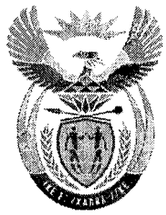


IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO. 6567/2007

In the matter between:

NTOMBELANGA NOVUYISANANI MRAPUKANA	**APPLICANT**
And	
THE MASTER OF THE HIGH COURT	**1ST RESPONDENT**
MANDISA MIRRIAM MAGWAXAZA	**2ND RESPONDENT**

JUDGMENT DELIVERED ON 21 NOVEMBER 2008

DLODLO, J

[1] The Applicant/Plaintiff in this matter (an adult female person resident at Ntywenka Administrative Area in Tsolo district, Eastern Cape Province), brought an application on urgent basis seeking the following order against the Second Respondent/Defendant:

(a) That the appointment of Mandisa Mirriam Magwaxaza (The Second Respondent/Defendant) as the executrix and administratrix of the estate of the late Mr. Luvo Magwaxaza (the deceased)

reported under estate number 3790/07 be cancelled and/or set aside and that her appointment by the Master be substituted by an appointment of an Attorney chosen by the beneficiaries in the deceased estate.

(b) That the purported civil marriage between the Second Respondent/Defendant and the deceased be declared null and void *ab initio*.

(c) That (a) and (b) orders mentioned above shall operate as an interim interdict and/or mandamus pending the return date of this application.

(d) That a Rule Nisi be issued calling upon the Respondents/Defendants to show cause on a date to be specified by the Court why aforegoing paragraphs (a) and (b) should not be made final.

(e) The Respondents/Defendants be ordered to pay costs of the application.

A *Rule Nisi* to the above effect with certain amendments was granted earlier on in this Court. This is therefore the return date of the *Rule Nisi*.

BACKGROUND

[2] The deceased in this matter is father to two (2) sons, Lutando Magwaxaza (born on 31 July 1992) and Luzuko Magwaxaza (born on 9 February 1995). The two (2) boys' biological mother is Ntombelanga Novuyisanani Mrapukana, the Applicant/Plaintiff in the instant matter. The Applicant/Plaintiff averred in the application that she was married to the deceased by way of customary marriage and that the two (2) sons mentioned above are in fact children born

between her and the deceased. It is common cause that the deceased was born and bred at Ntywenka administrative area, (Rural tribal reserve) Tsolo in the Eastern Cape. Similarly the Applicant/Plaintiff is born in the same area. It is alleged by the Applicant/Plaintiff that their customary marriage consummated at their place of birth. The deceased who initially worked in Johannesburg (but maintained his place of origin in the Eastern Cape) subsequently found his way to the Western Cape and he eventually operated a taxi business in Cape Town. He resided at Delft-South, Cape Town. As a taxi operator, the deceased registered for and became a member of a taxi organization called Codetta. The deceased apparently, like most persons that came for work in urban areas, fell in love with one Mandisa Mirriam Magwaxaza, cited as the Second Respondent/Defendant in these proceedings. According to the Second Respondent/Defendant she and the deceased got married first by way of customary union and secondly by way of civil marriage. It is common cause that the Second Respondent/Defendant stayed together with the deceased at a house in Delft-South, Cape Town, Western Cape. It is also common cause that the deceased did not make it a secret of his own that he was the biological father of two (2) sons referred to above. He fetched the two (2) sons from Tsolo in the Eastern Cape and they came to stay with him and the Second Respondent/Defendant at their Delft house. This, according to the papers and the oral testimony was the position until the demise of the deceased.

[3] It is common cause that the deceased was attacked, shot and killed by unknown persons who arrived at his Delft house. He was, as is

customary, buried at his place of birth, namely Ntywenka reserve, Tsolo, in the Eastern Cape. It is also common cause that the Applicant/Plaintiff did not attend the funeral of the deceased. The reason for her failure to attend was given by her when she testified. Her reason is, however, disputed by the First Respondent/Defendant. The latter did attend the funeral of the deceased in the Eastern Cape. Upon her return from the Eastern Cape, she discovered that the taxis belonging to the deceased which should have been at his house at Delft-South, were nowhere to be found. On being assisted by the taxi organization, Codetta, she eventually succeeded to get these taxis back to her. They were in fact found to have been taken by the sister of the deceased (one Lulama) who also then worked and stayed in the Cape Town area. These taxis apparently formed the biggest portion of the estate of the deceased because they generated income for the deceased and subsequently for the Second Respondent/Defendant who continued the business with the assistance of Codetta. Concerns and unhappiness developed from the deceased' family members regarding the fact that the First Respondent had appointed the Second Respondent/Defendant as the executrix of the deceased estate. This resulted in the present application being lodged. The application is resisted by the Second Respondent/Defendant on various grounds but the most important ground of opposition she used is that the Applicant/Plaintiff in her Replying Papers questioned the validity of the marriage between the Second Respondent/Defendant and the deceased. Clearly the papers then showed that there existed a dispute of fact rendering it difficult or even impossible for the dispute to be decided on the papers before Court.

[4] On 8 August 2007 the matter was dealt with by my brother Sholto-Douglas AJ who made the following order:

"1. That the matter be transferred to the 4th Division of this Honourable Court to the 26th of November 2007 for the hearing of oral evidence on the following issues:

1.1 Whether there was a customary marriage between the Applicant and the deceased;

1.2 If so, whether at the time of the conclusion of the marriage between the Second Respondent and the deceased, such marriage still subsisted;

1.3 The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 14 below;

1.4 Save in the case of the Applicant and the Second Respondent, neither party shall be entitled to call any witnesses unless:

1.4.1 It has served on the other party at least 14 days before the date appointed for the hearing a statement wherein the evidence to be given in chief by such person is set out;

1.4.2 The fact that a party has served a statement in terms of paragraph 1.4.1 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned;

1.4.3 That the rule nisi be amended to read as follows:

2.1 The Master of the above Honourable Court, is directed to appoint an independent executor/executrix;

2.2 Such appointed executor/executrix is directed to realize all the assets belonging to the deceased estate and further operate the

deceased taxi business for the benefit of the estate up until the finalization of this matter;

2.3 *Executor/executrix is directed to provide maintenance for the deceased minor children, being Lutando Magwaxaza, Luzuko Magwaxaza and Mpho Magwaxaza from the proceeds of the taxi operations with effect from the 1st September 2007;*

2.4 *Such maintenance be an amount of R500,00 per month for each child and such shall be payable to Ms Mrapukana in respect of Lutando and Luzuko Magwaxaza and also to Mrs. Mandisa Magwaxaza in respect of Mpho Magwaxaza;*

2.5 *Such appointed executor/executrix is directed not to distribute the estate pending the finalization of this matter;*

3. *The Sheriff of the Court is directed to release all the deceased' assets to whoever is appointed by the Master as Executor subsequent to this order;*

4. *Costs to stand over for later determination."*

The matter proceeded before me as per the above Court order.

