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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

Case No: CA04/2020

Case No. 6254/2018

REPORTABLE

In the matter between:

F[…] M[…]	Appellant
And	
N[…] R[…]	First Respondent
M[….] K[…]	Second Respondent
T[…] R[…]	Third Respondent
V[…] R[…]	Fourth Respondent

K[…] R[…] Fifth Respondent

THE MINISTER OF HOME AFFAIRS Sixth Respondent

THE MASTER OF THE HIGH COURT Seventh Respondent

JUDGMENT

TOKOTA J:

[1] The appellant approached the court *a quo* seeking an order declaring that her customary marriage which was contracted on 26 January 2012 between herself and the deceased, V[…] S[…] R[…], was, in terms of the customary law, a valid customary marriage. She also sought consequential relief directing the sixth respondent to register and issue a certificate in respect of such marriage; further she sought an order that the first respondent disclose any funds collected by her in her capacity as the representative of the estate of the late V[…] S[…] R[…]. The main issue on this appeal is whether customary marriage can be valid in the absence of the handing over of the bride by her family to the bridegroom's family. The court *a quo* held that the handing over of the bride is a requirement for the validity of a customary marriage. It held that in *casu* no handing over was made and consequently the marriage was invalid. The appeal is with leave of that court. The

first to the fifth respondents filed a notice to oppose the application and the sixth to the seventh respondents did not participate in the proceedings.

[2] The material facts are to a large extent common cause. During 2011 the appellant and the late V[…] S[…] R[…] (the deceased), who died on 1 March 2018, agreed to get married by customary law. On 17 December 2011 a delegation of men from the deceased's family were sent as emissaries to the family of the appellant to seek consent of the appellant's family to the marriage of the deceased and appellant and to negotiate lobola accordingly. This delegation was welcome and accepted by the bride's family. The two families agreed that the lobola would be calculated as follows:

2.1 Nine cows valued at R4 000.00 each;

2.2 One cow called imvulamlomo/ubusobentombi valued at R4 500.00; and

2.3 A horse inclusive of a saddle valued at R10 000.00

[3] The total amount of lobola, excluding the horse with a saddle, was paid in full on the same day of lobola negotiations. It was agreed that the delivery of the horse would follow later. Appellant alleges, and is supported by Mr N[…] G[…], that on 10 January 2012 the horse was delivered by the deceased accompanied by his best friend, one N[…] G[…], to her family. The initial men who had acted as emissaries deny the delivery of the horse. In my view nothing turns on this.

[4] On 26 January 2012 a ritual for the appellant called *utsiki* was performed at the deceased's home. This is usually a welcoming ceremony for the bride at her marital home. It is the beginning of the consummation of the marriage where the bride is given a new name which her in-laws will use in addressing her. The appellant was given a name of Olulutho. This name was suggested by her sister-in-law one O[…] R[…]. She was fed with *isiphanga* and was given a bile juice to symbolize that she was welcome by her marital ancestors.

[5] After the conclusion of the customary ritual by way of *utsiki* the deceased and appellant went to stay together as man and wife at their property situated at 6 T[…] S[…] Street, Northcrest, Mthatha. Appellant was well received by the R[…] family. Although they were staying at Northcrest they frequently visited their family home at Payne, the home of the deceased. At her marital home she attended to household necessities including buying groceries; she attended family gatherings, funerals and other family events.

[6] The marriage between the parties started to disintegrate during 2014 when the appellant discovered that the deceased was involved in an extra-marital affair with one N[…] K[…] who was working at King Sabatha Dalindyebo Municipality where the deceased was also employed. The appellant duly reported this conduct to her marital family. During October 2014 a family meeting was held at the home of the deceased to try and resolve the problem. The deceased did not deny the allegations but undertook to desist from continuing with the affair.

Despite his undertaking to do so, the deceased continued with the extra-marital affair.

[7] From mid-January 2015 the deceased left the common home at Northcrest and went to live at Payne with his mother. A further family meeting was held during the Easter Holiday in 2015 to address the conduct of the deceased. This meeting too did not yield any positive results as the deceased continued with his extra-marital affairs.

[8] During 2016 the deceased's health deteriorated. He started abusing drugs and alcohol related substances which psychologically affected him. He was admitted in and out of St. Marks Rehabilitation Centre, East London. In 2017 his health condition got worse and he could not even walk properly. He was again admitted at St Mary's Hospital, Mthatha. In August 2017 he was taken to Cape Town hospital by his sister. He returned in November 2017. His health never improved. In January 2018 he was admitted in hospital and he passed away on1 March 2018.

