

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

Case No: 21530/2016

In the matter between:

VUYOKAZI APHENDULE TSHONGWENI

Plaintiff

and

NQABAYOMZI SAZISO KWANKWA

Defendant

Coram: Bozalek J

Heard: 15 – 18 March; 19 – 22; 26 April; 10 & 13 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10:00 on 9 July 2021.

JUDGMENT

BOZALEK J

[1] This is a divorce action which commenced in November 2016 when the plaintiff issued a summons against the defendant seeking a decree of divorce and extensive ancillary proprietary relief. In her particulars of claim the plaintiff averred that during July 2012 the parties were married to each other in terms of customary rites and such marriage still subsists. She further averred that one minor child, at that stage 9 years old, was born from the marriage.

[2] The action was opposed and was only set down for trial on 15 March 2021. On 1 February 2021 the defendant filed an amended plea. That portion dealing with the alleged existence of the marriage read as follows:

'[5] The defendant pleads that towards the end of 2011 and beginning of 2012 he and the plaintiff wished to marry each other. To this end the family of the defendant initiated lobola negotiations in 2012. The lobola negotiations were never concluded

in accordance with the customary law and rights applicable to the defendant's family.

[6] *The lobola was negotiated and agreed to and st (sic) at the amount of R50 000.00.*

[7] *It was a condition precedent to taking further steps and to attend to other formalities – which are the essential ingredients in the consummation of a customary marriage – that the defendant would pay seventy percent of the lobola.*

[8] *Put differently, further steps and other formalities which were essential to conclude a customary marriage between the parties were to be undertaken upon payment by the defendant of seventy percent of the lobola.*

[9] *The defendant made part payment of the lobola in the amount of R20 000.00. The part payment of lobola in the amount of R20 000.00 is a far cry from the seventy percent part-payment of the lobola agreed to in the lobola negotiations to pave (sic) way for the parties to proceed and attend to essential formalities to conclude their customary marriage.*

[10] *Pursuant thereto, the parties experienced irreconcilable differences in their relationship which culminated to a complete breakdown of the relationship soon thereafter, they lived separate lives.*

...

[12] *Instructively, there we (sic) no further steps and other formalities, - which were essential to seal a customary marriage – undertaken to conclude a marriage between the parties.*

...

[14] *Accordingly, the defendant denies that there is in existence a marriage in terms of customary rights between the parties and that such a marriage still subsists.*

[15] *Further there is no customary marriage of the parties registered in terms of sec 4(1) and (2) of the Customary Marriage Act. 120 of 1998.'*

[3] *On commencement of the hearing at the Court's suggestion the parties agreed that a primary issue would be separated out and determined initially, namely 'whether a valid customary marriage was concluded between the parties on or about July 2012, as alleged in paragraphs 4 and 5 of the plaintiff's particulars of claim read with paragraphs 5 – 9 of the defendant's amended plea'.*

[4] *In due course when the defendant testified he gave a version which was entirely at variance with his pleaded case, the main differences being that he testified that there had been no agreement on the amount of lobola and he had no knowledge*

of how much was paid in part payment of, or towards, lobola. Notwithstanding the glaring contradictions between the defendant's pleaded version and his evidence, the defendant only sought an amendment to his pleadings during argument, and then only when the Court pointed out that it was untenable for counsel to argue on the basis of a version at complete variance with the pleadings.

[5] The defendant also applied for the withdrawal of three paragraphs of two statements of agreed facts, all of which applications were granted. In the first statement of agreed facts, dated 6 September 2019, paragraphs 7 and 8 read:

'7. Lobola was agreed to be R50 000.00;

8. R20 000.00 was paid towards the lobola.'

[6] Paragraph 5 of the statement of agreed facts dated 15 March 2021 read *'an amount of about R20 000.00 was paid to Mrs Tshongweni's family'*. All of these statements are accordingly no longer agreed facts.

[7] In terms of sec 2(2) of the Recognition of Customary Marriages Act, 120 of 1998, a customary marriage entered into after the commencement of that Act (15 November 2000) is for all purposes recognised as a marriage. The requirements for the validity of a customary marriages are set out in sec 3(1) which reads as follows:

'(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 direct accordance with customary law.'

[8] In the present matter the first requirement is not disputed leaving an onus on the plaintiff to prove the second two requirements. As the evidence unfolded three primary disputes of facts came to the fore; firstly, whether the lobola negotiations between the respective families were successfully concluded; secondly, what portion of the lobola had been paid and whether the plaintiff's family had agreed to her release and; thirdly, whether the ceremony in which the bride was handed over to the defendant's family had taken place and if so whether this had been with the defendant's consent. It is appropriate then to commence with the evidence regarding the lobola negotiations. The plaintiff testified and called two witnesses in regard to the lobola negotiations, Mr Phumzile Tshongweni and Mr Sanele Tshongweni.

Mr Phumzile Tshongweni

[9] Mr Tshongweni testified that the plaintiff was his sister's daughter and that he had been the leader of her family's delegation in the lobola negotiations at his sister's homestead in Engcobo on 30 June 2012. His delegation had welcomed the visitors who had advised that they had come to ask for the plaintiff's hand in marriage. The defendant's delegation were told that the price of *ubuso bentombi* i.e. 'to see the (plaintiff's) face' was one cow, in effect R4500.00. The price of other cows was agreed at R4000.00. An agreement was reached that plaintiff's delegation would accept three cows for the time being (R12 500.00), let the defendant's delegation 'borrow' plaintiff and they would discuss the balance of the lobola at a later stage. Somewhat contradictorily Mr Phumzile Tshongweni testified that his delegation also stipulated that until the defendant's delegation had paid five cows the plaintiff could not be released and even the five cows would not be the full lobola. That effectively ended negotiations on that day. On the following day the defendant's delegation returned, he was told, but he was not available and thus not present. The witness testified that his delegation had received R12 500.00 in cash on the first day of lobola negotiations as well as a further amount of R2000.00 being the balance of the damages which the defendant was required to pay for impregnating the plaintiff. The witness confirmed that notes of the negotiations had been written by another of his family's delegates, the plaintiff's brother, Mr Sanele Tshongweni.

[10] Those notes appear in a folio notebook, Exhibit A, in full. They are written in isiXhosa but an agreed translation reads as follows:

'Visitors from Ematshaweni

They started with the payment of impregnation in the amount of R2000.00 which was outstanding.

The came back and paid R12500.00.

Those are three cows, ubuso bentombi cow is R4500.00, together with two other cows as at R4000.00 each.

They said they will come back again, because we did not release our daughter as amaQwathi.

We will release her when they leave five cows behind.

They took out/paid their responsibilities which were:

Isazimzi: How amaTshawe knew the amaQwathi home.

Iswazi: Whip that was used along the way directing the cows.

Ihambidlane: What the cows ate along the way to emaQwathini.

The Cows wanted by amaQwati are ten in total.'

[11] The single page of the folio notebook contains four names as representing the amaQwati i.e. the plaintiff's family, namely, the witness and Messrs Sanele Tshongweni, Thanduxolo Jada and Ayeza Mdlunya. It contains also what appears to be the signatures of the three delegates of the defendant's family: MH Kwankwa, K Ntoshe and M Ntunze.

[12] In cross-examination Mr Tshongweni confirmed that the defendant was not part of the discussions or negotiations. He stated also that *ukwenda* i.e. the introduction of the groom to the plaintiff's family had not taken place on 30 June 2012. At times the witness' recollection of events on 30 June 2012 were at odds with the notes but ultimately he conceded that the notes were more likely to be correct because, as he put it, he was old and his memory was not what it used to be. In cross-examination it was put to the witness that he had complained to the defendant sometime after the negotiations that his authority was being undermined by the plaintiff's family but he denied that this had ever happened. He was insistent that the plaintiff was a bride of the Kwankwa family i.e. the defendant's family.

[13] In re-examination the witness confirmed the essence of his evidence, namely, that the agreement reached between the families was that once five cows were paid the bride would be released. In answer to the Court's question as to why he regarded the plaintiff as the defendant's bride his answer was because the defendant's family had accepted her and she had undergone the *utsiki* ceremony. The basis of this latter evidence, however, was what he had been told by the plaintiff i.e. it was hearsay.

Mr Sanele Tshongweni

[14] The witness, 26 years old in 2012, testified that he was the plaintiff's younger brother and works at Old Mutual in Johannesburg. He identified the notes covering the two days of the lobola negotiations as having been made by him. The other members of the amaQwati delegation on 30 June 2012 were Mr Phumzile Tshongweni, Mr Ayeza Mdlunya and Mr Thanduxolo Jada. He had written down the names of the amaTshawe delegation in the book. He confirmed that the first issue discussed was the family's requirement that the plaintiff pay R2000.00 further damages in respect of the plaintiff's impregnation and this was agreed and effected. He confirmed that it was agreed that the price of *ubuso bentombi* would be R4500.00

and that a further R8000.00 i.e. two cows, was received making a total of R12 500.00 (excluding the damages). That sum was also paid in cash. It was further agreed that the bride would not be released until five cows had been paid i.e. a total lobola of ten cows. The Tshongweni family were subsequently gathered together and were told what had happened. The visitors left but on the understanding that they would return. Before they left they were invited into the house where a lunch was prepared for them. The witness testified that the defendant was also present at the lunch which was the first occasion when he had met him.

[15] Mr Sanele Tshongweni testified that on the following day, 1 July 2012, the visitors returned to make payment of the balance of the five cows agreed upon. He had been present and had not been surprised to see them. They paid a further R8000.00 making a total of R20 500.00 payment of lobola over the two days. On that day a light lunch was served. Present from the Kwankwa family were two of the previous day's three delegates. The defendant was also present having been initially seated in a car outside but then having come into the house. The amaQwati delegates had been himself and Mr Thanduxolo Jada who had been in charge. After receipt of the R8000.00 he had reported this to the family and they had agreed that the plaintiff could be released to the defendant's family. He left Engcobo after the negotiations and only heard later that on 16 July 2012 the *utsiki* ceremony had taken place.

[16] The witness was cross-examined at length. He denied that there had been no further payments/lobola negotiations on 1 July 2012 and maintained that two envoys had paid a further R8000.00 towards lobola on that day. It was put to him that the defendant and his brother, Mr Thulani Kwankwa, were in Engcobo on 1 July 2012 but neither of them attended at the plaintiff's homestead; further that the defendant had used the plaintiff's car to bring his delegation from King Williams Town to Engcobo on 30 June 2012 and back again and then had brought the car back to Engcobo on 1 July 2012.

[17] In re-examination the witness testified that it was some three kilometres from the alleged car drop-off point to his family's homestead and involved a walk of at least ten minutes. The other delegate present on 1 July 2012 for the plaintiff's family was Mr Jada. Inasmuch as some questions had been put to him based on the customs of the Rharhabe kingdom, the witness testified that he and his family were amaQwati falling under the amaQwati kingdom. He insisted that the defendant's

brother, Mr Thulani Kwankwa, was one of two delegates who visited his family's homestead on 1 July 2012 and paid the R8000.00. The witness confirmed that he had made notes in the folio notebook relating to the events of 1 July 2012. The agreed translation of the notes reads as follows:

'Visitors from Ematshaweni

amaTshawe visitors came back again.

Saying they came back to add two cows on top of the three cows. Which made a total of five cows.

amaQwati agreed that they are releasing their daughter to eMaTshaweni.

But amaTshawe said they will come back.'

Underneath this note appears the names of two amaQwati delegates: Messrs Sanele Tshongweni and Thanduxolo Jada are written, as well, in a different handwriting, of two delegates for the Tshawe's, namely, Messrs Mzwebantu Kwankwa and Thulani Kwankwa.

