**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 2021/48331**
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED NO

In the matter between:

**P [....] 1 P [....] 2 M [....] 1** **APPLICANT**
**(ID NO: [....])**

**And**

**R [....] P [....] 3** **1st RESPONDENT**
**([....])**

**MINISTER OF HOME AFFAIRS** **2ND RESPONDENT**

**JUDGEMENT**

**Delivered:** This judgement was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 24th of August 2022.

**DIPPENAAR J:**

[1] The applicant sought a declaratory order that there is a valid customary marriage between her and the first respondent and ancillary relief. Both the applicant and the first respondent are Pedi. Divorce proceedings are presently pending between the parties. At issue in those proceedings are immovable and movable property, as well as the first respondent's pension payout in respect of which there is an interdict withholding payment of 50% of his pension fund pending finalisation of the divorce action, granted on 20 September 2021.

[2] The application is opposed by the first respondent who contended that the High Court has no jurisdiction as there are currently divorce proceedings pending in the Tembisa Regional Court. On the merits, the first respondent contended that no valid marriage was concluded and that it was null and void. His central contention was that as no consent had been obtained from his first wife, Ms Thelmy M [....] 2 for his marriage to the applicant, no valid customary marriage was concluded between him and the applicant. No evidence was placed before me by the first respondent supporting any Pedi customary law provision that requires the consent of a first wife for a subsequent customary marriage.

[3] In the alternative it was argued that if it was found that a valid marriage was concluded, such marriage would be out of community of property. No counter application was launched by the first respondent for such relief and no sound legal basis or authority was provided for that contention.

[4] The second respondent delivered a notice to abide.

[5] As the applicant seeks final relief, the application is to be determined on the basis of the so called Plascon Evans test[1]. It is well established that motion proceedings, unless concerned with interim relief, are about the resolution of legal

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C; NDPP v Zuma 2009 (2) SA 277 (SCA) para [26]

issues based on common cause facts. Where there is a genuine dispute of fact, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can be safely rejected on the papers.[2]

[6] In my view, the jurisdiction point raised by the first respondent lacks merit and this court has the necessary jurisdiction and is the appropriate forum to determine the declaratory relief sought by the applicant.

[7] Customary marriages are regulated by the Recognition of Customary Marriages Act[3] ("the Recognition Act"). The validity requirements of a customary marriage are regulated by s 3(1), which provides:

> *"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".*

[8] On the facts, I am persuaded that the applicant has illustrated compliance with these requirements.

[9] It is undisputed that the applicant and the first respondent were respectively 25 and 36 years of age when the families negotiated lobola and the customary marriage was concluded in 2006. They both consented to the marriage under customary rites and

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[2] J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para 12
[3] 120 of 1998

the respondent sent emissaries to the applicant's home, who were cordially welcomed by emissaries from the applicant's family during August 2006. The lobola letter reflects that a bridal price of R15 200 was paid.

[10] According to the applicant, the marriage was not only negotiated and entered into by customary rites, but celebrations were conducted on 26 August 2006 at the applicant's home. A cow was slaughtered by the applicant's family as part of the celebration. The applicant, as bride, was handed over to the first respondent's family at their home and a sheep was slaughtered in their welcoming of the bride. The applicant was dressed in formal bride attire and was introduced to the guests as their daughter in law.

[11] The first respondent baldly disputed that there was a handing over of the bride, but provided no countervailing evidence, nor did he meaningfully grapple with the detailed version presented by the applicant. The first respondent's bald denial of the handing over can be rejected on the papers as untenable[4]. I am persuaded that the applicant has illustrated that the customary marriage was negotiated, entered into and celebrated in accordance with the customary law.

[12] In any event, even if the respondent's version was to be believed, the ceremony of handing over the bride is not necessarily a key determinant of a valid customary marriage and its waiver would be permissible. The ritual is simply a means of introducing a bride to her new family and signifies the start of the marital consortium[5]. Thus, even if there was no handing over, the customary marriage would still be valid in accordance with customary law.

[4] Wightman supra paras [12]-[13]
[5] Mbungela & Another v Mkabi & Others (820/2018) [2019] ZASCA 134 (30 September 2019) paras [25] - [30]

[13] It follows that the applicant has established the existence of a customary marriage, whether monogamous or polygamous.[6]

[14] The first respondent's reliance on s7(6) [7] of the Recognition Act in support of his contention that his marriage to the applicant was invalid, is misconceived. A failure by a husband to enter into a contract regulating matrimonial property does not invalidate a subsequent customary marriage. S 7(6) deals with the proprietary consequences of a marriage and not with the validity thereof [8]. A lack of compliance by the husband with his obligations in terms of s7(6) does not render the marriage void. Moreover, the purpose of the section is to protect the rights of wives in polygamous marriages[9], not the rights of the husband.

[15] As stated, the first respondent further contended that the marriage between him and the applicant was invalid as at the time the marriage between him and the applicant was negotiated he was already in a customary marriage with Ms M [....] 2 , which marriage predates his marriage to the applicant and was concluded on 14 December 1997. According to the first respondent the applicant was aware of his first customary marriage and no consent was sought from Ms M [....] 2 at the time the second customary marriage was negotiated. The only document put up by the first respondent in support of this first marriage, was a lobola letter. His version was not corroborated by any witnesses and no confirmatory affidavits nor a marriage certificate were provided. This version pertaining to a first wife had not been raised by the first respondent in the earlier litigation between the parties, wherein the lack of a valid marriage certificate was raised as a defence.

