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

CASE NO: 4888/2020

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

.....21 April 2021 DATE

Gavin Rome SIGNATURE

In the matter between:-

MGENGE MANTSHADI JEANNETTE Applicant

and

MOKOENA MALESHOANE ROSE First Respondent

DEPARTMENT OF HOME AFFAIRS Second Respondent

JUDGMENT

ROME, AJ:

INTRODUCTION

1. This is an application by the mother of a deceased adult male for the cancellation of an abridged marriage certificate (dated 27 November 2019) certifying that the

deceased, the late Mr Siphiwe Mgenge, and Ms Maleshoane Rose Mokoena were married by customary marriage.

2. The respondents are the abovementioned Ms Mokoena Maleshoane Rose (the first respondent) and the Department of Home Affairs (which was cited as the second respondent). The Department has not entered an appearance in this matter.

RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998

3. The application pertains to the provisions of the Recognition of Customary Marriages Act 120 of 1998 ("the Act"). Before turning to the facts it is helpful to refer to the purpose of the Act and its pertinent provisions.

4. The Act came into effect on 15 November 2000. It is this country's first piece of legislation that gives full legal recognition to customary marriages. Prior to its enactment customary marriages were in our law treated as inferior to civil marriages otherwise concluded in terms of the common law and marriage legislation.

5. In terms of section 1 of the Act "*a customary marriage*" is defined to mean a marriage concluded in accordance with customary law. *"Customary law"* is in turn defined to mean the customs and usages traditionally observed amongst indigenous African peoples of South Africa and which form part of the culture of those peoples.

6. Section 2(2) of the Act provides for the recognition of customary marriages entered into after the Act's commencement. Marital recognition is made subject to the condition that the relevant marriage complies with the Act's requirements.

7. The requirements for the conclusion of a valid customary marriage are set out in section 3. They are the following: (a) The prospective spouses must both be older than 18; (b) They must both consent to be married to each other under customary law; and (c) The marriage must be negotiated and entered into (or celebrated) in accordance with customary law. If either of the intended spouses is a minor, his or her parents must both consent to the marriage. The intended spouses must not be prohibited from marriage because of a proscribed relationship by blood or affinity, as determined by customary law.

8. The requirements appear capable of easy fulfilment.[1] However, the prerequisite that the marriage must be negotiated and entered into or celebrated in accordance with customary law gives rise to some legal complexities.[2] This requirement entails examining whether the customs, traditions, or rituals, that have to be observed in the negotiations and celebration of customary marriages, have been complied with.[3] These include the negotiations leading to the agreement on *lobolo,* its actual provision and the "handing over" of the bride to the bridegroom's family or the bridegroom himself as well as any other tradition,

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[1] See MAITHUFI, Papa IP. The requirements for validity and proprietary consequences of monogamous and polygynous customary marriages in South Africa: Some observations. *De Jure (Pretoria)* [online]. 2015, vol.48, n.2 [cited 2021-04-20], pp.261-279. Available from:<http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602015000200002&lng=en&nrm=iso>. ISSN 2225-7160. http://dx.doi.org/10.17159/2225-7160/2015/v48n2a1.

[2] Ibid.

[3] *Moropane v Southon* [2014] JOL 32172 (SCA).

custom or ritual associated with these. If a customary marriage has not been concluded in accordance with customary law, it cannot be regarded as valid even if all other requirements are met.[4]

9. The requirements for a valid customary marriage are thus similar to those prescribed for a civil marriage except that a customary marriage has to be negotiated and entered into or celebrated in accordance with customary law. A clear distinction is still, however, maintained between these marital relationships.

