

SOUTH AFRICA / JUDGMENT

N.V.M v D.S.R (1327/2024) [2025] ZANCHC 9 (7 February 2025)

[2025] ZANCHC 9

COURT

Northern Cape High Court, Kimberley

BEFORE

Williams

CASE / FILE NUMBER

1327/2024

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IN THE HIGH COURT OF

SOUTH AFRICA

(NORTHERN CAPE

DIVISION, KIMBERLEY)

CASE NO.: 1327/2024

Date heard: 23-08-2023

Date delivered:

07-02-2025

Reportable:

Yes/No

Circulate

to Judges:

Yes/No

Circulate

to Magistrates:

Yes/No

In the matter between: V[...]
N[...] M[...]
Plaintiff
(ID No: 8[...])
S[...]
D[...] R[...]
Defendant
(ID
Number: 7[...])
CORAM: WILLIAMS
J:

JUDGMENT

WILLIAMS J:

1. In an action for divorce, the plaintiff Ms VM M[...] alleged that she and the defendant, Mr SD R[...] entered into a customary marriage on 17 April 2010. The plaintiff is Tswana and the defendant Sotho.

In an action for divorce, the plaintiff Ms VM M[...] alleged that she and the defendant, Mr SD R[...] entered into a customary marriage on 17 April 2010. The plaintiff is Tswana and the defendant Sotho.

2. The defendant opposed the divorce on the basis that no marriage relationship existed between the parties. He alleged that the lobola negotiations which were to take place on 17 April 2010 were postponed, as a result of which no marriage was negotiated and entered into.
3. The parties agreed before the commencement of the trial that the issue as to whether or not a valid customary marriage was entered into be determined separately.

Evidence for the plaintiff

4. Mr ME Makhele on behalf of the plaintiff testified that he had been invited, together with Mr J[...] M[...], by the plaintiff's mother to represent the plaintiff's family in the lobola negotiations which took place at the plaintiff's parental house on 17 April 2010. The defendant's family were represented by the defendant's father Mr L[...] and another gentleman unknown to him.
5. After the negotiations an agreement was reached that twelve cows be paid as lobola. Mr Makhele explained that one cow represented R1000, 00. It was also agreed that R5000, 00 would be paid on that day and the balance of R7000, 00 at a later stage.

6. The lobola agreement was put in writing and signed by Mr Makhele and Mr M[...] on behalf of the plaintiff's family and by the defendant's father on behalf of the defendant's family. The lobola letter written in Setswana, was handed in as an exhibit. By agreement an English translation was acquired for purposes of the trial. It reads as follows:

6.1 "2[...] M[...] Street

2[...] M[...] Street

Galeshewe Location

Kimberley

17 April 2010

Regarding the letter for the lobola negotiation of our daughter we the M[...] family.

The meeting the M[...] and the R[...] family held on the 17 April 2010. Both parents agreed in uniting their children to be husband and wife and to take care of each other's lives.

The children are D[...] S[...] R[...] and V[...] N[...] M[...].

D[...] S[...] R[...] is the son of S[...] R[...] from Lesotho, N[...] V[...] M[...] is the daughter of G[...] B[...] P[...] M[...] from Kimberley.

The bride price agreed upon is R12 000,00 (twelve thousand rand) they paid R5000,00 (five thousand rand) and remaining balance is R7000, 00 (seven thousand rand)

Witnesses of Mr S[...]: 1.(signature) S L L[...]

Witnesses of Mr M[...]: 1.(signature) M E Makhele

2.(signature)

”

(I have added the portions in brackets to give a more complete picture of the letter.)

