REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 14295/10

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

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In the matter between:

SOUTHON, ELIZABETH Plaintiff

and

MOROPANE, MOHAU JACKSON Defendant

J U D G M E N T

SALDULKER J:

INTRODUCTION

[1] South Africa is a rainbow nation, its inhabitants owing allegiance to many religions, diverse cultures, and rich traditions. Before the constitutional

era, customary marriages were not afforded recognition as valid marriages and were considered '*to be repugnant to principles of public policy and natural justice or contra bonos mores*[1]'. The new constitutional order brought about a 'recognition of our diversity, which is an important feature of our constitutional democracy'[2] and a decisive break from the past. The Constitution in recognising marriages by cultural traditions provided respectability, hope and salvation to many women and the vulnerable members of our society.

[2] In this action the plaintiff, Ms Elizabeth (*Pule*) Southon, has instituted proceedings against the defendant, Mr Mohau Jackson*(Dinky*) Moropane, for an order, *inter alia* declaring that she is married to him by customary law, and claims maintenance in the amount of R13 970,00 and other ancillary relief.

BACKGROUND

[3] It is common cause that on 17 April 2002, Mr Strike Moropane, the defendant's brother visited the family home of the plaintiff in Seshego, to begin negotiations for lobola for the plaintiff and paid a sum of R6000 to the Mamabolos. It is not in dispute that a sheep was slaughtered on that day. Photographs were shown in court of the plaintiff draped in a blanket, with people around her singing and dancing. Later that night the plaintiff went to the defendant's family home in Atteridgeville, accompanied by her aunt Ms Malotana and the defendant's sister Jojo, where the defendant was present.

[4] The plaintiff contends that the amount of R6000 was paid by the defendant's family (the Moropanes) to the plaintiff's family (the Mamabolos) for lobola[3]. The defendant's contention is that no customary marriage exists

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[1] TSAR:2002.4,*The Current legal Status of Customary Marriages In South Africa* ,I PMaithufi and GMB Moloi,p601,fn16:Ismail v Ismail 1983 (1) SA 1006(A); Docrat v Bhayat1932 TPD, 125; Seedat's Executors v The Master (Natal) 1917AD 302;Nkambula v Linda 1951(1)SA 377(A); Malaza vMndaweni1975BAC (C) 45

[2] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03)[2004]ZACC17;2005(1)SA 580(CC);2005(1)BCLR 1 (CC)(15October 2004)

[3] In *The Recognition of Customary Marriages Act No 120 of 1998* , lobolo is defined as the property in cash or in kind, whether known as *lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.

between the parties and that the R6000 did not represent lobola,[4] (traditionally known as '*magadi* ') but was an introductory fee, traditionally called '*pula molomo'* or '*goko kokota."*[5]

[5] The primary issue for determination is whether the plaintiff and the defendant are married to each other in terms of customary law.

[6] Two expert witnesses, both academics with many years of teaching experience testified on customary marriages. Professor Mokgwatsane testified for the plaintiff and Mr Phatudi Sekhukune testified for the defendant. Although there were differences between the two experts as to what the formalities of a customary marriage entailed, they agreed in principle that the essentials for a customary marriage included the following:

i. There would be a messenger, traditionally known as the *'mmaditsela'* appointed by the groom's family;
ii On an agreed date, the family of the groom will visit the family of the bride;
iii. The two families will negotiate the lobola to be paid *;*
iv The family of the groom will pay the lobola or part of it;
v. After the receipt of the lobola, a 'beast' will be slaughtered 'to seal the deal', and a portion thereof will be given to the groom's delegation;
vi On the same day the family of the bride will select a group to accompany the bride to the groom's family and that will conclude the marriage. The experts were agreed that this 'crucial element of handing over the bride 'by her family to her new family,' is the 'most important and final step in the chain of events and happens in the presence of both the bride's and groom's families and in the absence of which no customary union can be seen to have been concluded'.

[7] The differences between the two experts were recorded in their joint minutes and further highlighted during their testimony. According to the

[4] LAWSA, Vol 32, para128, p120- The origin of the word lobolo comes from the Zulu noun 'ilobolo' from the verb stem 'lobola'.
[5] *Pula molomo* is sepedi for 'knocking'or 'open the mouth to talk'.

defendant's expert, Mr Phatudi Sekhukune, the customary marriage was not complete because of *inter alia* the following:

i. The absence of *' lehlakore, letsogo la bakgonyana* and *mohlobolo',* when plaintiff was being transferred to the groom's homestead. The plaintiff's expert contended that '*lehlakore'* which is a tribute to the Chief, and '*mahlobolo*'(the pelvic girdle) are not in 'sync' with modern developments and changes. Municipal by- laws 'inhibit' the slaughtering of cattle in urban areas, and further held the view that this was an archaic practice that is compromised, depending on context. As a result, smaller livestock such as sheep and goats are slaughtered from which '*lehlakore'* cannot be derived.

ii. The defendant's expert held the view that traditional '*magadi*' (lobola) consists mainly of cattle, sheep and goats and not money.

In contrast, the plaintiff's expert recorded that '*magadi' i*s not limited to cattle, sheep and goats but is extended to refer to monetary contributions and services rendered by the groom's family.

iii. The defendant's expert contended that there was also the absence of a pot of homebrew (*phafa ya bjalwa)* and the failure of the bride's parents to provide *'letswele le ngwana'* (a breast of meat which is intended to assist the bride in the upbringing of the first born child). The plaintiff's expert contended that these practices, homebrew and '*lehlakore'* were defunct in some areas such as townships and cities.

iv. The significance of '*go ya boenyana'.* (going back for a short visit). The plaintiff's expert contended that current practices include absence of *'boenyane'* at times; however there are married people who continue living happily without '*go tliswa'* after 'boenyane'.

v. The defendant's expert stated that dependants are not permitted to witness the payment of *'magadi'*(lobola). The plaintiff's expert stated that if they are married, they were allowed to participate in similar discussions and in similar contexts. They have the right to enjoy similar privileges in the community.

[8] This court is grateful to both counsel for providing it with relevant authorities and detailed heads of argument in regard to the issues. In the preparation of this judgment I have borrowed substantially from their respective submissions.

SUMMARY OF THE EVIDENCE

Evidence for the plaintiff

The plaintiff called several witnesses.

[9] Ms Monica Malaza testified that the plaintiff was her aunt's daughter. On 17 April 2002, she represented the plaintiff's family at a gathering at the plaintiff's home in Seshego, during the negotiations for lobola for the plaintiff between the two families, the Moropanes and the Mamabolos. The date 17 April was specially chosen by the couple, signifying the day they had met.

[10] Included in the Moropane delegation, were Mr Strike Moropane, and Ms Johanna (Jojo), the brother and the sister of the defendant. Amongst the Mamabolo family delegation were Mr Gilbert Mamabolo, Mr William, Ms Malotana, the plaintiff's uncles and aunt.

[11] She testified that she was the '*mmaditsela',* the messenger, during the negotiations between the two families when the Moropanes had come to the plaintiff's home to 'marry the plaintiff and pay lobola'. This was corroborated in evidence by both Mr Ernest Mamabolo, the plaintiff's uncle, and Mr Gilbert Mamabolo, the plaintiff's elder brother who is visually impaired, the latter denying the defendant's version that he was the messenger, being led by Mr Mokone between the two delegations.

[12] All the plaintiff's witnesses testified that the Moropanes paid R50 to 'open the mouth to talk', traditionally known as '*pula molomo'*. Initially the Mamabolo delegation requested R10 000,00 in respect of lobola, but eventually the sum of R6 000 was agreed upon, which amount Ms Malaza handed over to the Mamabolo family. The R6000 was for lobola, and that once lobola was paid, the marriage was complete. A receipt for the lobola was issued and received. It was not the custom to sign a receipt for *'pula molomo'*.

[13] The Moropanes then asked for, and were shown the bride, the plaintiff. Thereafter, the Mamabolos announced that they have a sheep, but before they went outside to slaughter it, the Moropanes produced a blanket which was placed around the plaintiff's shoulders. This was a token, signifying that she had entered into a marriage with the defendant. The Moropane family did not have knives to slaughter the sheep and assistance was sought from the plaintiff's family.

