IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

13/11/15.

CASE NUMBER: 43113/2014

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

13 November 2015
DATE

SIGNATURE

In the matter between:

JOHN MATHUNYANE	APPLICANT
And	
MOTLAGO BAPELA	FIRST RESPONDENT
MRS LINDA ADDITIONAL MAGISTRATE MDUTJANA	SECOND RESPONDENT
MAINTENANCE OFFICE VICTOR RAMAWELA	THIRD RESPONDENT

JUDGMENT

MAVUNDLA J

[1] The Court is called upon to review and set aside the finding and order by the second respondent that there is a marriage existing between the applicant and the first respondent; and substitute that order of the second respondent with an order that there is no marriage existing between the applicant and the first respondent and that the applicant has no obligation to maintain the first respondent.

[2] It is common cause that the applicant paid lobolo to the first respondent's Bapela family in the amount of R18 000. 00 (eighteen thousand rand) and outstanding is an amount R2000. 00 (two thousand rand) and three cows; woods, African brew, jacket and a stick of the old man, the blanket of the old woman and an African female skirt (animal skin skirt). The event of the paying of the lobolo was witnessed by representatives from both families of the applicant and the first respondent. The lobolo agreement was reduced in writing and a copy thereof was attached to the papers as annexure "A".

[3] The first respondent brought a maintenance claim against the applicant at the Magistrate's Court, Mdutjana on the basis that there was an existing customary marriage between herself and the applicant. At the magistrate's court the applicant raised a point *in limine*, that there was no customary marriage existing because the lobolo was not paid in full nor celebrations in accordance with Sotho custom neither was there compliance with s3(1)(b) of the Customary Marriages Act 120 of 1998.

[4] The first respondent was called to the stand to refute under oath the applicant's contention. She testified that after the marriage, she was not taken on a celebration to the applicant's family because their cultures are not the same. The

applicant's family came to stay in Siyabuswa where she and her family were staying. She had her own house. She and the applicant stayed together at her house and he gave instructions to her as his wife. The applicant further undertook to take care of her, pay their debts, and pay the children's school fees. The applicant's family regarded and accepted her as his bride. In respect of the outstanding lobolo the applicant's family asked she said that the applicant would decide when to pay that, depending on whether he has enough money to purchase and slaughter the three cows.

[5] The applicant had his own house in Tafelkop while she had hers in Siyabuswa. They together at her house and would go to Tafelkop on weekends. She refuted that the amount of lobolo paid was a deposit.

[6] The magistrate did not uphold the applicant's point *in limine*, but found, quite correctly so, in my view, that that there was a customary marriage existing between the first respondent and the applicant. It is this decision which this court is beseeched to set aside.

[7] The question is: when is a customary marriage a marriage, has engaged various Courts and the Legislature. In this regard I find it apposite to cite and sanguine myself, with respect, with Matlapeng AJ in the matter of *Motsoatsoa v Roro*[1] who held that:

> "[8] It is trite that customary marriage is an age-old institution deeply respected and embedded in the social cultural fabric of all indigenous people of South Africa. However, over a long period of time during the apartheid era, customary

[1] 2011 (2) ALL SA 324 (GSJ).

marriage became an object of serious distortion. Regrettably, we have now reached a stage where there is a serious and all pervasive confusion regarding the true nature of customary marriage. With the advent of our new democracy, the Recognition of Customary Marriages Act was passed in an attempt to clarify the legal status of customary marriages. The preamble therefore states the following as the purposes of the Act:

"To make provision for recognition of customary marriages, to specify the requirements for a valid customary marriage, to regulate the registration of customary marriages...."

[9] Section 3(1) of the Act deals with the requirements for the validity customary marriages. It provides as follows:

"(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 under customary law;

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

[10] Whilst the requirements mentioned in paragraphs (i) and (ii) are self-explanatory and clear, the requirements that marriage must be negotiated and entered into or celebrated in accordance with customary law is vague as it does not specify the actual requirements for a valid customary marriage.. A factual determination still has to be made in order to reach a finding as to whether this requirement has been complied with.

[11] The Act defines customary marriage as "a marriage concluded in accordance with customary law" and customary law as "the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those peoples". This statement simple as it may sound creates serious problems regarding how to ascertain the applicable customary law. This is compounded by the fact that some customary and cultural practices among the indigenous people are not homogeneous. This is further exacerbated by the fact that there are many sources of customary Law in existence." These sources are (i) the unwritten customary law as practiced by the indigenous Africans (living customary law); (ii) interpretative customary law found in the statutes, case law; (iii) academic law in text books.[2]

[8] In the matter of *Fanti v Boto and Others*[3] the Court held that the essential requirements of a customary marriage are:

"(i) consent of the bride

(ii) consent of the bride's father or guardian

(iii) payment of lobolo

(iv) the handing over of the bride."

[9] In the matter of *Ngwenya v Mayelane*[4] the Supreme Court of Appeal referring to s 3(1) of the Act held that:

"[23] The Act does not specify the requirements for celebration of a customary marriage. In this way, the Legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when the customary law celebrations are generally in accordance with

[2] Motsoatsoa v Roro (SUPRA) at 327 para [14];
[3] 2008 (5) SA 405 (CPD).
[4] 2012 (3) ALL SA 408 (SCA) at 415a-b, 417c-g.

the customs applicable in those particular circumstances. But once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence."

[10] In my view, a purposive interpretation of section 3(1) requires that the court should be slow to conclude that there was no customary marriage in a given set of facts. The courts must be sensitive to declaring that there is no customary marriage, when lobolo has been paid, be it in full or not. It is trite within the indigenous African communities that lobolo is never paid in full. It is equally trite that the concept of a "deposit" in the indigenous African communities, particularly, in the context of marriages is foreign and unknown. Any suggestion that, where there has been part-payment of lobolo, such payment is a deposit, in my view, is commercialising and demeaning a centuries well respected institution and must out rightly be rejected. To hold that part payment of lobolo does not result into a customary marriage; will be denuding women of their dignity which is protected in terms of section 10 of the Constitution, by reducing them to objects to be purchased in instalments, and consigning children born in such circumstances into illegitimacy, which is a Eurocentric concept, if I may dare say so.

[11] *In casu* the amount of lobolo agreed upon was R20, 000. 00. An amount of R18 000. 00, which is quite substantial, was paid. The outstanding amount of R2000.00 is insignificant compared to what has already been paid. The payment of a substantial amount of lobolo is a clear manifestation of intent to marry and in fact marrying the first respondent. The subsequent living together of both parties, which was not disputed by the applicant, demonstrate acceptance of the parties that they are united in wedlock. The above, in my view, accords with a purposive interpretation and living customary law.

[12] In the premises, I find that there is indeed a customary marriage existing between the applicant and the first respondent. It therefore follows that the applicant is duty bound to provide for his wife, the first respondent. I equally find that that the magistrate quite correctly did not uphold the point applicant's point *in limine*. It follows that that the application must fail with consequential costs order.

[13] In the result the following order is made:

1. That there exists a customary marriage between the applicant and the first respondent;
2. That the applicant is duty bound to maintain the first respondent;
3. That the applicant's application is dismissed with costs.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 27/10/2015
DATE OF JUDGMENT : 13 / 11 /2015
APPLICANT'S ATT : MOLOEKE MATSEPE ATTORNEYS
APPLICANT'S ADV : ADV S BOYCE
1ST RESPONDENT'S ATT :
1ST RESPONDENT'S ADV : NO APPEARANCE
2ND RESPONDENT'S ATT :
2ND RESPONDENT'S ADV : NO APPEARANCE