

SOUTH AFRICA / JUDGMENT

J.A.M v J.J.Z (46712/2014) [2025] ZAGPPHC 10 (10 January 2025) [2025] ZAGPPHC 10

COURT

North Gauteng High Court, Pretoria

BEFORE

Van Niekerk N

CASE / FILE NUMBER

46712/2014

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG DIVISION,
PRETORIA

CASE Number: 46712/2014

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO
2025/01/10
In the matter between: -
M[...],
J[...] A[...]
Plaintiff
AND
Z[...],
J[...] J[...]
Defendant

JUDGMENT

Van Niekerk N AJ:

Introduction:

This matter came before me as a trial on the 25th of August 2024 at 14:00. At the commencement of the trial, the legal representatives for the parties confirmed that they reached an agreement to separate the issues and that the only issue to be adjudicated upon by this Court was the validity of the Customary Marriage. The other claims were to be postponed sine die. They further recorded that when the matter was called at the trial roll-call, they confirmed to the Deputy Judge President, Ledwaba DJP, that the matter needed to be allocated for one and a half days. As such, when it became apparent after one and a half days that the matter was not close to finality, and on instruction of Ledwaba DJP, the matter was postponed to and proceeded with on the 1st and the 2nd of October 2024, as a part-heard matter. For purposes of this judgment, I will inter alia refer to and analyse what the parties recorded in the pleadings, pre-trial minutes and practice notes. I will also refer to and analyse the documents and photographs presented to court and the witnesses called to give evidence on behalf of the parties.

The Pleadings:

[1] In the summons the Plaintiff pleads, in respect of the validity of the Customary Marriage, that:

1.1 The parties were married to each other on the 24th of March 2012 at Ekangala, Bronkhorstspuit, Gauteng, in community of property, in terms of Customary Law.

1.2 The parties have complied with the requirements for a valid Customary Marriage in terms of Clause 3(1) of the Recognition of Customary Marriages Act, Act 120 of 1998 in that:

1.2.1 The parties were both above the age of 18 years old at the time when the marriage was entered into;

1.2.2 Both parties consented to be married to each other in terms of Customary Law;

1.2.3 The marriage was negotiated and celebrated in accordance with Customary Law.

[2] In the Defendant's plea the Defendant specifically denies the following:

2.1 That the parties were married to each other on the 24th of March 2012 in terms of Customary Law;

2.2 That the Customary Marriage was entered into;

2.3 That a Customary Marriage was entered into in accordance with the Recognition of Customary Marriages Act 120 of 1998 in that:

2.3.1 The marriage was negotiated, but the Defendant did not comply with the terms of the Lobola agreement reached between the families;

2.3.2 The marriage was not celebrated in accordance with Customary law in that no ceremony and thus handing over of the bride took place.

Minutes of pre-trial conferences:

Conference held on 9 September 2022:

[3] A teleconference took place on 9 September 2022. See CaseLines 08-1 to 08-6. At this pre-trial conference both parties were represented. The Plaintiff was represented by a certain Ms Nkosingiphile Mazibuko and the Defendant was represented by a certain Mr Vusi S[...]. At this pre-trial conference the common cause facts were recorded by the parties and the minutes of the pre-trial conference were signed by the legal representatives on 28 October 2022. The common cause facts were recorded as the following:

3.1 The citation of the parties;

3.2 The marriage;

3.3 That the parties were married to each other on 24 March 2012, in terms of the Recognition of Customary Marriages Act, No. 120 of 1998 ("the Act"). They are married in community of property as they did not conclude an antenuptial contract;

3.4 Jurisdiction;

3.5 The marriage has broken down irretrievably and there is no prospect of the restoration of a normal marriage relationship;

3.6 The parties have not resided together as husband and wife since 2014;

3.7 There are no children born of the marriage.

[4] At that stage, the recorded issues in dispute related to the division of the joint estate and the Defendant's claim for forfeiture of the benefits of the joint estate.

Conference held on 11 July 2024:

[5] A further pre-trial conference was held between the parties on 11 July 2024. The minutes of the conference can be found at CaseLines 08-07 to 08-17. The parties were represented. The Plaintiff was represented by Ms N Mazibuko and the Defendant was represented by Adv S Stadler and Ms Courtney Elson. At this pre-trial conference, the parties recorded that the common cause facts were the following:

5.1 The identity of the parties;

5.2 That the Honourable Court has jurisdiction to hear the matter;

5.3 That lobola negotiations were held on 24 March 2012;

5.4 That the relationship between the parties has broken down irretrievably and there exists no reasonable prospect of the restoration of a normal relationship between them.

[6] At this pre-trial conference the recorded disputes to be adjudicated on at trial, were:

6.1 Whether the parties entered into a valid customary marriage;

6.2 In the event that the Honourable Court finds that the parties entered into a valid customary marriage, certain relief would be sought which relief is irrelevant for purposes of this judgment.

[7] At this pre-trial conference the following admissions were sought by the Defendant and answered by the Plaintiff:

7.1 Does the Plaintiff admit that it was agreed on 24 March 2012 that the Defendant would pay lobola of 12 cows, R24 000.00 and two live cattle? – Yes

7.2 Does the Plaintiff admit that the Defendant paid R24 000.00 to the Plaintiff's family on 24 March 2012? – Yes

7.3 Does the Plaintiff admit that the balance of the Lobola namely the cattle, was never paid to her family? – Yes

7.4 Does the Plaintiff admit that the women in both families never met to discuss the gift exchange ceremony? – Yes

7.5 Does the Plaintiff agree that it was the intention of the parties that they would have a wedding celebration and hand-over celebration once the Defendant had delivered the outstanding cattle to the family? – No

Joint Practice notes:

Joint Practice note dated 29 January 2024:

[8] A joint practice note was signed by the legal representatives of both parties and uploaded to CaseLines on 29 January 2024. See CaseLines 11-1 to 11-5.

[9] In the joint practice note the common cause facts were recorded as being the following:

9.1 The parties were married to each other on 25 March 2012 in terms of the Customary Law. No antenuptial contract was concluded. See lobola letters, CaseLines 04-5 to 04-5 translated under 04-02 and 04-04 respectively;

9.2 No children were born of marriage;

9.3 The parties have not been living together as husband and wife since 2015;

9.4 The parties agree that their marriage has irretrievably broken down and there is no prospect of the restoration of a normal marriage relationship;

9.5 The Defendant was employed and have pension funds at Alan Gray.

[10] The parties recorded in this practice note that the only issues in dispute related to the patrimonial consequences of the marriage of the parties and as such are not relevant for purposes of this judgment.

Dated 14 August 2024:

[11] A further joint practice note was signed by the legal representatives of both parties on 14 August 2024. In this joint practice note it was recorded that the following were not in dispute:

11.1 The identity of the parties;

11.2 The court's jurisdiction;

11.3 The lobola negotiations were held on 24 March 2012. No antenuptial contract was concluded;

11.4 The relationship between the parties has broken down irretrievably and there are no prospects for restoring a normal relationship between the parties;

11.5 No children were born of the relationship between the parties;

11.6 The parties have not been living together since 2014.

[12] In this practice note it was recorded that the issue in dispute was firstly whether the parties entered into a valid customary marriage and if the answer was yes, certain patrimonial consequences and disputes in respect thereof followed.

