IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: **A196/2019**

In the matter between

M[….] C[….] B[….] **APPELLANT**

AND

T[….] N[….] M[….] **RESPONDENT**

CORAM: ROGERS J; THULARE AJ

JUDGMENT

THULARE AJ

[1] This is an appeal against a finding by the Regional Magistrate of Bellville that a customary marriage took place between the parties. The two issues are whether the appellant consented to be married to the respondent under customary law and whether the marriage was negotiated and entered into or celebrated in accordance with customary law.

[2] From the evidence before the court and the submissions of counsel, I understood the following isiXhosa terms as follows:

(a) *amadhaki*- traditional clothes in which a bride is dressed at her reception in the groom's home signifying the transition from being a single maiden to a married woman. The dressing is a ritual as the ceremony and the clothes are deemed dignified to command respect to only a married woman, which clothing she is allowed to wear subsequently especially at ceremonies and festivities.

(b) *Igama lomzi* - the new name given to a bride by the groom's paternal aunt, eldest sister, mother or delegated family or blood relation as part of the customary marriage rituals.

(c) *inhlawulo* – an amount paid in money or in kind to a woman's elders after a man had impregnated her. It is sometimes referred to as damages.

(d) *lobola* – an amount paid in money or in kind to a woman's elders for her hand in a customary marriage.

(d) *Imbheleko* – a ceremony and ritual performed for a child to introduce the child to the ancestors of a parent.

(e) *unmqombothi* – traditional beer brewed for family rituals, ceremonies and festivities. A woman who is not married is not allowed to participate in the brewing of beer for her intimate partner's family or relations.

(f) *ukwamkela* – a ceremony held after successful *lobola* negotiations to receive the bride by her in-laws or the groom by his in-laws.

(g) *uduli* – the bride's family and relatives accompanying the bride when she is being taken to the groom's family home. The name is also used to refer to gifts which the accompanying persons carry to be given to the bride and the groom's family.

(h) *ikhukho* – a traditional mat or similar furniture, which may include a bed, presented to the bride and on which she is placed during a ritual and ceremony where she is inducted into the new family as a wife.

(i) *makoti* – a wife as referred to after what needs to be done for the completion of a customary marriage is completed.

(j) *unozakuzaku* – a delegation of elders sent to negotiate both the damages and marriage on behalf of the parties.

(k) *white wedding* – a celebration after a customary marriage where the bride would wear a wedding gown ordinarily worn by brides in western cultures which is generally but not necessarily white.

[3] The respondent fell pregnant and the father of that child was the appellant. At the instance of appellant, *unozakuzaku* attended on the respondent's elders where *inhlawulo* was paid in an amount of R5000. After the respondent became pregnant, the parties agreed to marry each other.

[4] At the instance of the appellant, *unozakuzaku* attended on the respondent's elders to discuss his marriage to the respondent. The appellant did not inform the respondent that he intended only to comply with *isiXhosa* culture, customs and traditions and did not intend to marry under customary law.

[5] The respondent was 26 years of age when *unozakuzaku* attended at her home in Delft, Cape Town. The marriage was negotiated and *lobola* in the amount of R20 000 was paid. The respondent was handed over to *unozakuzaku* and was taken to appellant's relatives in Gugulethu, Cape Town. The respondent was later taken to Carletonville, to the appellant's homestead. The appellant himself took her to Carletonville. The appellant resided in Cape Town but his family was in Carletonville. For purposes of negotiating the marriage, his family had used his elders in Gugulethu, Cape Town.

[6] In Carletonville she was dressed in *amadhaki* and also given *igama lomzi,* to wit, S[….] by appellant's sisters. This is done to a person accepted and received as a wife. The plan was that they would later have a *white wedding.* The *white wedding* never happened. The two families later arranged a ceremony in Delft where a sheep was slaughtered in order to bring the two families together as tradition dictated. The appellant's elders at this ceremony were his relatives in Gugulethu.

[7] The respondent's version is that an *imbheleko* was not done for her daughter. At the time of her testimony it had still not been done. This was because when her daughter was two months old, she had taken the child to appellant's family in order to arrange *imbheleko* for her. The appellant's elders informed her that in their clan they do not perform *imbheleko* for a girl child.

[8] It was only when they experienced problems in their relationship, having a lot of arguments, that the appellant started talking about concluding a civil marriage which should not be in community of property. He told her that this was to ensure that if he passed on, she would not get anything out of the marriage. They attended counseling, and then appellant agreed that they would conclude a civil marriage which would be in community of property. The problems in their relationship were not resolved. She is the plaintiff in a divorce action.