7. Mr Makhele could not remember who drafted the lobola letter, but testified that he was present when it was compiled and that the R5000, 00 was given to Mr J M[...].
8. He also testified that after the lobola letter was signed, the food cooked by the women, was eaten in celebration of the fact that the plaintiff was welcomed into the defendant's family.
9. Mr Makhela testified that the plaintiff and the defendant were not present at the lobola negotiations, as was the norm, He also stated that in his culture, when a man wants to take a wife he first lives with her, then takes her to his family where an animal is slaughtered to welcome her. Thereafter the man's family informs the woman's family that they want to start lobola negotiations as they have already welcomed the woman into the family. According to his knowledge, this is also how the process between the plaintiff's and the defendant's families took place.

10. Mr Makhele denied the defendant's version that the lobola negotiations were postponed on 17 April 2010 because it was established that the plaintiff had had a miscarriage during 2009 and

a cleansing ceremony had to be performed first. He testified that he had only heard about the miscarriage two weeks before the trial and in any event the plaintiff's culture does not require a cleansing ceremony after a miscarriage.

11. The plaintiff testified that she and the defendant started a relationship during 2004 when she was in grade 11. The defendant was a tenant at her mother's house. After some time he asked her to marry him and arrangements were made for her to meet his family.

12. During November/December 2009 the plaintiff visited the defendant's

family in Lesotho. She arrived on a Saturday and was told to enter the house during the night because the defendant's father was not supposed to see her. On the following day, the defendant's family held a ceremony for her during which a sheep was slaughtered. She was dressed in traditional shweshwe and she was told that it is the makoti dress. The defendant's father gave her the name of M[...], which was an indication that she was welcomed into the family. She was also made to eat a rib of the sheep. Photographs of the plaintiff dressed in shweshwe were handed in as exhibits.

13. The plaintiff testified that Mr L[...], the defendant's father,

informed her that she was now married to the defendant and that she had to stay with them for three weeks. Thereafter, when she and the defendant leave Lesotho they will live together as husband and wife. In the meantime an arrangement will be made with her family for lobola to be paid.

14. According to the plaintiff the lobola negotiations took place at her mother's house on 17 April 2010. Neither she nor the defendant were present at the lobola negotiations. They were living in Colesberg at the time. She however received the lobola letter from her mother after the event. The respondent

told her that he had also received a copy of the letter from his father.

15. The plaintiff testified that she had a miscarriage during 2008 (it

was later agreed that the miscarriage occurred during 2009) but that it was not part of her culture to have a cleansing ceremony after such an event. In any event, she testified that her family had been aware of the arrangements to meet to negotiate lobola on that day and had agreed to it. Initially the lobola negotiations were to take place during January 2010, but her mother had arranged for it to be held at someone else's house, which did not suit the defendant's family. It was the agreed between the families that it take place at a later date, 17 April 2010.

16. The plaintiff testified that she and the defendant lived together in Colesberg during 2010 and when she fell pregnant with their elder child, she moved back to her parental home in Kimberley, since it was tradition that you give birth to your first child at home. During that time the defendant visited her over weekends until he obtained employment in Barkly-West, close to Kimberley. They then lived together in a house left to her and her sister by the plaintiff's grandmother and paid rental to the sister. The parties second child was born two years later. During the time before the parties separated, the plaintiff testified that she visited the defendant's family in Lesotho at least 13 times. Copies of the plaintiff's passport showing the entries into Lesotho were handed up as exhibits.
17. During 2015 the relationship between the parties turned sour and the defendant left the common home. The plaintiff then approached Fletcher's Attorneys for legal advice. She informed the attorney that the lobola amount had not been paid in full. She had been under the impression that the marriage would only be completed once the lobola was paid in full. The result of her consultation with the attorney was that a letter of demand was addressed to the defendant claiming damages in the amount of R100 000,00 for breach of the contract of marriage.

According to the plaintiff the defendant refused to pay because he was of the view that they were married.

18. It was only when the plaintiff approached the Maintenance Court for assistance with a claim for maintenance of the children during 2018 that she was informed that a customary marriage is valid even if the lobola had not been paid in full. She was then advised to have the marriage registered but learned that the defendant was already in another relationship and that a child had been born from this relationship. It was then that she instituted divorce proceedings.

