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

Case no: HCA28/2017-B

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

13/06/2023

In the matter between:

M[...]1 L[...] M[...]2

APPELLANT

And

J[...] M[...]2 L[...]

FIRST RESPONDENT

SANLAM'S PORTFOLIO PRESERVATION

SECOND RESPONDENT

JUDGMENT

MULLERJ:

[1] This appeal emanated from an order by this court (MG Phatudi and Semeya JJ) dated 20 May 2020 in terms whereof the appeal was upheld with costs and the order of absolution from the instance granted by the Regional Court was

set aside and the matter was referred back to the court *a quo* to hear further evidence. When the matter came before the court *a quo* again, no further evidence was adduced by any of the parties. The action was dismissed with costs. The appeal is before this court yet again to be determined on the same evidence that was before the court previously.

[2] The appellant was the plaintiff in an action in terms whereof a decree of divorce with ancillary relief was claimed on the basis that the parties have entered into an unregistered customary marriage in 2006. The respondent in his plea denied the existence of such a marriage or that such a marriage has irretrievably broken down.

[3] The parties agreed at the commencement of the trial in the court *a quo* that the only issue to be determined was whether a customary marriage had been entered into between the plaintiff and the defendant. It will be convenient to refer to the parties as the plaintiff and the defendant.¹

[4] The plaintiff accepted that she had the onus to prove the existence of the customary marriage.² Section 3(1) of the Recognition of Customary Marriages Act³ provides:

"For a customary marriage entered into after commencement of this Act to be valid-

(a) The prospective spouses-

(i) must both be above the age of 18 years; and

¹ Sanlam Portfolio Preservation Fund was cited as second defendant in the summons. The second defendant played no part in the trial. In this judgment reference will be made to the first defendant as simply the defendant.

² The customary marriage was not registered.

³ Act 120 of 1998. (Hereinafter the Act).

(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."

[5] The first witness called was M[...]¹ L[...]³, the plaintiff. She testified that the defendant requested his mother in the presence of the plaintiff, in 2005, to go to the homestead of the plaintiff to ask for her hand in marriage. He asked her to drive his mother to her homestead. Upon their arrival the defendant's mother found the plaintiff's mother at home. She told her mother that they are there to ask the plaintiff's hand in marriage. Her mother said that the M[...]³ family must be gathered and that it is the responsibility of the plaintiff to gather them. The mother of the defendant then returned. The M[...]³ family gathered and decided that the M[...]² family must pay R8000.00 towards lobolo. Her mother phoned the defendant's mother and informed her of the decision. It was arranged that the two families meet on 20 August 2005 at the M[...]³ homestead. The M[...]² family arrived and paid the amount of R8000.00. The M[...]² family was informed that the R8000.00 is only for the cows and that in addition they should also give a knife to the M[...]³ family. An amount of R30.00 was paid towards the knife. The knife was to be utilised to slaughter the cows they should have brought. The M[...]² family was informed that a blanket was needed for the bride. They were supposed to bring a blanket for the mother in law and a blanket for the bride. The father of the bride was to be given a coat and a doek to tie all those items and knobkieries were to be used for herding the cattle. It was agreed that the M[...]² family will bring those items on 18 March 2006 which is the date on which the families will meet to celebrate. On the appointed day the members of the M[...]² family arrived and waited in terms of custom at the gate. They were invited inside the homestead and were taken to the seats allocated to the M[...]² family. The emissaries of the M[...]²

family informed the emissaries of the M[...]3 family that they have arrived. The M[...]2 family informed the M[...]3 family that they are there to hand over the items they were unable to hand over previously, namely the blankets, the coat and the knobkieries.

[6] The items were taken to the M[...]3 family by their emissaries to inspect and both families appended their signatures as proof that they received R8000.00 towards lobolo. After receipt of the lobolo and the specific items the M[...]2 sent emissaries with the request to see the bride. At the M[...]3's family a sheep was slaughtered for the M[...]2 family.

