IN THE HIGH COURT OF SOUTH AFRICA
(TRANVAAL PROVINCIAL DIVISION)

Case No: 20949/07
Date: 23 July 2008

NOT REPORTABLE

In the matter between:

MAMUTEANE HLOKA'MONI MMUTLE	**Applicant**
And	
DIBUSENG MARY THINDA	**First Respondent**
DEPARTMENT OF HOME AFFAIRS	**Second Respondent**

JUDGMENT

VILAKAZI AJ:

INTRODUCTION

1. The Applicant seeks an order:

1.1 Declaring the customary union between David Molahlehi Mmtle (hereinafter referred to as the deceased) and the First Respondent "null and void", *ab-initio*

1.2 Authorising and/or directing the Second Respondent to cancel the marriage from its registers;

1.3 Cost of the Application.

BACKGROUND

2 The Applicant is the biological daughter of the deceased and has instituted this action in her capacity as such. The deceased and the First Respondent had lived together as man and wife since the 1990's in Mafikeng. In 1997 and in particular on the 28th March 1997, the parties decided to formalise their co-habitation. The deceased sent representatives to the First Respondent's parental home in Botshabelo to negotiate and pay Lobola for the First Respondent. Lobola was agreed upon in the sum of R 2300.00 of which an amount R 1000.00 was thereupon paid leaving a balance of R 1300.00. A receipt for the Lobola paid was issued by the First Respondent's father to the deceased's representatives. No arrangements were made with regard to the payment of balance.

3 After payment of Lobola the deceased and First Respondent returned to their home in Mafikeng and continued to live together as husband and wife. On the 4th August 2000 the First Respondent gave birth to their child. During 2006 deceased and First Respondent sold their house in Mafikeng and relocated to Callinan. In January 2007 the First Respondent had the customary union registered at the offices of the Second Respondent in terms of the Recognition of Customary Marriages Act, 98 of 2000. After the death of the deceased the Applicant instituted action against the First Respondent which is now the subject of this matter.

APPLICANT'S CASE

4 The Applicant's case is that there was no customary union between the deceased and the First Respondent as Lobola had not been paid in full; there was no exchange of gifts between the two families, there was no handing of the bride to the bridegroom's family and lastly, that if there was any customary marriage, such marriage is void by reason of non-compliance with Tswana customs.

FIRST RESPONDENT'S CASE

5 The First Respondent avers that a valid customary union was concluded between the Thinda and the Mmutle families. At the time of Lobola the deceased and First Respondent had been living together for a considerable time and after the Lobola the parties continued to live as husband and wife thus consummating the customary union.

ANALYSIS

6 The Applicant's action is premised on the Tswana's customary laws and culture. She avers that for a valid union to be recognised as a customary marriage between the deceased and the First Respondent, such marriage should have been concluded exclusively according to Tswana customary laws and culture according to which the essentialia of a valid customary union are:

6.1 Payment of Lobola in full by the bride groom's representatives;
6.2 Exchange of gifts or celebration of ceremonies;
6.3 Official handing over of the bride to the bridegroom.

According to Tswana laws all, these *essentialia* must be complied with and none of them can be dispensed with.

7 The Applicant's case is that the amount of R 1000.00 paid by the deceased representatives to the First Respondent's father was damages for the child born prior to the parties marriage and not for Lobola. She states that if the amount of R 1000.00 was paid as part Lobola, then such payment was contrary to the Tswana culture and customs and could therefore not constitute payment of Lobola. She avers that even if the parties stay together after partial payment of Lobola, such cohabitation cannot constitute a valid customary union.

8 It appears that the Applicant's case is also premised on an affidavit deposed to by the deceased in July 2006 wherein he described his marital status as "unmarried" at the time of the sale of their Mafikeng house. Furthermore it

appears that by virtue of a will drawn by the deceased, the latter makes no mention of the First Respondent.