Evidence for the defendant

19. The defendant confirmed that he and the plaintiff had been in a relationship since 2004 while he was a tenant at her parental home. The plaintiff became pregnant with his child and had a miscarriage during 2009.
20. The defendant testified that he took the plaintiff to Lesotho to meet his family during December 2009. The reason for taking the plaintiff to his family he explained initially, was because she had requested him to assist her financially with her studies and he had to at least let them get to know the person he intended to assist.

21. The defendant denied that he had proposed to the plaintiff, but admitted that he had told his family that she was someone he will be able to live with. He admitted that a sheep was slaughtered to welcome the plaintiff and that his sister made her a shweshwe garment which he paid for. He denied however that the plaintiff was treated or recognised as his wife, but that the celebrations were held because he had introduced her as someone he had intentions to marry.
22. Defendant further testified that he first sent his family to visit the plaintiff's family to negotiate lobola during January 2010, but that there was a problem with regard to the venue and arrangements were made for the lobola negotiations to take place during April 2010.
23. Despite the defendant's denial that he had proposed to the plaintiff he stated that he and the plaintiff had agreed that he would pay lobola of R5000, 00 since he was paying for her education and driving lessons.
24. The defendant's evidence was that he sent his father and two cousins who lived in Kimberley to conduct the negotiations. He was informed by his father afterwards that the lobola negotiations did not take place because the plaintiff's family informed his family of the miscarriage and required a cleansing ceremony to be held first. The money was handed over to the plaintiff's family for the cleansing ceremony. The defendant denied that the lobola contract before court was entered into and signed by inter alia his father. He insinuated that it was a forgery and that he had seen a copy thereof for the first time during 2015 as it was attached to the letter of demand he received from the plaintiff's erstwhile attorneys.
- inter alia
25. According to the defendant he and the plaintiff were not living together during 2010. At that time he was living in Colesberg and she was in Kimberley. He stated that they lived together in Kimberley from 2011 to 2015, but as life partners, not as husband and wife. This was known to the plaintiff, according to his evidence, since she agreed, when they first went for mediation with the Family Advocate during October 2015, that they were not married.
26. The defendant does not deny that after 2010 the plaintiff had visited his family in Lesotho on several occasions and even attended the funeral of a family member there. He however denies that she had been to Lesotho thirteen times since 2010.
27. The defendant contended, as substantiation for his allegation that

lobola had not been negotiated and paid, that none of the customary rituals after the payment of lobola occurred. The plaintiff

would have been taken by his family to live with them. If she is pregnant a ritual will be performed whereby a cloth would be put around her waist. If she is not pregnant she would be taken to visit her family accompanied by one of his family members. Once a baby is born the husband's family will deliver a cultural necklace and place it around the baby's neck.

28. None of the above rituals were performed after 17 April 2010.

His family had come to Kimberley to perform the ritual after the birth of a baby but the plaintiff's family would not allow it because they said that he has not married to the plaintiff.

29. The defendant's father Mr S[...] S[...] L[...] also testified.

He lives in Lesotho. He testified that he got to know the plaintiff during November/December 2009 when the defendant brought

her to their home. The defendant told them that the plaintiff had requested financial assistance with her studies and that they should get to know her. Mr L[...] stated that he welcomed her as a visitor and gave her a place to sleep and the same food that they ate. If a sheep had been slaughtered it would have been done to welcome the defendant as he does not visit them often.

30. Mr L[...] denied having any conversations with the plaintiff during

that initial meeting except for greeting her. The defendant also did not tell him that he and the plaintiff were in a relationship. Only after the plaintiff had left Lesotho for home did defendant inform him that he should go to the plaintiff's family to make negotiations concerning the plaintiff.