The plaintiff – Ms Vuyokazi Tshongweni

[18] The plaintiff works as a manager for a medical company and has a number of tertiary qualifications. The defendant and her are married by customary marriage and he is the father of her child. They met in 2006 and by October of that year she was pregnant with her daughter who was born in July the following year. She and the defendant began living together in 2010 in the Cape Town suburb of Montclair. She moved in with the defendant because he had resigned from his job as a lecturer and they decided to share a household. Marriage was discussed and they both agreed on a traditional wedding but decided to get married by customary rites first in order to save money for a 'white wedding'. The defendant proposed marriage to her and threw a surprise engagement party for her. On that occasion he had rung her mother and informed her that the two of them were engaged.

[19] In June 2012 the two of them drove together to the Eastern Cape for the purposes of lobola negotiations. At Graaff-Reinet the defendant withdrew R20 000.00 from his Absa account for this purpose. Her family lived in Engcobo and the defendant's family lived in King Williams Town (hereinafter 'eQonce'). They drove up in her car and she was dropped off in Engcobo and the defendant proceeded in her car to eQonce.

[20] The following day, 30 June 2012, the defendant and his delegation arrived at her family's homestead. During the day she and the defendant had communicated

with each other by text message. He messaged her when he arrived saying he was hungry and she prepared food and took it to him where he sat in her car outside the homestead. At the commencement of negotiations she was called by her family's delegates and asked if she knew the visitors from the amaTshawe, which she confirmed and then went back to the house to cook for them. She was not told of the outcome of the negotiations that day but the defendant called her and told her that her family had not agreed to release her. He explained that the cows (money) which they had brought was too little. She had queried this because as far as she was concerned the defendant had enough money. The defendant had explained that his uncle was trying to save but that she should not worry because they would be coming back the following day since they had not paid for all the cows. She had been present when lunch was served to the delegates. Her mother had told her that she must go and call the defendant into the homestead so that the family would know that he was the son in law. Her mother has since passed away.

[21] The next day, 1 July 2012, she was told that the defendant's delegates had returned and she herself saw them. The delegation of 1 July 2012 had comprised the defendant's late uncle, Mr Mzwebantu Kwankwa, and Mr Thulani Kwankwa, the defendant's brother. They spoke to Sanele and Mr Jada. She also made them some light food and something to drink and they sat at a table in the homestead. She had only received her vehicle back on the Monday i.e. 2 July 2012 when the defendant came back to her homestead and she drove him to the bus station in Engcobo to catch the bus back to Cape Town. She was then told by her mother that she had been released to the defendant's family.

[22] The next step in the proceedings was that she had proceeded to the defendant's homestead so that the *utsiki* celebrations could be held although this had only taken place on 16 July 2012.

[23] Much of the cross-examination which the plaintiff faced sought to demonstrate that the defendant, and hence his delegates, were not at her family's homestead in Engcobo on 1 July 2012. Plaintiff testified that she only got her car back from the defendant on the Monday, 2 July 2012, in time for her to drop him off at the bus station to catch the bus back to Cape Town. She believed that he must have arrived in Cape Town only the following day, 3 July 2012, because it is an 11-hour trip and he called her from there. The plaintiff was, however, shown an extract from the defendant's bank statement showing that he withdrew or transacted for an amount of

R200 at the BP Promenade on 2 July 2012 which, the defendant later testified, was a filling station in Mitchells Plain, Cape Town. Ultimately, the plaintiff stated that if the defendant was indeed in Cape Town on 2 July 2012 she would not deny it.

[24] It was put to her that the defendant would testify that he left Engcobo on Sunday, 1 July 2012 taking the bus to Cape Town. He would also state that he was never inside her homestead that day. He would testify that he arrived in Engcobo on 1 July 2012 accompanied by his brother and dropped her car at the Transito, apparently a shopping mall where her mother's business was situated. From there he went to the bus stop together with Thulani to catch the bus back to Cape Town. This arrangement was disputed by the plaintiff who asked, rhetorically, why would the defendant not drop her vehicle at her homestead and how would she have got it since doing so would have involved her making a long walk to town and why would she do that? It was further put to her that the defendant could not have brought Mr Mzwebantu Kwankwa back to her house on 1 July 2012 and have taken him back to eQonce and then only returned to Engcobo on the Monday. The plaintiff testified that on the Saturday, 30 June 2012 she had recognised the defendant's envoys as Messrs Mzwebantu Kwankwa, Thulani Kwankwa and another two elderly men. According to her Mr Thulani Kwankwa had not been '*stable*' on 30 June 2012 since he had been in and out of the township and had visited a shebeen. He had been under the influence of alcohol and had broken the key to her car's ignition which led to a hefty disagreement between the two of them. The plaintiff testified that the defendant would have been welcomed with great ceremony into her family's homestead that day had all the cows been paid that day.

[25] I deal now with the evidence led by the defendant dealing with lobola.

Mr Thulani Kwankwa

[26] The defendant's brother, Mr Thulani Kwankwa, testified that the defendant was his aunt's child and the plaintiff was the mother of the defendant's child. He recalled the lobola negotiations in respect of the couple in 2012 when his role had been was that of a runner/messenger between the defendant and his delegation which travelled to the plaintiff's homestead in Engcobo. The defendant's delegations were Messrs Mzwebantu Kwankwa, Mr Khawulezile Ntoshe and Mr Maqetsebani Ntunze. They drove on the morning of 30 June 2012 from eQonce to Engcobo in the plaintiff's car and dropped the delegates at the gate to the homestead. He and the

defendant remained in the car at a distance so that they could keep an eye on the gate. The defendant was not allowed into the homestead for cultural reasons. When he, the witness, would see his uncle at the gate he would go there to find out what he wanted and to relay messages. He recalled that on the second such occasion his uncle had told him that their delegation was not welcome because they were *'limping'* i.e. did not have enough money for lobola. The witness stated that he had not entered the plaintiff's homestead that day. He agreed that he had been given food and drink but explained that they had not consumed this on the premises. He conceded too that he had been under the influence of alcohol that day and had broken the ignition key to the plaintiff's vehicle. Although unsure, he believed the delegation left the homestead in the late afternoon for the three-hour journey back to Middeldrif (outside eQonce). The following day (1 July 2012) he and the defendant drove the plaintiff's vehicle back to Engcobo and caught the bus from there to Cape Town. They left the car at the plaintiff's mother's place of business in town some time before 2pm and they arrived in Cape Town the following morning on the bus. The witness said that it was untrue that he and Mr Mzwebantu Kwankwa had arrived at the plaintiffs' family homestead on 1 July 2012.

[27] Under cross-examination Mr Kwankwa conceded that he did not remember much of 30 June 2012 because of the alcohol which he had consumed that day. He stated that he did not know how much was paid by his brother's delegation in the lobola negotiations.

Mr Khawulezile Ntoshe

[28] Mr Ntoshe testified that the elder of his clan, the amaTshawe's, who was later established to be Mr Batini Kwankwa, appointed him as the leader of the amaTshawe delegation to travel to Engcobo to negotiate lobola after asking for the plaintiff's hand in marriage for the defendant. He and two other delegates entered the homestead and met the amaTshawe delegation although he was not able to name them. He was unable to remember the plaintiff's name but said it had been written on a piece of paper. She had been called and confirmed that she knew the amaTshawe delegates. In the negotiations the amaQwati had first said that they had to pay R2500.00, being the unpaid portion of the damages for the defendant having impregnated the plaintiff. His delegation duly paid the R2500.00 and the lobola negotiations proper started. His delegation put down R7500.00 and on being asked

by the amaQwati's told them that that was all they had. Their response had been to tell them that they were '*short*' whereupon his delegation undertook to take this back to the amaTshawe clan in Middeldrif. The translated notes of the first day's negotiations were read to him but he disagreed that the impregnation damages were R2000.00 and also disagreed that his delegation had paid a further R12 500.00. Mr Ntoshe testified further that his delegation had agreed that they were going to come back but had given no indication when this would be and he himself had not come back. He was shown the written notes and his name and confirmed that it appeared to be his signature. After the negotiations ended his delegation was given something to eat and they left. He testified that the defendant had not entered the homestead.

[29] In cross-examination Mr Ntoshe's evidence, already far from clear, became even less so. He testified that his delegation had been given a copy of the first page of the notes regarding the negotiations and that he had taken this back to Mr Batini Kwankwa. He said the full cash amount given to him before the delegation left was R10 000.00 and that he had only R2500.00 of that in his pocket which he used to pay for the impregnation damages. He could not recall how much his delegation had paid for *ubuso bentombi*. He was repeatedly asked by how much his delegation was short in lobola money and could not give an answer. He testified that his delegation had given the defendant and his brother (Thulani Kwankwa) feedback on the negotiations. Although it was put to him that the notes recorded that lobola in the amount of ten cows had been agreed upon he would not concede that this was so. When his delegation returned home they told Mr Batini Kwankwa only that the amaQwati had not accepted the offer. The witness then testified that the amaQwati had said that they needed to have three cows before they could even hear his delegation but even at that point they would not be ready to release the plaintiff. The witness then immediately changed his evidence and said that the amaQwati had stated that when they paid three cows they would release their daughter.

[30] At the time of giving evidence Mr Ntoshe was 63 years of age. He testified that Mr Mzwebantu Kwankwa had died in the meantime and that Mr Ntunzi was old and could not walk. At the time, Mr Thulani Kwankwa was a '*child*' and not allowed to take part in the negotiations. Later in his evidence he said that his delegation was told by how much they were short but he could not remember how much this was.

[31] Mr Ntoshe ultimately conceded that he did not have a good recollection of the events on the day of the negotiations and it was possible that they had paid

R12 500.00 rather than only R10 000.00. When it was put to him that the plaintiff's case was that agreement was reached that on payment of five cows the bride would be released the witness' answer was that he could not remember. He conceded that if someone comes to negotiate lobola for his daughter that person would have to follow his rules. In other words, the suitor cannot dictate which rules must be followed. In keeping with the confused nature of his evidence, in re-examination the witness reversed this last part of his evidence.

The defendant – Mr Ngabayomzi Kwankwa

[32] The defendant testified that he was a politician and Member of Parliament and the father of six children by a number of different women. He confirmed in his testimony that he had proposed marriage to the plaintiff and that they had travelled together to the Eastern Cape in her car in late June 2012. At Graaff-Reinet he withdrew R20 000.00 for the lobola negotiations from an ATM before dropping the plaintiff off at her Engcobo homestead. He then went through to his village near Middeldrif which is some distance from eQonce. The following day he drove his brother, Thulani, and three delegates from his family to Engcobo for the lobola negotiations. He dropped the delegates, Mr Mzwebantu Kwankwa, Mr Ntoshe and one other at the gate but himself remained outside in the vehicle. His delegates appeared and disappeared into the house on the homestead on a regular basis and emerged to caucus. After some of these caucuses they called Thulani to the gate who would then keep him abreast of developments. At a stage he was told that the amaTshawe's were complaining that the amount of money his delegation had brought was not enough. He had responded by saying that he had given his grandfather, Mr Batini Kwankwa, all the money he had i.e. R20 000.00. At a later stage it appeared that the negotiations had broken down for the same reason and he conveyed the same message through Thulani, namely, that he had given all the he had and was not in the position to make any alternative arrangements. He took the delegation back to his homestead that afternoon so that they could report to his grandfather. Forty minutes after leaving from home he received a phone call from the plaintiff who wanted to know by how much the money was short and he told her that he had no details as he had not been given them. At no time on the day had he gone into the plaintiff's homestead because this was culturally improper and nor had his brother Thulani.