THE FOUNDING AFFIDAVIT AND ORAL EVIDENCE

[5] Ntombelanga Novuyisanani Mrapukana ("Applicant/Plaintiff") is the deponent to this Affidavit and she subsequently testified as well. The Applicant/Plaintiff in her Founding Affidavit stated that she got married to the deceased by way of customary marriage on 7 April 1989 in consequence to which marriage the two (2) sons Lutando and Luzuko were born. According to the Applicant/Plaintiff the Second Respondent/Defendant and the deceased entered into a civil marriage

in the Western Cape during the subsistence of the customary marriage between her and the deceased. The Applicant/Plaintiff averred that she was not aware that the Second Respondent/Defendant and the deceased were married and the Second Respondent/Defendant was appointed as the executrix of the deceased estate. The Applicant/Plaintiff further elucidating on this aspect stated categorically that the Second Respondent/Defendant applied to the First Respondent (The Master of the High Court) for appointment as executrix and administratrix of the deceased estate but did not disclose to the First Respondent that the deceased was also party to an existing customary marriage prior to his death. The result was that the Second Respondent/Defendant secured an appointment by the First Respondent/Defendant. In her capacity as an executrix (according to the Applicant/Plaintiff) the Second Respondent/Defendant was "running away with some of the estate assets and was mismanaging same." The Applicant/Plaintiff in her Founding Affidavit further accused the Second Respondent/Defendant of having failed to disclose all the assets of the deceased estate and of consuming same to the exclusion of all the other beneficiaries. Another important averment made by the Applicant/Plaintiff in the Founding Affidavit is the following:

"Since the Second Respondent's appointment, the deceased' taxis have been operating as usual, but no support and/or maintenance has been forthcoming to my children nor to myself; instead, the Second Respondent has left the common home at Delft South together with all the taxis and engages in business for her own benefit excluding everyone else who is entitled to benefit from the estate."

[6] The Applicant/Plaintiff contended that the Second Respondent/Defendant's appointment by the First Respondent was invalid in that the marriage between the Second Respondent/Defendant and the deceased is invalid because the two (2) could not conclude a valid civil marriage during the subsistence of the customary marriage between the Applicant/Plaintiff and the deceased without first dissolving the said customary marriage. According to the Applicant/Plaintiff the Second Respondent/Defendant deceived the First Respondent in order to secure the appointment and that had she disclosed or placed the true state of affairs before the last mentioned, she could not have been appointed as such. The Applicant/Plaintiff attached a Confirmatory Affidavit by Popie Magwaxaza, cousin to the deceased. In this Affidavit Popie fully corroborated her assertion that she was married to the deceased and that she mothered two (2) sons, Lutando and Luzuko. Another Confirmatory Affidavit attached to the Founding papers is that of Patricia Nozibele Gabayi, an aunt to the Applicant/Plaintiff. She also corroborated the version of the Applicant/Plaintiff's marriage to the deceased. There was also a handwritten letter attached to the Founding papers purportedly written by the Chief of the area. In this letter/note the Chief confirmed (although this is not an affidavit) that the Applicant/Plaintiff was indeed married to the deceased in terms of the customs in the area. In her oral testimony the Applicant/Plaintiff re-affirmed the averment about her customary marriage to the deceased and gave fine details thereof. She told the Court that lobolo was negotiated by Onozakuzaku on behalf of the family of the deceased. The lobolo was

paid in the form of cash representing cattle on hooves. She stipulated the number of cattle paid as her lobolo. She testified how a goat was slaughtered in conformity with Xhosa custom as utsiki custom. She told the Court how the local Tribal Authority allocated to her and her husband a residential site on which they subsequently built two (2) huts. According to her testimony these two (2) huts still exist to date hereof there at Ntywenka tribal reserve (Esilaleni), Tsolo in the Eastern Cape.

[7] According to the Applicant/Plaintiff's oral testimony the deceased never forgot about his roots even when he found work in Cape Town. The deceased would often drive to the Eastern Cape and he provided financially and otherwise for his family, that is, the applicant/Plaintiff and the two (2) sons. There was a stage, however, when the deceased started to support the family in the Eastern Cape rather so inadequately such that the elders even encouraged the Applicant/Plaintiff to also go and look for employment so that she could better provide for the children. Even though the Applicant/Plaintiff found employment in Johannesburg consequent upon this inadequate maintenance, the customary marriage between her and the deceased was never threatened and it did not dissolve. She told the Court that Mziwekhaya Mneno and Mzoliso Mneno were the onozakuzaku who shouldered the responsibility to negotiate and ultimately to pay the lobolo which preceded her customary marriage to the deceased. These two (2) mentioned onozakuzaku represented the family of the deceased. The persons they negotiated with representing the Applicant's/Plaintiff's family were the latter's father

and two (2) other elders from the village. These two (2) were Simon Nondabula and Vuyisile Mbombo. In her oral testimony the customary marriage that consummated upon payment of lobolo was never dissolved until date hereof and that of course was the position until the death of the deceased. The Applicant/Plaintiff called Mr. Zolisa Mneno, who resides at Ntywenka reserve, Tsolo in the Eastern Cape. The latter testified about the lobolo negotiations which he together with Mziwekhaya Mneno conducted on behalf of the deceased' family. He was one of the onozakuzaku negotiating lobolo which they subsequently paid.

[8] According to Zolisa Mneno they were negotiating lobolo with the Applicant's/Plaintiff's father, Mdabula Mrapukana and the latter was being assisted by Mr. Mbombo in conducting the talks on behalf of this family. Mr. Mneno corroborated the evidence by the Applicant/Plaintiff that altogether six (6) head of cattle was paid as lobolo. These cattle sounded in money. The first two (2) per agreement was to be valued at four hundred rands (R400,00) per beast. The rest were valued at eight hundred rands (R800,00) per beast. He also corroborated the Applicant/Plaintiff as to the rituals that followed upon the payment of lobolo. That included the slaughtering of a sheep by the family that received the lobolo. The onozakuzaku went back to the deceased' family with the skin, left hind-leg, bowel, tea and a bottle of brandy. All this entertainment is meant to indicate in a concrete manner the acceptance of the new relationship formed between the two (2) families. Such relationships are sealed by the slaughtering of this sheep. The gifts were handed over to the

deceased' family. Mr. Mneno also testified about rituals that took place at the house of the deceased upon the conclusion of the customary marriage. He also testified about how the married couple, that is, the deceased and the Applicant/Plaintiff, were allocated a residential site in keeping with the local custom. Mr. Mneno confirmed that the customary marriage between the deceased and the Applicant/Plaintiff was blessed with two (2) sons earlier on referred to in this Judgment. Mr. Mneno confirmed that the customary marriage between the Applicant/Plaintiff and the deceased was still subsisting at the time when the deceased died.

[9] Importantly, Mr. Mneno testified that he and the deceased were in good terms. He emphatically denied that the deceased entered into a marriage relationship with any other woman, that is, other than the Applicant/Plaintiff. He denied in particular that there was any customary marriage which was solemnized between the deceased and the Second Respondent/Defendant. Asked how come that the Second Respondent/Defendant wore mourning dress for the deceased, namely black clothes, Mr. Mneno remarked that the wearing of black clothes as a sign of mourning does not per se prove the existence of the marriage. Further elucidating on this aspect, Mr. Mneno made it clear that women are normally the persons who ask certain persons to wear black clothes. However, according to Mr. Mneno, women do not feature in lobolo negotiations. Women are not included when onozakuzaku are sent to the maiden home of the bride in order to, for an example, to discuss/negotiate lobolo or even matrimonial difficulties that surfaced during the subsistence of the customary

marriage. According to Mr. Mneno, the Applicant/Plaintiff could not attend the funeral of the deceased because she was sick. He testified that she, however, arrived at the matrimonial home after the funeral and a sheep in keeping with custom was slaughtered. Mr. Mneno was present when this ritual as well was done.

