REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION,

PRETORIA

CASE NO: 56880/2021

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES:NO

(3) REVISED

DATE:05 SEPTEMBER 2023

SIGNATURE

IN THE MATTER BETWEEN

MOKHORO SHAWN **APPLICANT**

And

EUSACH BOY SHABALALA **1ST RESPONDENT**

DEPARTMENT OF HOME AFFAIRS **2ND RESPONDENT**

JUDGMENT

CEYLON AJ

[A] INTRODUCTION:

[1] This is an application in terms of which the Applicant seeks an order in the following terms:

"1. That the customary marriage entered into between the Applicant and the Respondent on the 09th December 2017 be declared a *marriage in terms of section 2(2) of the Recognition of Customary Marriage Act 120 of 1998 and in community of properly of profit and* loss *in terms of section 7(2) of the Recognition of Customary Marriage Act 120 of 1998;*

2. an Order that the marriage be registered as such by the Department of Home Affairs in terms of section 4(7) of the Recognition of Customary Marriage Act 120 of 1998;

3. That the Respondent be ordered to pay costs in the event of opposing this application;

4. Further and/or alternative relief

[2] The application is opposed by the 1st Respondent only. The 2nd Respondent filed a notice to abide by the decision of this Court [see notice to abide dated 26 July 2022, at pg 037-1, Caselines] and did not participate further in the proceedings.

[3] The matter first came before this Court for hearing on 17 November 2022 and was referred for oral evidence in terms of rule 6(5)(g) of the Uniform Rules of this Honourable Court by the learned Van Heerden AJ. Said judge further ordered that:

"2. *The deponents to Founding affidavit, confirmatory affidavit, answering affidavit and supporting affidavit* as *well as any other party either party intend to call shall testify on issues of the validity of the customary marriage between the applicant and First Respondent on the date to be determined by the Registrar of the above honourable court;*

[3]. *The application* is *postponed sine die with* costs *to be costs in the cause."*

[4] According to the 1st Respondent, the Applicant filed her replying papers out of time and did not apply for condonation for said late filing thereof [refer to "Preliminary Issues", 1st Respondent's Heads of Argument ("HOA") at pg 036-4 and further, Caselines]. The 1st Respondent addressed this issue in her supplementary HOA under "Introduction", paragraph 1 at pg 038-1 and further, Caselines]. This issue will be dealt with herein-under in this judgment.

[5] The Applicant raised an objection to the testimony of a prospective witness to testify on behalf of the 1st Respondent in these proceedings. This objection and the outcome thereof will also be set out below.

[B] BRIEF BACKGROUND:

[6] The following is a brief background to this matter:

(a) The parties met around January 2017 and started a romantic relationship which apparently became serious later.

(b) According to the Applicant, the parties allegedly became engaged around July 2017 when the 1st Respondent proposed marriage to the Applicant.

(c) The families of the parties met and negotiated lobolo in terms of their traditions and customs on 04 November 2017 and a dowry amount was agreed and paid. Hereafter, the said families met again on 18 March 2018 and discussed that a traditional celebration umembeso be done on 07 July 2018, which apparently did happen on said date.

(d) In 2017 or 2018 the parties apparently moved in together, with the Applicants' two children, into an apartment in Faerie Glen, Pretoria.

(e) The Applicant allege that all the requirements for a valid customary marriage has been complied with and should therefore be registered as such in terms of said Recognition of Customary Marriages Act 120 of 1998 ("the Act"). The 1st Respondent

disputes the Applicant's allegations and deny that any marriage has taken place between the parties.

(f) It is against the above background that the Applicant launched this application.

[C] COMMON CAUSE FACTS:

[7] The following are the main common cause facts between the parties:

(a) the parties were involved in a romantic relationship, both over the age of 18 years old and no children were born from this relationship;

(b) the parties mandated representatives to attend to the lobola negotiations;

(c) the said lobola negotiations were held on 04 November 2017 and 09 December 2017;

(d) the agreed lobola amount was fully paid;

(e) umembeso was held on 07 July 2018;

(f) the Applicant and her two children moved in with the 1st Respondent in Faerie Glen, Pretoria;

(g) umbondo, umgcagco and umabo did not take place,

[D] ISSUES TO BE DETERMINED:

[8] The following are the main issues for determination before this Court:

(a) whether a valid customary marriage was entered into by the parties on 09 December 2017 and if it be declared as such in terms of section 2 (2) of the Act and in community of property and profit and in terms of section 7 (2) of said Act.

(b) whether the marriage, if any, should be declared a marriage in terms of said Act and be registered by the 2nd Respondent.

E. TECHNICAL POINTS:

[9] It will be opposite to deal with the technical points raised herein at this stage.

(i) condonation:

(a) As indicated at para [4] above, the 1st Respondent alleged that the Applicant filed her replying papers out of time without applying for the condonation for such late filing and furnishing reasons for same. The 1st Respondent contended that this caused delays in the proceedings and that he is prejudiced as a result of the said conduct of the Applicant. The 1st Respondent submitted that the said replying papers are not properly before court and should be rejected.

(b) The Applicant (in her supplementary HOA) denied the late filing of the replying papers and explained that, according to her calculations was filed timeously, and therefore submitted that the contention of the 1ste Respondent is unfortunate and bad in law.