31. Mr L[...] described the negotiations he was to make as "marking a piece". He explained that it was a Sotho culture whereby he would go to the woman's family and inform them that his son is interested in their daughter. If the woman's family allows it he will place a "mark piece" – normally money or an animal – and he would then return and marry. This version is contrary to that of the defendant who had requested his father to negotiate lobola.

marking a piece".

mark piece"

32. The first time he visited the plaintiff's family was in January

2010. There were certain complications in that the negotiations had to be done at a different home. He went back to Lesotho and arranged another date for the negotiations.

33. Mr L[...] returned to plaintiff's family during April 2010

after he had sent his nephew, Tsekolo Mbele, to inform them of his plans. On the arranged day, himself, Tsekolo Mbele and Lebogang Mbele went to the plaintiffs parental home. When they arrived there they were informed that the plaintiff had had a miscarriage and needed to be cleansed before marriage could be negotiated. It was the first time he had heard of the miscarriage. He accepted that the plaintiff had to be cleansed first because this was very important in his culture as well. If not done, things could go badly in future and even result in having a disabled baby.

34. The plaintiff was represented at that meeting by one Puleng, J[...]

and an unknown man. They informed him that they needed R5000, 00 for the cleansing ceremony. He testified that in the Sotho culture cleansing is performed by slaughtering a sheep but he was satisfied to give the plaintiff's family money as he did not know their culture. The plan was that he would return to Lesotho and come back to Kimberley at a date after the cleansing to negotiate the marriage. This never happened.

35. Mr L[...] at first explained that he did not return to the plaintiff's family to negotiate the marriage after the cleansing because the plaintiff fell pregnant and gave birth during 2011 and thereafter the parties split up. When confronted with the fact that the parties only separated during 2015, Mr L[...] changed his version by saying he had been sickly and was unable to commence negotiations during that period before the break-up.

36. Mr L[...] admitted that he had given the plaintiff the name of M[...], but only after the first child was born and he had named the child K[...], not when the plaintiff had first visited them in 2009.

He disputed that the defendant had the authority, in his culture, to give the wife and child names. He subsequently corrected

himself by saying he meant "woman" not wife.

woman"

37. Mr L[...] also testified about the ritual his daughter was sent to

perform after the birth of the first child and the fact that the plaintiff's family would not allow it since the parties were not married.

38. Mr I[...] T[...] M[...], the defendant's cousin, also testified. His testimony was that he had been present when the first meeting of January 2010 was postponed. He was also present at the meeting of 17 April 2010 as part of the defendant's delegation, together with his brother Samuel Mbele and Mr L[...].

He confirmed that the intention was to negotiate marriage with the family of the plaintiff.

39. At the plaintiff's parental home the plaintiff's delegation consisted of Mr Makhele, Mr J[...] M[...], the plaintiffs' mother, a certain Puleng and an unknown male person. The

defendant's family was informed that as the plaintiff had previously suffered a miscarriage, a cleansing ceremony had to be performed before lobola negotiations could take place. The plaintiff's family required R5000, 00 for the cleansing.

This witness called the defendant, who was in Colesberg with the plaintiff at the time, and informed him of the unexpected turn of events. The defendant gave permission that the R5000, 00 intended for lobola be given to the plaintiff's family for the cleansing ceremony.

40. Mr Mbele testified that there were no negotiations regarding lobola

at all. There was no lobola letter drafted or signed by the representatives. The defendant's representatives left the plaintiff's family home, mission unaccomplished and were supposed to return at a later date. According to Mr Mbele the lobola negotiations were not completed and therefore no marriage had taken place.

41. The requirements for a valid customary marriage are to be found ins3(1)of theRecognition of Customary Marriages Act 120 of 1998which reads as follows:

Recognition of Customary Marriages Act 120 of 1998

"3.Requirements for validity of customary marriages.– (1) For a customary marriage entered into after the commencement of this Act to be valid-

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Requirements for validity of customary marriages.

– (1) For a customary marriage entered into after the commencement of this Act to be valid-

(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law."