[33] The following week he had received a report that his envoys had reported back to his grandfather but he had not been part of that process. The report he received was that although the delegation was well received his proposal for marriage was not accepted because they had not brought enough money, that they would have to go back again to the plaintiff's homestead but that date was never set. He had phoned the plaintiff to tell her that they would have to come back a second time for her to be released.

[34] Earlier, on the day after the initial negotiations, 1 July 2012, he and Thulani woke up early and drove the plaintiff's car to Engcobo. They dropped off her car at her mother's place of business because they feared they were running late for the bus. They rushed to the bus station and got there timeously because the plaintiff was there. They boarded the bus and left at about 2pm arriving back in Cape Town at 2am or 3am the next morning i.e. 2 July 2012. He and Thulani had not been anywhere near the plaintiff's homestead on 1 July 2012. He confirmed that prior to the lobola negotiations he had already been fined R5000.00 by the plaintiff's family for impregnating her and had made an initial payment of R2500.00 thereof. Mr Phumzile Tshongweni was the person who had phoned him and told him he had to pay those damages. He denied arriving at the plaintiff's homestead on 1 July 2012 with Thulani and Mzwebantu Kwankwa. This would not have been practically possible since he would have to have taken those two people back to his village and then returned to Engcobo and the journey was three hours in one direction. He disputed that the plaintiff's evidence that he had brought her car back on Monday, 2 July 2012. He identified in his bank statements a withdrawal of R20 000.00 made on 29 June 2012 in Graaff-Reinet and a purchase of R200.00, which he said was probably for fuel, made on 2 July 2012. He denied that he was ever inside the plaintiff's homestead on 1 July 2012 when a further R8000.00 was paid allegedly thereby reaching the fifty percent needed for the release of the bride by her family. He stated that there was never a further lobola meeting to discuss the plaintiff's release to his family. He testified to a discussion between himself and the plaintiff regarding coming back to the Ciskei in December of that year to finalise outstanding issues.

[35] In cross-examination the defendant presented himself as almost completely excluded from any communications regarding the lobola negotiations and uncurious about them. He could not say by how much money his delegation was short because

he said he had not even been told how much had been offered. He had not even told Mr Mzwebantu Kwankwa that he had given Mr Batini Kwankwa R20 000.00 for lobola because it was *'not his place to do so'*. He agreed though that it was he who would have to raise more money and in order to do so he would need to know by how much he was short. He maintained nonetheless that he was not told this figure and he did not ask for it. The repeated assertions in earlier versions of his plea and in his Rule 43 affidavit that he made part payment of lobola in the amount of R20 000.00 were put to him but he disavowed them, saying that all that he could say was that he withdrew R20 000.00 and gave the money to his grandfather, making no payments himself. Similarly, his earlier repeated assertions in pleadings and other documentation that lobola was negotiated at the amount of R50 000.00 were put to him but he blamed these misstatements on a previous attorney. He also sought to explain them away on the basis that he got this information from the plaintiff (herself not a party to the negotiations) who was his only source of knowledge and on whom he had to rely. The defendant testified that he never spoke to his grandfather about re-opening the lobola negotiations and never found out by how much he was short in them. By the time of trial Mr Batini Kwankwa was still alive but aged 93 and suffering from dementia. At a later stage in his evidence the defendant stated that he only understood that R10 000.00 or thereabouts was paid in lobola, as was testified by Mr Ntoshe.

[36] In re-examination the defendant furnished yet a further explanation for his initial assertions in pleadings and other legal documentation that the lobola negotiations had been successfully concluded and that he had paid R20 000.00 in part-payment thereof. These were incorrect assertions, he stated, but because of the proliferation of litigation in which he had found himself embroiled with the plaintiff he had not wished to risk another opposed application and the consequent legal costs. So instead he had decided to leave the pleadings as they were and press for an early trial to bring the litigation to a conclusion.

[37] In response to a question from the Court regarding two withdrawals from his account on the morning of 1 July 2012 in the amount of R1000.00 and R3000.00 he stated that this was money he needed for his journey back to Cape Town.

Prince Zolile Burns-Ncamashe

[38] The defendant called, as an expert witness on Xhosa customs, more

particularly those of the Rharhabe kingdom, Prince Zolile Burns-Ncamashe, a teacher, lecturer, author and senior traditional leader of the amaQane tribe. The witness has a background of serving in the Eastern Cape House of Traditional leaders as well as the National House of Traditional leaders. The Rharhabe kingdom is that section of the Xhosa nation from Kei river to the Gamtoos river and within it falls eQonce and the village of eMnqaba (where the defendant's homestead is situated). The plaintiff's clan, the amaQwati, do not form part of his kingdom, however. According to the witness the traditions regarding customary marriage are homogenous across Xhosa clans. Lobola was a gift of cattle offered to the bride's family from the suitor to build the bonds of affinity between the families. Nowadays money is generally used as a substitute for cattle. According to the witness it is rare for negotiations to be concluded on the first day of negotiations since a relationship is being built which requires astute negotiators. Only after about six cattle have been offered will there be a level of comfort on the part of the bride's family. The welcoming of the son-in-law to the brides' family is part of *ukwenda* and is a general practice. The bridegroom's family asks that the bride be released to their family. The daughter is released once the lobola is set. If the bride's father is alive he, together with the elders, will make the decision to release the daughter to the other family but if the bride's family has no father this would be role of the leader of the negotiating team. After every round of negotiation the mother of the bride and the elderly women would be given a report. A significant portion of lobola must be paid, in the witness' view at least half, otherwise the bride is seen as an *ushweshwe*, a bride of very low value. According to the witness, notes of the negotiations would be kept by a young man who is himself not a negotiator because he is not married and is merely a scribe. Including the *ubuso bentombi* cow in the total lobola price would be a deviation from the norm but not significant.

Discussion and the law

[39] The approach to resolving disputes in civil matters where there are irreconcilable versions was authoritatively set out in *Stellenbosch Farmers Winery Group and Another v Martell et Cie*¹ and others as follows:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the

¹ 2003 (1) SA 11 (SCA) at para 5.

probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[40] According to LAWSA² one of the main features of a traditional African marriage is the payment by the bridegroom of marriage goods or lobola to the bride's family. Lobola is agreed following 'negotiations' between emissaries of the two families and agreement on this and other wedding particulars leads to a formal engagement which is followed by the marriage ceremonies whereby the woman takes leave of her family and is transferred to the groom's family and incorporated into it.³ It is customary for some of the lobola cattle to be delivered prior to the marriage.⁴ There can be no valid customary marriage without an agreement that lobola cattle will be delivered. Customs differ amongst the different communities regarding the number, time of delivery and so on but the general rule is that at least one beast has to be

² Vol 32 (Indigenous Law) para 86.

³ Ibid para 89.

⁴ Para 91.

delivered before the wedding ceremonies.⁵

[41] In *Tsambo v Sengad*⁶ the Supreme Court of Appeal held, after considering the views of experts in indigenous law, that *'historically, significance was paid to the conclusion of the lobola agreement, and not necessarily the full payment of lobola'*. On that basis the Court dismissed as devoid of merit the contention that the marriage could not have been concluded because part of the lobola price had yet to be paid.

Was a lobola price negotiated and paid?

[42] Although it was common cause that lobola negotiations were held the parties presented divergent accounts of whether agreement had been reached and what sum, if any, had been paid. According to the plaintiff's case lobola had been agreed in the amount of ten cows and half thereof, some R20 500.00 paid. According to the defendant's case no agreement could be reached in the lobola negotiations and an indeterminate part-payment was made. The plaintiff's case comprised her evidence, and that of the lead negotiator Mr Phumzile Tshongweni and another delegate/scribe, Mr Sanele Tshongweni.

[43] Mr Tshongweni presented as a somewhat stubborn man who at times clung to details of his evidence even when he was not certain thereof. Nonetheless, he impressed as a credible witness and the substance of his evidence can be accepted. A feature of his evidence was that he was party only to the negotiations on 30 June 2012 and could not speak directly to any resumption or the conclusion of the negotiations on the following day. It would also appear that his memory for detail was not clear but this was not unexpected in an elderly man testifying to events which had taken place some nine years previously. In essence this witness' evidence was first that damages of R2000.00 was paid for impregnation of the plaintiff and thereafter a further R12 500.00 in cash for the *ubuso bentombi* cow and two further cows. It was agreed further that the bride would not be released until at least five cows were paid i.e. R20 500.00, but this would not constitute the full lobola, which would be negotiated at a later stage.

[44] Mr Sanele Tshongweni's recollection of events was essentially the same of that of his uncle. He confirmed the payment of R2000.00 damages for the impregnation plus a further R12 500.00 in respect of three cows including the *ubuso*

⁵ Para 101.

⁶ 244/19 [2020] ZASCA 46 (30 April 2020).

bentombi price. His evidence went somewhat further however, namely, that the total lobola price of ten cows was agreed upon. Mr Sanele Tshongweni made a very good impression as a witness. He had a much clearer recollection of events than Mr Phumzile Tshongweni and it was he who had kept the notes of the negotiations. His evidence was not without flaws but these are understandable given the lapse of time. I accept the substance of his evidence.

[45] The plaintiff's evidence could only lend indirect support for her case since she was not a direct participant in the negotiations. Be that as it may her evidence is entirely congruent with that of the two family members who were her delegates, namely that insufficient lobola was paid on day one but that substantial progress was made in the negotiations.

[46] To my mind the greatest support for the plaintiff's case lies in the contemporaneous notes kept by Mr Sanele Tshongweni. They confirm that the amount of R2000.00 was first paid as damages on 30 June 2012 followed by R12 500.00 being in respect of three cows. The notes also confirm that the plaintiff would be released when five cows were paid and that the total cows wanted or agreed were ten and that the amaTshawe emissaries would return. The notes for the following day, 1 July 2012, confirm furthermore, that a further two cows were paid making a total of five cows, this even though no direct reference to R8000.00 is contained in the notes.

[47] Mr Ntoshe did not directly dispute the notes and nor could they be disputed by the defendant or his brother, Mr Thulani Kwankwa. There was no direct attack on the authenticity of the notes during cross-examination with the result that when the defendant's counsel asserted during argument that the notes were a fabrication this not only came as a surprise but was completely unsubstantiated.

[48] Further support for the plaintiff's version is to be found in the fact that between November 2016 and some four and a half years later when he testified, the defendant's case, as contained inter alia in his pleadings, was consistently that lobola was negotiated and agreed to (albeit in the total amount of R50 000.00) and that part payment in the amount of R20 000.00 was paid. (It must be noted that R12 500.00 plus R8000.00 comes to R20 500.00.) Even after the defendant's plea was filed these facts were recorded as agreed facts in a statement of agreed facts dated 6 September 2019. In a further statement of agreed facts dated 15 March 2021 the defendant appeared to back away from the notion that the lobola

negotiations had been successfully concluded but continued to assert that an amount, of R20 000, now qualified by the word '*about*', was paid to Ms Tshongweni's family. This is not the end of the documentation supporting the plaintiff's account of the lobola negotiations, however. In a sworn affidavit made by the defendant on 17 March 2017 in Rule 43 proceedings he stated as follows:

'The lobola was negotiated, agreed to and set at the amount of R50 000.00 ... I made part payment of the lobola in the amount of R20 000.00.'

[49] Against all this is the defendant's version that lobola negotiations were never concluded and he is unable to state what part payment was made towards lobola. This version relies also on the evidence of Mr Ntoshe.