(c) Having had regard to the submissions of the parties, the rules of court and the authorities cited by the parties, this Court is of the view that there is no need for any of the parties to have brought substantial applications for condonation as all the papers are before this Court and the matter is ready for adjudication [see Pangbourne Properties Ltd v Pulse Moving CC 2013 (3) SA 140 (GSJ) at 147G-148]. This Court is satisfied with the explanation provided by the Applicant and consider it to be in the interest of the parties, this Court and of justice that the affidavit be admitted.

(ii) objection:

(a) As stated at para [3] hereof, this matter was referred for oral evidence in terms of rule 6 (5)(g) of the Uniform Rules of this Court by the learned Van Heerden AJ. At the hearing, the Applicant objected to the testimony of Mr Mthethwa, being a witness

called to testify by the 1st Respondent in circumstances where he (said Mthethwa) did not make any affidavit in relation to the 1st Respondent's case. This Court invited the legal teams of the parties to make submissions relating to the objection of the Applicant which was complied with by both teams. The Applicant contended *inter alia* that the 1st Respondent, by calling a witness who has not deposed to an affidavit is seeking to substantiate their defence which they ought to have done before the matter could be referred for oral hearing, and that it is a trite principle that, in motion proceedings, a party must stand and fall on their papers.

(b) The 1st Respondent submitted, *inter alia,* that the learned Van Heerden AJ, in his said order, did not specify which issues should be determined by oral evidence and it was open to this Court to exercise its discretion and grant leave that the said witness be allowed to testify, with a view of ensuring a just and expeditious decision.

(c) In the opinion of this Court, in terms of the order of Van Heerden AJ (of 17 November 2017), it would be permissible that any other party who may testify on the validity of the customary marriage between the parties may be called by any of the parties. Also, Mr Mthethwa was part of the 1st Respondent's delegates to the lobola and subsequent processes and participated therein, and as such has direct and personal knowledge of the validity of the customary marriage between the parties. In addition, this Court is of the view that there would not be any prejudice to the Applicant if Mr Mthethwa's testimony would be allowed, especially given the fact that he would be subject to cross-examination by the Applicant's legal representatives. This Court is of the view that it would be in the interest of justice that his testimony be allowed. The Court made an order in accordance with the aforegoing, allowing for the 1st Respondent to call Mr Mthethwa to testify.

[F] <u>THE CONTENTIONS OF THE PARTIES:</u>

[10] The parties submitted elaborate contentions. The following are the main ones:

(I) <u>the Applicant's contentions:</u>

(a) The Applicant (Mokhoro) contended that there was compliance in terms of the Act

for a valid customary marriage referring to section 3(1) thereof, in that the prospective spouses (the parties) are both over 18 years old, consented to be married to each other under customary law and that the marriage was duly negotiated and entered into or celebrated in accordance with customary law.

(b) The Applicant contended that it is common cause between the parties that they were both over the age of 18 years old when the alleged marriage was entered into. Accordingly, the first requirement in terms of the Act has been satisfied.

(c) The Applicant submitted further that there was proper consent between the parties to be married to each other under customary law. In this regard the Applicant refers to paragraphs 8.1 to 8.5 of her Founding affidavit and paragraph 60 of the 1st Respondent's answering affidavit and contended that the parties did consent to enter into a customary marriage or to be married to each other in terms of customary law when 1st Respondent sent his family to the Applicant's family to commence the lobola negotiations, and is evidenced, according to the Applicant, by undisputed documentary evidence attached to the Applicant's Founding affidavit, marked as annexures "STM1" and "STM2". The Applicant submitted that the 1st Respondent admitted to the contents of the said paragraphs 8.1 to 8.5 of the Applicant's Founding affidavit as the correct version of events in paragraph 60 of the 1st Respondent's answering affidavit.

(d) The Applicant submitted further that it is trite law that lobola negotiations form an integral part of custom and is a significant factor when parties enter into customary marriage [relying on Maluleke v Minister of Home Affairs, unreported, case no: 02/24921 of 09 April 2008 (GP); Himonga and Nhlapo: African Customary Law in South Africa at 103].

(e) The Applicant contended that it is the evidence of witnesses Mr Mthethwa and Sipho Mokhoro, both of whom attended the lobola negotiations, that it was agreed that an amount of R33 000-00 was payable as the lobola amount and allocated to seven (7) cows and that the remainder, namely another two (2) cows, would be reserved for slaughtering during the wedding celebrations. According to

the Applicant, the 1st Respondent, at paragraphs 61 and 65 of his Answering affidavit, alleged that the lobola amount was paid only in part and was not allocated to anything. According to the Applicant that this latter evidence of the 1st Respondent was incorrect and not in line with the evidence of the parties that attended the lobola negotiations. Therefore, the Applicant submitted, it can be accepted that the lobola amount was fully paid.

(f) Even in the event that it is found that the lobola amount was not paid up in full, the applicant submitted that this did not invalidate the customary marriage relationship. In this regard, the Applicant cites the decision of Mbungela and Another v Mkabi and Others [(820/2018)[2019] ZASCA 134 (30 September 2019) at para 15] wherein it was held that:

"In the court's view, a *valid customary marriage could be concluded without the full payment of lobola in light of the evolution of customary law if other requirements of* a *customary marriage were met, such as the payment of a portion of the lobolo and the exchange of gifts by the two families in the instant matter."*

(g) In view of the above, the Applicant contended that the second requirement for a valid customary marriage in terms of the Act have been complied with.