[14] Mr Ernest Mamabolo testified that the slaughtering was the symbolic joining of the two families into 'one family'. Portions of the slaughtered sheep was divided and given to the Moropane and the Mamabolo families. At the insistence of Mr Strike Moropane, a portion of the meat was cooked and eaten by the two families. They then celebrated and danced.

[15] When photographs of the event which took place on 17April 2002 was shown to Ms Malaza, she experienced difficulty identifying some members of the Moropane and the Mamabolo families, explaining that the events of April 2002 had occurred a long time ago.

[16] Ms Malaza testified that it was a mistake for the plaintiff not to have mentioned her name in her affidavit as one of the persons present at the gathering on 17 April 2002. She explained that she had been nursing her sick husband, and had only deposed to an affidavit the week before, asserting to her presence at the plaintiff's family home. She denied the defendant's version that the Moropanes had negotiated with Mr Gilbert Mamabolo and not with her.

[17] After the events in Seshego, the plaintiff left for the defendant's family home in Atteridgeville, driving her own vehicle in the company of her aunt, Ms Malotana and the defendant's sister Jojo. The aunt of the plaintiff 'delivered' the plaintiff to the defendant's home in Atteridgeville on the same evening.

[18] In November 2003, Mr Gilbert Mamabolo testified that he was called to the defendant's home in Sandton to resolve a dispute between the plaintiff and the defendant. There were problems between the plaintiff and the defendant's children from his previous marriage. However, he was not aware that the problems delayed the parties' marriage by civil rites.

[19] When it was put to Mr Ernest Mamabolo, that the plaintiff had deposed to an affidavit that she and the defendant had agreed to the amount of R6000 for lobola, and that no negotiations about this amount took place, he replied that, as the parties had been living together, they may have agreed between themselves to the amount of lobola to be paid.

[20] All the plaintiff's witnesses denied the defendant's version, that the R6000 paid was an introductory fee, for '*pula molomo',* nor was it paid to 'close the gate and 'ringfence' the plaintiff from other would-be suitors', and further corroborated each other that the R6000 was for *magadi,* which was lobola. Had the R6000 been for *'pula molomo'*, the Mamabolo family would not have given the Moropanes a sheep to slaughter, nor the blankets. As far as they were concerned the parties had concluded a marriage on the 17 April 2002.

[21] Ms Francina Malotana, the wife of the plaintiff's maternal uncle testified that she and her husband were approached by the mother of the plaintiff, to attend a meeting at the plaintiff's home in connection with lobola on 17April 2002. Her 'duty' included taking and /or accompanying the plaintiff, to be handed over to her in-laws in Atteridgeville. After the negotiations for lobola were concluded, there was ululating. She confirmed the testimony of Ms Malaza and the Mamabolos that a sheep was shown to the Moropanes which was then slaughtered with assistance from others.

[22] After the festivities in Seshego, she travelled with the plaintiff to her in-laws place in Atteridgeville, accompanied by the defendant's sister, Jojo. They arrived late at night at Atteridgeville, where they were met by many people, including the defendant and his aunt, who were happy to see the plaintiff, welcomed her and sang praises in her honour. They were led into the house with the plaintiff and defendant walking ahead of them. There was a prayer by the defendant's sister, Nkele, who thanked the defendant for bringing their 'mother'. There was a feast and music was played.

[23] Thereafter, the plaintiff and the defendant returned to Sandton, to the defendant's home, travelling in two vehicles, Ms Molatana travelling with the plaintiff. She stayed at the parties' home for three days. On her departure, the defendant gave her a clock as a gift and expressed his gratitude for bringing him his bride. She denied that the R6000 was for '*pula molomo'*. Had it been for the latter she would not have taken 'Pule' to be delivered to her in-laws. For *'pula molomo*' only a token amount of R50 was offered, and she had never come across a situation where R6000 was paid for '*pula molomo'*.

[24] Professor Mokgwatsane was called as an expert witness for the plaintiff. He agreed in principle with the defendant's expert, Mr Sekhukune about the essential requirements of a customary marriage. He testified that in Sepedi culture, (which both parties belong to) the groom's family 'knock' on the door of the bride's family for a relationship with the bride. This is traditionally known as '*pula molomo'* for which there was 'no price'. The groom could call the woman 'his wife' after *'pula molomo'*. A messenger is appointed and a date arranged for the groom's family and the bride's family to meet. On the agreed date, the two families negotiated the amount of lobola to be paid. After receipt of the lobola in full, a 'beast' is slaughtered 'to seal the deal' to celebrate the customary marriage. A portion of the slaughtered meat is given to the groom's delegation when they return to their home. A woman is selected to accompany the bride to the groom's family home, which will then conclude the marriage.

[25] He stated that no money was required to be paid for '*pula molomo',* and no slaughtering took place after *'pula molomo'.* A token of R50 could be paid. He was referred to the points of dispute set out in the joint minutes between himself and the defendant's expert. He testified that *magadi* (lobola*)* was not limited to livestock, and extended to monetary contributions and services rendered by the groom's family. He opined that the concept of "*lehlakore*", is no longer observed. This was in reference to the custom that a portion of the slaughtered meat after the lobola was paid , three rib-cages extracted from a cow was given to the local Chief. He stated that the custom of '*lehlakore '* was not practiced in that many people were urbanised and did not owe allegiance to Chiefs. Social cultural conditions had brought about changes, and compromises were made as a result of municipal by-laws.

[26] He stated further that practices, such as , *'letsogo la bakgonyana'* and '*mohlobolo' (*the pelvis girdle*)* which is given to the prospective in-laws, were no longer observed due to evolved culture. The *lehlakore* and homebrew were also defunct practices. The absence of these practices did not mean that a customary marriage did not take place.

[27] The plaintiff, Ms Elizabeth (Pule) Southon, testified that she met the defendant Mr Dinky Moropane in 1985. It is common cause that at that stage the defendant was married to his ex-wife, Thembeka, with whom he had three children. After his divorce, the parties began to live together. On 17 April 2002, the defendant's brother, Mr Strike Moropane arrived in a delegation, which included, Jojo the sister of the defendant, Billy, the son of her aunt, and Mr Tipi Seema, the son in-law of the defendant's aunt. She and the defendant had agreed to a marriage on the 17 April 2002. She denied that the meeting was for '*pula molomo'*. She sat in a room with her cousin whilst lobola was being negotiated between the two families and the messenger.

[28] After the amount of R6000 was paid for lobola, the defendant's family wanted to see the 'makoti', and she was draped in a blanket by Jojo and taken outside the house, to meet the people who had gathered there, who

began to sing when they saw her. The Moropane family had brought blankets for her and her mother.

[29] She confirmed Ms Malaza and Mr Gilbert Mamabolo's tesimony that Mr Strike Moropane had not arrived alone to her home on 17 April 2002. She identified herself in the photos dressed in a doek and a blanket and also identified members of the defendant's family, Jojo, and Mr Tipi Seema who had come with the defendant's brother, Mr Strike Moropane. She also pointed out Billy, who was related to the defendant in the photos. She was referred to the affidavits deposed to by Ms Elizabeth Seema and Mr Tipi Seema, members of the defendant's family, in which they confirmed their presence at her home on 17April 2002. This was confirmed by Mr Gilbert Mamabolo when he testified. The plaintiff testified that Ms Seema had been part and parcel of the ceremony at her home.

[30] After the events in Seshego, she left for Atteridgeville, accompanied by the defendant's sister Jojo and her aunt, Ms Malotana. At Atteridgeville, the defendant, his aunt and his sisters welcomed them. She was still wearing the blanket over her shoulders. The people at the defendant's home sang and danced. They prayed and welcomed her as their 'mother'. They then ate and the plaintiff and the defendant thereafter left in two separate vehicles for their home in Sandton. Her aunt travelled with her, and stayed until the weekend, and when she departed, the defendant gave her a clock as a token of appreciation. She denied the defendant's version that the reason she had gone to the defendant's home on 17 April 2002 was to drop off his sister, Jojo.

