IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MAIN SEAT)

Case no.2362/2021
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 11 / 03 / 2024
SIGNATURE

In the Application of:

THANDI CONSTANCE ZWANE Applicant
(BORN MALABELA)

and

MARY ZWANE First Respondent

NQOBILE ROBERT ZWANE Second Respondent

JOAN ZWANE (BORN HILL) Third Respondent

MASTER OF THE HIGH COURT Fourth Respondent

MPUMALANGA DIVISION
MINISTER OF HOME AFFAIRS Fifth Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties and/or the parties' representatives by e-mail. The date and time for hand-down is deemed to be 11 March 2024 at 10h00.

PICK, AJ

INTRODUCTION

1 This is the story of the untimely death of a very wealthy man. As a rich man, should, he had three wives. This Court was requested to declare that the deceased was customarily married to the Applicant, the First Respondent and the Third Respondent – and to nullify the deceased's civil marriage to the First Respondent.

2 Claiming she was the first and only wife to the deceased, as she was married to him civilly, the Application is vigorously opposed by the First Respondent. She insists on the other customary marriages being nullified. The Third Respondent filed a notice to abide and reserved her right to participate in the proceedings, whether it be by the Explanatory Affidavit she filed, or orally if the Court so orders.[1]

3 This Application was initially enrolled on the urgent roll. An affidavit in opposition was filed by the Second Respondent, the contents thereof being confirmed by the First Respondent in so far as it had bearing on her. On 14 July 2021, the Second Respondent and Fourth Respondent were interdicted from distributing the estate, pending determination of the statuses of the deceased's marriages to the Applicant, First and Third Respondent.

4 The First and Second Respondents' special pleas were dismissed, and the parties were authorised to supplement their papers. Part B of the Notice of Motion was dismissed. Costs were reserved. On 13 June 2023, the parties agreed on a postponement to 14 November 2023. The Applicant tendered the costs occasioned by the postponement.

5 The Fourth Respondent is the Master of the High Court, who was added to the Application for the purpose of Part B of the Application.

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[1] Pages 179 – 184 of the Bundle

6 The Fifth Respondent was added for the purpose of expunging and registering the deceased's marriages accordingly, should the Court uphold the Application.

THE BACKGROUND FACTS

The history of this matter and the significance of the requested remedies necessitates dealing with the facts of this matter in more detail than usual.

The deceased's 1972 marriage to the Applicant:

7 The Applicant, an African woman, avers that the deceased and herself got married customarily in 1972. They were blessed with three children, the eldest being a boy in 1971. She alleges to be the deceased's first wife. She further alleges her lobola letter dated 1972 got lost when they moved from Mbombela to Kanyamazane Township. She presently occupies one of the deceased's properties and conducts business from another of the deceased's properties in Kanyamazane. She gave permission for the deceased's marriages to the First and Third Respondent. She was already 70 years of age in 2019, when the deceased passed on.

8 In her supplementary affidavit she elaborates on the lobola negotiations between her family and the Zwane family in 1972. Most of her family emissaries have passed on. Celebrations started from her family and two cows were slaughtered. On the day, she and her family accompanied the Zwane family home for further celebrations and she was handed over to the Zwane family. The deceased did not complete paying his lobola in 1972 and only finished payment in 2017, after having been reminded thereto by the Applicant's brother. The Applicant's version is supported by the Affidavits of her daughter, Delisile and her elder brother and sister.

9 Ms Elsie Zwane, the deceased's younger sister, denies a marriage ceremony having taken place between the deceased and the Applicant in 1972 and says they know the Applicant to be a female companion of the deceased. Ms Elsie Zwane and her son, Mr Themba Zwane attended the 2017 lobola negotiations

on behalf of the deceased. Mr Themba Zwane was the keeper of the 2017 lobola certificate and subsequently misplaced it. According to the deceased's brother, Mr Lucas Zwane, the Applicant and the deceased were not married in 1972.

