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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1) REVISED

CASE NO: 2017/2016

In the matter between:

D R M

PLAINTIFF

And

D M K

DEFENDANT

JUDGMENT

MAKGOBA JP

- [1] The Plaintiff instituted an action against the Defendant and prayed for a declaratory order that no valid customary marriage exists between the Plaintiff and the Defendant. In the alternative and in the event the Court finds that a valid customary marriage exists between the parties, that an order of divorce be granted.
- [2] The Plaintiff's case is that despite his payment of lobola in full, the Defendant has however not been formerly transferred or handed over by her family to the Plaintiff or the family of the Plaintiff accompanied by the rituals and / or ceremonies involving both families. The Defendant

maintains that a valid customary marriage exists between the parties and in her counterclaim she prays for an order of divorce on the ground of the irretrievable breakdown of the marriage.

[3] The following facts are common cause:

- 3.1. The Plaintiff and the Defendant met and fell in love with each other during the year 2005.
- 3.2. One child was born of the relationship between the parties, a son born on 31 December 2007.
- 3.3. On 23 October 2010 a lobola agreement was concluded between the Plaintiffs and the Defendant's family groups. On this day, the 23 October 2010, the lobola was paid in full in respect of the Defendant.
- 3.4. On the date of payment of the lobola an additional amount of R 100.00 was paid being in respect of asking for the bride (go kgopela ngwetsi).
- 3.5. After payment of the lobola on the 23 October 2010 the Plaintiffs delegation did not return to the Plaintiffs home with the bride, being the Defendant.
- 3.6. During May 2013 the Defendant told the Plaintiff that she no longer loved him and wanted to move on with her life.
- 3.7. On 9 July 2013 the Defendant caused a divorce summons to be issued out of the North Gauteng Division of the High Court Pretoria, against the Plaintiff. As a ground for divorce the Defendant stated, inter alia, that: "The parties have not exercised marital privileges with one another for a considerable period and have not been staying together since 2010. The Plaintiff stays in Modimolle and the Defendant stays in Polokwane."

[4] During the trial the Plaintiff testified and called three witnesses to support his version. The Defendant also testified and called two witness to support her version.

Evidence for Plaintiff

- [5] The Plaintiff is 44 years old and employed as a Deputy Director, Risk Management in the Department of Justice. He testified that he met and fell in love with the Defendant during the year 2005. He has one child with the Defendant. The said child was born on 31 December 2007. The Plaintiff confirmed that his family sent a delegation to the Defendant's family ("the K family") to pay lobola for the Defendant on the 31 October 2010. That after payment of lobola the Defendant was not released there and then by her family to join his family ("the M family") as expected. The report he got was that the Kekana family wanted to hold or perform their rituals and a feast before they could hand over the Defendant to the M family and that during such handing over the Defendant would be accompanied by the elders of her family to hand her over to the M family at Mohodi, Ga - Manthata, Bochum. The Plaintiff testified further that while he waited for the handing over of the Defendant, the two of them visited each other at their respective places of employment. The Defendant resided at Modimolle while the Plaintiff stayed at Polokwane. By the end of the year 2012 there was still no action from the Defendant's family regarding the handing over of the Defendant. When the Plaintiff communicated with the Defendant in this regard she told him that her family are still in preparation. The Plaintiff's mother also contacted the K family and was told the same.

During May 2013 and while still in Polokwane the Defendant communicated with Plaintiff and told him that she does not love Plaintiff anymore and that she wanted to move on with her life and that he should also move on with his life. The Plaintiff then accepted that their love relationship has been terminated at the instance of the Defendant. The Plaintiff's mother communicated with the Defendant's father to discuss their respective children's relationship but the two families were not able to meet. In July 2013 the Plaintiff was served with a divorce summons issued out of the Gauteng Division, Pretoria wherein the Defendant sought a decree of divorce. The Plaintiff engaged the services of his legal

representatives to handle the divorce matter on his behalf.

There was no progress from the Defendant's attorneys side and during the year 2014 the Defendant told Plaintiff that she was not in a hurry to have the divorce case finalized. During the year 2016 the Plaintiff engaged services of his present attorneys of record to institute the present action declaring the purported customary marriage to be null and void.