[31] During the proceedings, a DVD with the caption *'Pule Moropane's 50th Birthday'*, was shown in court. In 2005, on the plaintiff's 50th birthday ,the defendant had organised an event, inviting 250 guests to the Johannesburg Country Club. Mr Strike Moropane opened the occassion with a prayer quoting from the Bible, 'Husbands, love your wives, wives respect your husbands'. In the DVD the defendant referred to the plaintiff as his wife and spoke of his profound love for her. The defendant's son Deejay, from his

previous marriage, referred to the plaintiff as his mother. The defendant also acknowledged Mr Gilbert Mamabolo, the plaintiff's brother, as his brother in-law and spoke about his mother-in-law, the plaintiff's mother, who had passed away at his home.

[32] It surprised her that Mr Strike Moropane denied that he had participated in a customary marriage on 17 April 2002. She denied that the defendant had sent his brother for *'pula molomo'*, to 'ringfence her from other would-be suitors'. She did not agree with the plaintiff's expert that the defendant could still refer to her as 'his wife' after paying only for '*pula mulomo'.*

[33] She confirmed that in the application for a protection order launched against her by the defendant, the defendant referred to her as his 'traditional wife', and in the application for membership to the Johannesburg Country Club, the defendant referred to her as his wife and recorded their date of marriage as '19 December 2000'.

[34] She ran the business 'Southmor Communications' from year 2000, which was a Multichoice Agency. In 2006, the defendant obtained a Nashua licence and this was merged with the company run by the plaintiff, and called the Southmor Communication Kolonnade.

[35] She was referred to the letters written to her by the defendant in regard to an outstanding tax assessment for the business and the personal transactions she had made from the business funds, which she denied. She had a disagreement with Mr Strike Moropane who wanted to assist in her business. She thereupon left the business and started selling jewellery.

[36] It was put to her that the defendant did not mention the date 17 April 2002 when he addressed the gathering on her 50th Birthday in 2005 nor in the application for membership for the Johannesburg Country Club, but referred to the year 1998 as the defining moment in his life. She testified that the date of marriage, the 19 December, recorded on the form , was the defendant's birth date and he had no reason to distance himself from the date 17April

2002. She testified that 17April 2002 was significant, in that it was celebrated by them every year as the date on which they had met each other. It was the defendant who told her that he wanted to get married on 17April 2002. She denied the defendant's version that there was no marriage between them.

[37] She denied that the problems between them were caused by his children. She did not know why the defendant's daughter was frequently hospitalised. She was referred specifically to her affidavit where it was stated that 'Often, the fights arose over the behaviour of the respondent's children from his former marriage'. To this she replied that her attorney had phrased the paragraph in this manner. She also denied that the meeting with Ms Mama Vilakazi was set up to resolve hostilities and to work on her relationship with the defendant's children so that they could make plans to get married by civil rites.

[38] She testified that she attended therapy sessions as a result of the problems between her and the defendant, and that her brother also tried to resolve their problems. She stated that the defendant was dictatorial in his attitude towards her. She admitted that there were two protection orders sought against her by the defendant, and that she did not reply to the serious allegations contained in the defendant's affidavit of abuse perpetrated by her against the defendant and his son.

[39] In 2005, she celebrated her 50th birthday. She was in fact born on 21 Dec 1955 and not in 1951, but had not rectified her birth certificate to reflect the correct date. She stated that the defendant had written a note to her on 21 December 2007, expressing his love for her, on her birthday and gave her permission to restyle her wedding ring. This was after the lobola was paid. He had also given her a ring in 2004 and she identified a photo which celebrated the occasion, where the defendant had, in the presence of his friends, announced: 'I have completed'.

[40] She was cited as a respondent in the divorce action instituted by his previous wife Ms Thembeka Moropane. She had met the defendant in 1985

and had started an extra-marital affair with him. She moved into the defendant's home, after his ex-wife had moved out, and lived with the defendant as man and wife until she left the defendant's home on 16 November 2009. She and the defendant had never discussed the conclusion of a civil union, nor about their proprietary regime. It was her understanding that they shared everything.

[41] The plaintiff then closed her case.

Evidence for the Defendant

[42] The defendant called Mr Sekhukune as an expert. He was in agreement with the plaintiff's expert in principle as to requirements of a customary marriage. Their differences were recorded in the joint minutes. His testimony to a large extent described how a customary marriage is celebrated in a rural setting. He was of the opinion that the marriage between the plaintiff and the defendant was not complete because certain rituals had not been performed.

[43] He stated that the negotiations for a customary marriage began with '*pula molomo'*, traditionally to 'ringfence the bride from other would-be suitors'. It was 'expressed in terms of a '*beast*' , with some people paying money. With the payment of '*pula molomo'*, the man was formally ushered into the bride's home. He testified that *'pula molomo'* was the 'initial lobola' and the beginning of the dowry which will be counted, as part of the lobola.

[44] Thereafter another day would be chosen by the groom's family for the marriage and the payment for lobola. An intermediary, viz *'mmaditsela'*(go-between'/messenger) would be appointed between the families. On the appointed day the lobolo (*magadi)* would be negotiated. After the agreement is reached on the lobola, the slaughtering of a *'beast'* will take place with the groom's family using their own knives. A portion of the slaughtered '*beast*' (the *lehlakore*) must be given to the local Chief. The messenger from the bride's family will then accompany the bride to the in-laws. There will be ululating and celebrations at the in-laws that the bride has arrived.

[45] There were certain aspects that made him question whether a customary marriage had taken place between the plaintiff and the defendant in this matter. He disagreed with the plaintiff's expert that 'lehlakore' and homebrew were archaic and defunct practices. These were traditions. Furthermore, it was irregular for the son of the plaintiff to have been present during the negotiations in Seshego, and that it was not in accordance with custom that both the defendant and the plaintiff had agreed to the lobola in the amount of R6000, as the plaintiff's affidavit indicated. Furthermore the entire ceremony was concluded in one day which was also not in accordance with tradition. A marriage could take three days. It was also not in accordance with custom that the plaintiff was met by the defendant's younger sister at his home on the night of the 17 April 2002 and not by the elders of the defendant's family.

[46] He conceded that he had not carried out a study as to how urbanised people had adapted traditional ceremony to the urban setting. He also conceded that the difference between himself and the plaintiff's expert was his confinement to pure traditional Pedi culture, whilst the plaintiff's expert dealt with contemporary and evolved culture.

[47] Initially, he stated that he did not speak to Mr Strike Moropane and did not question him as to why he had gone to the plaintiff's home in Seshego on 17 April 2002, and that everything he knew about the case was from what he had read in the documents. However, when pressed on this aspect, he stated that Mr Strike Moropane had informed him that he had gone to the plaintiff's home 'to ask for the plaintiff's hand in marriage'.

[48] He testified that the marriage between the parties was not complete as they had not given 'lehlakore' to the Chief, they were not 'loyal'. He testified that a 'beast', viz a cow should have been slaughtered, as it symbolised the dowry. When it was put to him that a sheep was slaughtered, he replied that this was traditionally incorrect, and did not complete the marriage as the ritual of giving '*lehlakore*' to the Chief had not taken place.

[49] He stated that only after *'pula molomo'*, did the negotiations start for '*magadi'*, viz for lobola. It was put to him that R50 was paid as *'pula molomo'* for the plaintiff. He stated that a token amount for '*pula molomo'* could be paid, depending on the individual. He was shown photographs which depicted the plaintiff draped in a blanket, and his reply to this was that he could not explain what the blanket on the plaintiff symbolised, as blankets were not brought for '*pula molomo'*. He agreed with the essentials of a marriage as set out in the case of *Motsoatsoa v Roro and another*[6]. He stated that a customary marriage was completed when the bride was transferred to the groom's place. He insisted that the transfer was accompanied by a wedding celebration lasting up to three days. In his opinion the R6000 was paid for 'ring fencing'. He conceded however, that the R6000 paid would count towards the lobola. He stated that there was no traditional customary marriage between the parties.

[50] Mr Pappi Samson (Strike) Moropane, the defendant's brother confirmed that he attended the plaintiff's home on 17April 2002. His instruction from the defendant was to go to the plaintiff's home and 'knock', viz to *'go kokota'*. He was handed an amount of R10000.

[51] He arrived alone at the plaintiff's home. The plaintiff's delegation included her son Tony, Mr Gilbert Mamabolo, whom he regarded as the leader of the plaintiff's delegation, was visually impaired, and was being led by Mr Mokone between the delegations.