Relevant documents:

[13] During the trial, the court was referred to the following relevant documents:

13.1 A lobola invitation letter on CaseLines 12-1 ("the invitation letter");

13.2 The translation of the invitation letter on CaseLines 12-10;

13.3 The letter at the conclusion of the lobola negotiations on CaseLines 12-11 ("the lobola letter");

13.4 The translation of the lobola letter on CaseLines 12-15;

13.5 Photographs attached to the expert's report on CaseLines 15-13 to 15-15.

Lobola invitation letter:

[14] The translated version of the invitation letter as on CaseLines page 12-10 reads as follows:

“ANNEXURE A

37 Section C

EKANGALA

1021

The M[...] Family

512 Section B

The Z[...] family is asking to come and have an agreement with the M[...] family on Saturday, 24 March 2012.

We hope our request will be accepted.

Thank you,

The Z[...] family”

[15] At the outset the court was informed by Adv Stadler that there is no formal admission of this letter. The Defendant, however, admitted during evidence that he was the author of this invitation letter.

Lobola letter:

[16] The lobola letter appears in Z[...] on CaseLines 12-11 and the translated version thereof is on CaseLines 12-15.

[17] This lobola letter was entered into evidence as Exhibit A. The translated version reads as follows:

“ANNEXURE “A1”

24 March 2012

Today the Z[...] family came to build marital relationships with the M[...] family. The M[...] family asked for a Lobola of twelve cows, R24 000.00 (Twelve Thousand rand) and two live cattle.

The Z[...] family left R24 000.00 worth of cows. They said they were going to work so that they prepare and bring the balance, which is the two live cows. The women from both sides will have a conversation regarding the gift exchange ceremony.

Z[...] family: 1. MJ Moloko M[...] family: 1. G[...]

2. G.J. Shongwe 2. E. G[...]

3. S[...] 3. S[...]

4. Signature

5. Signature”

[18] The second witness of the Plaintiff, Mr G[...], confirmed that he personally wrote the original document by hand after the successful lobola negotiations and he signed as the first witness for the M[...] family;

[19] At the outset the court was informed by Adv Stadler that there is no formal admission of this letter, but the Defendant, during evidence, did not deny the contents of this letter and did not deny that the letter reflected the agreement reached between the two families and/or that it was signed by the Z[...] delegates.

Photographs:

[20] Mention was made of photographs by two of the witnesses of the Plaintiff, without the photographs being introduced into evidence.

[21] Both Mr B[...] and Mr G[...], who were called as the Plaintiff’s witnesses before the Plaintiff was called to the stand, gave evidence that there were photos taken of the celebrations and of the Plaintiff in traditional clothing for purposes of the handing over of the bride ceremony.

[22] The photographs were not introduced into evidence during the Plaintiff’s evidence in chief.

[23] During cross-examination, the Plaintiff referred to the photographs as confirmation of inter alia the following:

23.1 That she was dressed in Z[...] clothes for purposes of the handing over of the bride. She was using Z[...] apparel, whilst she is a Ndebele, because she was being handed over to the Z[...] family;

23.2 That E[...] G[...], Ms Z[...] (Defendant’s mother figure) and Ms Shongwe (Ms Z[...] and Ms Shongwe clothed the Plaintiff in Z[...] regalia) were all depicted in the photos;

23.3 That Mr G[...] (the second witness) was not in the pictures, because it is the women of the bride’s family handing over the bride;

[24] During cross-examination it was put to the Plaintiff that these alleged photographs were not before court;

[25] During redirect, Adv Lukhele introduced the photographs and it was objected to by Adv Stadler on the basis that no notice was provided that the photographs were to be used in evidence and no witness will be called by the Plaintiff to verify taking the pictures;

[26] The court allowed the photographs provisionally and indicated that the admissibility and weight thereof will be determined by the court;

[27] The Plaintiff then gave evidence about the photographs as follows:

27.1 The photos were taken on the 24th of March 2012 when they arrived at the Z[...] residence for purposes of the handing over of the bride, but she cannot recall who took the specific photos;

27.2 She identified the people in the photographs as inter alia:

27.2.1 Ms S[...] (from Defendant's side and the one who went to buy the traditional regalia for the Plaintiff for purposes of handing over the bride);

27.2.2 a certain Maselola (Plaintiff's friend);

27.2.3 Ms Z[...] (the mother figure of the Defendant and one of the Defendant's delegates at the Lobola negotiations);

27.2.4 Ms B[...], (S[...] B[...]’s wife)(S[...] B[...] was Plaintiff's first witness and one of Plaintiff's delegates at the Lobola negotiations);

27.2.5 Ms G[...] (Plaintiff's aunt and one of Plaintiff's delegates at the Lobola negotiations);

27.2.6 Ms Shongwe (the wife of one of Defendant's delegates at the Lobola negotiations);

27.2.7 Plaintiff with traditional Z[...] hat vest and skirt for purposes of the handing over of the bride;

27.2.8 Mr S[...] (One of Defendant's delegates at the Lobola negotiations).

27.3 In the photos they were standing at the gate of the Z[...] residence and that she was flanked by Ms B[...] and Ms G[...];

27.4 They were singing and dancing;

27.5 The Plaintiff identified Mr S[...] who was standing in front with a “knopkierie” in his hand and she said that he was reciting the Z[...] clan names.

[28] It needs to be mentioned that these photographs were referred to by the Plaintiff and the witnesses for the Plaintiff on the 26th and 27th of August 2024 when the matter was part-heard. The photographs were only introduced into evidence on the 1st of October 2024;

[29] These photographs were attached to the Plaintiff's expert report dated December 2018, but according to the Defendant he only saw them for the first time in the office of Adv Stadler on the 24th of July 2024;

[30] It seems that the expert report with annexures was discovered by the Plaintiff in a discovery affidavit signed on the 26th of July 2024. The date of service of the discovery affidavit could not be ascertained from the documents uploaded to CaseLines. From the documents uploaded to CaseLines there is no indication that the Defendant objected to the discovery affidavit of the Plaintiff;

[31] What is noteworthy is that these photographs were only “discovered”, albeit not in accordance with the Uniform Rules of Court, on or about the 26th of July 2024, by the Plaintiff. In my mind, the reasons for the late “discovery” thereof can be found in the fact that the Defendant admitted the validity of the Customary Marriage on the 9th of September 2022 and again on the 29th of January 2024 and as such there was no need for the Plaintiff to prove the validity of the Marriage. It was recorded, on behalf of the Defendant, at the pre-trial conference held on the 11th of July 2024, that the validity of the Customary Marriage was disputed and thereafter the Plaintiff discovered the expert report

with the photographs attached as annexures thereto.