- [6] The Plaintiff concluded his testimony by stating that his standpoint is that there was no valid customary marriage between him and the Defendant due to the fact that she was never handed over to him and the M's family irrespective of the payment of lobola.
- [7] The next witness to testify for the Plaintiff is Mr D W R. He is a 71 years old man, related to the M family and a cousin to the Plaintiff. He was a member of the M delegation that went to K family on 23 October 2010 to pay lobola in respect of the Defendant. The witness testified that on their departure from M family home to K family his delegation was given a mandate to return home with the bride (the Defendant) on the same day after payment of lobola. Indeed after the negotiations and payment of lobola he asked that the K family release the bride to their delegation so that they could return home with her. The response he got was that according to the K family custom and culture they would not release or hand over the bride to them there and then. That the Kekana family would bring the bride to them some day after they would have held a ceremony and slaughtered an animal, that is "go hlabisa". According to this witness he himself did not even see the Defendant on that day. He said he did not accept the explanation or excuse offered by the Kekana family and was disappointed when his delegation returned home without their bride. Upon arrival at Mphelo home he reported that the Kekana family had refused to hand over the Defendant to them.

- [8] During cross-examination of this witness by Counsel for the Defendant a very crucial statement was put to him. It was put to him that the bride was released to go with the M delegation but the latter refused to take her along and said that they did not want the people at their village to know that the Plaintiff was married and had brought home a bride, lest the M family would be bewitched. The witness emphatically denied this statement. He maintained that the reason why they could not bring along the bride on the 23 October 2010 was that the K family were unwilling to release their daughter and gave an excuse that they would deliver her to the M family in due course.
- [9] The next witness to testify was Mrs M A M, a 60 years old lady and the mother of the Plaintiff. She confirmed that a delegation was sent to Kekana family to pay lobola on 23 October 2010 and that the mandate given to their delegation was to ask for the bride after payment of lobola and return home to M family with the bride. The delegation did not return with the bride. The report by the delegation was that the Kekana family would inform the M family of a date in future when they would bring the bride to M family. That such a handing over of the bride will be accompanied by a ceremony and slaughtering of an animal.

According to this witness a long time elapsed without hearing from the K family as to when the Defendant would be handed over to the M family. She communicated with the Defendant's father on two occasions but could not achieve anything, according to her. During July 2013 she got a report from the Plaintiff that he had been served with a divorce summons. That is when she realised that the love relationship between the Plaintiff and the Defendant had come to an end.

- [10] The last witness to testify for the Plaintiff is Mr L M. He is the Plaintiffs father. The witness testified that on 23 October 2010 he sent a delegation to Kekana family to pay lobola. His mandate to the delegates was that after payment of lobola they should ask for the bride and bring her along to

the M family. He confirmed that on their return the delegation reported that the Kekana family did not hand over the bride but said they would bring the bride to the M family in due course. That M family would be notified of the date when the Defendant would be handed over to the M family.

[11] During cross-examination it was put to both witnesses, Mr and Mrs M that the M delegation had refused to take along the bride on 23 October 2010 because the M family was afraid of witchcraft. The witnesses denied this statement and maintained that it was the Kekana family that refused to hand over the bride to the M family. That the Kekana family had made a promise to hand over the bride themselves in due course.

[12] I do not find any fault with the evidence of the Plaintiff and his three witnesses. Their demeanor and also their credibility as witnesses is found to be beyond approach. There are no contradictions or inconsistencies in their evidence.

Evidence for Defendant

[13] Mr A M was the first witness to testify for the Defendant. He is a 61 years old man and a relative of the Defendant's family, the K family. On the 23 October 2010 he took part in the lobola negotiations and the final payment of the lobola from the M family. He confirmed that over and above the lobola amount paid an amount of R 100.00 was paid for requesting for the bride. He stated that after food was served the M delegation asked for the bride to be taken along to the M family home. The K family agreed to hand over the Defendant to the M delegation. The M delegation changed their mind and indicated that they would not take the bride along as they were not yet ready and still wanted to make some preparations.

The witness testified further that the Defendant was present in the house and was allowed to join the M delegation while food was served. According to this witness the reason why the Defendant was not handed over and allowed to go with the M delegation is that the M family had refused to take their bride along when they returned to their place of residence.

[14] The witness, Mr M denied the statement put to the Plaintiff's witness that

the reason for refusing to take the bride was that the M family wanted the marriage to remain a secret lest they would be bewitched. The witness conceded that in their culture when a bride is handed over to her in-laws there would be slaughtering of an animal and the bride would be accompanied by her aunts when handed over to her in laws. This did not happen on the 23 October 2010 or on any other day concerning the Defendant. The version given by Mr M regarding the handing over of the Defendant to the M family is improbable. He stated that the M delegation asked for the bride to take with them but when the K family agreed, the M delegation there and then refused to take the bride and said that they were still to make preparations at home.