(h) The Applicant submitted further that the third requirement for a valid customary marriage, that the marriage must be negotiated and entered into or celebrated in accordance with customary law, has also been met. The Applicant submitted that the use of the words "must be negotiated" in the Act suggests that the legislature had the negotiation of lobola and ancillary matters in mind [relying on the S Sibisi: The Juristic Nature of Lobola Agreements in South Africa at pg 60]. The Applicant argued that if regard is had to paragraphs 8.8 of her Founding affidavit and paragraph 67 of the 1st Respondent's answering affidavit, the families of the parties did celebrate their marriage in accordance with the customary law by performing "umembeso" in terms of the Zulu culture. According to the Applicant, umembeso refers to a Zulu traditional ceremony wherein gifts are handed over by the groom's family to the bride's family, which is done at the bride's home. By their participation in the umembeso ceremony by both families, the parties negotiated and/or celebrated their

marriage in line with customary law, so the Applicant submitted.

(i) It was contended by the Applicant that the Act does not specify that more than one celebration should be done, but it merely refers to a celebration in accordance with the Act. In view of the latter, the Applicant submitted that she complied with the requirements of a celebration, alternatively that there was substantial compliance with said requirement in terms of the Act. With regards to this requirement of a celebration, the Applicant cited the decision of Ngwenyama v Mayelane and Another [(474/11)(2012] ZASCA 94 (01 June 2012) where it was held that:

"The Recognition Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstance. But once the requirements have been fulfilled, a customary marriage, whether monogamous of polygamous, comes into existence."

(j) The Applicant submitted that the 1st Respondent views umembeso as one of the requirements of a valid Zulu customary marriage, wherein gifts are given to the bride's family. The Applicant argued that from the definition of the word "umembeso", it is clear that at the time of the umembeso ceremony, the woman is already regarded as the bride and that the parties are in a valid customary marriage upon payment of the lobola amount, and what happens after the payment of such lobola is a celebration of a successful marriage relationship between the spouses. The Applicant went on to contend that the 1st Respondent, when questioned during examination in chief as to why he refers to the Applicant's family as his "in-laws" if the parties were not married, failed to give an explanation, but rather explained what umembeso is.

(k) The Applicant submitted further that it is the testimonies of the Applicant and Mr Sipho Mokhoro both that, immediately after the lobola negotiations on 09 December 2017, the 1st Respondent's family requested the Applicant's family to allow the Applicant to move in together as husband and wife since the lobola has been fully paid up. With regards to the latter, the 1st Respondent stated that he cannot comment

on said Mr Mokhoro's evidence as he was not present at the lobola negotiations. The said evidence was, according to the Applicant, not refuted by Mr Mthethwa who was part of the 1st Respondent's family delegation at the lobola negotiations, and therefore remains undisputed as evidence in the matter. The Applicant refer to, in the latter regard, to the Small v Smith decision [1954 (3) SA 434 (SWA)] where it was held it is grossly unfair and improper to let a witnesses evidence go unchallenged in cross- examination, and afterwards argue that he mut be disbelieved. Accordingly, the Applicant argued that she was indeed handed over to the 1st Respondent's family and allowed by both families to move in together with the 1st Respondent as husband and wife, which the Applicant has done around 2017, alternatively 2018.

(l) The Applicant contended that it is trite that the requirement of handing over can also be inferred from the cohabitation by the parties and it therefore does not matter how the parties came to stay together. The Applicant refer to the Mbungela decision, *supra* [at para 25) where the SCA held that:

"... *And* a *proof of cohabitation alone may raise* a *presumption that* a *marriage exists, especially where the bride's family has raised no objection or showed disapproval by, for example, demanding* a *fine from the groom's family."* This issue (cohabitation) was also addressed in Tsambo v Sengadi [(244/2019)(2020] ZASCA 46 at para 27) and the principle in Mbungela, *supra,* confirmed therein.

(m) The Applicant went on to submit that, as a result of the foregoing, the following issues/factors are not in dispute and therefore common cause between the parties; that-:

- the parties were in love and partners when they began the lobola negotiations;

- 1st Respondent proposed marriage and engaged the Applicant in July 2017;

- the 1st Respondent's family sent the lobola letter (annexure "STM1") to the Applicant's family;

-the two families met on 04 November 2017 to begin lobola negotiations in

accordance with their traditions and customs;

- the two families met again on 09 December 2017 and the final part of the agreed lobola amount was paid by the 1st Respondent to the Applicant's family;

- an amount of R33 000-00 was paid for lobola, allocated to seven (7) cows;

- the lobola was paid in full;

- by entering into the lobola negotiations the parties agreed to be married according to customary law;

- the Applicant was requested to move in with the 1st Respondent after payment of the full lobola amount;

- the Applicant moved in with the 1st Respondent;

- neither of the families of the parties objected to the parties moving in together as husband and wife after the finalisation of the lobola negotiations;

- the customary marriage was celebrated by way of umembeso at the bride's family home;

(n) The Applicant submitted that the payment of the lobola and proof of payment is sufficient to register the marriage in terms of section **4(4)(a)** of the Act, which provides that:

"4(a) The 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 and any other particulars prescribed."*

(o) The Applicant further dealt with some of the grounds upon which the 1st Respondent contended that a valid customary marriage was not concluded, namely

that-:

- the Zulu custom of "umabo" was not performed;

- even though the parties was intend to get married, such marriage never materialised;

- the 1st Respondent never intended to be married in community of property due to him being already 58 years old and previously married in community of property.