[16] Once again, the first respondent did not in his answering affidavit in all respects, grapple with the detailed version put up by the applicant pertaining to Ms M [....] 2 's

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[6] MMN v MFM and Minister of Home Affairs (474/11) [2012] ZASCA 94 (1 June 2012); LS and RT In re JT Case no 40344/2018 (Gauteng Local Division, Johannesburg) (2 November 2018)
[7] It provides: "A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages".
[8] Mayalane v Ngwenyama CCT 57/21 [2013] ZACC 14 para [6]
[9] MMN fn 5 supra, para [19]-[24]

role. His version is further confusing in various respects, such as the averment that when Ms M [....] 2 died three years after lobola for the applicant was negotiated on 7 July 2009, he was still married to and living with Ms M [....] 2 . This version is in stark contrast to the applicant's version that she and the first respondent had been living together since 2006. In his answering affidavit, the first respondent did not expressly dispute the applicant's version, nor did he deal with which averments of the applicant were admitted and which were denied.

[17] The applicant disputed that the first respondent was married to Ms M [....] 2 and claimed that he was unmarried throughout their relationship which commenced in 2005 and when their customary marriage was concluded. On her version, she and Ms M [....] 2 knew each other and Ms M [....] 2 never contended that she was married to the first respondent. The respondent's family also did not make such a claim.

[18] In support of the applicant's averments controverting the first respondent's version, she put up various documents and evidence. First, the death certificate of Ms M [....] 2 , which reflects her as being never married. Second, an affidavit by the first respondent which confirms that the applicant is his wife whom he married in a traditional ceremony. This affidavit was provided in support of an application to POLMED to register the applicant on his medical aid as a dependent. No similar affidavit was made by the first respondent in respect of Ms M [....] 2 . Third, the applicant relied on the fact that the first respondent did not seek to obtain any spousal benefits from the South African Police Services such as pension pay outs and funeral cover, pursuant to Ms M [....] 2 's death, to which he would have been entitled had he been married to Ms M [....] 2 . Ms M [....] 2 was also a police officer. Related thereto, the applicant pointed out that as both the first respondent and Ms M [....] 2 had been employed by the South African Police Services, a record would have existed of their marriage so that any spousal benefits which would accrue to him pursuant to Ms M [....] 2 's death, would have been recorded as accruing to his benefit. Fifth, the applicant relied on the fact that the first respondent could not produce any marriage certificate of his alleged marriage to Ms M [....] 2. Sixth, the applicant pointed out that despite the extensive litigation between the

parties the first respondent for the first time raised his purported marriage to Ms M [....] 2 and her lack of consent as a version.

[19] I am not persuaded that the first respondent has illustrated any defence to the applicant's claim. The first respondent's version is in various respects unsatisfactory and can be rejected on the papers as not creating *bona fide* disputes of fact [10]. More importantly, even if his version is not rejected, the first respondent's case fails to illustrate that his marriage to the applicant is null and void.

[20] The first respondent's reliance on *Mayelane v Ngwenyama and Another*[11] *("Mayalane")* is misplaced for various reasons. *Mayalane* is not applicable, both on the basis that the dispute in that matter centered around rights two customary wives were trying to enforce in relation to their marriages to their deceased husband and on the basis that the case involved Xitsonga customary law only.[12] In the present instance, both the applicant and first respondent are Pedi and no evidence or authority was placed before me supporting any customary law provision that requires the consent of a first wife for a subsequent customary marriage.

[21] *Mayalane* further made it clear that the Recognition Act does not require a husband to obtain the consent of his first wife for a subsequent customary marriage for such marriage to be valid[13].

[22] The judgment in *Mayelane* was moreover delivered on 30 May 2013, well after the customary marriage was concluded between the applicant and the first respondent. *Mayelane*[14] expressly did not operate retrospectively, but only to marriages concluded after the date of the judgment.

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[10] Wightman supra
[11] CCT 57/21 [2013] ZACC 14
[12] Mayelane para [42]
[13] Mayelane supra para [38]- [41]
[14] Para [85]

[23] I am further not persuaded that it is open to the first respondent to raise the issue of the lack of consent by Ms M [....] 2 in order to avoid the validity of his marriage to the applicant, given that he is purporting to exercise her rights, rather than his own.

[24] I conclude that the applicant is entitled to the relief sought. Insofar as the second respondent is directed to register the customary marriage on its data base, it would be appropriate to direct it to take all consequential steps relating thereto, which would include the issuing of a marriage certificate.

[25] There is no reason to deviate from the normal principle that costs follow the result. The applicant sought an order directing the respondent's attorney of record to pay the costs on a *de bonis propriis* basis. I am not persuaded that a proper case has been made out for such relief and the attorney was not formally joined to the proceedings.

[26] I grant the following order:

> [1] It is declared that the customary marriage concluded between the applicant and the first respondent during August 2006 is valid;
>
> [2] The second respondent is directed to forthwith register the marriage in [1] above on its relevant database and take all consequential steps ancillary thereto, including the issuing of a marriage certificate;
>
> [3] The first respondent is directed to pay the costs of the application.

**EF DIPPENAAR**

**JUDGE OF THE HIGH COURT JOHANNESBURG**

**APPEARANCES**

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| **DATE OF HEARING** | : 26 July 2022 |
| **DATE OF JUDGMENT** | : 24 August 2022 |
| **APPLICANTS COUNSEL** | : Adv. J. Vilakazi |
| **APPLICANTS ATTORNEYS** | : Mangxola Attorneys |
| **RESPONDENTS COUNSEL** | : Mr Mukovhanama |
| **RESPONDENTS ATTORNEYS** | : Mukovhanama Tshilidzi Attorneys |