[9] C[….] N[….] M[….] (M[….]) was appellant's cousin who lived in Gugulethu. It was at her address where the appellant had arranged for the *lobola* negotiations' briefings to take place. She was present at her home in Gugulethu when M[….] G[….] and M[….] M[….] were sent by the elders as *unozakuzaku* to negotiate a customary marriage for appellant to respondent at appellant's instance. She had also been present earlier when *inhlawulo* was negotiated and paid.

[10] *Unozakuzaku* left her home for Delft, respondent's home. She was not part of *unozakuzaku.* After the negotiations, *unozakuzaku* returned to her home. She had been part of the elders present and was present when *unozakuzaku* gave a report back. The arrangement was that the appellant would take the respondent to Carletonville to his family, for purposes of *amadhaki* ceremony. She was not present at Carletonville when a ceremony took place. Afterwards appellant reported to her and others that the respondent, who he referred to as his wife, was indeed taken to Carletonville to his family for the *amadhaki* ceremony. Mapitiza's evidence of appellant's reports to her before and after the Carltonville excursion was not challenged in cross-examination. The only point the cross-examiner sought to establish from her was that she did not

travel to Carltonville and thus did not have personal knowledge of what happened there. That is true, but appellant's statements to her about the purpose of the Carltonville trip and as to what happened there is an admission which is admissible against him as proof of the nature of the Carltonville ceremony.

[11] She accepted that the respondent had undergone the ceremony because a wife who had gone through the ceremony is clearly visible, especially when there are family ceremonies. When her nephew and appellant's son went for initiation, the function was held at her home in Gugulethu. The elders taught and allowed the respondent to brew *umqhombothi.* The respondent wore *amadhaki* at family ceremonies. The respondent would not have been allowed to brew *umqombothi* or wear *amadhaki* if she was not married. (Her evidence that respondent brewed *umqombothi* and that this would not have been allowed if she was unmarried was not challenged.)

[12] At that initiation ceremony, the appellant was present. It was at that ceremony where the respondent reported to the elders about the challenges in her marriage. As the elders recognized the respondent as the appellant's wife, the elders sat the parties down in a family conference. This was one effort the family tried to reconcile their differences.

[13] K[….] G[….] V[….] (V[….]) is the respondent's mother. She received *unozakuzaku* of appellant who paid *inhlawulo* of R5000. She later also received *unozakuzaku* of appellant who negotiated his customary marriage to the respondent. *Unozakuzaku* were the appellant's elderly uncles from Empangeni. The respondent was subsequently taken to Carletonville for her reception ceremony. It was only the appellant, the respondent and their child who, from Cape Town, went to Carletonville for the ceremony. She did not accompany the respondent there.

[14] When the respondent returned from Carletonville, she was wearing *amadhaki.* Since the appellant and the respondent returned from Carletonville, the appellant called the respondent *S[….],* slang for what she was told was the respondent's *igama lomzi,* to

wit *S[….].* After the *lobola* but before the ceremony in Carletonville she arranged a ceremony where she slaughtered a sheep. This was to acknowledge the appellant as her daughter's husband. The appellant's family was invited to that ceremony and they were present.

[15] In his testimony the appellant told the trial court that he did not regard himself as married to the respondent. He acknowledged that he paid *lobola* for the respondent. He paid *lobola* because he wanted to get married. There were other processes to follow. According to him, the slaughtering of the sheep by V[….]was basically to celebrate that the *lobola* negotiations went well.

[16] In his clan, *Amabhele*, they do *imbheleko* for a girl child. The ceremony in Carletonville was *imbheleko* for their daughter. It was his way to acknowledge the child and introduce the child to the *Amabhele* ancestors. The ceremony was before the *lobola.* The respondent was dressed in traditional clothing simply as a sign of respect at that ceremony.

[17] He disputed that the respondent wore *amadhaki* in Carletonville. She had clothes ordinarily worn by the Xhosa tribe, which are readily available and could be bought and worn on days like Heritage Day to signify their culture. He disputed that the photos which the respondent alleged were taken on the day in Carletonville depicted the venue and *amadhaki.* He also disputed that the respondent was given *igama lomzi.* He had no knowledge of the name *S[…].*

[18] He agreed to marry the respondent but did not agree to marry her customarily. The respondent's family did not accompany her to Carletonville and as such she was never handed over to his family. She could not have been accepted by his family as per tradition, being alone. She was never accepted by *Amabhele* as *makoti.* He did research and discovered the types of marriages available, and wanted to marry out of community of property as he had children not born of the respondent. Arguments arose and trust was broken and he ended up evicting the respondent from the house.