(p) With regards to said "umabo", the Applicant deals with the 1st Respondent's perception of the custom - the 1st Respondent, according to the Applicant, views umabo as the actual celebration of a marriage and this is usually held at the family home of the groom. The 1st Respondent indicated that the bride will leave her home early in the morning, covered by a blanket given to her by her mother, and on the day of the umabo, it is the turn of the bride to give gifts. In this regard the Applicant referred this Court to the article of S Sibisi, [at pg 63), *supra,* that:

"During a customary wedding, particularly a *Zulu wedding the bride give gifts to selected members of her family-in-law (her family usually receives their gifts during umembeso - a ceremony that occurs at her homestead usually long before the wedding). This is called umabo. She usually buys some or all these gifts using ilobolo fund. Thus,* a *poor bride relies on ilobolo to make her wedding day memorable."* According to the Applicant, this is the bride's way to introduce herself into the groom's family.

(q) The Applicant then referred this Court to the MA-degree dissertation of Magwaza, T: Orality and its Cultural Expression in Some Zulu Traditional Ceremonies (1993) at pg 53, where umabo was explained as follows:

"This is the giving of gifts ceremony. It is the bride and her group who gives her in-laws. In most arears this ceremony is performed after a *church wedding ceremony. The Umabo is either held on Saturday afternoon after the church ceremony or usually on Sunday, the next day.*

Umabo is held at the bridegroom's place. This is a *very important occasion, and it is generally believed that it must be performed. Vilakazi (1958:177) contends that the Zulu give these gifts out of fear of the ancestors who might punish the bride for failing to recognise the importance of this ceremony of informing them.*

I know of some women who give these gifts after the been married for years. They give gifts to appease the ancestors and to ask their blessings usually in a *troubled marriage or childless marriage."*

(r) In light of the views of the learned author Magwaza, *supra,* the Applicant submitted that umabo can be celebrated after many years of marriage, and therefore, that failure to perform it does not invalidate the customary marriage between the parties but just out of fear of the ancestors who might punish her for failing to recognise the importance of the ceremony of informing them thereof.

(s) The Applicant went further to refer this Court to the article of Mmagubane C: "The Imposition of Common Law in the Interpretation and Application of Customary Law and Customary Marriagge [pg 346-348], where the learned author states:

"However, in Zulu culture, there are other pre-marital ceremonies like Umabo and Umembeso that take place before the actual wedding. After those pre-marital ceremonies, a date for the wedding is set on which the woman will be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration.

The importance of the pre-marital ceremonies and their significance in the conclusion of the customary marriage is yet to be argued and/or stressed either by litigants, courts, or academics, but the importance of observing them can also assist in the determination of what constitutes a valid marriage.

Furthermore, the performance of pre-marital ceremonies may assist in this determination but the failure to complete these ceremonies cannot result in the marriage being declared invalid."

(t) The Applicant relied further on the article of attorneys Van Niekerk, S and Maumpa S where the learned authors state that there is an assumption that after the lobola has been paid, the couple can start living as husband and wife, however, often various other traditions and practices still need to take place, one of which is umembeso or izibizo (which is often abused) and which is a Zulu tradition involving the giving of gifts to the bride's family and which gifts usually includes blankets, pinafores, lead scarfs, clothes, food and straw mats.

(u) The Applicant contended that, in respect of umabo, we need to refer to paragraphs 46 to 48 of the 1st Respondent's answering affidavit, as well as paragraph 36 of the Applicant's Replying papers, where the Applicant submitted that all processes that the 1st Respondent referred to, was completed, including that a goat was brought and slaughtered, food was available and people celebrated by way of dancing, which celebrations is confirmed by the photos and annexures "SM1", "SM4", "SM5" and "SM6" [refer to pg 021-1, 025-1, 026-1, caselines].

(v) According to the Applicant, one of her family representatives, Mr Sipho Mokhoro, testified that they (the Mokhoro family) understood umembeso and umabo to be one and the same, and since they (Mokhoros) are from a Sotho cultural background and practice their traditions differently than those from the Zulu tradition, and, therefore their misunderstanding of Zulu culture is understandable in the context. The evidence of said Mr S Mokhoro is strengthened by what was said in the lobola letter ("SM1"), in that, in the letter the Mokhoro's requested umabo during the lobola negotiations to which the Shabalalas (1st Respondent family) responded that umembeso should be done as by agreement between the families ["STM4"]. The evidence of said Mr S Mokhoro during examination in chief and cross examination, that during the lobola negotiations and in the lobolo letter, when the Mokhoro family referred to umabo, they were referring to umembeso, as to them, it meant the same thing. According to the Applicant, the evidence of Mr Mokhoro cannot be viewed as hearsay evidence, as he was present at the lobola negotiations and participate there when necessary. The evidence of Mr Mokhoro, so the Applicant argues, was supported by that of Mr Mtehthwa during his examination in chief and re-examination in particular.

(w) The Applicant submitted that both families agreed on the celebration of the customary marriage in the form of umabo during the lobola negotiations and it was done following the letter from the 1st Respondent's family wherein they referred to the celebration as umembeso, and that the agreement referred to in annexure "STM4" is the agreement reached during the lobola negotiations and the agreement is the performance of umabo and/or umembeso.