Words and phrases to be clarified:

[32] In this judgment certain words and phrases as used by the witnesses are included and it is necessary to clarify the meaning of these words and phrases as follows:

32.1 Z[...] family – This refers to the representatives of the Defendant’s family in respect of the Lobola negotiations and/or to the family and friends of the Defendant who were present when the bride was taken to the Defendant’s home, depending on the context;

32.2 Z[...] delegates/representatives - This refers to the representatives of the Defendant’s family in respect of the Lobola negotiations;

32.3 M[...] family - This refers to the representatives of the Plaintiff’s family in respect of the Lobola negotiations and/or to the family and friends of the Plaintiff who were present when the bride was taken to the Defendant’s home, depending on the context;

32.4 M[...] delegates/representative - This refers to the representatives of the Plaintiff’s family in respect of the Lobola negotiations;

32.5 Z[...] home/family home/homestead – This refers to the home of the Defendant;

32.6 M[...] home – This refers to the home of the Plaintiff’s father.

Witnesses for the Plaintiff:

S[...] Johannes B[...]:

[33] The Plaintiff called a certain Mr S[...] Johannes B[...] as the first witness. Mr B[...] gave evidence in chief that:

33.1 He was part of the Lobola negotiations and that he was requested by Mr M[...] (the Plaintiff's father) to be part of the negotiations;

33.2 When the Z[...] family first brought the invitation letter, Mr M[...] was sick and in hospital. They said they would come back later;

33.3 He is illiterate and therefore he could not give specificity in respect of dates or what was contained in the letter;

33.4 The Z[...] family came back to the M[...] family to negotiate Lobola. He gave names of the delegates present on behalf of the M[...] family, but these names did not correspond with the names of the delegates contained in the Lobola letter, and/or referred to in evidence by Mr G[...] and the Plaintiff;

33.5 The Lobola was R42 000.00. The Lobola was paid but two cows were outstanding. The two cows were not part of the Lobola. The true purpose of the two cows was to unite the bride and groom. He later said that the slaughtering of the sheep was to unite the two families and the two cows were for cleansing purposes;

33.6 After Lobola was paid they said (he did not say who "they" were) that the bride could only enter the Z[...] family with traditional clothing and that is why a certain S[...] went to purchase traditional clothing for the bride;

33.7 Thereafter there were celebrations.

33.8 His wife, who has since passed away, is also depicted in the photographs of the ceremony and she also wore the traditional clothing. His wife accompanied the Plaintiff to the Z[...] family home.

33.9 They slaughtered a sheep at the M[...] home to unite the two families. The two cows were supposed to be given as livestock to the M[...] family and they can decide what they want to do with them.

33.10 Mr B[...] did not know if the Lobola agreement was in writing.

[34] In cross-examination Mr B[...] testified that:

34.1 He is very forgetful as he was injured at work and he indicated with his hand a head injury. He cannot remember everything and said he is forgetful and we can see the scars on his head;

34.2 He was not part of the initial stages of the Lobola negotiations and he was called by the M[...] family by invitation and honoured the invitation. He did not want to get fully involved. Mr M[...] reported to him that everything was done except for the two cows;

34.3 The Z[...] family initially came to his house and brought the invitation letter to him, whilst Mr M[...] was in hospital and indicated that they would come back on another day. They returned after Mr M[...] was discharged but Mr B[...] could not remember the date;

34.4 He was not part of the negotiations because when he came back from work on that day everything was already in progress;

34.5 He did not know everything about the traditional clothing because the tradition is that the women take care of clothing, the bride and traditional clothing;

34.6 His wife was present when the bride was handed over but she had since passed in 2013;

34.7 The reason for the slaughtering of the sheep was to receive the Z[...] family. The sheep was cut in half, half of the carcass left with the Z[...] family and the other half stayed at the M[...] family. The half that went with the Z[...] family was proof that they negotiated successfully;

34.8 S[...] went to buy traditional clothing for the Plaintiff on the S[...]e day of the lobola negotiations;

34.9 Mr B[...]’s wife was involved in the clothing of the Plaintiff in traditional clothing and she is also depicted in the photographs but she passed away in

2013. He further indicated in cross-examination that he saw the Plaintiff in traditional clothing. He saw his wife with the Plaintiff in traditional clothing before they left for the Z[...] homestead. Afterwards he saw the bride working at the caravan which is the business of the Defendant’s family, selling cement.

[35] On a question from the Court what the celebrations with the slaughtering of the sheep were for, he said that the slaughter of the sheep is to receive the Z[...] family, to say thank you that they fulfilled their mandate and that they are taking the bride.

T[...] G[...]:

[36] Mr T[...] G[...] was called as the second witness for the Plaintiff. He gave evidence that:

36.1 He was present at and involved in the Lobola negotiations on the 24th of March 2012 and he was the person who wrote the Lobola agreement (the Lobola letter) in his own handwriting and he signed the letter as representative of the M[...] family;

36.2 He confirmed the contents of the Lobola letter as what was agreed during the Lobola negotiations;

36.3 On behalf of the M[...] family there were three delegates/representatives at the Lobola negotiations, namely himself, Ms E[...] G[...] (the aunt) and S[...] B[...];

36.4 He was requested by the M[...] family to be part of the negotiations to talk to the Z[...] family and he was present on the 24th of March 2012 when the Z[...] family arrived;

36.5 According to Mr G[...], the Z[...] family requested the M[...] family to meet with them on the 24th of March 2012 and on that date the Z[...] family came and found the M[...] family delegates waiting at the M[...] family home;

36.6 The Z[...] family came asking for a relationship and the M[...] family welcomed them whereafter they started negotiating;

36.7 At the end of the negotiations they agreed that 12 cows would be paid (an amount of R24 000.00 because people don't have cattle anymore);

36.8 The R24 000.00 was received and according to Mr G[...] this was the full nature of the Lobola agreement;

36.9 After the negotiations the women came for the cleansing ceremony and to clothe the bride (the Plaintiff) and a sheep that was provided by the M[...] family was slaughtered;

36.10 The reason for the sheep being slaughtered was to welcome the Z[...] family and to show that everything in respect of the negotiations went well;

36.11 The two live cows were for the women to celebrate the relationship between the Z[...] family and the M[...] family;

36.12 During the negotiations the groom was not present, but after the successful negotiations the bride was taken to the groom with the women;

36.13 In terms of the culture the celebration will start at the bride's family without the groom and then continue to the groom's family where the bride will be handed over.

[37] During cross-examination Mr G[...] gave evidence that:

37.1 The Plaintiff's father, Mr M[...] was present at the M[...] home on the day of the negotiations and the delegates personally discussed the terms of the lobola agreement with him to get his consent;

37.2 The negotiations took some time, but it concluded before the sun set because, after successfully negotiating the agreement, the Z[...] family managed to go to town to buy clothing for the bride;

37.3 He was not at the Z[...] home when the bride was handed over. The elders remained behind at the M[...] family and carried on with the celebrations. The women took the bride to the Z[...] home to be handed over;

37.4 The Lobola negotiations ended and the spilling of the blood of the sheep concluded the Lobola negotiations, welcoming the Z[...] family and confirming that the negotiations were successful;

37.5 The two cows and the gift exchange were exactly that – it were just gifts, but it did not detract from the successful Lobola negotiations;

37.6 The gifts did not have to be exchanged before the bride was handed over;

37.7 In this instance the bride was taken before the exchanging of gifts, that is the prerogative of the families. The two cows were not handed over before the bride was taken. Before the Z[...] family left they requested to take the bride and for the bride to be clothed in traditional clothing before they left for the Z[...] home;

37.8 The request to take the bride on that day was made by the Z[...] delegates to the M[...] delegates;

37.9 The clothing of the bride is something that the women do. The men are not part of that. It was done on the S[...]e day of the negotiations. After she was clothed, the Z[...] family with some of the M[...] family left with the bride on the S[...]e day;

37.10 The parties were married on that day when the bride was requested by the Z[...] family, dressed in traditional clothes and taken to the Z[...] home.

[38] On a question from the Court, Mr G[...] stated that he saw the Plaintiff after she was dressed in traditional clothes to go to the Z[...] home. He saw her in the traditional clothes with some of the women who escorted her to the Z[...] family. They included, aunt E[...] G [...], S[...] B[...]’s wife (who since passed) and the bride’s sister, who all assisted the bride before they left for the Z[...] family.

