**IN THE HIGH COURT OF SOUTH AFRICA**

**MPUMALANGA DIVISION, MBOMBELA**

**Case no. A08/2021**

| | |
|---|---|
| (1) | **REPORTABLE: YES** |
| (2) | **OF INTEREST TO OTHER JUDGES: YES** |
| (3) | **REVISED.** |

**26/10 /2021** — **DATE**

**NDLOKOVANE AJ** — **SIGNATURE**

In the matter between:

**NGWENYAMA PILATO** — **APPELLANT**

**AND**

**ALUCIA NOMONDE FAKUDE** — **RESPONDENT**

**IN RE:**

**REGIONAL COURT FOR THE DIVISION OF MPUMALANGA HELD AT MBOMBELA CASE NO: MRCC:83/2020 JUDGEMENT HANDED DOWN BY MAGISTRATE KHUMALO ON THE 28th of OCTOBER 2020**

**Between:**

**ALICIA NOMONDE FAKUDE** — **APPLICANT**

**AND**

**DEPARTMENT OF HOME AFFAIRS** — **FIRST RESPONDENT**

**MASTER OF THE HIGH COURT** **SECOND RESPONDENT**

**STANDARD BANK LIMITED** **THIRD RESPONDENT**

**PILATO NGWENYAMA** **FOURTH RESPONDENT**

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**JUDGEMENT**

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**NDLOKOVANE AJ**

## INTRODUCTION

[1] This is an appeal against the decision of a Regional Court Magistrate (the Court a *quo*"). The court a *quo* found that the marriage between the Respondent and the late Tsepo Hector Ngwenyama (the deceased), the son of the Appellant, contracted on 4 June 2010, was a valid customary marriage and ordered costs against the appellant on an attorney and client scale.

[2] Aggrieved by the court ***a quo's*** finding and order, the Appellant has approached this court on appeal. The appeal is opposed by the Fourth Respondent only. For purposes of convenience, I shall refer to the Fourth Respondent as Ms Fakude.

## FACTUAL BACKGROUND

[5] A brief factual background giving rise to the proceedings in the court a *quo* is necessary: Ms Fakude instituted an application in the court *a quo* for, *inter alia*, a declaration that her customary marriage to the late Tsepo Hector Ngwenyama ('the deceased') was valid. Furthermore, she sought an order for the condonation of the late registration thereof and direction that the Department of Home Affairs (the Department), should register the said marriage in terms of s 4(7) of the Recognition of Customary Marriages Act 120 of 1998 ('the Act'). Ms Fakude sought an order of costs on an attorney client scale, if there was any opposition to the application. The application was opposed by the Appellant.

[7] Ms Fakude and the deceased met in 2004, after which a love relationship between them developed. It was common cause that in 2010, the deceased asked for Ms Fakude's hand in marriage. A letter was dispatched to Ms Fakude's parents asking for her hand in the marriage through *lobola*.

[9] On the 4 July 2010, the deceased sent emissaries to Ms Fakude's parental home where *lobola* was negotiated and agreed at R30 000.00. Of the amount of R30 000.00 the emissaries made a part payment in the amount of R12 000.00, accompanied by various gifts from the deceased's family to the Fakudes in terms of annexure "ANF1", attached to the record in these proceedings.

[10] After *lobola* was paid, refreshments were served, and Ms Fakude was introduced to the deceased's emissaries as their bride. Later in July 2010 Ms Fakude moved in with the deceased. Three children were born of the union between Ms Fakude and the deceased, namely a girl born in December 2010, followed by another girl in July 2013 and the last born, a boy, born in 2014.

[12] On 11 March 2017, the deceased and Ms Fakude registered the *lobola* agreement at the iNkambeni Traditional council led by Chief Mhaule through annexure ANF5, which was attached to record in these proceedings. The deceased, Ms Fakude and their children lived together at their matrimonial home situated at Hazyview Sabi River Eco Estate until the untimely death of the deceased in a motor vehicle accident on 9 October 2019. At the time of the deceased's death, the customary marriage had not been registered with the First Respondent, in accordance with the provisions of the Act.

<u>The appellant's contentions</u>

[15] Before the court *a quo* and again in his notice of appeal before us, the Appellant contends that the serving of refreshments at the end of the lobola negotiations did not amount to a seal of a binding customary marriage and instead was a mere gesture of courtesy and affinition agreement between the two families.

