

SOUTH AFRICA / JUDGMENT

Lijane v Kekana and Others (21/43942) [2023] ZAGPJHC 5 (3 January 2023)

[2023] ZAGPJHC 5

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

21/43942

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HEADNOTE: LABOUR

–INTERRACIAL CUSTOMARY MARRIAGE

Family

– Marriage – Customary – Interracial marriages under customary law – Between Black man and Coloured woman –

Application of customary law not confined to one racial group

– Recognition

of Customary Marriages Act 120 of 1998.

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

CASE

NUMBER: 21/43942

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
3
January 2023
In

the matter between: GEORGE
MONAMODI LIJANE
Applicant
and
SOLOMON
KEKANA
First
Respondent
MINISTER
OF HOME AFFAIRS
Second
Respondent
BRONWIN
CEALIN SAULS
Third
Respondent
MBALENHLE
LUZERENE SAULS
Fourth
Respondent

JUDGMENT

WILSON J:

1 The applicant, Mr. Lijane, seeks a declaration that he entered into a valid customary marriage with Gracious Katrinah Sauls on 27 and 28 August 2016. Gracious Sauls died on 26 June 2021, but the first respondent, Mr. Kekana, together with the third respondent, Bronwin Sauls, and the fourth respondent, Mbalenhle Sauls, oppose the application. Mr. Kekana was the Sauls family's principal representative in the negotiations that led to the marriage Mr. Lijane alleges. Bronwin and Mbalenhle Sauls are Gracious Sauls' two children from a previous relationship.

2 The second respondent, the Minister of Home Affairs, is joined because an order is sought directing him to register the putative marriage. The Minister has given notice that he abides the relief sought, and has not otherwise participated in this application.

3 Section 1, read with section 2 (2), of the Recognition of Customary Marriages Act 120 of 1998 says that any marriage "concluded in accordance with customary law" after the Act's commencement (on 15 November

2000) is a marriage “for all purposes”. Under section 3 (1) of the Act, a customary marriage is “valid” if the prospective spouses are both over 18 years old; if they have both consented “to be married to each other under customary law”; and if the marriage is “negotiated and entered into or celebrated in accordance with customary law”.

4 There is no dispute between the parties that Mr. Lijane and Gracious Sauls were in a long-term, loving and committed relationship. Nor is there any dispute that they were both over the age of 18 on 27 August 2016, and that they intended to marry each other according to customary law on that date.

5 The dispute between the parties concerns whether the marriage they contracted was in fact “negotiated and entered into or celebrated in accordance with customary law”. The respondents contend not. I address each of their arguments in support of that contention below.

The alleged absence of a “handing-over” ceremony

6 First, it is contended that what is referred to in the respondents’ papers as “the Basotho tradition of go-shobedisa” was not performed. The respondents deploy that term in the sense of a ritual “handing-over” of the bride to the groom’s family. For reasons that are not entirely clear to me from their answering papers, the respondents contend that this did not happen. As a result, so the respondents contend, the customary marriage Mr. Lijane alleges could not have come into existence.

7 There is no dispute that there was a meeting between Mr. Lijane’s and Gracious Saul’s respective families on 27 and 28 August 2016 during which at least some customary marriage rites were performed. It is less clear whether there was a “handing-over” of the nature the respondents suggest is necessary, but I need not make a finding on that issue. In *LS v RL* 2019

(4) SA 50 (GJ), my brother Mokgoathleng J held that the practice of “handing-over” the bride to the groom’s family can no longer be considered a prerequisite for the validity of a customary marriage. I am bound to follow his decision unless I think

that it is clearly wrong. The decision in *LS* in fact strikes me as entirely correct, and I agree with it for substantially the reasons Mokgoathleng J gives.

8 In any event, in *Mbungela v Mkabi* 2020

(1) SA 41 (SCA), the Supreme Court of Appeal held that the handing-over of a bride “cannot be placed above the couple’s clear volition and intent where . . . their families . . . were involved in, and acknowledged, the formalisation of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer” (at paragraph 30). Accordingly, whatever its status in the customary law of marriage, the absence of a “handing-over” ceremony does not invalidate a customary

marriage which the spouses and their families have otherwise recognised as a marriage.

9 It follows that the respondent's first objection to the validity of the customary marriage alleged must fail.

The adornment of the bride in traditional costume

10 The respondents' second contention relates to whether Gracious Sauls was dressed in Basotho traditional clothing by Mr. Lijane's family, or whether Ms. Sauls dressed herself. Although the papers are, again, somewhat obscure on this point, the respondents appear to suggest that the marriage was not valid because Gracious Sauls dressed herself in Basotho costume rather than being dressed by Mr. Lijane's family. I was not referred to any evidence or authority for the proposition that it makes any difference to the validity of a marriage by Basotho custom who dresses the bride in traditional clothing. It seems to me that the critical and uncontested fact is that Gracious Sauls was dressed in traditional costume on the day of the wedding alleged. Whether that is itself a requirement for the validity of the marriage is also a matter on which no evidence was presented. However, it would require the strongest evidence to persuade me that the integrity of an otherwise valid customary marriage could turn on such a minor detail as who dresses the bride in traditional garb.