9 The Applicant approached the Court on the basis of a skeleton case as correctly pointed out by Mr. Nonyane on behalf of First Respondent. When confronted by the First Respondent's evidence as set out in her opposing affidavit, the Applicant tried to put flesh to the skeleton, raised new facts and even obtained an affidavit from a certain Daniel Matobo who was one of the deceased's representatives during the Lobola negotiations. What is however peculiar from the affidavit of Matobo is the allegations that the Lobola agreed upon in the amount of R 2300.00 included an amount for damages for the child. According to Tswana custom, a customary union can be concluded only after the whole balance of the Lobola had been paid. However, Matobo's allegations are in stark contrast to exhibit 'MH5'. As pointed out earlier, there is no reference to the child or damages in "MH5" and no indication as to when the balance would be payable. There is no doubt in my mind that Matobo was deliberately lying in order to assist Applicant build her case.

10 The First Respondent denies the Applicant's averments and insists that a valid customary union was concluded between the Thinda and the Mmutle families on the 28th March 1997. Her evidence is a clear exposition of what transpired at her parental home leading up to the conclusion of the marriage and she is fully supported by the Lobola receipt exhibit 'MH5' which encapsulate the agreement concluded between the parties. There is no mention whatsoever in exhibit 'MH5' of any conditions or any reference to the customary laws according which the marriage had to be concluded or any reference to any ceremonies and/or the exchange of gifts as alleged by the Applicant.

ISSUES

11 The only issue to be decided in this matter is whether a valid customary union was concluded between the deceased and the First Respondent. To answer this question, the Court must establish what are the legal requirements/essentialia for a valid customary marriage in accordance with the laws and customs practiced by indigenous Africans, not only according to

Tswana customs. Indeed, there may be variations according to particular ethnic groups in addition to the generally accepted requirements governing customary marriage. However these variations or additional requirements are usually negotiated and agreed upon between the parties during the negotiations.

12 The essentialia of a valid customary union have been recognised as:

a) agreement between the two families with regard to the marriage of the bride and the bridegroom (which presupposed an agreement between the bride and the bridegroom to be married);
b) payment of Lobola (be it cash or in kind i.e. cattle);
c) handing over of the bride to the family of the man.

See *Seymour's Customary Law in Southern Africa, 5th edition* – Bekker p. 105-109.

13 Over and above these essentialia the parties may agree on the exchange of gifts and/or celebration of ceremonies which would normally be reflected in the Lobola receipt or be embodied in an annexure attached thereto. Sometimes this aspect is discussed and negotiated after Lobola has been paid and the bride having been handed over to the bridegroom. The ceremonial aspects of the marriage are in many instances severable from the negotiations and payment of Lobola. the following was said in respect of the requirements for a customary union in *Khasi v Tabana, 1944 NAC (N & T) 67 (Johannesburg)*

> *"The requisites for a customary union in the Transvaal are (a) the intention by the parties that there shall be a union; (b) agreement regarding Lobola (not necessarily the number of cattle to be paid); and (c) cohabitation."*

See also *Kgapula v Maphai, 1940 NAC. (N & T) 108 (Hammanskraal); Modisanyane v Mokgokolo, 1942 NAC. (N & T) 65 (Heidelberg).*

In *Dlomo v Mahodi, 1946 NAC. (C & O) 61 (Tsolo)*:

> *"The essentials of a customary union are (1) agreement between the bridegroom's people and the bride's people; (2) the passing of cattle or its equivalent, and (3) the handing over of the girl. Handing over may be either actual or constructive."*

14 The ceremonies and exchange of gifts do not have any legal consequences to the validity of a customary union or marriage. In *Majola v Lemuka, 1944 NAC. (N & T) 15 (Germiston)* it was said:

> *"It is not essential that there should be a feast and other celebrations before such a union can be organised. If the proposed husband, after the agreement in regard to Lobola, lives with the woman with the knowledge of her people, this fact is an indication that the woman's father agreed to transfer the woman tacitly, if not directly."*
>
> *"Certain other ceremonies are sometimes observed but these are not essential and their non-observance in no way affects the validity of the marriage."* See Dlomo's case (supra)

ANALYSIS

15 It is against these backdrops that the Applicant's evidence must be analysed to determine whether it supports her averments. Firstly Mr. Maibelo contends on behalf the Applicant that the deceased was a die-hard traditionalist who followed and practised the Tswana customs to the letter. It was contended that the requirements of a Tswana customary marriage were premised on the following:

15.1 payment of Lobola in full by the bridegroom to the bride's parents;
15.2 the exchange of gifts between the families;
15.3 official handing over of the bride to the bridegroom's family.