[50] Mr Ntoshe made a poor impression as a witness although I gained no impression that he was being deliberately untruthful. In the first place he appears to have been a somewhat reluctant emissary and one whose involvement was confined to what took place on 30 June 2012. His interest in the negotiations as a whole seemed to be very limited. Mr Ntoshe was an elderly and unsophisticated man and gave his evidence very haltingly and hesitantly. There were often long silences during his testimony as he tried to remember what had taken place all the years before. On various factual aspects his evidence veered from side to side and ultimately, where it is not supported by other credible evidence or documentation, it can certainly not be preferred to that of the plaintiff's witnesses. The bottom line of this witness' evidence was initially that damages for impregnation were paid and thereafter a further R7 500.00. However, in cross-examination he conceded it was possible that his delegation had left R12 500.00 behind on that day i.e. paid that sum over rather than just R7500.00 or R10 000.00. This would, of course, accord with the plaintiff's version of events.

[51] As mentioned, the evidence of Mr Thulani Kwankwa does not take the defendant's version of what took place on 30 June 2012 much further since his role was limited to that of a go-between between the defendant and the defendant's delegation. All that he confirms is that a sufficient part-payment i.e. an amount necessary for the release of the bride, was not paid on the day in question. Mr Thulani Kwankwa definitely did not come across as a reliable or impressive witness. By his own account he was drunk or under the influence of alcohol for much of the day.

[52] The principal feature of the defendant's evidence was its vagueness. All that

he could essentially say was that he had drawn R20 000.00 and given it to his grandfather for lobola. There were other unsatisfactory features to the defendant's evidence, chief of which was his claim that he had not known by how much his delegation was short in the lobola negotiations. The defendant was the source of the lobola monies and, judging by his evidence and demeanour, he is very much a self-confident, assertive and intelligent individual. I find that it highly unlikely that he was a mere cypher in the negotiations, passively waiting to be told of the course of the negotiations, by how much he was short, whether agreement had been reached and how much money had been paid. What further strains credulity is that this passive ignorance on the defendant's part was not limited to the events of 30 June 2012, but on his version appeared to endure indefinitely inasmuch as he claims never to have received any further or more substantial reports even after his delegation returned to eMnqaba village and reported to his grandfather.

[53] This version of the defendant's stands in glaring contrast to that which was pleaded on his behalf, obviously on his instructions, and to which he deposed to in his Rule 43 opposing affidavit. What is more, the only difference between his initial and long-standing pleaded version and the plaintiff's version was the amount at which lobola was negotiated. Whereas on the plaintiff's version this was a total of ten cows (presumably some R40 000.00), on the defendant's version this was the sum of R50 000.00. This figure of R50 000.00 was neither explained nor mentioned by the defendant in evidence. Also unexplained was his pleaded and sworn version of having to initially pay a minimum of seventy percent of the total lobola price. Again, the defendant did not even mention this in evidence, raising the likelihood that it was merely a percentage in excess of fifty percent which he seized upon in order to assert that, not having paid it, the condition precedent which he averred, namely, that the further steps and formalities essential to conclude a customary marriage could only be undertaken once such percentage was paid, had not been fulfilled.

[54] Finally, it must be mentioned that there was further documentary evidence placed before Court in the form of affidavits by Messrs Phumzile and Sanele Tshongweni apparently made to the South African Police in Engcobo in September 2018. For reasons known only to the parties' legal representatives little use was made of these affidavits in evidence or in cross examination. In the agreed translation of the affidavits both deponents confirmed the following elements of the plaintiff's version:

- impregnation damages in the amount of R2000.00;
- *ubuso bentombi* in the amount of R4500.00;
- agreement that the total of lobola price would be ten cows and that one cow was worth R4000.00;
- that the plaintiff would be released on payment of five cows;
- that on the first day R12 500.00 was paid; and
- that on the second day the defendant's delegates returned to pay three cows whereafter the plaintiff was released.

[55] These affidavits align with the viva voce account of the plaintiff's witnesses of the lobola negotiations save in one respect viz that on day two a further three cows were paid. In their viva voce evidence the *ubuso bentombi* cow was counted as part of the lobola price but seemingly not in the affidavits. On that basis when the defendant's delegation returned they paid for three cows i.e. R12 000.00 and not R8000.00, although these figures are never mentioned in any of the documentation. It is quite possible that, given the elapse of six years between the negotiations and the making of the affidavits, both Tshongweni's could have erred in their recollection of whether two or three cows were paid on Sunday, 1 July 2012.

[56] The second issue regarding the lobola negotiations is whether the plaintiff succeeded in proving that fifty percent of the lobola price was paid. This largely turns around the question of whether the defendant's envoys supplemented the lobola payments they made on 30 June 2012 when, it was common cause, they were found to be short or '*limping*'. Mr Sanele Tshongweni testified that Messrs Mzwebantu and Thulani Kwankwa arrived on the Sunday, with the defendant in the wings, and payment in respect of the balance of half of the lobola was made. The plaintiff confirmed her brother's evidence when she testified she saw the defendant's two delegates, Messrs Mzwebantu and Thulani Kwankwa, that day and that they engaged with Messrs Sanele Tshongweni and Thanduxolo Jada. She confirmed also that the defendant was in the vicinity and that she prepared food and drink for them. Mr Jada was never called as a witness.

[57] The plaintiff's version of events in this regard is confirmed by contemporaneous or semi-contemporaneous notes kept by Mr Sanele Tshongweni which were not attacked in evidence. As mentioned above, the notes make no reference to the sum of R8000.00 being paid but refers only to two cows being

added on top of the three cows. The affidavits by the Tshongweni's refers however to three cows being added. Notwithstanding this difference the key point is that the notes, together with the evidence of Mr Sanele Tshongweni and the plaintiff, indicated that half of the full price of the lobola i.e. five cows was settled by the Sunday. On the other hand is the version of the defendant to the effect that no further negotiations were held or payments made after 30 June 2012. The defendant's version is that he and his brother in Engcobo on Sunday, 1 July 2012, to return the plaintiff's car and to catch a bus to Cape Town and also includes a denial that his delegate, Mr Mzwebantu Kwankwa, was or could have been in Engcobo on 1 July 2012. This, testified the defendant, would have entailed him driving to and from his village on that day which, the evidence established, was some 270km from Engcobo. The plaintiff's version is that the defendant's delegation did arrive in Engcobo on 1 July 2012, that the defendant travelled back to his village that day and only returned the plaintiff's vehicle and caught the bus to Cape Town the following day, 2 July 2012. Seen in perspective, the difference between the two versions amounts to whether any payments were made on 1 July 2012, whether Mr Mzwebantu Kwankwa was present and whether the defendant caught a bus to Cape Town that day or the following day.

[58] There are two pieces of objective or documentary evidence in regard to the dispute concerning the events of 1 July 2012. The first is the folio notebook containing Mr Sanele Tshongweni's contemporaneous or semi-contemporaneous notes. These indicate the defendant's delegates did return on 1 July 2012 and they were Messrs Mzwebantu and Thulani Kwankwa. The former did not testify and the latter agreed that he travelled with the defendant to Engcobo that day but testified there was no visit to the homestead. As mentioned previously Mr Thulani Kwankwa was a poor witness. The other piece of objective evidence is an extract from the defendant's bank records which suggests he made a withdrawal of R200.00 in Cape Town on 2 July 2012. This piece of evidence is however not dispositive since he could have left Engcobo on 2 July 2012 any time between 12 or 2pm which, if the bus journey was more or less 11 hours, would have allowed him to make the relevant transaction in Cape Town late on that same day.

[59] Determining the events of Sunday 1 July 2012 question requires an evaluation of the evidence and the probabilities. A key point which weighs against the defendant's evidence that no further payments were made after 30 June 2012 are

the assertions in his plea, in his amended plea, in statements of agreed facts and in an affidavit, that R20 000.00 or '*about*' R20000.00 was paid in lobola. These statements were only withdrawn or amended at the eleventh hour i.e. during argument. Even on the plaintiff's version at most R12 500.00 was paid towards lobola on 30 June 2012 so any balance had to have been paid later. What is more, the defendant's account of how he returned plaintiff's car is contradictory and improbable. According to him he and his brother simply drove to Engcobo and left the car at the plaintiff's mother's place of business in town because they were so pressed for time. However, he also testified that they caught the bus in time because the plaintiff was there (and presumably drove him to the bus station). But it had been put to the plaintiff only that her vehicle had been at her mother's place of business and not that she had been present or had driven the defendant and his brother to the bus station. The plaintiff had testified earlier that it would be a substantial walk for her to get to town and collect her vehicle and that this had not happened. Notwithstanding all this earlier evidence the defendant never made clear how the plaintiff obtained her vehicle that day. Taking all this evidence into account the probabilities are that the defendant did in fact travel to the plaintiff's homestead on 1 July 2012 and that this is how it came about that she was able to drive him (and possibly Thulani Kwankwa) to the bus stop. The defendant's insistence that he never was at the homestead on 1 July 2012 is improbable but is understandable since admitting that he and his brother were there offers support to the plaintiff's version that his delegates were there and made a further payment towards the lobola price.

[60] There remains the dispute as to whether the defendant caught a bus to Cape Town on 1 July 2012, as he testified, or returned to eQonce that day only to return the following day to return the plaintiff's car and catch the bus. Having regard to the evidence as a whole I consider that the probabilities favour the defendant's version. Firstly, one piece of objective evidence, the plaintiff's bank statement apparently showing a card transaction in Cape Town on 2 July 2012, although not dispositive, points in the direction of him having left for Cape Town on the Sunday. In this regard it was common cause that, unlike the plaintiff, the defendant was not on leave and had to get back to his employment as soon as possible. Returning to eQonce on the Sunday only to drive back again on the Monday would have made little sense. The plaintiff used this point to bolster his evidence that Mr Mzwebantu Kwankwa was not with him on Sunday 1 July 2012 thereby casting doubt on the plaintiff's case that

Mzwebantu Kwankwa, together with Thulani Kwankwa, were at the plaintiff's homestead that day to pay the balance of fifty percent of the agreed lobola price. In my view, however, this does not follow. What happened to Mr Mzwebantu Kwankwa is unclear and, in a sense, not strictly material. He was not called to testify and it is quite possible that he simply made his own way back to Middeldrif.

[61] At the conclusion of her evidence the plaintiff was no longer insistent that the defendant could not have been in Cape Town on 2 July, testifying that if he was in Cape Town on that day she accepted that. I understood her evidence in this regard to be an implied admission that she could be mistaken that the defendant caught the bus back to Cape Town on Monday, 2 July 2012. In my view, on the evidence as whole and on the probabilities, the plaintiff's memory failed her in that all the events described took place on the Sunday and not over two days. This does not materially affect the issue of whether the balance of half of the lobola price was paid that day or not.

[62] One further factor which bears mentioning with regard to the events of Sunday, 1 July 2012, is the large sum of money that the defendant withdrew in East London that morning, a total of R4000.00. This he ascribed to monies he needed for the journey back to Cape Town by bus but without providing any detail. It is noteworthy however that on top of the initial R20 000.00 which the defendant withdrew, this would amount to R24 000.00 withdrawn by him at the time of the lobola negotiations. Accepting that a sum of R14 500.00 for impregnation damages and lobola was paid on 30 June 2012, the defendant would have had sufficient funds to pay a further R8000.00 on 1 July 2012, thereby paying half of an agreed lobola price of ten cows (*R2000.00 plus R12 500.00 plus R8000.00 totalling R22 500.00*), and still have R1500.00 for travel purposes.

[63] Applying the principles in *Stellenbosch Farmers Winery* and *Tsambo* and having regard to the evidence as a whole I consider that the plaintiff has succeeded in proving, on a balance of probabilities, that the lobola negotiations concluded in an agreement that the total lobola price would be ten cows; further, that half of this amount i.e. five cows, including the *ubuso bentombi* cow, was paid thereby fulfilling the condition that upon payment of fifty percent of the total lobola the plaintiff would be released, or became available for release, to the defendant's family for marriage. The plaintiff has proved furthermore to my satisfaction that five cows (in fact the monetary equivalent thereof) was duly paid.