[10] In cross-examination, Mr. Mneno stated that he knows Bigboy, the older brother of the deceased. He also admitted that he knows Popie Magwaxaza, sister to the deceased. Mr. Mneno told the Court that he is the oldest member of his clan in the area. When it was put to Mr. Mneno that there were lobolo negotiations at East London with regard to the Second Respondent/Defendant, Mr. Mneno told the Court that he did not hear this and in his knowledge she was never lobolaed. Asked if he was present when the Second Respondent/Defendant ate utsiki, Mr. Mneno answered in the negative but added that he heard about this. Asked what steps he took to get to the roots of what he heard happened, Mr. Mneno answered that he called for a discussion on this when he particularly confronted the deceased about what he was doing, the deceased avoided him and simply went away. Mr. Mneno told the Court that in confronting the deceased on this, he demanded to know what the deceased was doing, he needed to know whether or not the latter was then involving himself with the practice of polygamous marriage. Mr. Mneno reiterated that he got no answer from the deceased on this aspect. When asked about the name "Nomthunzi", he first stated that he does not know the name but he later on recalled this to be another name for the Second Respondent/Defendant. Asked about the arrival of uduli (in respect of

customary marriage of the Second Respondent/Defendant, Mr. Mneno said he was not present but was then in Durban (Kwazulu-Natal). He told the Court that whilst polygamy is a widely recognized custom, it has, however, not been practiced in his area – *"the forefathers practiced the custom but it no longer find applicability."*

[11] **THE ANSWERING AFFIDAVIT** was deposed to by Mandisa Mirriam Magwaxaza ("the Second Respondent/Defendant") in this matter. She gave some background as to how she met the deceased in the Western Cape. According to the Second Respondent/Defendant, she and the deceased became romantically involved, a relationship which grew into being a fully-blown one. The deceased expressed a desire to marry the Second Respondent/Defendant. The Second Respondent/Defendant stated the following regarding her relationship with the deceased:

"Both the deceased and I wanted things done in a proper manner. We married first in terms of customary law in 2002. The deceased knew my father for only a brief period of time, before sadly the latter passed away in 2000. Prior to us getting married in 2002 in terms of customary law, my husband had approached my father's side of the family, in order to enter into negotiations regarding the payment of lobolo. I am aware of the fact that agreement in this regard had been reached, and that the deceased had paid R4 000.00 cash to my father's side of the family and to my recollection he simply handed over the cash to one of the family members."

[12] The Second respondent/Defendant alluded to the fact that she and the deceased at that time were already living together in the Western Cape where the latter conducted a taxi business. What is of significance in her Answering papers, the Second Respondent/Defendant stated the following:

"In view of the fact that we live in modern times and to ensure legal certainty we decided to confirm the aforementioned customary matrimonial bond we had, by also entering into a civil marriage. Thus we got married by way of a civil marriage on 13 December 2004 at the Nyanga Magistrate's Court." She attached a copy of the marriage certificate as Annexure **"MMM1"** evidencing the existing civil marriage between her and the deceased. She informed the Court that in her marriage to the deceased a boy named Mpho Magwaxaza was born. The Second Respondent/Defendant gave an exposition as to how volatile the taxi business is in which the deceased was involved and how shocked she was when one night on 7 March 2007 certain unknown men knocked at the door of the couple's house and upon the door being opened, gained entry, shot and killed the deceased in front of her. The Second Respondent/Defendant stated in her Answering papers that she is aware that the deceased had been involved in a relationship with the Applicant/Plaintiff in this matter. According to what the Second Respondent/Defendant knows the Applicant/Plaintiff in this matter was "romantically involved" and stayed together for a short while. In her knowledge the Applicant/Plaintiff and the deceased, however, split up in 1995 resulting in the former leaving the common home and the deceased breaking up the said relationship. She stated in her papers that the breaking up of the said relationship

was premised on issues of infidelity. The aforementioned information was gathered from the deceased by the Second Respondent/Defendant. The latter also reiterated that the deceased never indicated to her that he had been married to the Applicant/Plaintiff by way of customary marriage. She maintained that if this was the case, her husband, the deceased, would have indicated this to her. The Second Respondent/Defendant averred that she was aware that there are two (2) children fathered by the deceased in the relationship which existed between the Applicant/Plaintiff and the deceased, but hastened to add that the birth of such children is no proof of the existence of a customary marriage. She stated that it was rather strange that the deceased never visited the Applicant/Plaintiff, a thing which would reasonably be expected if there was a customary marriage between the two. She added that the two (2) children fathered by the deceased and mothered by the Applicant/Plaintiff, stayed with her (Second Respondent/Defendant) and the deceased since 2002 until the death of the deceased. Confirming her challenged appointment as executrix the Second Respondent/Defendant stipulated as follows:

"Upon his death I was appointed as the executor of the deceased estate. We were married in community of property, and the deceased had not drafted a proper will, therefore the estate is to be finalized on an intestate basis" and she referred the Court to **Annexures "MMM3"** and **"MMM4"** respectively being the letters of executorship and letters of Authority issued by the First Respondent. Responding to the content of paragraph 3 of the Founding Affidavit regarding the existence of the customary marriage between the

Applicant/Plaintiff and the deceased, the Second Respondent/Defendant made certain observations which in her view tend to prove that there was never such customary marriage. She *inter alia* referred the Court to the following observations:

(a) That the deceased was buried in the Eastern Cape at his original place of birth but whilst the Second Respondent/Defendant attended the funeral, the Applicant/Plaintiff never attended it.

(b) That the averment relating to an alleged customary marriage between the Applicant/Plaintiff and the deceased has only been raised after the latter's death and at a time when the deceased' estate has to be wound-up.

(c) During the funeral the deceased' "direct family" as per tradition provides the widow with black clothes to wear and the Second Respondent/Defendant is the one who was provided with such a black dress and other clothing to wear.

(d) That in terms of Section 4 of the Recognition of Customary Marriages Act, 120 of 1998, all spouses to a customary marriage have a duty to ensure that their marriage is registered.

(e) That the Applicant/Plaintiff attached a note to the Founding Affidavit from one Keith Mneno to indicate that she was married to the deceased. The note, translated loosely, reads: "I am Chief Mneno and do testify that Novusa Nani Magwaxaza (born Mrapukana) id 7207251094086 is the wife for the clan of Emabheleni. Her husband is Luvo Magwaxaza. She has got two sons Luthando and Luzuko Magwaxaza."

[14] The Second Respondent/Defendant criticizing the above quoted note, cascaded it as providing no proof of the customary marriage but merely attempts to corroborate the assertion by the Applicant/Plaintiff that she was married to the deceased. Importantly she remarked that the note falls to be ignored as it was not in the Affidavit form. The Second Respondent/Defendant also attacked the validity of the Confirmatory Affidavits of Patricia Nozibele Gabayi and Popi Magwaxaza used by the Applicant/Plaintiff. The deponents are aunt and cousin of the Applicant/Plaintiff and the deceased respectively. The Second Respondent/Defendant labeled these persons as distant relatives who are not truthful in what they aver.