[16] Further grounds of appeal are that the learned magistrate in the court *a quo* erred in rejecting the documentary evidence filed on behalf of the Appellant, which allegedly established that the deceased was not married to Ms Fakude and in finding furthermore, that there was a valid customary marriage between the deceased and Ms Fakude despite the two not living as husband and wife. The Appellant contends

furthermore that the Court a *quo* erred in that it failed to exercise its discretion properly and judicially in granting the order of costs against the Appellant.

[17] In his notice of appeal, the Appellant stated that he reserved the right to amend and or supplement his notice of appeal once the written reasons of the learned magistrate would have been provided and or obtained. In the heads of argument, the Appellant raised further grounds of appeal, that the learned magistrate erred in finding that the judgement in ***Mbungela and Another v Mbaki and others 2020 (1) SA 41 (SCA***) was applicable in the matter.

The respondent's grounds of opposing appeal

[19] Ms Fakude did not file a notice opposing the appeal but filed heads of argument in this court. Counsel for Ms Fakude contends, in the heads of argument, that the appeal lacks prospects of success and raises two main grounds in opposing this appeal, namely non-compliance with the rules of this Court and lack of factual and legal basis to sustain the appeal.

[21] Regarding non-compliance with the Uniform Rules of Court, counsel for Ms Fakude raises the following:

(a) the Appellant failed to comply with the provision of section 50(1) read with subsection (4) of the Uniform Rules of Court in that, the Appellant noted an appeal on 24 November 2020 but only lodged the appeal and completed form F, a form filed for the management of appeal matters in accordance with practice directive of this court, on 8 March 2021;

(b) further that there was no agreement reached between parties on the extension of the time periods provided by Rule 50(1) of the Uniform Rules of Court;

(c) there was no record of proceedings and or a copy of the reasons from the magistrate.

[22] Regarding lack of factual and legal basis to sustain the appeal, it is contended *inter alia,* that:

(a) in declaring the customary marriage valid, the learned magistrate based his decision on evidence presented before him through the l*obola* letter and confirmation thereof annexed as "ANF1" and "ANF5" respectively;

(b) the magistrate found that, based on ***MMN v MFM and the Minister of Home Affairs* (474/11 [2012]** and ***Gumede v President of the RSA and Others* 2009 (3) SA 152 (CC**) that a celebration in the form of *Ukumekeza* is not a requirement for a valid customary marriage and as such it is misleading to state that the learned magistrate based his finding on celebration on the day of the *lobola* negotiation, and;

(c) the court judicially exercised its discretion when it determined the costs after listening to arguments advanced by both parties.

[26] Attached to the heads of argument of Ms Fakude's counsel, was a letter dated 28 November 2020 wherein Ms Fakude's attorneys of record brought the issue of the time frames to the attention of the appellant. The letter reads as follows:

> "1*. We hereby wish to state that we have received the purported notice of appeal which was served on our correspondent attorney's office (MG Boshoff Attorney) on the 24 November 2020 regarding the judgement taken on 28 October 2020 by the learned Magistrate Mr Khumalo.*
>
> *2. On the strength of the above, we wish to categorically state that, in the absence of a copy of the lodged and court stamped notice of appeal we will disregard the document served on our correspondents' office and proceed with the execution of our instruction as per the court order, as it doesn't serve as a court document and as such, we are unable to calculate the prescribed period due to the lack of that actual date of noting such as appeal*
>
> *3. We further wish to inform you that the prescribed period in terms of rule 51(1) of the Magistrates' court rules, from the date of judgement has lapsed and further that the 20 days' period from the date of judgement has lapsed too".*

Legal questions for the court's determination

[23] This court is called upon to make a pronouncement on:

(a) whether or not the Appellant has complied with the applicable rules and directives in prosecuting this appeal, if not, who must bear the legal costs?

(b) whether or not the learned magistrate erred in finding that a customary marriage existed between Ms Fakude and the deceased and it properly and judicially exercised its discretion in granting the order of costs against the Appellant.