42. It is not in dispute that the parties were both above the age of 18 years on 17 April 2010 and that they consented to be married to each other under customary law. Despite the defendant's denial of having proposed to the plaintiff, his evidence that they discussed and agreed on the amount of lobola which he would pay, contradicts his denial. Counsel who appeared for the defendant, Ms Thyuthuza, who appeared during the trial and drafted heads of argument and Mr Botha who represented the defendant during argument, did not dispute that there was consent between the parties.

43. The issues in dispute are whether the requirements ins3(1)(b) of the Act – that the marriage must be negotiated and entered into or celebrated in accordance with customary law – have been complied with.

s3(1)(b)

The lobola letter/contract

44. It is not in dispute that the defendant's family went to the plaintiff's family on two occasions to negotiate lobola. On the second occasion R5000, 00 was paid by the defendant's

delegation. The issue is whether the R5000, 00 had been paid for lobola as contended by the plaintiff, or a cleansing ceremony as contended by the defendant.

45. In disavowing the lobola letter, much was made of the fact that Mr

L[...]’s initials (next to his signature) had been entered as S L whereas it would be SS for S[...] S[...] according to his identity document. The argument being that it is improbable that a person would get his own initials wrong. The other argument raised is that Mr L[...] would not have signed as his own witness, that is if one accepts that “Mr S[...]” refers to Mr L[...].

Mr S[...]

46. The letter however also makes provision for witnesses of “Mr M[...]” and the only Mr M[...] who was allegedly involved in the negotiations, according to Mr Makhele, was Mr J[...] M[...].

The question would then be – why would Mr J[...] M[...] sign as a witness for himself? The body of the letter also refers to the defendant as being the son of “S[...] R[...]” which is not the name of his father, Mr L[...].

Mr M[...]

S[...] R[...]

47. The lobola letter is definitely not perfect. But are the flaws

therein as a result of mere human error or because it is a forgery? Without the benefit of a handwriting expert to assist in determining the authority of the lobola letter and in light of the conflicting versions of the parties, I am left to consider and weigh the probabilities to determine which version is more probable.

Introduction

of plaintiff to defendant's family

48. On the defendant's own version, in the Sotho culture there are two ways in which marriage to a woman is initiated. The first is that the man sends his family to the women's family to negotiate the marriage. The second way is for the man to take the woman to his family home. While the woman is at his family home, his parents will go to the woman's parents to negotiate marriage. The woman will thereafter only be taken to her parental home to visit, accompanied by a male relative of the man, or when she is pregnant.
49. Despite the defendant's and his father's denial that he had taken the plaintiff to his parental home to introduce her as the woman he wanted to marry, the admitted facts tell a different story. The plaintiff was dressed in shweshwe, the traditional makoti (wife) dress, a sheep was slaughtered and welcoming celebrations were held. I find it improbable that such a welcome would have been given to someone who was merely introduced by the defendant as a person who's studies he was paying for.
50. The defendant's reluctance to admit that he had taken the plaintiff to his parental home to introduce her as the woman he intended marrying is astonishing given the fact that he had asked his father, during that same period and while visiting in Lesotho, to approach the plaintiff's family in order to negotiate marriage with the plaintiff. Within a month the first visit to the plaintiff's family took place. The senseless denial by both the defendant and Mr L[...] that the plaintiff was introduced to the defendant's family in preparation of lobola negotiations and marriage, does not hold any water.
51. The plaintiff had testified that she had been given the name of M[...] by Mr L[...] in December 2009 after the ceremony welcoming her into the defendant's family. The defendant denied any knowledge of this occurring, only that he and the plaintiff had decided on their firstborn's name together. Mr L[...]’s version that he had given the plaintiff her name after their first child was born and had been given a name by him, is not only contradictory to the defendant's evidence but also to his own version that the plaintiff was never accepted into their family. Support for the plaintiff's version that she was given a name before the birth of the first child is however found in an article written by Mthobeli Guma titled Guma, M.(2001) the Cultural Meaning of Names among Basotho of South Africa. A Historical Analysis, where the author states at 271, paragraph 4 thereof that:

Guma, M.