10. As noted above one such distinguishing feature is the abovementioned provision that customary marriages be negotiated, entered into or celebrated in accordance with customary law. Nonetheless as recently stated by the SCA (per Maya P) in *Mbungela*:[5]

> *"no hard and fast rules can be laid down, this is because 'customary law is a flexible, dynamic 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' … because of variations in the practice of rituals and customs in African society, the legislature left it open for the various communities to give content to section 3(1)(b) in accordance with their lived experiences" (See para17).*

11. Section 4 of the Act states that spouses married by customary marriage must ensure that their marriage is registered. The period within which registration must

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[4] *Rasello v Chali In re: Chali v Rasello* 2013 JOL 30965 (FB); *Fanti v Boto and Others* 2008 (5) SA 405 (C).
[5] *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) para 17.

take place is three months after the conclusion of the marriage or within such longer period as the minister may from time to time prescribe in a notice in the *Gazette*.[6]

12. Although the Act makes it obligatory to register a customary marriage, section 4(9) provides that a failure to do so does not affect the validity of that marriage. One consequence of failing to register a customary marriage would be that absent a marriage certificate it would be difficult for either spouse in their interactions with third parties and government departments (and similar organisations), to establish the subsistence of the marriage and his/her marital status. In contrast, possession of a marriage certificate constitutes prima facie proof of the marriage. Section 4(8) provides that "*a certificate of registration of a customary marriage issued under this section… constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.*" Registration of the customary marriage thus provides for public certainty about the relevant spouses' marital status.

13. In terms of section 4(2) either spouse may register the marriage on behalf of both spouses. It appears that the purpose of this section is to ensure that a spouse who is reluctant to register the marriage does not frustrate or undermine the other spouse's wish to have their marriage registered.

[6] In terms of GN 51, *GG* [*Government Gazette* number missing], dated 5 February 2010 the period in which both customary marriage entered into before the act and a customary marriage entered into thereafter was extended up to 31 December 2010. For marriages entered into subsequent to 31 December 2010 this does not appear to be relevant.

14. In a treatise on the Act prepared for the Justice College, it is stated (in my respectful view, correctly) that because marriage terminates on death, after the death of one of the spouses the Department will not issue a marriage certificate but will merely provide proof of registration of the marriage.[7]

15. If either of the spouses fail to make the necessary application to register the marriage, the Act enables an interested party to apply for its registration. Section 4(5) of the Act provides:

> *"(a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.*
>
> *(b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage an issue a certificate of registration as contemplated in subsection (4)."*

16. In terms of section 4(7), a court may, upon application made to that court and upon investigation instituted by that court, order:

(a) the registration of any customary marriage; or

[7] See justice college paper compiled by MM Meyer in March 2009 and updated during May 2012, on Recognition of Customary Marriages (at page 12 thereof).

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

17. The Act does not expressly state who may bring such an application but having regard to the fact that the Act enables both of the spouses, and also any person with a sufficient interest, to apply in the ordinary course for the registration of a customary marriage, it appears clear that both of the spouses and any person with sufficient interest, would have the necessary standing to bring an application under section 4(7).

18. In the present matter, the applicant as the mother of the deceased would thus have sufficient interest to apply to this court, under section 4(7) of Act, for the cancellation of the relevant registration. The first respondent has in any event not contended otherwise.

19. Both the notice of intention to oppose and the answering affidavit were filed late, the first respondent sought condonation therefor. She explained in the answering affidavit that it took her a while to obtain the necessary documents that her attorneys had requested her to provide and that the process of finalising these documents and her answering affidavits was then further delayed as result of the exigencies of the Covid epidemic and the attendant lock down regulations during the first half of 2020. No prejudice was occasioned to the applicant thereby and the applicant has in any event replied to the answering affidavit. A proper case for the late filing of the answering affidavit was therefore made out.

THE FACTUAL DISPUTE

20. Turning now to the particular facts of the matter. The deceased died on 7 November 2019. The applicant annexed to her founding affidavit a copy of the marriage certificate that she seeks to have cancelled. *Ex facie* the certificate, the registration is dated 27 November 2019 and certifies that the marriage took place at “Boiketlo QwaQwa” on 17 November 2018.

21. Despite the above precept about death terminating a marriage, in this matter the Department did not simply provide proof of registration of the marriage but, post the death of the deceased and on application of the first respondent, issued a marriage certificate. It is not apparent from the record if before issuing the marriage certificate, the registering officer had been informed of the fact of the deceased’s death. There is also an incongruity between the express wording of the Act and the facts in this matter in that the application for the registration of the marriage occurred well outside the prescribed three-month statutory period but, nonetheless, the Department still proceeded to issue the certificate. Moreover, there is a contradiction between the death certificate (a copy of which the applicant annexed to her founding affidavit) and the marriage certificate. The death certificate indicates that the deceased at the time of his death was a divorcee, whereas the marriage certificate indicates that the deceased’s status was the husband of the first respondent. The death certificate was likewise issued by the Department but its date precedes the date of the marriage certificate by a couple of weeks.

