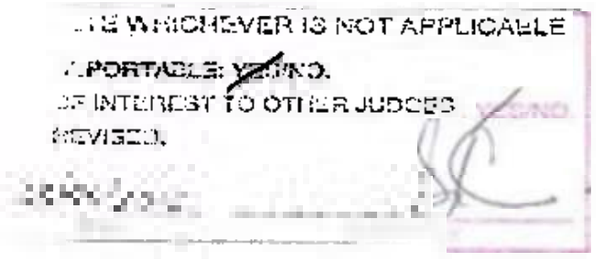
IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN GAUTENG, PRETORIA)

NOT REPORTABLE



Case No: 35611/2008

Date heard: 25/05/2010

Date of judgment: 03/06/2010

In the matter between:

Matlala Gertrude	APPLICANT
and	
Dlamini Patricia Bikwaphi	FIRST RESPONDENT
The Minister of Finance	SECOND RESPONDENT

JUDGMENT

DU PLESSIS J:

The applicant is the mother and the sole surviving parent of the late Mr Lefi Montsejane Matlala. I shall refer to the late Mr Matlala as "the deceased". The applicant seeks two declaratory orders. First, she seeks an order that no valid customary marriage existed between the deceased and the first respondent. In the second place the applicant seeks an order to the effect that the first respondent is not entitled to any benefit from the estate or the pension

fund of the deceased. The applicant also sought an order to the effect that the second respondent, a pension fund, be directed to pay to the applicant the pension benefits standing to the credit of the deceased's estate. Mr Makondo who appeared for the applicant informed me that the applicant does not persist in seeking such an order because the relevant pension credit has already been paid to the first respondent.

The first respondent, contending that a valid customary marriage existed between her and the deceased, opposes the application.

It is necessary to remark on the state of the papers before the court. When the matter was called for hearing, the court file was empty. Counsel informed me that, as happens too often, the entire contents of the court file went missing in the registrar's office. The parties' legal representatives, working together, prepared an agreed duplicate set of papers. They also handed to me an agreed copy of annexure PBD6 to the answering affidavit. They could not agree on which of two documents is the correct annexure PBD3 to the answering affidavit. Those interested will therefore find in the papers two documents marked PBD3. In my view nothing turns on the difference between the two documents. It will also be noted that the sequence of annexures to the answering affidavit does not correspond with the sequence of the pagination. The reason is that when I prepared this judgment, I noticed that the annexures

were not properly marked and that they were bound out of sequence. I marked them and put them in what I trust is the correct sequence.

As to the central question whether a customary marriage existed or not, there are disputes of fact on the papers. The applicant, however, did not seek to have the matter referred to trial or for the hearing of oral evidence. What now follows is a summary of the facts as I find them by application of the general rule set out in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD).**

At some stage prior to November 2000 the respective families of the deceased and the first respondent ("the couple") entered into marriage negotiations. They agreed on the proposed marriage and on payment of R10 000 as lobolo. The father of the deceased and the guardian of the first respondent, her elder brother, accepted the agreement. On 11 November 2000 the deceased paid an amount of R5000. The first respondent's family issued a receipt in the following terms: "An amount of R5000 was given to Dhlamini's family by Matlala's family for a lobolo and Dhlamini family took it and keep it for further discussion". After the payment of the R5000, and on the same day, the bride was handed over to the groom and she formally left her parent's house to move in with the deceased. To the knowledge of both families the couple thereafter lived together as husband and wife until the death of the deceased on 13 December 2006.

The first respondent's eldest brother, who is the head and traditional leader of the family, saw that the deceased was properly taking care of the first respondent and that the couple were happy. He decided not to insist on payment of the balance of the lobolo. The evidence does not show, however, that the Dhlamini family waived the right to payment of the balance of the lobolo.