[7] The plaintiff testified that she who was 36 years old at the time consented to the marriage. A blanket was placed on her and she was taken to where the M[...]2 family was seated. The emissaries of the M[...]2 family enquired if they may take the plaintiff with them. The M[...]3 family then lectured her how to behave when she arrives at the M[...]2 family. Her clothes were packed and she proceeded in a motor vehicle to the M[...]2 family homestead. On her arrival at the M[...]2 family's homestead she discovered that there was a gathering as well. They have slaughtered a sheep and provided African beer. They had to pay a fine of R100.00 at the gate to the M[...]2 family's homestead because it was said that they had arrived late. Inside the homestead they were directed where to be seated. The members of the M[...]2 family were ululating. An emissary from the M[...]2 family came to greet them and welcome them. The emissaries of the M[...]3 family informed them that they came with the bride. The emissary from the M[...]3 family gave the M[...]2 family a sheep African beer and porridge. The M[...]2 family brought them food to eat. After eating they were shown the bedrooms. The next day she was shown how to sweep the yard by the emissary of the M[...]3 family. The M[...]2 family then started to celebrate and they consumed the meat and drank the African beer brought by the M[...]3 family. The emissaries who had taken her to the M[...]2 family requested and was granted permission to be released. The defendant took them

to town for them to get taxis to go home. The plaintiff remained at the M[...]2 homestead and they stayed together as husband and wife from then onwards. She was given the name Mantswarisheng by the M[...]3 family to carry to the M[...]2 family. She and defendant had two children at the time when they were married to each other.

[8] During cross-examination the plaintiff stated that the defendant was not present at the M[...]3 family's homestead on 18 March 2006 when the lobolo was paid. He was there only when he brought the M[...]2 people there. He did not attend the function. She stated that on the said date there was also a naming ceremony for the wives of her brothers Michael and Elias when their wives were given new names. She denied the assertion that family members of the defendant went to her family with the aim of paying lobolo and not to have a celebration because there was a celebration of her brothers who got married. It was also denied that there was any form of celebration at the M[...]2 home as described by her. She stated that at the time of their marriage they had been staying together in Polokwane for thirteen years in a government house.

[9] She said that she was never given a new Pedi name by the M[...]2 family. When it was put to her that such a new name is an essential requirement for a Pedi marriage, she replied that her in-laws told her family that when they slaughtered something for them that the defendant would rather have a white wedding for her. It was put to the plaintiff that because there was no naming ceremony and because "Omarero"⁴ never happened, no valid marriage was concluded. The plaintiff stated that the defendant never attended the celebration but he is the one who took the M[...]2 family to the M[...]3 family and he even took them back home.

[10] The plaintiff stated in re-examination that she was given a name by her

⁴ The interpreter explained the meaning of the word to the magistrate at his request that it means the broader family of M[...]2 had never gathered because they were supposed to be informed that they have a new bride and the naming ceremony was supposed to take place.

paternal aunt but was not given a name by the M[...]2 family. She stated that there was no event that stopped the families from celebrating the customary marriage.

[11] The plaintiff called Kwena Jane Matsitela who testified that on the first occasion that she had met the M[...]2 family was when they stopped at the gate of their homestead in August 2005. She was requested to go and collect the visitors and to accompany them inside the house. She was told by the M[...]2 family members that they have been sent because the parents have agreed on something and they have been informed of the amount to pay as lobolo. The M[...]3 family requested her to go and enquire what they have brought. She was given the amount of R8000.00 and she handed it over to the M[...]3 family. The M[...]3 family informed her that they cannot eat these cows without something to slaughter them with. The M[...]2 family paid R30.00 towards a knife to be used to slaughter those cows. She was told to convey to the M[...]2 family that they must bring two blankets (one for the bride and one for the mother in-law) as well as a coat. When she conveyed that to the M[...]2 family they said they will return with the required items. The M[...]2 family returned on the 18th. They were shown the animal to be slaughtered on their behalf. After the items were handed over they asked to see the bride. After seeing her they asked if they may take the bride back with them to the M[...]2 family. When she asked permission from the M[...]3 family if the bride may leave with the M[...]2 family she was told that the bride cannot leave home without a new name being given to her. She was given the name Mantwarisheng. It was late in the afternoon. She proceeded with the bride to the M[...]2 family. She took along African beer, porridge and meat. When they arrived at the M[...]2 family homestead they found the gate closed. When they asked permission to enter they were fined R100.00. The M[...]2 family cut the porridge. They slept at the M[...]2 family homestead that night. The following morning, they were given brooms and they swept. They made fire and warmed water for them to bathe. The M[...]2 family gathered and started to eat the meat, the porridge and they consumed the beer. After they finished, the witness requested to be released. The witness was

taken in a car to the taxi rank by the defendant. She said when she arrived the defendant was present with his parents. She also stated that no celebration was held at the M[...]2 family homestead and that nothing else happened at M[...]2. When she was asked by counsel for the plaintiff if what happened at M[...]2 is not part of the celebration she answered in the affirmative. She testified that the emissaries of M[...]2 consisted of Matala's two sisters and their aunt.