22. There are therefore competing versions of the applicant and the first respondent about whether the relationship of the first respondent and the deceased had progressed to the point of the conclusion of a customary marriage ceremony (the first respondent's version) or whether it had only reached the point of there being negotiations to enter into a marriage, but not the conclusion thereof (the applicant's version).

23. The applicant alleged that during 2018 the deceased, who was then a divorcee with children, was of a mind to enter into negotiations with the first respondent's family. These negotiations if successfully concluded, would have resulted in a customary marriage. In respect of the deceased's alleged intention, the applicant annexed to her founding affidavit a copy of a contemporaneous handwritten document authored by the deceased (written in Sesotho). It is unfortunate that neither party had saw fit to assist this Court by providing a typed version and translation of this handwritten document in terms of Rules 61 and 62(2) of the Uniform Rules of Court which together prescribe that where evidence is given in any language with which the Court is not sufficiently conversant that such evidence be interpreted and that documents filed with Court be typewritten on A4 standard size.

24. The applicant alleged that the contents of the handwritten document indicates an intention to enter into marriage negotiations and that it does not evidence the deceased's promise to marry the first respondent. The applicant further alleged that despite the deceased's intention to commence marriage negotiations, the marriage ceremony never took place. According to the applicant this was

because the deceased was already father to several children and the first respondent would “not accept” them. As a result (so says the applicant) the deceased changed his mind and decided not to marry the first respondent. Finally, the applicant alleged that it was only often after the death of the deceased and in January 2020 that she first learned that a marriage certificate had been issued and that a customary marriage, as recorded in the certificate, ostensibly taken place. According to the applicant she was not aware of any wedding ceremony and absent her consent thereto as “the sole parent” of the deceased and in terms of customary law there could not have been a valid marriage.

25. In her answering affidavit the first respondent, in amplification of her version that a customary marriage had indeed been validly entered into, provided details of her relationship with the deceased. She stated that this relationship commenced in 2014, and that a son was, during January 2018, born of the relationship. She further averred that at the time of deposing to her affidavit she was pregnant with their second child.

26. According to the first respondent, during 2018 she and the deceased had decided to get married in accordance with customary law. Thereafter the necessary negotiations were concluded between her uncles, the deceased’s father, and the maternal and paternal uncles of the deceased in accordance with customary law. Although the first respondent and the deceased were present during these negotiations they did not participate therein.

27. Upon the successful conclusion of these negotiations a written lobola agreement was entered into, witnessed by the respective uncles of the deceased and the first respondent; this written agreement is the handwritten document annexed (as annexure C) to the applicant's founding affidavit. The first respondent alleged further that the customary wedding ceremony took place at her paternal home (for convenience, "the homestead") and that the night before the wedding the applicant had requested the deceased's uncles to sleep at her (the applicant's) home (in Soweto)) before travelling to the homestead to attend the wedding celebrations. The applicant, so the first respondent alleges, was thus clearly aware of the intended wedding ceremony.

28. The first respondent denied that the deceased had any change of heart. She averred that the customary wedding ceremony duly took place on 18 November 2018. She alleged that at the wedding feast, sheep were slaughtered, fat of the sheep was rubbed on the deceased's head (symbolizing the conclusion of the marriage under customary law) and that the deceased made part payment of an agreed lobola amount (with the balance to be paid at a later date).

29. The first respondent also averred it was only after the death of the deceased that the applicant first denied the existence of the marriage. She accordingly then went to the offices of the Department to have the customary marriage registered. She alleged that the Department, on the production of two supporting affidavits from witnesses to the marriage ceremony, then issued the marriage certificate. In support of these allegations the first respondent annexed corroborating affidavits from two of the uncles who were at the ceremony. As further evidence

of the marriage, the first respondent referred to and annexed a copy of the funeral notice for the deceased. This notice refers to the first respondent as the deceased's "wife". Apart from denying the applicant's lack of knowledge of the marriage, the first respondent also denied that the applicant's consent to the marriage was required given that the authorised family of representatives of the deceased, his father, and his uncles, had consented thereto.