[15] Mr S K, the father of the Defendant also gave evidence for the Defendant. He testified that according to him the marriage between the Plaintiff and the Defendant was completed on the 23 October 2010 and what is now outstanding is the celebration. According to him the payment of the R 100.00 (for requesting for the bride) signified the handing over of his daughter to the M family. He said that on the 23 October 2010 he was surprised when the M delegation said they were not taking along their bride to their home. He said the reason given by the M delegation for not taking their bride with them was that they were still going to make some preparations. He denied that the fear of witchcraft by the M family was ever mentioned as the reason for leaving the bride behind.

Mr K conceded that the handing over of a bride entails the involvement of the aunts (dikgadi) who would accompany the bride to her bridegroom's home. This did not take place on the 23 October 2010 or any day thereafter.

[16] The Defendant was the last person to testify. Her testimony started on a rather dramatic or perplexing manner. Led by her Counsel while giving her evidence in chief she expressly stated that she and the Plaintiff never agreed to marry each other. She repeated this statement three times until her Counsel asked for an adjournment to consult with her. The Court

adjourned and on resumption she proceeded with her evidence.

- [17] The Defendant is 36 years old. She confirmed that she met and fell in love with the Plaintiff during 2005 and their child was born in December 2007. She stated that upon reaching an agreement to marry with the Plaintiff she informed her parents. The M family brought lobola to the K family (her parental home) on the 23 October 2010. That after the payment of lobola on the 23 October 2010 she also met the M delegation and had food together. On that particular day she was told by her family elders that she was married to the Plaintiff and she accepted that. Thereafter she and the Plaintiff used to visit each other at their respective places of employment and residence.

She confirmed that when the M delegation returned home on the 23 October 2010 she did not go with them. She expected that she would be accompanied by her aunts to deliver her to the M family but that was never done. Her love relationship with the Plaintiff became strained from the year 2011 with the result that during July 2013 she instituted a divorce action against the Plaintiff in the Gauteng Division, Pretoria.

- [18] Regarding her demeanor and credibility as a witness, I find the Defendant to be an enigma. She is a mysterious or puzzling person. As she continued with her testimony she reached a stage where she became emotional, broke into tears and literally cried. The Court adjourned at the request of her Counsel and on resumption she was composed and even started laughing as she gave evidence. There and then she changed colours by even frowning on her own Counsel. The latter even called her to order and coaxed her into cooperating with the Court. To sum up, I can only state that the Defendant was not a truthful witness. One got the impression that she was only dragged into this litigation and participated therein for possible monetary gain. This is so because of the outrageous claims sought in her counterclaim for divorce.

She claims R 10 000.00 maintenance for herself, R 10 000.00

maintenance for the minor child and a 50 % share in the pension benefits of the Plaintiff over and above an equal share in the joint estate.

- [19] The evidence of the Defendant together with that of her witnesses, Mr M and Mr K is not sufficient to establish the handing over of the Defendant to the Plaintiff, or the latter's family. Their version is not convincing enough to gainsay the version of the Plaintiff that there was never a handing over of the Defendant until the two parties broke up in the year 2013.

Evaluation of the Evidence

- [20] It is trite that when faced with two mutually exclusive versions, the Court has to resolve the factual disputes by making findings on the credibility of the various factual witnesses, their reliability and the probabilities.

See **Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others 2003 (1) SA 11 (SCA) at par [5]**.

- [21] In the present case the versions of the Plaintiff and the Defendant are incompatible, in particular on the issue whether there was a handing over of the bride on the 23 October 2010. I have mutually destructive versions before me.

- [22] In order to resolve this impasse, I have to consider and weigh the probabilities to determine which version is more probable than the other. I also have to consider the credibility and reliability of the various witnesses who testified for the Plaintiff and those for the Defendant. The test to be applied in such a case was enunciated lucidly as follows in **National Employers' General Insurance v Jagers 1984 (40 SA 437 (ECO) at 440D - 441A**:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless where the onus rests on the Plaintiff as in the present case,

and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster KO-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (Supra). I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitutes separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

- [23] Having regard to the above dictum, I proceed to evaluate the evidence of the witnesses. I have already stated in paragraph [12] above that the

evidence of the Plaintiff and his three witnesses cannot be faulted. On the balance of probabilities the evidence shows that the K family failed or refused to hand over the Defendant to the M family. I find the evidence of the Defendant and her witnesses to be improbable, moreso with regard to the alleged refusal by the M delegation to take their bride home. The mandate given to their delegation by the M family was loud and clear that they bring along the bride on the 23 October 2010. The witnesses, Mr R, Mr and Mrs M corroborated each other on this aspect.