11 There being no evidence – whether weak or strong – of the possibility that Gracious Sauls dressing herself in traditional clothes could have been anything more serious than a minor ritual error, the respondents' second objection to the validity of the marriage must also fail.

Lobolo

12 The third point the respondents raise is the non-payment of lobolo. Mr. Lijane says that the Sauls family "refused to accept lobolo on the basis that they were of Coloured origin and were not practicing the lobolo tradition". However, the papers do not bear that out. A written agreement between the Lijane and the Sauls families is annexed to the founding papers. It is signed by Mpho Dijane, a representative of the Lijane family, and by Mr. Kekana, in his capacity as a representative of the Sauls family. Neither its authenticity nor the truth of its contents have been placed in dispute.

13 The note declares that both families affirm the decision of Mr. Lijane and Gracious Sauls to marry according to customary law, and that Mr. Lijane will compensate ("vergoed") the Sauls family in the sum of R10 000 for the marriage ("vir die toekomstende huwelik tradiesioneel"). Read in the context of all the surrounding circumstances, that seems to me to be an offer and acceptance of lobolo. There is no evidence before me relating to whether the amount was actually paid, but that there was an agreement to pay can scarcely be disputed. It seems, at worst for Mr. Lijane, that a payment was agreed, but that the Sauls family did not accept the money as lobolo, but as some form of dowry or contribution to the costs of the wedding.

14 Accordingly, the respondents' third objection amounts to this: lobolo was offered, and a payment of R10 000 was agreed. If that amount was ever actually transferred to the Sauls family, it was not accepted as lobolo, but as something else. For that reason, the marriage Mr. Lijane alleges cannot be a valid customary marriage.

15 I think this objection must fail for the same reasons as the objection based on the alleged absence of a “handing-over”.

As the Supreme Court of Appeal held in *Mbungela*, the absence of a “handing-over” ceremony could only matter to the validity of a customary marriage if the families of the prospective spouses had thought that the marriage would not be valid without one. So it is with lobolo – at least in this case, where, on the best analysis, the Lijanes offered a lobolo payment, the Sauls accepted the payment as something else, but neither family thought that they were conducting anything other than a “huwelik tradiesioneel”.

The validity of interracial marriages under customary law

16 The respondents finally contended that interracial marriages cannot be contracted under customary law. Mr. Lijane is an African man. Gracious Sauls was a Coloured woman. As a matter of law, this, it was contended, rendered a customary marriage impossible.

17 In support of this far-reaching proposition, Ms. Joubert, who appeared for the respondents, offered a creative argument based on statutory interpretation. The first step in that argument was to point out that the Recognition of Customary Marriages Act defines “customary law” as “the customs and usages traditionally observed among the indigenous African peoples of South

Africa and which form part of the culture of those peoples”. It was then contended that, because customary law must involve customs forming part of the culture of indigenous African people, Coloured people, not being “indigenous Africans” are not persons to whom customary law applies.

18 The basic flaw in this argument is that the Act makes clear that indigeneity and culture are attributes of customary laws themselves, not the people who choose to be governed by them. The Act has nothing at all to say about whether a Coloured person can contract a marriage under customary law, so long as those laws have their origins in indigenous African cultural practices. Were that basic textual observation not enough to reject Ms. Joubert’s argument (it is), I would be bound to point out that I must interpret the Act in accordance with the spirit, purport and objects of the Bill of Rights (section 39 (2) of the Constitution, 1996). There could be little more destructive of that spirit than to confine the application of customary law to one racial group.

19 These conclusions render it unnecessary for me to address the startling assertion that Coloured people do not count as either “indigenous” or “African”. But perhaps the less that is said about that proposition, the better.

20 Accordingly, I reject the argument that interracial marriages may not be contracted under customary law.

Costs

21 Mr. Lijane is plainly entitled to the relief he seeks, and there is no reason why costs should not follow the result. The respondents accepted throughout that Mr. Lijane and Gracious Sauls intended to marry, that they were of the necessary age and legal capacity to do so, and that they and their families intended to conclude a union according to Basotho tradition. That really should have been the end of the matter.

22 For all these reasons, I make the following order –

22.1 The customary marriage entered into between GEORGE MONAMODI LIJANE (ID No: [...]) and GRACIOUS KATRINAH SAULS (ID No: [...]) on 27 and 28 August 2016 is declared valid.

22.2 The second respondent is directed, in terms of section 4 (7) (a) of the Recognition of Customary Marriages Act 120 of 1998, to register the marriage.

22.3 The first, third and fourth respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of this application.

S D J WILSON

Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 3 January 2023.

HEARD ON: 23 November 2022 DECIDED ON: 3 January 2023 For the Applicant: K Ntsewa
Instructed by Moloko Mokobi Attorneys For the First, Third and Fourth M Joubert Respondents:
Instructed by Ndzondo Kunene Mosia Inc

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