[19] There were counter protection orders which arose out of her eviction. In his application for a protection order he wrote:
"T[….]and myself are customarily married and have one child …"
Further on in the same affidavit he had written:
"While my wife was laying on the couch watching TV …"
and
"The reasons for requesting protection is that I am not sure what my wife [will] do to me or my properties."
His explanation for these was that he did not know the danger of saying so in an affidavit. He had the intention, but had not yet married her. His evidence in this respect was decidedly feeble and lacking in credibility.

[20] There were children's court proceedings which ended with a parenting plan made an order of court. The respondent then filed for divorce. It may be noted, here, that appellant and respondent lived together for three years after the Carltonville ceremony until appellant evicted her in 2015.

[21] Appellant's evidence that the Carltonville ceremony happened before the *lobola* negotiations was not put to the respondent or her two witnesses in cross-examination, despite their clear evidence that it happened afterwards. This glaring omission is material in assessing appellant's credibility, as are his allegations under oath in the protection proceedings.

[22] B[….] B[….] B[…] (B[….]) was the appellant's sister. According to her, her brother was not married and they did not have a *makoti* for him. The respondent was not brought home. No people brought her home. It would have been the respondent's family or people that would bring her over to the family and the appellant's uncles and aunts would have been there to receive the respondent. The handing over would have signified that the respondent was the wife. At that ceremony, each of the two families would have brought sheep which they slaughter and the blood of the two would be

mixed, among the other rituals performed. The elders from the families would then give the bride instructions and guidance.

[23] *Lobola* was paid for the respondent but they never signed. According to her, the purpose of paying *lobola* is to build relations between the family of the bride and the groom. The appellant's family did *imbheleko* for his child with the respondent when the child turned one in Carletonville. At the *imbheleko,* the respondent was given *amajailana* also known as *amadhaki* to put on as she could not wear trousers for the ceremony. The *inhlawulo* was done first, then *imbheleko* and thereafter *lobola.* No traditional wedding ceremony was done for the respondent. The parties also did not sign or exchange rings. (I point out, in this regard, that the unchallenged evidence from respondent and her witnesses that the Carltonville ceremony happened in March 2012 is inconsistent with Buhle's testimony: the child in question was born on 30 May 2011, and so had not yet turned one by March 2012.)

[24] As the eldest sister, she would know, be present and participate in the customary marriage of her sibling. There was no *uduli* and *ikhuko* from and for the respondent. It would have been her paternal aunt who would name her brother's wife. In negotiating for the appellant, the appellant's mother had asked his uncles here in Cape Town to meet her half-way and do some processes on her family's behalf.

[25] B[….] admitted that she used to chat with the respondent on facebook. She admitted that when she chatted with the respondent, she used the name *S[….]* when she referred to her. She denied having been present when the respondent was given the name. She admitted addressing the respondent as *makoti,* which she understood to mean that she was referring to the respondent as her brother's wife. The reason she gave was that *lobola* had been paid for her.

[26] The well-established principles governing the hearing of appeals against findings of fact are set out in *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f as follows:

‘In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.’

[27] The requirements for validity of customary marriages are provided for in section 3 of the Recognition of Customary Marriages Act 120 of 1998 (RECMA). It reads as follows:

‘3 Requirements for validity of customary marriages

(1) 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.’

[28] A customary marriage is not concluded by two parties only. In its conclusion there is participation by the couple themselves, their respective families and this participation extends to their blood relations. The nature of its participatory model, the family as well as blood relations orientation, has the result that it is not constituted by a single event. A series of negotiations, festivities and rituals officiate it into a marriage.

[29] The parties were above the age of 18 at the time that the appellant initiated the process of marrying the respondent. The parties discussed marrying each other. At the instance of the appellant, they participated in the processes necessary for a customary marriage. It was incumbent upon the appellant, at the time of his proposal to the respondent, to inform her that although he intended to comply with isiXhosa custom, he did not intend to marry under customary law. The appellant did not inform her. The parties consented to be married to each other and in my view also consented to be married to each other under customary law.

[30] The appellant had an obligation to inform his elders, and instruct *unozakuzaku* who were sent to negotiate the marriage on his behalf to inform the respondent's elders that he simply wished to comply with custom and did not intend to marry under customary law. *Unozakuzaku* were not called as witnesses. I have no doubt that if they had been informed that the appellant did not consent to be married to the respondent under customary law, and had been so instructed and had delivered the message, the appellant would have called them as his witnesses.

