no longer in control of parents. In addition, the woman was free to re-marry upon the death of her husband.

VIII. The present matter

[16] In this matter the deceased sent his uncles (brothers of the second Respondent) to negotiate lobolo and marriage on his behalf because the second Respondent would not welcome the Applicant as ngwetsi. Clearly, the intention of the second Respondent initially was to frustrate the marriage of the Applicant and deceased by refusing to recognise the Applicant as ngwetsi. After her intention became unsuccessful, she subsequently opposed the application by the Applicant to bury the deceased on the basis that section 3(1) (b) was not complied with, particularly the requirement of formal handing over of the Applicant to her, as the mother of the deceased. Is this not an abuse of section 3(1) (b) by the second Respondent?

¹³ Dingwetsi

IX. Explanation of section 3(1) (b)

[17] Section 3(1) (b) provides that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'. This simply means that (i) 'the marriage must be negotiated and entered into' or (ii) 'the marriage must be negotiated and celebrated in accordance with customary law'.

The difference between (i) and (ii) is that the marriage in (i) can be concluded without celebration in accordance with customary law whereas (ii) requires conclusion of marriage and celebration which include handing over of the bride to the family of man. To my understanding, parties may follow either (i) or (ii) depending on the circumstances they find themselves in .

X. The reasons for granting the order

[18] The families of the deceased and Applicant negotiated lobolo and marriage of the deceased and Applicant. During the negotiations an amount of R30 000 which was agreed upon between the parties as lobolo was paid to the family of the Applicant. After both families were satisfied with negotiations they gave permission to the Applicant and deceased to live together as husband and wife rather than cohabit, thus concluding marriage in terms of (i) above. Clearly, the Applicant and the deceased would not conclude their marriage in terms of (ii) above simply because the second Respondent would not acknowledge the Applicant as ngwetsi as she refused to participate in the lobolo negotiations without sound reasons. Clearly, she could not be forced

to participate in the negotiations. In the same breath she cannot be allowed to frustrate the applicant on the basis that the requirement of hand over was not met.

XII. Conclusion

[19] It should be emphasised that (i) above is significant in that it also accommodates the divorcees and widows who are keen to be re-married. If they are compelled to follow (ii) they will be expected to be handed over to their men's families. To my knowledge, a woman cannot be handed over more than once, in African culture, especially after she had already conducted marriage of her daughters and welcomed into her family women from other families as her daughters or dingwetsi.

[20] It was stated earlier that customary marriage in the past protected women from divorce and becoming widows. Since this is no longer the position, to deny them and young men whose partners are not being recognised in their families as dingwetsi as in the present matter, the right to marry on the basis that the requirement of 'hand over' was not met, would result in an abuse of section 3(1) (b) and importantly, deny them their rights to establish families.



M.M MABESELE

(Judge of the Gauteng Local Division)

Date of hearing : 4 July 2019
Date judgement : 4 July 2019
For the Applicant : Adv Makakaba
Instructed by : Tlaka Attorney
For the respondent : Details not provided
Instructed by : Chuene Attorneys

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LEGAL SUMMARY

MABESELE J.

Customary Law- Recognition of Customary Marriages Act 120 of 1998, s 3 (1) b – Customary Marriage- Declaration of Validity – No hand over of the bride

The applicant was married to the deceased in terms of customary law. The deceased's mother disapproved of the applicant and as a result did not participate in the lobolo negotiations. Lobolo was negotiated by the groom's uncles and aunt. The lobolo amount was agreed upon, between the two families and paid by the deceased. However, the bride was not handed over to the groom's family, even though the groom and applicant were given permission to live together as husband and wife. The deceased tragically died when he was shot during the hijacking of his car.

The second respondent, the mother of the deceased denied the existence of the marriage between her son and the applicant. She alleged that the applicant was never handed over to her family as it is required in terms of section 3 (1) b of the Customary marriages Act 120 of 1998. The applicant brought an urgent application to court for an order to declare herself to be the customary wife of the deceased and to give her the right to bury the deceased in the manner she deems appropriate.

Held, that the marriage between the applicant and the deceased was validly concluded when the two families negotiated and agreed on a lobola amount, which the deceased paid, hence they were given permission to live as husband and wife. The court found in her favour.

Held, that the requirement of hand over of the bride, although it was lawful, it should be understood in context of the origins and development of customary law itself. In the past or in other circumstances it could have been necessary for the bride to be handed over e.g when the parents were the ones paying lobola for their son and recognised the bride as she was likely to have been chosen by them. However, in the present day youngmen chose their wives and paid lobola on their own. Therefore, in such circumstances the need for the parents to recognise the bride and physically hand her over to the new family was less important. This did not invalidate the marriage.

The court further held that strict application of the requirement to hand over of the bride in terms of section 3 (1) b, in the circumstances where the family was not willing to recognise the bride as their daughter in law, would result in an abuse of section 3 (1) b and 'deny them their right to establish families.'