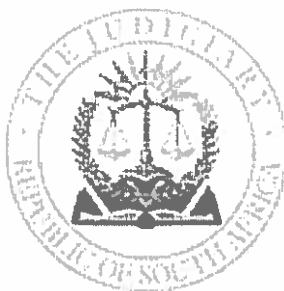



IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 46248/2012

(1)	REPORTABLE: YES/NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED.	
(4)	SIGNATURE	DATE
		26/06/2020

EVA MANGETANE MOLEFE

APPLICANT

And

DIRECTOR GENERAL OF HOME AFFAIRS

1ST RESPONDENT

JOSEPHINA N DIPEE

2ND RESPONDENT

MASTER OF THE HIGH COURT

3RD RESPONDENT

JUDGEMENT

N V KHUMALO J

Introduction

1] On his demise on 11 February 2008, one Letladi Opsie Phaahle (Phaahle), ("the

deceased”), an educator at the Department of Education at Ga-Mashabela Village left a will nominating Absa Trust as the Executor of his deceased estate and declaring his only sibling, Eva Mangetane Molefe (Molefe), the Applicant herein, the sole heir to his deceased estate. No marriage was registered against his name at the time.

[2] The deceased’ death followed shortly after the occurrence of certain customary practices on 3 November 2007 that were in pursuance of a customary marriage that he intended to enter into with one Ngwanamatlopo Josephinah Dipee (“Dipee”), the 2nd Respondent, who is the mother of his two children. The second child was born on 9 February 2008, two days before his death.

[3] The Applicant and Dipee both hold letters of executorship issued by the Office of the 3rd Respondent, the Master of the High Court in Limpopo (“the Master”). The Applicant was issued with her letters on 2 September 2008 as a testamentary heir. On 14 December 2009 Dipee applied at the Jane Furse office of the 1st Respondent, the Director General; Department of Home Affairs (“Home Affairs”) in terms of the Recognition of Customary Marriages Act 120 of 1998 (“the Act”) for the posthumous registration of a customary marriage between herself and the deceased. Home Affairs registered the marriage on 25 January 2010. Subsequent thereto, the Master also issued letters of executorship to Dipee on the basis of the posthumous registration of the customary marriage.

[4] The Applicant is challenging Home Affairs’ posthumous registration of the customary union marriage which led to the Master’s subsequent issuing of the letters of executorship to Dipee allegedly as the customary wife of the deceased. The relief sought is per Applicant’s amended notice of motion the following:

[4.1] an order declaring Home Affairs’ registration of the customary union marriage between Dipee and the deceased to have been ultra vires;

[4.2] alternatively that the decision to register the marriage be reviewed and set aside.

[4.3] the 1st Respondent is ordered to deregister the registration of customary marriage between the deceased and Dipee,

Which would then lead to the revocation of the letters of executorship.

[5] The order sought by the Applicant was initially as in prayer 4.1. and 4.2 in terms of s 4 (7) (b) of the Recognition of Customary Marriages Act, 120 of 1998, (the Act”), on the ground that Home Affairs contravened s 4 (3) (a) or (b) thereof, by registering the marriage after the cut- off date or extension period as set out by the Minister within which such marriages could be registered.

[6] The contention however further developed to a disagreement on whether the customary marriage was entered into or concluded by the deceased and Dipee prior the passing away of the deceased, with the Applicant alleging that the customary marriage proceedings were initiated but not finalised at the time of the deceased death, and as a result, Home Affairs posthumous registration thereof at the instance of Dipee be reviewed and set aside. The Minister is not opposing the Application.

[7] The Recognition of Customary Marriages Act, 120 of 1998, (the Act") came into operation on 15 November 2000. The purpose of which was, inter alia, to make provision for the recognition of customary marriages, to specify the requirement for a valid customary marriage and to regulate the registration of customary marriages. In terms of section 3 thereof a customary marriage concluded or entered into after the commencement of the Act will be recognised if:

- (i) *the prospective spouses are both above the age of 18 years;*
- (ii) *both consent to be married to each other under customary law; and*
- (iii) *the marriage is **negotiated and entered into or celebrated** in accordance with customary law.*

[8] On the registration of the customary marriages, s 4 of the Act provide that:

(1) *The spouses of a customary marriage have a duty to ensure that their marriage is registered.*

(2) *Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.*

(3) *A customary marriage entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or*

(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(4) (a) *A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any lobola agreed to and any other particulars prescribed.*

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5) (a) *If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.*

(b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(7) A court may, upon application made to that court and upon investigation instituted by that court, order-

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

(8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes proof of the existence of the customary marriage and of the particulars contained in the certificate.

(9) Failure to register a customary marriage does not affect the validity of that marriage. (my emphasis)

[9] Unless the parties have indicated otherwise by entering into an antenuptial agreement prior to the conclusion of a customary marriage, a customary marriage of a spouse who is not a partner in any other existing marriage is in terms of s 7 (2) automatically considered to be in community of property. **This means that all the assets and debts from before the marriage are shared in a joint estate** between spouses. When couples are married in community of property, their separate estates are combined, and **each spouse loses the right to dispose of assets as they wish** or acquire debt without the others knowledge and consent.

[10] These are the basic fundamentals of customary union marriages. In casu, the deceased and Dipee, the purported spouses to the alleged customary marriage are of Bapedi descendants following a Sepedi culture.

Factual Background

[11] A few days after the demise of the deceased on 11 February 2008, Dipee attempted on 18 February 2008 to register the customary marriage at the Regional Office of the Department of Home Affairs at Lebowakgomo. She and one other Ms Mphahlele, had prior thereto separately endeavoured to report the estate to the Master, both alleging to be the deceased's surviving spouse and armed with a letter confirming such status from the local Traditional Authority. The Master, who at the time was already in receipt of an application from the Applicant, delayed the issuing of the letters and gave Messrs Dipee and Ms Mphahlele until the 31 July 2008 to submit their marriage certificates. The Master was intending to co-appoint the Applicant and the deceased's spouse/s jointly as co-executrix and issue them with joint letters of Executorship, if the marriages are proven. On failure by both to submit marriage certificates, the Master proceeded on 2 September 2008 to issue the Letters of Executorship to only the Applicant.

[13] The Applicant denies that Dipee and her late brother entered into a customary marriage prior to the former's death and insist that she is the rightful holder of the Letters of Executorship to her brother's deceased estate. She points out that as Dipee was not handed over or lobola paid during the proceedings between her and the deceased, she never got married to the deceased.

[12] On 26th and 27th September 2009, nearly a year and a half post the deceased's death, the Applicant and the Phaahle family held a celebration ceremony. According to the Applicant, they were celebrating Dipee's customary marriage to the Phaahle family in terms of the Pedi culture as "Mosadi wa le lapa." The marriage was officially celebrated with an official handover. A lobola amount of R10 000 was paid, 2 goats and a cow plus R200 handed over to the Dipee family by Applicant's delegation a day before the celebration, on 25 September 2009. A customary process which the Applicant alleges not to have taken place at the time of the negotiations of the marriage between Dipee and the deceased on 3 November 2007. Applicant personally paid the amount of R10 000 to Dipee, bought the cow and 2 goats, bought Dipee a wedding ring and dress for the celebration and bore all the wedding costs. She alleges that it was all so that Dipee can be married to the Phaahle family.

[14] On 26 September 2009, the celebrations were at the Dipee home with "go hlabisa" (welcoming the in laws) taking place. The celebrations continued on 27 September 2009, with Dipee being handed over to the Phaahle family. On that day the Phaahles had also a ceremony for the unveiling of the deceased's tombstone. Similarly to when the deceased's lobola negotiations took place on 3 November 2007, the Phaahle family was unveiling the tombstone of Applicant and the deceased's father, Paulus Sising Phaahle. The Applicant says the reason behind the family's decision to marry Dipee after the death of her brother was because she had children with her deceased brother and she did not want the Phaahle name to be extinguished. They were the only two siblings and the deceased the only brother she had. She therefore had nobody to carry on the name of the Phaahles except Dipee's children. She was already married as a Molefe. It is a custom that is predominant in the Pedi culture to bring in Dipee and her children into the Phaahle family as she was not yet married by the deceased.

[16] There is a divergence of views between the Applicant's and Dipee as to the purpose of the celebration and the handing over proceedings that took place on the day. According to the Applicant, as already mentioned, Dipee was culturally married to the deceased's household as "Mosadi wale lapa" on behalf of the deceased, not to the deceased. Applicant denies that it is possible whether legally or customarily for Dipee's claim that on the day, she posthumously was married to the deceased.

[17] Dipee on the other hand alleges that the celebration on 26 and 27 September 2009 was of her posthumous marriage to the deceased and her being handed over during the celebrations sealed the marriage. According to her the said celebration was organised by her and the Phaahle family without a problem, the parties only differed as to the reasons of the celebration.

[18] Subsequently on 14 December 2009, following the alleged celebrations Dipee applied for the posthumous registration of a marriage between herself and the deceased at the Jane Furse Home Affairs Regional Office. She however stated on the application/record that a customary marriage was entered into between herself and the deceased more than two years ago on 5 November 2007. On registration of the customary marriage and on being issued with

a marriage certificate on 25 January 2010, Dipee applied again to the Master to issue her with letters of executorship.

[19] The Applicant through her attorneys queried Home Affairs posthumous registration of the customary marriage alleging it to have been after the prescribed cut-off date for late registration of customary marriages as published in terms of s 4 (3) (a) of the Act by the then Minister of Home Affairs, Minister N N Nqakula in the Government Gazette no 31735 dated 24 December 2008. The Applicant's attorneys were advised that if their client is aggrieved of the registration, she can apply to court under s 4 (7) (b) of the Act in terms of which the court may on application and upon its own investigation, order the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

[20] As a result when the matter came before Thlapi J, the Applicant had only applied for a court order for the cancellation of the late and posthumous registration of the customary marriage. Thlapi J in her judgment on 8 November 2013 found that the documentation or record relating to the decision that was taken by Home Affairs to register the marriage was relevant and crucial for the court to be able to investigate the circumstances under which the decision alleged to be invalid was taken, and the reasons for the decision, including determining whether or not the marriage was valid. Thlapi J found that the Application actually involves a review process, the registration of the marriage being an administrative action, thus PAJA applicable. The documents therefore had to be obtained in terms of Rule 53 of the High Court Rules proceedings.

[21] The Applicant, following the judgment of Thlapi J, proceeded to amend her Notice of Motion to include as an alternative prayer the s 53 proceedings to review and set aside the Home Affairs decision. She in terms thereof attended to obtain the Home Affairs record that constitute its reasons for acceding to Dipee's application for the posthumous registration of a marriage between herself and the deceased after the cut-off date. Hence the matter is being heard as a s 4(7) (b) application for cancellation, alternatively as a review upon which the court may set aside or confirm the decision of the 1st Respondent.

[22] This had resulted in parties being required to file Supplementary Affidavits post receipt and access to the record. Full sets of Affidavits have been filed, that is, the Applicant's Founding and Supplementary, Respondent's Answering and a late filed Supplementary Answering Affidavit and Applicant's Replying Affidavits. On the date of the hearing there was no appearance for the Respondent although she has been part of the proceedings since the inception of the matter in 2012. An Application for Condonation for the late filing of her Supplementary Answering Affidavit was delayed by two years. She had then applied for Condonation of its late filing. The Applicant has moved for the Application to be considered notwithstanding Dipee's absence and for it to be dismissed on merits with costs, rather than on a technicality of Dipee's non-appearance or non-representation in the proceedings. Applicant also applied in that regard for the main Application to proceed, with the court granting the order sought by the Applicant.

[23] The Condonation Application was based on an allegation that Dipee was not aware of the order of Thlapi J until two years after it was delivered. Even though it was indicated that there was an appearance on her behalf when the judgment was delivered, condonation was

granted as there was no allegation that she factually was made aware of the order. On a balance of probabilities there was still a chance that she might not have known of the order. Taking into account such a possibility and of the fact that the matter needs to be finalised for the parties to find closure and be able to continue with their lives, and that the Applicant has had an opportunity to reply to the Supplementary Opposing Affidavit, I found that proper and fair adjudication of the dispute was uncompromised and indispensable.

[24] On the Applicant's disputation of Home Affairs' powers to register the marriage allegedly due to contravention of s 4 (3) (b) as determined in the government Gazette, an official from Home Affairs conceded that the registration might have been outside the law, upon which cancellation or rectification is possible through a court process. No justification or reasons were furnished for its decision to accede to the late registration thereof, which explains the importance of s 53 proceedings.

[25] All that had happened leading to the registration of Dipee's customary union marriage being common cause, what turned out to be the main dispute on the supplemented papers is whether Dipee and the deceased entered into a customary union marriage.

[26] On the documents that were attached to Dipee's application which Home Affairs relied upon to register the customary marriage between Dipee and the deceased, it is alleged that the marriage was entered into on 3 November 2007, notwithstanding that Dipee had also alleged to have entered into the customary marriage with the deceased on 26 September 2009 when their marriage was allegedly posthumously celebrated. Both allegations are vehemently denied by the Applicant alleging that neither of the occasions amounted to a customary marriage to the deceased. Applicant argues that the deceased died an unmarried man and the posthumous registration of the marriage invalid. For the court to be able to decide whether the posthumous registration of Dipee's customary marriage to the deceased should be cancelled/nullified, it should establish whether Dipee and the deceased entered into a customary marriage, for if they did the marriage cannot be nullified by its late registration.

The alleged marriage on 3 or 5 November 2007

[27] According to Dipee it all started in June 2007 when the deceased realised that she was expecting his child he expressed his desire to pay lobola for her, on the day the deceased's father's tombstone was to be unveiled on 3 November 2007. On 6 October 2007 the deceased's family came to her home to "kokota," that was to start the negotiations (of asking for her hand in marriage). A relative of the deceased said to be his paternal uncle's son, namely, Taumang Frank **Tompane** ("Tompane") formed a delegation to her home to start lobola negotiations. By that gesture the deceased had come to kokota at her family home to request her from her family to be his wife.

[28] Dipee refers to a writing in a document dated 6 October 2007 as proof of the lobola negotiations or interaction that took place between the two families. In the document under the mentioned date of 6 October 2007 there is a caption that reads: 'on asking for "sego sametsi" which is to "kokota" what has been requested from the Phahlamoka family, 'is 2 goats, 1 cow and R10 000 for lobola.' It is further recorded in the document that they will meet again on 3 November 2007. Nothing further is said about 3 November 2007 date. In the same document there is a recordal of another date 'the 25 October 2007.' Dipee points out

that the date is wrong, it should read 25 September 2009. It is further recorded under that date that 'we the Dipee family acknowledge to have received a cow, 2 goats and R200 for the shepherding of the animals from Phaahla. The document has the names F Phahlamoka and Maloa Rakwadi appended on it. No name is appended from the Dipee family.

[29] It should be noted that the name of the person Dipee has alleged was delegated by the Phaahla family, Mr Tompane is also not on the document. The dates of 25 October 2007 or 25 September 2009 does not seem to make sense as the date the lobola was received. For the reason that the return date for bringing the lobola was according to the document 3 November 2007.

[30] Dipee alleges that on 3 November 2007, notwithstanding what is in the document of 6 October 2007, the Phaahla's were requested not to deliver the livestock as at that stage the date of the ritual of "gohlabisa" was not yet determined or agreed upon. And also her family had no kraal to keep the livestock safe. It was as a result proposed that livestock be delivered on the date of "gohlabisa", hence the delivery was done on 25 September 2009 at her home, a day before celebration of the marriage took place at her home. Only the R200 for shepherding the livestock was paid by the deceased's maternal uncle as a symbolic gift on 3 November 2007. She further confirms that the ritual of "gohlabisa" and also the celebration of her marriage did not take place on the day on 3 November 2007 but took place on the day of the unveiling of the deceased's tombstone on 26 September 2009, which she argues could be done on any other day and does not take away the consummation of the marriage. She also did not mention anything about the R10 000.

[31] Nowwithstanding all that is alleged in the preceding paragraph, Dipee proceeds to allege that on 3 November 2007 the Phaahle family came to marry her as the deceased's wife, not to 'kokota' or propose as alleged by the Applicant, the marriage proposal having taken place on 6 October 2007. Dipee attaches a lobola document that is dated 3 November 2007 on the basis of which she alleges that the marriage was as a result consummated. In the document the following is written:

'we the Dipee family has received lobola from the Phaahle family for Oppie Phaahla's to marry Dipee which comprised of a live cow, 2 goats and an amount of R10 000.00. An amount of R200 was also paid for asking that she should leave the Dipee family for Phaahle family.'

The names Maa Rakwadi and F Phahlamohlaka from Phaahla family and MD Dipee and D J Dipee from Dipee family appended. The 1st document to append names allegedly from both families.

[32] The contents of the documents, of course contradicts what Dipee has mentioned in her affidavit as she had confirmed that no livestock was delivered and the R200 for shepherding the livestock was paid by the uncle as a symbolic gift even though there was no livestock to shepherd. There was also no mention of a payment of the R10 000.00. No "gohlabisa" took place nor was there any celebration. The indication being that nothing much happened on 3 November 2007 since all the things mentioned are indicated to have been actually paid on another date. The document therefore cannot be proof of the marriage having been entered into or consummated on that day as alleged by Dipee as none of what is written in the document is confirmed to have taken place by Dipee.

Handing over

[33] On the issue of being handed over “go beka”, Dipee alleges that as indicated in the document of 3 November 2007 the “go beka” custom was followed, which allowed her after being married to leave her family and go to the family of the groom, as per official handover.” She alleges that in her instance there was no need for a formal procedure of a hand over by her family to the deceased’s family as they already stayed together as husband and wife although for a short period. She and the deceased had agreed on 3 November 2007 when the marriage was consummated that she will go and stay with him in January 2008. Her family had agreed as of 3 November 2007 to release her to join the deceased as her husband. She went to live with him in January 2008 even though for two weeks, and not for transport reasons as alleged by the Applicant.

[34] However since nothing happened on 3 November 2007 so far, the alleged handover would have taken place prior to the delivery of the lobola, “gohlabisa,” and the celebration. Dipee is however adamant that notwithstanding that, when the deceased passed away two months thereafter on 11 February 2008 their customary marriage was finalised, insisting that lobola was paid to her family on 3 November 2007 as in accordance with the document of the same date which she has on her own contradicted, alleging that it was signed by her cousin from the maternal side who is since deceased’s and the other one from the paternal side.

[35] Dipee has also attached to her application a programme of the deceased’s funeral proceedings where it was written in the obituary that the deceased was married to her and they had two children. She alleges that the obituary was written by the deceased’s family and indicate that they also regarded her as the wife to the deceased.

The celebrations on 26 and 27 September 2009

[36] Dipee denies that she was married by the Applicant or Phaahles as “ngwetsi ya-lapa” and points out that she was never shown a bull that she was supposed to cohabit with nor has the Applicant indicated who negotiated the lobola when, how much and to whom was it paid.

[37] According to Dipee the wedding celebration on 26 and 27 September 2009 happened at the instance and instigation of the Applicant who had approached her uncle as she wanted to finalise the ceremony of her deceased’s brother by celebrating the marriage that was consummated on 3 November 2007 in accordance with custom, to continue with “go hlabisa” that never took place, to connect the ancestors of the two families. Dipee points out that the custom is crucial as she gets to be introduced to the Phaahla ancestors formally and be accepted by them. She alleges to have bought herself a wedding ring and dress and acknowledged that Applicant paid her the R10 000.00, mentioning the payment of R10 000 for the first time, although she alleges that it was to augment her expenses. The celebration happened at her village on Saturday 26 September 2009. The next day on Sunday the wedding celebrations happened at the deceased’s home simultaneously with the unveiling of the deceased’s tombstone. She denies that she was being married as “ngwetsi ya-lapa” indicating that the program indicate that she was being married to the deceased posthumously which can happen if parties had a desire to get married prior to the passing away of one of them. She however states that in her case she actually got married to the deceased. She alleges that

the celebration on 26 and 27 September 2009 was the posthumously celebration of her existing customary marriage to the deceased.

Registration by the traditional authority

[38] A day after the deceased passed away on 12 February 2008, Dipee alleges that Appellant and the deceased cousin Maloa accompanied her and her relative MD Dipee who was a signatory to the lobola letter, to the Tau-Chabeleng Traditional Authority to obtain a confirmation letter that confirmed the marriage between herself and the deceased. The Traditional Authority furnished them with the letter confirming that she was the wife of the deceased, married in accordance with the Bapedi custom and tradition on 3 November 2007. She said on the same day they went to the office of Home Affairs in Lebowakgomo where she made an application to register the customary marriage completing B1-1700. She says she kept on following up on the Application until 2009 without success. She was then advised to try and apply at Jane Furse which she did on 14 December 2009, and the marriage certificate was issued on 25 January 2010.

[39] It is noticeable that the names of persons who accompanied Dipee to the Traditional Authority is not indicated in the document from the Authority. The document only indicates that Dipee's brother confirmed to have received the dowry, naming all the dowry items even though she had alleged to have been accompanied by the deceased's uncle and the Applicant. Furthermore according to her no dowry was paid.

[40] Dipee further refers to minutes of the Kgoro ya Tampane stamped 9 October 2012 from the Phaahle traditional Council that confirms that the marriage between her and the deceased was reported to the Council by a member of the Council Mr Tompane Frank Taumang. She indicates that Applicant was there when she registered the marriage with these authorities. Mr Taumang Frank Tampane however filed a confirmatory Affidavit and alleges to be the person that signed the two documents as "Phahlamohlaka" and "Phahlamoka" relating to the lobola dated 6 October 2007 and 3 November 2007. He alleges to have used his clan name when signing the document, and to have misspelt it in the first document that is why the names are written differently. He further alleges to have since dumped the name because as a clan name it is used by everybody where he stays, causing confusion. He says he decided to adopt the surname Tampane, first name of his forefathers (I will therefore refer to him as "Tampane"). Tampane alleges to be the person who was sent on 6 October 2007 to initiate the lobola negotiations when an agreement was reached as to what was payable. He confirms that no livestock was delivered on 3 November 2007 but according to him the R10 000 and the R200.00 for "go beka" was paid. Even though Dipee's evidence with regard thereto was different. He does not explain why in the 3 November 2007 document he nevertheless wrote that the Dipee family acknowledge receipt of all the lobola items when the items therein were actually not received creating an impression that they were received. He also alleged that when they went to Dipee's home on 3 November 2007 they were going to pay the lobola and finalise everything. He also does not explain what is written in the 7 October 2007 document under 25 September 2007 or 2009.

[41] Tampane also confirms to have reported the marriage to the Phaahla Tribal Council in the deceased jurisdiction. However the announcement was about the coming wedding celebrations of the deceased's marriage to Dipee on 26 and 27 September 2009. It was not a confirmation that the couple were married on 3 November 2007. **He in his affidavit also**

confirmed that the practice of “go beka” kicks in after the representatives of the man’s family have finalised marrying a woman. The bride’s parents or an elderly relative should consent that the bride can leave her maiden home and go and live with her husband or her in laws. It is a form of handover that is done when grooms family had paid a token amount.

ultra vires registration of the marriage

[42] On the invalidity of the registration due to it being contrary to the provisions of s 4 (3) (a) of the Act, Dipee argues that the Government Gazette referred to by Applicant is not applicable to her circumstances as her marriage was entered into post 2000 upon which s 4 (3) (b) is applicable. The section referred to by Applicant applies to marriages concluded prior 2000. She pointed out however that whether or not her marriage is registered or registered late, it does not render the marriage invalid or the registration ultra vires. Also that the registering official was however satisfied that the marriage is valid. This was no longer the main issue, as I have already indicated that a validly concluded marriage cannot be invalidated by the late registration thereof. So whether or not cancellation should take place will only be relevant and considered if it is found that there was no marriage concluded upon which the registration would then be cancelled.

[43] Dipee denies that legally she was not supposed to register the marriage and insist that she was, and as a result entitled to half share of the deceased estate since her marriage is in community of property and of profit and loss. She admits that the Master had requested her and a certain Ms Mphahlele who had also at some point a relationship with the deceased, to produce marriage certificates. The marriage certificate issued by the Jane Furse Home Affairs Regional Office records that the marriage was entered into on 5 November 2007. She argues that the appointment of the Applicant as an executor does not debar her from obtaining her half share of the estate.

Applicant response

[44] In respect of the document from the Home Affairs records wherein it is stated that on 6 October 2007, the Phahlamohlaka Family request a wife. Also that the Dipee family received one head of cattle, two goats and R200 meant to accompany and shepherd them from Phaahlamohlaka. The ceremony is alleged to have taken place on 26 and 27 September 2009 post the deceased’s death.

[45] The Applicant denies that any such proceedings took place on 6 October 2007 which thereafter resulted in a marriage taking place on 3 November 2007, but alleges that instead on the latter date only a ceremony of “go kokota” took place at Dipee’s parental home whereupon lobola negotiations followed. The allegation is confirmed by Mr Maloa, the deceased’s cousin who was part of the delegation and whose confirmatory affidavit has been filed by the Applicant. Maloa denies having any knowledge about the document dated 6 October 2007 or knowing of any Phahlamokas or Phahlamohlaka’s being sent by such persons. He denies putting his name on the document and points out that the names seem to have been added by the same person. He points out that nobody has signed the document on behalf of the Dipee members, nor do they acknowledge their visitors as hosts. He also rejects Tampane’s explanation regarding his surname.

[46] On the celebration that took place after the deceased passed away. The Applicant alleges that as there was no marriage prior to the deceased's death, no marriage could have taken place by the celebration after his death. Applicant disputes Dipee's allegation that on 27 September 2009 Dipee was being handed over to the family of her deceased husband in continuation or finalisation of the customary marriage that started prior to the deceased death, or celebrating the marriage that allegedly took place prior thereto or that Dipee had a right thereafter to register the marriage. Applicant argues that it was not possible for Dipee to get married to a deceased person, however she was married to the family so that they can lay claim to the deceased's children.

[47] The Applicant confirms that on the celebration that took place on 26 September 2009, she issued out invitations for people to come and witness the wedding ceremony of the Late Letladi Opie Phaahle and Josephine Dipee without stating that posthumously, which is in accordance with marriages of 'ngwetsi ya lapa.' She deposited R10 000 into Dipee's bank account and contributed cash to her personal expenses, bought two goats, a cow and R200 to be delivered to her family. The celebrations of bringing home a "Ngwetsi" (Bride) ya lapa" then took place. A process that takes place where a male person dies unmarried having had a wish to do so, not after the demise of a married man. There was no mention of a celebration of a marriage posthumously.

[48] "Go hlabisa" also took place on 26 September 2009, a ritual which marks the official handover to the lapa la gaPhaahla of their 'ngwetsi'. The ancestors being informed that she is now married to the Phaahla family having left her home to that of her husband. She points out that Dipee had actually alleged that only then was a marriage concluded between her and the deceased, notwithstanding her previous allegation that she was married on 3 November 2007 before the demise of the deceased. She further points out that Dipee had first lodged the Application to register the marriage a day after the deceased passed away on 12 February 2008 at the Lebowakgomo Regional Office of the 1st Respondent. There was no registration, as all these necessary steps had not taken place. Nearly two years thereafter, subsequent to her payment of the lobola and celebration in September 2009 of the 'ngwetsi yalapa' marriage, she lodged an application at the Jane Furse Home Affairs office whereupon she then claimed that the dowry paid in September 2009 was paid in place for the alleged marriage on 3 November 2007.

[49] The Applicant also denies that an arrangement as alleged by Dipee between herself and the deceased can be regarded as an official handover, without the ritual of "Gohlabisa" and the ceremony of "go gorosa" or go-beka which is the physical handover of the bride by her family. That Dipee as the bride can on her own time and space just walk over and hand herself. She said they were never made aware of the arrangement and that is not recognised by custom. According to her the arrangement that culminated in a short stay was for Dipee to attend the ante-natal clinic.

[50] It is also denied by the Applicant that she accompanied Dipee to the Tribal Authority or to Home Affairs to obtain a letter of confirmation that Dipee was married to the deceased. She challenges the authenticity of the letters issued by the Traditional Authority as she indicates that a day after Dipee's letter was issued, the Traditional Authority issued another letter confirming that the deceased was married to one Ms Mphahlele from the Mphahlele Tribal Authority. She indicated that the Traditional Authority seem to issue the letters on

request not on proof or verification. She also points out that none of the Home Affairs documents cite her to have been present at any stage of Dipee's visits to any of those authorities. She alleges that Dipee's posthumous application for the registration of the marriage was unlawful or fraudulent.

[51] She points out that the obituary was incorrectly translated into Sepedi indicating that the deceased was married to Dipee when what was to be indicated was that the deceased had two children born out of a relationship he had with Dipee.

[52] Applicant also criticises the Phaahle Traditional Council's 2012 confirmation of the marriage that allegedly took place in 2007, after it has already been registered by Home Affairs in 2010. She points out that the court proceedings were already instituted by the Applicant when the marriage is alleged to have been reported to the Council by Tampane, 5 years later. She alleges that the document seem to have been created after the fact. The reporting is of a marriage that was going to take place on September 2009 and nothing is said about the alleged marriage on 3 November 2007. It therefore cannot be proof of that marriage. It explains as well why the documents dated 6 October 2007 had to be altered because how do you explain the non-payment of lobola on 3 November 2007 if the marriage is supposed to have been concluded on that day when also no customary rituals had taken place. She argues that the documents appear fraudulent.

[53] The Applicant does not agree with Tampane's explanation of his use and misspelling of the alleged clan name as not making any sense. Also the adoption of another surname without indicating when that happened and how long he has been using the new surname. She denies being related to any Phahlamohlakas or Phahlamokas, or that her family is called Phahlamohlaka. She therefore does not know who that person or Tampane was representing from that name. She points out that Mr Maloa who was delegated by the Phaahlas has also denied knowing anything about the documents which do not bear his signature but just appended names. Maloa does not know a Mr Phahlamohlaka or Phahlamoka. He also denies putting his signature on the document dated 3 November 2007 or attesting to the truthfulness thereof whereupon it is alleged that the Dipee family received the items that have been set out in the document. He confirms that the Dipee's asked for the items on that date, which was their first go kokota meeting to negotiate the lobola. Also that none of the things were delivered. He denies that R200 was paid for the purpose of "go beka" and deny that there was any discussion or agreement about "go beka" or "go hlabisa" on 3 November 2007. He indicates that he belongs to the Bapedi ba Sekhukhune and well conversant in customs, practices and culture of the Bapedi people.

[54] Mr Maloa confirms that he was also delegated to lead the proceedings on the marriage of the "Ngwetsi ya lapa" and confirms that the marriage is well known to the Pedi people and practised by them to preserve and dignify the name of the deceased who will have died being an unmarried man, like his cousin. He points out that since Dipee has got children with the deceased there is no need for a bull to be pointed out for her and only a woman can be married as Ngwetsi ya lapa. He confirmed that prior to taking the Lobola to the Phaahlas on 25 September 2009 he was informed that the R10 000 was already deposited into Dipee's account and she was going to declare it to her family as lobola. He then went to deliver the remainder of the lobola, that is, the cow, 2 goats and the R200. The R10 000 was confirmed to have been declared by Dipee. He denies that Tampane was part of the delegation. He also

confirms that it was clear in the invitations that it was a celebration of a marriage between the deceased and Dipee and not a posthumous celebration of a marriage that was already finalised.

Home Affairs' record of proceedings

[55] The record constitutes of a letter sent to the Director General: Directorate Population Registry by the Jane Furse Office of the Department of Home Affairs attaching a report on the outcome of an investigation about the customary marriage of Dipee and the deceased. The author thereof is a Mr MP Phetla and it is dated 10 November 2010. The report is with a heading "Department of Home Affairs Jane Furse Regional Office Customary Marriage." With the report is an Application for the registration/enquiry into existence of customary marriage. Mr Phetla wrote in the report, that:

"This is to certify that Phaahle Letladi Oppie have entered into Customary Marriage with his wife/husband Dipee Ngwanamotlolo Josephina in 2007.11.03

According to my investigation and interviews I'm convinced that the attached marriage did took place and celebrated on the above mentioned date.

I visited the tribal office and the next of kin, I found that they acknowledge the marriage.

I therefore recommend that the marriage be registered."

There is no date on the report and it is signed by Mr Phetla. Thereafter it is written that the registration was approved for the following reasons:

"The marriage was contracted in accordance with the traditional law and custom"

[56] The attached Department of Home Affairs Regulation 2 Application for the registration/enquiry into existence of customary marriage document was signed on 9 September 2010. Details of the husband and the declarations supposedly made by or on his behalf are filled in. On the signature by the declarant it is stated that "deceased." The official who signed the document is Mr Disolopane. The wife's details are then completed and her signature appended to the document on 9 September 2010. On the particulars of the customary marriage and lobolo agreement, the date of marriage is stipulated as 3 November 2007 at GaPhaahla and particulars of lobolo agreement stipulated to be R10 000, 2 Goats and 1 Cow. There is no declaration by a traditional leader or a delegate/witness. F T Tampane has signed as a representative and father of the husband. M Dipee has signed also on 9 September 2010 as a representative and cousin of the bride. The two representative's addresses are the same. This therefore all happened after the registration of the marriage by Home Affairs on 25 January 2010.

[57] Whereafter the registering officer Mr Disolopane signed a declaration on the Application stating that 'registration approved for the following reasons: "the marriage was contracted in accordance with the traditional laws and customs." A stamp of the office in Jane Furse dated 9 September 2010 is appended. Attached to the same document is a letter signed by FT Tompane who alleges to be related to the deceased as his Father. The Applicant has attached to her court documents a Death Certificate that indicates that the deceased father

Phaahle Paulos died on 27 December 1995. Therefore Mr FT Tompane is not the Father of the supposedly deceased husband. The second portion that relates to the wife is signed by one M D Dipee said to be signing it in his capacity as Dipee's cousin who is supposed to be deceased. The investigation and the documents were signed long after the fact and the officials would not have known of what had exactly happened on 3 November 2007 to be able to make out if the allegations that lobola was paid and marriage entered into on that date were true. At the time of the investigation the Department had also already issued a marriage certificate on 25 January 2010. The people who were consulted on the different aspect of the marriage were not mentioned.

Legal framework

[58] Customary law is defined as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of their culture. The Act, in recognition of the customary law marriages was introduced to be in tune and subservient to the values of our Constitution as our supreme legislation, to safeguard, give implementation and recognition to those customs and cultures under the purview of a constitutionalised and a democratic society, and with the purpose not only of safeguarding but also democratising the application of African customs and cultures.

[59] Following the provision of s 3 of the Act, it was held in *Fanti v Boto and Others* 2008 (5) SA 405 (C) that in order to prove the existence of a valid customary marriage, essential requirements that inescapably must be alleged and proved are the following:

- (i) consent of the bride
- (ii) consent of the bride's father or guardian
- (iii) payment of lobola
- (iv) handing over of the bride

[60] The Court clearly regarded the afore-mentioned requirements as customs traditionally observed by indigenous people in South Africa. The Court *inter alia* stated as follows at 4131 - 414C:

"Regard being had to the above requirements for the validity of a customary marriage, payment of lobola remains merely one of the essential requirements. In other words, even if payment of lobola is properly alleged and proved, that alone could not render a relationship a valid customary marriage in the absence of the other essential requirements. See *Gidya v Yingwana* 1944 NAG (N&T) 4, *R v Mane* 1947 (2) PH H328 (GW); *Ziwande v Sibeko* 1948 NAG (C) 21; *Ngcongolo v Parkies* 1953 NAG (S) 103. These requirements have not vanished with the advent constitutional democracy in this country. On the contrary, the Constitution of the Republic of South Africa, 1996, enjoins the Courts to develop customary law and to marry it to the constitutional order of the day. The importance of these rituals and ceremonies is that they indeed indicate in a rather concretely visible way that a customary union is being contracted.

I am in agreement with Van Tromp's views expressed in his work *Xhosa Law of Persons* at 78 that these ceremonies must be viewed as ceremonial and ritual process in which essential legal requirements have been incorporated."

[61] The Supreme Court of Appeal recognized the pluralistic nature of the South African society and pointed out that although Africans in general share the majority of customs, rituals and cultures, there are some subtle differences which, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, Vha Venda and the Va Tsonga. The issues in casu are firmly embedded in our culture and customs as practised by the Bapedis from the Limpopo Province. In the matter of *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014), the Supreme Court of Appeal had an opportunity to deal with and decide on the essential requirements of a valid customary marriage and also to look at the requirements from the Bapedi culture perspective, wherein Bosielo JA stated as follows:

"[39] Except for minor and inconsequential differences on cultural rituals, both experts were agreed that the current customary requirements for a valid customary marriage among the **Bapedi** people include amongst others, negotiations between the families in respect of lobola; a token for opening the negotiations (**go kokota** or **pula molomo**); followed by asking for the bride (**go kopa sego sa metsi**); an agreement on the **number of beast payable as lobola** (in modern times this is replaced by money); payment of the agreed lobola; **the exchange of gifts between the families**; the slaughtering of beasts; a feast and counselling (**go laiwa**) of the makoti followed by the **formal handing over** of the makoti to her in-laws by her elders.

[40] Importantly, **the two experts agreed that the handing over of the makoti to her in-laws is the most crucial part of a customary marriage**. This is so as it is through this symbolic customary practice that the makoti is finally welcomed and integrated into the groom's family which henceforth becomes her new family. See *Motsotsoa v Rora & Another* and *The Current Legal Status of Customary Marriages in South Africa*, IP Maithufi and GBM Moloi, *Journal of SA Law*, 2002, p 599 and Bennett (above) at p217." (my emphasis)

[62] On the question whether the handing over of a bride is an element of a customary marriage, the Full Court of the Free State Division, Bloemfontein answered the question in *Rasello v Chali & Others* (A69/2012) [2013] ZAFSHC 182 (23 October 2013). Molemela J, as she then was, said the following at paragraph [18]:

".....Although the Recognition of Customary Marriages Act does not include transfer of the bride in the requirements for a valid customary marriage, I accept that this, being an old Sesotho custom that is still widely recognized, it is a custom contemplated in section 3(6) of that Act and is thus an essential requirement for

validity of a customary marriage. It was so accepted by the court in the case of **Fanti v Boto** (supra) on the basis of many authorities. **Delivery of the bride entails that the bride will be accompanied to the groom's family by her own delegation, which will then formally hand her over to the groom's family.** Olivier, Bekker *et al* in their work *Indigenous Law* describe delivery of the bride as "the transfer of the bride by her family group to the family of the man". (my emphasis)

[63] The requirement of handing over a bride to the groom's family was explicitly set out in *Motsotsoa v Roro & Another* [2011] ALL SA 324 (GSJ) where it was decided that one crucial elements of a customary marriage is the handing over of the bride by her family to her new family, namely that of the groom. The Court held further that the mere fact that lobola was handed over to the bride's family, significant as it is, is not conclusive proof of the existence of a valid customary marriage. It stated that:

"The handing of the bride (go gorosa ngwetsi) is not only about celebration with the attendant feast and rituals. It also encompasses the most important aspect associated with the married state, namely "go laya" that is coaching or briefing which includes **the education and counselling** both the bride and the groom by the elders of their rights, duties and obligations which a married state imposes on them. **The Court regarded this as the most important and final step in the chain of events. One can even describe this as the official seal in the African context,** of the customary marriage." (my emphasis)

[64] The authors, IP Maithufi and JC Bekker, in an article entitled *Recognition of Customary Marriages Act 1998 and, its impact on Family Law in South Africa* CILSA 182 (2002) correctly submit that a customary marriage in true African tradition is not an event but a process that comprises a chain of events and involves not only the bride and the groom but also their families. The authors further submit that after the negotiated lobola or part thereof is handed over to the woman's family, the two families will then 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 a celebration.

[65] **TW Bennett, in Customary Law in South Africa, 18th Edition** states at p217 that:

"Hence, when the Recognition of Customary Marriages Act provides that in order to qualify as customary, a marriage must be negotiated and entered into or celebrated in accordance with customary law, the form of negotiations, the handing over of a bride and the wedding are all relevant to giving the union the character

of a customary marriage. It may then be distinguished, on the one hand, from an informal partnership and, on the other, from a marriage according to other cultural or religious traditions."

[66] Makgoba JP pronounced in *M v K* (2017/2016) [2018] ZALMPPHC 62 (7 November 2018) that:

"In my view the handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially been handed over to the groom's people there can be no valid customary marriage. In terms of practice or living customary law the bride cannot even hand herself over to the groom's family. She has to be accompanied by the elders or relatives for the handing over to her in-laws." (my emphasis)

[67] The court has taken cognisance of the constraint within which this matter is decided that in the instance where there are factual disputes that are material, a final decision is to be made only if the facts as stated by the Respondent together with the facts as alleged by the Applicant that are admitted by the Respondent, justify such an order; see *Stellenbosch Farmers Winery (Pty) Ltd* 1957 (4) SA 234 © at 235. Furthermore of also the relevance of the court satisfaction as to the inherent credibility of the Applicant's factual averments; see *Room Hire Co Pty (Ltd) v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

Analysis

[68] In casu it has become apparent that as it has been agreed by Dipee the Phaahla family did initiate the negotiations for a marriage between the deceased and her. Indeed a delegation was sent to her parental home to go and kokota, whereupon the lobola was discussed. The Phaahla's were undeniably informed of what the lobola comprises, it is not in dispute that a cow, two goats and an amount of R10 000.00 plus R200 00 was agreed upon. It is also not in dispute that the families met on 3 November 2007, which was the day when there was an unveiling of the deceased's father's tombstone. The only contention is whether was that day the day of the negotiations when the Phaahla's went to 'go kokota' or was it the day when they went to pay the lobola that was agreed upon. According to the Applicant that is the day when the Phaahla's went to kokota, and the negotiations took place. The only day when the initiative was taken towards the fulfilment of the wishes of the deceased. On that day they were told what is required for lobola, for that reason nothing could have been paid. Accordingly, as confirmed by Maloa who formed part of the delegation, they came back to report to the Phaahlas and nothing was paid.

[69] Now even though Dipee contends that it was not the first time the Phaahlas have visited her parental home alleging that they have been there before on 6 October 2007 to kokota and were told what comprised of the lobola, according to her they would have nevertheless on 3 November 2007 came back to her parental home with nothing to deliver as they had been asked not to deliver the livestock. She also did not say anything about the payment of the R10 000 on 3 November 2007, but only referred to the R200.00 which she

initially said was a gift from the maternal cousin of the deceased and later said was for asking that they come back with the bride. It is far-fetched that the delegation would have gone back with no lobola just to go and pay the R200 and fetch the bride which is the last act of the ritual to be performed in the whole process. Dipee has also contradicted herself when she referred to the document dated 3 November 2007 that states that the Dipees have received the lobola that includes the livestock, the money and the R200.00 to be proof that a marriage has occurred when it has been accepted that none of those things were received or delivered to them that day. It is therefore apparent that on the day only the 'go kokota' and lobola negotiations took place, no 'go hlabisa' or 'go kesa' was discussed as those are the things that are discussed after the lobola has been paid. Also it was obviously the first time the delegation was sent to Dipee's parental home.

[70] The origin of the document that Dipee relies upon to indicate that a delegation came to her parental home on 6 October 2007 is also a mystery as it refers to people that are unknown to the Applicant who is the sister of the deceased and to Maloa who formed part of the delegation. The document contradicts Dipee's and Tampane's version as it indicates and confirms that the items of lobola referred in there were paid on a date after the death of the prospective husband. Therefore on 3 November 2007 no lobola was paid or any of the usual rituals or processes in a customary union were discussed or agreed upon. The discrepant document therefore with no significance to what has happened. All this just confirms that the initial negotiations of go 'kokota' did not take place on the alleged date of 6 October 2007 but on 3 November 2007. Also that there was no consummation of the marriage.

[71] Dipee has also alleged regarding the ritual of being handed over that, on the day of 'go kokota', that is 3 November 2007, she agreed with the deceased that she will come and stay with him in January 2008, which she then did but for a few weeks, two weeks to be precise. She indicated that her parents had agreed that she could go and stay with the deceased and regards that as being handed over. Yet it has been mentioned that hand over is a ceremonial ritual that takes place within the perimeters of the customary negotiations between the two families and one of the crucial steps taken towards the entering into a customary union. It also does not just happen, certain things need to take place first. It cannot take place through a discussion between boyfriend and girlfriend and thereafter for the bride just to walk into the home of the groom as and when the couple feels like it, as Dipee did. In that instance there is no handover. It takes away from the union the character of a customary marriage. In *M v K Makgoba* JP addressing that situation stated that:

"In my view the handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially been handed over to the groom's people there can be no valid customary marriage. In terms of practice or living customary law, **the bride cannot even hand herself over to the groom's family.** She has to be accompanied by the elders or relatives for the handing over to her in-laws.

[72] In this instance there has not even been "go hlabisa' or a date agreed upon as to when that was going to happen. How does than 'go gorosa ngwetsi' and 'go layiwa' would have to fit in when Dipee has just walked to the home of the deceased. This all involves planning and

discussion between the two families with a couple of things happening on the day including “go layiwa.” It does not happen at the whim of the couple. Makgoba J in *M v K* proceeded to conclude that:

“Once that is done severance of ties between her and her family happens. Her acceptance by the groom's husband and her incorporation into his family is ordinarily accompanied by well-known extensive rituals and ceremonies involving both families. The importance of these rituals and ceremonies is that they indeed indicate in a rather concretely visible way that a customary marriage is being contracted and that lobola has been paid and / or arrangements are acceptable to the two families. The fact of the matter is that the customary marriage is and remains an agreement between two families.

[73] All the authorities seem in agreement that a valid customary marriage only comes about when the woman has been transferred or handed over to her husband or his family. It is such a fundamental ritual that it does not just happen without the involvement of the family.

[74] In *casu* not only was lobola not paid to the Dipee family on 3 November 2007, there was nothing else that occurred that could be regarded as having advanced the entering into or the conclusion of a customary union marriage except the negotiations on the lobola. Dipee speaks about the “go beka” custom that was allegedly followed which allowed her after being married to leave her family and go to the family of the groom, being the official handover. However since nothing happened on 3 November 2007 beyond negotiations, the handover would have taken place prior the delivery of the lobola, to “go hlabisa” or ‘go layiwa’ and ‘go gorosa ngwetsi’ when she will be given a new name by her in laws. The allegation that the marriage was consummated is therefore a step too far. It is clear that at the time of the deceased death no marriage was yet concluded or entered into between Dipee and the deceased.

[75] Dipee has however after being adamant that when the deceased passed away their customary marriage was finalised, has also conversely and strangely submitted that her marriage to the deceased was entered into on 25 - 26 September 2009 when lobola was paid to the Dipees in full and the marriage celebrated. According to her she was then handed over to the Phaahlas on 26th September 2009. She agreed that the money was paid to her at that time by the Applicant and that her family received the livestock and the R200 00 that accompanied it for “go gorosa ngwetsi” (hand over) whilst as a Mopedi she should be aware that this is all symbolic. There is no way she can legally, enter into a marriage with a deceased person, whether culturally, customarily or otherwise. Dipee then tried to use and mention the lobola and the rituals followed when she was being married to the family on 27 September 2009 as if they have happened on 3 November 2007 or they had occurred in finalization of that process. This is apparent as she has then after the 26 September 2009 celebration endeavored again to register the marriage and referred to the document dated 6 October 2007.

[76] Furthermore not only was lobola not paid to the Dipee family on 3 November 2007, there was nothing else that occurred that could be regarded as having resulted in the entering into or the conclusion of a customary marriage except the preliminary negotiations on the

lobola. Dipee refers to the “go beka” custom that was allegedly followed which allowed her after being married to leave her family and go to the family of the groom, being the official handover. However since nothing happened on 3 November 2007 beyond negotiations, the handover would have taken place prior to payment or delivery of dowry or lobola, “go hlabisa,” golayiwa and or celebration. The allegation that the marriage was consummated is therefore a step too far. It is clear that at the time of the deceased death no marriage was yet concluded or entered into between the deceased and Dipee.

[77] In *Motsoatsoa v Roro & Another* [2010] JOL 26460 (GSJ) the court gave emphasis to the fact that even if the deceased’s parents or the prospective wife’s parents had acquiesced to the living arrangement between the prospective wife and the deceased, that in itself could not have transformed what was primarily a mere cohabitation into a valid customary marriage. It branded that an unfortunate perversion of customary law.

[78] Dipee has however after being adamant that when the deceased passed away their customary marriage was finalised, has also conversely and strangely submitted that her marriage to the deceased was entered into on 25 - 26 September 2009 when lobola was paid in full to the Dipees and the marriage celebrated. According to her she was then handed over to the Phaahlas on Sunday the 26th September 2009. She agreed that the money was paid to her at that time by the Applicant and that her family received the livestock and the R200 00 that accompanied it for “go gorosa ngwetsi” (hand over) whilst as a Mopedi she knows that this is all symbolic, there is no way she can literally enter into a marriage with a deceased person, whether customarily or otherwise. This however indicate that she is aware of exactly what is required for a valid customary marriage to be concluded. She has then tried to use or mention the lobola and the rituals followed on 27 September to have happened on 3 November 2007 or in aid of a finalisation of a marriage negotiated then.

[79] It is also apparent that with all the documents attached by Dipee being proven to have been not a true recordal of what had taken place during the process of the negotiations of her intended marriage to the deceased and Dipee’s admission that lobola was paid, ‘go hlabisa’ and all other rituals in a customary union performed only in September 2009, that no customary marriage was entered into or celebrated between her and the deceased. What was recorded by the Tribal Authorities or published in an obituary on the death of the prospective husband cannot also be a determining factor or proof of such a marriage having taken place due to their apparent discrepancies. An example of such discrepancies is on the Tau Nchabeleng Traditional Authority document. Applicant had rightly indicated that the Authority just issues documents at the request of any individual without verifying the facts. The Traditional Authority had issued two confirmatory letters or certificates within two days on 12 and 14 February 2008 to different ladies confirming that they were both married to the deceased by customary law and that the deceased had paid a dowry of R10 000 for each, and on Dipee that the dowry also included a cow and 2 goats received by Dipee D J, the brother of the bride when no such dowry or lobola was paid for Dipee at that time. It is one of the documents on the basis of which the Home Affairs office in Jane Furse issued a marriage certificate referring to the date of marriage as 5 November 2007. It however had no bearing to whether or not a customary marriage was concluded between Dipee and the deceased and therefore could not be held as proof thereof.

[80] Having regard to the legal requirements of a valid customary marriage, it is obvious that the celebration that took place on 26 to 27 September 2009, despite the payment of lobola in full and the cultural rituals and celebrations that followed did not for the obvious reasons result in a coming into existence of a legal customary marriage between the deceased and Dipee or validate a customary marriage that never came into existence during the life of the deceased (prospective husband).

[81] I am therefore satisfied on the facts that no valid customary marriage was shown to have been entered into or concluded between Depee and the deceased on 3 November 2007 as alleged or could have been entered into or concluded with the deceased after his death .

In the result I grant the following order.

1. That the decision of the 1st Respondent to register the marriage between the 2nd Respondent and the deceased, Lethladi Oppie Phaahle is set aside.
2. The 1st Respondent is ordered to deregister /cancel the registration of the customary marriage between the deceased and the 2nd Respondent;
3. There shall be no order as to costs.



N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

On behalf of Applicant:

T MOLEFE

Instructed by

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No appearance

MAKGOBA KGOMO MAKGALENG INC