[52] He informed the plaintiff's delegation that he had been sent there to *' go kokota'*. They told him that a 'cow' is needed to 'knock' and that its equivalent was R6000. He gave the amount of R6 000 for which a receipt was issued to him on 17 April 2002. He was then welcomed by the plaintiff's family as having finished '*go kokota*', and he told them that 'I will go back to accumulate the cows'. The amount of money was not mentioned. The bride, the plaintiff was then brought to him, covered in a blanket and people began

[6] [2011] 2 ALL SA 324 (GSJ), at para [16] to [20]

to ululate and sing. He identified the plaintiff from photographs wearing a doek and a blanket. He was told by the Mamabolos that it was their tradition to slaughter. Since 'they', the Moropones had no knives, assistance was sought from others to slaughter the sheep.

[53] He insisted that the R6000 was for '*pula molomo'.* He did not bring blankets or knives nor did he take any portion of the meat when he left the plaintiff's home. He ate and then left for Atteridgeville. He did not think that the plaintiff was going to be delivered to the defendant's house. At the house of the defendant he waited for a while, but left to go home, before the defendant and the Moropanes arrived.

[54] He saw Jojo, his sister, who enjoyed a close relationship with the plaintiff, at the time when they ended the singing. He did not ask her what she was doing at the plaintiff's home. He denied Ms Malaza's and the Mamabolos' testimony that he had arrived in a delegation consisting of Jojo, his sister, his paternal aunt, Mr Tipi Seema, and his aunt's son Billy, the latter whom he could not point out in the photographs. He insisted that he had gone alone to the plaintiff's home, and could not explain why his relatives had deposed to affidavits stating that they were present at the plaintiff's home in Seshego on 17 April 2002 during the customary marriage celebrations. He denied that Ms Malaza was the messenger negotiating between the parties.

[55] The defendant had complained to him about the plaintiff's attitude towards his children, and in 2003 a meeting took place to discuss the problems of the children. He advised the parties to try to make peace. In 2007, a further meeting was held, where Ms Mama Vilakazi ,a friend of the plaintiff, was also invited to resolve the problem between the plaintiff and the defendant's children, but to no avail. He had promised the Mamabolos that he would return to complete the lobola, but hesitated because of the problems relating to the children, and the defendant also did not give him instructions to proceed to the plaintiff's home to do so.

[56] At the plaintiff's birthday party which took place in 2005, he referred to the plaintiff as the defendant's wife and was seen praising her on the video. He explained that although the parties were not husband and wife, in Pedi culture, there is no word for 'girlfriend'. The defendant was an elderly man and could not refer to the plaintiff as his girlfriend. Since an introductory fee, 'pula molomo' had been paid, the defendant could call the plaintiff his wife. He explained that the defendant had referred to Mr Gilbert Mamabolo as his brother-in-law because he had 'ringfenced' his sister. The parties were living together.

[57] He denied speaking to the defendant's expert. When it was put to him that Mr Sekhukune testified that he had informed the expert that he had gone 'to ask for the plaintiff's hand in marriage', to ' *go kokota'*, he replied that Mr Sekhukune may have been informed of this by the defendant in his absence. When he was asked as to who was speaking the truth he said both of them were.

[58] He testified that he did not know how the members of his family had travelled to Atteridgeville from Seshego. It was put to him that he had used the adjective 'they' to refer to them whereas his evidence was that he had gone to the plaintiff's home alone. His explanation was that he had used the word 'they' as a sign of respect for an elderly person, and that he was referring to his sister, Jojo.

[59] Ms Mama Vilakazi testified that she knew both the parties well, having known them for many years. She was called to be part of mediation efforts between the parties. There were problems concerning the children. Mr Moropane said he wanted peace between the children and the plaintiff. Members of the families of both parties were present when someone remarked that the issue of the children stood in the way of the completion of the marriage. She testified that she was surprised and shocked because she believed that the parties were married, the plaintiff wore a ring. She conceded that she did not ask for clarification regarding the marital circumstances of the

parties. When she got to the meeting she found out that the parties were not married.

[60] The defendant, Mr Mohau Jackson Moropane testified that he was 63 years old, born on 19 December 1948. He was previously a director at Liberty Life. He had met the plaintiff in Polokwane in 1985. He formed an adulterous relationship with her, which he said was not pleasant. His ex-wife Thembeka, found out about the relationship between himself and the plaintiff and instituted divorce proceedings against him. He tried to save the marriage. However, the divorce proceedings were reinstituted by his ex- wife and on 26 October 2000 the divorce was granted. Thembeka left for London in 2003. He made up his mind never to marry in community of property again.

[61] On 17 April 2002, he sent his brother Mr Strike Moropane, to the plaintiff's family home in Seshego '*in order to start the negotiations to pay lobola for Elizabeth'*. His brother went alone to the plaintiff's family home and met with the plaintiff's delegation led by her brother Mr Gilbert Mamabolo. He denied that Ms Malaza was the messenger between the two delegations, stating that the plaintiff herself had not mentioned her presence in her affidavit.

[62] All that his brother did in Seshego was to 'go *kokota/pula molomo*'. An amount of R6 000 was paid for this purpose, which amount would be deducted from the '*lobola'* to be paid. He knew nothing about the slaughtering of the sheep nor about the blanket given to the plaintiff. His brother thereafter returned to Atteridgeville alone to report to the defendant.

[63] He confirmed that on the night of the 17 April 2002 at around 22h00, he met the plaintiff, her aunt Ms Malotana and his sister Jojo on their arrival at his family home in Atteridgeville from Seshego. The plaintiff had called earlier and informed him that she was on her way back from Polokwane, and would pass Atteridgeville as they were to drop off Jojo first and his vehicle. For this reason the defendant decided to wait for them at his family's home.

[64] He did not have any intention to marry the plaintiff according to customary law. He had lived in an urban area and did not know African customary law. He stated that '*if you lived together you will be ridiculed*'. He regarded the payment of lobola as a small part of the tradition which did not have the legal consequences of a marriage.

[65] He testified that he had assisted the plaintiff in becoming a member of the Johannesburg Country Club. The joining fee was R21,000 but was a lesser amount for a married couple. He saved money by stating that they were a married couple, and had recorded the date of marriage as 19 December 2000. Had the date of 17 April 2002 been important for him, he would have recorded that date.

[66] He was referred to the plaintiff's 50th birthday party video where he declared his love for the plaintiff, extolling her virtues. He told the guests that in 1998 they had decided to marry and had called the plaintiff his wife and the members of the plaintiff's family, his in-laws. To this he replied that it was a prepared speech, and he had not promised to marry the plaintiff in 1998, as he was then still married to Thembeka. He had only 'ringfenced' the plaintiff from other suitors. He had not paid lobola.

[67] His brother did not go back to the Mamabolos because of the problems with the children. There was a meeting in November 2003 to resolve their problems, so that the process of 'lobola' could be taken forward. Deejay, who was 12 years old at the time of the divorce between himself and his ex-wife, had been traumatised by the divorce between his parents, and blamed the plaintiff for their breakup. He stated that it was a low moment in the trial when the plaintiff said she did not know about his daughter's bipolar illness.

[68] In 2007, a further meeting was called about the plaintiff's attitude towards the business and the children. A neutral person Ms Mama Vilakazi was called on the plaintiff's side, but the meeting did not produce any results.

[69] The plaintiff had her own Close Corporation which was a very successful business at Multichoice, which was maximised by his Nashua Mobile Agency. He had lent money to the business because the plaintiff was not creditworthy. The business owed SARS and was responsible to pay the taxes, but the plaintiff refused to resolve the tax problem and resigned instead.

[70] He had bought two rings for the plaintiff, one in 2004 and the other in 2007. The ring that he had given to her on 21 December 2004 was not a wedding ring but was for her birthday, and admitted that he had slipped this ring on her 'wedding ring finger'. In 2007 he wrote a private note to the plaintiff addressing her as 'my darling wife' and gave her permission to re-style her wedding ring. He conceded that this time he was referring to a wedding ring, and not just a ring.

[71] In 2008 the parties tried professional counselling with a psychologist, Ms Budlender, but this was terminated after a few sessions. The problems with his son Deejay continued, which caused a lot of problems at home between them. The plaintiff fought with him, insulted him, and as a result, he had to take out protection orders against the plaintiff which brought peace in his life. The plaintiff left the house in 2009.