The deceased's 1973 marriage to the First Respondent

10 Two years later, and in 1973, the deceased married the First Respondent, a coloured woman. She was 75 years old in 2019, when the deceased passed away. They were married in accordance with civil law in a Catholic church and were blessed with four children. She alleges to be the deceased's first and only wife. She lives in one of the deceased's properties and conducted business, together with the deceased, from another of his properties. Their first child, a boy was born in 1973.

11 She is in possession of an abridged marriage certificate. Photos of their wedding ceremony are attached to the bundle before Court. A copy of the entrance in the marriage register is attached to her papers and the content thereof confirmed to by a Catholic Priest, one Mr Makgale. He did not personally attend to the marriage between the deceased and the First Respondent. The deceased at the time of the civil marriage to the First Respondent indicated that he was a bachelor. The marriage between the First Respondent and the deceased was registered by her son, (the Second Respondent) following the death of the deceased.

12 The Second Respondent rejects the Applicant's claim that she got married to the deceased customarily in 1972. He confirms a lobola payment towards the Applicant and a consequent celebration having taken place in 2016/2017. He states, relying on the Recognition of Customary Marriages Act,[2] that there can be no marriage between the Applicant and the deceased in 2017, as the First Respondent was civilly married to the deceased at the time. The Minister of Home Affairs did not consent to the deceased's further marriage and the

[2] Recognition of Customary Marriages Act, Act 120 of 1998

marriage was never registered. Neither did the First Respondent consent to the deceased's marriage to the Third Respondent.

The deceased's 1986 marriage to the Third Respondent:

13 In 1986, the deceased married the Third Respondent, an African woman customarily. They were blessed with three children. She lives in one of the deceased's properties and conducted business from another of his properties. She was 65 years old in 2019 when the deceased passed on. The Third Respondent's lobola letter was taken by the Second Respondent under the auspices of registering her marriage to the deceased. She was requested to accompany the Second Respondent to find out whether the deceased left a will, which she denied, as she was still in mourning.

14 In her affidavit, the Third Respondent refers to the Applicant as the deceased's first wife and supports her version of events. She states that both the Applicant, First Respondent and herself were wives to the deceased and they should all be treated equally following his death.

Further background from the Affidavits of the Parties:

15 After the passing of the wealthy man on 12 February 2019, his three wives mourned his death together. The Applicant alleges they mourned at the deceased's house, whilst the First Respondent says it was at her house, as she was the first wife of the deceased. A family meeting was called. Present was the Applicant, First and Third Respondent and Ms. Elsie Zwane, the deceased's sister. It is the Applicant's version that it was agreed that one child from each of the wives should be appointed as co-executors of the deceased's estate. The Second Respondent alleges he registered the deceased's marriage to the First respondent with the consent and blessing of all present at the family meeting.

16 The estate was reported on 24 May 2019. On 02 August 2019 the Second Respondent was appointed as executor in the deceased's estate. The First and Third Respondents supported the Second Respondent's appointment as executor at the time. The Applicant's name is nowhere to be found on the

nomination letter. On 03 December 2020, the First Respondent wrote a letter withdrawing the Second Respondent's executorship. This letter was revoked by her on 17 February 2021. In her affidavit, the Third Respondent makes it clear that she is not satisfied with the Second Respondent's appointment as Executor.

17 According to the First Respondent, the deceased's cousin, Mr Msibi, does not want to get involved in the dispute before Court. He alleges having been forced by the Applicant to sign certain documentation. A copy of a handwritten note is attached to the First Respondent's Supplementary Affidavit. Mr Msibi did however depose of an Affidavit which is attached to the Applicant's Supplementary Affidavit. He states that he was called to Mbombela for the lobola negotiations and confirms the version of the Applicant. He remembers lobola was agreed on 12 cows, having been valued at five pounds (approximately R10) each at the time.

18 According to Mr Msibi, the deceased had three wives and treated them equally. The First Respondent was a coloured woman and their custom did not entail lobola. The deceased never mentioned having married the First Respondent civilly, but had he done so, it would have been as a result of their conflicting cultures.

Arguments before this Court:

19 It was held that the deceased was of Zulu descent but became Swati due to regionalisation. No expert evidence was placed before Court to explain the applicable customs during the deceased's marriage to the Applicant. The custom applicable to the marriage between the deceased and the Third Respondent was never placed in contention. Counsel for the First and Second Respondents pointed out in argument that this application should have taken the form of a trial, rather than an Application. It was argued that there is a dispute of facts which requires oral evidence. This is denied by counsel for the Applicant.

20 Having given it due consideration, this court is of the view that oral evidence would not have assisted greatly. Bearing in mind the deceased's cultural turn around, it is only the deceased who would have been able to honestly explain which customs had to be applied at the time of his marriage to the Applicant. It is also only the deceased who can explain what he did and didn't do and whether he abided by the reigning legislation at the time and if not, for what reason he did not consider it necessary to abide by such.

21 The First Respondent's case, supported by the deceased's brother and sister, does not weigh on observance of the applicable culture. They simply deny that the deceased married the Applicant in 1972. They do however acknowledge that there was a payment of lobola and celebrations in 2017. For as far as it might have constituted a marriage ceremony, the First Respondent, relying on the Recognition of Customary Marriages Act, denies the validity thereof.[3]

22 The First Respondent's case is based on her marriage to the deceased being civil and therefore the only legitimate marriage. As such, the deceased's marriages to neither the Applicant nor the Third Respondent could be legitimate, although they were both known to be female companions to the deceased. At the time of the deceased's death in 2019, the Applicant has been known as his female companion for at least the last 47 years and the Third Respondent for at least the last 33 years.

23 It is important to recognise what hangs on this order. Should it be ruled by this Court that the First Respondent, in her having been civilly married to the deceased, was his first and only legal wife, the Applicant and the Third Respondent will not be placed on an equal footing as the First Respondent and will not inherit from the deceased's estate.

24 Considering the dire prejudice the Third Respondent potentially stands to suffer, this Court found it in the interest of justice to consider the Third

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3 Para 12 above

Respondent's affidavit as being part of the evidence before the Court. In further recognising the Third Respondent's constitutional right to equality before the law, her filing a Notice to Abide did not, in the view of this Court, void her of her right to have her case properly considered by this Court. Any ruling in this Application, either way, will also affect her rights. She clearly indicated her interest in the outcome of this matter by filing an affidavit and reserving her right to participate in the proceedings. The spirit of customary law is not rigid. It was held in *Mayelane*:[4]

'[61].… it must be emphasised that, in the end, it is the function of a Court to decide what the content of customary law is, as a matter of law, not fact. It does not depend on the rules of evidence a court must determine for itself how best to ascertain that content…

…

[79] …Under the Constitution the legal status of all persons is based on everyone being equal before the law and having the right to equal protection and benefit of the law ….'

DISCUSSION:

25 For the sake of clarity, and at the risk of repeating myself, the deceased allegedly married the Applicant in 1972, the First Respondent in 1973 and the Third Respondent in 1986. The First Respondent however holds that the Applicant only married the deceased in 2017.

Historical Background:

26 It is advisable to consider the historical background to customary marriages, before we deal with the deceased's marriages to the Applicant, the First and Third Respondents.

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[4] Mayelane v Ngwenyama and Others (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013)

27 When the deceased got married to the First Respondent back in 1973, the Prohibition of Mixed Marriages Act 55 of 1949 did not, contrary to argument by counsel for the Applicant place a ban on marriages between African and Coloured people.[5] The Black Administration Act 38 of 1927 (repealed in 2005) made it obligatory for men who wanted to enter into any further marriages, whether civil or by custom, to first declare the names of their existing wives, the children between themselves and their wives and the nature and amount of movable property he would leave to each such woman or house under custom, before he could enter into a further marriage.[6] Failure to have acted accordingly was considered an offence and was punishable by law.[7] A later civil marriage would nullify the prior existing customary marriages and there could be no further customary marriage without the aforesaid declaration. Sections 22 and 23 of the Act provided that all his wives would be considered equal upon the death of their husband.

28 Customary marriages were, at the time, seen as contracts between the families and not the individuals and all marriages concluded before 01 November 1988 were ordinarily and unless parties indicated the contrary, considered as having been concluded out of community of property.[8] Explaining the reasoning behind these injunctions, Judge Langa, DCJ (as he then was) in the groundbreaking judgment on the abolishment of discriminatory laws governing customary intestate succession in *Shibi v Sithole and Others*[9] held:

'[76] ….. Property was collectively owned and the family head, who was the nominal owner of the property, and administered it for the benefit of the family as a whole…'

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5 Section 1(1)(a)(ii) of the Prohibition of Mixed Marriages Act, Act 55 of 1949
6 Section 22(1) and (3) of the Black Administration Act, Act 38 of 1927, repealed 2005
7 Section 22(5) of the Act – see 6 above
8 Section 22 of the Act – see 6 above
9 Shibi v Sithole and Others (CCT 50/03, CCT 69/03, CCT 49/03) [2004] ZACC 18; 2005 (1) SA 580 (CC);
2005 (1) BCLR 1 (CC) (15 October 2004)

29 Since 15 November 2000, customary marriages are governed by the *Recognition of Customary Marriages Act, as amended ("the Act")*.[10] In accordance with the Act, spouses must both be over the age of 18 years and consent to be married to each other under customary law. Their marriage must be negotiated, entered into and celebrated in accordance with customary law[11]. Existing valid customary marriages, even where a person is in a polygamous marriage, will be recognised as marriages by the Act.[12]

30 These marriages are considered to be in community of property.[13] Provided they are not already a party to another customary marriage, parties may wed each other in terms of the Marriages Act.[14] The matrimonial property regime of a husband's further customary marriages must be regulated by Court.[15] Customary marriages must be registered within 12 months from date of commencement of the Act by either party thereto or anyone who has sufficient interest in the matter.[16] This Act repealed sections 11(3)(b) and 22 of the Black Administration Act 38 of 1927. It also recalled sections of the Transkei Marriages Act 21 of 1978, the KwaZulu Act on the Code of Zulu Law 16 of 1985, and section 27(3) of the Natal Code of Zulu Law 1987.

31 As the Recognition of Customary Marriages Act ("the Act") came into operation on 15 November 2000,[17] it could only find application once the validity of the deceased's marriages to the Applicant, the First and the Third Respondents have been established.

The Plascon-Evans[18] Rule

32 Counsel for the First and Second Respondent argues that the Court has no choice but to apply the Plascon-Evans rule and find in their favour. The

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10 Recognition of Customary Marriages Act, Act 120 of 1998
11 Section 3(1)(a) and (b) of the Act
12 Section 2(3) of the Act
13 Section 7(1) of the Act
14 Section 3(2) and 10(1) of the Act
15 Section 7(6) to 7(8) of the Act
16 Sections 4(1), 4(2) and 4(5) of the Act
17 Recognition of Customary Marriages Act, Act 120 of 1998
18 The rule established for dealing with mutually destructive versions in Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

Plascon-Evans rule has two legs. The first is that the Court is to decide a matter before it, where there are two mutually destructive versions in an Application, on the common cause facts or otherwise on the Respondents' version. The Supreme Court of Appeal, with reference to paragraphs 634I to 635D of the Plascon-Evans case, explains the second leg of the test in *Malan and Others v Law Society of the Northern Provinces* as follow:[19]

'… the second and important leg of the Plascon-Evans rule, namely whether the disputes raised were real, genuine or bona fide, or whether the allegations or denials were so far-fetched or clearly untenable that the Court would have been justified in rejecting them merely on the papers.'

33 The common cause facts are that the First Respondent was civilly married to the deceased. The Applicant, the First and the Third Respondent were all in long-term relationships with the deceased. They each stay in one of the deceased's houses and trades from another of his properties. The deceased stayed over at all their houses during his lifetime. They all had children with the deceased. Together they attended a family meeting after the deceased's death. Thereafter and on 13 September 2020, they again attended a meeting to discuss the liquidation and distribution account. At this meeting, the Applicant discovered she was not a beneficiary in the deceased's estate.

34 They are *ad idem* that the consent of the first wife was necessary for any further marriages by the deceased. They agree that neither the Applicant, nor the Third Respondent are in possession of their respective 2017 and 1986 lobola letters. The Applicant and both the First and Second Respondents acknowledged that lobolo was paid towards the Applicant and a ceremony took place in 2017. The Applicant and First Respondent agree that the deceased's marital status on his death certificate was changed from unmarried to married by the Second Respondent after the date of his death. They agree that they mourned the deceased's death together with the Third Respondent.

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[19] Malan and Another v Law Society of the Northern Provinces (568/2007) [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 ALL SA 133 (SCA) (12 September 2008)

35 The only issues really in dispute, is whether the deceased and the Applicant got married in 1972 or in 2017 and would it be found that the deceased indeed married the Applicant in 1972 - whether the deceased at the time declared his intended marriage to the First and the Third Applicant as he was obliged to, prior to marriage.

Application

36 De Villiers, AJ (as he then was) discussed the requirements for a valid customary marriage in *ND v MM*:[20]

'[16] ….. the formalities for the coming into existence of (a customary) marriage have crystallised over the years.'

The Court goes on to quote from an article in *CILCA 182 (2002), Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa by Maithufi IP and Bekker JC*[21] and relates the basic formalities to a customary marriage being that the man's family would send emissaries to the women's family indicating possible interest in a marriage. A meeting of the families' relatives would take place to negotiate lobola, discuss whether part or full payment will be made and discuss the formalities regarding the date the woman will be handed over to the husband's family. The handing over might be accompanied with celebrations. De Villiers AJ reiterates that this view found support in the matter of *Fanti v Boto and Others 2008 (5) SA 405 (C) and Chakalisa v Mmemo (CACLB 04106) [2008] BWCA 11 (30 January 2008)*.

37 In her Supplementary Affidavit, the Applicant describes that there were lobolo negotiations between her and the deceased's family and two cows were slaughtered. Celebrations started from her home, whereafter her family and herself went to the deceased's home and she was handed over to the deceased's family. If the version of the First and Second Respondent were

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20 ND v MM, see 20 above at para 16
21 ND v MM, see 20 above at para 17

true, and the families never accepted each other, as there was no 1972 marriage between the deceased and the Applicant, there would have been reference to a payment for seduction or a fine in 2017 when the Applicant and the deceased finally married each other. No such evidence was placed before this Court. It is more likely that the remainder of the lobolo was paid up in 2017. The Applicant's version is largely supported by the Third Respondent's affidavit. She refers to the Applicant as the deceased's first wife, as "mamkhulu". She says "first was there the Applicant, then the First Respondent and finally herself". She submits that they should be treated equally before the law. She denies the averment by the Second Respondent that she is scared of the Applicant. Evenly, Mr Msibi's affidavit supports the version of the Applicant. He deals with the lobolo negotiations in the finest details, even remembering what a cow was worth in 1972.

38 The mere denial of the Applicant's 1972 marriage to the deceased, as that of the First and Second Respondents and the deceased's brother and sister, does not make out a real, genuine or bona fide factual dispute warranting either oral evidence or dismissal of the Application. Apart from stating they are only aware of the 2017 ceremony, no other substantiation, detail or contradictory facts are placed before this Court.[22] Neither their versions so far-fetched or improbable that it had to be dismissed on the face thereof.

39 Not in dispute are that all the parties lived together with the deceased as husband and wife, under the same roof (albeit from time to time), had children together and the Applicant resided in one of the deceased's houses prior to his death. These factors were considered indicative of a proper marriage relationship in *Mbungela and Another v Mkabi and Others*.[23] The deceased further exercised firm discipline over the Applicant. The Second Respondent states that the Applicant was expelled from the family at one stage but returned on the death of her second son. Clearly the Applicant fell under the house of the deceased.

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[22] Tsambo v Sengadi (244/19) [2020] ZASCA 46 (30 April 2020); Lombaard v Droprop CC and Others (377/09) [2010 ZASCA 86; 2010 (5) SA 1 (SCA); [2010] 4 All SA 229 (SCA) (31 May 2010)

[23] Mbungela and Another v Mkabi and Others (820/2018)[2019] ZASCA 134; 2020 (1) SA 41 (SCA); [2020] 1 All SA 42 (SCA) (30 September 2019) at [28]

40 Has the Applicant not been considered as married to the deceased or at least having had a protectable interest, there is no logic in her having been invited to family meetings post the deceased's death. The Applicant, in the spirit of customary law, says that she gave permission to the marriages of the deceased to the First and Third Respondent. The First Respondent on the other hand, grabs at every technicality to place herself in a better position as the deceased's other two wives, with whom she lived in relevant peace whilst the deceased was still alive.

41 The blatant attempt by the First and Second Respondents to discredit the evidence of the Third Respondent and Mr Msibi does not go unnoticed. The First and Second Respondents, in their answering affidavit, aver that the Third Respondent is scared of the Applicant. The Third Respondent denies having been threatened or being scared of the Applicant. Evenly so, and in their supplementary affidavit, the First and Second Respondents aver that they attended Mr Msibi's house. According to them, he signed documentation and later his confirmatory affidavit, used by the Applicant in her supplementary affidavit, under false pretenses. Yet, Mr Msibi, notwithstanding being so strongly opposed to getting involved, does not depose of another affidavit withdrawing his first affidavit before this Court.

CONCLUSION

42 As held earlier, at the time of the deceased's death, the Applicant has been his female companion for at least 47 years and the Third Respondent for at least 33 years. The First Respondent, at the time, was civilly married to the deceased for 46 years. There is in my mind no reason why they should not all be afforded equal protection before the law. The community's interest would expect no less. It was held in *Mayelane:*[24]

'[62] Section (1) of the Constitution provides that everybody is equal before the law and has the right to equal protection and benefit of the law

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[24] See 4 above

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[64] This Court has repeatedly emphasised the importance of the right to equality as a cornerstone of our constitutional democracy. As noted in ***Hugo (President of the Republic of South Africa and Another v Hugo (1997) ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41):*** *"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.'*

43 Customary law is unwritten[25] and its contents are to be determined by the customs of the people and their values, in such a manner that their constitutional rights are respected. Customary law is not governed by rigid rules, but is flexible.[26] As was held in *Tsambo v Sengadi*:[27]

'[17] …That customary law has always evolved is evident from the following observation made by Professor Bennet almost three decades ago and approved In many judgments:

"In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual formulae was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value….

[18] It is evident from the foregoing passage that strict compliance with the rituals has in the past been waved… Clearly, customs has never been static. They develop and change along with the society in which they are practiced…'

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25 Alexkor Ltd and Another v Richterveld Community and Others [2003] ZACC 18; 2004 (5) SA 460 (CC);
2003 (12) BCLR 1301 (CC) (Alexcor)

26 Mbungela and Another v Mkabi and Others, 23 above

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

44 In *Tsambo*, referring to *Mbungela*,[28] it was held that the Court decided that the handing over of the bride was not a pre-requisite to a valid customary marriage. Referring to *Mabuza*[29], the Court remarked that "*ukumekeza*" has evolved to such a degree, that it was capable of being waved by agreement between the two families. In *ND v MM*[30] it was held that the non-observance of registering a customary marriage does not invalidate it, it only makes it harder to proof the marriage without a certificate in hand.

45 In *ND v MM*,[31] the Constitutional Court was further quoted as holding in *Mabuza v Mbatha:*[32]

'[17] … It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistent with the Constitution, so as to meet the changing needs of the people who lives by its norms. The system therefore, requires its content to be determined with reference to both history and the present practice of the community concerned …..

"[18] The Constitutional Court has cautioned Courts to be cognizant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefor be balanced against the value of legal certainty , respect for vested rights and the protection of constitutional rights. The Court must strive to recognize and give effect to the principle of living, actually observed customary law, as it constitutes a development in accordance with the spirit, purport and objects of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.' (my emphasis)

46 Considering the nature and duration of the relationship between the deceased and the Applicant, the surrounding circumstances, community interest and the

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28 Tsambo at para 16, Mbungela and Another v Mkabi, see 20 above
29 Tsambo at para 16, Mabuza v Mbatha, see 21 above
30 ND v MM, see 20 above at para 10
31 ND v MM (18404/2018) ZAGPJHC 113 (12 May 2020); See also Mbungela and Another v Mkabi and Others 2020 (1) SA 41 (SCA) para 7
32 Mabuza v Mbatha 2002 (4) SA 218 (C)

spirit of customary law, I am satisfied that the Applicant has made out a proper case. In keeping with the living values of customary law, I am not prepared to accept that the Applicant was merely a female companion to the deceased for 47 years. She bore him children and gave a home to him from time to time. He allowed her to stay in one of his properties and trade from another. These are not the actions of a man who keeps a female companion his wife does not agree to. Discriminating against the Applicant by virtue of a lost lobolo letter is untenable in our democratic dispensation.

47 The deceased's marriage to the Third Respondent might have been invalid, in so far as the necessary declaration in terms of the Black Administration Act was not made. Only the deceased would be able to truthfully tell the Court whether he abided by the Act or not. Whether he declared the marriage or not, would not matter after his death.[33] The Third Respondent is, by virtue of the Second Respondent, not in possession of her lobolo letter. She mourned the deceased's death together with the Applicant and the First Respondent. She had at least a 33 year long relationship with the deceased. She bore him children and gave him a home. She stays in one of the deceased's properties and trades from another. Again, this is not the actions of a man who kept a female companion without his wife's blessing. On the face of the facts before me, the deceased treated all three his wives equally. Post his death he would have expected the Court to respect his wives and also treat them equally.

48 My judgment is in keeping with the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.* This Act repealed sections 22 and 23 of the Black Administration Act. The new Act provides that all the deceased's wives, whether married to him by civil law or customary marriages shall be considered equal upon his death. *Section 7(1)* and 7(2) of the Act provide as follow:

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[33] Section 22 and 23 of the Black Administration Act, which was repealed and replaced by Section 7(1) and 7(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

'7(1) A marriage under the Marriages Act, 1961 (Act 25 of 1961) does not affect the proprietary rights of any spouse of a customary marriage or any issue thereof if the marriage under the Marriages Act, 1961 was entered into -

(a) On or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriages and Matrimonial Property Law Amendment Act, 1988 (Act 3 of 1988); and …

(b) …..

7(2) The widow of the marriage under the Marriages Act, 1961, referred to in subsection (1), and the issue thereof have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the marriage under the Marriages Act, 1961, had been a customary marriage.'

49 Finally and as held in *Mayelane:*[34]

'[43] This Court has accepted that the Constitution's recognition of customary law as a legal system that lives side-by-side with the common law and legislation- requires innovation in determining 'living' content, as opposed to the potentially stultified version contained in past legislation and court precedent…'

50 The Application stands to be granted with costs on a party and party scale. I do not see any reason why the Applicant has to be penalized with a cost order apart from that for the postponement occasioned on 13 June 2023.

ORDER:

51 The civil marriage between the First Respondent and the deceased is declared null and void;

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[34] Mayelane v Ngwenyama and Another, see 4 above; See also Shilubana and Others v Nwamitwa (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008) at paras 47-49 and 55

52 The civil marriage of the First Respondent to the deceased shall be equal in status to the customary marriages of the deceased to the Applicant and the Third Respondent;

53 The Fifth Respondent is herewith ordered to remove the civil marriage of the First Respondent to the deceased from the marriage register and to register the three customary marriages between the deceased, the Applicant and the First and Third Respondent;

54 The Fourth Respondent is ordered to oversee the division of the deceased's estate accordingly.

55 The applicant shall pay the First and Second Respondent's costs occasioned by the postponement on 13 June 2023 on a party and party scale, subject to the discretion of the taxing master.

56 Cost of the Application shall be cost of the estate, payable in accordance with the discretion of the taxing master on a party and party scale.

57 A copy of this judgment is to be forwarded to the Mpumalanga Deeds Office.

PICK, AJ
Acting Judge of the High Court of South Africa
Mpumalanga Division, Mbombela Main Seat

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Appearance for the First and Second Respondent:

ADV HF FOURIE

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And to:

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Fourth Respondent:

The Master of the High Court

Mbombela, Mpumalanga

Fifth Respondent

The Minister of Home Affairs

c/o Office of the State Advocate

Mbombela, Mpumalanga