REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

CASE NO: 2018/59387

In the matter between:

F[….] C[….] **Applicant**

and

B[….] M[….] **1st Respondent**
MINISTER OF THE DEPARTMENT OF HOME AFFAIRS **2nd Respondent**

JUDGMENT

MOKOSE J

[1] The applicant approached this court for an order in the following terms:

(i) that it is hereby declared that a customary marriage exists between the applicant and Benedict Modise (the first respondent);

(ii) that the late registration of the customary marriage between the applicant and the first respondent be and is hereby condoned;

(iii) that the Minister of the Department of Home Affairs (second respondent) be and is hereby ordered and directed to register the

marriage referred to in paragraph 1 above, in terms of the provisions of Section 4(7) of the Recognition of Customary Marriages Act 120 of 1998;

(iv) that the second respondent be and is hereby ordered and directed to issue the applicant with a marriage certificate.

[2] The application is strenuously opposed by the first respondent on the grounds that no valid marriage had been concluded between the parties due to an essential requirement in terms of the Recognition of Customary Law Marriages Act 1998 not having been met. The Minister of Home Affairs (the second respondent) has not indicated his opposition to the application and has not filed a notice to abide by the decision of the court.

[3] At the commencement of the matter, argument for a point *in limine* was submitted by counsel for the first respondent that there was a dispute of fact in the matter. It was noted that there were no further averments in the affidavit pertaining to that and the court dismissed the point *in limine.*

[4] For a proper understanding of the dispute, it is essential that the full background facts are set out. It is common cause that the applicant and first respondent met during November 2005 and engaged in an intimate relationship. They then cohabited from January 2006 at such time that the applicant moved into the first respondent's house in Lebanon, Mabopane. The applicant gave birth to a son on 13 July 2007. During February 2007 the first respondent asked for the applicant's hand in marriage and in a letter addressed to the applicant's parents, indicated that they would visit her home to negotiate lobola.

[5] The first respondent's family sent emissaries to the applicant's home at which time lobola was negotiated and paid for the applicant in the sum of R10 000 on 24 February 2007. Lunch was served after the payment of lobola and later that day, the representatives of the Modise family left.

[6] The applicant avers that on the day that the lobola was paid to her family, she was taken to the first respondent's house by her elder sister. Ordinarily, a bride would go her mother-in-law's house but as the first respondent's parents were never married and his mother was married to someone other than the first

respondent's natural father, this was not possible. It was then agreed by her family and the first respondent's maternal uncle that she would be taken to the first respondent's house where she had been cohabiting. It was averred further that the first respondent had been brought up by his maternal uncle and strictly speaking, his uncle's house was not his home although he may have been brought up there.

[7] On her arrival at the house, the applicant found that her mother-in-law had already left and returned to her home. Her sister announced to the first respondent's maternal uncle that she had brought the 'makoti' (the bride). The maternal uncle was delighted and welcomed the applicant. The applicant's sister left and the applicant continued living with the first respondent at his home. From that time, she regarded herself as the first respondent's **wife.**

[8] The relationship between the parties became strained and on 1 April 2014, the applicant left the matrimonial home. The applicant informed the first respondent that she intended to file for divorce but needed the customary marriage to be registered. The first respondent refused to accompany the applicant to the offices of the Department of Home Affairs for the purpose of registering the customary marriage. The first respondent denied that there was ever a 'handing-over' of the applicant as the families had not agreed to any formalities. He averred further that the applicant's return to his house where they had cohabited prior to the lobola negotiations did not culminate in a 'handing-over' of the bride and therefore the conclusion of a customary law marriage. In particular, the applicant was not coached (go laya) nor was she handed over (go gorosa) in the seTswana tradition.

[9] The issue to be determined by this court is whether there existed a valid customary marriage between the applicant and the first respondent.

[10] Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 ("the Recognition Act") provides as follows:

"3(1) For acustomary 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;

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

[11] Section 4 provides that failure to register a customary marriage does not affect the validity of that marriage.

[12] Customary law is defined in the Recognition Act as *'customs and* usages *traditionally observed among indigenous African peoples of South Africa and which form part of the cultures* of *those peoples'.* A customary marriage is defined as 'a *marriage concluded in accordance with customary law'.* The Act stipulates that the marriage must be negotiated and entered into or celebrated in accordance with customary law. The legislature did not consider it necessary to define 'celebration in accordance with customary law'. This is understandable as customary law is as diverse as the number of different ethnic groups as we have in this country. It is further compounded by the fact that there are many sources of customary law in existence. It is also accepted that African law and custom are not static but dynamic.[1] They develop and change along with the society in which they are practised.

[13] It follows that it would be well-nigh impossible and undesirable to attempt an exhaustive and inclusive definition *pf* a customary law marriage followed by a particular ethnic group. How then does a court determine the current customary law applicable to a particular case? The first two requirements of a customary law marriage being that both parties must be over the age of 18 and that they must consent to the marriage are clear in their interpretation. However, the requirement that the marriage must be negotiated and entered into or celebrated in accordance with customary law is vague as it does not specify the actual requirements of a customary law marriage. As such, a factual determination has to be made to ascertain whether the requirements have in fact been complied with.