[72] Under cross-examination he stated that his brother was sent to start negotiations for lobola for the plaintiff. He had a choice to pay lobola and that it was 'my decision to pay lobola.' It was put to him that in 2007, he wrote a letter in which he called the plaintiff 'my darling wife' and that furthermore, in the protection order she was referred to as 'his wife' and in certain parts as his 'his traditional wife'. He replied that he had the right to call the plaintiff, his wife after he had 'ringfenced' her from 17April 2002. He himself had not spoken to the experts, only his lawyers had.

[73] He stated that he was at his home in Atteridgeville, on the night of 17 April 2002, sitting and drinking with his friend, whilst waiting for the plaintiff to return his vehicle. There were about 5 people at his home at the time the plaintiff arrived with his sister Jojo and the plaintiff's aunt, Ms Molatana. Jojo

was a mother figure in the family and knew of his intentions towards the plaintiff. He was not sure of the reason why the plaintiff's aunt had come to Atteridgeville, and stated that she may have been looking after her grandchildren. His sister Nkele was also present at his home and was excited to see the plaintiff. There were no festivities at his home upon the arrival of the plaintiff.

THE LAW

[74] In *Gumede v President of Republic of South Africa and others*[7], Moseneke DCJ, declared as follows:

'[16] ..The Recognition Act[8] *was assented to and took effect well within our new constitutional dispensation. It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered in accordance with the law and culture of the indigenous African people of this country…*

[17] ….'the Recognition Act is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes….'

'[T]he Recognition Act gives effect to the explicit injunction of the constitution that courts must apply customary law subject to the Constitution and legislation that deals with customary law. Courts are required not only to apply customary law but also to develop it. Section 39(2)of the Constitution makes plain that when a court embarks on the adaptation of customary law it must promote the spirit, purport and objects of the Bill of rights…'

[75] In *Bhe and others v Magistrate, Khayelitsha and others (Commission for Gender Equality as Amicus Curiae)*[9],Ngcobo J declared as follows:

'*The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practiced in the community. This law is sometimes referred to as living indigenous law…'*

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[7] 2009(3) SA 152 (CC), at para [16] to [23]

[8] The Recognition of Customary Marriages Act No 120 of 1998

[9] 2005 (1) BCLR 1(CC),para; Shilubana and others v Nwamitwa 2009(2) SA 66 (CC), para [42] to [49]

' It is now generally accepted that there are three forms of indigenous law: (a) that practiced in the community;(b) that found in statutes, case law or textbooks on indigenous law(official); and (c)academic law that is used for teaching purposes. All of them differ. This makes it difficult to identify the true indigenous law. The evolving nature of indigenous law only compounds the difficulty of identifying indigenous law'.

[76] Hlophe JP, in *Mabuza v Mbatha*,[10] held that customary law was a flexible and evolving system of law. In that case, a dispute arose about the existence of a customary marriage. The husband sought to deny it on the basis that a certain customary ritual, *'ukumekeza'* (whereby a bride is formally integrated into her husband's family) , an indispensable component of Swazi customary law, according to the husband, had not been observed, although he had referred to the woman as his wife, lobolo was negotiated and paid in full and the wife handed over to his family. Hlophe JP stated the following in regard to the custom of '*ukumekeza'*, which the man had claimed had not been performed in the particular marriage:

"*In my judgment there is no doubt that ukumekeza, like so many other customs, has somehow evolved so much so that it is probably practised differently … Further support for the view that African customary law has evolved and was always flexible in application is to be found in T W Bennett's A Source Book of African Customary Law for Southern Africa. Professor Bennett has quite forcefully argued (at 194):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. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters.*"

[77] Moshidi J in *MG v BM* and others [11]enunciated as follows:

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[10] 2003(4) SA 218 (C), at para [25] and [26]
[11] 2012 (2) SA 253, para[10] and[11],

'*The starting point in the line of some applicable legal principles is the trite requirement that the applicant bears the onus of proving on a balance of probabilities that a customary marriage existed…'.*
'It is equally a notorious fact that prior to the new political democratic dispensation since 1994, the registration of customary unions or marriages was almost non-existent due to the negative attitude towards customary law'
[11] However, the advent of the Constitution, followed by the Recognition of Customary Marriages Act, improved matters'.

[78] The preamble to the Recognition of Customary Marriages Act, (the Recognition Act) which came into operation on 15 November 2000, provides:
'*To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; 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 spousesof such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.*'

[79] Customary marriages are recognised by both the Constitution[12] and the Recognition Act. The Constitution does not define customary law.[13] The Recognition Act does. It defines customary law as '*customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples*', and attempts to give context to the provisions of the Constitution[14]. The Recognition Act defines a

[12] Section 15(3)(a) and (b) of the Constitution for the Republic of South Africa Act 108 of 1996 provides that (a) "*this section does not prevent legislation recognizing –*

(i) marriages concluded under any tradition, or system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

[13] Gumede v President of the Republic of South Africa and others 2009(3) SA 152 (CC),at para [23]

[14] See *Alexkor Limited and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC).

customary marriage as: '*a marriage concluded in accordance with customary law*.' It further provides that, '*(2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognized as a marriage.*'

[80] In terms of s 3(1) of the Recognition Act, the following are the statutory requirements for a valid customary marriage concluded after 15 November 2000[15] - '*(a)the prospective spouses- (1) must be above the age of 18years; 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'.* This requirement takes into account the legal position with regard to the distinguishing features of a customary marriage.

[81] The payment of lobola is not mentioned as an essential element for a valid customary marriage in the Recognition Act. However, it remains an element intrinsically linked to a customary marriage. Lobolo[16] is defined in the Recognition Act and its meaning includes *inter lia*, property in cash, or in kind, whether known as *lobolo, magadi, bohai, bogadi* , or by any other name, which a prospective husband or head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage. The traditional principle that there can be no customary marriage without lobolo being delivered or at least negotiated, still prevails.[17]

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[15] LAWSA, Vol 32, Indigenous Law,para 116,p112,'Legal requirements for valid customary marriage before 15 November 2000:[1] The consensual agreement between the two family groups (or between the man and the family group of the girl) with respect to the two individuals who are to be married and the lobolo to be paid by the man himself or his family group)[2] the transfer of the bride by her family group to the family of the man;Seepara126, p118 to 119,fn 1.

[16] See: S 1 of the Recognition Act ; LAWSA, Vol 32, para 128, p120;'Requirements for the Validity of a Customary Marriage', 2004,Tydskrif Vir Hedendaagse Romeins-Hollandse Reg, 2004, by JC Bekker;'The lobolo agreement as the 'silent' prerequisite for the validilty of a customary marriage in terms of the Recognition of Customary Marriages Act', Lesala L Mofokeng, Tydskrif Vir Hedendaagse Romeins- Hollandse Reg,Journal F Contemporary Roman-Dutch law ;2005.

[17] De Jure ,Volume 1, 1998. Jaargang,'Perceptions of the Law regarding , attitudes towards lobolo in Mamelodi and Atteridgeville, By M W Prinsloo et Al, p 92

[82] Most authorities are clear that the part payment of lobola is also sufficient to constitute a customary marriage[18]. Lobola need not be paid in full, as long as there is agreement that lobola will be paid. Both the plaintiff and defendant's experts were also agreed in principle that lobola could be paid in full or in part.

[83] Mokgoathleng J in *Maloba v Dube and Others*[19] stated as follows:
"*It is trite in African Customary Law that there is no rigid custom governing the time stipulation within which lobola has to be fully paid. What is sacrosanct is the undertaking to pay the agreed lobola. Consequently the non payment of the lobolo balance as alleged by the applicant is not decisive of the ultimate question, which is whether, was a valid customary marriage negotiated or concluded and that in pursuance of such negotiations lobola was fixed. In my view whether lobolo was fixed at R6 000 or R4 000 is not decisive, the fact is that lobolo was fixed and agreed upon … It is trite in Customary Law that the payment or part payment of lobolo is accompanied by a ceremony symbolically joining the respective spouses and families together as one. This ceremony is conducted in accordance with Customary Law and is a manifestation of the celebration of a customary marriage*."