[15] The Second Respondent/Defendant denied that she did not disclose certain assets of the deceased estate and that she consumed same to the exclusion of all other beneficiaries. She expressed concerns that the Applicant/Plaintiff hardly gave examples of such assets allegedly undisclosed and consumed. She, however, confirmed that the deceased owned three (3) taxis of which two (2) are currently in a working order. She averred that after the death of the deceased, the latter's sister, Lulama Mbiyo, took the said taxis by force and handed them to the deceased' cousin, Nceto Walija and friends to utilize same in order to earn an income. The Second Respondent/Defendant, however, with the help of a certain Mr. Ncati of Codetta was able to secure these taxis back to herself. In any event, the Second Respondent/Defendant denied the existence of other beneficiaries to the estate stating that it was an intestate estate and she and the deceased were married in community of property. In her view, the

present application is an attempt by the Applicant (assisted by some members of the deceased' family) to try and obtain benefits from the said estate. She also expressed a view that the Court erroneously granted the interim order in this matter and sought the dismissal of the application with an appropriate order as to costs, that is an order that costs be awarded in her favour on "an attorney-client and/or attorney own client scale."

[16] Testifying in chief the Second Respondent/Defendant told the Court that when she got married to the deceased she was clad with umakoti dress. Rituals were performed, for an example, utsiki ritual. According to her it was her husband, the deceased, who went to her maiden home in the company of his brother and another man from his family, in order to pay lobolo. Her maiden home is situated at East London. According to her oral testimony the abovementioned persons "went to ask for intombi". Her maiden people accepted them. The lobolo paid was the sum of R4 000.00. The persons who received and accepted this lobolo (according to the Second Respondent/Defendant) were her elder uncle Bio and her brother, one Mlindeli. Upon payment of lobolo and after certain rituals were done at the deceased' family place at Tsolo, the Second Respondent/Defendant remained there for some time. When utsiki was slaughtered, according to the Second Respondent/Defendant, Lulama Mbio, Bigboy and Zolisa Mneno were present. The sheep and goat were slaughtered. According to the Second Respondent/Defendant, she was told that the sheep was utsiki and the goat was amasi.

[17] She also testified that upon conclusion of lobolo negotiations and payment thereof her maiden family members went to the deceased' family at Tsolo in order to create relationship. They slept over. The sheep was slaughtered at the deceased' family and her maiden family left with the hind leg of the sheep. In her testimony the leg of the sheep symbolized the created relationship. In her oral testimony the Second Respondent/Defendant reiterated that it was in 2004 that that she and the deceased went to "KwaNsumpa" (offices of the Superintendent) at Nyanga in order to conclude the civil marriage. The Second Respondent/Defendant confirmed in her oral testimony that all she was told by the deceased was that he fathered the two (2) sons and that their mother was merely his lover and that their relationship ended in 1995. She was never told by anyone, nor by the deceased that the latter was married to the Applicant/Plaintiff and/or any other woman for that matter. During the subsistence of her customary marriage and the civil marriage, the Second Respondent/Defendant visited the Eastern Cape together with the deceased regularly, particularly during December and Easter holidays and whenever there was a funeral to be attended there. She, however, never saw the Applicant/Plaintiff during all these visits. The Second Respondent/Defendant also testified that the name she was given by the in-laws upon the conclusion of the customary marriage is Nomthuzi. The name is said to have been given by Lulama. She also testified that after the funeral of the deceased, the relationship she had enjoyed with the deceased' family members became sour. They accused the Second Respondent/Defendant of having killed and/or caused the deceased to be killed. The poor relationship was worsened

when the Codetta persons moved swiftly and dispossessed Lulama of the taxis she had taken from the deceased' and Second Respondent's/Defendant's matrimonial home at Delft South, Cape Town, Western Cape. It was after the abovementioned happening that the Second Respondent/Defendant was served with papers in this matter.

THE REPLYING AFFIDAVIT

[18] This, as could be expected, was deposed to by the Applicant/Plaintiff in this matter. In view of the oral evidence tendered in this matter it hardly becomes necessary to summarize this Affidavit. The oral evidence fully covered the contents of the Replying Affidavit. It suffices, in my view, to merely highlight those issues which were not dealt with in the oral evidence. The Applicant/Plaintiff contended that if the Second Respondent/Defendant and the deceased were acting in conformity with laws and customs, the issue of her alleged marriage to the deceased would have been discussed at the latter's home by the members of the family including the Applicant/Plaintiff. The importance of such discussion lies in the fact that should it be the case that the deceased really wanted to marry the Second Respondent/Defendant as his second wife, he needed to seek and obtain the Applicant/Plaintiff's consent. The latter reiterated that in such a meeting the family could have selected two (2) senior persons from the deceased's family to negotiate lobolo on behalf of the Amabhele clan. Emphasizing on this aspect the Applicant/Plaintiff remarked as follows:

"Moreover, lobolo in customary law is not simply a question of handing over money to one person as if buying bread over a counter; instead the male members of the bride's family sitting unicameraly accept same on behalf of the bride's clan and later hand over the money paid to the father with specific instructions as to how to deal with such money or cattle."

The Applicant/Plaintiff invited the Court's attention to her observation to the effect that if the second Respondent/Defendant was indeed married by way of customary marriage to the deceased, there would have been no need to find legal certainty by converting the purported customary marriage to a civil marriage because the Recognition of Customary Marriages Act 120 of 1998 was already operational and provides for the registration of such marriages in its Sections 4 (1) and (2). The Applicant/Plaintiff admitted in reply that it is true that her husband, the deceased, fathered Mpho, the child mothered by the Second Respondent/Defendant.

[19] Responding to paragraph 12 of the Answering Affidavit the Applicant/Plaintiff stated the following:

"I specifically deny that what was between myself and my late husband was simply a relationship and state that my late husband and I had always been married, moreover, by virtue of our agreement, I had to reside in the Eastern Cape and take care of his kraal and livestock as is usually the custom in our community and I could only visit as and when there was a need, but in our case I did not because my late husband visited the Eastern Cape frequently by reason of taxi

operations since he conveyed passengers from Cape Town to Tsolo and other parts of the Eastern Cape and we would then meet."

THE ISSUES

[20] The first issue seems to be whether there was a valid customary marriage between the deceased and the Applicant/Plaintiff and whether such marriage still subsisted at the time of the demise of the deceased. On this issue the party that bears the onus of proof is the Applicant/Plaintiff. Another issue is whether the deceased was at all married to the Second Respondent/Defendant by way of customary union apart from the civil marriage, the certificate of which is annexed to the Answering Affidavit. The determination of the dispute in the instant matter necessitates that one must consider the customary law as it applies to customary marriages. It is important to mention that historically the customary marriage was never recognized as a valid marriage. It could not stand on equal footing with the marriage by civil rites.