[9] Appellant was not involved in the preparations for the funeral but she was in attendance when the deceased was buried.

[10] During July 2018 the appellant approached the seventh respondent and requested a letter of appointment as the deceased's estate Executrix. She was asked to produce a marriage certificate. She informed the seventh respondent that

their marriage was never registered. She was informed that in order for her to be appointed she should bring a marriage certificate. She then approached the sixth respondent seeking the registration of the marriage in terms of section 4 of the Recognition of Customary Marriages Act No. 120 of 1998 (the Act). She could not succeed as she could not obtain affidavits from the emissaries on her marital side to confirm the existence of the marriage.

[11] The deceased was a member of the National Fund for Municipal Workers. When appellant approached the fund to claim the deceased's pension fund she was advised that the first respondent had already lodged a claim stating that the deceased was not married at the time of his demise. She was advised by the fund that a portion of the money had been paid to the first respondent.

[12] The application in the court *a quo* was triggered by this problem of the appellant not being able to claim what she considered to be her rights as a married woman to the deceased by customary law.

[13] The issue in this appeal is whether the handing over of the bride to the bridegroom's family is a prerequisite to a valid customary marriage in terms of section 3 of the Act. Therefore the issue relates to the interpretation of section 3(1)(b) of the Act. The relevant portion of section 3 reads thus:

"3 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."

It is common cause that both the appellant and the deceased were above the age of 18 years and had consented to be married to each other under customary law. Therefore there is no issue about the jurisdictional factors in section 3(1)(a) of the Act.

[14] The parties seem to agree that the interpretation of section 3(1)(b) revolves around the handing over of the bride by her family to the bridegroom's family. The appellant contends that the ceremony of welcoming the bride by slaughtering *utsiki* lamb and giving her the marital name at her marital home constituted the handing over of the bride. Consequently, the appellant contends that the handing over was complied with on 26 January 2012.

[15] The respondents contend that for a valid customary marriage section 3(1)(b) requires the handing over of the bride by her family to the bridegroom's family. They contend that in *casu* there was no handing over of the bride. They further contend that appellant has failed to file the necessary confirmatory affidavits confirming the handing over. They submit that handing over involves the two families and in the

absence of the appellant's family at the *utsiki* ceremony there was no handing over. Consequently, so the argument ran, there was no valid customary marriage. As will be shown later in this judgment I see things differently.

[16] Before dealing with the above parties' contentions it is perhaps apposite to deal with preliminary points raised by the respondents. Firstly, the respondents in this, and the court *a quo*, contended that the appellant failed to deal with the handing over of the appellant by her family in the founding affidavit but only dealt with the aspect tersely in the replying affidavit. Secondly, the respondents further take issue with the fact that the appellant was engaged with another man shortly before the deceased died. They contend that she has failed to adequately deal with that issue as well. They make a point that the engagement of the appellant to another man signified acquiescence that she was never legally married to the deceased.

[17] The court *a quo* dealt with these issues and in a way agreed with the respondents. In my view with regard to the first issue if the respondents wanted to make issue in this regard, they should have used a Rule 30 procedure or, request from the court leave to file further affidavits to deal with the new point. This was not done.

[18] The court *a quo* dealt with the first point as follows:

"[21] It needs to be emphasized, even at the risk of being repetitive, that in the founding affidavit where the applicant's case ought to be made, there was no mention of the applicant being handed over. When this issue was raised in the answering affidavit the applicant suddenly brought some facts in the replying affidavit

the import of which is to suggest that a handing over was done. Even then the applicant skirts around the issue and the affidavit is bereft of all the essential averments on aspects as basic as by whom from her family she was handed her over to her in-laws. She belatedly creates the impression that what she had described as utsiki ritual in the founding affidavit was in fact a handing over ceremony. The respondents pointed out that the utsiki ritual was not a handing over occasion."

Save for what is referred to above, it does not appear from the judgment that the court *a quo* made any ruling in this regard.