Was the plaintiff released to the defendant's family, were the marriage ceremonies celebrated and did the defendant consent to the marriage?

[64] This brings me to the second leg of the plaintiff's case viz proof of her release and the marriage ceremonies and, given the defendant's denial thereof, proof of his consent to the marriage. In LAWSA the question of whether the marriage ceremonies are essential elements of the marriage contract is discussed.⁷ The conclusion reached by the authors is that, important as these ceremonies may be from a ceremonial and ritual point of view, they cannot be regarded as essential legal requirements. The authors continue:

'The absence of the ceremonies, if the essential requirements have been met, does not affect the validity of the marriage – although, of course, they have probative significance in the sense that a prima facie presumption could be drawn from them that a valid marriage was concluded and that all the essential legal requirements were satisfied. Not all marriages take place with full ceremonial; the economic situation of the parties is no doubt an important factor'.

[65] This approach was endorsed in *Tsambo* when the Court stated:

'[15] When dealing with customary law, it should always be borne in mind that it is a dynamic system of law. In Ngwenyama v Mayelane and Another this Court stated as follows:

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

...

[17] The appellant's contentions pertaining to the rituals observed during the handing over of the bride ceremony fail to take into account that customary law is by its nature, a constantly evolving system. That customary law has always evolved is evident from the following observation made by Professor Bennett almost three decades ago and approved in many judgments:

⁷ Ibid Para 104.

“In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value...”

[18] It is evident from the foregoing passage that strict compliance with rituals has, in the past, been waived. The authorities cited by the respondent, mentioned earlier in the judgment, also attest to that. Clearly, customs have never been static. They develop and change along with the society in which they are practised. Given the obligation imposed on the courts to give effect to the principle of living customary law, it follows ineluctably that the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law.’

[66] I turn now to the evidence relating to the remaining issues, the first of which is whether, lobola having been negotiated, agreed and fifty percent thereof paid, the bride was released to the bridegroom’s family and whether the various ceremonies which can formalise a customary marriage and which denote the acceptance of the bridegroom by the bride’s family and the acceptance of the bride by the bridegroom’s family, were performed. It is necessary to review the evidence of both parties regarding this matter.

The plaintiff

[67] As previously mentioned the plaintiff testified that on 30 June 2012, although in a low-key fashion, the defendant had come into her family’s homestead and joined the delegates in a lunch after the lobola negotiations had been concluded. According to her this had been her mother’s idea so that her family would know that he was the son-in-law. Once the balance of the fifty percent of the lobola price was paid the following day she was duly released by her family and was told this by her mother. The next step for her was going to the defendant’s homestead so that the *utsiki* celebrations could be held. She did not go immediately because she was waiting for the defendant who in turn was waiting for his payday so that he could buy the sheep, the slaughtering of a sheep for the bride being a key part of the *utsiki* ceremony. She left in her car on 16 July 2012 from Engcobo with a Mrs Mdlunya and a Mrs Sondlo, the former being a family member and the latter being a member of the community and close to her mother. With them also was the plaintiff’s young daughter. In

Once they contacted and picked up the defendant's aunt, Ms Lulama Kwankwa ('Ms L Kwankwa' or 'Lulama'), for the necessary directions and then travelled together to the defendant's family homestead where the plaintiff was duly welcomed. She had brought with her the clothes necessary for the ceremony, having been guided by Ms L Kwankwa. The defendant had told her that there was a further ceremony, *uphindindlela*, and he had told her that to save costs the two ceremonies i.e. *utsiki* and *uphindindlela* should be held together. The latter ceremony or ritual involved her bringing everything she needed for a kitchen i.e. cutlery, crockery etc. which items remain at the groom's household for use when she was there. Upon arrival at the defendant's homestead she was told to remain in the vehicle until called and was eventually called by the defendant's mother, Mrs Funeka Kwankwa ('Ms F Kwankwa' or 'the defendant's mother'). She was taken to a separate building and told to undress and put on the *makoti* attire. These clothes are called '*amadaki*' and comprise a black doek, scarf, a long-sleeved shirt and on top, a towel and blanket. The defendant's mother helped dress her in those clothes. She was then taken to another house/rondavel and asked to sit on a traditional mat and wait. She was then '*guided*' by older women in the defendant's extended family. A sheep was brought into the rondavel and she was introduced to the women as a bride of the amaTshawe. She was told that a sheep was to be slaughtered and that she must confirm that she had seen the sheep. The sheep was then taken to slaughter and various members of the community guided her i.e. told her what she must do as a *makoti*, such as obeying her husband and advising her that the marriage would not be an easy journey. The defendant's aunt, Mrs Nonceba Kwankwa ('Ms N Kwankwa' or 'Nonceda'), played a leading role in this aspect. When the sheep had been cooked she was brought a special piece by the defendant's mother and she duly ate some and was then told that the ancestors now knew her.

[68] The defendant was not present during this ceremony, having returned to Cape Town to work two weeks previously. According to the plaintiff however, he phoned his mother that night and when told that the plaintiff's new name was Nomtha told his mother he did not like this name and he wanted it changed to Phumzile. The plaintiff heard the defendant's mother's side of the conversation as she sat nearby. The next day the community was told that her name had been changed to Phumzile. It was the *makoti*, the married women, who told her of her new name. After the *utsiki* ceremony i.e. on the preceding day, the plaintiff had been told to start performing

various domestic tasks which she duly did and also went into town, eQonce, to buy groceries whereafter she prepared dinner for those present. She then washed and swept up the hut or rondavel which was allocated to her. She performed all these household routines, serving and cooking for the family as a new bride, for the next five days under the supervision of Mrs Funeka Kwankwa until she left the homestead on the Friday going back first to Engcobo and then to Cape Town. In Engcobo she had a photograph taken of herself in her traditional *makoti* clothes. This photograph is Exhibit C, and it was not disputed on behalf of the defendant. As a new bride the plaintiff dressed in that attire for three months, even back home in Cape Town. When she arrived back in Cape Town the defendant had been excited to see her dressed in these traditional clothes. At that stage he was employed at Parliament and he invited her to come and see him at work where he introduced her to his secretary, a UDM employee, and to an IFP member as '*Mrs Kwankwa*'.

[69] In cross-examination the plaintiff's version of this ceremony and its aftermath was only superficially dealt with, the defendant's version being simply that no such ceremony ever took place although it was conceded that the plaintiff had met Ms L Kwankwa in eQonce on the day in question. It was put to her that Ms L Kwankwa would testify she was only contacted by the plaintiff for directions and never travelled with her in her car to the defendant's homestead. It was further put that at the homestead the plaintiff had been told to turn around and go back home with all the goods she had come with. It was also put to her she had arrived with a sheep. This latter proposition was met with amused disbelief on the part of the plaintiff who asked where she would have put a sheep in her car at which point it was then put to her that she had been towing a trailer. She met this with the same reaction, stating there was not even a tow bar on her vehicle.

Messrs Phumzile Tshongweni and Sanele Tshongweni

[70] Mr Phumzile Tshongweni testified that he regarded the plaintiff as the defendant's bride *inter alia* because she underwent the *utsiki* ceremony but, as he conceded, he was not present. In his view it was not necessary for the groom to be present at the *utsiki* ceremony. He also agreed that the defendant was never formally introduced to the *amaqwabati* (elders) of the Tshongweni family.

[71] Mr Sanele Tshongweni testified that after receipt of the balance of fifty percent of the lobola price he reported this to his family and they agreed that the plaintiff

could be released as a bride to the defendant's family. Following that there was a light lunch and present thereat were the two Kwankwa family delegates and the defendant who also came into the homestead. The witness testified that the plaintiff was duly released by the family. He himself left Engcobo that day after the negotiations and had only heard that his sister had gone through with the *utsiki* celebrations, travelling to eQonce on 16 July 2012.

Mrs Mamu Nokwanda Mdlunya

[72] Mrs Mdlunya was a 71-year-old woman from Engcobo who testified she had known the plaintiff from when she was a baby. She was a sister of the plaintiffs' grandmother. She testified that she took the plaintiff to her in-laws near eQonce when the *uphindindlela* and *utsiki* ceremonies were held together. She and a Mrs Sondlo, also known as Ma Mandungwani, since deceased, travelled with the plaintiff and her child in the plaintiff's car. They took with them all the clothes which the plaintiff had to change into as well as cups, pots, pans and other items of kitchen equipment and it was a big load. They first went to eQonce where they met a woman, whose name she does not remember, in order to get directions. This woman (it was common cause that it was Ms L Kwankwa) climbed into the car and accompanied them, directing them to the homestead. There they were met by a man and the defendant's mother who was the owner of the house but Mrs Mdlunya was not able to remember their names. Again it was common cause the latter was Mrs Funeka Kwankwa. Mrs Mdlunya testified, however, that she had met Mrs Funeka Kwankwa previously in Engcobo at the plaintiff's homestead when the latter was accompanied by a mentally ill child and the purpose of their visit was to consult a healer from Swaziland, evidence later confirmed in part by Mrs Funeka Kwankwa.

[73] At the Kwankwa homestead the plaintiff had remained behind in the car for an interval and then was allowed in and dressed in traditional attire. A sheep was brought out for slaughter and after it was cooked a piece of meat was given to the plaintiff to taste. This was a part of the shoulder cut and is called *umshwamo*. Mrs Mdlunya testified that this signified that the bride was now a married woman and as such was welcomed at the bridegroom's homestead. After the ceremony the plaintiff had taken her and Mrs Sondlo back to eQonce in her car together with Ms L Kwankwa. The two women were left there and made their own way back to Engcobo taking with them an uncooked leg of lamb from the slaughtered sheep. According to

her its purpose was to show the plaintiff's family back home that they had not gone '*just around the corner*'. They had arrived back home late that day and advised the plaintiff's mother that the *utsiki* ceremony had been completed.

[74] In cross-examination Mrs Mdlunya explained that the *uphindindlela* ceremony normally involves the unmarried bride staying with her in-laws for a couple of months and then going back to her homestead. Thereafter, the family buys pots and pans, bakes bread, and gets tea, sugar etc. which is all put in a basket and the bride returns to her in-laws. In the present instance this ceremony and the *utsiki* ceremony had been combined. She herself was married in 1967 and had gone through these ceremonies. As far as she could recall the plaintiff had received the special piece of meat, *umshwamo*, from a male member of the Kwankwa clan. She did not recall the plaintiff being guided or receiving her new name. The defendant's version that no ceremony had ever taken place that day was roundly rejected by the witness. When it was put to her on behalf of the defendant that it was bizarre that the plaintiff had entered the homestead that day but left again to drive her and Mrs Sondlo back to eQonce, the witness explained that this was so because no one else could drive the car to eQonce and back. In answer to the Courts' question she advised that she had attended five or six *uphindindlela* and *utsiki* ceremonies.

[75] Earlier in her evidence in chief Mrs Mdlunya testified that all the goods which the plaintiff had brought along had been unloaded from the car at the Kwankwa homestead and left in a room/rondavel. She also stated in chief that it was not necessary for the groom to be present during the *utsiki* ceremony and that it was the in-laws who she supplied and paid for the sheep.

[76] Mrs Mdlunya impressed as a good witness who gave clear evidence despite her advanced age. She stood up to cross-examination without any difficulty.

The defendant's case

[77] The defendant's case in regard to the *utsiki* and *uphindindlela* ceremonies involves, as I have already indicated, a denial that they ever took place. The defendant's evidence, insofar as it goes, is relevant and was supplemented by that of Mrs Nonceba Kwankwa and Ms Lulama Kwankwa.