[12] During cross-examination she explained that she is the younger sister of the mother of the bride. She also stated that on the day the lobolo was paid and handed to her there was a celebration at the M[...]3 home. A cow was slaughtered for the two brothers of the plaintiff to bring together the children of that the M[...]3 family. The celebration was a naming ceremony for the wives of the brothers. She testified that it was in respect of the celebration for the plaintiff that M[...]3 must slaughter something for the M[...]2 family to please the ancestors. She again confirmed that no celebration was held at the M[...]2 homestead the night that she slept at the M[...]2 homestead.

[13] In re-examination the witness confirmed that on 18 March 2006 the M[...]3 family held a celebration for the two brothers. No other celebration was held except the celebration for the brothers.

[14] The court enquired from the witness:

"So, would you say the naming of the new bride by her in-laws is a requirement for the marriage in your customary? --- Yes.

So before the naming happens there is marriage even though lobolo might have been paid and the bride might have been delivered there is no marriage --- It is a marriage Your Worship because others look in their pocket to see whether they have got enough to have a white ceremony and

then in that white ceremony that is when they will include the naming part of it.

Mm --- The naming ceremony.

Just to be clear. Are you saying that in case where the naming did not take place and the customary phase of it and you get to the white wedding and the naming happens there, is it only there that marriage is formally concluded then --- Your worship in our culture Your Worship when lobolo has been paid and those something was slaughtered for the in-laws and then if you see that something had been slaughtered on your behalf from the bride's side then you can have a white wedding then after that if something has been slaughtered for you then if the bride is taken to the in-laws then it is okay.

So, in this instance was that something slaughtered for the bride? --- Yes. At which place, at M[...]3 or at M[...]2? --- At M[...]3.

What you are saying now seems to be different from what you said earlier. What then about the naming, if something is slaughtered at the M[...]3's for the bride and she is then into the new family but there is no celebration nothing slaughtered there is no naming. Is that still a wedding or not or a marriage. It is a wedding Your Worship because we are satisfied we did what we were supposed to do.

But the naming was not done by the in-laws yet? --- No

So, it is still a marriage even though the naming was not done by the new family --- The fact remains, they have paid lobolo and they have taken out cows to marry sorry."

[15] Counsel for the defendant then asked the witness:

"Your Worship just one aspect. Ma'am. I put it to you that in the Pedi culture the husband's family who accepts the daughter into their family must have a celebration and must have a naming ceremony for the bride. -
-- Yes, there is supposed to be such.

If there is no? --- We do not control what the M[...]2's will do or not do.

So I just understand you to mean, you mean from your side, from your family's side you had what you had to do? --- That is correct.

Just like the Plaintiffs brothers that have the naming ceremonies for them in March in your family that has not happened yet at the M[...]2 family –
Yes

I just want to understand, was it important for Michael and Elias the two brothers that the naming ceremonies be held by your family --- Correct."

[16] Counsel for the plaintiff asked the witness:

"Ma'am, I would like to get clarity on this aspect. All the M[...]2 families, who was actually responsible to give the name to the bride? --- The M[...]2 family.

Okay, in other words, do you confirm that they failed to discharge their duty on their part? ---

We do not know.

[17] The brother of the plaintiff, Elias M[...]3 testified that a celebration was held at M[...]3's homestead on 18 March 2006. The celebration was for his sister which included a celebration of 'name giving' of the wives of his and his brother. The witness was asked if there was a celebration done for the plaintiff. He answered that the celebration was for him and his brother. Counsel then asked if the celebration, according to his knowledge was only for him and his brother. His reply was that the celebration was for him, his brother and the plaintiff. He stated that the purpose of the celebration, was to receive the items that were not handed over by the M[...]2 family and then the naming ceremony of their wives and, in addition, to confirm that the plaintiff is married to the M[...]2 family. He himself did not go the M[...]2 family homestead after the celebration at the M[...]3 homestead.