The Process of Appeal on question of law

[24] Section 84 of the Magistrate Courts Act 32 of 1944 provides, *inter alia*, that every party noting an appeal shall do so within the period and in the manner prescribed by the rules. The periods for noting an appeal in the Magistrates Court are laid down by rule 51(3) of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa ("the Magistrate's Court rules") and the periods for prosecuting appeals in the High Court are governed by rule 50 of the Uniform Rules of Court, ("the High Court rules"). In other words, the prosecution of an appeal from the Magistrate's court is a proceeding whose foundation is laid in the Magistrates Court Rules, but which is conducted in the High Court.

[25] An appeal must therefore be noted within the period and in the manner prescribed by the Magistrate's Court rule 51 and prosecuted within the period and in the manner prescribed by High Court rule 50.

[26] Rule 51 of the **Magistrates Courts' rules** states that:

*"(1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal the judicial officer shall within 15 days' hand to the registrar or clerk of the court a judgment in writing which shall become part of the record showing—*

*(a) the facts he or she found to be proved; and*

*(b) his or her reasons for judgment.*

*(2) The registrar or clerk of the court shall on receipt from the judicial officer of a judgment in writing supply to the party applying there for a copy of*

*such judgment and shall endorse on the original minutes of record the date on which the copy of such judgment was so supplied.*

*(3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be the longer.*

*(4) An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R1 000: Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board."*

[27] Rule 51(3) provides, i*nter alia*, that an appeal may be noted within 20 days after the date of the judgement appealed against. This will be the case where an appellant has not made a request for judgement in writing as provided for in rule 51(1) of the Magistrates' Court Rules.

[28] Rule 2 (2) of the Magistrates Court Rules provides that:

> *"A Saturday, Sunday or public holiday shall not, unless the contrary appears, be reckoned as part of any period calculated in terms of these rules"*

[29] Making reference to ***Suliman Mia v Bulbolia*** **1924 (1) PH F13,** in *Erasmus Superior Court Practice,* the learned authors say that as a general rule, in computing a period of time in terms of the definition, the first date is to be excluded and the last date included and, where a rule or order of court prescribes that something shall be done "within" a particular number of days "after" a named day or event, the named day or event is excluded from the calculation and the period starts to run from the following day, whether the word "after" or "from" or "of" is used.

[30] The commentary, *Jones & Buckle The Civil Practice of the Magistrates Court in South Africa* states, in relation to the terms of rule 51 (4) of the Magistrate Court Rules, that delivery means filing with the clerk of the court and serving a copy on the

respondent as envisaged in Rule 2 (1) (b). In their discussion of the meaning of delivery the authors observe that both the filing with the clerk of the court and the service upon the opposite party must take place within the proper time and if one of this is omitted, there is no valid service.

[31] Bringing an appeal to the notice of the other party in a manner which is not in accordance with those prescribed by the rules is not sufficient**.** Rule 51 (8) of the Magistrates Court Rules reads as follows:

> *(a) Upon delivery of a notice of appeal, the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing so far as may be necessary having regard to any judgments in writing already handed in by him or her)-*
>
> *(i) The facts he or she found to be proved;*
>
> *(ii) The grounds upon which he or she arrived at any finding of fat specified in the notice of appeal as appealed against; and*
>
> *(iii) His or her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against; and*
>
> *(b) A statement referred to in paragraph (a) shall become part of the record.*

[33] The Magistrate's written explanation forms an integral part of the appeal record and serves to assist the court of appeal to deal with the appeal in a speedy and decisive manner. (see, ***Regent Insurance Company Limited v Maseko* 2000 (3) SA 983 (W) at 990 A-E).**

[34] Rule 51(9) of the Magistrates Court Rules reads in relevant part as follows:

> *"(9) A party noting an appeal… shall prosecute same within such time as may be prescribed by the rule of the court of appeal and in default of prosecution, the appeal shall…be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary,"*

[35] In terms of Rule 50(1) and 50(4) of the **High Court rules**, the following is stated in respect of the prosecution of appeals:

*(1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.*

*(4) (a) The appellant shall, within 40 days of noting the appeal, apply to the registrar, in writing, and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented.*

*(b) In the absence of such an application by the appellant, the respondent may at any time before the expiry of the period of 60 days referred to in subrule (1) apply for a date of hearing in like manner.*

*(c) Upon receipt of such an application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted.*" (Own emphasis).