Ms Lulama Kwankwa

[78] Ms L Kwankwa testified that the defendant was her nephew i.e. her sister's

child and that she had known the plaintiff since she was introduced to her by the defendant in Cape Town in 2011. The next occasion she saw her was in July 2012 when the plaintiff arrived in eQonce wanting directions to the defendants' homestead which is also her homestead. She had received a phone call from the plaintiff that day and arranged to meet her at her workplace. Almost her first question to the plaintiff was why she had so much luggage and she described the plaintiff's vehicle as looking as if it was about to cross over Beitbridge to a foreign country. The plaintiff's response had been that this was because she was on her holiday that was almost ending. The plaintiff had also explained that she was going to do '*this thing*' at the defendant's homestead and in response thereto the witness asked where the defendant was. She had also asked the plaintiff what was this '*thing*' but the plaintiff had never answered. The witness then decided to give her the necessary directions and said that she was going to follow her when she had finished work. She gave directions to the plaintiff to the Kwankwa homestead and after work went to the taxi rank and took a taxi to her village because she had promised to go there.

[79] When she got there she noticed the plaintiff's vehicle was already inside the homestead but all the luggage was still in the car. She met with her sisters, Funeka (the defendant's mother) and Nonceba and her brother, Mzwebantu. The visitors were also there. She was told by her siblings that the plaintiff was bringing their daughter (her child) to them and she then asked Funeka whether she had spoken to her son, the defendant, and had he explained this to her. Funeka then said that the defendant had not told her that there were people coming to the house and that she was not going to let this happen because she had heard nothing from her son. Pressed to explain, the witness stated that this exchange took place after the visitors had explained that they were bringing the plaintiff to come and do the *ukwenda*/acceptance ceremony. She herself could not explain the ceremony however because she had never gone to one and had never been married. She had told Funeka that she must lead her siblings in this response as she was the mother of the defendant. The witness then regarded her job as done and her promise to come to the homestead as kept and so she left and went back to where she stayed which is a distance of about 75km away i.e. at Keiskammahoek. She left sometime after 5pm. Ms L Kwankwa denied that she ever accompanied the plaintiff in her vehicle and in so doing directing her to eMnqaba village. She denied that the plaintiff had earlier called her and asked her what she was supposed to bring with her to the

Kwankwa homestead. She denied that *uphindindlela* or *utsiki* ceremonies took place. After a few days when she again spoke to Funeka the latter had told her that nothing further had happened after she left.

[80] During lengthy cross-examination Ms L Kwanka said that she was unable to describe what the luggage in the plaintiff's vehicle comprised and insisted that the plaintiff had just said she was going to do '*this thing*' at the homestead without explaining what '*this thing*' was. She had been unable to identify the people in the car when she first saw them but according to the voices there were four of them in total. It was not her evidence that the plaintiff also brought a sheep in the car. The journey from her work to the homestead lasts approximately an hour. It starts off on a tar road then branches off onto a gravel road which one has to go along and pass three villages until you reach her village. Asked how someone who had not been to her village would find it, her answer was that she gave directions to the plaintiff who never called back to say that she was lost. She denied also that she got a lift back to eQonce with the plaintiff that evening. Ms L Kwanka eventually conceded that at the homestead she was told that the visitors had brought the plaintiff there so that she could get married traditionally i.e. for *ukwenda*. In the same breath however she stated that she didn't know what *ukwenda* was and that her siblings did not tell her. When the Court asked her about the initial lack of curiosity as to the purpose of the plaintiff's mission to the defendant's homestead, her answer was that her siblings were older than her and that was their concern. She testified that the plaintiff had been pulling a trailer as well, evidence which had not emerged in chief.

[81] Ms Kwanka was an extremely cagey witness with a distinct tendency to give evasive answers. She did not create a good impression as a witness and her evidence contained many contradictions and improbabilities. She was, in addition, very vague concerning the details of much of her evidence, such as the directions to the homestead.

Mrs Funeka Kwanka

[82] Mrs Funeka Kwanka is the mother of the defendant who has lived at James Mama village in eMnqaba location/village at Debbenek, Middledrif which is near eQonce. It takes an hour to get from her home to eQonce. She testified that after turning off the tar road there are four villages which must be passed before getting to her village which is the fifth. She knows the plaintiff, who had a child with her son

and who had been involved in a romantic relationship with him. She herself is married in a Christian marriage and she does not believe in the ancestors. She first met the plaintiff in 2011 when her son brought her to Cape Town to see his house in Montclair. She next saw the plaintiff at a church service in Engcobo in 2011 and then on a third occasion when the plaintiff arrived unannounced at her homestead in eMnqaba village on 16 July 2012. When the witness heard and saw the car she and her two siblings first gathered to have a discussion for about ten minutes. Her siblings, Nonceba and Mzwebantu, then sent her to the visitors where she found that the driver was the plaintiff and who was accompanied by her daughter and two women together with much luggage in the car. Mrs Kwankwa greeted them and called them inside the house where all seven persons met. She asked the visitors the reason for their visit and was '*shocked*' when the plaintiff said she had come to become a *makoti* because her vacation was ending and she had been sent by her mother. The witness had been aware that there had been lobola negotiations some weeks previously but, as a woman, had not been told what the outcome was. She told the plaintiff that it was not going to happen in her house and was backed up in this by her siblings. Lulama then arrived and together with her siblings they had another discussion in which Lulama agreed with the decision to send the plaintiff away. Lulama lived at Keiskammahoek and had asked to be excused and left. The remaining three siblings went to the visitors to '*excuse*' them and they duly left. Mrs Kwankwa denied that any marriage ceremony took place, that she dressed the plaintiff in her *makoti* attire, that a sheep was slaughtered, that the plaintiff was given a new name and then sent to the elders to be guided by them in the process known as *ukuyalwa*.

[83] Under cross-examination the witness distanced herself from the lobola negotiations stating that these were led by her uncle Mr Batini Kwankwa. She stated that it was incorrect that the outcome of the lobola negotiations would be reported to her since this was an issue only for men. On 16 July 2012 when they first saw the plaintiff's car the first thing the siblings did was to hold a discussion. This they did even though they did not yet know the reason for the plaintiff's visit. Asked what was discussed she replied that it was to caucus to ask the visitors why they were there – even though they did not know who they were. When asked to explain the logic of this answer her reply was '*that is how we do things*'.

[84] In cross-examination Mrs Kwankwa also said that the plaintiff was towing a

trailer. She could not identify the luggage the plaintiff had which, she said, was in big black plastic bags. Cross-examined over differences between her and Lulama in the directions to her village, she said that Lulama could be mistaken because she stays at Keiskammahoek. When it was put to her that it would be difficult for a first time visitor to get to her village based only on verbal directions, her answer was that one could enquire at the police station. She stated also that her son, the defendant, was '*famous*' in the area in which he lives and everyone would know where he lives. Asked if the plaintiff had brought a sheep in the car or in a trailer she stated she did not know. Late in her evidence she testified that Mzwebantu, her brother, had come to her the day after the lobola negotiations and told her that they were '*limping*' i.e. not well equipped moneywise. She denied that she was contradicting her earlier evidence that she had been given no report on the outcome of the negotiations. Significantly, in regard to Mrs Mdlunya's evidence of knowing her from before, she confirmed that she had gone to Engcobo the previous year to attend a funeral and had been accompanied by her son who indeed suffered from a mental illness. In answer to the Court's question the witness stated that she had not telephoned the defendant when the plaintiff arrived unannounced for the marriage ceremonies.

[85] At this point in her evidence the witness had a remarkable outburst. Up to this stage Mrs Kwankwa had been quiet and self-possessed but she suddenly lost control and, unprompted, began loudly wailing about the injustice of the case against her son who had suffered so much and whose money was being stolen by the plaintiff. This went on for some time until the witness calmed down and apologised. An adjournment was necessary for the witness to compose herself. The outburst was, however, revealing in indicating the depths of the witness' antipathy for the plaintiff and how fiercely protective she was of her son, the defendant. After the witness resumed her evidence she answered further questions from the Court. She testified that her siblings Nonceba and Mzwebantu had passed away in the meantime and that the plaintiff had left with her companions for Engcobo sometime after 6pm on 16 July 2012. Although she had not spoken to her son that day, her brother had phoned him on the same day after the plaintiff had left.

Evaluation

[86] As mentioned, Mrs Kwankwa initially presented as a quiet and subdued person but this impression was belied by her outburst. She too was a guarded witness and

in many instances answers had to be prised out of her. Her evidence also contained many improbabilities and contradictions. A prime example of such an improbability was the caucus with her brother and sister even before ascertaining who the visitors were and the purpose of their visit. Another is that she did not immediately contact her son, nor even on that same day, to find out what was going on. An area of confusion and contradiction was the question of what the directions to her house were and how a first time visitor would get there unaided without getting lost. Her directions differed from those given by Ms L Kwankwa who came from the same homestead. Her evidence was contradictory in other respects as well such as that her son was famous and everyone in the district would know how to reach her homestead. The evidence was that her son's public role and profile had been very limited in 2012 and Mrs Kwankwa was attributing his later prominence to an earlier time. It is clear is that Mrs Kwankwa was extremely proud and protective of her son, the defendant, and harboured great feelings of antipathy towards the plaintiff.

Prince Zolile Burns-Ncamashe

[87] In his expert evidence Prince Burns-Ncamashe testified that after the lobola negotiations are concluded a sheep is slaughtered at the suitor's homestead. The bride arrives with a group assisting her but the gate is closed. She must offer gifts to have the gates opened. There is a similar ceremony for the welcoming of the bridegroom who arrives at the bride's homestead and must be dressed formally and after being admitted, sleeps over. Reverting to the ceremony involving the bridegroom, one sacred element thereof is *ukukisa amasa* where part of the meat of the slaughtered sheep, a special cut from the leg, is put in sour milk and then handed to the bride on an olive branch. The bride has to eat or at least taste that piece of meat. Another name for this ceremony is *utsiki* which is something usually done by those who are not as economically well off. It involves the same ceremony but not quite as elaborate. According to the witness the bride has to be there when the bridegroom enters her household and vice versa because this is part of the process of building affinity between the families. The bride and the bridegroom are respectively told by the elders how to conduct themselves as the new wife and husband. The witness seemed to indicate that the bridegroom would be present when the bride went through her welcoming ceremony. The *utsiki* ceremony is the last ritual and seals the solemnity of the marriage. Asked about the *uphindindlela*

ceremony the witness explained that this is when the bride comes to the homestead of the suitor and is a maternal ritual to be observed. The witness testified further that he had not been apprised of the details of the alleged marriage the present matter but was asked merely to give general evidence about customary law and traditions as they relate to customary marriage. He accepted that in evaluating whether a customary marriage had taken place the intention of the parties was critical.

[88] Prince Burns-Ncamashe impressed as an intelligent and sophisticated man who gave erudite and clear evidence. He is obviously someone who is knowledgeable about, and closely wedded to, the system of traditional rituals, rights and customs and a strong proponent thereof. He appeared to be impartial and did not try to push one side's case above the other and I have no hesitation in accepting his evidence in broad terms. However, his evidence was general in nature since he had not acquainted himself with the facts of the present matter and nor did he express an opinion on the validity of the customary marriage allegedly contracted by the parties. This detracted in no small measure from the weight of his evidence. Another reservation I have regarding Prince Burns-Ncamashe's evidence is that he is clearly a purist as far as traditional customs and rituals are concerned and several of his statements regarding the necessary elements of a customary marriage were somewhat dogmatic and lacking an appreciation of the flexibility with which the Courts have decreed customary law must be applied. He thus cannot be considered as the final authority on all points of customary law.