30. In reply the applicant persisted with her denial that the marriage ceremony had taken place. She repeated her version that the written document produced as annexure C to her founding affidavit, properly translated and interpreted, indicates nothing more than an intention to enter into marriage negotiations. As to the ceremony, she denied having knowledge that the deceased had gone to the homestead for the purposes of being married. She admitted that the deceased and family members had indeed visited at her home and that they had then travelled to the homestead but, according to the applicant, this was for the introduction of the deceased to the first respondent's family. She further denies that there was a wedding celebration and alleges that any slaughtering of sheep was in the context of a guest offering not a wedding ceremony.

31. Whilst the replying affidavit is somewhat lacking in detail, it repeated the essence of the applicant's version, namely that the handwritten document evidenced an intention to enter into negotiations (but not an intention per se to marry). The applicant further in reply alleged that the reason why the funeral notice described the first respondent as the deceased's wife was because of a mistranslation by the undertaker (presumably the funeral home) who prepared that document.

According to the applicant the deceased's family (and she does not say who on behalf of the deceased's family did so) had given the "undertaker" details in the Sesotho language of the information that should be in the funeral notice. The undertaker had however mistranslated the Sesotho word for partner ("*molekane*") as "wife" when he prepared the notice.

32. The replying affidavit, as read with the founding affidavit contains what is a potentially significant inconsistency in the applicant's version. In the founding affidavit the applicant had alleged that she was the sole parent of the deceased. Presumably she meant by this that the deceased's father Mr. John Solani Mahlangu was either dead or entirely absent from parental responsibilities. The first respondent in answer stated that the deceased's father consented to the marriage. In reply the applicant did not persist with her claim to be the sole parent of the deceased and admitted that the deceased, his father, and the uncles had travelled to the homestead. However the applicant, as noted above maintained that that the purpose of their meeting was introductory in nature.

33. The most pertinent of the replying affidavit reads as follows:

"I reiterate that when Mr. John Solani Mahlangu and the messengers were send [sic] to Mokoena family, they were going ho kopa sego sa meetse (introducing the family of Mahlangu (Mgenge) to that of Mokoena and if welcomed, to find out how much will be needed for the conclusion of the marriage. THIS IS NOT THE MARRIAGE IT IS INTRODUCTION."[8]

[8] Emphasis in the original.

DETERMINATION

34. Thus the primary factual dispute that emerged on the papers was whether the meeting between certain members of the respective families resulted in the conclusion of a customary marriage. Both parties rely on the handwritten document in support of their competing versions. This document was however not translated into English for the assistance of this court. Moreover there appear to be linguistic nuances that need to be understood in interpreting the handwritten document and the document also needs to be interpreted by reference to a determined factual context.

35. Ordinarily a customary marriage certificate would constitute *prima facie* proof both of its contents and the existence of the customary marriage. An applicant seeking to set aside a customary marriage certificate in circumstances where one or both the parties thereto will likely insist on the validity of the marriage, should anticipate that disputes of facts are likely to arise. That party would accordingly in these circumstances be wise to proceed by way of action. Given the clear animosity apparent on the affidavits this matter is an example where the likelihood of dispute of fact could have been anticipated.

36. I am however not minded to dismiss the application on the basis of there being disputes of fact which the applicant ought to have anticipated. The following considerations have application. The marriage certificate was issued outside of the prescribed three-month period. There is nothing in the record to indicate on what basis the Department issued the certificate outside of the prescribed period. Moreover, it appears strange that after the death of the deceased, the

Department would have issued a marriage certificate as opposed to simply having recorded (proof of) the existence of the marriage. It may be that at the time of the application for the certificate, the registering officer was unaware of the deceased's death. If so this would mean that the Department failed to keep its records updated. Had it done so, it would have been aware that it had already (at the time when considering the first's respondents' application to register the marriage) issued a death certificate certifying that the deceased was a divorcee (i.e., he was then unmarried). As the Department did not enter an appearance there was unfortunately a complete absence of evidence in the record on the clear anomaly between the Department's two certificates.