Plaintiff: J[...] A[...] M[...]:

[39] The Plaintiff gave the following evidence in chief:

39.1 On the 24th of March 2012, the Z[...] delegates came to the M[...] home. Prior to that the Defendant sent a letter to the M[...] family requesting that the Z[...] family wants to meet with the M[...] family on the 24th of March 2012;

39.2 On the 24th the delegates for the Z[...] family were Busi Shongwe, the Defendant’s sister Maureen, a Mr Moloko (working with the Defendant), Ms Z[...] (the mother figure of the Defendant) and Mr S[...] (friend of the Defendant). There were five delegates on behalf of the Z[...] family;

39.3 On behalf of the M[...] family there were E[...] G[...] (Plaintiff’s aunt), S[...] B[...] and Mr G[...] (Plaintiff’s cousin) as well as a certain M[...] (married to the Plaintiff’s cousin and there as an observer);

39.4 The Plaintiff was not present whilst the negotiations took place but, at some stage, she was called to the room by the elders to be pointed out as the bride by the Z[...] family;

39.5 The invitation letter was written by the Defendant in the presence of the Plaintiff. Prior to this letter being written by the Defendant, the Defendant and the Plaintiff discussed that they wanted to get married to each other. The purpose of the invitation letter was for them to get married;

39.6 The parties married each other on 24th of March 2012;

39.7 On the day the delegates negotiated the Lobola agreement, the Plaintiff was clothed in Z[...] clothing and given to the Z[...] family;

39.8 She was told by the representatives of both families, that:

39.8.1 The M[...] family requested 12 cows and that the Z[...] family paid the requested price (12 cows);

39.8.2 Before the Z[...] family could take her, she had to be clothed;

39.8.3 The Z[...] family did not have the traditional clothing with them and the Defendant sent his son, a certain Mzwake with his “bakkie” to take S[...] to town to purchase the clothing.

39.9 S[...] came back with the traditional clothing and the Plaintiff was clothed. Ms Z[...] and Ms Shongwe (as part of the Z[...] family) also assisted in clothing the Plaintiff;

39.10 The M[...] family slaughtered a sheep and gave the Z[...] family half of the sheep. Half of it went to the Z[...] family and half of it stayed with the M[...] family;

39.11 When the bride is clothed with traditional attire it means she is leaving her own family of birth to go to another family, the traditional clothing is representative of the new home that she is going to. This symbolised that she was no longer a M[...], but she was a Z[...] now. According to her, the M[...] traditional attire looks different than the Z[...] traditional attire;

39.12 At the M[...] family home, after she was clothed and the sheep slaughtered the Z[...] family told the M[...] family that they will leave so that they can give report to the Defendant and then they will come back to collect the bride;

39.13 At that stage she did not leave with them and they left on their own. When they left, she remained behind, preparing herself. At the M[...] home they were celebrating and when they heard that the Z[...] family returned, the Z[...] family was singing and they said they came to fetch the bride. The M[...] family released the bride to the Z[...] family and told them that they can take her. This happened at the M[...] home and her biological parents were there, as well as her aunt. It was them who told Ms Z[...] and

Ms Shongwe, that they can take the bride with them. Thereafter they left in a few cars which followed each other to the Z[...] home;

39.14 On behalf of the M[...] family Ms E G[...], Ms B[...], Plaintiff's sister, two of her cousins as well as her friends went with her. Ms S[...], Ms Z[...] and Ms Shongwe as well as Mr Shongwe and Mr S[...] went with on behalf of the Z[...] family;

39.15 When they arrived at the Z[...] family home the gates were closed and they waited at the gate and started singing. Ms Shongwe and Ms Z[...] started singing praises and the welcome song to the Plaintiff and then the Z[...] family started opening the gate and she was welcomed. Ms Z[...] told the Plaintiff that she is welcome and that the Plaintiff is now the daughter and she is the mother;

39.16 They went inside the Z[...] home, drank cold-drinks and alcohol, ate cake, danced and celebrated. The Defendant was part of the celebration. They were happy and he called her “wifey”.

[40] During cross-examination the Plaintiff’s evidence was the following:

40.1 She indicated that even though Ms E G[...] and M[...] were still alive she will not be calling them as witnesses;

40.2 She was not part of the Lobola negotiations and she was told by the delegates what was agreed upon and it was also written in the Lobola letter;

40.3 She could only give evidence on the part where she was clothed, the rest the delegates will be able to testify too;

40.4 When the families met on the 24th of March 2012, they fulfilled the wishes of the Plaintiff and the Defendant. They had a mandate;

40.5 The Z[...] family bought the traditional clothing and a sheep (beast) was slaughtered and half give to the Z[...] family;

40.6 The Plaintiff gave evidence that the photographs show the traditional clothing she was wearing as well as the people who accompanied her to the Z[...] home. In response to this it was put to her by Adv Stadler that no photographs were introduced into evidence and that she was not referred to any photographs. It was also put to her that she is referring to photographs that was not before court and not presented to court;

40.7 When customarily the beast (sheep) is slaughtered, it confirms that the marriage has been completed. The exchange of gifts can be deferred to a later stage.

At this stage in the Plaintiff’s evidence, the matter had to be postponed on instruction of the Deputy Judge President, Ledwaba, because of the fact that the parties’ time estimation was wrong and they did not complete the trial within 1 and a half days. As a result, at 10:00 on the 28th of August 2024 the matter was postponed as a part-heard matter to the 1st and 2nd of October 2024, costs of postponement reserved for adjudication at the finalisation of the trial.

[41] On the 1st of October 2024, the trial proceeded and the Plaintiff was still under cross-examination. She testified as follows:

41.1 The two cows that were outstanding were not part of the Lobola to be paid;

41.2 The Lobola was paid in full;

41.3 She was handed over as the bride to the Defendant;

41.4 There are delegates on the Defendant’s side that he can call as witnesses to corroborate his version that no marriage was concluded;

41.5 The traditional certificate on CaseLines 15-16 is not written in her handwriting.

[42] Under re-direct the photographs were introduced and the court accepted it on a provisional basis. The Plaintiff gave the evidence in respect of the photographs as already indicated supra. She confirmed that the photographs were taken on the 24th of March 2012, when they arrived at the Z[...] home.

Professor CC Boonzaaier:

[43] The next witness called on behalf of the Plaintiff was the expert, Prof. Boonzaaier. In his evidence in chief, he testified that:

43.1 He provided an expert report dated December 2018 in this matter after he was approached by the Plaintiff to give his opinion on whether a valid Customary Marriage was entered into between the Plaintiff and the Defendant;

43.2 He had an interview with the Plaintiff and no further interviews with any other party. For purposes of his report, he did extensive research on the Z[...] and Ndebele customs;

43.3 There are three requirements for a legally valid Customary Marriage as follows:

43.3.1 An agreement between the fathers to allow their children to marry. Today, in contrast with the past, the young man and woman decide to marry and unless sound reasons can be given by the fathers, they have to give their consent;

43.3.2 The handing over of the Lobola and its acceptance before witnesses;

43.3.3 The transfer of the bride in public and before witnesses.

43.4 He based his opinion contained in his report on the following information provided to him by the Plaintiff, which information he accepted as the truth:

43.4.1 Both the Plaintiff and the Defendant wanted to get married and that is why they caused the invitation letter to be sent to the M[...] family;

43.4.2 The Lobola was negotiated and the Z[...] family produced R24 000.00 in cash which showed that the Lobola negotiations were successful;

43.4.3 The payment of the R24 000.00 concluded the Lobola and the outstanding two cows did not form part of the agreed Lobola;