The defendant – Mr Ngabayomzi Kwankwa

[89] The defendant's case was that no *utsiki* or *uphindindlela* ceremonies had taken place on 16 July 2012. However, at that time he was in Cape Town working and so his evidence on that what place took place that day is almost wholly hearsay. In chief, his evidence was that sometime between 1 and 16 July 2012 he had a telephone conversation with Mr Phumzile Tshongweni who told him he was upset because the plaintiff and her mother were undermining his authority as head of the household and lead negotiator by attempting to hand the plaintiff over to the bridegroom's family. It will be recalled that Mr Phumzile Tshongweni had denied any such communication. The defendant also testified that he received a phone call from the plaintiff a day after 16 July 2012 telling him that she and her mother had decided that she would be handed over to his family. He responded by telling the plaintiff that

it was not her decision to take nor was it his place to enter into discussions about such matters. She had told him that it was important and urgent that she do so because her leave was coming to an end and her mother wanted to ensure that the handing over of the bride process was completed by the time she (the plaintiff) went back to Cape Town. He had then reminded the plaintiff that the lobola negotiations were not concluded, that she had not been released by her family and that the matter would have to be referred back to the elders. The plaintiff had not been happy with his response and that was the end of the conversation. It was put to the defendant that the plaintiff's evidence had been that they had both decided that she should do the *uphindindlela* and *utsiki* ceremonies at the same time. He denied this stating that what they had discussed were that they would come back to the Ciskei in December 2012 to finalise outstanding issues.

[90] According to the defendant what happened next was that on 16 July 2012 whilst at work he had received a phone call from Mrs Nonceba Kwankwa saying that the plaintiff had arrived at their homestead and that he must speak to Mzwebantu. He then told his uncle that he had not been aware that the plaintiff was coming to hand herself over but told him of his two prior telephone conversations with her. His uncle said that this could not be allowed and the defendant's (somewhat indifferent) response had been that it was up to the elders to decide. Mzwebantu had asked him to repeat all this to Nonceba Kwankwa which he had done and he then continued with his work. Later that evening he had phoned Nonceba to find out what had happened and she had told him that no handover process had taken place and that the visitors had been sent back to where they came from, including the plaintiff.

[91] A great difficulty with much of the defendant's evidence regarding telephonic discussions he had with the plaintiff regarding her intention to hand herself over to his family and the events of 16 July 2012, is that none of it was foreshadowed in his counsel's cross-examination of the plaintiff nor substantiated by any of his witnesses. The plaintiff accordingly had no opportunity to deal with these allegations including that there had been phone calls with the defendant where she had insisted that she was going to go ahead with the marriage ceremonies notwithstanding his opposition thereto. Nor was another important element of his evidence ever put to her, namely that they would return to the Ciskei in December to resume lobola negotiations and the like.

[92] Under cross-examination the defendant gave vague evidence about the

plaintiff's car not having a tow-bar but of an attachment that could be inserted so that it could tow a trailer. This evidence was likewise never put to the plaintiff. He testified that he and the plaintiff had not taken any trailer up to the Ciskei in June 2012 and ventured no evidence as to where she would have obtained a trailer. He denied that he had known before 16 July 2012 that the marriage ceremonies at his homestead would go ahead in his absence. He denied calling his mother for an update that evening and expressing his dislike for the name Nomtha. At a late stage in his evidence the defendant testified that there had been a huge argument between him and the plaintiff concerning the events of 16 July 2012. He testified that they had fought about it a great deal because he '*hated*' the fact that the plaintiff had attempted to hand herself over to his family without his knowledge or consent. Again this evidence had not been put to the plaintiff. He denied that upon the plaintiff's return to Cape Town he had asked her to visit him at work, stating that they were not even on speaking terms then.

[93] According to the defendant upon the plaintiff's return to Cape Town they bickered for a month or two over this issue in the same way as their families were fighting over the issue. The couple were together just for a short while. According to him the plaintiff's family had been very upset that the plaintiff had been sent back on 16 July 2012 from his homestead with her delegation. For his family's part they felt undermined by the fact that she had been sent to them without '*due process*' being followed. The defendant argued that why the plaintiff did not call him on 16 July 2012 or the following days is because she knew she did not have his permission to go to the family's homestead. Again none of this evidence was put to the plaintiff in cross-examination for her comment even where it directly contradicted her evidence. In answer to the Court's questions, the defendant confirmed that the plaintiff was wearing her *makoti* clothes when she came back from the Eastern Cape, but said this was only for a day or two. He testified further that the couple were only together till the end of 2012.

Discussion

[94] Before analysing the evidence of the parties and witnesses regarding the marriage ceremonies it is necessary to evaluate them as witnesses. The plaintiff was an outstanding witness. She gave her evidence clearly and was untroubled by cross-examination save in regard to her evidence as to the exact day when the defendant

caught the bus back to Cape Town. Where appropriate the plaintiff made concessions, largely based on her not having personally witnessed certain events. Importantly, she gave detailed evidence of the *utsiki* and *uphindindlela* ceremonies. Her evidence was no mere broad assertion that she had gone through these ceremonies at the defendant's homestead but dealt in considerable detail with her meeting Ms L Kwankwa, how she was dressed in *makoti* attire, the eating of the *umshwamo*, being guided by the elders, the new name she was given, staying on in the homestead for five days doing household chores at the behest of the defendant's mother and many other topics. As I have mentioned, much of the evidence from the defendant purporting to contradict her account was not put to her.

[95] Mrs Mdlunya impressed as a sincere and credible witness. She did not have the same recollection of detail that the plaintiff had but this was understandable since she was there at the defendant's homestead for only a few hours. Nonetheless, her evidence also contained some telling detail, namely, that she and her companion, Mrs Sondlo, had left bearing a leg of the sheep given to them by the defendant's family and which also served as proof that they not simply taken the plaintiff '*around the corner*' as she colourfully put it. Mrs Mdlunya's evidence was not dented at all in cross-examination.

[96] As previously discussed the defendant's first witness, his aunt Mrs Lulama Kwankwa, created a very poor impression as a witness. She was both cagey and evasive in her answers and her overdramatised evidence about the plaintiff's car looking as if it was about to cross Beitbridge i.e. so full of luggage, appeared, even in chief, to be contrived and over-dramatized. Over and above this her evidence was replete with contradictions and improbabilities. Her testimony amounted to her being at one and the same time extremely curious as to the reason for the plaintiff's proposed visit to the family homestead but at the same time not pressing the plaintiff as to what '*this thing*' was that she had come to do. Similarly, her evidence that she '*promised*' to go to the defendant's homestead makes no sense. This purported to be a promise to the plaintiff to whom, on her own evidence, she owed no such obligation. Having decided that she would go to the homestead it is improbable that Ms L Kwankwa would do so under her own steam i.e. an hour's journey by taxi when by leaving work an hour earlier she could have gone with the plaintiff in her car and at the same time given her directions to the far-flung eMnqaba village. Further improbability lies in her arriving at the homestead and only then being apprised that

the plaintiff was there unannounced and uninvited to conclude the marriage ceremonies. Then, having satisfied herself that her sister, Funeka, would not allow this she turns around and makes her own way back to Keiskammahoek 75km away when it would appear she could have had the benefit of a lift all the way to eQonce with the plaintiff. It is very difficult to escape the impression that Ms L Kwankwa was endeavouring, through such evidence, to distance herself from having lent any assistance to the plaintiff in preparing for and concluding the wedding ceremonies.

[97] As previously discussed Mrs Funeka Kwankwa initially created a better impression when she presented as a quiet and almost detached witness, but her subsequent outburst strongly suggests that this was merely a guise and that in truth she was deeply invested in the defendant's case, fiercely protective of him and very hostile towards the plaintiff. She too experienced considerable problems with contradictions and improbabilities in her evidence. She could not explain why she and her siblings would caucus for some time before approaching the plaintiff when she first arrived at the homestead. Nor could she give an adequate explanation as to why she did not do the obvious thing and immediately phone her son in Cape Town to find out what was going on. Later evidence from the defendant that he had spoken at the time to her brother, Mzwebantu, and to Nonceba, was nowhere to be found in her evidence when one would expect that she would obviously have been made aware of this at the time. Mrs Kwankwa also ran into considerable difficulties concerning the exact directions to her homestead. What became clear was that a first-time visitor to her homestead would struggle to find it unaided and that in 2012 her son's political or public profile was certainly not such that 'everyone' in the district would know where his homestead was and thus could guide first-time visitors to it.

[98] The defendant is clearly an intelligent and highly articulate person, as borne out by his post as the spokesperson for the political party of which he is a leading member. He gave his evidence in chief in a polished and confident manner, although much less so in cross-examination, and was never short for words when in comfortable territory. A major difficulty I have with his evidence was that many crucial aspects involving the plaintiff were never put to her. Quite apart from this shortcoming the plaintiff's evidence threw up many contradictions and improbabilities. A further serious difficulty with the defendant's evidence, one which was not simply cured by the last minute amendment of his plea and his retraction of agreed facts, was his clinging steadfastly to the case that the lobola negotiations has

been successfully concluded and that he had paid R20 000.00 in part payment of the lobola price. I find the defendant's reason and explanation for clinging to this case unsatisfactory and unconvincing. What is more, this version was deposed to him under oath in the Rule 43 proceedings. Someone as intelligent, self-assured and articulate as the defendant is unlikely to have continuously asserted a version of events to which he could not personally testify, and furthermore deposed to this version, when in reality, as far as he was concerned, the lobola negotiations had never reached conclusion and he had no idea as to what was paid as part payment towards the lobola price.

[99] When the evidence is looked at as a whole the plaintiff presented a strong case that the rituals or ceremonies traditionally associated with a customary marriage were duly observed by both families. She gave detailed and credible evidence that she had been released by her family and had then travelled to the defendant's homestead where, over a period of five days, all the necessary rituals were observed. Her evidence was supported directly by that of Mrs Mdlunya and indirectly by Messrs Phumzile and Sanele Tshongweni whose evidence was unequivocal that they regarded the plaintiff as the defendant's bride. Against this there is the defendant's version that no such ceremonies were completed. However the defendant was not present at his home village over the period in question, it being common cause that he was in Cape Town. His case relied on the evidence of his mother, Mrs Funeka Kwankwa and his aunt, Ms Lulama Kwankwa. I have already indicated that both these witnesses were far from satisfactory, in particular Ms Lulama Kwankwa, who was an evasive and cagey in her evidence. Ms L Kwankwa had the difficult task of credibly explaining her interaction with the plaintiff in eQonce and her presence at the defendant's homestead, a feat which in my view she did not accomplish. Similarly, the defendant's mother's evidence was beset with difficulties and improbabilities.

[100] Key to an assessment of the opposing parties' versions is an evaluation of the probabilities. On the defendant's version the plaintiff unilaterally decided that, uninvited and unheralded, she would drive to the defendant's homestead and insist on going through with the marriage rituals even though the lobola negotiations were at an inconclusive stage and in the face of the defendant's strong opposition. On the defendant's version she would moreover have gone to the lengths of buying all the equipment necessary for the *uphindindlela* ceremony and taken two members of her

community or her family and her child 200 or 300km to the defendant's village in the hope of forcing her plan through. To my mind this is a most improbable scenario which could or would have been brought to a grinding halt when the defendant's mother or an elder simply telephoned the defendant in Cape Town to ascertain whether all this was with his knowledge and consent. Apparently recognising this, the defendant testified that in the days preceding 16 July 2012 there had been telephone conversations between him and the plaintiff in which she evinced her intention of pursuing this plan and in which he expressed his strong disagreement. The difficulty is that none of this evidence was put to the plaintiff when it should have been one of the cornerstones of her cross-examination.