[36] The ***Practice Directive For Mpumalanga Division Of The High Court*** issued In terms of Section 8(3) of the Superior Courts Act 10 of 2013, read with Rule 37a (1) and (2) of Uniform Rules of Court as amended, on Enrolment and Management of Civil and Criminal Appeal ("the Practice Directives") states in paragraphs 21 that:

> *"21.1 Every appeal matter shall be case managed and enrolled for hearing as contemplated in paragraph 21.2, hereunder and appeal matter shall be enrolled for hearing on each Friday of civil trial week. The number of matters so enrolled shall not exceed six matter per roll.*
>
> *21.2 In managing appeal cases, the parties or their legal representatives shall complete Form F of this Practice Directive in terms of which the parties or their legal representatives determine the date of hearing and time frames to ensure readiness thereof.*
>
> *21.3 Within five days upon receipt of an appeal from the clerk of the lower court, or after granting of a petition by two judges of petition from the lower court, the registrar's clerk shall enrol the matter for case management.*
>
> *21.4 Should the Registrar fail to enrol an appeal matter for case management within 5 days upon filling of an appeal or granting of petition*

*by two judges, any party thereto shall be entitled to approach the registrar to have the matter placed on the case management roll.*

*21.5 …….*

*21.6 Once a date of hearing is chosen, Form F shall be completed and parties or their legal representatives shall accordingly set the time frames for themselves as provided in Form F…….”*

[37] Rule 50(4) (c) of the Uniform Rules court states that an appeal is deemed to have been duly prosecuted when an application for a date of hearing has been made in writing to the Registrar of the High Court on notice to all other parties. See also **Hall v Van Tonder 1980 (1) SA 980 (C) at 910.**

[38] If one were to summarise the time frames and the appeal process from a judgment in the magistrates’ court in this division, it would be as follows:

a. Within ten (10) days of judgement, and before noting an appeal, a party may request for reasons thereof (rule 51(1));
b. Within 15 days of delivering judgement the magistrate hands the written judgement to the clerk of court, whether a party has requested reasons or not. The judgment should show the facts that the magistrate found to be proved and his or her reasons for judgment. (Rule 51(1));
c. The clerk of court is supposed to supply a copy of the written judgment to a party who requests for it and endorse the date which the copy was supplied. (Rule 51(2));
d. The appellant is supposed to note an appeal in the magistrates’ court, that is within 20 days of the judgment or 20 days after the written judgment has been supplied. (Rule 51(3));
e. Noting an appeal means delivering a stamped notice of appeal to the respondent and filing same with the clerk of court, together with the requisite security deposit for the respondent’s cost of appeal Rule 51(3) Magistrates court Rules);
f. Within 40 days of noting appeal in the Magistrates Court, Appellant should apply to the Registrar of the High Court in

writing, on notice to other parties, for a date to be assigned to the appeal. (50(4) Uniform Rules of Court);

*g.* Within five (5) days of receipt of an appeal from the clerk of the lower court *the registrar's clerk enrols the matter for case management. (Practice Directive);*

*h. Should the Registrar fail to enrol an appeal matter for case management within 5 days upon filling of an appeal or granting of petition by two judges, any party thereto shall be entitled to approach the registrar to have the matter placed on the case management roll (Practice Directive);*

*i. Once a date of hearing is chosen, parties then complete Form F and accordingly set the time frames for themselves as provided in Form F (Practice Directive).*

**Whether the Appellant has followed the Appeal Procedure**

[39] Having set out herein above the prescribed procedure in civil appeals in terms of the rules of both the Magistrates Court and the High Court as well as the practice directive of this division, it remains to be seen whether the Appellant in the present appeal has complied with the rules regulating the appeals from the Magistrate court to the High court. I hasten to state herein that the Appellant has not followed the procedure provided for in the Magistrate's court rule 51 and uniform rule of court 50.

**Noting of the appeal**

[40] In the appeal before us, the Magistrate in the court *a quo*, gave an oral judgement on 28 October 2020. In terms of Rule 51(1), appellant ought to have applied in writing to the clerk of the court for the facts that the magistrate found to be proved and the reasons for judgment ought to have been made by any party within 10 days after judgment. There is no indication in the papers before us that the Appellant made a request for a judgement in writing as provided for in rule 51(1) of the Magistrates' Court Rules. We do not have before us the written judgment of the magistrate in the court *a quo*, we only have the transcribed record of the judgment.