The Dhlamini family regarded the couple as lawfully married in accordance with their (siSwati) customs. As for the Matlala family, the applicant contends that in accordance with their (baPedi) customs, the couple were not lawfully married. The applicant, however, visited the couple at their communal home. After the death of the deceased, the Matlala family recognised the first respondent, in accordance with baPedi custom, as the mourning wife. Customs and rites in that regard were followed before, at and after the funeral.

After the death of the deceased, probably at the request of the first respondent, the department of home affairs issued a marriage certificate certifying that the couple were married. The existence of the marriage certificate does not assist in the determination of the issue between the parties. In terms of section 4(8) of the **Recognition of Customary Marriages Act, 120 of 1998** ("the Act") the certificate constitutes *prima facie* proof of the marriage. It is open to the applicant, who bears the onus in any event, to prove that the marriage did not exist.

According to the first respondent, the marriage was performed on 11 November 2000. That is four days before the Act came into operation on 15 November 2000. Section 2(1) of the Act provides that a "marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage." The question therefore is whether, according to the applicable customary law[1], the couple had entered into a valid marriage.

The Matlala and Dhlamini families are respectively baPedi and siSwati. In the authorities that I have consulted, I did not find a relevant difference between baPedi and siSwait customs. For the sake of completeness I point out that the applicant avers that the families agreed that the couple's proposed marriage was to be regulated by the baPedi law. The first respondent denies that. Section 1(3) of the **Law of Evidence Amendment Act, 45 of 1988** provides:

> "In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the

[1] See section 211(3) of the **Constitution of the Republic of South Africa, 1996**.

court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs."

Applying section 1(3) to this case, siSwati law must be applied.

The requirements for a valid customary union entered into before the commencement of the Act may be gathered from authorities such as **Fanti v Boto and Others 2008 (5) SA 405 (C)** at paragraphs 19 and 20, **Olivier, Die Privaatreg van die Suid Afrikaanse Bantoetaalsprekendes** (3rd ed. p. 19), **Jansen** in **Inleiding tot Regspluralisme in Suid Afrika** edited by **Bekker, Rautenbach and Goolam** (2nd ed. p. 36). It is unnecessary for purposes of this judgment to attempt an exhaustive definition of a siSwati customary marriage. Mr Makondo for the applicant submitted that in this case there is no valid marriage because the bride was not formally handed over to the family of the groom. The submission loses sight of the first respondent's explicit statement that she was "officially handed over" to her husband. In **Fanti v Boto and Others** (*supra* at para. 22) Dlodlo J pointed out that the handing over of the bride could be to the groom or to his family. (See also **Jansen** *op. cit.* at p. 37 .) In this case the evidence shows that the bride was formally handed over to the groom and accepted into his family .

It is common cause that the amount of lobolo was agreed upon but that payment of the outstanding R5000 was left for further discussion. I assume that an agreement between the families as to the amount of lobolo to be paid (where

The application is dismissed with costs.

B.R. du Plessis

Judge of the High Court

the lobolo consists of money) is essential. Payment of the full amount, however, is not a prerequisite for a valid customary marriage. In the **Fanti**-case at para. 23 it is stated that the requirement is that "lobolo has been paid and/or the arrangements regarding the payment of lobolo have been made ...". See again **Jnasen** *op.cit.* at pages 34, 37, 38 and **Olivier** *op. cit.* pages 54, 78 and 79.

For the applicant it was also submitted that further factors, such as that the first respondent did not adopt the surname of her husband, are indicative of the absence of a customary marriage. In my view the facts as I have summarised them all point to the existence of a customary marriage.

It is concluded that the first respondent and the deceased were parties to a valid customary marriage. The application must therefore be dismissed and costs must follow the event.

The following order is made:

The application is dismissed with costs.

B.R. du Plessis

Judge of the High Court

On behalf of the Applicant:	Mahlaola Incorporated 209 Olivetti House Cnr Pretorius & Shubart Pretoria Adv. Z.P. Makondo
On behalf of the Respondent:	G.F. Botha and Van Dyk Inc. C/O Couzyn, Hertzog and Horak 321 Middel Street Brooklyn Pretoria Adv. M. Kruger