[18] In cross examination the witness explained that an appointment was made by the M[...]2 family that they will come and bring the final items to be handed over and to pay the lobola. The naming ceremony was held on the same day to minimize the costs. An animal was slaughtered for that reason. The witness confirmed that he was present when the M[...]2 family arrived at the homestead of M[...]3 and that a sheep was slaughtered for the purpose of celebration.

[19] The court questioned the witness to establish a clear understanding of the custom. He asked:

"Let me just put it differently. According to your custom when were all legal requirements fulfilled for a legal customary marriage in your case? --- In 1998.

Alright. Are you referring to the same wife with the name giving ceremony that you have celebrated in 2006? --- Correct.

Do I understand you correctly that the name giving by your family was not a requirement for the fulfilment of the marriage itself? --- It was one of the requirements Your Worship.

Well, then I am definitely misunderstanding you because you started out by saying: your marriage was concluded finalised legally, customarily in 1998 but then in 2006 you are still doing something to finalise it? --- According to us there is nothing wrong.

Look, I agree with you one hundred percent and I am not saying anything is wrong or that your marriage was not legal. I am trying to establish when L[...]s became legal in terms of customary law because that is the dispute here. Thank you the witness is excused. So, according to you, with or without the celebrations of the day the name giving by the in-laws, when did her marriage become legal in terms of customary law? -- The customary marriage is legalised immediately after they bring everything that they are supposed to bring to the in- laws."

[20] When questioned again by counsel for the plaintiff he stated that there is no time limit in which the bride must be named. The plaintiff was named by the M[...]3 family.

[21] The defendant elected to close his case without adducing any evidence or to call any witnesses. The magistrate, faced once again with the same evidence as before, dismissed the claim with costs. Hence the current appeal.

[22] It is common cause that the antagonists were above the age of 18 years. For purposes of the dispute which the magistrate was requested to adjudicate on, it was necessary to determine if both of them consented to be married and whether a marriage was negotiated and entered into or celebrated in accordance with

customary law as required by section 3 of the Act. The said Act acknowledged, in accordance with section 211(3) of the Constitution, that indigenous law is an integral part of South African law which is applicable to marriages entered into in terms of prevailing African customary law.⁵ Courts must, therefore, satisfy themselves as to the content of the customary law and rules applicable to customary marriages.⁶ The Constitutional Court in *Shilubana and Others v Mwamitwa*⁷ recognised that:

"Like any other law, customary law has a status that requires respect. As this court held in *Alexkor v Richtersveld Community*, customary law must be recognised as 'an integral part of our law' and 'an independent source of norms within the legal system.' It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly."⁸

[23] The court then continued to emphasise that practices followed by different communities inform the content of customary law:

"It follows that the practice of a particular community is relevant when determining the content of a customary norm. As this court held in *Richtersveld*, the content of customary law must be determined with reference to both the history and the usage of the community concerned. 'Living' customary law is not always easy to establish and it may sometime not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community

⁵ *MM v MN* 2013 (4) SA 415 (CC) para 26-27.

⁶ *MM v MN supra* para 48. *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (S) SA 460 (CC) para 51.

⁷ 2009 (2) SA 66 (CC).

⁸ Para 43.

and to acknowledge developments if they have occurred."⁹

[24] This court is also mindful of its duty:

"...where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law." ¹⁰

[25] Past practices and traditions are important factors to consider what the current state of customary law is and, of course, if contemporary practice of the community suggests a change to past practices and traditions then such changes although not decisive, need to be considered to establish what the current state of customary law is. Such practices and traditions may impose validity requirements in addition to the requirements contained in section 3(1) (a) of the Act.¹¹

[26] In *MM v MN supra*, the Constitutional Court following *Shilubana supra* said that the determination of customary law is a question of law and pointed out that the mere assertion by a party of the existence of a rule of customary law may not be sufficient for the establishment of a particular rule of customary law. It is imperative that:

⁹ Para 46.

¹⁰ Para 49

¹¹ Customary law" is defined by the Act as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people. "Customary marriage" is defined by the Act as "a marriage concluded in accordance with customary law."