43.4.4 A sheep was slaughtered and one half was for the M[...] family and the other half for the Z[...] family;

43.4.5 Plaintiff's family requested wedding regalia and the Defendant sent his friend to go and purchase S[...] for the Plaintiff for purposes of the handing over of the bride;

43.4.6 On that S[...] day the bride was handed over to the Z[...] family;

43.4.7 The transfer of the bride took place in public in front of her own family and friends and the Z[...] family. They danced in the street and she was welcomed into the Z[...] family and home;

43.5 The expert's opinion, based on the above information, is the following:

43.5.1 The payment of R24 000.00 showed that the Z[...] family was serious about the conclusion of the marriage, because it is a lot of money;

43.5.2 The slaughtering of the sheep and the exchanges of the two halves sealed the negotiations and the marriage was almost complete;

43.5.3 The conclusion of the Customary Marriage is a process and the Lobola negotiations, the payment of the Lobola, the slaughtering of the sheep and the transfer of the bride indicates that a valid Customary Marriage has been concluded;

43.5.4 The Defendant wanted to marry the Plaintiff that is why he sent someone to purchase wedding regalia for the Plaintiff;

43.5.5 The conclusion of the marriage is a process. It is a bond between two families. The bride is transferred from one family to the other family;

43.5.6 If a sheep is slaughtered the marriage is not completed yet, because the bride has to be transferred;

43.5.7 Customarily, the handing over of the bride concludes the marriage;

43.5.8 Sometimes a man is not able to pay the full amount of Lobola immediately, in such instances, if the transfer of the bride takes place, the marriage is concluded in anticipation of payment of the rest of the Lobola;

43.5.9 Even if the Defendant only paid R12 000.00 of the R24 000.00 and then the bride was transferred it will still be a valid Customary Marriage;

43.5.10 In the premises the expert is convinced that a valid Customary Marriage was entered into between the Plaintiff and the Defendant and that all the requirements were met.

[44] In cross-examination he gave the following evidence:

44.1 He conceded that he based his findings on the information received from the Plaintiff and that it was the Plaintiff who had to convince the court that these facts provided by the Plaintiff were true and correct;

44.2 The marriage was registered with the traditional leaders as contained in the annexure to his report. (It needs to be mentioned that if regard is had to this certificate, there is a stamp indicating Chief Sipho Mathews M[...], but there is no date indicated on the stamp. It does, however, seem to be signed by the Chief.)

44.3 Even if the full Lobola amount is not paid, because the man does not have the full amount, the transfer of the bride can still take place in anticipation of the full payment and then it is also a valid Customary Marriage;

44.4 Even if the two cows formed part of the Lobola amount and it was not paid on that day it does not mean that a marriage was not concluded because R24 000.00 was delivered and the bride was handed over;

44.5 If the bride was not handed over, the father who received the marital goods for the daughter will have had to give it back. According to the expert there can be no uncertainty because the R24 000.00 was paid;

44.6 The fact that the Plaintiff and the Defendant did not partake in the Lobola negotiations is tradition;

44.7 The slaughtering of the sheep signifies a bond between the two families and the celebration of a new bond between the families. It is possible that it can also be interpreted to mean that the Lobola negotiations were successful and one should be careful to try and cast customary law in stone. There is much room for deviation.

[45] During the redirect examination the expert testified that:

45.1 The Lobola letter serves as confirmation that an agreement on the amount of Lobola was reached and the first requirement was met. The agreement was to pay R24 000.00;

45.2 If there was uncertainty about the amount of Lobola to be paid and no agreement in respect of the Lobola, no amount would have been paid by the Defendant;

45.3 The photographs confirm the handing over of the bride which took place in public and in the street. The groom does not need to be outside he could be waiting in the home for the bride.

This concluded the case for the Plaintiff. The Defendant proceeded to call his first and only witness.

Witness for Defendant:

The Defendant: J[...] J[...] Z[...]

[46] The Defendant was the only witness for the Defendant. The Defendant gave evidence in chief that:

46.1 The Defendant and the Plaintiff lived together since January 2012;

46.2 They were involved in a romantic relationship;

46.3 The Plaintiff had a problem to stay in his house without the knowledge of her parents and that is why they decided to formalise their co-habitation;

46.4 He wrote the invitation letter to her parents;

46.5 He was aware of the negotiations that took place on the 24th of March 2012 for the payment of Lobola of R24 000.00;

46.6 He could not deliver the two cows at that stage and that remained owing. The mothers also did not meet to discuss exchanging the gifts;

46.7 During the negotiations he was represented by Mr Moloko, Mr Shongwe, Mr S[...], a certain Gampi and his aunt, Ms Z[...];

46.8 After the negotiations his representatives came back to him and told him that everything went well and that they gave the M[...] family the pre-determined amount of R24 000.00. They said everything went well and did not go into detail;

46.9 The delegates told him that the meeting between the women in respect of the exchange of gifts will be held at a later stage and that this was only the initial stage. He still had to provide the two cows which he could not give on that S[...]e Saturday, because he did not have enough money. He never delivered the two cows;

46.10 The Plaintiff and the Defendant resided together from January 2012 to 2014, but their relationship deteriorated to such an extent that there were protections orders against him and his son and the relationship could not be saved;

46.11 He only saw the expert report for the first time on the 24th of July 2024 and he never previously saw the photographs attached to the report. He saw the report for the first time in the office of Advocate Stadler on the 24th of July 2024 on which date he also saw the photographs and the traditional certificate for the first time;

46.12 The witnesses reflected on the certificate is not his mother and he does not know the boy Shongwe. The document was completed in the Plaintiff's handwriting;

46.13 He recognised some of the people in the photographs and specifically referred to Mr S[...] and his wife. He said that Mr S[...] was still alive, but that he was unsure about his wife;

46.14 It was impossible that there were celebrations after the Lobola negotiations because his family was not there. There were never further celebrations, the two cows were not paid and there was no exchange of an animal and he was not aware of the handing over of the bride;

46.15 His son was not at home on the 24th of March 2012, because he left in February 2012 for Kempton Park during his apprenticeship;

46.16 The reason for the invitation letter was because he did not want to stay with the Plaintiff, disrespecting her parents. It was risky to stay with her without informing her parents;

46.17 They were finalising the process and he still needed to give two cows, the gift exchange had to be arranged between the women and the handing over of the bride had to take place. It never came to conclusion because their relationship got worse and never recovered.

[47] During cross-examination he:

47.1 Confirmed that the R24 000.00 was paid;

47.2 Indicated that his intention of sending delegates to the M[...] family was just for the Plaintiff's parents to know that the Plaintiff and the Defendant were co-habiting. After the payment of the R24 000.00 they resumed staying together as boyfriend and girlfriend;

47.3 Before the payment of the R24 000.00 they were staying together as boyfriend and girlfriend;

47.4 For the very first time, indicated that the intention of the payment of the R24 000.00 was Ukucela and that all he wanted was Ukucela (referring to co-habitation and not marriage);

47.5 When he returned home on that day he found the Plaintiff there. It was a surprise because he thought she would stay home to help them clean up, but he was happy to see her;

47.6 He confirmed that he could not dispute the slaughtering of the sheep because he was not there and he did not ask the delegates. He knows that S[...] is still alive but he did not reach out to him and did not ask him to comment on this evidence and he never asked him what transpired on that day;

47.7 He also cannot deny that a request was made for the bride to be handed over because he was not there;

47.8 He was then shown the photographs and he identified his aunt Lydia Z[...], Mr S[...], Ms S[...], Mr Shongwe and the Plaintiff;

47.9 When asked why he is not calling Mr S[...], who is shown in the photos, and who can confirm his version that it was not the handing over of the bride, he indicated that he did not know the meaning of the photographs.