(x) The Applicant contended that if it is found that the celebration referred to herein-above, is not umabo, then it is her submission that the failure to understand the Zulu culture cannot invalidate the marriage relationship between the parties and that umembeso is also a celebration in accordance with Zulu culture and therefore complies with the provisions of section 3(1)(b) of the Act wherein a celebration is required to be in line with custom. It was further submitted by the Applicant, that the wording of the definition of umabo, similarly to umembeso, indicated that at the time of the umabo ceremony, the Applicant would have already been regarded as the bride and that the parties would be in a valid customary marriage, and that umabo is just an introduction of the bride to the groom's family. According to the Applicant, umabo is an important, but not significant factor in determining the validity of the customary marriage relationship between the parties.

(y) The Applicant referred this Court to the Mbungela decision *supra,* Mabuza v Mbatha [(1939/01)[2002] ZAWCHC 11; 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C) (04 March 2003)] and Mavhali v Lukhele and Others [34140/21)[2022] ZAGPJHC 402 (18 July 2022)] at paras 35-36] regarding the handing over and acceptance of the bride requirements. In Mbungela, *supra* [paras 25, 27-30] it was held that:

"... *it is important to bear in mind that the ritual of handing over of* a *bride is simply* a *means of introducing* a *bride to her new family and signify the start of the marital consortium. And a proof of cohabitation alone may raise a presumption that a marriage exist, especially where the bride's family has raised no objection nor showed disapproval by, for example, demanding a fine from the groom's family.*

The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated, neither can the

value of the custom of the bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just one ritual has not been observed, even if the other requirements of section 3(1) of the Act, especially such as the present ones, could yield untenable results.

…..

To sum up: The purpose of the ceremony of handing over of a bride is to mark the beginning of a *couple's customary marriage and introduce the bride to the groom's family. It is not an important but not necessarily a key determinant of a valid customary marriage.*

(z) The Mbungela court went on to examine the question as to whether non-observance of the bridal transfer ceremony invalidates a customary marriage or not [at para 21] and held it has been decisively answered by our courts and found that:

"In Mabuza v Mbatha the court considered whether non-compliance with the siswati custom of bridal transfer, ukumekeza, invalidated a customary marriage. The eourt held

"There is *no doubt that ukumekeza, like* so *many other customs,* has *somehow evolved* so *much that it* is *probably practised differently than it* was *centuries ago* ... As *Professor De Villiers testified, it* is *inconceivable that that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate* cases.

Further support for the view that African customary Jaw has evolved and was a/ways *flexible in application* is *to be found in TW Bennet A Sourcebook of African Customary Law for Southern African.* Professor *Bennet* has *quite forcefully argued (at 194): -*

"In contrast, customary law was a/ways *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 [because of a pregnancy of elopement].

(aa) The Applicant submitted that this Court should also follow the approach as laid down in Muvhali *supra,* where it was stated at a court could look at other features which may constitute customary practices that are indicative of, or are compatible with the acceptance of the bride by the groom's family and/or the groom, as well as the 1st Respondent's features which are indicative and/or compatible with the acceptance of the Applicant as his wife. The Applicant considers the following features as indicative and/or compatible of the Applicant as the 1st Respondent's wife:

- the 1st Respondent, in an affidavit at the Police station, refers to the Applicant as his wife and confirmed that he married her in a traditional marriage;

- he refers to the Applicant as his wife to whom he is married traditionally in his bond application and subsequent registration of the property at erf[…], G[…], Pretoria;

- he resided with the Applicant and her children in the communal home after finalisation of the lobola negotiations, where he welcomed her and her children into the home without any objection;

(bb) In view of the above, the Applicant submitted that if regard is had to the living, flexible and pragmatic nature of African custom, a valid marriage did exist between the parties.

(II) the 1st Respondent's Contentions:

a. The 1st Respondent contended that the Applicant did not satisfy the requirements of section 3(1)(b) of the Act in the present proceedings in that the intended customary marriage between the parties did not happen and there was no customary marriage that was entered into by the parties.

b. The 1st Respondent submitted that the following were common cause facts, alternatively not placed in dispute between the parties:

- the parties were in a romantic relationship;

- they were both over 18 years old at the time;

- the parties have no children together;

- the lobola negotiations were held on 04 November 2017;

- the parties had intended (and carried out their intentions by consenting) to get married to each other.

c. The 1st Respondent states the following as the issues apparently in dispute:

- whether the intention to get married amounts to the parties being married in terms of customary law;

- whether the parties' intentions of getting married under customary law amount to a valid customary marriage.

d. The 1st Respondent contended that the Applicant's case were based on an abstract idea that the parties were married and the abstract argument or discussion raised by the Applicant is general and not based on particularity [the Applicant alleges that there was lobola negotiations but does not state or provide proof what the agreement in the lobola negotiations was, and, she alleges a "celebration" but does not state when it happened].

e. The 1st Respondent submitted that the Applicant should not be entitled to an order, especially declaratory relief based on abstract issues [relying on Ex parte Attorney- General Witwatersrand Local Division 1997 (2) SA778 (W) at 783F]. The 1st respondent also referred to the decision of Ex parte Noriskin 1962 (1) SA 856(0)

where it was held that:

"when considering the grant of declaratory relief, the court will not grant such order where the issue *raised before it, is hypothetical, abstract and academic, or where the legal position is clearly defined by statute."*

f. With regards to the fulfilment of the requirements of a valid customary marriage in terms of the provisions of the Act, the 1st Respondent contended that the Applicant will rely on the Tsambo decision, *supra,* (which he argues is distinguishable from the facts in casu) wherein which the SCA stated, at para 15, that:

"In Ngwenyama v Magelane and Another this Court stated as *follows:*

The Recognition Act does not specify the requirements for the celebration of a *customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement* is *fulfilled when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled,* a *customary marriage, whether monogamous or polygamous,* comes *into existence."* The pt Respondent emphasised that the three requirements must all be fulfilled for a valid customary marriage to exist in terms of the Act.

g. The 1st Respondent submitted that the following enquiry needs to be made, based on the aforementioned principles and applying it to the facts herein:

- if there was consent by both spouses to be married in terms of customary law, then what was the question on the type of marriage to be entered into intended for or founded on? [the question contained in the letter dated 04 November 2017]. The 1st Respondent argued that the Applicant never dealt with this pertinent and pointed question in her reply [refer to para 43 thereof]. All she did was to complain and moan about an irrelevant issue of the payment of the lobola of R30 000-00 and R3000-00 respectively, which had been explained in the 1st Respondent's answering affidavit. This was not done by mistake, but by design by the Applicant.

h. The question relating to the type of marriage intended came from the Applicant's family, not that of the 1st Respondent. This question would not have been asked by the Applicant's family if the parties already agreed on the type of marriage they proposed to enter into. Also, the 1st Respondent submitted, it would have been irrelevant to ask such whether the parties intend to get married in terms of customary or civil law if it was already agreed to get married in community of property because the matrimonial consequences of both types are the same.

i. The 1st Respondent submitted that the Applicant and her family was well aware of the 1st Respondent's preference of the marriage out of community of property without accrual as the 1st Respondent informed the Applicant herself of his intentions and his reasons for this decision, namely his mature age, his daughter that the is looking after, his previous marriage wherein which he was the sole breadwinner and which ended up in divorce and resulting in him suffering serious financial, emotional and physical distress at the time. According to the 1st Respondent, it would make little sense to deliberately seek to inflict such hardship on himself again and the objective facts were not seriously disputed by the Applicant as she only raised bare denials and irrelevant self-indulgence in which she talks about herself whereas he talks about the history of his previous married life. The Applicant did not meaningfully dispute the said objective facts and evidence placed before this Court on why he could not have consented to entering into a marriage in community of property, be it civil or customary.

j) The 1st Respondent then addressed the requirements of negotiations and entering into marriage or celebrations. In terms of the provisions of the Act, there must be an agreement between the parties during the negotiations, which agreement would culminate in the celebrations. The 1st Respondent submitted that there were indeed negotiations between the parties, but it was not concluded, which submission is not disputed by the Applicant, but rather noted and providing her views on why she thinks the negotiations were concluded [refer for instance to para 18 of the answering affidavit in this regard]. According to the Applicant the negotiations were concluded when the full lobola amount was paid, that is, first R30 000-00 and then the balance of R3000-00. The 1st Respondent avers that not unless the Applicant seeks

to avoid the real issue or to mislead perhaps because her reliance on whether the negotiations were concluded is founded on the said annexure "STM2", which is heavily populated with questions and requests and contains nothing that constitute any agreement between the parties. Nowhere in said annexure "STM2" does it talk about any agreement on the lobola amount [Tsambo decision, *supra,* at para 3].

K. The 1st Respondent alleged that the Applicant is constrained to take the Court into her confidence by disclosing how much the parties had agreed on regarding the lobola amount and by providing the reasons why the amount of R30 000-00 is said not to be allocated to anything according to "STM2". In addition, the Applicant does not proffer any explanation on what the "conclusion" was with regards to the crucial requests made by her family, namely charging the 1st Respondent 11 cows for lobola, exchange of gifts and the type of marriage to be entered into by the parties, nor on the objection raised by the 1st Respondent's family regarding the cows charged for the ancestors. Further, no explanation was proffered by the Applicant on what the conclusion was regarding the charging of the 11 cows in annexure "STM2" on what the causal connection was between the 11 cows and the payment of the R30 000-00, or on what the "conclusion" was on the attitude of the 1st Respondent when they mentioned, according to said "STM2", "The Shabalala's then indicated that they are still to report this at home." Accordingly, the 1st Respondent concluded, in view of the aforementioned, that the parties intended to get married, but this intention did not materialise because there was no meeting of minds that would constitute the "agreement."

(I) With regards to the waiver of the customs, the pt Respondent also referred to the Tsambo and Mabuza decisions, *supra,* and submitted that whilst he accepts that customs evolve, it is still being practised today even if differently than centuries ago, and even if it can be waived, it cannot be done so unilaterally, but by agreement between the parties and/or their families. According to the 1st Respondent, customary marriages remain an agreement between the two families or family groups [relying on decision of Fanti v Soto and Others [(16451/2007)[2007] ZAWCHC 78; [2008] 2 All SA 533; 2008 (5) SA 405 (C); (13 December 2007) at para 24]. The 1st Respondent argued that in this case, neither the 1st Respondent nor his family was aware of any

waiver of their customs or that they will be waived or not respected. If there was any waiver, it was not by agreement between the parties.

(m) With regards to the adherence to traditional customs, the 1st Respondent referred to the said Tsambo decision *supra* [at para 16 thereof] where the importance of the observance of traditional customs and usages were recognised, but that it must also be recognised that *"an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results."* The 1st Respondent argued that the courts, in the Mabuza, Mbungela and Tsambo decisions accept the importance of traditional customs and usages and that they be observed, and it cannot be completely nullified by the Applicant. The 1st Respondent submitted that the Court, in Tsambo, *supra,* refused not to recognise the validity of customary marriage on non-performance of just one ritual (bridal transfer).