- [24] The evidence is clear that save for visiting each other at their respective places of employment, the Plaintiff and the Defendant never stayed together in their common home. It is significant to note that when Defendant instituted a divorce action in the Gauteng Division, Pretoria, the main ground or reason for the divorce was that the parties have not stayed together since the year 2010, that is the year in which the Plaintiff paid lobola for the Defendant. This is a clear indication that the Defendant was never handed over to the Plaintiff after payment of lobola.
- [25] On the issue of credibility I find that the Plaintiff's and his witnesses' version is to be preferred to that of the Defendant and her witnesses.

The law regarding validity of a customary marriage

- [26] In terms of section 3 of the Recognition of Customary Marriages Act 120 of 1998, a customary marriage entered into after the commencement of the Act will be valid if
- (i) the prospective spouses are both above the age of 18 years;
 - (ii) both consent to be married to each other under customary law; and
 - (iii) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

Customary law is defined as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people. Lobola is defined as the property in cash or in kind which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in

consideration of customary marriage.

[27] In **Fanti v Boto and Others 2008 (5) SA 405 (C)** it was held that in order to prove the existence of a valid customary marriage, essential requirements that inescapably must be alleged and proved are the following:

- (i) consent of the bride
- (ii) consent of the bride's father or guardian
- (iii) payment of lobola
- (iv) handing over of the bride

The Court clearly regarded the afore-mentioned requirements as customs traditionally observed by indigenous people in South Africa. The Court *inter alia* stated as follows at 4131 - 414C:

"Regard being had to the above requirements for the validity of a customary marriage, payment of lobola remains merely one of the essential requirements. In other words, even if payment of lobola is properly alleged and proved, that alone could not render a relationship a valid customary marriage in the absence of the other essential requirements. See Gidya v Yingwana 1944 NAG (N&T) 4, R v Mane 1947 (2) PH H328 (GW); Ziwande v Sibeko 1948 NAG (C) 21; Ngcongolo v Parkies 1953 NAG (S) 103. These requirements have not vanished with the advent constitutional democracy in this country. On the contrary, the Constitution of the Republic of South Africa, 1996, enjoins the Courts to develop customary law and to marry it to the constitutional order of the day. The importance of these rituals and ceremonies is that they indeed indicate in a rather concretely visible way that a customary union is being contracted. I am in agreement with Van Tromp's views expressed in his work Xhosa Law of Persons at 78 that these ceremonies must be viewed as ceremonial and ritual process in which essential legal requirements have been incorporated."

- [28] On the question whether the handing over of a bride is an element of a customary marriage, the Full Court of the Free State Division, Bloemfontein answered the question in **Rasello v Chali & Others (A69/2012) [2013] ZAFSHC 182 (23 October 2013)**.

Molemela J, as she then was, said the following at paragraph [18]:

*".....Although the Recognition of Customary Marriages Act does not include transfer of the bride in the requirements for a valid customary marriage, I accept that this, being an old Sesotho custom that is still widely recognized, it is a custom contemplated in section 3(6) of that Act and is thus an essential requirement for validity of a customary marriage. It was so accepted by the court in the case of **Fanti v Boto** (supra) on the basis of many authorities. Delivery of the bride entails that the bride will be accompanied to the groom's family by her own delegation, which will then formally hand her over to the groom's family. Olivier, Bekker et al in their work *Indigenous Law* describe delivery of the bride as "the transfer of the bride by her family group to the family of the man".*

- [29] The requirement of handing over a bride to the groom's family was explicitly set out in **Motsotsoa v Roro & Another [2011] ALL SA 324 (GSJ)** where it was decided that one crucial elements of a customary marriage is the handing over of the bride by her family to her new family, namely that of the groom. The Court held further that the mere fact that lobola was handed over to the bride's family, significant as it is, is not conclusive proof of the existence of a valid customary marriage.

The handing of the bride (go gorosa ngwetsi) is not only about celebration with the attendant feast and rituals. It also encompasses the most important aspect associated with the married state, namely "go laya" that is coaching or briefing which includes the education and counseling both the bride and the groom by the elders of their rights, duties and obligations which a married state imposes on them. The Court regarded this as the

most important and final step in the chain of events. One can even describe this as the official seal in the African context, of the customary marriage.

[30] The authors, **IP Maithufi and JC Bekker**, in an article entitled **Recognition of Customary Marriages Act 1998 and, its impact on Family Law in South Africa CILSA 182 (2002)** correctly submit that a customary marriage in true African tradition is not an event but a process that comprises a chain of events and involves not only the bride and the groom but also their families. The authors further submit that after the negotiated lobola or part thereof is handed over to the woman's family, the two families will then agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by a celebration.

