

**IN THE HIGH COURT OF SOUTH AFRICA  
(WITWATERSRAND LOCAL DIVISION)**

**CASE NO: 02/24921**

In the matter between:

**MALULEKE, ADELAIDE THOKOZILE**  
**(in her capacity as representative of the estate**  
**of the late Dumakude Patrick Mtshali)**  
**TSHABALALA, PERCIVAL LUCKY**  
**MOGAGABE, PETUNIA**  
**MAKHUBELA, FLOYD**

**1<sup>st</sup> PLAINTIFF**

**2<sup>ND</sup> PLAINTIFF**

**3<sup>RD</sup> PLAINTIFF**

**4<sup>TH</sup> PLAINTIFF**

**and**

**THE MINISTER OF HOME  
AFFAIRS**

**1<sup>ST</sup> DEFENDANT**

**RADEBE, LINDIWE CAROLINE MARGARET** **2<sup>ND</sup> DEFENDANT**

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**JUDGMENT**

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**TSHIQI J**

[1] In this action the plaintiffs seek an order in the following terms:

1. Cancelling the registration of a customary marriage between the late Patrick Mtshali (the deceased) and the second defendant.
2. Declaring that the deceased was not married to the second defendant.

[2] The first plaintiff who passed away during the course of the trial proceedings was the mother of the deceased. Despite an enquiry from the legal representatives of the plaintiffs, I have not been informed who has been appointed as the executor. The second defendant and the deceased had no children. The children of the deceased from previous relationships are the second to the fourth plaintiffs.

[3] It is common cause that the deceased and the second defendant had been conducting a love relationship, which culminated in lobola negotiations between their respective families. The first amount of the agreed lobola was paid in December 2000. A further amount was paid on 30 June 2001. On this date there were two significant occurrences: the lobola negotiations were finalized and the families agreed that an “imvume” would be held in October 2001.

- [4] The deceased passed away on 16 September 2001, before the imvume was held. On 21 September 2001, after the death of the deceased, a marriage certificate was issued by a Mr Banda, an official in the employ of the Department of Home Affairs (“the Department”), for which the first defendant is responsible, recording that the deceased and the second defendant were married to each other on 30 June 2001, the date on which the last payment of lobola was made.
- [5] The marriage certificate was issued as a consequence of an application lodged after the deceased’s death by the second defendant. The application form is co-signed by a representative of the deceased’s family, his brother a Mr Cecil Mtshali, whose identity number and residential address are reflected on the form, and by a representative of the second defendant’s family, a Mr Piet Msibi, whose details are also reflected on the form. Two affidavits are attached to it. The first attested, to by Mtshali, includes the following: “..... I was paying lobola for Lindiwe Caroline Margaret Radebe and they didn’t yet get married. The husband has pass away at this moment. They got

married, on customary on 01/06/30. Western marriage was not yet done.....” The second, attested to by Piet Msibi states *inter alia*: “..... Our child they got married customary on 01/06/30. They supposed to get married on Western style very soon. Mr D P Mtshali pass away on 2001/09/16.....”

(I repeat the words used without adding the customary facts to indicate errors).

[6] The plaintiffs contend that as there was no *invume*, the defendant was not integrated into the family and was consequently not yet married by custom to the deceased. The second defendant contends that the *invume* is not an essential requirement for the validity of a customary marriage.

[7] For a customary marriage to be valid, it has to comply with the provisions of Section 3(1)(b) of the Recognition of Customary Marriages Act, No 120 of 1998 (“the Act”).

This Section states:-

*“(1) For a valid customary marriage entered into after the commencement of this Act to be valid.*

(a).....

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

- [8] Both counsel accepted that (the word) “negotiated” refers to negotiations regarding the marriage, including the lobola concerned. It is not in dispute that these negotiations were finalized. What is in dispute is whether a valid customary marriage was “entered into or celebrated”. The Act does not define these terms. It was not argued that “celebrated” could convey anything more than its ordinary Oxford English Dictionary meaning: ‘festivities or performance of a rite or ceremony’. As no ceremony or celebration had been held, the alleged marriage was clearly not celebrated and the remaining issue therefore is whether the marriage was “entered into”.
- [9] Mr Banda testified that proof of payment of the agreed lobola amount suffices for registration of a valid customary marriage at the Department of Home Affairs.