The Defendant closed his case.

Legal principles:

Admissibility of photographs:

[48] Rule 35(4) of the Uniform Rules of Court provides that a document or tape recording not disclosed may not, save with leave of the court granted on such terms as it may deem appropriate, be used for any purpose at the trial by the party who was obligated but failed to disclose it, provided that any other party may use such document or tape recording.

[49] Rule 36(10)(a) of the Uniform Rules of Court provides that no person shall, save with the leave of the court or the consent of all the parties, be entitled to tender in evidence any plan, diagram, model or photograph unless such person shall not more than 60 days after the close of pleadings have delivered a notice stating an intention to do so, offering inspection of such plan, diagram, model or photograph and requiring the party receiving notice to admit the S[...]e within 10 days after receipt of the notice.

[50] In *Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195 (C) at 199I to J the court held that:

“In my view, discovery in terms of Rule 36(10) has the S[...]e purpose as discovery in terms of Rule 35, namely to make all parties aware of the existence of the objects referred to therein so that the issues may be narrowed and incontrovertible points of debate eliminated.”

[51] In *Human v Road Accident Fund* (62174/2013) [2016] ZAGPPHC 134 (8 March 2016) a forensic collision homicide reconstructionist compiled a report based on documents,

photographs and reports made available to him whilst there was no oral evidence to authenticate the photographs and the court found

that:

“[27] I now turn to the evidence of Mr Bezuidenhout, who used certain photographs as one of the bases of his report. Defendant’s

counsel made certain submissions regarding the admissibility of these photographs as evidence at the end of the trial. A photograph is a document and there must be proof of its accuracy from the photographer or someone else to show that the photo is indeed a true likeness of the subject photo.

“[29] I do not attach any weight to the photographs of the general scene, the alleged point of impact or the final resting position of the vehicle. Neither the Plaintiff nor the expert witness could testify to the authenticity of these photographs and related details. However, the photos of the vehicle are in order.”

[52] Schmidt ed al, *The Law of Evidence*, May 2024 at 12.2 recorded the opinion that when a photograph is adduced as evidence there must usually be supporting evidence showing who took the photograph and where it was taken; and the content (persons and or objects) will have to be identified. Sometimes additional evidence will also be necessary to explain the content or interpret it.

[53] Section 33 of the Civil Proceedings Evidence Act 25 of 1965 includes a photograph in the definition of “document” and section 34(2) provides that:

“The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings-

- (a) notwithstanding that the person who made the statement is available but is not called as a witness;
- (b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or the material part thereof proved to be a true copy.

[54] Section 3 of the Law of Evidence Amendment Act 45 of 1988 provides that:

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
- (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,is of the opinion that such evidence should be admitted in the interests of justice.
- (2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph
 - (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.”
- [55] Section 3(1)(c) confers a judicial discretion on presiding officers to admit hearsay evidence if the admission of the evidence would be in the interest of justice. In exercising this discretion, the court must consider the six specified factors as well as any other factor which should be in the opinion of the court be taken into account.
- [56] In casu, the court allows and accepts the photographs into evidence, based on the following:
 - 56.1 The photographs were discovered by the Plaintiff as part of the expert report on or about 26 July 2024 and as such the Defendant had knowledge of the fact that they formed part of the Plaintiff’s discovered documents;
 - 56.2 There is no indication that the Defendant objected to the discovery of these photographs as an attachment to the expert’s report;

56.3 Mr B[...], Mr G[...] and the Plaintiff referred to the existence of the photographs in their evidence, prior to the photos being introduced into evidence;

56.4 They gave evidence of what was contained in the photographs and referred to the photographs as confirmation of the evidence they presented to court, without the photographs being placed before court;

56.5 When the photographs were introduced into evidence the Plaintiff gave evidence as to where and when they were taken and identified the people photographed;

56.6 The relevancy of the photographs is contained therein that they confirm the evidence that was already given by the Plaintiff and two of her witnesses in respect of the traditional clothing she wore and the people who accompanied her to the Z[...] residence. Evidence which was challenged and denied by the Defendant;

56.7 It is also significant to note that the Plaintiff was criticised by the Defendant's advocate during cross-examination for referring to photographs which were not placed before court and specifically informed that she did not proof her case. As a result, the photographs were entered into evidence and provisionally allowed by the Court;

56.8 I am of the opinion that the Defendant is not prejudiced by the fact that the photographs were allowed into evidence, because he had knowledge of the photographs since 24 July 2024 and they were discovered as part of the expert report on or about the 26th of July 2024. He thus had ample opportunity to prepare to deal with these photos before the commencement of the trial and definitely

before the second part of the trial which commenced on 1 October 2024.

Single witness evidence:

[57] Section 16 of the Civil Proceedings Evidence Act 25 of 1965 provides that a court may give judgment in any civil proceedings on the evidence of any single competent and credible witness.

[58] In *S v Sauls and others* 1981 (3) SA 172 (A) the court held at 180E that:

"There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

[59] In *Moloi v Road Accident Fund* (63711/2016) [2024] ZAGPPHC 1071 (30 October 2024) the court held that:

“[19] There is the need for special caution in scrutinizing and weighing the evidence of a single witness (as part of the accepted cautionary rules), especially in cases where there is a real risk of fabricating evidence, for instance in “hit-and-run” cases. The cautionary rules were devised mainly for criminal matters but, where appropriate, they are also applied in civil cases (Woji v Santam Insurance Co Ltd 1980 2 SA 971 (SE)). In the end, when the Court considers and scrutinizes the evidence before it, the exercise of caution should not be allowed to displace the exercise of common sense.”

[60] In casu, the Defendant was a single witness. The court did not find him to be a credible witness. It is necessary to have regard to the different versions of the Defendant. The following is relevant:

60.1 In his plea he stated that the marriage was negotiated, but that he did not comply with the terms of the Lobola agreement (confirming a Lobola agreement) reached between the families. This differs from the version put forward in court in that:

60.1.1 In his evidence he wanted the court to belief that it was not Lobola negotiations but in fact negotiations in respect of their co-habitation;

60.1.2 It was put to witnesses on his behalf that there was uncertainty about the terms of the Lobola agreement and thus no agreement;

60.2 During the pre-trial conference held on 9 September 2022, where the Defendant was duly represented, it was recorded that the marriage between the parties in terms of the recognition of Customary Marriages Act was admitted and that the parties were married in community of property as they did not conclude an antenuptial contract;

60.3 In a joint practice note dated 29 January 2024, whilst the Defendant was also represented, it was recorded that the parties were married to each other on 25 March 2012 in terms of Customary Law, that no antenuptial contract was concluded and reference was made to the Lobola letters under CaseLine 04-5 translated under CaseLine 04-02;

60.4 At a pre-trial conference dated 11 July 2024 it was confirmed that Lobola negotiations were held on the 24th of March 2012, but it was disputed that a valid Customary Marriage was entered into. In evidence the Defendant wanted the court to belief that it was not Lobola negotiations, but some other type of negotiations for purposes of co-habitation (Ukucela). This is clearly a new version and the term was used for the first time under cross-examination. It is significant that:

60.4.1 This version was not recorded in any of the pleadings, pre-trial minutes and/or practice notes;

60.4.2 At no stage during the cross-examination of any of the witnesses of the Plaintiff was it put to them or to the expert, that the Defendant paid Ukucela and not Lobola and/or that the negotiations were for purposes of co-habitation and not marriage. In fact, it was put to the witnesses of the Plaintiff by Adv Stadler that the Defendant will come and testify that the Defendant still had to pay the two additional cows and because of that Lobola (not Ukucela) was not paid in full;

60.4.3 It is clear from the pleadings that the Defendant's case was at all times that marriage negotiations took place and a Lobola agreement was reached and this was never amended by the Defendant to record that it was a co-habitation that was negotiated and/or that no agreement was reached;

60.5 On the one hand he gave evidence that the negotiations were in respect of co-habitation but on the other hand he gave evidence that the marriage was not concluded because he did not comply with the payment of the full Lobola amount negotiated and agreed;

60.6 It is necessary to note that the Defendant was a single witness and that even though there seems to be witnesses alive who could testify in respect of the negotiations on behalf of the Defendant as well as the photographs which was presented to court (the handing over of the bride), the Defendant elected not to call those witnesses;

60.7 Even if the Defendant did not understand the relevance of the photographs (as stated by the Defendant) prior to the commencement of the trial, the following is relevant:

60.7.1. What is significant is that the Defendant indicated that he first saw the photos on 24 July 2024 together with the expert report. The expert report makes the relevance of the photos clear and the Defendant's version that he did not understand the relevance of the photos makes no sense and is not probable;

60.7.2 Be that as it may, the relevance of the photographs became clear from the evidence presented on behalf of the Plaintiff that the photographs pertained to the handing over of the bride, which was already evident during the first part of the trial;

60.7.3 As indicated above this matter was part heard during August 2024 and it continued on the 1st and 2nd of October 2024, giving the Defendant ample opportunity to request and/or subpoena further witnesses to court.

Customary Marriage:

[61] Section 3 of the Recognition of Customary Marriages Act 120 of 1998 states:

"Requirements for validity of customary marriages

- (1) For a customary marriage entered into after the commencement of this act to be valid -
 - (a) The respective spouses –
 - (i) must both be above the age of 18; and
 - (ii) must both consent to be married to each other under customary law, and
 - (b) The marriage must be negotiated and entered into or celebrated in accordance with customary law".

[62] Section 3(1)(b) of the Act does not stipulate the requirements of Customary Law which must be met to validate a Customary Marriage. The reason for this is 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. See *Mbungela and another v Mkabi and others* (2019) ZASCA 134 (30 September 2019); 2020 (1) SA 41 (SCA) where the SCA held that:

“... the legislature left it open for the various communities to give content to section 3(1)(b) in accordance with their lived experiences.”

(18) The Constitutional Court has cautioned courts to be cognisant of the fact that the 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.”

[63] After a Lobola agreement, part payment thereof and the slaughter of the beast celebrating event, the customs and rituals relating to a Customary Marriage including its celebration may remain outstanding. See *Mankayi v Minister of Home Affairs and others* 2021 ZAKZPHC 43 para 28; *Ndluli v Minister of Home Affairs and others* (1789/21 PO (2023) ZAKZPHC 23 (3 March 2023)).

[64] The SCA confirmed that part payment of Lobola is sufficient to constitute a Customary Marriage and the Lobola need not be paid in full, as long as there is an agreement that Lobola will be paid. See *Moropane v Southon*

(2014) ZASCA 76; TS[...]bo v Sengadi

(2020) ZASCA 46 para 13.

[65] An agreement on Lobola, part payment thereof and the staying together of the bride and bridegroom as husband and wife with the knowledge of her people, means the existence of a Customary Marriage. The failure to hand over the bride or to celebrate the union are of no consequence. See *Mankayi supra*, para 28 and 33; *Mbungela supra* at para 30;

[66] The question whether non-observance of the bridal transfer ceremony invalidates a Customary Marriage has been decisively answered by our courts See *Mabuza v Mbatha* 2003

(4) SA 218 (C), paras 25 to 26; *Mbungela* at para 30;

[67] The SCA confirmed that the ritual of handing over of a bride is simply a means of introducing a bride to her new family and signified a start of the marital consortium. See *Mbungela supra* at para 25 and TW Bennett Customary Law in South Africa

(2004) at 213.

[68] The conclusion of a Customary Marriage is a process rather than an event. Once there has been an agreement on Lobola and the bride is allowed to join her husband or his family a Customary Marriage has been formed. See Mankayi supra, para 30.

[69] By definition Lobola is paid for somebody you want to take as your wife. See Mankayi supra, para 33.

[70] In casu, the question is whether a valid Customary Marriage was entered into. On the Defendant's version the full Lobola was not paid and the bride was not handed over. On the Plaintiff's version the full Lobola was paid and the bride was handed over. If we, for purposes of argument, accept the Defendant's version, and analyse the high-water mark of the Defendant's case it seems to be the following:

70.1 On 24 March 2012, the Defendant sent representatives of his family to meet with the Plaintiff's family in order to negotiate a Lobola agreement;

70.2 The Lobola agreement consisted of the payment of R24 000.00 plus the delivery of two cows and the arrangement for the exchanging of gifts between the women;

70.3 On the S[...]e day the R24 000.00 was paid by the Defendant to the Plaintiff's family;

70.4 On the S[...]e day the Plaintiff returned to the home of the Defendant where they resided together in an intimate romantic relationship;

70.5 The co-habitation terminated in 2014 when the summons in this matter was issued;

70.6 Prior to the Lobola negotiations the parties resided together since January 2012.

[71] There was no evidence of whatsoever nature that the Plaintiff's family objected to the co-habitation of the Plaintiff and the Defendant and it is common cause between the parties that the parties resided together after the Lobola negotiations until 2014.

Analyses of the evidence:

[72] The court accepts that both parties were above the age of 18 on 24 March 2012, because the Plaintiff was born in 1976 and the Defendant was born in 1959;

[73] The court accepts that the Plaintiff and the Defendant consented to be married, based on the following:

73.1 They formalised an invitation letter to the M[...] family to arrange a meeting to come to an agreement between the two families;

73.2 The Defendant tried in his examination in chief, to convince the court that the negotiations were in respect of formalising the co-habitation between the Plaintiff and the Defendant, but he also referred to the payment of the R24 000.00 as a Lobola payment and that the marriage was not concluded because certain requirements were to take place at a later stage. These requirements were never met because the relationship between him and the Plaintiff deteriorated, before it was done;

73.3 The Defendant personally wrote the invitation letter;

73.4 The Defendant gave evidence that the marriage was not concluded because he was still owing the two cows in respect of the Lobola to be paid and the exchange of gifts had to be arranged by the women. This in itself indicates that he consented to be married but some requirements remained outstanding for the marriage to be valid (according to him);

73.5 The Lobola letter also confirms that the Z[...] family came to build marital relationships with the M[...] family. The Z[...] family were at the negotiations on behalf of the Defendant, fulfilling the Defendant's mandate and as such the conclusion can be drawn that he consented to be married to the Plaintiff.

[74] The court accepts that Lobola negotiations took place between the M[...] family and the Z[...] family on the 24th of March 2012, based on the following:

74.1 It is common cause that the Z[...] family requested a meeting with the M[...] family and that such meeting took place on the 24th of March 2012.