[41] In terms of rule 51 (3) the Appellant ought to have noted an appeal within 20 days after Wednesday 28 October 2020, when judgement was delivered. Applying the above interpretation of Rule 2 of the Magistrates Court rules, 20 days started running on Thursday 29 October 2020 and terminated on Wednesday 25 November 2020.

[42] The Appellant's notice of appeal filed of record is stamped 24 November 2020, and which was served on the Respondent's attorneys of record on the same day, but unstamped according to the letter of Ms Fakude's attorneys of record. The stamped notice of appeal must be filed with the Clerk of court and served on the Respondent within 20 days. There is nothing to show that the Appellants ever remedied the breach indicated in the letter of 28 November 2020**,** nor did counsel address the issue in his heads of argument filed on 26 March 2021. We therefore find that the Appellant did not timeously note its appeal.

**The record of appeal**

[43] In terms of Rule 51(1) the written judgement, and in terms of rule 51(8)(b) the magistrate's statement should form part of the record of appeal.

[44] In terms of Rule 50 (7)(c), the record of appeal shall contain a correct and complete copy of the pleadings, evidence, and all documents necessary for the hearing of the appeal.

[45] We do not have before us a complete copy of all documents, because, we do not have the magistrate's written judgement in terms of rule 51(1) or the magistrate's statement in terms of rule 51(8) of the Magistrates Court rules. What we have is a transcription of the judgment handed down orally, something which is not required in terms of the rules. All that the rules require is the magistrate's written judgment in terms of 51(1), and a statement in terms of rule 51(8) supplementing such judgment, which addresses issues raised in the notice of appeal.

**Prosecution of the Appeal**

[46] In terms of Rule 50(4)(a) of the Uniform Rules of Court, the Appellant should have applied in writing to the Registrar of the High Court, on notice to other parties, for the assignment of a date for the hearing of the appeal. Noting that the judgement was delivered on 28 October 2020 and the filed notice of appeal is stamped 24 November 2020, the appellant ought to have written to the Registrar of the High Court within 40 days of 24 November 2020, that is by Thursday 21 January 2021 for assignment of the date for the hearing of the appeal.

[47] In terms of Rule 50(4)(c) upon receipt of an application as envisaged in Rule 50(4)(a), the appeal shall be deemed to have been duly prosecuted. Clearly, there is no indication in the indexed and paginated bundles that the Appellant had applied for assignment of a date for the hearing of the appeal within the period provided for in the Uniform Rule of Court 50(4) or at all.

[48] The index of the appeal records and notice of appeal bear a date stamped of this court for 8 March 2021. Assuming that such filing was an attempt to comply with rule 50(4), it would have been out of time in that it was 71 days after the appeal was noted in the Magistrates Court and 31 days after the period within which the appeal ought to have been filed in this court.

[49] There was no application to condone the non-compliance with the rules. Consequently, we find that the appeal was not duly prosecuted in terms of the Rules. It follows therefore that the appeal lapsed as dictated by Rule 50(1).

**Appellant's enrolment of appeal**

[50] In terms of Rule 50 (5) of the High Court rules, upon receipt of an application for a date of the hearing of the appeal, the Registrar of the High Court shall forthwith

assign a date which shall be at least 40 days after the application. The registrar would then give all the parties 20days notice of the date on which the appeal is set down.

[51] The notice contemplated in rule 50(5) does not appear *ex facie* the appeal record. What appears in the record are the heads of argument on behalf of the appellant and Ms Fakude's were filed on 26 March 2021 and 31 March 2021 respectively and the parties Form F which is date stamped 21 May 2021 and states in paragraph one that the appeal in the matter was filed on 8 March 2021. There is also a notice of enrolment dated 11 June 2020.