[10] Professor J C Bekker, an expert in traditional customs and practices, testified on the meaning and significance of the invume. He described invume as a form of integration of the bride into the bridegroom's family, and he stated that, in his opinion, there is no customary marriage until there is a form of integration of the bride into the bridegroom's family. He conceded that as a result of urbanization and social and economic factors, tradition and custom have evolved to the extent that some families dispense with the formal and elaborate festivities that used to be held in the past to signify integration of a bride into the groom's family. Despite this development, in his opinion, an act of integration is still crucial for the existence of a customary union. He stated that this may even take the form of a mere agreement by both families that the bride be integrated into, or regarded as part of, the bridegroom's family, without the holding of any celebration or feast or ritual.

[11] The evolution in customary marriages has been accepted in our courts.

See **Mabena v Letsoalo 1998 (2) SA 1068 (T) at 1073 D-E**

**Mabuza v Mbatha 2003 (4) SA 218 (C) at 226 D-G.**

[12] As the Act specifically requires, for the validity of a customary marriage that it “be negotiated” and that it be “entered into” or “celebrated”, the negotiations, which, in many instances involve and culminate in lobola payment therefore seem to be the fundamental stage in the conclusion of customary marriages. The negotiation and payment of lobola are crucial in signifying an intention to marry and consequently indicate that the parties plan to advance beyond mere cohabitation. Once it is clear that the negotiations have taken place, the next enquiry, applying the Act is whether there are any factors that show that the marriage was ‘entered into’ or ‘celebrated’.

[13] As a result of the evolution in customary practices and because the Act does not define the term “entered into” the court in my view has to look at several factors which might assist to determine whether the parties have “entered into” a customary marriage. The term “entered into” is normally used to denote a contract. The question therefore is

whether the second defendant and the deceased agreed that they were married. Such an agreement may either be explicit or tacit.

[14] In the present matter the deceased and the second defendant advanced further than mere negotiation and payment. They fixed a date for the imvume. The deceased was not a youngster, he was an adult man who was already a divorcee, and in my view, he may well not have felt it necessary to inform his family of his living with the second defendant. At the time he was involved in the accident that led to his death, he was, according to her residing permanently with her. Mrs Lehong denied knowledge of this but did not dispute it and I accept the second defendant's version in this regard.

[15] The second defendant testified that the family of the deceased regarded her as the deceased's wife. This was disputed by Mrs Lehong and by Mtshali. However, the conduct of the latter in assisting the second defendant to obtain the marriage certificate belies his stance on this issue. He admits that he visited the offices of the Department with the second defendant, the latter's mother, and a



representative of the second defendant's. The Mtshali who, at the time, according to him did not regard the second defendant as married by custom to his late brother, deposed to an affidavit stating that the deceased and the second defendant were not married by civil rites, but were married "on customary". When questioned on this assertion he denied furnishing it to the official concerned. He also denied reading his affidavit. Mtshali was clearly misleading the court. He is an educated man who is fully literate. He admits knowing that at the time he deposed to the affidavit he was doing so to assist the second defendant to lodge a claim with an insurance company flowing from the death of his brother. Mtshali worked at the time in the insurance industry. He was unable to explain how the officials at the Department acquired the knowledge of his personal details contained in his affidavit. Consequently his evidence is rejected.

- [16] It is therefore accepted that at the time of the deceased's death his family regarded the second defendant as his wife. Clearly too, the deceased and the second defendant agreed that they were husband and wife. This agreement together with the acceptance of the second

defendant as his wife and the family of the deceased satisfied the requirement of the Act that the customary marriage be “entered into”. Although the parties also intended to celebrate the marriage by holding an invume, the fact that the celebration of their marriage in the form of invume did not occur does not, in my judgment, detract from that conclusion. It follows that the action must fail.

[17] I therefore make the following order:

The plaintiffs’ action is dismissed with costs.

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**Z L L TSHIQI**  
**JUDGE OF THE HIGH COURT**

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## ASSOCIATED ATTORNEY'S

DATE OF HEARING

10/10/2007

DATE OF JUDGMENT

9/04/2008