[21] It is fair to say that it was tolerated by authorities of the time and was allowed to continue to exist despite the fact that it was not recognized. This non-recognition of the customary marriage caused untold hardship and pain to the Black communities because members of such communities were so married. Some of the severe hardships flowing from non-recognition of customary marriages were *inter alia*, that children born from such marriages were not regarded as legitimate and wives in such marriages were not accorded status similar to the status of wives involved in civil marriages in matters of succession,

maintenance and litigation. Today, thankfully, the present democratic government has taken a giant step to recognize marriage by way of customary law. The piece of legislation in this regard is known as the Recognition of customary Marriages Act 120 of 1998. The latter Act is also relevant to the issues to be decided in this matter. For that reason it is only prudent to briefly refer to this Act before one uses same in adjudicating the dispute between the litigants in the instant matter.

THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998

[22] I have had the privilege of reading through Parliamentary debate as contained in the HANSARD on the promulgation of the abovementioned Act. Although divergent views were expressed by politicians in our Parliament, it would appear that central to the passing of this piece of Legislation was to bring about a measure of uniformity in the matrimonial regime in this country. The theme of the debate becomes abundantly clear, for an example, in the following extracts from the said Parliamentary debate on the legislation:

> *"The Recognition of Customary Marriages Bill before us constitutes one of our small contributions to easing the pain of African women in this country, and is also a crucial pillar for poverty alleviation. Customary law was one of the instruments used to confine black people, particularly African women, in poverty. This was the fate suffered through indigenous marriages, ultimately by women whose rights depended on their marital status and children whose rights hinged on the status of*

their parents. This Bill does not provide an answer to everything. However, it will emancipate women and others whose rights have, until now, been undermined. African women married under customary law will cease to be regarded as perpetual minors enjoying less proprietary protection than minor children. These women will, for the first time, enjoy full recognition of their marriages. They will share equally in the control, including alienation of matrimonial property. They will enjoy full contractual capacity and all parental rights including custody and maintenance……

The impact of this law, accordingly, is to eradicate aspects of race and gender discrimination. The remaining challenges include public education and the raising of awareness among service providers. To foster a climate for successful implementation of the new laws, the training of service providers, such as magistrates, judges and private lawyers, is absolutely critical. ...many of them have handled customary law matters not only without any background of the cultural context, but also having never studied customary law at all. The other challenge is to adapt dispute resolution mechanisms to the way of life of many traditional communities. Alternate dispute resolution is particularly critical in this regard. There are two areas that require urgent intervention, and these are inheritance and traditional courts. It is rather sad to have had to defer the Bill on secession. I do, however, hope that this law, which is, in fact, an extension of the principles in the Recognition of Customary Marriages Bill, will be passed soon.

It is also our wish as a department to see to the speedy recognition of other marriages which are currently not recognized, and in that regard I am referring to the religious marriages."……

……

"What this Bill also stipulates is that a customary marriage is not inferior to other types of marriage, such as marriages by religious or civil rites. Previously, as the hon members know, customary marriages were treated as having no legal value, with some people treating them as having very little legal value. During the apartheid era what used to happen was that if a man married one woman, MaDlamini, by customary rites and then later on married another one, MamNtande, by religious or civil rites, the latter marriage would be regarded as legal ahead of the former. People would even boast that they had a certificate, because they were married in the white people's way. In some families this situation would result in misery for the woman married by customary rites and her children. In the end recognition would be enjoyed only by the second marriage.

……All these types of marriages are going to enjoy equal recognition, so that even children out of each can be treated equally. Furthermore, the procedure for the termination of these marriages is the same. One will have to go through a divorce court. However, even these courts still need to be restructured in order to make them accessible to everybody.

……Now people who are married by customary rites according to this new law, and not those in polygamous unions,

will have joint ownership of their income and purchases unless they have a signed agreement to the contrary. ……
It is our wish that all women participate in this debate, especially the women from the IFP, and not allow the honourable male members to decide fort them. Once this Bill has been passed, it will be necessary that all marriages by customary rites are registered with a registrar who will be nominated by the Minister of Home Affairs. People who married prior to the passing of this Bill are encouraged to ensure that they register within twelve months. If a man is involved in polygamous marriages, in terms of this Bill, all those marriages are equally acceptable before the law. Therefore they should be registered. Those who marry after the passing of this Bill are encouraged to register their marriages within three months of getting married. Certificates will be issued out for all registered marriages. ……
……
In order for a customary marriage to be fully accepted as legal, the man and the woman should have reached the age of 18, and they should have agreed and there should be consultation and a ritual in accordance with local custom. A man in a non-polygamous customary union who is still living with his wife is allowed to remarry that wife in terms of the law that was passed in 1961. However, a man who already is married to one woman by customary rites and that marriage still subsists, may not marry another woman according to the 1961 law.
……

……of this new law polygamy is still acceptable, and that means that a man married by customary rites is free to marry another one by similar rites. However, this man should first enter into a written agreement in which it is stated whose responsibility it will be to manage any wealth and material possessions that have been obtained as a result of this marriage and how these will be managed. The court should be satisfied that the manner in which these are managed will benefit the woman and her children. I know that the issue of polygamy is a very sensitive one for females. However, it is entirely up to the unmarried females to choose or not to choose to enter into polygamous unions. ……

The Bill we are discussing today lays the foundations for the adjustment of the marriage law so that all types of marriages in South Africa are equally acceptable in law irrespective of the rites. As women, we would like to request the Department of Justice to speed up the consideration of amendments to this law." ……

"As changes made their presence felt on the African continent, African people also started using other forms of marriage such as civil marriages……Unfortunately certain customs and traditions regarded the status of a woman in a customary marriage as inferior to that of her husband. This evil was re-emphasized by the Black Administration Act passed by

the NP. This unforgettably bad legislation not only declared the woman a perpetual minor, but also declared customary marriages as mere customary unions which did not have the status of marriage for all purposes. ……

……

The Recognition of Customary Marriage Bill before Parliament today seeks to correct the above bad law in the following ways. Firstly, for the first time in this country a customary marriage is given the same status as a civil marriage. Children born of this marriage will no longer be regarded as illegitimate under any circumstances. Secondly, the status of a woman in a customary marriage is made equal to that of her husband. The woman is no longer a perpetual minor as declared by the NP centuries ago. Thirdly, the woman in a customary marriage will be able to be the joint owner of the common estate in a customary marriage. Fourthly, all customary marriages entered into before commencement of this Bill are recognized as marriages in terms of this Bill as long as such marriages were regarded as valid according to the customs and traditions in terms of which such marriages were entered into. ……

……

This Act is probably not going to solve all problems in customary marriages but it is an attempt in the correct direction. I want to make an appeal to all the people who might be affected by this legislation to take it in a positive spirit. The thorny issues to the traditionalists are perhaps the equal status of a woman to that of her husband in a customary marriage and

the proprietary consequences of a customary marriage in terms of the Bill. My response to the objectors to these clauses is as follows:

Firstly, it is now unlawful in this country to treat people unequally. The equality clause of our Constitution demands that equal status must be given to husband and wife in a customary marriage too. Secondly, it is only fair to grant a woman in a customary marriage the right to be the owner of the communal estate. This is yet another transformation by the ANC-led Government to make the lives of the married couples in a customary marriage better. ……

……

I would like to make a brief comment on my hon colleague Mr. Mzizi's view that this Bill is aimed at killing the fabric of the customary marriage. I would like to differ with him directly and say that that is not the case. It is a misunderstanding of the issues. Before this legislation customary marriage was neither in nor out of community of property. In a polygamous customary marriage one would have the house of different wives of a husband in that marriage. These people had the right to use the property of the houses and to plough the mielie field, but they had no right of ownership. That is the only difference.