[31] The respondent's elders were not told that the negotiations in respect of the marriage were simply to comply with culture, customs and traditions and would not yield their obvious and natural consequences of a marriage under customary law. *Unozakuzaku* had explained the departures from ordinary customary practice. It is clear that Vumazonke as the respondent's mother was aware that it was not expected for her to prepare her daughter and dispatch *uduli* on the day that *lobola* was paid.

[32] *Unozakuzaku* had no reason to explain the other departures from practice, and leave out the most important, to wit, that the appellant was simply complying with custom and was not marrying under customary law. The marriage celebrations were not one composite event. *Unozakuzaku* were being briefed from Carletonville and worked from Gugulethu. They were responsible for only parts of the process. They had no authority to *ukwamkela* the respondent in Gugulethu in accordance with custom, although they received her and took her to Gugulethu immediately after *lobola*. The *ukwamkela* ceremony for the respondent was to be done by the appellant's parents in Carletonville on a different date.

[33] In my view the parties and the families agreed to perform the celebrations and rituals at each other's convenience, to accommodate each other's unique circumstances. *Ukwamkela,* by the respondent's family to welcome the appellant, was not done on the day *lobola* was paid. It was done sometime thereafter. At that *ukwamkela* ceremony, the appellant's family from Carletonville was not present. Only

his relatives from Gugulethu were present. The timing and the constitution of those who participated in the processes was dispensable to accommodate each other.

[34] No academics were led to ascertain what isiXhosa law and custom is in relation to a customary marriage. It was the people who lived the law and custom who testified. In my view, the evidence was enough to enable a court to establish *ukwamkela* as part of isiXhosa law and custom with sufficient certainty. The evidence proved as a fact that *ukwamkela* of the new bride into the groom's family is part of the isiXhosa law and custom performed during and as part of the customary marriage celebrations. *Ukwamkela* is recognized in isiXhosa as a normative law with moral authority that provides legitimacy. Ordinarily *ukwamkela* ought to be performed in accordance with the dictates of that law and custom, which included amongst others *uduli* and *ikhukho* rituals. It is clear that *ukwamkela* of the respondent by the appellant's family did not happen in accordance with isiXhosa law and custom.

[35] It is quite conceivable that a court might hold that even though the position as it was, was not identical with what ought to have been, the ceremony and ritual had nevertheless been complied with [*Maharaj and Others v Rampersad* 1964 (4) SA 638 (AD) at 646C-D]. In the determination of whether *ukwamkela* of the respondent by her in-laws had been complied with, the object sought to be achieved by the ceremony and whether this object had been achieved are of importance [*JEM Motors Ltd v Boutle and Another* 1961 (2) SA 320 (N) at 327H-328A].

[36] The respondent was handed over to *unozakuzaku* after the customary marriage negotiations were completed in Delft where amongst others *lobola* was paid. *Unozakuzaku*, who were acting at the instance of the appellant and at the direction of his parents, took the respondent with them to Gugulethu where the proceedings of that day were finalised. This is the address from which the appellant's marriage to the respondent was initiated. It is the address where the appellant's elders had assembled to negotiate his marriage. It is the address from which appellant's relatives later left to

go to Delft to honour an invitation by the respondent's family to *ukwamkela* the appellant into their own family.

[37] Thereafter, on a date determined by the appellant's family, the appellant took the respondent and their child to a ceremony in Carletonville. At that ceremony, amongst others, the respondent was given *igama lomzi.* The respondent was also dressed in *amadhaki* to symbolize her transition into being a married woman. Amongst other relatives, the appellant and B[….] from that date onwards, used *igama lomzi*, *S[…],* when referring to the respondent.

[38] After that ceremony, appellant's relatives including B[….] referred to the respondent as *makoti.* The appellant referred to her as his wife. After that ceremony, the respondent was allowed by the appellant's elders to brew *umqombothi* at family functions. The appellant's family acknowledged the respondent as his wife. The object sought to be achieved by *ukwamkela* of the respondent by the appellant's family had been achieved.

[39] Customary law has evolved and has always been flexible in application and pragmatic in its approach [*Mabuza v Mbatha* 2003 (4) SA 218 (CPD) at para 26]. Ceremonies would be simplified or abbreviated for a variety of reasons, including poverty, the unavailability of persons designated for some responsibilities, the dictates of prevailing circumstances and the need to expedite matters. Africans have never been proponents of strict adherence to ritual formulae in negotiations, entering into and celebrations of customary marriages. Customary law has developed and adapted itself to the changing needs of the communities [*Motsoatsoa v Roro and Another* [2011] 2 All SA 324 (GSJ) at para 14]. In the current era the families whose participation would ordinarily be expected according to customary law may be geographically remote from each other, as was the case here. Work and family commitments, and cost, may make it difficult for families to come together in the traditional way. Customary law, with its flexibility, can accommodate itself to these changes in social circumstances.