74.2 It was recorded in the pleadings, the pre-trial minutes and the joint practice notes that Lobola negotiations took place at the home of the M[...] family on the 24th of March 2012;

74.3 Two of the Plaintiff's witnesses confirmed that the Lobola negotiations took place on the 24th of March 2012 between the two families;

74.4 The Plaintiff, Mr B[...] and Mr G[...] confirmed that the negotiations took place;

74.5 The Plaintiff and Mr G[...] confirmed the three delegates for the M[...] family and the five delegates for the Defendant's family. The Defendant also confirmed the S[...]e five delegates who negotiated on his behalf on the 24th of March 2012;

74.6 The Defendant admitted that negotiations took place between delegates of his family and delegates of the M[...] family on the 24th of March 2012;

74.7 It was never put to any of the Plaintiff's witnesses that the negotiations which took place on the 24th of March 2012 was anything other than Lobola negotiations;

74.8 In his evidence the Defendant referred to the payment of the R24 000.00 as a Lobola payment and that he was aware of the negotiations for the payment of Lobola;

74.9 It was only under cross-examination that he referred to Ukucela and that the negotiations were in respect of Ukucela (referring to co-habitation);

74.10 The Lobola letter was not denied by the Defendant and in terms of the Lobola letter which was signed by all five of the Defendant's delegates, it was recorded that the Z[...] family came to the M[...] family on 24 March 2012 to "build marital relationships with the M[...] family".

[75] The court accepts that the two families successfully negotiated a Lobola Agreement and that the Agreement was reduced to writing based on the following:

75.1. Mr G[...] gave evidence that he reduced the agreement to writing and that the Lobola letter contains the terms of the agreement;

75.2 The contents of the Lobola letter were not challenged, denied or contradicted by the Defendant;

75.3 The case of the Defendant was not that an agreement was not reached (although this was put to several witnesses, it was never testified by the Defendant). His version was that the payment of the two cows and the arrangements in respect of the gift exchange remained outstanding (both contained in the Lobola letter);

75.4 Mr B[...] and Mr G[...] signed the Lobola letter and testified that the sheep was slaughtered because the Lobola negotiations were successful;

75.5 It is common cause that R24 000.00 was paid by the Z[...] family to the M[...] family on the 24th of March 2012 and the Defendant confirmed that this was what him and the Plaintiff discussed before the negotiations;

75.6 The expert confirmed that the R24 000.00 would not have been paid if the Lobola negotiations were not successful and if a Lobola agreement was not reached. This was not challenged, denied or contradicted by the Defendant.

[76] The court accepts that the Lobola (in full or in part) was paid by the Z[...] family, based on the following:

76.1 It is common cause that the amount of R24 000.00 was paid on the 24th of March 2012;

76.2 According to Mr G[...] this was the Lobola amount and the two cows was not part of the Lobola payment but they were gifts;

76.3 Mr B[...] also confirmed that the two cows were not part of the Lobola payment;

76.4 The Defendant confirmed that the R24 000.00 was a Lobola payment but according to him the two cows were also part of the Lobola payment and remained outstanding;

76.5 Even if the Defendant's version is correct the full payment of the Lobola is not a pre-requisite for the validity of a Customary Marriage.

[77] The court accepts that on the day of the negotiations of the Lobola Agreement a sheep, provided by the M[...] family was slaughtered and celebrations were engaged in, based on the following evidence:

77.1 The Plaintiff, Mr B[...] and Mr G[...] all testified that a sheep was slaughtered on that day;

77.2 Mr B[...] and Mr G[...] testified that the sheep was provided by the M[...] family;

77.3 Mr B[...] and Mr G[...] testified that the sheep signified the welcoming of the Z[...] family by the M[...] family and that the negotiations were successful;

77.4 Mr B[...] and Mr G[...] testified that one half of the sheep was given to the Z[...] family and the other half was kept by the M[...] family for their celebrations;

77.5 The Defendant conceded that he could not deny that a sheep was slaughtered because he was not at the M[...] home on that day;

77.6 The Defendant gave evidence that his delegates were “tipsy” when they arrived at his house on that day.

[78] The court accepts that a certain S[...] purchased traditional clothing for the Plaintiff on the 24th of March 2012, for the handing over of the bride to the groom and that the handing over of the bride took place on the S[...]e day, based on the following:

78.1 Mr G[...] gave evidence that the Z[...] family requested the M[...] family after the successful negotiations of the Lobola agreement, that the bride should be handed over to the Z[...] family;

78.2 The Defendant conceded that he could not deny that the Z[...] family requested the bride to be handed over that day, because he was not there;

78.3 Both the Plaintiff and Mr G[...] gave evidence that she could not be handed over if she was not dressed in traditional clothing;

78.4 The Plaintiff, Mr G[...] and Mr B[...] confirmed in evidence that S[...] (on behalf of the Defendant) was sent to purchase the wedding regalia for the Plaintiff on the day of the negotiations, although Mr B[...] could not remember the date;

78.5 The Plaintiff gave evidence that she was dressed in the traditional clothes by the women and both Mr B[...] and Mr G[...] gave evidence that they saw the Plaintiff in the traditional clothing with some of the women before they left for the Z[...] home;

78.6 The Plaintiff described that she was wearing a Z[...] hat, vest and skirt and this is also confirmed in the photographs;

78.7 The photographs provided by the Plaintiff show the Plaintiff in traditional clothing with women of both families in the photographs, as well as Mr S[...] (one of the Defendant’s delegates) in the photographs with a “knopkierie” and Mr Shongwe (another one of the Defendant’s delegates);

78.8 Even the Defendant’s aunt, Ms Z[...] (also one of the Defendant’s delegates) is depicted in the photographs next to the Plaintiff;

78.9 On a balance of probabilities, the court accepts that these photographs were taken on that day, because no-one gave evidence in respect of any other day or event when the M[...] family and the Z[...] family were together and when these photographs could have been taken;

78.10 The Plaintiff gave evidence that she was handed over to the Defendant's family on that day and that the Defendant's aunt welcomed her in the family with words to the effect that she was now the daughter;

78.11 It is common cause that after that day the Plaintiff and the Defendant resided together;

78.12 The court accepts the version of the Plaintiff, because the Plaintiff was found to be a reliable witness, whilst the Defendant's evidence raised serious concerns in respect of reliability for the reasons set out above.

In the premises, I grant the following order, that:

1. A valid Customary Marriage was concluded between the Plaintiff and the Defendant on 24 March 2012;
2. The remainder of the prayers in the Plaintiff's Particulars of Claim and the Defendant's Counterclaim are postponed sine die;
3. The Defendant is ordered to pay the costs of the action pertaining to the validity of the Customary Marriage, including the costs occasioned by the postponement on 28 August 2024 on Scale C.

N VAN NIEKERK AJ

JUDGE OF THE HIGH COURT

Date of hearing: 26 - 27 August 2024 and 1 - 2 October 2024

Date of judgment: 13 January 2025

Appearances:

On behalf of the Plaintiff: Adv B Lukhele PABASA Arcadia Chambers Pretoria

lukhele@loftusadv.co.za Instructed by: MaMyeni Mazibuko Attorneys 259 West Avenue Die

Hoewes Centurion 082 920 6967 Nkosingiphile@mmmazibukoattorneys.co.za On behalf of the

Defendant: Adv SM Stadler Groenkloof Chambers Pretoria stadlerlaw@outlook.com Instructed

by: Adams & Adams attorneys Lynnwood Bridge Office Park 4 Daventry Road Lynnwood Manor

Courtney.Elson@adams.africa

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Prepared on 10 October 2026 · Esheria