[52] At some point, the appellant somehow procured the enrolment of the appeal by the Registrar of this court for hearing. This was done despite not following the procedure prescribed in the Magistrate's court rule 51(9) and the Uniform Rule of court 50(1) and (4) and (5) for prosecuting the appeal

[53] The following irregular steps are apparent from the papers before us:

j. the Appellant did not properly note the appeal in that the notice served on Ms Fakude did not bear a court stamp as provided for in rule 51(4) read with rule 51(3) of the Magistrates Court Rules.
k. the Appellant did not apply to the Registrar for assignment of a date of the hearing of the appeal within the set time as required by the rule 51(9) read with rule 50(4), and for that reason we find that the appeal has lapsed.
l. the Appellant did not, as required in rule 50(7)(c), lodge a complete record of the matter as contemplated in rule 51(1) and 51(8) of Magistrates Court Rules.

m. The Registrar somehow assigned the date of hearing of the appeal without having received a written application from the appellant as provided for in uniform rule of court 50(4)
n. the notice of appeal *ex facie* does not even indicate whether the appeal is against the whole or part of the court *a quo's* judgement.

[54] Despite the Appellant's non-compliance with the rules regarding the appeal, the Appellant did not bring any application for condonation. Instead, in the written submission dated July 2021, the Appellant submitted that once the party completes form F in terms of the practice directives, it has an automatic waiver of application of the hearing date in terms of the Uniform Rules of Court. This interpretation is misplaced. As the heading of Form F states, it is for purposes of case management of an appeal. The first paragraph of that form clearly requires parties to fill in a date on which the appeal was filed. Filing is done in terms of rules of court and Form F simply records that date of filing. Paragraph 3 of Form F then states time frames that parties or their legal **representatives should agree on which to ensure that the record and heads of** argument ought to be filed. Form F does not replace rule 51(4).

[55] In view of the above, the point in *limine* raised by the respondent must succeed. However, as often stated, the rules are for the court and not the court for the rules. Consequently, the Appellant's failure to comply with the rules will not preclude the court from dealing with the merits of the appeal.

**Whether a customary law marriage was validly concluded**

[56] Section 3(1) of the Recognition of Customary Marriages Act 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.'*

[57] In ***Shilubana & others v Nwamitwa*** **2009 (2) SA 66 (CC) paras 44-46**; the Constitutional Court cautioned courts to be cognisant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights.

[58] In ***Ngwenyama v Mayelane and Another*** **2012 (4) SA 527 (SCA**) the SCA stated as follows:

> '*The Recognition Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence.' (Own emphasis.)*

[59] In ***Tsambo v Sengadi,*** **[2020] ZASCA 46 the SCA** stated that

> "*It is evident …that strict compliance with rituals has, in the past, been waived. ... Clearly, customs have never been static. They develop and change along with the society in which they are practised. Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law"*

.

[60] Our courts have, in a number of cases, been called upon to consider whether non-observance of the bridal transfer ceremony invalidates a customary marriage.

[61] *In* ***Mbungela and Another v Mbaki*** **and others 2020 (1) SA 41 (SCA)**, which the Appellant argues was not applicable in *casu,* the court said:

*"It is important to bear in mind that the ritual of handing over of a bride is simply a means of introducing a bride to her new family and signify the start of the marital consortium… proof of cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has raised no objection nor showed disapproval, by, for example, demanding a fine from the groom's family….*

*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 ones, could yield untenable results. (paragraphs 25 to 27) ".*

[62] I find that the case *Mbungela and Another v Mbaki* is applicable *in ca*su.

[63] In ***Mabuza v Mbatha, 2003 (4) SA 218 (C)*** where the court found that there was a valid siSwati customary marriage between plaintiff and defendant, the court considered whether non-compliance with the siSwati custom of bridal transfer, *ukumekeza*, invalidated a customary marriage. The court said:

*"[T]here is no doubt that ukumekeza, like so many other customs, has somehow evolved so much that it is probably practised differently than it was centuries ago… As Professor De Villiers testified, it is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.*

*Further support for the view that African customary law has evolved and was always flexible in application is to be found in T W Bennett A Sourcebook of African Customary Law for Southern Africa. Professor Bennett has quite forcefully argued (at 194):*

> *"In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters [because of a pregnancy or elopement]."*

**Application of the law**

[64] The court *a quo* found that it was common cause that, there was an agreement to perform a customary marriage, parties entered into *lobola* negotiations, and twelve thousand rands of the agreed amount had been paid and parties were served food after the *lobola* negotiations. There was a letter recording the negotiated l*obola*, what had been paid and what was outstanding, as well as and the names of the people representing the deceased's family and Ms Fakude's family. There was no statement in the letter to say a marriage would only come to being after a handover or payment of all l*obola*. The parties also registered their customary marriage and *Lobola* agreement at the iNkambeni Traditional council led by Chief Mhaule.