……

……

Otherwise, this Act re-emphasises the law which was applicable as customary law in the olden days, when the man was checked, if he married a second wife, to see whether he was taking the

property of the existing wife or not. This Act now provides that the contract must be entered into after consultation, and that the court must intervene to make sure that the first wife is not prejudiced by that arrangement. ……

……

That was the original custom, which was only changed because of changes in the economic system which resulted in people using it to their own advantage, which was wrong. This Bill reaffirms what constitutes a traditional marriage. ……..a man cannot just decide on his own to take a second wife without consulting the relevant stakeholders, including the wife concerned. Therefore, what is the problem? What fabric is broken? ……..Now the court is the monitor of such a situation, because the contract will be before the court."

[23] Essentially Parliament passed the Recognition of the Customary Marriages Act in order to correct the inequalities that were created by the Black Administration Act and to bring the customary law in line with international law and the Constitution Act 108 of 1996. What apparently hastened the promulgation of the Act under discussion is that the President of the Republic of South Africa ratified the International Convention on the Elimination of All Forms of Discrimination Against Women in 1995 without any reservations. The Convention's requirements are very stringent as discrimination against women is outlawed in no uncertain terms. The Convention requires proactive measures by the signatory's government to empower them. There are certain provisions of the Act that are

directly relevant to the dispute between the parties in this matter. I was referred particularly to Section 10 which reads:

"10(1)A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an ante-nuptial contract which regulates the matrimonial property system of their marriage.

(3) ……

(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage."

[24] A reference was also made to Section 4 of the Act which provides as follows:

"4(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy him- or herself as to the existence of the marriage.

(3) Any customary marriage –

(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by Notice in the Gazette;

(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(4) (a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5)(a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering

officer in the prescribed manner to enquire into the existence of the marriage.

(b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(7) A Court may, upon application made to that Court and upon investigation instituted by that Court, order –

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

(8) A certificate of registration of a customary marriage issued under this Section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and the particulars contained in the certificate.

(9) *Failure to register a customary marriage does not affect the validity of that marriage."*

Most of the provisions of the Recognition of Customary Marriages Act are new. But the question of registration provided for in Section 4

set out above is not completely new. In KwaZulu-Natal customary marriages could be registered in terms of the provisions of Section 44-50 of the KwaZulu-Natal code on Zulu Law. Similarly in the former Transkei parties could register their customary marriages although this had no effect on the validity of any such marriage. See: ***Bekker, Requirements for validity of customary marriages, (South African Journal of Ethnology*** 44 (2001); ***West, Proprietary Consequences of marriages in Customary law and the Contractual Capacity of spouses so married (De Rebus***, 47 (Oct. 2002).

APPLICATION OF CUSTOMARY LAW

[25] It is fairly simple to determine whether or not a party has successfully proved the existence of a customary marriage. There are requirements for a valid customary marriage, namely consensus between the parties, a formal ceremony to transfer the bride to the other family and the payment of lobolo. Initially the consensus I have referred to was not concerned with consensus between the two marrying parties. The marriage was and is still regarded as a union between two (2) families rather than two (2) individuals. See: ***Mabena v Letsoala*** 1998 (2) SA 1068 (T). We know that because customary law is not static but it also develops with the times, this requirement is now such that the two marrying individuals should agree to the marriage as well. Section 3 (2) (a) of the Recognition of Customary Marriages Act has nowadays explicitly provided that permission of both individuals to the marriage is required. In my view this does not amend or outlaw the old customary practice to any greater extent. It is inconceivable that individuals to such a marriage can exclude the two families. The new

provision in the Act compliments the agreement between two (2) families in my view. Lobolo can consist of cattle or the monetary value thereof. In nowadays cash is seemingly preferred, particularly in urban areas. In rural areas cattle on hooves are still the only known form of paying lobolo. Lobolo can either be partially paid or fully paid. In the event of the former scenario, an agreement would have to be entered into as to when and how the balance of lobolo shall be paid. Lobolo survived evolution and was never declared contrary to the rules of natural justice or public policy. See: ***Thibela v Minister of Wet en Orde*** 1995 (3) SA 147 (T). The bride must be formally transferred to the family of the prospective husband. Once this is done, she is then formally regarded as part of the latter family. Her release from her own family relationship and her incorporation into her husband's family is celebrated with extensive public rituals and ceremonies. This is a very important requirement for the validity of the customary marriage.

[26] It is relevant to these proceedings to mention that prior to 1988 a man and a woman could enter into a common law marriage with someone other than his customary wife during the subsistence of a customary marriage. The position was that the customary marriage would have been regarded as dissolved and only the common law (civil) marriage would receive recognition. See: ***Bennet (Sourcebook on African Customary Law*** 232-237 – Cape Town 1991). This resulted in great hardships and frustration experienced by wives married by customary marriages. Many men were pressured into engaging in this practice by their urban lovers for economic benefits only. Section 22 of the then

Black Administration Act 38 of 1927 which purported to deal with property owned by blacks did not accord wives in such customary marriages their deserved protection. There was no uniformity in the case law of the time. For instance in ***Ndhlovu v Ndhlovu*** 1937 NAC (N&T) 80 the Court found that such subsequent marriage would be invalid while the Court in ***Malazi v Mndaweni*** 1975 BAC (C) 45 found that the common law marriage would be voidable. Section 22 (7) of the Black Administration Act purported to provide protection to the customary wife and children in relation to inheritance. See also: ***Marissa Herbs and Willemien Du Plessis*** **(Electronic Journal of Comparative Law**). We bear in mind that Section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 resolved this anomaly by providing that a spouse should first dissolve his or her customary marriage before entering into a civil marriage.

[27] Now (thankfully) in terms of Section 3 (2) of the Recognition of Customary Marriages Act none of the parties to a customary marriage will be allowed to conclude a marriage in terms of the 1961 Marriage Act. However, Section 10 (1) quoted in full earlier on in this Judgment provides that two (2) parties in a monogamous customary marriage may conclude a civil law marriage but not visa versa. The intention seems to further monogamous marriages rather than polygamous marriages. I hasten to add though, that nowhere in the Recognition of Customary marriages Act are polygamous marriages outlawed. The summarized evidence of the Applicant/Plaintiff as well as that of her witness, Mr. Zolisa Mneno, is no doubt very impressive and persuasive. The Applicant/Plaintiff reaffirmed her assertion that

she was married to the deceased by way of customary marriage. She gave minute details as to the steps taken by the deceased' family and her own family prior to, during and after the celebration of this customary marriage. She dealt exhaustively with the payment of lobolo, the agreement between the two (2) families that she and the deceased should enter into this customary marriage, the handing over of herself by her family to that of the deceased, the celebration as well as all other ancillary rituals that form the central part of the coming into being of the customary marriage. Despite grilling and truth searching cross-examination, her evidence did not change its colour. Cross-examination instead served to put her in a position to give further details to improve on her evidence in chief. Importantly, she thereafter called Zolisa Mneno, a clearly well informed self confessed tribal man who does not only know the customs and practices of his tribe, but who lives them.