[19] It is now a well-established rule in our law that the notice of motion and founding affidavit, together with its annexures, constitute pleadings and evidence in support of the relief sought. Therefore, in the founding affidavit, the applicant must set out sufficient facts disclosing the cause of action relied upon for the relief sought.[1] Basically in application proceedings facts necessary to prove a claim must appear in the founding affidavit and its supporting documents — hence the principle that an applicant must stand or fall by its founding papers and the facts alleged in it.[2]

[20] However, the rule of practice that an applicant must, generally speaking, stand or fall by his founding papers, is not one cast in stone, but has been relaxed from time to time. This is because of the existence of a judicial discretion to permit the filing of further affidavits to enable the court to adjudicate on the matter upon all

[1] *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) para 23; and *Louw and Others v Nel* 2011 (2) SA 172 (SCA) para 17; *MEC for Education, GP v Governing Body, Rivonia Primary School* 2013 (6) SA 582 (CC) (2013 (12) BCLR 1365; [2013] ZACC 34) para.93

[2] *Brayton Carlswald (Pty) Ltd and Another v Brews* 2017 (5) SA 498 (SCA) para.29; *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) (2011 (3) BCLR 264; [2010] ZACC 23) para 29; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 29 – 30.

the relevant facts to the issues in dispute.[3]The rule has been applied in many cases, but it is not a law of the Medes and Persians. In exceptional circumstances, a court may allow the applicant to supplement in reply to the allegations in the founding affidavit.

[21] Therefore a court still has a discretion to allow the applicant to supplement new facts and, if necessary, allow the opponent an opportunity to file further affidavits to deal with the new matter.

[22] Where the point is taken the court can also strike out the new matter especially if the other party will suffer prejudice as a result thereof. However, in my view the question of handing over was not raised for the first time in the replying affidavit. It was always the appellant's case that the negotiation and payment of lobola, the ceremony of welcoming her at her marital home constituted a handing over. In the replying affidavit she merely repeated this contention.[4]However in the light of the view I take of this matter it is not necessary to delve further into this issue. Suffice it to say that even if the appellant was precluded from dealing with the issue of handing over for the first time in the replying affidavit it would make no difference to the outcome of this matter.

[23] The second point was the engagement of the appellant with another man during the subsistence of her customary marriage with the deceased. I have

[3] See Rule 6(5)(e) of the Uniform Rules of Court
[4] Paragraph 17.1 p.99

reservations with the manner in which this evidence was presented in the court *a quo*. Much of it constituted hearsay evidence. However, for purposes of this judgment I will accept that the appellant was engaged to another man. Be that as it may, in my view whether or not the appellant was engaged to another man during the subsistence of their marriage with the deceased, this did not affect the validity of their customary marriage. Any subsequent marriage by the appellant, prior to the dissolution of her customary marriage to the deceased, would have been void. During the subsistence of her customary marriage she would have been incapable of contracting another marriage. In terms of section 8 of the Act a customary marriage may only "*be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage*."[5] Consequently in my opinion such engagement was of no consequence to the validity of her customary marriage to the deceased.

[24] Having disposed of the preliminary points I now turn to the issue for determination. Before dealing with section 3(1)(b) of the Act it is perhaps expedient to briefly refer to the requirements of a valid customary union before the Act came into effect.

[25] The requirements for a valid customary union varied from area to area in accordance with customs and usages of the particular tribe. The general requirements were:

[5]See also *Netshituka v Netshituka* 2011 (5) SA 453 (SCA) ([2011] ZASCA 120) para. 15; *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T). Para.32;
Monyepao v Ledwaba and Others (Case no 1368/18) [2020] ZASCA 54 (27 May 2020) para.19

(i) Consent of the bride's guardian

(ii). Consent of the bride;

(iii). consent of the bride's groom;

(iv). Payment of lobola, Bogadi, ikhazi; and

(v). Handing over of the bride to the bridegroom.[6]

[26] On the issue of handing over of the bride this did not need to be a formal ceremony. Upon delivery of the lobola cattle the subsequent movement of the bride to the bridegroom's homestead consummated the marriage. The physical consummation was not necessary so long as the bride had been sent to the homestead where the bridegroom lives as his wife even if the bridegroom was away at labour centres at the time.[7]

[27] Then in 1998 Parliament enacted the present Act in order to harmonise the marriage institutions without undermining customs and usages of Black people. In the preamble of the Act its purpose was to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution thereof.

[6] Seymour's Customary Law in Southern Africa: Bekker and Coertze 4th ed. p.106
[77] Seymour's Customary Law in Southern Africa: Bekker and Coertze 4th ed. P.109

[28] In the light of the Constitution and the preamble of the Act in my view the interpretation of section 3 should accord with the spirit and purport of the Constitution. In the past, customary union was discriminatory in its nature and afforded no equal opportunities for both parties to it. The woman was always in an inferior position than her husband. The interpretation of the section must therefore reflect the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, imbalances and indignity within the discipline of our constitutional framework.