"First, a court is obliged to satisfy itself, as a matter of law, on the content of customary law, and its task in this regard may be more onerous where the customary-law rule at stake is a matter of controversy. With the constitutional recognition of customary law, this has become the responsibility of the courts. It is incumbent on our courts to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule."¹²

[27] In order to enable a court to establish the relevant unwritten customary law rules, judicial notice may be taken of indigenous law.¹³ The cautionary remarks in *Alexkor supra* are equally important:

"In applying indigenous law, it is important to bear in mind that, unlike common-law, indigenous law is not written. It is system of law that was known to the community, practiced and passed on from generation to generation...Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. In the course of establishing indigenous law. Courts may also be confronted with conflicting views on what indigenous law on a subject provides."¹⁴

[28] From the above, it seems clear that this court is obliged to establish the

¹² Para 48; *Bhe v Magistrate Khaylitsha* 2005 (1) SA 580 (CC) para 150-153.

¹³ Evidence Amendment Act, Act 45 of 1988.

¹⁴ Para 53-55.

content of the customary law rule pertaining to the conclusion of a valid bapedi customary marriage, as a matter of law. It is, as I understand the position, not open to a court to find that a relevant customary-law rule has not been established by the party who bears the onus to prove its cause of action based on a customary-law rule.

[29] It will, in some instances, be difficult for a court to determine what a particular unwritten customary-law rule is, without sufficient evidence of practices in a community. A court, on a literal interpretation of the passage in *MM v MN*, para 48, is obliged to establish a customary-law rule and to evaluate local custom. The obligation placed upon courts may be particularly onerous and challenging for a variety of reasons. Generally speaking a court, in civil litigation, can neither interfere in the manner a case is presented by the parties,¹⁵ nor can it call any witnesses, not called by the parties, without the express consent of the parties.¹⁶ The content of unwritten customary law is sometimes obscured and not widely known. Parties, mostly, do not present evidence of an unwritten rule of customary law or of a particular practice of a community relevant to their case.

[30] The Magistrate held:

"[100] In the current case it followed that in the first instance we should be concerned with the customary law as it is practiced in the communities of the parties before the court. To that end the onus is on the plaintiff to establish the requirements and how the law has evolved in their culture, and how they have been complied with. Had the plaintiff presented credible evidence, there would have been no further need.

¹⁵ *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) para 12-15; *Road Accident Fund v Taylor and other matters* (2023) ZASCA 64 (8 May 2023) para 31; *Media 24 (Pty) Ltd v Nhleko and Another* [2023] ZASCA 77 (29 May 2023) para 18.

¹⁶ *Rowe v Assistant Magistrate Pretoria and Another* 1925 TPD 361; *Buys v Nancefield Trading Stores* 1926 TPD 513,518; *De Lange v Rudman* 1928 EDL 439,442; *Pauley v Marine and Trade Insurance Co Ltd* 1964 (3) SA 657 (W) 658C.

[101] In the appeal proceedings in the Polokwane High Court the defendant's counsel reminded the honourable judges that the evidence presented by the plaintiff did not establish with certainty the requirements in Pedi custom."

[31] The above argument found favour with the magistrate and was also apparently presented to this court in the previous appeal. The proposition that a plaintiff has the duty to prove customary law or a local custom cannot be accepted.

[32] The Magistrate also held that the plaintiff has failed to prove that the marriage has been negotiated or entered or celebrated in accordance with customary law. The evidence of the plaintiff and her witnesses, moreover, were rejected as not credible. I do not agree.

[33] It is surprising that no photographic evidence of the joyful occasion was presented by the plaintiff as proof that the respective families celebrated their union.

[34] Only evidence of the plaintiff and her family members was presented in relation to the process followed when the M[...]3 family was approached by the M[...]2 family to marry the plaintiff. The propositions put to the witnesses during cross-examination are not evidence. No evidence to gainsay the version of the plaintiff and her witnesses was put up by the defendant.

[35] The formalities relating to customary marriages are well known to Africans. The reason is simply that it is a respected institution which is deeply embedded in the African culture with which they grow up, particularly, in rural Limpopo. The conclusion of a customary marriage, first and foremost, is a process that is put into operation when the family of the groom sends emissaries to the family of the

bride to indicate interest in a marriage between the groom and the bride. A meeting between the relatives will be arranged where lobolo is negotiated, together with other gifts. The families will then agree on a date when the bride will be handed over to her new family which might or might not include a celebration or wedding.¹⁷ Payment of lobolo agreed upon and the other gifts may be handed over on the day of the celebration or when the handing over takes place.¹⁸ The handing over signifies that the bride has cut ties with her family and that she is welcomed and integrated within her new family.