“Among Basotho, marriage gives both men and women a new status in society with concomitant rights and privileges (Ashton 1967). Added to this is the new relationship that incorporates both the couple and their families. Within this relationship, a new bride is usually given a teknonymous name so that the inlaws avoid addressing her or referring to her by her maiden name (Mohome 1972: 181). The husband is expected to call her by this name particularly among kin members or in public. Sometimes the name becomes permanent as her firstborn is usually given a name that will match her teknonymous name. If, for example, she is named M[...], her child, if it is a boy, may be named Tshepo (trust). For a girl the name is dropped for one that is suitable for a girl such as Tshepiso (promise). Since Basotho are a patrilineal society, the majority of teknonymous names given to new brides are based on boy's names.”

Among Basotho, marriage gives both men and women a new status in society with concomitant rights and privileges (Ashton 1967). Added to this is the new relationship that incorporates both the couple and their families. Within this relationship, a new bride is usually given a teknonymous name so that the inlaws avoid addressing her or referring to her by her maiden name (Mohome 1972: 181). The husband is expected to call her by this name particularly among kin members or in public. Sometimes the name becomes permanent as her firstborn is usually given a name that will match her teknonymous name. If, for example, she is named M[...], her child, if it is a boy, may be named Tshepo (trust). For a girl the name is dropped for one that is suitable for a girl such as Tshepiso (promise). Since Basotho are a patrilineal society, the majority of teknonymous names given to new brides are based on boy's names.”

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. For a girl the name is dropped for one that is suitable for a girl such as Tshepiso (promise). Since Basotho are a patrilineal society, the majority of teknonymous names given to new brides are based on boy's names.”

(own emphasis)

52. Teknonymy is the practice of referring to parents by the names of

their children. In my view the probabilities favour the plaintiff's version that her visit to Lesotho in November/December 2009 was to introduce her to the defendant's family as his future wife and she was accepted as such with the traditional celebrations and rituals.

53. Whilst it is so that the plaintiff did not stay behind in Lesotho

while the lobola negotiations were pending, as contended by the defendant she should have done according to their customs, that

factor in my view has been overtaken by the very fact that the defendant's family in any event still made arrangements for

lobola negotiations and by all appearances waived this particular requirement.

Payment for cleansing v lobola

54. As already intimated herein, the defendant and Mr L[...] did not make a good impression as witnesses. They were evasive, contradictory and intent on denying even the incontrovertible.

Mr Mbele made a better impression as a witness, but then his contribution to the defendant's case was limited. He did

however confirm the plaintiff's version that she and the defendant lived together in Colesberg at the time of the negotiations

and that Mr Makhele was part of the plaintiff's delegation at the negotiations.

55. On the other hand, both the plaintiff and her witness Mr Makhele made a good impression. They were subjected to lengthy cross-examination but were not budged. They denied that a cleansing ritual was part of the plaintiff's culture and Mr Makhele denied that this topic had ever been mentioned during the negotiations on 17 April 2010. Mr L [...], however testified that a cleansing after a miscarriage was an important part of his culture and that it had to be done before lobola negotiations could take place. Curiously though, after paying R5000, 00 for a cleansing ceremony, neither the defendant nor Mr L[...] knew whether in fact the cleansing ceremony had taken place or even enquired about

it afterwards. I find it highly unlikely that neither defendant nor Mr L[...] would not at least have enquired about the cleansing ceremony if that had been a prerequisite for the resumption of lobola negotiations.

56. In my view the probabilities favour the plaintiff's version in this respect, that lebola negotiations took place on 17 April 2010, and R5 000, 00 was paid by the defendant's family towards the lebola, as set out in the lobola letter. It would also explain why nothing further was done by the defendant and his family regarding lobola after that date.