37. The applicant apparently understood from the first respondent's heads of argument that the first respondent was requesting a referral to oral evidence[9]. While the first respondent's heads of argument do make reference to the principle that the disputes of fact in this matter cannot be resolved on affidavit but only through oral evidence, there is no request therein to refer the matter for oral evidence. Instead the first respondent contended in her heads that the application falls to be dismissed because the necessary facts to ground the application had not been established on motion.

38. Accordingly neither party had requested a referral to evidence. Nonetheless it is clear law that a court may in the exercise of its discretion *mero motu* refer a

[9] And for this reason the applicant filed further heads of argument contending why what she perceived as a request to refer the matter, should be refused. This perception was incorrect.

matter to oral evidence if it is of the view that this would ensure 'a just and expeditious decision' as contemplated in Rule 6(5)(g).[10]

39. The importance of determining the deceased's marital status at the time of his death as expeditiously is a material consideration in favour of my exercise of this *mero motu* discretion. The determination of the deceased's marital status ought to made by reference to the complete factual context necessary to evaluate both the correct meaning of the handwritten lobola document and the competing versions about whether the meeting between the families amounted to a marriage ceremony or was merely for introductory purposes. A referral to oral evidence will assist in the circumstance and in my view assist in achieving in a just and equitable determination of the dispute.

CONCLUSION

40. In the summary there is fa actual dispute as to whether the first respondent and the deceased were married under customary law. The parties have both given the essence of their competing versions under oath. Cross-examination would assist in determining the veracity of each version. The dismissal of the application would not resolve, and would instead prolong, the conflict between the deceased's mother and the first respondent (who regardless of her marital status was at the very least his partner and the mother of his child and also of his as yet unborn child, at the time of his death). The fact that the marriage certificate and the death certificate are contradictory of each other is a further consideration

[10] *Fikre v Minister of Home Affairs and Others* 2012 (4) SA 348 (GSJ) para 25 and the cases cited thereat.

requiring that the dispute between the parties be resolved as expeditiously as possible and that the best route to do so is through a referral.

41. In exercising my discretion to order a referral *mero motu*, I have of course carefully considered the admonition of Myburgh J[11] to the effect that a referral to oral evidence *mero motu* would constitute an unusually bold step by the presiding judge. Nonetheless in the exercise of my discretion, I consider that that this is indeed such a case. In regard to the costs of this application these would be best determined after the hearing of the oral evidence.

ORDER

42. I accordingly make the following order:

1. Condonation for the late filing of the answering affidavit and notice of intention to oppose is granted.

2. The issue of whether a customary marriage was concluded between the deceased and the first respondent is referred to oral evidence on a date to be arranged with the Registrar.

3. Unless this court otherwise directs, in relation to the issue referred to oral evidence:

[11] *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 at 428H-429B.

a. the applicant and the first respondent will be entitled to call any witness who deposed to any affidavit in the application proceedings;

b. the applicant and the first respondent are obliged to make available for cross-examination such witnesses who deposed to affidavits in these proceedings to the extent that such party persists in seeking to place any reliance on that person's evidence in the affidavits;

c. the applicant and the first respondent are entitled to call any further witnesses who were not deponents to affidavits in these application proceedings;

d. provided that such party has at least thirty court days before the date of the hearing of the oral evidence served on the other party a statement of the evidence in-chief to be given by such person;

e. but subject to the court, at the hearing of the oral evidence, permitting such further witnesses to be called notwithstanding that no such statement has been served in respect of his or her evidence;

f. the applicant and the first respondent may subpoena any witness to give evidence or to furnish documents at the hearing, whether such person has consented to furnish a statement or not in relation to the issue referred to oral evidence;

g. that a party has served a statement in terms of sub-paragraph 2.3 above or has subpoenaed a witness shall not oblige such party to call the witness concerned;

h. Uniform Rule 35 will be applicable to the discovery of documents on the issue referred to oral evidence.

i. The incidence of costs, including any costs arising from the hearing of this application on 26 January 2021, will be determined after the hearing of oral evidence.

21 April 2021 *Gavin Rome*

GB ROME
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the applicants:	Adv. MJ Letsoalo
Instructed by:	M.J Mphahlele Attorneys
For the respondents:	Adv. WJ Prinsloo
Instructed by:	BMH Attorneys Inc
Date of hearing:	25 January 2021
Date of judgment:	21 April 2021