[31] In my view the handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially been handed over to the groom's people there can be no valid customary marriage. In terms of practice or living customary law the bride cannot even hand herself over to the groom's family. She has to be accompanied by the elders or relatives for the handing over to her in-laws.

TW Bennett, in Customary Law in South Africa, 18th Edition states at p217 that:

"Hence, when the Recognition of Customary Marriages Act provides that in order to qualify as customary, a marriage must be negotiated and entered into or celebrated in accordance with customary law, the form of negotiations, the handing over of a bride and the wedding are all relevant to giving the union the character of a customary marriage. It may then be distinguished, on the one hand, from an informal partnership and, on the other, from a marriage according to other cultural or religious traditions."

[32] The Supreme Court of Appeal had an opportunity to deal with and decide on the essential requirements of a valid customary marriage in the matter of **Moropane v Southon (755/12) [2014] ZASCA 76 (29 May 2014)**

wherein Bosielo JA said the following:

"[39] Except for minor and inconsequential differences on cultural rituals, both experts were agreed that the current customary requirements for a valid customary marriage among the Bapedi people include amongst others, negotiations between the families in respect of lobola; a token for opening the negotiations (go kokota or pula molomo); followed by asking for the bride (go kopa sego sa metsi); an agreement on the number of beast payable as lobola (in modern times this is replaced by money); payment of the agreed lobola; the exchange of gifts between the families; the slaughtering of beasts; a feast and counselling (go laiwa) of the makoti followed by the formal handing over of the makoti to her in-laws by her elders.

[40] Importantly, the two experts agreed that the handing over of the makoti to her in-laws is the most crucial part of a customary marriage. This is so as it is through this symbolic customary practice that the makoti is finally welcomed and integrated into the groom's family which henceforth becomes her new family. See Motsotsoa v Rora & Another and The Current Legal Status of Customary Marriages in South Africa, IP Maithufi and GBM Moloi, Journal of SA Law, 2002, p 599 and Bennett (above) at p217."

[33] The Supreme Court of Appeal recognized the pluralistic nature of the South African society and pointed out that although Africans in general share the majority of customs, rituals and cultures, there are some subtle differences which, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, Vha Venda and the Va Tsonga.

[34] All the authorities I referred to are in agreement that a valid customary marriage only comes about when the woman has been transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom's husband and her incorporation into his family is ordinarily accompanied by well-known extensive rituals and ceremonies involving both families. The

importance of these rituals and ceremonies is that they indeed indicate in a rather concretely visible way that a customary marriage is being contracted and that lobola has been paid and / or arrangements are acceptable to the two families. The fact of the matter is that the customary marriage is and remains an agreement between two families.

[35] Counsel for the Defendant referred to and relied heavily on the unreported case of the Free State Division, Bloemfontein in **C v P (1009/2016) [2017] ZAFSHC 57 (6 April 2017)**. Counsel argued with reference to the aforesaid decided case that the payment of the amount of R 100.00 in the present case signifies the handing over of the bride. Furthermore Counsel argued that the handing over of the bride need not be a formal ceremony and that the handing over can be effected tacitly.

[36] In my view the case relied on by Counsel is distinguishable from the present case. In that case the following words were uttered by the bride's mother upon the payment of lobola:

"Here is my daughter, I am handing her over to you. I don't want to see her coming home naked and having scratches"

Thereafter the daughter and her man went on to live together. In this case I agree that there has been a handing over even though there was no ceremony or ritual performed. There were express words from the bride's mother that she is being handed over to another family. In my view the reliance on the **C v P** case by Counsel in the present case is misplaced.

[37] On the analysis of the evidence in this case and having regard to the legal requirements of a valid customary marriage, I come to a finding that there was no valid customary marriage entered into between the Plaintiff and the Defendant. Despite the payment of lobola in full by the Plaintiff there has not been any handing over of the Defendant to the Plaintiff.

[38] In the result I grant the following order :

1. It is declared that no valid customary marriage exists between the Plaintiff and the Defendant.

2. The issue of maintenance of the minor child born of the relationship between the Plaintiff and the Defendant is referred to the Maintenance Court.
3. There shall be no order as to costs.

E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

Heard on	:	22, 23 & 24 October 2018
Judgment delivered on	:	07 November 2018
For the Plaintiff	:	Mrs MC De Klerk DDKK Attorneys Inc.
For the Defendant	:	Mr O B -Morare Ramushu Morare Inc.