(n) According to the 1st Respondent, in this case, the most crucial of traditional customs were not observed, namely: there was no agreement on the lobolo amount, no hand over of the bride, no performance of umbondo, umgcagco and also umabo. The 1st Respondent went on to argue that there is a further distinction between the said SCA decisions and this current application, in that in the SCA, the question before it was whether or not the non-handing over of the bride invalidates the customary marriage between the parties whereas in this application the court is seized with determining whether there was a lobola agreement between the parties during the negotiations and whether violation of several traditional customs or rituals was waived, and if so, whether it was by agreement, that is, whether such waiver was mutual between the parties.

(o) The 1st Respondent referred to the Tsambo decision, *supra,* which in turn referred to the Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another decision, regarding the effect of factual disputes in motion proceedings, and held as follows:

"The difficulty for the appellant in this matter is *that he provided no answer to* some *of the respondent's crucial a/legations. He did not engage with the respondent's assertions pertaining to specific events that were said to have happened in his presence, such* as *her being dressed in a wedding attire* as *described by the deceased's aunts, being introduced to the witnesses by them* as *the deceased's wife and welcomed to his family and being congratulated by the appellant on the marriage. These allegations were not gainsaid despite the fact that they related to aspects that lay within his personal knowledge and for which he could provide an answer."*

(p) Concerning the registration of the marriage, the 1st Respondent asserted that the Applicant did not provide an answer to the crucial question regarding the nature of the marriage despite it being in the knowledge of the Applicant ["STM2"], which the 1st Respondent submitted, goes to the root of whether there was spousal consent or agreement thereto. According to the 1st Respondent, the Applicant made no attempt to engage with his assertion pertaining to this specific event which happened in the presence of the Applicant and her family and which allegations are not gainsaid despite the fact that it relates to aspects that is in her (Applicant's) personal knowledge and for which she could provide an answer. According to the 1st Respondent this is clear dispute of fact which was reasonably foreseeable and for which this Court will be invited to dismiss the application outsight with at least relief being referred for oral evidence as those said dispute of facts cannot be adjudicated on paper.

(q) The 1st Respondent refers to section 4 of the Act and the requirements for registration of the customary marriage, which was alluded to above. The 1st Respondent also refer to the registration on application in a court where the Act provides that a court may, on application and upon investigation instituted by such court, order the registration of the marriage or cancellation or rectification of any marriage affected by the registering officer. The 1st Respondent submitted that the Applicant accepted that she was advised to approach Home Affairs to register the marriage as she was armed with such knowledge, but she chose to directly approach this Court with this current application [refer to para 33 of her replying affidavit]. In paragraph 5 of said replying affidavit, the Applicant, on being confronted of abuse of

the legal process (by way of this application), responded by saying her application is "a genuine court procedure" which she has to follow in order to register her customary marriage. According to the 1st Respondent, the Applicant failed to give reasons to this Court why the very piece of legislation she relies on to obtain the current relief was not equally being used for the registration of the marriage.

(r) The 1st Respondent questioned why the Applicant did not utilise the mechanism of registration of the marriage in terms of section 4 of the Act, rather than to burden this Court with the present application and enquired why the marriage was not registered at Home Affairs within the three (3) month period after the marriage, as envisioned in said section 4. According to the 1st Respondent, the Applicant acknowledged her duty to register the customary marriage but does not explain why it took her a period of approximately four years to do so, and regard the conduct of the Applicant in the latter context as an abuse of the court process [refer to para 8 of the replying affidavit].

(s) The 1st Respondent submitted that the Applicant admitted that the facts deposed to by the 1st Respondent are correct and true [para 4 of the replying affidavit] and admitted to the 1st Respondent's version that the parties never married [para 9 of said replying affidavit]. Initially the Applicant stated that the parties were married [para 9 of the founding affidavit] but changed her version and indicated that the marriage did not happen but there was an intention to do so, and, that "intention" is one of the requirements for a valid customary marriage in terms of the Act, which the 1st Respondent submitted is absurd. The 1st Respondent contended that there is no word such as "intention" in section 3 of the Act and that said section requires that marriage be negotiated and entered into, or celebrated according to customary law. The 1st Respondent submitted that marriage cannot be entered into or celebrated when the negotiations are still ongoing or have collapsed.

(t) The 1st Respondent contended that the Applicant [in para 10 of her reply, in response to para 9 of the answering affidavit] stated that she has been advised that if a marriage out of community needs to be concluded, a prior meting of the families to negotiate lobola, to execute an antenuptial contract, needs to be held. According

to the 1st Respondent, this statement is bizarre because annexure "STM2" confirms that the nature of the intended marriage regime was not dealt with, and was left open as the parties and the families always knew about the parties' intentions to get married out of community of property.

(u) The 1st Respondent submitted that section 7(2) of the Act provides for the default position (in community of property) where the parties entered into a customary marriage and nothing precludes them from applying to change their marital regime as contemplated in section 10, including the consequences ensuing from such. Due to the fact that there was no marriage, no matrimonial consequences can emerge.