[36] It bears notice that the defendant contended that the naming of the plaintiff by the family of the defendant is a pre-requisite for a valid customary marriage to be concluded, in addition to 'handing over' or celebration of the marriage. The naming of the bride by the groom's family is an occasion where she is given a teknonymous name by the groom's family. The naming is not a precondition or a requisite for the conclusion of a valid bapedi customary marriage. It is clear from the plaintiffs brother's evidence that the occasion took place several years after he had entered into a customary marriage. It is celebrated as an illustration of acceptance of the bride into the groom's family whence she will no longer be known by her maiden name.

[37] It was common cause at the trial that the parties cohabited for a period of approximately thirteen years at the time of the impugned customary marriage. They lived together in a government owned house in Polokwane and they have children together.

[38] When the defendant initiated the process of negotiations to marry, he requested the plaintiff to drive his mother to plaintiffs family to go and ask for her

¹⁷ *Fanti v Boto and Others* 2008 (5) SA 405 (C) para 19- 22; *Motsoatsoa v Roro and Others* [2011] 2 All SA 324 (GSJ) para 17.

¹⁸ *Moropane v Southon* [2014] ZACSA 76 (29 May 2014) para 7-8 and 51.

hand in marriage.¹⁹ On their arrival the defendant's mother asked her mother if the defendant may marry the plaintiff. Her mother replied that she needed to gather the M[...]3 family to consider the proposal. They then returned.

[39] The M[...]3 family gathered and agreed that an amount of R8000.00 for lobola. The date of 20 August 2005 was chosen for the two families to meet. The M[...]2 family paid the amount of R8000.00 when they arrived. The M[...]2 family was informed that the lobolo amount is only for the cows. They should have brought a knife. The M[...]2 family then paid an amount of R30.00 towards the knife. The knife would have been used to slaughter the cows they would have brought (as lobolo). The M[...]3 family accepted R30.00 cash *in lieu* of the knife. The M[...]2 family was informed that knobkieries and two blankets (one for the bride and one for her mother) as well as a coat for the father of the plaintiff as well as a 'doek' in which the items may be gathered are needed by the M[...]3 family as gifts. It was agreed that the M[...]2 family will bring the gifts on a future date when the two families will meet and when they will slaughter something towards that. The date of 18 March 2006 was chosen by the M[...]3 family for the handing over of the outstanding gifts. On the agreed date the required gifts were handed over and a sheep was slaughtered by the M[...]3 family. The emissaries of the M[...]2 family draped a blanket over the plaintiff and took her to the room where the M[...]2 family was waiting. The M[...]2 family requested to take the plaintiff with them. She was taken aside where she was lectured how to behave when she arrives at the M[...]2 family. Her clothes were packed and she was taken to the M[...]2 family homestead. At the M[...]2 family homestead they consumed porridge and also had some of the slaughtered sheep to eat and they enjoyed African beer.

[40] This court must decide, on a preponderance of probability, if a customary marriage had been concluded. The negotiations were concluded. The lobolo was paid and gifts to the satisfaction of the M[...]3 family were handed over. The

¹⁹ The request by the defendant signified his consent to the marriage.

celebration of the marriage took place when the sheep was slaughtered at the M[...]3 homestead with the family members of both families in attendance. The handing over of the bride to the M[...]2 family was celebrated when the plaintiff was presented to the M[...]2 family at their homestead by the second witness who acted as an emissary with the drinking of beer and eating of porridge and the consumption of meat. In the absence of any evidence to the contrary, a valid customary marriage, in my judgment, had been concluded.

[41] I am, therefore, of the view that the appeal should succeed.

ORDER

1. The appeal is upheld with costs.
2. The order of the Regional Court dismissing the plaintiff's claim with costs is set aside.
3. It is declared that the parties entered into a valid customary marriage.
4. The defendant is ordered to pay the costs.

GC MULLER
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

I concur

M NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

APPEARANCES

For the Appellant : Adv R Chikoro

For the Respondent : Adv Mark Du Plessis

Date judgment reserved : 22 February 2023

Date judgment delivered : 13 June 2023