[101] In my view it is far more likely that the plaintiff proceeded to the defendant's homestead with the knowledge and consent of not only the defendant but the defendant's family because, as she testified, the lobola negotiations were successfully concluded and she and the defendant had agreed that they would compress the two traditional wedding ceremonies into one in order to expedite the customary marriage. The customary marriage itself, according to her testimony, was the result of the fact that both wished to get married but did not have the money to indulge in a full '*white wedding*'. They therefore agreed to be married by customary rites first and thereafter save for the full white wedding. The compression of the ceremonies and the short period over which the entire lobola negotiations and marriage ceremonies were conducted was done because the parties were resident and working in Cape Town. The plaintiff was able to take leave for several weeks but for work reasons the defendant could only spare two or three days. It was for this reason that he was not able to be present but must have consented to the welcoming of the bride ceremony etc taking place in his absence. Apart from the plaintiff's version making complete sense, there are telling details such as the phone call that evening from the defendant from his mother to find out how things had gone and his insistence that her new name be changed from Nomtha to Phumzile. In this same regard it is improbable, if not farfetched, to imagine that the plaintiff would go to a photographer in Engcobo and have herself photographed in *makoti* dress with the intention of one day using it in legal proceedings where she would seek to enforce a non-existent customary marriage to the defendant.

[102] The aftermath of the events of late June and early July 2012 are also telling. When the plaintiff testified, little evidence was led from her concerning her and the

defendant's life when she returned to Cape Town after the marriage ceremony. There was no indication from her that her marriage or relationship with the defendant was all but over. The only detail she did give, once again telling, was of how she wore her *makoti* attire for a considerable time and of being introduced by the defendant as Mrs Kwankwa. An entirely different picture emerged when the defendant testified. According to him the plaintiff's unsuccessful attempt to force through the marriage ceremonies unilaterally became a huge bone of contention between them and their respective families and they bickered and quarrelled from then on and were only together until the end of 2012. Yet again, however, this version of events was not put to the plaintiff when she was cross-examined. Moreover, the defendant's Rule 43 affidavit was put to him and in particular paragraph 5. It follows immediately after the defendant's statement under oath that he made part payment of the lobola in the amount of R20 000.00 but that he had not paid seventy percent thereof, a condition precedent to taking further steps and attending to other necessary customary marriage formalities. It reads:

'Subsequent to part payment of the lobola the applicant and I experienced irreconcilable differences in our relationship. The differences that we experienced in our relationship, which culminated to the ultimate break down of the relationship, were solely caused by the applicant's repulsive and indifferent attitude towards my other children and my family.' [my underlining]

[103] Inexplicably no mention is made of the plaintiff's alleged unilateral attempt to force through the marriage ceremonies as the immediate cause of the breakdown. The affidavit continues:

'Our relationship disintegrated and ended before the finalisation of the payment of the lobola and before the commencement of other formalities which are essential ...

7. *In January 2015 when it became clear that the differences we experienced in our relationship would not be reconcilable I moved out of my house, which until then, I shared with the applicant and my daughter ...'* [my underlining]

[104] This version is wholly at odds with the defendant's viva voce evidence that the parties were only together till the end of 2012. Confronted with this contradictory material during his evidence the defendant's answer was that he had moved out of the house at the end of 2012 but had only formally (whatever that means) moved out in 2015. In my view this latter evidence on the part of the plaintiff was yet a further

indication of the defendant's habit of adjusting his case and his evidence to suit the exigencies of the situation in which he found himself. The best example of this tendency lies in the defendant's abandonment of his earlier version that lobola negotiations were concluded and he paid R20 000.00 in part payment but this did not reach the condition precedent level of seventy percent. Of this seventy percent condition precedent not a word came from the defendant in evidence which leads me to conclude that this was a fabrication, having no basis in fact or in custom. Also left unexplained was why the defendant and the plaintiff would remain living together as husband and wife for another two and a half years with the lobola negotiations half concluded. It is noteworthy furthermore that notwithstanding the payment by the defendant of a sum somewhere between R12 500.00 and R20 000.00, and a relationship which he alleged broke down in July 2012, there was no evidence of any attempt on the defendant's part to recover these monies.

[105] On behalf of the defendant it was contended that the plaintiff's case should be rejected in toto, firstly on the basis that the lobola negotiations had never been concluded. Counsel's argument in this regard was based largely on what I consider were minor discrepancies in the factual accounts by Messrs Phumzile and Sanele Tshongweni. The argument failed to grapple with the probabilities and took, in my judgment, a myopic rather than a holistic view of the evidence. In this regard, during argument the defendant's counsel was invited on several occasions to make submissions on the probabilities in respect of the conflicting factual versions put up by the parties. Counsel for the defendant steadfastly declined to do so on the basis that the plaintiff's version was '*false*'. Needless to say this approach was unhelpful both for the Court and for the defendant's case.

[106] What remains is the argument on behalf of the defendant that he was never properly received as a bridegroom into the bride's household or family and another argument, more technical in nature, that the plaintiff could not have been properly received into his family as his bride in his absence.

[107] In regard to the wedding ceremonies the defendant's counsel set great store by the fact that defendant had not been properly welcomed into the plaintiff's family in accordance with custom following the conclusion of the lobola negotiations, and, thereafter, in his not being present during the wedding ceremonies. As far as the defendant not being welcomed into the bride's family, I accept the plaintiff's evidence that on both the Saturday and the Sunday he was invited into the homestead to

partake in the lunch meals on those days. It is correct that his presence on the Saturday was a low-key affair but this was quite understandable since the negotiations had not been concluded by payment of fifty percent of the lobola price. On the Sunday, the evidence reveals the defendant to have been in a tearing hurry to catch the bus to Cape Town. In the circumstances and bearing in mind the flexibility of customary law, this deviation from usual customary practices, can in no way serve to invalidate any subsequent marriage.

[108] As far as the defendant's absence from the wedding ceremonies on 16 July 2012 are concerned, I have already pointed out that in terms of customary law the presence of the bridegroom is not necessary. In the present matter, accepting the plaintiff's version of events, the defendant was absent by choice. He had to work in Cape Town and it was with his full agreement, and in fact on his initiative, that the two ceremonies were compressed into one and proceeded in his absence.

[109] Section 15(3) of the Bill of Rights recognises legislation sanctioning marriages concluded '*under any tradition*', whilst sections 30 and 31 thereof recognise a person's right to participate in the cultural life of their choice and to enjoy their culture provided that their rights are not exercised in a manner inconsistent with any provisions of the Bill of Rights.

[110] In *Mbungela v Mkab*⁸ the issue before the Supreme Court of Appeal was whether a couple had concluded a valid customary marriage in circumstances where the deceased's family did not hand her over to the first respondent's family in terms of custom. It was held that customary law was a dynamic, continuously evolving, flexible and pragmatic system of law and that the ceremony of handing over of the bride is not necessarily a key determinant of a valid customary marriage. The Court held further that the waiver of that ceremony or requirement was permissible and thus did not invalidate a customary marriage. The Court, per Maya P, stated as follows⁹:

'[17] As pointed out above, the appeal revolves around s 3(1)(b) of the Act; the jurisdictional factors in s 3(1)(a) are not in issue. '[C]ustomary law' is defined in s 1 of the Act as "customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". But s 3(1)(b) does not stipulate the requirements of customary law which must be met to

⁸ 820/2018 [2019] ZASCA 134 (30 September 2019).

⁹ At para 17 – 19.

validate a customary marriage. The reason for this is not far to seek. It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned. As this Court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society. Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.

[18] The Constitutional Court has cautioned courts to be cognisant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights. The courts must strive to recognise and give effect to the principle of living, actually observed customary law, as this constitutes a development in accordance with the “spirit, purport and objects” of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.’

[111] In my view the arguments that the deviation from the custom of welcoming the groom into the bride’s homestead after conclusion of the lobola negotiations and that the groom’s absence from the *utsiki* ceremony, invalidated any customary marriage are without any merit. The evidence of the defendant’s own expert witness, Prince Burns-Ncamashe as well as established case law makes it clear that the ceremonies and procedures involved in a customary marriage are part of a flexible system, elements of which can be compressed or even left out depending on the circumstances of the matter and the exigencies of the situations in which the parties find themselves. In LAWSA the authors note that the son does not necessarily have to be present at the formal wedding ceremony and may be represented. Regarding the groom’s consent, this, given either explicitly or otherwise (for example by acquiescence), is essential.¹⁰

¹⁰ Ibid, para 98.

[112] In my view, having regard to the evidence as a whole and the credibility of the parties and the witnesses, the probabilities are overwhelming that the plaintiff's version that a customary marriage was indeed contracted is what in fact took place. It follows from what I have said that, in relation to those issues where there is a dispute between the versions of the plaintiff and the defendant (save for the question of on which day the defendant caught the bus to Cape Town), I prefer and accept that evidence of the plaintiff.

[113] On the plaintiff's version, which I accept, there were full lobola negotiations and agreement on a lobola price was reached, namely, ten cows. There was further agreement that the bride would be released upon payment of half this amount and that duly occurred. There was evidence that the Tshongweni family, or the elders of their greater family, agreed to the release of the plaintiff. The parties then went through with both the *utsiki* ceremony and the *uphindindlela* ceremonies, albeit compressing these two together into the five-day stay which the plaintiff spent at the defendant's homestead. There she was accompanied, as is customary, by a female family member and another older woman from her community and arrived with all the necessary gifts and household utensils. When she arrived she was welcomed and received into the homestead. She was dressed in *makoti* attire and a sheep, which could only have been produced by the defendant's family, was slaughtered and cooked. Thereafter the plaintiff ate or tasted the special part of the sheep, *umshwamo*, and received guidance from the female elders of the amaTshawe clan into how she must behave or conduct herself as a wife. The plaintiff then demonstrated her commitment to her new family by spending five days in the homestead performing household tasks and ministering to the needs of the defendant's family at the behest of his mother, Mrs Funeka Kwankwa. She returned home to Cape Town dressed in *makoti* attire which she wore for a substantial period.

[114] Both in terms of the customary marriage ceremonies described by Prince Burns-Ncamashe and in terms of the case law as determined by the Supreme Court of Appeal in *Mbungela* and *Ngwenyama*, the parties fulfilled all the necessary elements of a customary marriage. The fact that the defendant was not present when his bride was welcomed into his family's homestead does not, to my mind, operate as an impediment to the marriage and nor does any shortcoming as regards the defendant not being formally welcomed into the plaintiff's family or homestead on the weekend of the lobola negotiations. On the plaintiff's version the defendant had

full knowledge of the wedding ceremonies on 16 July 2012 and was absent by choice albeit through circumstances beyond his control. By clear implication he consented to the proceedings going ahead in his absence and it is farfetched to suggest that he was somehow married without his consent in breach of his constitutional rights. Having regard to all these factors, I consider that there is no room for the argument made on behalf of the defendant that his (voluntary) absence from the wedding ceremonies was a breach of his constitutional right in terms of sec 9(3) of the Bill of Rights not to be discriminated against on the basis of his gender.

[115] For these reasons I find that the plaintiff has succeeded in proving her case that during July 2012 a valid customary marriage was concluded between the plaintiff and the defendant. It follows that the plaintiff is entitled to the costs of this action.

[116] Accordingly, the following order is made:

- (a) It is declared that the plaintiff and the defendant entered into a valid customary marriage at eMnqaba village, Middeldrif on 16 July 2012;
- (b) The defendant is to pay the plaintiff's costs.

BOZALEK J

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|-------------------|---|-------------------------|
| For the Plaintiff | : | Adv S Dzakwa |
| As Instructed by | | Mphahlwa Ndlamhlaba Inc |

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|-------------------|---|---------------------|
| For the Defendant | : | Adv L Dzai |
| As instructed by | : | N Potelwa Attorneys |