

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

CASE NO: 2021/36333

Reportable: NO

Of interest to judges: NO

23 May 2022

In the matter between –

**THUSHENI, NONHLANHLA VERONICA
(IDENTITY NUMBER: [....])**

APPLICANT

AND

**MINISTER OF HOME AFFAIRS
THE MASTER OF HIGH COURT JOHANNESBURG
ESTATE LATE: DLAMINI, SHADRACK MFANA
(IDENTITY NUMBER: [....])
DLAMINI, MELUSI RONALD
MAGUBANE, ABRAHAM
PHIKE, ELIZABETH
PHIKE, NTHOMBIKAYISE ANGELINE
ANY OTHER INTERESTED MEMBER(S)
OF THE DECEASED’S FAMILY**

First Respondent
Second Respondent

Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eight Respondent

JUDGMENT

MOORCROFT AJ:

Summary

The applicant seeks an order for the late registration of a customary marriage entered into by herself and the late Mr. Dlamini. It is common cause that there were negotiations between the two families and that part of the agreed labola amount was paid over. The performance of the marriage celebrations are in dispute. There are many disputes of facts incapable of resolution on the papers.

The application is dismissed.

Order

[1] In this matter I make the following order:

1. *The application dismissed;*
2. *The applicant is ordered to pay the costs of the application.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant seeks an order condoning the late registration of the customary marriage between herself and the deceased Mr. Dlamini who passed away in July 2021, and that the Minister of Home Affairs (the first respondent) be ordered to register the customary marriage concluded on 2

May 2021, issue a customary marriage certificate, and to reflect the deceased marital status as 'married' on his death certificate.

[4] The Master,¹ the deceased estate,² the deceased's relatives (including his brother³) and his daughter,⁴ and the mother⁵ of his daughter are also cited as respondents. The application is opposed by the sixth respondent, the daughter of the deceased.

¹ Second respondent.

² Third respondent.

³ Fourth respondent.

⁴ Sixth respondent.

⁵ Seventh respondent.

The case for the applicant

The sixth respondent's evidence

The Recognition of Customary Marriages Act

[16] In section 1 of the Recognition of Customary Marriages Act, 120 of 1998 customary law is defined as *"customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples"* and a customary marriage as *"a marriage concluded in accordance with customary law"*.

[17] In terms of section 3 of the Act parties who have reached the age of eighteen may consensually enter into a valid customary marriage provided that the marriage is *"negotiated and entered into or celebrated in accordance with customary law."*

[18] Customary marriages must be registered within a prescribed period and a certificate of registration is then issued.⁶ A court may on application⁷⁸ made to the court, enquire into a customary marriage and order registration, cancellation of registration, or rectification.

[19] The important role of customary law as a living system of law was discussed by the Constitutional Court in *MM v MN*.⁸ It was not the intention of the legislature to regulate every facet of a customary marriage. The Constitutional Court said:

[32] 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 s 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

⁶ S 4 of the Recognition of Customary Marriages Act, 120 of 1998.

⁷ S 4(7).

⁸ (4) SA 415 (CC) paras 23 to 25.

rules and norms in the light of changing circumstances and the overarching values of the Constitution.

[20] In a living system of law, customs will undoubtedly evolve so that it is now *“probably practised differently than it was centuries ago.”*⁹ Age-old customs such as the handing over of the bride may be waived by agreement, or perhaps performed very differently in a modern society where the bride and groom are already living together at the time of the marriage in an urban environment. One simply cannot expect strict adherence to old traditions in an urban environment. In *Mbungela v Mkabi*, Maya P said:¹⁰

[27] The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present, could yield untenable results.

[28] Thus, for example, a woman could consent to a customary marriage, followed by payment of lobola, after which she cohabited, built a home with her suitor, and bore him children, with the full knowledge of his family. When the man died, she and those children could be rejected and disinherited by his family simply on the basis she was not handed over or properly introduced to his family and was therefore not his lawful wife, and that the children were illegitimate. Needless to say, that consequence would be incongruous with customary law's inherent flexibility and pragmatism, which allows even the possibility of compromise settlements among affected parties (contemplated

⁹ Hlope JP in *Mabuza v Mbatha* 2003 (4) SA 218 (C) para 25. See also *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) and Bennett *A Sourcebook of African Customary Law for Southern Africa* p 494.

¹⁰ 2020 (1) SA 41 (SCA) paras 27 and 28.

in cases such as Bhe),¹¹ in order to safeguard protected rights, avoid unfair discrimination and the violation of the dignity of the affected individuals.

[21] A Court must therefore be careful not to insist on exact compliance with what any party to litigation regards as the appropriate celebrations in a specific case. The key is spousal consent.

Evaluation

[22] There are fundamental disputes of fact on the papers. These were foreseeable as the dispute between the parties to the present litigation was evident already prior to the application.

[23] The question whether a customary marriage was concluded cannot be answered with reference to the affidavits. Similarly the question whether the applicant and the deceased ever lived together as husband and wife, as opposed to being simply 'boyfriend and girlfriend' cannot be resolved on the papers.¹²

Conclusion

[24] For all these reasons I made the order quoted in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

¹¹ Footnote 19 in the judgment refers to *Bhe v Magistrate, Khayelitsha*, (*Commission for Gender Equality as Amicus Curiae*); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

¹² Rule 6(5)(g) of the Uniform Rules; *Van Loggerenberg and Bertelsmann Erasmus: Superior Court Practice* RS 17, 2021, D1-70; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162 and 1168; *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) paras 9 and 10.

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **23 MAY 2022**.

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INSTRUCTED BY: NTSHONA INC

DATE OF THE HEARING:

5 MAY 2022

DATE OF JUDGMENT:

23 MAY 2022