[14] This issue was identified in the matter of **Bhe v Magistrate, Khayelitsha** (supra) where Ngcobo J (as he then was) in a dissenting judgment identified

[1] Bhe v Magistrate, Khayelitsa 2005 (1) SA 580 (C)

three ways in which customary law can be established. This is by:

(i) taking judicial notice where it can be readily ascertained with sufficient certainty;

(ii) where it cannot be readily ascertained, expert evidence may be adduced to establish it; and

(iii) having recourse to text books and case law.

[15] Ngcobo J remarked in the Bhe matter (supra) that in ascertaining customary law, caution should be exercised when relying on case Jaw and text books. The same cautious approach was spelled out as follows in the case of **Alexcor Limited and Another v The Richtersveld Community & Others**[2] where the court held as follows:

"Although a number of textbooks exist and there is a reasonable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed in the courts and by the administration(which, he points out, diverges most markedly from actual social practice); the law used by academics forteaching purposes; and the law actually lived by the people."

[16] Reverting to the facts of the matter on hand, the first respondent avers that there is no valid customary marriage without the 'handing-over' ceremony of the bride. The first respondent places much emphasis on the handing over ceremony. It was however held in the case of **Motsoatsoa v Roro & Another**[3] that lobola or the 'handing-over' to the bridegroom's family will form evidentiary material to prove the existence of a marriage.

---

[2] 2004 (5) SA 460 (CC) at **para** (51)

[17] In a similar case of **Maluleke & Others v the Minister of Home Affairs and Others**[4] the court referred to Seymours Customary Law in Southern Africa 5111 edition by Bekker CJ in which he describes the integration of a bride into the bridegroom's family. While he suggests that there is no marriage until there is a form of integration of the bride into the bridegroom's family, he concedes that it may take the form of a mere agreement by both families that the bride be integrated into or regarded as part of the bridegroom's family without the holding of any celebration or feast or ritual.

[18] The first respondent, in his answering affidavit admits that negotiations were held and lobola in the sum of R10 000 was paid to the applicant's family. He also does not deny the allegation by the applicant that there were difficulties about her being brought to the matrimonial home and formally 'handed over'. However, he denies that the families agreed on the formalities and the date upon which the applicant would be 'handed- over'. As such, he is of the view that no marriage was concluded in terms of customary law between the parties due to the fact that certain seTswana customs were not followed and mentions in particular 'gogorosa" and "go laya". The first respondent has failed to explain what those customs are, he further fails to explain by who and how these customs would be performed.

[19] The court also notes that the first respondent fails to dispute the allegations of the applicant that he noted that she is his 'spouse' on an application for insurance. Furthermore, he made a statement under oath in which he confirmed that the applicant was his **'wife'.** His explanations as to why he described her as such are implausible especially in light of the fact that they were made under oath.

[20] Accordingly, I am of the view that the first respondent has failed to contradict the evidence of the applicant that a customary marriage was concluded. The evidence as alleged points to the requirements of a valid customary marriage having been concluded and as such, I am satisfied that the parties were indeed married by customary law. Furthermore, it appears that the two families had agreed to do **away** with formalities pertaining to 'handing over' of the applicant as she was taken to the first respondent's home with the approval of

---

[3] **(2011) 2** All **SA 324** (GSJ) **at para 18**

the maternal uncle.

[21] The first respondent has requested the court to grant costs on a punitive scale. He has failed to give reasons for costs to be awarded on such a scale. The normal rule pertaining to an award of costs is that costs should follow the result. The court may, in certain circumstances award punitive costs to show its displeasure for the way the litigation was conducted. This is not a matter in which the court needs to show its displeasure at the way the matter has been handled by the parties.

[22] Accordingly, the following order is made:

(i) It is hereby declared that a customary marriage has been concluded between the applicant and the first respondent:

(ii) the late registration of the customary marriage between the applicant and the first respondent is hereby condoned;

(iii) the second respondent be and is hereby ordered and directed to register the marriage referred to in clause (i) above in terms of the provisions of Section 4(7) of the Recognition of Customary Marriages Act 120 of 1998;

(iv) the second respondent is hereby ordered to issue the applicant with a marriage certificate;

(v) the first respondent is ordered to pay the costs.

MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

For the Applicant:

[4] **(02/24921) (2008) ZAGPHC** 129 (9 **April 2008) at para 10**

Adv M D Mohlamonyane

instructed by

AM Vilakazi Tau Attorneys (Pretoria)

For the Defendant:
Adv (Dr) V Peach
instructed by

TS Mnisi Attorneys

Date of Hearing:	**6 August 2019**
Date of Judgement:	**16 August 2019**