The Applicant on the basis of these requirements denies the events of the 28th March 1997 produced a customary union according to the Tswana customs.

16 The Applicant admits that Lobola was agreed upon in the sum R 2300.00 and that amount R1000.00 was paid to the First Respondent's father. In her founding affidavit she denies that the amount of R 1000.00 was in respect of Lobola and contends that this amount represented damages paid to the Respondent's father for the child born prior to the parties' marriage.

LOBOLA RECEIPT

17 Before I proceed any further I pause to examine the Lobola receipt, referred to, and attached to the Applicant's affidavit as exhibit 'MH5'. This is a hand-written document which reads as follows:

> *"Attention: Ndlovu (Dibuseng)*
>
> *TO WHOM IT MAY CONCERN:*
>
> *An amount of R 1, 000.00 was received by Mr. TJ Thinda for Lobola of Dibuseng Thinda on the 28/3/97 from MD Mmtle.*
>
> *The balance being R 1, 300.00*
>
> *Signed T.D Thinda and witnessed by D.O Matobo."*

A cursory glance of this document reflects what the parties agreed upon on the date in question and a decision as to whether exhibit 'MH5' is proof of the existence of a customary union is self-evident.

18 The Applicant contends vigorously that the amount of R 1000.00 represented damages. This assertion is in stark contrast with what is reflect in exhibit 'MH5' which states clearly that the amount was paid as Lobola for the First Respondent. Nowhere in this document do the words "damages for child" appear. At any rate, a separate receipt in respect of damages payable for the

defloration of a woman or arising from the birth of a child by an unmarried woman would have been issued to the representatives of the deceased. If the damages where incorporated in 'MH5' this fact would have been reflected on the document. In any event the child in *casu* was born three years after the payment of Lobola. Therefore the Applicant's allegations that the payment of R 1000.00 represented damages for a child born before the parties' marriage are completely false and not supported by any evidence whether objective or by inference.

19 In her answering affidavit the Applicant makes a complete volte-face and engages in an incredible somersaulting. She states for instance that the deceased instructions to his representatives were "*...not to negotiate and pay Lobola but it was a visit to start negotiations and to determine amount of Lobola/Bogadi as well as to pay damages for a child born out of their relationship.*" However, in the same breath she contradicts herself by stating that the R1000.00 was paid as part Lobola and it was agreed that the deceased's family will return on a specified date to pay the remaining balance.

20 The Applicant further states that even if deceased and First Respondent lived together after payment of Lobola, the handing over of First Respondent was necessary to validate the customary marriage and in that in the absence of the ceremony and payment of the total amount of Lobola and here follows the interesting part:

> *"... some form of an agreement between the families to dispense with some of the requirements of a valid customary union, a valid customary union cannot come into existence."*

21 It is not surprising that Applicant contradicts herself at every other turn; this is so because she was not present at First Respondent's place on the 28th March 1997, secondly the Applicant is not herself an expert in customary law, let alone Tswana customs. She relies on what she has been advised by unknown advisers who themselves are not experts in customary law. In her desperate bid to have the customary union declared null and void, the Applicant has entangled herself in a disingenuous re-invention of customary

law, in particular Tswana customary law in a manner which makes mockery of her efforts.

22 In *Sigcau v Sigcau 1944 AD 67* at 76 it was stated that:

> *"...The only way in which the court can determine a disputed point, which has to be decided according to native customs, is to hear evidence as to the custom from those best qualified to give it..."*

23 When dealing with customary law and practices one should not be dogmatic to the extent of accepting as a given that certain practices and customs have certain legal consequences which cannot be dispensed with. Ordinarily, proof will be required of the legal force certain practices and customs have as well as the effect of non-compliance therewith in so far as the customary union is concerned. In *casu* the burden rested throughout on the Applicant to prove by means of acceptable evidence the legal force of partial payment of Lobola the non-compliance with certain ceremonies.