[40] It follows that in my view, *Motsoatsoa* should be approached with some circumspection to the extent that it advanced a proposition of some rigid, formalistic and grading of rituals, processes, customs and celebrations. A court should not base its conclusion for a factual determination on only some part of the evidence or some custom, celebration or ritual which it elevates above others. I am more persuaded by what was said in *Sengadi v Tsambo* [2019] 1 All SA 569 (GJ) at 577i-j:

> 'After all, there is no universal, rigid, catechismal formula that exists for all customary marriages, and the handing over of the bride is not the *sine qua non* that it is made out to be.'

A proper test in my view is that the court should arrive at a conclusion that the customary marriage was negotiated, entered into and celebrated in accordance with customary law on account of all the evidence.

[41] As to *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014), on which appellant's counsel placed much store, the statement in para 40 thereof must now be read in the light of *Mbungela & Another v Mkabi and Others* (820/2018) [2019] ZASCA 134 (30 September 2019) at paras 27 and 30.

In *Moropane* it was said:

> '[40] Importantly, the two experts agreed that the handing over of the makoti to her in-laws is the most crucial part of a customary marriage. This is so as it is through this symbolic customary practice that the makoti is finally welcomed and integrated into the groom's family which henceforth becomes her new family. See *Motsoatsoa v Roro & another* and The Current Legal Status of Customary Marriages in South Africa, I.P. Maithufi and GBM Moloi, Journal of SA Law, 2002, p599, and Bennett (above) at p217.'

In *Mbungela* it was said:

> '[27] 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 recognized 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.' …

> [30] To sum up: The purpose of the ceremony of the handing over of a bride is to mark the beginning of a couple's customary marriage and introduce the bride to the groom's family. It is [. . .][1] an important but not necessarily a key (a) determinant of a valid customary marriage. Thus, it cannot be placed above the couple's clear volition and intent where, as happened in this case, their families, who come from different ethnic groups, were involved in, and acknowledged the formalization of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer. I am satisfied in all the circumstances that the essential requirements for a valid customary marriage were met. The appeal must accordingly fail.'

[42] For reasons that do not appear from the record, the appellant became gravely concerned about the future of his children not born of the respondent in relation to his estate should something happen to him. It is unknown as to whether this was a natural instinct or it was triggered by his experiences. The fact that the respondent had an equal share when according to him she did not make a meaningful contribution to the joint estate also stole his peace and comfort. It is against this background that the appellant started a research on different regimes of marriages and their consequences in relation to his estate.

[43] His discovery that he was married in community of property and of profit and loss to the respondent clearly did not sit well with him. He started only then to discuss the possibility of concluding a civil marriage out of community of property with the respondent. The respondent rejected this idea. This was part of the problems in their marriage and was also an issue in their irreconcilable differences.

[44] Section 7(2) of RECMA provides as follows:

> 'A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such

[1] In the bracketed position the word 'not' appears in the published judgment but in context this is clearly an error.

consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.'

[45] The parties did not specifically exclude the community of property and of profit and loss between them in an antenuptial contract, as a property system which regulated their marriage.

[46] The conclusion that the appellant agreed to marry the respondent under customary law and that the marriage was negotiated and entered into or celebrated in accordance with isiXhosa customary law accounted for all the evidence. The evidence in support of the respondent's case was convincing and conclusive. It excluded the probability that the appellant did not agree to marry under customary law or that the marriage was not negotiated and entered into or celebrated in accordance with custom. On a balance of probabilities, the respondent's version was true and stood to be accepted, and the appellant's version was false and fell to be rejected.

[47] I am not persuaded that the magistrate was wrong. For these reasons I would make the following order:

The appeal is dismissed with costs.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

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O ROGERS
JUDGE OF THE HIGH COURT

Dates of hearing:		Appeal Hearing on the 25 October 2019 with Judge Rogers and Acting Judge Thulare. Judgment hand down on 20 November 2019, by Judge Rogers.
For the Applicant	:	Mr Charl May
Attorneys for the applicant	:	BDP Attorneys
Counsel for the respondent	:	Adv Sithe Ngombane
Attorneys for the respondent	:	Mr L Ciko Venfolo Attorneys