[84] It appears that the formalities of a customary union marriage are not difficult to identify. In *Motsoatso v Roro & Another* ,[20] the following was stated by Matlapeng AJ:
"*Proving the existence of a customary marriage should not present many problems as the formalities for the coming into existence of marriage have crystallized over years. The reasons for these are not hard to find. The institution of customary marriage is an age-old and well respected one, deeply embedded in social fabric of Africans. The formalities relating thereto are well known and find application even in the marriages of the majority of Africans who marry by civil rites as the two marriages are celebrated side by side. Any distortions and deviations to the formalities can easily be identified,*

[18] Motsoatsoa v Roro, [2011]2ALL SA 324 (GSJ), at para [18]
[19] *Maloba v Dube* [2008] ZAGHPHC 434 at para 24, Case no 08 /3077-23 June 2008.
[20] [2011] 2 ALL SA 324 (GSJ), at para [16] and [17]

particularly by those who are well-versed with the real and true customary law.

As described by the authors Maithufi I.P. and Bekker J.C., Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa CILSA 182 (2002) a customary marriage in true African tradition is not an event but a process that comprises a chain of events. Furthermore it is not about the bride and groom. It involves the two families. The basic formalities which lead to a customary marriage are: emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage (this of course presupposes that the two parties i.e. the man and the woman have agreed to marry each other); a meeting of the parties' relatives will be convened where lobolo is negotiated and the negotiated lobolo or part thereof is handed over to the woman's family and the two families will agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration (wedding)." (my emphasis)

[85] Clearly, there must be a meeting of minds.[21] This means there must be an agreement to marry between two people of marriageable age. The application of the customary marriage regime to the parties depends on whether or not they intended to marry in accordance with its terms. And further, whether or not they also intended to be bound by it. It is common cause between the parties that they did not contract a civil marriage, even though the latter is not uncommon between parties generally, before or after a traditional wedding. In a country like South Africa where there are many different cultures, religions and traditions, understandably there is a cross-pollination of traditional culture with Western culture. In this regard, The South African Law Commission in its Report on Customary Marriages[22],points to a practice by people to follow the rites of both a customary and a civil marriage according to the laws of South Africa. It says:

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[21] The Law of Contract in South Africa 5th Edition page 29, Christie.

[22] Project 90: the Harmonization of the Common Law and the Indigenous Law, para 3.2.3 - 3.2.4- South African Law Commission Report, 1998, Chapter 3

'*The so called dual marriages are in fact quiet common, and many variations on the theme are possible. A couple may celebrate a traditional wedding and then, on the same day, they may have it blessed in Church or celebrated again in a civil registry office. The rites may be reserved: a civil marriage may be followed by an African ceremony. The lapse of time between these rites may be days or years. What is more, the acts by which the parties purport to marry may vary. A lobolo agreement is usually negotiated before a civil Christian ceremony. Or the parties might combine a lobolo agreement, a traditional wedding ceremony and the Christian rite.*"

ASSESSMENT

[86] To consider whether a valid customary marriage has come into being in terms of the Recognition Act, requires a fact-intensive enquiry. The requirement that the prospective spouses must be above the age of 18 years may be easily determined. However, the requirement that both the parties must have consented to be married to each other in terms of customary law and that 'the marriage was negotiated and entered into or celebrated in accordance with customary law', as set out in the Recognition Act, is not so easily determined. Customs are dynamic and evolving, as was stated in *Bhe* (*supra)* :'*The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version'.*[23]

[87] The issue is really what the parties intended. The plaintiff's case is that all of the requirements of a valid customary marriage were fulfilled. The

[23] Bhe, (supra) at para154

defendant disputes that the events in Seshego and Atteridgeville on 17 April 2002 represented the ceremonies and rituals of a customary marriage[24].

[88] I turn to consider the facts of this matter. According to the plaintiff, she and the defendant were married by customary law on 17 April 2002. On 17 April 2002, the defendant sent a delegation led by his brother to her family home in Seshego to enter into lobola negotiations. The defendant's delegation included his sister Jojo. Lobola negotiations were entered into and 'lobolo' was agreed at R6000. The defendant's delegation paid the amount of R6000 for lobola to the plaintiff's family, and a receipt for this amount was issued and received. A blanket brought by the defendant's family was draped over her shoulders, and a sheep was slaughtered. Certain portions of the slaughtered sheep were given to the defendant's delegation to take with them to the defendant's family home in Atteridgeville, Pretoria, where the plaintiff was later 'handed over' to the defendant's family by her aunt Ms Malotana, late at night on 17 April 2002, where she was welcomed by the defendant and members of his family.

[89] The defendant's version is that he never agreed to marry the plaintiff under customary law. His mandate to his brother was to begin lobola negotiations with the plaintiff's family. All that the defendant's brother did was to '*go kokota/ pula molomo'.*[25], and an introductory fee of R6000 was paid for this purpose, which amount would be deducted from the 'lobola' to be paid.[26] It is common cause that a slaughtering took place after the payment

[24] In Majola v Lemuka 1944 NAC (N&T) 15 (Germiston) :'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 the 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'. See also Kgapula v Mphai 1940 NAC (N&T) 108(Hammanskraal); Dlomo v Mahodi 1946 NAC(C&O) 61(Tsolo);See also Seymours *Customary law in Southern Africa* 5th Edition-Bekker ,p105-109

[25] Fanti v Boto and others 2008 (5) SA 405(C), at para [8] [19] and, [[25], where the concept of imvula mlomo(opening of the mouths) is referred to, which is the equivalent of pula molomo'; In *'Introduction to Legal Pluralism in South Africa'*, Chapter 3, Customary Family Law, 3.3 Customary Marriage(Third Edition), the authors Bekker et Al comment that 'Criticism against the judgment is that although it was alleged that the marriage was contracted in 2005,no mention was made of the Recognition of Customary Marriages Act and the requirements stipulated therein'.

[26] See Mamuteane Hloka 'Moni Mmutle v Dibuseng Mary Thinda and The Department of Home affairs (TPD) Case no 20949/07 : Date of Judgment 23 July 2008, para12-14 , and

of R6000, and that the plaintiff accompanied by her aunt and the defendant's sister, arrived later that night at the defendant's family home in Atteridgeville, where they were met by the defendant.

[90] There are thus two mutually destructive versions before the court. In National Employers Mutual General Insurance Association v Gany[27] the following was stated : '*Where there are two stories mutually destructive/before the onus is discharged , Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false'.*

[91] In challenging the plaintiff's version, the defendant also relies on the fact that certain requirements for the validity of a customary marriage, as highlighted in the joint minutes of the experts, and during the testimony of the defendant's expert, were not fulfilled. *Inter alia*, that no proper handing over of the plaintiff took place; the two intermediaries, Ms Malaza and Mr Strike Moropane were not present when the plaintiff was 'handed over' to the defendant's family in Atteridgeville in accordance with custom; the Moropanes did not use their own knives to slaughter; the absence of certain traditional rituals, ie: *'lehlakore'* to the chief; the homebrew; the slaughtering of sheep instead of a 'beast'; the presence of the plaintiff's son at the negotiations in Seshego, were factors which justified the conclusion that no customary marriage was entered into by the defendant.

[92] However, the experts were agreed in principle to the essentials of a customary marriage, viz: the appointment of a messenger , the visit by the groom's family of the bride's family, the negotiation on the lobola to be paid, the payment of lobola or part of it, the slaughtering of an animal, and the 'crucial element of the handing over of the bride', the absence of which no customary marriage came into existence.

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para 23 to 26;Sibiya v Mtembu 1946 NAC (N&T) 90, it is stated that 'Payment of part of Lobola and the handing over of the girl are sufficient proof of the union'.

[27] 1931(AD) 187 at 199;See also National Employers General Insurance Co Ltd v Jagers 1984(4) SA 437 (E), and at 440D-G;Stellenbosch Farmers Winery Group Ltd and another v Martell ET Cie and others 2003(1) SA 11 (SCA) at para5, I-J

[93] The experts also agreed, as did the witnesses, that *pula molomo* is simply a token. It is a small sum of money given by the groom's family to 'open the discussions' for the negotiations. Witnesses for both sides testified that the negotiations began with 'pula molomo', the plaintiff's witnesses stated that a small token of R50 was paid by the defendant's family to the plaintiff's family, which was before the negotiations started. The amount of R6000 was paid for lobola and a receipt for this amount was given, confirmed by witnesses on both sides. The defendant's witnesses testified that the amount of R6000 was given for pula molomo, and that no lobola was paid. However, the defendant, in explaining the R6000 stated in his answering affidavit *inter alia* that '*any payment made at the lobola negotiations would have been deducted from the final lobola amount agreed upon*'.