[29] Therefore a purposive interpretation of the section will be in line with the spirit and purport of the Constitution to give effect to democratic values of our society. The preamble of the Constitution aims at healing the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights;

[30] At the risk of repetition, section 3(1)(b) provides "*the marriage must be negotiated and entered into or celebrated in accordance with customary law."* The sub-section does not expressly provide for the handing over of the bride by her family to the family of the bridegroom. It requires negotiations between the two families and consummation of the marriage or celebration thereof. The requirement of handing over was a customary law requirement before the coming into effect of the Act as alluded to in paragraph 25 above.

[31] Section 3 of the Act has been the subject of judicial consideration.

For the contention that if there is no handing over of the bride there is no valid customary marriage the respondents relied on the case **DRM v DMK [2017/2016] [2018] ZALMPPHC 62 (7 November 2018).** Quite properly, they have also referred to two Supreme Court of Appeal decisions which are against them and have endeavoured to distinguish them from **DRM** case.[8]

[32] The decisions that predate the Supreme Court of Appeal judgments alluded to above are to the effect that the handing over of the bride to the bridegroom's family is a precondition to the existence of customary marriage.[9] The current legal position is that the handing over of the bride, though important, is not a key determinant factor of a valid customary marriage.[10]

[33] In **Mbungela and Another v Mkabi and Others 2020 (1) SA 41 (SCA**) para.27 Maya P stated thus:

"[*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, could yield untenable results."*

[8] *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA);

Tsambo v Sengadi (244/19) [2020] ZASCA 46 (30 April 2020)

[9] In *Motsoatsoa v Roro and Another*2010] ZAGPJHC 122; [2011] 2 All SA 324 (GSJ) court stated that the bride is invariably handed over to the bridegroom's family at the husband's family's residence and this was cited with approval in *Mxiki v Mbata*, In re: *Mbata v Department of Home Affairs and Others* [2014] ZAGPPHC 825, where the court found that there can be no valid customary marriage until the bride has been formally and officially handed over to her bridegroom's family.

[10] *Mbungela* at para.30 Footnote 6 above

Therefore the rule that handing over is a prerequisite to a valid customary marriage is slowly fading away.

[34] Customary law cannot be stagnant in a dynamic changing society. It is a system of law that is practised in the various communities, particularly Black communities, which have their own values and norms. It is practised from generation to generation and evolves and develops to meet the changing needs of the community and will continue to evolve within the context of its values and norms consistently with the Constitution.[11]

[35] Where the parties have consented to the customary marriage and agreement has been reached at the negotiation stage by the two families for the beginning of such marriage, the handing over of the bride becomes superfluous. The bride is not like goods that need to be delivered to the marital home. The reading of section 3(1)(b) suggests that it is sufficient if the marriage is 'negotiated and entered into or celebrated' in accordance with customary law.

[36] Where there is an agreement, at the lobola negotiation stage, for the acceptance of the proposed customary marriage, a contract of marriage relationship is entered into between the two families. In some communities this is signified by the slaughtering of lamb to welcome the new in-laws (*abakhozi*) after a certain number of lobola cattle agreed upon have been delivered or in the case of money after a

[11] *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) (2003 (12) BCLR 1301; [2003] ZACC 18):para.53

certain amount of money has been paid. The celebration thereof is optional. In any event the slaughtering of *utsiki* lamb at the bridegroom's homestead is in itself a celebration of the marriage. In this way the requirements of section 3(1)(b) of the Act are satisfied.

[37] In my opinion there is a further reason why the handing over of the bride cannot be a precondition for a valid customary marriage under the Act. Under customary law the consent by both the bride and the bridegroom to be married according to customary law is not enough. There must also be an agreement to pay lobola to the family of the bride. Section 3(1)(b) is aimed at that agreement. That is precisely why the section refers to "*negotiated and entered into...in accordance with customary law."* The payment of lobola is only done in accordance with customary law. The maximum and minimum number of cattle to be paid as lobola is negotiated with the bride's family. The practise is that the two families negotiate and the agreement is reached about the number of cattle to be paid as lobola. Payment thereof is then made either to a certain number of cattle or in full. Once this is done customary marriage is entered into in accordance with customary law.

[38] On the facts of this case the appellant was recognised as a wife of the deceased at her marital home. Prior to the disintegration of their marriage she was always welcome and she attended all family events of her husband's home. Even when the marriage started to break down the respondents' family endeavoured to assist her to repair it. In the circumstances I conclude therefore that a valid

customary marriage was entered into between the deceased and the appellant in accordance with customary law as envisaged in section 3 of the Act.