[65] The basis of the Appellant's objection to the existence of a customary marriage was that no cow was slaughtered, there was no handover and no celebrations observing unspecified rituals.

[66] In ***Tsambo v Sengadi*** *supra* as in this case, the appellant who was the deceased husband's father, in denying the existence of a customary marriage between his son and the respondent, argued that 'at best for the deceased, the necessary customs, rituals and procedures required for the conclusion of a customary marriage may have commenced, but were not proceeded with or completed.' He averred that the meeting that took place when money was transferred from the deceased to the Respondent's family was confined to *lobola* negotiations and what

happened thereafter merely constituted a celebration of the successful conclusion of the *lobola* negotiations.

[67] Much like the Appellant in this case, the father in T*sambo* contended that in terms of custom, subsequent to the initial payment of lobola, a date is set on which the bride's family will hand over the bride to the husband's family, 'go gorosiwa', and upon arrival a lamb or goat is slaughtered, and the bile therefrom is used to cleanse the couple. He contended that the performance of that ritual would signify the union of the couple and the joining of the two families. That ritual would be followed by a celebration, during which the lamb or goat that was slaughtered would be consumed. The Appellant contended that because that ritual was not observed, the handing over of the bride, which he considered as the most crucial part of a customary marriage, did not take place. Thus, so it was contended, no customary marriage came into existence between the deceased and the respondent.

[69] In ***C v P [2017] ZAFSHC 57***,where R20 000.00 had been paid towards *lobola*, there was a document signed by both families which it is recorded that the plaintiff's family received *lobola* and food was served, but no festivities or celebrations took place, the court found that a valid customary marriage was concluded between the parties because they lived together as husband and wife together after *lobola* was paid, "constructive delivery" is present. The court found that formal ceremonial handing over under these circumstances would be mere a ceremonial gesture with no adverse consequences on the validity of the customary marriage.

[70] I find that the weight of precedent favours the existence of a marriage where there is no ritual to handover a bride but *lobola* has been paid and there is recognition of the establishment of a relationship and parties have lived together. What is more significant in this case is that the deceased and Ms Fakude registered their marriage with the traditional leadership. I find that the court *a quo* righty rejected the will which described the deceased as unmarried.

**COSTS**

[71] Ms Fakude has asked for costs on an attorney client scale. Costs on an Attorney and client costs are awarded only in very exceptional or special circumstances. See Herold ***v Sinclair*** **1954 (2) SA 531 (A) at 531.**

[72] It is trite that the granting of a cost order is in the discretion of the court which must be considered judiciously.

[73] As noted earlier the Constitutional Court cautioned on the need to consider legal certainty, respect for vested rights and the protection of constitutional rights. In making an order for costs, one of the considerations that the court a quo applied was that despite sending a delegation to the lobola negotiations, and despite there being grandchildren, the Appellant persisted in denying the existence of a valid customary marriage between the deceased and Ms Fakude. I cannot fault the exercise of the court *a quo's* discretion on the circumstances.

**ORDER**

[74] In the result the following order is made:

74.1 The appeal is dismissed.

74.2 Appellant shall pay the costs of the appeal.

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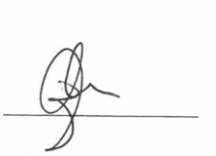
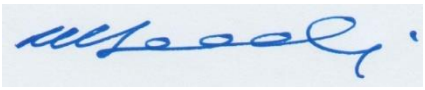


**NDLOKOVANE N**

**ACTING JUDGE OF THE HIGH COURT**

**MPUMALANGA DIVISION, MBOMBELA**

I agree. It is so ordered.



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**LEGODI F**

**JUDGE OF THE HIGH COURT**

**MPUMALANGA DIVISION**

**DELIVERED : THIS JUDGEMENT IS HANDED DOWN ELECTRONICALLY BY CIRCULATION TO THE PARTIES' LEGAL REPRESENTATIVES BY EMAIL. THE DATE AND TIME FOR HAND-DOWN IS DEEMED TO BE …….**