Integration of the plaintiff into the defendant's family

57. The defendant and Mr L[...] testified that after 17 April 2010, there

were no rituals performed for the plaintiff as was their custom after marriage and that the plaintiff was therefore never accepted and integrated into the defendant's family. There was not much elaboration on the rituals which had to be performed except for the fact that the plaintiff would be taken to the defendant's home and that her hair would be shaved. These rituals and the rituals pertaining to the birth of a baby were not done. I must at this stage mention that it was never put to the plaintiff that these above-mentioned rituals were a requirement for a valid customary marriage.

58. But be that as it may, it was never in dispute that there was no

formal handing over of the plaintiff after the lobola negotiations. In argument for the defendant, I was referred to the matters of *Fanti v Boto and Others* 2008 (5) SA 405(C) and *Rasello v Chali and Others* [2013] SAFSHC 182 (24 October 2013) in support of the contention that the payment of lobola alone, absent the other essential requirements, does not render a relationship a valid customary marriage.

Fanti v Boto and Others

2008 (5) SA 405

Rasello v Chali and Others

59. In *Fanti* it was held at paragraph 22 thereof that:

“[22] From the Applicant’s own papers it is abundantly clear that there was no handing over of the bride to the Applicant and/or the latter’s family. All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly 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 ritual and ceremonies involving both families. See: Customary Law in Southern Africa (5th edition) by Seymour revised by Bekker; Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes (derde uitgawe) by Olivier.”

[22] From the Applicant’s own papers it is abundantly clear that there was no handing over of the bride to the Applicant and/or the latter’s family. All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly 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 ritual and ceremonies involving both families. See: Customary Law in Southern Africa (5th edition) by Seymour revised by Bekker; Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes (derde uitgawe) by Olivier.”

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Customary Law in Southern Africa

edition) by

Seymor

revised by

Bekker

Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes

(derde uitgawe) by

Olivier

60. In *Raselli* the court stated the following at paragraph 18 thereof:

Raselli

“[18] On the appellant’s own version, there is no way that the ceremony alluded to by the appellant, having occurred before payment of lobola, could have equated to the ceremony of delivery of the bride. Significantly, the appellant made no reference whatsoever to her own family’s involvement in the ceremony she referred to. Although the Recognition of Customary Marriages Act does not include transfer of the bride in the requirements for a valid customary marriage, I accept that this, being an old Sesotho custom

that is still widely recognized, it is a custom contemplated in section 3(6) of that Act and is thus an essential requirement for validity of a customary marriage. It was so accepted by the court in the case

of *Fanti v Boto* (supra) on the basis of many authorities. Delivery of the bride entails that the bride will be accompanied to the groom’s family by her own delegation, which will then formally hand her over to the groom’s family. Olivier, Bekker et al in their work *Indigenous Law* describe delivery of the bride as “the transfer of the bride by her family group to the family of the man”.

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Fanti v Boto

(supra) on the basis of many authorities. Delivery of the bride entails that the bride will be accompanied to the groom's family by her own delegation, which will then formally hand her over to the groom's family. Olivier, Bekker et al in their work Indigenous Law describe delivery of the bride as "the transfer of the bride by her family group to the family of the man".

61. What counsel for the defendant has not borne in mind is the changing

nature of customary law. In *Maropane v Southon* (755/2012)[2014] ZASCA 76 (29 May 2014), the Supreme Court of Appeal held at paragraph 36 thereof that:

Maropane v Southon

[2014] ZASCA 76

"Furthermore African Law and its customs are not static but dynamic. They develop and change along with the society in which they are practised.";

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and at paragraph 153:

"The evolving nature of indigenous law

The evolving nature of indigenous law

[153] Indigenous law is dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates. It is not a fixed body of classified rules. As we pointed out in *Alexkor*:

"In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution".' "

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62. Moreover in *Mbungela and Another v Mkabi and Others* 2020(1) SA 41 (SCA), the SCA, dealing specifically with the ritual of bridal transfer, debunked the view that if one particular ritual has not been observed there could be no valid customary marriage. At paragraphs 26 – 29, the SCA states as follows:

Mbungela and Another v Mkabi and Others

“[26] No objection at all was raised here. Instead, there is overwhelming evidence that the families, including the deceased’s

‘guardian’, considered the couple as husband and wife for all intents and purposes. The evidence ineluctably leads to the conclusion that the bridal transfer ritual was waived. This finding, in my opinion, does not offend the spirit, purport and objects of the Bill of Rights and recognises the living law truly observed by the parties and the actual demands of contemporary society.