24 The courts are alive to the fact that like any other legal system, customary law undergoes adaptations and changes as it interacts with other legal systems in its application and as a living entity it is in a continuous state of evolution and flux. In Mabena v Letsoalo 1998 (2) SA 1068 at 1074h Du Pleussis J said of customary law:

> *"...moreover, customary law exists not only in the "official version" as documented by writers; there is also 'the living law', denoting 'law actually observed by African communities'."*

25 According to the Applicant part payment of Lobola, does not, according to Tswana customs produce a customary union. In *Sibya v Mkembu 1946 NAC (N&T) 90* it was stated that:

> *"Payment of part of Lobola and the handing over of the girl are sufficient proof of the union."*

It is clear that what is important is payment of Lobola or delivery of cattle, not necessary the full amount or the full number of the cattle. In *Sitole v Xaba 1945 NAC (N&T)* 81:

> *"Payment of Lobola cattle is the chief ingredient..."*

Hence phrases such as: *"there can be no customary marriage if there are no cattle with the girl's guardian"* are regarded as essentially correct statements of customary law (Semours's p.107).

26 Lastly, the Applicant contends that the First Respondent was not handed over to the deceased family, therefore a customary marriage could not have taken place according to Tswana customs between the deceased and First Respondent. It is common cause that the deceased and First Respondent lived together years before the contested customary marriage was concluded. After the said marriage they continued to live together until they relocated to Cullinan. It is correct, according to customary law, that no customary marriage can come into existence unless the bride has been handed over to the bridegroom. Bekker in *Semour's Customary Law in Southern Africa* at p.108 states that:

> *"This concise statement cannot be enlarged upon in anyway; it states literally the correct position."*

But proceeds immediately to point out that:

> *"The handing over need not be the formal ceremony."*

The deceased with his representatives and the First Respondent went to the latter's home for one purpose only, that is, to finalise issues relating to their marriage and thereafter returned to their home where they lived as husband and wife. In this case, the handing over of the First Respondent to the deceased or his representative would have amounted to a mere symbolic gesture. The absence of a formal handing over was therefore a non-event and had no legal consequences to the marriage.

27 In her answering affidavit the First Respondent states that she and the deceased lived together from the mid-nineties and confirms that on the 28th March 1997 a customary marriage was concluded between the deceased and her parents in accordance with annexure 'MH5'. After the conclusion of the customary marriage she and the deceased returned to Mafikeng, lived together as husband wife and gave birth to a child on the 4th August 2000. She confirms further that shortly before the death of the deceased she presented herself at the office of the Second Respondent and had their customary union registered in accordance with the provisions of the Recognition of Customary Marriages Act.

28 Since November 2000, customary marriages are now governed by Legislation to wit, The Recognition of Customary Marriages Act, 120 of 1998 which was promulgated for the purpose of, amongst others, eliminating the anomalous status between spouses which according to African customs relegated women to the status of perpetual minors and brought untold hardships to women married according to customary law. The Act also specifies requirements for a valid customary marriage. Section 2 thereof provides:

> *"**2. Recognition of customary marriages***
>
> *(1) A marriage which is a valid at customary law and existing at the commencement of this Act, is for all purposes recognised as a marriage.*
> *(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.*
> *(3) ...*
>
> ***3. Requirement for validity of customary marriages***
>
> *(1) For a customary union 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;*

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

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

29 The Act recognises the essentialia of customary union as practised under customary law. What the Act requires and envisages is that a customary marriage which was negotiated and entered into in accordance with customary law prior to the coming into operation of this Act is recognised as a valid marriage for all purposes. Accordingly the marriage relationship concluded between the First Respondent and the deceased in terms of Annexure 'MH5' satisfied all the requirements of a valid customary union in accordance with customary law and therefore qualified to be recognised and registered as a valid customary and marriage in terms of the Act. Even without the blessing of the Act, the customary union between the deceased and the First Respondent was to all intents and purposes a valid marriage.

30 The Act further provides for the registration of customary marriages and empowers either spouse to apply in the prescribed form for the registration of the customary marriage subject to the satisfaction of the requirements of the registering officer as set out in s4(a) of the Act.

31 On the basis of evidence placed before this Court I am satisfied that the First and Second Respondents acted in accordance with the provisions of the Act and the registration of the marriage by Second Respondent cannot be faulted.

32 Having regard to Annexure 'MH5' and the evidence the Court is satisfied that the Applicant has failed to make out a proper case for declaring the marriage between the deceased and First Respondent null and void and for an order directing Second Respondent to cancel the registration of the said marriage.

33 Consequently, I propose to make the following order:

Application is dismissed with costs.

T.J. VILAKAZI AJ