[28] I was singularly impressed by Mr. Mneno's evidence. Mr. Mneno is a relevant witness to have been called. He is brother to Chief Mneno and is bloodily related to the deceased. He belongs to the clan of Amabhele. He and Mr. Mneno (the Chief of the area) were the representatives (onozakuzaku) of the deceased' family specially selected to assume the responsibility to undertake lobolo negotiations with the family of the bride. This they did with pride. It is his evidence that the negotiations/discussions held between the two (2) families culminated in the payment of lobolo testified to by both the Applicant/Plaintiff and Mr. Mneno himself. The latter played a pivotal role in the subsequent ceremonies and rituals and celebrations which

necessarily followed. Mr. Mneno fully corroborated the version by the Applicant/Plaintiff as set out first in the Founding Affidavit and Replying Affidavit as well as documented in her oral evidence. The cross-examination of this witness elicited answers that effectively taught all involved what happens customarily when the customary marriage is concluded. He approached each question in a cool and collected manner and gave the Court significant straight forward, well thought out and logical answers. Mr. Mneno is a classical example of a man who is very well versed in his customs and practices. He would for an example, listen carefully to a statement made by the defence for him to comment. In response he would with dignity and certainty answer and say, "Ngamampunge lawo" (those are lies) and would then deal succinctly with what is the true position and that would almost always be in conformity with his detailed evidence already given. He was asked about whether he knew polygamy. In response he answered that polygamy was practiced by his great forefathers and that at present no one in his area practices polygamy. It was strange that there was hardly any contradiction of any type in the evidence led by the Applicant/Plaintiff and Mr. Mneno.

[29] The Second Respondent/Defendant also testified albeit she called no witness. The only drawback in her testimony is that it consisted essentially of what she gathered from the deceased principally. I refer in particular to her evidence that there was no customary marriage subsisting between the latter and the Applicant/Plaintiff. This is an aspect on which one tends to be sympathetic towards the Second Respondent/Defendant because experience has shown and taught us

that male persons who leave their original homes in rural areas and come to urban areas essentially in pursuit of what one may call "greener pastures" (better employment opportunities) have over time in memorial resorted to tendencies of not informing their urban lovers the true state of affairs when it comes to their matrimonial status. She testified that her husband, the deceased, paid lobolo for her and when he did so, he was being accompanied by his elder brother Bigboy. In other words Bigboy and the deceased were Onozakuzaku in her particular case. Unozakuzaku is a vital witness in any disputed customary marriage because apart from being the key figure (the go between) in discussions involving the two (2) families, he thereafter becomes involved as well during the celebration of the marriage he helped to begin. There is undoubtedly a fountain of information lost if one does not call such an important witness. According to the Second Respondent/Defendant Bigboy as an elder brother of the deceased was present when she ate utsiki etc. It certainly is not too much expectation on the part of the Court if I state I expected that Bigboy would be called by the Second Respondent/Defendant to give his side of what happened. Moreover, it came to light during this hearing that the Second Respondent/Defendant knows Bigboy to be resident and employed here in the Cape Town area. Although litigants choose which witnesses to call and which not, failure to call Bigboy was a serious omission on the part of the Second Respondent/Defendant. This left a gap unfilled in her version. The Second Respondent/Defendant knew from the time she received the papers in this matter that her alleged customary marriage and subsequent civil marriage were questioned by the Applicant/Plaintiff. It was also

abundantly clear when the Applicant/Plaintiff testified that her matrimonial status in both categories was called to question. Why would the presentation of her case leave such an important aspect unattended? Certainly there emanates herefrom troublesome questions that have no readily available answers.

[30] Whenever the Court is faced with two (2) versions from litigants it would be quite relevant to seek guidance from the following formulation of note by Eksteen AJP in ***National Employers' General Insurance v Jagers*** 1984 (4) SA 437 (E) at 440D-G:

> ***"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 a criminal case, 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 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 anymore 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."

[31] In the instant case after having heard the evidence and considered same holistically, I reach an inescapable conclusion that it has been proved to my satisfaction that the Applicant/Plaintiff was indeed married to the deceased in accordance with custom and that such customary marriage subsisted at the time of the deceased' demise. The parties were then ordinarily resident and domiciled in their place of birth Tywenka, Tsolo, in the previous Transkei. Even if one were to consider the provisions of the Transkei Marriages Act 21 of 1978, it would be found that the Applicant/Plaintiff satisfied the requirements of a marriage set out in terms thereof. Counsel for the Second Respondent/Defendant insisted that even if I find that the customary marriage between the Applicant/Plaintiff and the deceased existed, the fact that such marriage was not registered must negative the validity thereof. The fact of the matter is that registration of a customary marriage per se is not an essential requirement for the validity of a customary marriage. See: **Section 3 (3) of the Recognition of Customary Marriages Act.**

Notably the above cited Act recognizes the validity of customary marriages that existed and were valid prior to its commencement.

See: **Section 2 of the abovementioned Act.**

Section 4 (9) of the Recognition of Customary Marriages Act (fully quoted earlier on in this Judgment) makes it clear that non-registration or failure to register a valid customary marriage does not affect the validity thereof. The aforementioned submission on behalf of the Second Respondent/Defendant cannot therefore be sustained.

[32] I have great difficulty to understand the version of the Second Respondent/Defendant in this matter. She maintained there existed a customary marriage between her and the deceased prior to the subsequent conclusion of the civil marriage in 2004, the certificate of which is attached to her Answering papers. It is her evidence that her husband, the deceased, personally paid the sum of Four thousand rands (R4000,00) to her father which sum of money represented lobolo. She added that the deceased was in the company of his elder brother Bigboy. Although it is not contrary to any law for a person to act as Unozakuzaku in his own prospective marriage, it is, however, very unusual and strange. I do not intend wasting too much time on this aspect. It suffices to say the Second Respondent/Defendant has no personal knowledge of all this. She was told by the deceased. I am also very much concerned about her testimony about the alleged utsiki she testified she ate. Not a single person was called to substantiate her version. She also focused on her attendance of the funeral of the deceased and that she was made to dress in a black mourning dress. Nothing turns on attending a funeral. It is an accepted fact that when the deceased died, she was cohabiting with him at Delft South, Cape Town and importantly, she and the deceased had concluded civil marriage at Nyanga in 2004. It is common cause that the deceased

used to visit his original home in the Eastern Cape with her. It is quite probable that the elders (particularly women) at the deceased' home had come to accept her as not only the deceased' companion, but also his civil wife. We also know how much acceptable the validity of a civil marriage in rural communities had become.