[94] The plaintiff contends that the defendant, even on his own version, has misapplied the concept of *pula molomo* and is using it for his own ends to try and mischaracterise the events of 17 April 2002, as the defendant concedes by his own words that the R6 000 was part payment for lobola.

[95] The defendant's conduct after the events at Seshego on 17 April 2002 must be accorded proper weight in determining whether he had intended and consented to marry according to customary law. He admitted that he called the plaintiff 'his wife' after the events at Seshego. On his version, this was because with '*pula molomo',* he had 'ringfenced her from other would-be suitors.

[96] The defendant's intention when he sent his brother to begin lobola negotiations is obvious from his subsequent conduct post Seshego, which is clearly that of a married man. The parties began to live together permanently after April 2002. It is common cause that the plaintiff was already a dependant, with his son Deejay, on the defendant's medical aid scheme, entitled to benefits from 1 February 2001.

[97] During his evidence the defendant made the following telling statement: '*It was my decision to pay lobola for the Plaintiff*'. This remark is in conflict with

the denials by the defendant, that on 17 April 2002 all he did was to pay for *'pula molomo'* and not lobola. The defendant, despite calling the plaintiff his wife, tried his utmost to emphasise that his reason for doing so was because he had 'ringfenced' her, yet on his version, he was urbanised and knew nothing about customary law. These words were that of the experts used to describe the essence of '*ga kokota'*.

[98] In the application for the membership of the Johannesburg Country Club, in August 2003, the defendant described the plaintiff as his wife, and gave his date of marriage as 19 December 2000, his birth day. His reason for describing his status as a married man would earn him a discount must be rejected.

[99] In 2004 the defendant bought a ring for the plaintiff and slipped it on her 'wedding ring finger' in the presence of his friends, saying 'I have completed'. On the 21 December 2007, the defendant wrote to the plaintiff referring to her as 'my darling wife', giving her permission to restyle her wedding ring.

[100] In 2005 on the plaintiff's 50th birthday, the defendant organised a party at the Johannesburg Country Club. It is common cause that the guests included people who occupy high positions in society, government and commerce. The proceedings at the party were recorded on a DVD which was played in court. In the DVD, the defendant referred to the plaintiff as his wife and spoke of his love for her, paid homage to her , and extolled her virtues as his wife, a good mother to his children and a companion. The caption of the DVD is described as follows: '*Pule Moropane's 50th Birthday*.' In the DVD the defendant's son, Deejay, referred to the plaintiff as his mum. The defendant's brother, Mr Strike Moropane opened the occasion with a prayer and praising the plaintiff as a good wife and companion to his brother. He quoted a verse from the Bible which states : '*Husbands, love your wives, wives respect your husbands.*' The defendant also welcomed Mr Gilbert Mamabolo the plaintiff's brother as his brother-in-law, and referred to his late mother as his mother-in-law .

[101] It is common cause that during 2008 the defendant sought a protection order against the plaintiff. In his application he described the plaintiff as his 'traditional wife', and in some parts as 'his wife'. When the plaintiff's mother passed on, the defendant together with the plaintiff and members of her family prepared a 'thank you' card to people in appreciation of the support they had given them.

[102] The defendant's explanation for calling the plaintiff his wife because he had 'ringfenced' her by the payment of R6000 for 'pula molomo', which would in any event be taken into account as part of the lobola, is implausible and is disingenuous. The inference is inescapable that the defendant referred to the plaintiff as his wife because he knew that he was married to her in terms of customary law, and that he had consented to a customary marriage in Seshego on the 17 April 2002.

[103] It is common cause that the parties have been previously married, and have children from their previous marriages. The parties played golf, lived in Sandton and were members of the Johannesburg Country Club. The defendant professed to be an urbanised man who did not know the African customary law. Yet he sent his brother to the plaintiff's home to begin negotiations about lobola, a requirement intrinsically linked to the coming into existence of a customary marriage. The defendant being an elderly man, and a respected man in the community, was aware that if he had lived together with the plaintiff, he would have been ridiculed. He did the 'proper thing' for the woman that he loved for many years. He sent his family to the plaintiff's home to negotiate lobola, and 'it was his decision to pay lobola'. Lobola had consequences. After the negotiations in Seshego he called the plaintiff, his wife. He conceded that the first time he denied her as his wife, was when she left him on 16 November 2009, which is close to nine years.

[104] In so far as the events in Seshego are concerned, although Mr Strike Moropane testified that he went alone to the plaintiff's home, representing the defendant, it is common cause that the defendant's sister , Jojo was also at the plaintiff's house, and appears in the photos, as do other members of

the defendant's family. The defendant was at pains to distance Jojo from his delegation, but the evidence of the plaintiff's witnesses can hardly be ignored. It was Jojo the defendant's sister who draped a blanket around the plaintiff. Jojo is seen in the photographs[28] taken on 17 April 2002, dancing with the plaintiff, who is wearing a doek and a blanket. The Mamabolos had many members of their family and friends, uncles and aunts present at their home, together with members of the defendant's family on 17 April 2002, a Wednesday night. In my view the events at the plaintiff's home there had all the trappings of a lobola celebration. Although, Jojo and the plaintiff were good friends, it is improbable that she performed part of the customary rites, merely because she was friends with the plaintiff.

[105] It is not in dispute that the defendant was at his family's home in Atteridgeville when the plaintiff arrived there with Jojo and her aunt. The defendant's version is that no transfer took place at his home. When the defendant testified, he stated that the aunt was there because she was looking after the grandchildren. This version was never put to the aunt when she testified that she had 'handed over' the plaintiff as is customary to the in-laws. The plaintiff's version, corroborated by her aunt Ms Malotana was that the plaintiff had to be accompanied by a family member for the transfer/handing over to the in-laws. In this regard, the experts were agreed that a handing over/transfer of the bride was crucial and completed the marriage. The presence of the plaintiff's aunt at Attteridgeville was not just a coincidence. She was an elderly relative who concluded the customary marriage by the transfer of the plaintiff to the defendant's family. The aunt testified that at Atteridgeville they were met by people, and the defendant's aunt ululating, and singing when they arrived. The defendant danced with the plaintiff and appeared to be 'a happy man'. The proceedings were opened by Nkele, the defendant's sister. The defendant, himself confirmed the plaintiff's testimony that there were at least 5 to 6 people upon her arrival at his home in Atteridgeville, including his sister Nkele.

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[28] In K v P, Judgment of Moshidi J [2010] ZAGPJHC 93 (15 October 2010) at para [5]; photographs of the ceremony were taken as a form of proof of the marriage.

[106] It is common cause that after the events at Seshego, the plaintiff went to the defendant's home in Atteridgeville, to her in laws.[29]According to the defendant's expert, the messenger should have accompanied the plaintiff to be handed over to the defendant's family. The court in *Mabusa v Mbatha*[30](*supra)* stated that customary law has evolved, and where merely a small part of the tradition has not taken place , does not mean that it cannot be waived. Whether it is the aunt or the messenger who went to Atteridgeville with the plaintiff to be handed over, is not significant. The plaintiff was accompanied by a member of her family to the defendant's home. She did not go alone.

[107] Then there is the issue of who was the messenger. In my view it is not significant who was the messenger between the two groups whether it was Ms Malaza or Mr Gilbert Mamabola. It is common cause that there was a messenger, that all the witnesses testified to who went back and forth between the two delegations during the negotiations for lobola.

[108] The plaintiff is a sophisticated woman who ran a Multichoice Agency. The defendant is a past director of Liberty Life. It is understandable if the lobola amount would have been agreed upon between them. Atteridgeville is far from Seshego. The defendant's family would not have come all the way to Seshego not having an idea as to what the lobola amount was likely to be, as the plaintiff states in her affidavit. It is common cause that the negotiations started at R10,000 and ended up at R6000.