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- [27] The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of s 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results.

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- [28] Thus, for example, a woman could consent to a customary marriage, followed by payment of lobola, after which she cohabited, built a home with her suitor, and bore him children, with the full knowledge of his family. When the man died, she and those children could be rejected and disinherited by his family simply on the basis she was not handed over or properly introduced to his family and was therefore not his lawful wife and that the children were illegitimate. Needless to say, that consequence would be incongruous

with customary law’s inherent flexibility and pragmatism which allows even the possibility of compromise settlements among affected parties (contemplated in cases such as *Bhe*), in order to safeguard protected rights, avoid unfair discrimination and the violation of the dignity of the affected individuals.

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in order to safeguard protected rights, avoid unfair discrimination and the violation of the dignity of the affected individuals.

[29] Professor Bennett argues in *Customary Law in South Africa*, that the bridal transfer ceremony should be treated as an optional element of a customary marriage, which the parties would be free to observe if they chose to celebrate their marriage according to a particular tradition. He places reliance for this view on a suggestion made by the South African Law Commission's Special Project Committee on Customary Law in its Report on Customary Marriages, which considered the effect of wedding ceremonies and transferring the bride, and found that the variations in local practice and the ambiguities inherent in them suggested that neither should be deemed essential for the creation of a customary marriage. This opinion, to my mind, is not constitutionally reprehensible or repugnant to 'living' customary law of marriage as actually practised by the continuously evolving society, as the Law Commission itself clearly determined. Its recognition would constitute a development of the system and protect the interests of vulnerable affected parties, in the appropriate case, in accordance with the spirit, purport and objects of the Constitution."

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63. In casu, the plaintiff had been welcomed into the defendant's family with certain rituals and celebrations even before the lobola had been negotiated. The father of the defendant had given her a name as well as that of the parties' firstborn. The parties had lived together since before the lobola was paid and continued to do so for a further 5 years. In that time they had two children together with the full knowledge of both sets of families. The plaintiff visited the defendant's family in Lesotho on numerous occasions after the lobola was paid, even to attend the funeral of a family member of the defendant.

There can be no doubt in my view that the plaintiff had been integrated into the family of the defendant. As far as the absence of the formal handing over of the plaintiff is concerned I align myself with the view as expressed in *C v P* (1009/2016) [2017] ZAFSHC 57 (6 April 2017), at paragraph 52 thereof, that even if:

In casu,

[2017] ZAFSHC 57

“... it is accepted that there was no handing over due to the fact that the plaintiff was not formally accompanied and delivered by her family to the defendant's parental home, it would still be my finding that since the plaintiff and the defendant were living together after lobola was paid, “constructive delivery” is present.”

... it is accepted that there was no handing over due to the fact that the plaintiff was not formally accompanied and delivered by her family to the defendant's parental home, it would still be my finding that since the plaintiff and the defendant were living together after lobola was paid, “constructive delivery” is present.”

64. In conclusion, the fact that the plaintiff laboured under the impression that the customary marriage had not been completed because the full lobola had not yet been paid takes the matter no further

for the defendant (see *C v Psupraat* paragraphs 37 and 38). I am satisfied that all the requirements for a valid customary marriage have been complied with.

65. There is no reason why costs should not follow the result.

In the circumstances the following order is made.

a) A valid customary marriage was concluded between the parties.

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b) The defendant is to pay the costs of the action.

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CC WILLIAMS

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