[39] Lest it be said that the decision to declare the marriage valid, in the face of an engagement in another marriage by the appellant, is unreasonable and unfair and that the appellant came back merely to claim monies from the estate of the deceased, it suffices to refer to **Potgieter v Potgieter NO 2012 (1) SA 637 (SCA) ([2011] ZASCA 181) para. 34;**

where Brand JA stated:

"In addition, the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in Preller and Others v Jordaan 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge. (See also Brisley para 24; Bredenkamp para 38; PM Nienaber 'Regtersen en Juriste' 2000 TSAR 190 at 193; JJF Hefer 'Billikheid in die Kontraktereg volgens die Suid-Afrikaanse Regskommissie' 2000 TSAR 143.)."[12]

[40] In the circumstances I conclude that the customary marriage that existed between the deceased and appellant was dissolved by the death of her husband. Accordingly the appeal must succeed.

[12]See also *Trustees, Oregon Trust v Beadica* 231 CC 2019 (4) SA 517 (SCA) ([2019] ZASCA 23) para.24

[41] Once a conclusion is reached that there was a valid customary marriage it follows that the ancillary relief sought against the sixth and seventh respondent must now be considered.

[42] One of the prayers in the notice of motion is that an order should be made directing the first respondent to disclose all funds collected by her as a representative of the late **V[…] S[…] R[…]** and to pay such funds collected from any institution or individual into the trust banking account of the appellant's attorneys.

[43] No evidence in support of this prayer was adduced. There is no evidence that the first respondent had been appointed as the Executrix of the estate of the late V[…] S[…] R[…]. The only evidence available was that of the first respondent who disclosed that she claimed from the insurance policies in order to prepare for the funeral. That was reasonable to do so as the deceased deserved a decent funeral.

[44] It cannot be expected of the first respondent to foot the bill of her son's funeral expenses when there are insurance policies to cater for that. The appellant was not there for the deceased and does not explain why she was not involved in the preparations for the funeral. She states that the first respondent could not get letters of appointment as a representative of the estate because she (the appellant) had already reported the estate.

[45] The insurance claim by the first respondent was not fully canvassed in the papers. We can only speculate that since she had no appointment letters from the seventh respondent it is possible that she was the beneficiary. Generally the only person who can have access to the policies of the deceased must either have letters of Executorship or be a beneficiary. Consequently I cannot see my way clear to accede to this prayer. However, I see no reason why further prayers, except the costs, should not be granted.

[46] The general rule is that costs should follow the event. However, the award of costs is in the discretion of the court which must be exercised judiciously with due regard to equity and justice. The appellant sought costs on a punitive scale as between attorney and client. In my view the conduct of the first respondent was not unreasonable and reprehensible in defending the appeal. Awarding costs on a punitive scale is made to mark displeasure about a party's conduct. "*Factors that constitute the basis for that displeasure must be made clear and must justify the devastating consequences of that displeasure. For, it is a very serious decision with far-reaching financial, occupational and jurisprudential implications that must therefore be properly substantiated."*[13]

[47] The appellant had not shown that she had an interest in her ailing husband after the breakdown of their marriage. Instead, it appears that she moved on in her life. My view therefore is that a just and equitable order with regard to costs would be to direct that each of the parties bear their own costs.

[13]Public Protector v SA Reserve Bank 2019 (6) SA 253 (CC) para.100

[48] In the result the following order will issue:

1. **The appeal is upheld;**

2. **The order of the court *a quo* is set aside and replaced with the following:**

(i) It is hereby declared that the customary marriage which was contracted between the appellant and the late V[…] S[…] R[…] Id. No.850[…] who died on 1 March 2018 was valid in terms of the Recognition of Customary Marriages Act No. 120 of 1998;

(ii) The sixth respondent's is directed, through his department, to register and endorse in the departmental records the customary marriage between the applicant and the late V[…] S[…] R[…] Id.No.850[…] which was contracted on 26 January 2012in accordance with the provisions of section 4(4)(a) of the Recognition of Customary Marriages Act No. 120 of 1998;

(iii) The sixth respondent, through his department, is directed to issue to the applicant a certificate of registration, bearing the prescribed particulars referred in (ii) above;

(iv) Each party is to bear its own costs.

_____

B RTOKOTA

JUDGE OF THE HIGH COURT

I agree

_____

N K DUKADA

ACTING JUDGE OF THE HIGH COURT

I agree

_____

M S DUNYWA

ACTING JUDGE OF THE HIGH COURT

For the Appellant	:	Mr M Notyesi
Instructed by		Mvuzo Notyesi Attorneys
For the respondent	:	Mr T Qina
Instructed by		T. Qina & Sons
Date of Hearing	:	22 May 2020
Delivered	:	17 June 2020

Heads of argument were prepared and the matter was determined in terms s.19 (a) of the Superior Court Act No. 10 of 2013 without hearing oral argument.