[109] It is common cause that a slaughtering of a sheep took place with portion of the meat given to the groom's family, after the R6000 was paid. The fact that the Moropanes did not use their own knives, did not invalidate the marriage. It was implicit, as the plaintiff has argued, that because both parties are Sepedi, that the Moropanes would bring their knives. It is common

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[29] See Moshidi J, in K F v PST [2010]ZAGPJHC 93 (Case no 09/41473), [15October 201 , at para [5]

[30] 2003 (4) SA 218 (C), at para [26]

cause that the symbolic ceremony of slaughtering took place and is not invalidated by the absence of the groom's family's knives.

[110] The experts were agreed that a slaughtering accompanies the conclusion of a customary marriage. However, the defendant's expert insisted that the marriage between the plaintiff and the defendant was incomplete in that a 'beast' was not slaughtered, and that certain other rituals *inter alia,* giving "*lehlakore*" to their Chiefs had not been performed. When it was put to the defendant's expert that a beast was in fact slaughtered in this case in the form of a sheep, he stated that this is traditionally incorrect in that a cow had to be slaughtered and the "*lehlakore*" must be given to the Chief. According to the plaintiff's expert, these are defunct practices. In my view the absence of certain ceremonial rituals such as those recorded in the joint minutes, including 'lehlakore', no homebrew, and 'boenyane', did not mean that a customary marriage did not come into existence. These are ceremonial rituals which are not the essentials of a customary marriage and did not affect the validity of the marriage. The defendant's expert testified purely on traditional rural marriages confining himself to the pure traditional Pedi culture while the plaintiff's expert dealt with contemporary and evolved culture adapting traditional ceremonies to urban settings.

[111] In present times customary law has become flexible, the rituals are abbreviated to the extent that they combine the traditional ceremonies with modern western culture especially in urban areas and in my view '*Important as these activities may be from a ceremonial and ritual point of view,' they cannot be regarded as 'essential legal requirements'. These ceremonies must be viewed as a ceremonial and ritual process in which essential legal requirement*[31] *have been incorporated'. The absence of the ceremonies if the essential requirements have been met, does not affect the validity of the marriage-although , of course, they have probative significance in the sense that a prima facie presumption could be drawn from them that a valid*

[31] S3(1)of the Recognition Act

marriage was concluded and that all the essential requirements were satisfied'.[32]

[112] The defendant testified that the problems that the plaintiff had with his children prevented him from committing himself to a customary marriage with the plaintiff, and much was made of the fact that part of the problem for the breakdown of the parties relationship, may have been that the plaintiff did not accept the defendant's children. It was put to the plaintiff under cross-examination, that the meeting with Ms Vilakazi was to resolve the problems with the children so that the parties could conclude a civil marriage. Yet Ms Vilakazi offered no such corroboration when she testified. If the defendant is to be believed completion of the marriage on his version meant he was going to conclude a civil marriage.

[113] In my view, it was not only their marital relationship that deteriorated between the parties over the years, but also their business relationship. The defendant wrote letters to the plaintiff to curb her spending. The business owed taxes which the plaintiff refused to pay and resigned. The problems with the children which was always there from the inception of their relationship, worsened. The parties went for counselling but the protection order was the last straw in their relationship.

[114] The plaintiff was the 'other woman' as far as the defendant's children were concerned. Deejay was 12 years old when his parents divorced and blamed the plaintiff for the breakup of his parent's marriage. There would inevitably be tension in the plaintiff's relationship with the defendant's children, which in my view never dissipated. This however did not prevent the defendant from sending his brother to Seshego to negotiate lobola for the plaintiff. Although the plaintiff admitted to the problems in her affidavit, in her evidence she downplayed the role of

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[32] LAWSA, Vol 32, para 125 , p118, Indigenous law.; Hlophe JP In Mabuza v Mbatha 2003 (4) SA 218 (C), at para[26];Fanti v Boto, [para 23]

the children in the fights, was candid, and distanced herself from admitting that there were problems.

[115] It is common cause that the marriage relationship between the parties has disintegrated beyond repair. The plaintiff moved out of the matrimonial home in 2009 and the parties have since then not been staying together as husband and wife.

[116] The plaintiff and her witnesses withstood the rigours of cross-examination, and remained steadfast in their testimony. The plaintiff and her witnesses were reliable , candid and credible, despite vigorous cross-examination. They did not contradict themselves and corroborated each other on material aspects. Although Ms Malaza did not properly identify the persons depicted in the photographs presented in court, she was a reliable witness on the material aspects of the matter. She confirmed that the Moropanes had been expected and that they indicated that they had come to ask for the hand of the plaintiff in marriage. Although Mr Ernest Mamabolo could not remember the names of the Moropane delegation, his evidence about the events that he witnessed in Seshego is clear and uncontradicted. The plaintiff and her witnesses were honest, clear and consistent in their testimony. There appears to be no reason to reject their version which is not only more probable, but also true. On the key issues of the case, whether she is married customarily to the defendant, the plaintiff's evidence was convincing and she was able to discharge the onus on her. Her evidence was corroborated by the plaintiff's witnesses who were present in Seshego, on 17 April 2002

[117] The evidence of the defendant is unreliable and must be rejected as false. The defendant's witnesses were particularly unreliable and implausible In particular, Mr Strike Moropane denied having discussed the purpose of his visit to the plaintiff's home, with the defendant's expert witness. When it was put to him that the defendant's expert had testified that they discussed the matter, he said that both he and Mr Sekhukune were telling the truth. When he testified in chief, Mr Strike Moropane stated that he did not know how

members of his family travelled from Seshego to Atteridgeville. He used the adjective "*they*" to refer to members of his family whereas his evidence was that he had travelled alone to and from Seshego. The inference is inescapable that Mr Strike Maropane knew that he did not go alone to Seshego but was accompanied by elderly persons, including his aunt. His concerted effort to, and that of the defendant to exclude other people and pretend that he went alone to Seshego is an attempt to hide the truth. The photographs show members of both delegation present at the plaintiff's home.

[118] In my view all the requirements of a customary marriage were observed, and included, inter alia, both parties' consent to the marriage, there was a messenger appointed to negotiate between the families, lobola was negotiated and paid, a sheep was slaughtered, and the plaintiff was handed over to the defendant's family. Accordingly a customary marriage was concluded in this matter.[33] It is clear that the parties intended to enter into a customary marriage and are bound to its terms.

[119] I accordingly find that the requirements for a valid customary marriage between the parties on the 17 April 2002 has been proved by the evidence presented by the plaintiff and her witnesses, corroborated by the consistent conduct of the defendant in acknowledging the plaintiff as his wife. The customary marriage in this matter met all the basic requirements of a customary marriage and accordingly the parties are married in terms of customary law.[34]It must follow that the defendant's contentions and those of his witnesses that there was no marriage between the parties are not convincing and are entirely without substance.

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[33] See Ramoitheki v Liberty Group Ltd t/a Liberty Corporate Benefits& Others [2006] JOL 18075 (W), at p14, to 17, where the factors determining the existence of a customary marriage were discussed.

[34] In Mabena v Letsoalo 1998 (2) SA 1068 (T) at 1074 Du Plessis J, stated as follows on 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'

CONCLUSION

[120] Having considered all of the factual matrix, the testimony of the witnesses, the experts' testimony, the academic writings, case law, practices in the community and the authorities, in my view the essentials of a customary marriage between the plaintiff and the defendant in terms of s 3(1) of the Recognition Act were fulfilled. Both parties consented to marry each other according to customary law, and their marriage was negotiated, celebrated and entered into in accordance with customary law. No evidence was led by the plaintiff that she is in need of any maintenance. The plaintiff has thus not proved her claim for maintenance. No order is made in regard to maintenance. The remainder of the plaintiff's claim succeeds with costs.

[121] In the result, the following order is made:

i. The plaintiff and the defendant were married to each other on 17 April 2002 in Seshego, Polokwane, in terms of customary law;
ii. The marriage between the plaintiff and the defendant is dissolved;
iii. The joint estate between the parties shall be divided;
iv The plaintiff's claim for maintenance is dismissed;
v. The defendant is ordered to pay the costs of the action.

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H SALDULKER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG