

SOUTH AFRICA / JUDGMENT

Baloyi v Mabunda and Others (1867/2016) [2019] ZALMPPHC 25 (23 May 2019)

[2019] ZALMPPHC 25

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

1867/2016

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE
NUMBER: 1867/2016

In

the matter between:

NKHENSANI
REAGAN BALOYI
PLAINTIFF
AND
TINNY
MAPULA MABUNDA
FIRST DEFENDANT
DIRECTO-GENERAL
OF THE
DEPARTMENT
OF HOME AFFAIRS
SECOND DEFENDANT
MASTER
OF THE HIGH COURT
THIRD DEFENDANT

JUDGEMENT**KGANYAGO J**

- [1] The plaintiff has launched an application against the defendants seeking an order that her alleged customary marriage with the late Majozi Pax Mabunda (deceased) be registered by The Director General of the Department of Home Affairs (second defendant). She is also seeking an order that the alleged civil marriage between the deceased and Tinny

Rabothata (first defendant) be declared null and void, and further that the second defendant deregister that marriage.

- [2] The first defendant is opposing the plaintiff's application. The first defendant is disputing that the plaintiff's alleged customary

marriage is valid. According to her, it did comply with the requirements for a valid customary marriage. The first defendant contends that she was legally married to the deceased by civil rites.

- [3] The background facts are that the deceased allegedly married the plaintiff by customary union on the 24th November 1985. The plaintiff has also attached an alleged lobola letter that shows that the agreed lobola amount was R1500-00 and a deposit of R100-00 was paid. However, the balance of R1400-00 was never paid by the deceased. It also shows that R200-00 for damages for impregnating the plaintiff was also paid on the date of the alleged lobola negotiations. The letter also shows that an amount of R100-00 for negotiations (engagement), R2-00 to allow for the talk, R1-00 for reed mat was also paid on the date of the lobola negotiations.

- [4] With regard to the first defendant, she has attached to her answering affidavit an alleged lobola letter that shows that an amount of R1000-00 as lobola was paid for her on the 23rd April 2005. She has also attached copy of an alleged marriage certificate that shows that she and the deceased got married by civil

rites on the 31st July 2012.

- [5] The parties agreed that there was a material dispute of fact which could not be resolved on papers and referred the matter for trial. As per the minutes of the pre-trial, the parties agreed that the issue which the court must determine was whether a lawful customary marriage took place between the plaintiff and the deceased.

- [6] Should the court find that there was a valid customary marriage between the deceased and the plaintiff, that will affect the validity of the alleged civil marriage between the deceased and the first defendant. Should the court find that the alleged customary union between the deceased and the plaintiff is invalid that will validate the first defendant's alleged civil marriage with the deceased.

- [7] The plaintiff has testified. She testified that she knows the deceased. The deceased is her husband and he passed away on the on the 5th March 2016. She was customarily married to the deceased on the 24th November 1985. She and the deceased are having two children. The first child was born on the 15th November 1984 and the second child was born during 1987.
- [8] The lobola negotiations were held on the 24th November 1984. The Mabunda family had sent emissaries to negotiate lobola for her on behalf of the deceased. When she got married she was aged 17 years. She was not present during the lobola negotiations as custom does not allow her to be present. After the negotiations were concluded she was called and given a feedback. She was told by her grandmother that they have agreed with the Mabunda family for lobola in the amount of R1500-00. The deceased was not present during lobola negotiations. Their lobola agreement was reduced to writing.
- [9] The agreement showed that on the day in question the emissaries from Mabunda family paid a deposit of R100-00. To show that the negotiations were concluded, the emissaries from Mabunda family were given food. Later the deceased came to fetch the emissaries. The emissaries were also given food to take with to the Mabunda family. She did not leave with them as they did not ask permission for her to leave with them.
- [10] Before Christmas the deceased came to fetch her and the child saying he was going to buy Christmas clothes for the child. After buying clothes he took her to the Mabunda's homestead. Later the Mabunda's sent a representative to her family to inform them that she was now at the Mabunda homestead. She stayed at Mabunda homestead from December 1985 to September 1995.
- [11] During 1987 she gave birth to her second child. Both the first and second child have taken their father's surname. After the birth of the second born, her family decided that she should be formally handed over to the Mabunda's. She went back to her parental home on a Friday. On Saturday her family and other family representatives took her to the Mabunda family where she was formally handed over to them. Her family also bought pots, duvets, blanket and scones which they took along to Mabunda family for the handing over ceremony.
- [12] When they arrived at Mabunda's homestead, they were received by the deceased elder sister Maria Mabunda, both his parents and other family members. Her family informed the Mabunda's that they were formally handing her over, and the Mabunda's formally accepted her. After that a goat was slaughtered and a feast was held formally accepting her.
- [13] From that day she and the deceased stayed together as husband and wife at the deceased parental home until 1995. During 1995 the deceased bought a house in Nkowankowa and they moved to that house. She did not know that they were supposed to register their customary marriage. She, the deceased and their two children stayed together in Nkowankowa until

2002. During 2002 the deceased had financial problems as he was now working in Polokwane and was commuting between Polokwane and Nkowakowa on daily basis. They agreed to sell the house in Nkowankowa and buy a house in Polokwane. She could not relocate with them to Polokwane as she was working in Nkowankowa. The deceased moved to Polokwane with the children. She stayed in Nkowankowa at her mother's house. The deceased was visiting her over weekends. This went on until the deceased passed away. However, the visitation was no longer the same as the deceased will sometimes visit after a month.

[14] She knew about Tinny Mabunda (first defendant) after her children told her that she was having an affair with deceased. She confronted the deceased about the first defendant and he denied having an affair with her. She never met the first defendant. She was not aware that the first defendant was married to the deceased. She knew after the deceased has passed away. She did not give the deceased consent to marry the first defendant.

[15] On the Old Mutual policy the deceased had nominated her as a spouse, and the first defendant as an additional spouse. The deceased was her husband from 1985 until his death.

[16] The plaintiff was cross examined and she stated that she and the deceased started having a love relationship during 1982, and by then she might have been 14 or 15 years of age. She conceded that the balance of R1400-00 for her lobola was never paid, and that in their culture they will never demand payment of the outstanding lobola. She conceded that the deceased mother and sisters never coached her, but that she was coached by her family members. She conceded that on the transfer documents relating to the house which the deceased bought in Polokwane during the year 2000, he had stated that he is unmarried.

She conceded that she was not on the deceased medical aid. She conceded that there is a house in Nkowankowa that she jointly owns

with her first daughter. She conceded that on the affidavit relating to the transfer documents of the house in Nkowakowa, she has stated that she was unmarried. She stated further that it was as a results of an agreement between her and the deceased to depose an affidavit stating that she is unmarried. The reason for that was to assist her first daughter to secure a bond as she could not qualify on her own.

[17] The plaintiff called Penna Maxine Shandlale as her first witness. She testified that she knows the plaintiff. The plaintiff is the daughter of her eldest sister. On the 24th November 1985 the Mabunda family sent emissaries to Baloyi family to hold lobola negotiations regarding the plaintiff. She was present when the emissaries from the Mabunda family arrived. Her father, uncle, siblings, and other family members were present. They accepted the emissaries and after that lobola negotiations started.

[18] The emissaries told them that they have come to marry the plaintiff. The Baloyi family told the emissaries that they first had to pay damages for the plaintiff since the deceased had already impregnated her. The damage amount was fixed at R200-00 and the emissaries paid it. After payment of the damage amount the actual lobola negotiations started. They agreed

at the lobola amount of R1500-00. There were also other payments which were paid immediately by the emissaries which were procedural requirements before the parties could agree on the lobola amount. The emissaries paid R100-00 as a deposit for lobola and the outstanding balance of R1400-00 was to be paid at a later stage. She is the one who had written the lobola letter.

- [19] The deceased was not present during the negotiations. However, after the negotiations were finalized, the emissaries called the deceased and explained to him the lobola letter that she had drafted. After that the deceased was the first person to sign the lobola letter on behalf of the Mabunda family. After all the formalities were completed, they celebrated that the plaintiff was married.
- [20] During 1987 they contacted the Mabunda family notifying them that they will be formally handing over the plaintiff to them. After the lobola negotiations, the plaintiff and the deceased had agreed to stay together. There was a delegation from Baloyi family that accompanied the plaintiff when she was handed over to Mabunda family. On arrival at Mabunda family they were accepted and a goat was slaughtered. The slaughtering of a goat was a sign of welcoming them. After that the two families celebrated together. They have also bought some items like pots and other staffs which accompanied the plaintiff when she was handed over to the Mabunda's.
- [21] The witness was cross examined and she stated that the person who had written "subject to legal marriage" on lobola letter was his father. She denied that on the 24th November 1985 they were celebrating for the payment of damages. She conceded that on the 24th November 1985 after lobola negotiations were completed, the emissaries did not seek permission to leave with the plaintiff. She

stated that days after lobola negotiations, the deceased invited the plaintiff to come and stay with him at his parental home.

- [22] Under questions by the court she stated that according to the Shangaan custom, they will not demand payment of the outstanding lobola amount. She further stated that the groom will arrange a date when he will come and pay the outstanding lobola amount. After payment of the outstanding lobola amount, that is when a goat will be slaughtered to symbolize that he had paid the full outstanding lobola amount.
- [23] The plaintiff's second witness to testify was Mbuzini Jones Baloyi. He stated that the plaintiff is his niece. On the 24th November 1985 a delegation from the Mabunda family came to the Baloyi homestead to negotiate lobola for the plaintiff on behalf of the deceased. He was not part of the lobola negotiations. He was later informed that money for lobola was paid by Mabunda family but he did not ask how much was paid. They were told that the lobola negotiations were completed and that they must give the visitors

food. He, his mother and other people are the ones who cooked for the visitors from Mabunda family.

- [24] He was present and part of the delegation when the plaintiff was handed over to the Mabunda family. That was a formal handing over. Since the handing over of the plaintiff to the Mabunda family, the plaintiff became the wife of the deceased. The deceased became their so-in-law. The witness was cross examined and nothing new came out.
- [25] The plaintiff's third witness to testify was Daphney Musireni Rikhotso. She testified that the plaintiff is her daughter. She started knowing the deceased during 1984 when the plaintiff fell pregnant. The deceased is the one who had impregnated the plaintiff. When the plaintiff fell pregnant she (witness) was working and staying in Johannesburg. She was informed that the Mabundas will come to their homestead to have a discussion with them.
- [26] The deceased married the plaintiff during November 1985. That weekend she came home. When she arrived at home, her father told her that the Mabundas are coming to his homestead to discuss the issue of damages after the deceased had impregnated the plaintiff. During the discussion she was not present. It was later reported to her that after the Mabundas have paid damages, they proceeded to discuss lobola negotiations. During 1985 the plaintiff was aged 17 years and she gave consent for the continuation of the lobola negotiations as the plaintiff was still a minor. Her father (witness) was leading the negotiations and he gave consent for the plaintiff to get married. It was her father who called her and asked her whether she was agreeing that the plaintiff should get married.
- [27] After the negotiations, she received a report about the outcome of the negotiations. She was told that damages were paid and that R100-00 as deposit for lobola was also paid. Up to date the balance of the lobola was never paid. In Shangaan culture they don't invite many people when damages were discussed.
- [28] Sometime after the negotiations were finalised, the deceased arrived and it was explained to him the outcome of the negotiations. He agreed with the outcome of the negotiations and he signed the lobola letter. The plaintiff was also called and it was explained to her the outcome of the negotiations and she agreed with them. The plaintiff did not go to Mabunda family with the delegation immediately after the conclusion of the negotiations as Shangaan culture does not allow that. A day will be arranged when it will be formally announced as to when she will be handed over to her in-laws.
- [29] During December 1985 whilst in Johannesburg, she received a call that the deceased came and collected the plaintiff and her child under the pretext that he was going to buy clothes for the child, but did not return them. The Mabunda's sent a messenger to inform them that the plaintiff was at their homestead. During 1987 the plaintiff again fell pregnant whilst staying at Mabunda homestead. The same year they called the plaintiff back home to formally hand her over to the Mabunda family. They bought things that will be taken with her when she was handed over.

- [30] In Shangaan custom the groom never finishes marrying. Since the deceased did not pay the lobola of R1500-00 in full, in Shangaan custom they will deduct that money from the lobola of the deceased daughter when she gets married. If the wife dies before the full lobola was paid, the husband will not be allowed to bury her until he pays the full outstanding amount. According to their custom the payment of R100-00 by the Mabunda family meant something.
- [31] The witness was cross examined and she stated that the plaintiff has told her that the deceased wanted to marry her. She further stated that she had coached the plaintiff about marriage. She stated that she knew about the first defendant as she used to come to attend parties and funerals at their village. The first defendant also attended Saghwati's birthday party and was also present at the funeral of the deceased father. She knew the first defendant as deceased wife and they also had a child together. Under questions by the court she stated that they handed over the plaintiff to the Mabunda's as there was nothing they could do since the deceased and the plaintiff were staying together.
- [32] Maria Liza Mabunda was the plaintiff's fourth witness to testify. She testified that she knows the plaintiff as the wife of the deceased. She knew the plaintiff from 1985.
- [33] During November 1985 the Mabunda family went to the Baloyi family to marry the plaintiff. She was not part of the emissaries that went to marry the plaintiff. The elders of the Mabunda family had discussed about a date when they will go to the Baloyi family. She was not part of that discussion. However, after they agreed on the date, her father and mother came and notified her as their eldest child that they were going to marry the plaintiff for the deceased. During 1985 she was 28 years of age.
- [34] When the emissaries came back from the Baloyi family, they gave them a report of what happened and also gave them a letter written by the Baloyi family. According to the letter the parties have agreed on an amount of lobola to be paid. They did not come back with the plaintiff. The plaintiff came to their homestead the following day on a Sunday after she was collected by the deceased.
- [35] The plaintiff stayed at the Mabunda homestead for a long time. At some stage her family called her to return home for a proper handing over. Her family handed her over to the Mabunda family during June 1986 or
1987. When they handed her over, they also brought along cutleries and utensils. She will not know why she was not handed over earlier. She was present when the handing over was done. The Mabunda's slaughtered a goat as a symbol of showing happiness and that they were marrying her. The elders of the Mabunda family, her father, her younger brothers, aunt and the deceased were present during the handing over.
- [36] She knows the first defendant as the deceased second wife. She is the one who went to marry the first defendant on behalf of deceased. At the time of the deceased death, he was still married to the plaintiff, and the Mabunda family regards the plaintiff as the deceased wife.

- [37] The witness was cross examined and she stated that the plaintiff stayed at the Mabunda family from 1985 until her family called her for a formal handing over. She stated that when the Mabunda's went to the Baloyi family on the 24th November 1985, their intention was to marry the plaintiff, and they were also aware that they will first have to pay damages for the plaintiff's pregnancy. She stated that when the plaintiff was handed over, she was already permanently staying at Mabunda family.
- [38] Violet Tsakani Mabunda was the plaintiff's fifth witness to testify. She testified that she knows the plaintiff as someone who was staying with the deceased. The deceased is her brother even though not blood brothers. Her father and the deceased father are blood brothers. She is working at Nyavana Traditional Council as an admin clerk. She is the one who had issued the letter dated 23rd March 2016 confirming the customary marriage between the plaintiff and the deceased. Before she wrote that document, the deceased sister Liza Mabunda gave her a document which was signed showing that the marriage took place on the 24th November 1985. She was not present when the negotiations took place, but she had knowledge of them.
- [39] She is the custodian of the custom and culture. The procedure that they follow when they marry by custom is that a go between will be sent to the bride's family. The go between will agree with the bride's family about a date on which lobola negotiations will be held. From there the groom's family will go and prepare themselves and on the agreed date they will go to the bride's family having a certain amount of money.
- [40] On arrival at the bride's family the emissaries will stand at the gate and pay a certain amount of money to be allowed to enter the bride's homestead. On paying that amount, emissaries will be allocated their own room. Somebody from the bride's family will be sent to greet the emissaries. After the greetings, the emissaries will request to see a representative from the bride's family, and find out who will be their go between. The bride's family go between will come to the emissaries to tell them that they are ready to start with the negotiations.
- [41] Where the future bride has been impregnated by the future groom, before the lobola negotiations start the parties will first deal with the pregnancy damages. The parties will agree on the amount of damages to be paid. The bride's family will make a list of demands which usually consists of a coat, snuff, jacket, wallet, reed mat where money will be placed, etc. The bride's family will then pose a question to the emissaries as to who told them that there is a lady in that family. The list that is demanded form part of damages. Thereafter they will agree on lobola amount. Then they will have a total amount of the list and lobola amount. The emissaries will pay whatever amount they are having and if there is an outstanding balance, they will tell the bride's family that they will pay it at a later stage. If the emissaries are able to pay the full amount, the bride's family will tell them whether they are satisfied or not. If they are satisfied, the handing over of the bride may be done immediately after negotiations.

- [42] Where the groom's family did not pay the lobola amount in full, the parties will still be allowed to get married, and the groom will even be told that a man does not finish to marry. The handing over depends upon an agreement between the two families. Handing over can be done on the same date of the lobola negotiations or on a later date. The witness was cross examined and nothing new came out.
- [43] Saghwati Mabunda was the plaintiff's sixth witness to testify. She testified that she is a daughter of both the plaintiff and the deceased. Amukelani Hope Mabunda is her younger sister. Mbhoni is the son of the first defendant and the deceased. The deceased had also a son named Twananani and a daughter named Nkateko from different mothers.
- [44] She knows the first defendant to be the deceased girlfriend. She started knowing the first defendant either during 2004 or 2005. When the deceased introduced the first defendant to her, he introduced her as his friend. At a certain point the deceased had a child with the first defendant. She only knew after the deceased has passed away that the deceased and the first defendant were married to each other.
- [45] She used to stay in the same house with the deceased and the first defendant at the deceased house in Polokwane. She, her sister, the plaintiff and the first defendant are the ones who contributed to the deceased funeral expenses.
- [46] She and the plaintiff are joint owners of house no 876 B Nkowankowa. However she is the one who is paying the monthly bond repayments. At the time she bought the house, she did not qualify for a home loan. She talked to the deceased to assist her, and the deceased advised her to talk to the plaintiff. She and the plaintiff initiated a loan application and it was successful. The deceased and the plaintiff were married to each other. As her mother's marriage was not registered at the Department of Home Affairs, they were advised by the deceased and the people who were assisting them with the loan application that the plaintiff should sign the affidavit in support of the transfer as if she was unmarried.
- [47] The witness was cross examined and she conceded that there was nothing preventing the deceased to go to the Department Home Affairs to have their marriage registered. That concluded the evidence of the plaintiff and she closed her case.
- [48] The first defendant did not testify for her case but called witnesses to testify on her behalf. Derrick Vuma was the first witness to testify on behalf of the first defendant. He testified that he and the deceased are cousins and friends as well. He knows the first defendant as the deceased wife. He used to visit the deceased in Polokwane and is aware that the deceased had children with the plaintiff. To his knowledge the deceased was not married to the plaintiff. He never asked the deceased whether he was married to the plaintiff or not.

- [49] He met the first defendant during 2004 after the deceased had called him to visit him in Polokwane. On arrival the deceased introduced the first defendant to him as his wife. Before that day he was not aware that the deceased was married to any other lady, except that he knew that he had two daughters with the plaintiff. From time to time the deceased used to attend funerals and family functions in the company of the first defendant.
- [50] The witness was cross examined and he conceded that he did not know as a matter of fact whether the deceased was married to the plaintiff. He stated that around 1985 he was 13 years old. He stated that he did not know whether the deceased at any stage stayed with the plaintiff, but that he only knew that they had two daughters together.
- [51] Evelyn Sibiya was the second witness to testify on behalf of the first defendant. She testified that the deceased was her elder brother. She knows the plaintiff as she was having two children with the deceased. She knows the first defendant as the deceased wife. She met the plaintiff for the first time on the 12th March 2016 at the deceased funeral. She (witness) is married and she stays at her own homestead.
- [52] During 1986 her mother told her about the birth of Saghwati, the deceased daughter even though she was born during 1984. Her mother also told her that the plaintiff was staying with them together with Saghwati. She also told her that since they were from the royal family, they have sent a delegation to Baloyi family to pay damages for the deceased for having impregnated the plaintiff. The reason why they paid damages was that the deceased did not love the plaintiff and also did not intend to marry her. She does not remember the plaintiff being handed over to the Mabunda family. When the deceased went to the Baloyi family was to admit that he had wronged them. The alleged lobola letter according to her is not a lobola letter but a
- letter for payment of damages. In their custom the groom does not sign a lobola letter. According to their custom if lobola
- negotiations are held the Baloyi's and Mabunda's will draft their own letters, sign them and exchange them. It is only when it is payment of damages that two families will sign the same document.
- [53] During 2003 the deceased came to her place and introduced the first defendant to her. He told her that he intends marrying the first defendant since he did not have a wife. During 2005 the deceased told her that he was ready to marry the first defendant. In deed lobola for the first defendant was paid during 2005. In their culture a man will not marry a second wife without the knowledge of the first wife, and the elders will also not allow that. The day the deceased passed away, she went to the first defendant homestead to ask her where she wanted the deceased to be buried. She did that as she knew the first
- defendant to be the deceased wife.

[54] The witness was cross examined and she stated that between 1984 and 1986 she did not visit her parental homestead. She stated that she is aware that Saghwati was having a younger sister Amukelani, but did not know when she was born. She further stated that she did not know whether her family approached Nkateko and Twanani's family to pay damages on behalf of the deceased. In relation to Mbhoni the first defendant's son, she stated that there was no need to pay damages since the deceased intended to marry the first defendant, and that according to their custom, damages were payable if the man had no intention of marrying the woman. She conceded that when Amukelani was born the deceased family did not pay damages. She stated that if the plaintiff was handed over to the Mabunda family during 1987, the deceased and her parents would have informed her. She denied that her sister Liza is telling the truth when she testified that the plaintiff was handed over to the Mabunda family during 1987, and further stated that if there was such an event, she would have been notified. She stated that the confirmatory

affidavit that is attached to the first defendant answering affidavit is false, and that she was never in Thohoyandou where it was commissioned. She stated that the delegation that signed the alleged lobola letter dated 24th November 1985 did that without a mandate from Mabunda family. When asked why in relation to the alleged lobola letter of first defendant both families have signed the same document, she stated that the Mabunda's have compromised their own custom.

[55] Gladewill Blade Mabunda was the first defendant's third witness to testify on her behalf. He stated that the deceased is his elder brother. He knows the plaintiff as Saghwati's mother. He knows the first defendant as the deceased wife. He is disputing the contents of his confirmatory affidavit attached to the first defendant's answering affidavit. The author of that confirmatory affidavit did not read the contents of it to him.

[56] During December 1985, the deceased told their uncle that Saghwati together with the plaintiff came to their homestead in order for him to buy Saghwati Christmas clothes. The way his uncle laughed after being told, he could see that he knew about the plaintiff and Saghwati. However, the deceased did not tell their uncle that he intends marrying the plaintiff.

[57] With regard to the issue marriage, the elders would not have involved him since he was still young. He knows that the Mabundas have sent a delegation to Baloyi family but does not know why they were sent as he was not part of the discussion. The deceased was part of the people who went to Baloyi family. The plaintiff started staying in their parental homestead from early 1986. When the deceased and the plaintiff moved to Nkowankowa, they were not married. He does not remember the plaintiff been handed over to the Mabunda family during 1987. The Baloyi family never came to Mabunda family with gifts and blankets.

[58] He met the first defendant around 2002. That day the deceased went with him to Gakgapane where the first defendant was staying. On arrival the deceased introduced the first defendant as his girlfriend and that he intends marrying her.

- [59] In Polokwane the deceased was staying alone, but during school holidays Saghwati and Amukelani would visit him. During 2005 the Mabunda's sent emissaries to go and marry the first defendant. The deceased and the first defendant stayed together until the deceased passed away during March 2016. The deceased and the first defendant had a child together and the child was born during 1995.
- [60] The witness was cross examined and he stated that the plaintiff and the deceased stayed at their parental home from 1985 to 1995 as boyfriend and girlfriend. He conceded that their custom does not allow an elder brother to stay with his girlfriend at their parental home and that in the case of the deceased he did that as he had admitted guilt and paid damages. He further stated that the deceased had many girlfriends who were even fighting over him.
- [61] Constance Mabunda Nukeri was the first defendant fourth witness to testify. She testified that the deceased is her elder brother. She knows the plaintiff as Saghwati's mother. She knows the first defendant as the deceased wife. She disputes the contents of the confirmatory affidavit attached to the first defendant's answering affidavit. She was not in Thohoyandou when it was allegedly commissioned. She signed the document at Xihoko village and was only showed where to sign.
- [62] She met Saghwati for the first time at her parental home during 1985. That day she saw Saghwati in the morning and later she saw the plaintiff coming out of the deceased room. The plaintiff introduced herself to her and told her that Saghwati was the deceased daughter. From that day the plaintiff used to stay at their parental home and sometimes she (plaintiff) would go to her parental home. Amukelani is the plaintiff's second born child and was born during 1987.
- [63] Between 1985 and 1987 there was no celebration of any kind that was held at her parental home. During that period, the Baloyi's did not come to her parental home with pots and gifts. She (witness) left her parental home during 1993 to go and live at her own place. She does not know when the plaintiff moved out of their parental home to go and stay in Nkowankowa.
- [64] The deceased was someone who would come back home late at night and sometimes will wake up in the morning from his car or the room of his younger brother Gladewill.
- [65] The witness was cross examined and she stated that she does not know the reasons why the deceased and the plaintiff moved out of their parental home. She stated that during 1985 she was 14 years old and would not have been informed about lobola negotiations. She stated that at Nkowankowa the deceased was staying with the plaintiff and her children. She denied that the plaintiff was ever handed over to the Mabunda family.
- [66] Motupi Evans Selomo was the first defendant fifth and last witness testify. His testimony did not add value to the issue in dispute. Thereafter the first defendant closed her case. Both parties have submitted their written heads of arguments supplemented by their oral

submissions.

[67] It is trite that customary marriage is not an event, but a process that comprises a chain of events. In *Matsoatsoa v Roro and Others* 2010 ZAGPJHC 122, [2011] 2 All SA 324 (GSJ) (1 November 2010) at para 17 Matlapeng AJ said:

“The basic formalities which lead to a customary marriage are:

emissaries are sent by man’s family to indicate interest in the possible marriage (this of course presupposes the two parties man and a woman have agreed to marry each other); a meeting of the parties relatives will be convened where lobola is negotiated and the negotiated lobola or part thereof is handed over to the woman’s family and the two families will then agree on the formalities and date on which the woman will be handed over may include but not necessarily be accompanied by celebration (wedding)”.

[68] The most crucial part of customary marriage is the handing over of the makoti to the in-laws. The handing over symbolizes the customary practice that the makoti is finally welcomed and integrated into the groom’s family which henceforth becomes her new family. (See *Moropane v Southon* [2014] ZASCA 76 (29 May 2014) at para 40).

[69] The matter at hand has divided Mabunda family into those that support the plaintiff and those that support the first defendant. Witnesses for both parties to some extent were economic with the truth. The plaintiff testified that she saw the first defendant for the first time after the death of the deceased. However, the plaintiff’s mother testified that she knew the first defendant as the deceased wife, and that she has even attended Saghwati’s birthday party. If the first defendant was able to attend Saghwati’s birthday party, it is improbable that the plaintiff can claim to have met her

only after the death of the deceased. Saghwati was staying in Polokwane with the deceased and the first defendant, and it was also

improbable for the plaintiff not to have known the people who were staying with her daughter.

[70] The plaintiff has stayed at the deceased parental home for almost ten years. However, the first defendant’s witnesses claim not to have known as to what was happening between the deceased and the plaintiff. The first defendant’s witnesses claim to be coming from a royal house. The royal house is supposed to be the custodian of both custom and culture, and therefore would not have allowed the deceased who was induna in waiting to have stayed with the plaintiff as girlfriend and boyfriend for such a long period of time in their homestead. The first defendant’s witnesses put a picture as if the deceased and the plaintiff were not sharing the same room, however in the process children were born between the deceased and the plaintiff. Both children took the surname of the deceased.

[71] In African culture for a child to be named it is a big thing. The name of the child is decided by the elders and that child will not be given any other name, but a specific name linked to a specific individual who might be alive or dead. Therefore, the children of both deceased and

the plaintiff to take the deceased surname shows that the relationship of the deceased and the plaintiff was not just that of a boyfriend and girlfriend, but more than that. The first defendant's witnesses in my view were afraid that if they tell the court how they viewed the relationship of the plaintiff and the deceased, that might strengthen the plaintiff's case.

- [73] What this court must determine is whether this relationship which the plaintiff and the deceased had, met the requirements of a valid customary marriage.
- [74] It is not in dispute that the deceased and the plaintiff had two children together. The alleged lobola letter between the plaintiff and the deceased was signed after the birth of the first child Saghwati. The first defendant dispute that the said letter was for lobola negotiations. The first defendant contends that the said letter was in relation to negotiations for damages after the deceased had impregnated the plaintiff.
- [75] Both the plaintiff and the deceased are Shangaans. Both parties did not call any independent expert witness to testify about the Shangaan custom regarding customary marriage. The witnesses who testified about the procedure to be followed when a man asked a woman a hand in marriage are two of the plaintiff's witnesses Maxine Shandlale and Violet Mabunda. Both witnesses were not challenged on that aspect.
- [76] According to Maxine the man's family will send emissaries to the woman's family. On arrival at the woman's family, the woman's family will line up few girls for the man's family to identify out the girl they have come to marry. After identifying the girl, the negotiations will start. Thereafter they will agree on the lobola amount. If they are having something, they will pay that as a deposit. According to her in Shangaan custom they will not demand the outstanding lobola amount. When the man is ready to come and finish paying the outstanding lobola amount, he will first arrange the date with the woman's family as to when he will come. After paying the outstanding lobola amount, that is
- when a goat or sheep will be slaughtered symbolizing that the man has paid the full lobola amount.
- [77] According to Violet when the process of asking a woman a hand in marriage is started, a go between will be appointed. The go between will be sent to the woman's family to tell them that their son had seen their daughter. A specific date will be arranged on which lobola negotiations will be held. The man's emissaries will go to the woman's family on that specific day and they will also be having a certain amount of money.
- [78] On arrival at the woman's place they will stand outside the gate. The woman family will send a child to go and greet them. The emissaries will give the child a certain amount of money so that the child can open the gate for them and they will then be permitted to enter the homestead. After entering, the emissaries will be allocated a room. Somebody from the woman's family will be sent to go and greet them. After the greeting, the emissaries will tell that person

the purpose of their visit and will also request a go between from the woman's family. The go between from the woman's

family will be sent to the emissaries to tell them that they are ready to start with the negotiations.

[79] When the woman they have to marry has been impregnated, they will first deal with the issue of pregnancy and pay damages for that. The woman's family will list everything that is demanded for damages. After the list has been determined, they will come to a certain figure which will represent the lobola amount and damages. The emissaries will pay a deposit of what they brought along and tell the woman's family that the outstanding lobola amount will be paid at a later stage. If the whole lobola amount is paid in full they will write down a letter and thereafter tell the emissaries that they are handing over the woman to them.

[80] Handing over depends on the agreement between the two families. Handing over can be done the same day of the lobola negotiations are concluded or on a later date.

[81] From the testimony of both Maxine and Violet, it is clear that for every process during the lobola negotiations, both families must agree. They first agree on the date on which the lobola negotiations are to be held, secondly they agree on lobola amount, thirdly if the agreed lobola amount is not paid in full, the man's family will settle the balance at a later date, and if they are ready to pay the balance, the two families will agree on the date on which the balance will be paid, and fourthly when the full lobola amount is paid in full and other requirements have also been met, the two families will

agree when bride will be handed over to the groom's family.

[82] In the plaintiff's case, it is not in dispute that the Mabunda's and Baloyi's met and had a meeting. What is in dispute is the purpose of that meeting. As I have pointed out above, according to the plaintiff the meeting was about lobola negotiations, whilst the first defendant contends that the meeting was about the damages for the deceased having impregnated the plaintiff.

[83] There is no evidence that on the 24th of November 1985 when the Mabunda's arrived at the Baloyi family they stood outside the gate and a girl was sent to greet them. There is no evidence that the Mabunda's have paid a certain amount of money to be allowed to enter the Baloyi homestead. If a certain amount of money was paid give them permission to enter the homestead, it would have been recorded on the alleged lobola letter. There is no evidence that there was a go between of the two families. It seems that the Mabunda's have entered the Baloyi's family like any other person and thereafter they started with the discussion. That gives credence to the first defendant's

contention that the Mabunda's have gone to the Baloyi's to discuss about the damages for the deceased having impregnated the plaintiff. Daphney Rikhotso the plaintiff's mother has testified that her father has told her that the Mabunda's are coming to discuss the issues of damages regarding the deceased for having impregnated the plaintiff.

[84] In African culture it happens that a delegation will be sent to discuss damages and after agreeing on the damages payable, the delegation may ask the woman's family how much will lobola be in case the man decide to marry the woman. That will culminate the into lobola negotiations even though that was not the initial intention. If the parties agree on the lobola amount, an agreement will be drafted which both families will sign. The delegates will report to their elders what transpired. They would have killed two birds in one stone.

[85] It seems that is what happened in the matter at hand. That explains why the deceased had signed the alleged lobola letter. The groom does not form part of the lobola negotiations. In this case in my view, when the deceased arrived at Baloyi family, it was explained to him what transpired, and he agreed with the procedure that they followed by signing the document. By signing the document, the deceased had ratified their actions. The parents of the deceased had ratified the actions of the delegates as the plaintiff and deceased had stayed in their homestead for the next ten years based on the outcome of the negotiations of the 24th November 1985. In the process of the deceased and the plaintiff staying together, Amukelani their second child was born and both

children also took the surname of the deceased.

[86] Under the circumstances, taking into consideration the totality of the evidence, presented holistically, I am satisfied that the discussion of the 24th November 1985 even though initially was about damages, has resulted in lobola negotiations wherein the parties ultimately agreed on lobola amount. After agreeing on the lobola amount of R1500-00, a deposit of R100-00 was paid leaving a balance of R1400-00.

[87] As there was still an outstanding lobola amount, in African culture, the man will go to work to enable him to pay the outstanding lobola amount. If he is ready, a message will be sent to the woman's family wherein the two families will agree on a date when the man's family will come and finish paying the outstanding amount. Even before the full amount is paid, the man's family may request to leave with the bride to be but will have to pay a certain amount for that.

In the case of the plaintiff it is not in dispute that on the 24th November 1985 the Mabunda delegation did not request to leave with her.

[88] It is not in dispute that the outstanding amount of R1400-00 was never paid even up to date. The plaintiff's witnesses testified that it is not a prerequisite that the full amount be paid for the conclusion of a valid customary marriage. They even testified that hence there is a say that the groom does not finish paying lobola. In my view, the notion that the groom does not finish paying lobola does not refer to the outstanding lobola amount, but merely refers that

every time a groom goes to visit his in-laws, he must buy them something and not say he had paid the full lobola for the woman. The outstanding lobola is like a debt which must be settled unless the two families agree to dispense with the payment of the outstanding amount. In the case at hand it does not appear that the two families have agreed to dispense with the payment of the outstanding amount, hence the plaintiff's mother testified that in their tradition it will be deducted from the lobola of their daughter or if the woman's dies the man will not be allowed to bury her until the full outstanding amount has been settled. That shows that unless full lobola amount has been paid or an agreement of some kind has been reached, the woman's family will not be satisfied to pave the way for a proper handing over.

- [89] In African custom the handing over and celebration will be done after the bride's family is satisfied that all their demands have been met. Part of the demand is payment of the full lobola amount. If the woman was requested to stay at the man's homestead before the full lobola amount was paid, on the day when the full amount is paid, she must be at her parental home. The purpose for her being at her parental home is that if the handing over is going to be done on that date, she must be present at her parental homestead for purposes of performing certain rituals and also to be coached. There will also be a delegation of people who will be identified to accompany her to the groom's family. That will also be an opportunity to inform other family members and members of the community that the bride will be handed over to the groom's family. Functions of this nature are usually open to every member of the community to attend. People will be informed in advance to enable those who can to buy presents for the bride to do so.
- [90] Even if the full lobola amount has been paid, but the handing over was not yet done, a valid customary union has not been concluded. In the case of the plaintiff, the alleged handing over took place after two years immediately after the birth of Amukelani. By then the deceased had not paid the full lobola amount and it does not seem he had the intention to do so. According to the plaintiff's mother, they saw that there was nothing they can do since the plaintiff and the deceased were staying together hence they decided to hand her to the Mabunda family. The question is whether that was a proper handing over.

- [91] In *M v K* [2018] ZALMPPHC 62 (7 November 2018) at 34 Makgoba JP said the following:

"All the authority I referred to are in agreement that a valid customary marriage only comes about when the woman has been transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom's husband and her incorporation into his family is ordinarily accompanied by well-known extensive rituals and ceremonies involving both parties. The importance of these rituals and ceremonies is that they indeed indicate in a rather concretely visible way that a customary marriage is being contracted and that lobola has been paid and/or arrangements are acceptable to the two families. The fact of the matter is that the customary marriage is and remains an agreement of the two families".

- [92] In the case at hand taking into consideration that two years has lapsed before the alleged handing over, in my view that was supposed to be a huge celebration which would have included extended family members and members of the community. The celebration will start at the bride's family with beer being brewed, a cow or sheep or goat will be slaughtered. Relatives and members of the community will be informed in advance. However, that did not happen in the plaintiff's case.
- [93] The plaintiff's mother has been waiting for a long time for the deceased to come and pay the full lobola amount so that a proper handing over could be done. Realizing that same was not forthcoming but that the plaintiff and the deceased were continuing making babies whilst staying at the deceased parental homestead, she unilaterally decided to formalise their marriage by handing over the plaintiff to the Mabunda's. That explains why there was no ceremony at the Baloyi homestead. There is no evidence that despite the outstanding lobola amount, the two families came together and had an arrangements acceptable to both families regarding the outstanding lobola amount. In my view, the plaintiff's mother felt that it was a taboo for the plaintiff to stay with the deceased as husband and wife without that being formalized. It was a question of what will the people say.
- [94] In terms of custom since there was still an outstanding lobola amount and the time period that has lapsed, the two families were supposed to have sat together and arrive at an acceptable arrangement and a date for the handing over. If the outstanding lobola amount did not matter, the plaintiff's family would have handed her over to the Mabunda family on the 24th November 1985. Since the Baloyi's expected the deceased to do the right thing, they waited until they realise that the deceased had no intention of paying the outstanding lobola. The proper thing to do was for the Baloyi's after realising that the deceased had no intention of paying the outstanding lobola, but were continuing to make babies whilst the plaintiff was staying at the deceased parental home, call the Mabunda's to a meeting wherein an acceptable arrangement could be reached, and not to act unilaterally.
- [95] The plaintiff herself was not convinced that she was married to the deceased. If indeed the plaintiff was convinced that she was married to the deceased, she would not have deposed an affidavit wherein she confirms that she is unmarried and also not a spouse to a person in terms of customary marriage as intended by the Recognition of Customary Marriage Act, 120 of 1998. She deposed the affidavit on 18th May 2009 when she jointly bought a property with her daughter Saghwati. The affidavit was deposed 24 years after the alleged customary marriage, and by then the plaintiff was already employed as a professional nurse and was able to read and write English. She was aware of what she was signing for. In my view, the affidavit on its own is fatal to the plaintiff's case.

[96] Taking into consideration the totality of the evidence presented as a whole and the applicable law in relation to customary marriages, I am satisfied that the essential requirements for a valid customary marriage between the plaintiff and the deceased have not been met.

[97] In the results the following order is made:

97.1 The plaintiff's claim is dismissed with costs.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

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