[33] Mr. Sandlana submitted that the customary marriage alleged by the Second Respondent/Defendant must be found to have been invalid *inter alia* because it was purportedly entered into without the consent of the Applicant/Plaintiff. I deal with this submission later on in this Judgment. The civil marriage between the Second Respondent/Defendant and the deceased is simply rendered a nullity by the provisions of Section 10 (1) of the Recognition of Customary Marriages Act. Section 10 of this Act is fully cited earlier on in this Judgment. A man and a woman who is party to a subsisting customary marriage can no more enter into a civil marriage with another party. At the time of concluding the civil marriage in question in these proceedings, the deceased was party to a subsisting customary marriage with the Applicant/Plaintiff. It is quite possible that the deceased lied to the Second Respondent/Defendant and said he was not married to anybody. I have mentioned how common that has become. But the fact of the matter is that the Second Respondent/Defendant also had an obligation to undertake an investigation in this regard. Hers was even easier. The children of the Applicant/Plaintiff stayed with her and the deceased at Delft South as from 2002. These two (2) children carried the surname of the deceased. Ordinarily, in African communities, only children born

from a marriage relationship carry the father's surname. Children born out of wedlock normally carry their mother's surname. This is because they are taken to belong to their maternal grandfather with the biological father only burdened with the duty to maintain them.

[34] What appears to have happened here is that the Second Respondent/Defendant and the deceased cohabited (without forming any type of marriage) for some time. The Second Respondent/Defendant fearing the danger of staying with the deceased without defined matrimonial link, must have persuaded (understandably) the deceased that the two (2) should proceed to contract a civil marriage. The latter marriage is easier to bring into being compared to the marriage by way of customary law. This was probably an endeavour (understandably) on her part to secure her position when it comes to things like inheritance. She probably did not then know about the provisions of the Recognition of Customary Marriages Act which outlawed that practice. The practice now outlawed by Section 10 (1) of the Recognition of Customary Marriages Act had been the order of the day prior to the promulgation of the Act. The practice left the women (particularly in rural areas) married by way of customary marriages destitute whenever their husbands died.

[35] Mr. Sandlana contended that in his view the consent of the already married wife (by customary law) had to be first sought before the conclusion of the second and/or third marriage by the husband who is party to an existing customary marriage because the second and/or

third marriage implied that the property of the already married wife would diminish. Traditionally whenever one speaks of property this was almost always a direct reference to livestock in the nature of cattle. Indeed the conclusion of the second and/or third marriage by such husband involved the use of such cattle for purposes of paying lobolo. I, however, differ with Mr. Sandlana in this regard. The aspect of property was carefully managed in traditional communities. The wife upon marriage formed what is called a house. There will be cattle allocated to that particular house. Such livestock is properly identified and marked accordingly. They multiply and are known to that particular wife. This becomes known as house property. Another category in the same family will remain known as kraal property. The family head (the husband) remains in charge of all the property but he may not use any beast belonging to the house property for any purpose other than for the benefit of that particular house. If he must use same, he must fully consult the wife of that particular house. Until and unless an agreement between him and that house has been reached, he shall under no circumstances resort to the use of the house property. The most common agreement reached would entail the replacement of that property used by the husband other than for the benefit of the relevant house. The head of the family, however, had a free hand when it came to the use of kraal property. It was almost always from the kraal property that he paid lobolo for any further wife he intended to marry.

[36] He merely informed the senior wife that he intended to initiate lobolo negotiations with regard to any wife he then intended marrying. This

was more out of respect than soliciting consent from her. Before leaving this aspect of the Judgment, it may be useful to quote from the EJCL, an article authored by ***Marissa Herbst and Willemien du Plessis entitled Customary Law v Common Law Marriages: A Hybrid Approach in South Africa*** where the following statement of law appears:

"According to the KwaZulu-Natal Codes of Zulu law, house property belongs to the specific house but is still under the control of the family head. The house property must, however, be utilized for the benefit of the members of the specific household. The family head must maintain the daily needs of his wife (wives) and children. Family property includes all the property in the family excluding house property and personal property. Personal property includes, for example, clothes and other smaller items of personal nature or gifts that were received. Women had control over their personal property only."

See further: **Olivier et al, Inheemse Reg; T.A. Bennet, Sourcebook on African Customary Law 232-237** (Cape Town 1991); **I.P. Maithuli, Do we have a new type of voidable marriage?** (Journal of Contemporary Roman-Dutch Law 628-630 (1992).

[37] I do not hold the view that in the past a polygamous man could not enter into or contract further customary marriages without the consent of the senior wife. The situation is of course different today. The weak, un-persuading non-committal testimony by the Second Respondent/Defendant does not help me to make a finding that she was ever customarily married to the deceased. I am mindful of what she called utsiki which she told the Court she ate and that she was

given a name by the family members of the deceased. Utsiki alone does not mean that a valid customary marriage has come into existence. Mr. Zolisa Mneno conceded that there was some slaughtering at the deceased' house in the Eastern Cape and that the Second Respondent/Defendant was present. Mr. Mneno told the Court that he personally confronted the deceased if he was then engaging himself in polygamy. The latter did not reply but simply and quickly vanished from the eyes of Mr. Mneno. I cannot on the Second Respondent's/Defendant's evidence make a finding that there was a customary marriage between her and the deceased. Although she testified principally about things she had no personal knowledge of, she did not impress me either as a good witness even in things she should have had personal knowledge of. She was in my view, an untruthful witness. The conclusion I have reached about the Second Respondent's/Defendant's case must not be interpreted to mean anymore than that she was simply not customarily married to the deceased. She, however, remains the mother of the deceased' child, Mpho. It remains a fact that she stayed with the deceased at Delft South, Cape Town for a number of years prior to the demise of the latter.

[38] An application for interdictory relief (which this one is) must comply with certain requisites. The requisites for a final interdict are:

(a) a clear right;

(b) an injury actually committed or reasonably apprehended or an actual or threatened invasion of that right;

(c) the absence of similar protection by any other ordinary or suitable legal remedy.

See: Conradie J, ***Hall and Another v Heyns and Others*** 1991 (1) SA 381 (CPD) 395 D-E.

The Applicant/Plaintiff, in my judgment, satisfied each and every one of the above requisites for the granting of the final interdictory order in the instant matter. Having considered the papers in this matter and having heard, evaluated and considered the oral evidence led in this matter, I am in a position to make findings that will settle the dispute between the parties.

ORDER

[39] In the circumstances it is ordered that:

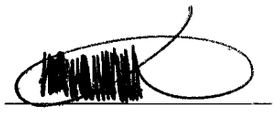
(a) The Rule Nisi granted in this matter and subsequently amended by my brother Sholto-Douglas AJ on 8 August 2007 is confirmed.

(b) The Applicant/Plaintiff and the deceased had entered into a customary marriage and the said customary marriage subsisted upto the date of the demise of the deceased.

(c) There was never a customary marriage between the Second Respondent/Defendant and the deceased; the civil marriage entered into between the Second Respondent/Defendant and the deceased on 13 December 2004 at Nyanga, Cape Town (Annexure "MMM1"), is declared null and void by virtue of the provisions of Section 10 (1) of the Recognition of Customary marriages Act 120 of 1998.

(d) The Appointment of the Second Respondent/Defendant by the First Respondent as the executrix and administratrix of the estate of the deceased (Luvo Magwaxaza) reported under estate number 3790/07 is hereby cancelled and/or set aside; the First Respondent/Defendant is directed to consider appointing a competent Attorney and/or an independent executor approved of by the beneficiaries in the estate of the deceased.

(e) The Second Respondent/Defendant shall pay costs of this application and the subsequent trial.



DLODLO, J