(v) The 1st Respondent then dealt with the nature and requirements relating to declaratory relief and referred to the decision of Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of Financial Intelligence Centre [(2017) 4 All SA 150 (GP) at paras 51-85] where the law on this point was explained. The 1st Respondent also cited section 21(1)(c) of the Superior Courts Act 10 of 2013 in respect of said relief to point out the two-legged enquiry that must be employed to engage the exercise of the court's jurisdiction: the court must firstly satisfy itself that the Applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion [relying on the Kaya Katsa CC v Le Cao and Another [(3368/2017)[2018) ZAFSHC 138 (12 September 2018) at para 1OJ. Further, the 1st Respondent refer to Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, Volumes (5th ed), 2009, Ch 43, pp 1438-1440, where the factors that courts needs to consider to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief is set out and which include the existence or absence of a dispute, the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties, whether a tangible and justifiable advantage in relation to the applicant's position to flow from the grant of the order sought, considerations of public policy, justice and convenience, the practical significance of the order and the availability of other remedies. It is the submission of the 1st Respondent that the declaratory relief

sought by the Applicant is abstract in nature and therefore legally incompetent and if other factors has to be considered, said relief would serve no practical significance because same is sought in order to open a way to divorce proceedings in order to unlock entitlement to half of the 1st Respondent's estate, which, it is argued, flies in the face of public policy, justice and convenience.

(w) With regard to the approach of the SCA in the Tsambo decision, *supra,* the 1st Respondent stated that it is well accepted the decisions of the SCA are binding on the proviso that the issues that the court is seized with are similar to those that have been decided by the SCA in terms of the *stare decisis* principle. Therefore the 1st Respondent submitted that this application is distinguishable from the Tsambo decision in that Tsambo concerned itself with whether the failure to hand over the bride to the groom's family amount thereto that the customary marriage was never entered into, and the 1st Respondent went on to quote paragraphs 21 and 25 thereof, which was already set out above [refer to pg 052-34 to 052-35, caseline].

(x) The 1st Respondent then submitted that this application does not make out a proper case, is opportunistic and should be dismissed with costs on an attorney and own client scale.

[G] WITNESS TESTIMONIES:

[11] The Applicant herself and Mr Sipho Mokhoro testified for the Applicant. The 1st Respondent, Mr N Mthethwa and Mrs N Shabalala testified for the 1st Respondent in these proceedings.

(I) the Applicant's testimony:

(a) She testified that umabo is where a woman is handed over to the husband's family and where her family will buy gifts for his family, by way of a gift ceremony to celebrate the intended marriage and to bring the families of the parties together, also to slaughter animals, a part of which is given to the groom's family to show that the families are brought together.

(b) She further testified that the pictures contained in, *inter alia,* annexures "SM2", "SM4" and "SM5" are people from the Shabalala side bringing gifts to her family for the umembeso ceremony and that the gentleman with the long coat is an uncle and negotiator of lobola on behalf of the 1st Respondent. She testified that she is the person with the sunglasses and the gentleman holding her is the 1st Respondent, on the day of the umembeso, as depicted in annexure "SM6".

(c) She testified that they did not do umabo as they did not get to that point because, at the time, the parties were house hunting and umabo should be done after they find a house, thereafter finalise the marriage and they only found a house around April 2019. She stated that even after they found the house, umabo could not be done due to a lot of issues that existed between the parties and they even had to attend counselling in relation to said issues.

(d) She testified that she moved in with the 1st Respondent in December 2017 after the lobola was paid, at the house in Pretoria East.

(e) With regards to the proof of customary marriage, she testified that annexure "STM5" indicated that the parties were traditionally married and that it was required by the children's school to show that they are staying there as the house was registered in the 1st Respondent's name. The signature on the affidavit was that of the 1st Respondent and made at the SA Police Services, Garsfontein, Pretoria. Further, in annexure "STMT' (email dated 05 February 2019), the 1st Respondent confirmed to the bond attorneys that the parties were traditionally married, as the bank required proof of marriage.

(f) She testified that after the umembeso, she regarded herself as the makoti, but the 1st Respondent's mother informed her that they regarded her as a girlfriend and not a wife (makoti). The 1st Respondent also advised her that he viewed her as a girlfriend, not a makoti. She testified that the 1st Respondent's mother indicated that, according to her believes and culture, a woman only becomes a wife after the smearing ceremony was conducted. She stated that the reason why the 1st

Respondent regarded her as a girlfriend is because of what his mother had said and that he always follows his mother's views and never defended her (Applicant) on what his mother said about her being a girlfriend and not his wife. She then explained that the smearing ceremony is part of the Zulu culture where a woman is smeared with the gall of an animal whereafter the woman will be accepted as a wife by the groom's family.

(g) The applicant testified that she did not see the 1st Respondent's mother at the lobola negotiations because the mother was an elderly lady and could possibly not attend, but she was represented by family members.

(h) Under cross-examination, the Applicant testified that she and the 1st Respondent is married but she is aware that the 1st Respondent deny the marriage to her. She stated that she admits an intention of being married to the 1st Respondent and she wants this Court to declare that the parties are married, but she does not want to remain married in the current circumstances. She further testified that she complies with the requirements of section 2(2) of the Act.

(i) She testified that she understands the contents of the provisions of section 7(2) of the Act, agrees with it and explained that the parties never discussed the possibility of entering and concluding any antenuptial contract (ANC) despite what was stated in the answering affidavit [at paragraph 64] where the Shabalala's requested clarity on the issue of the marital system the parties will be choosing [pg 012-13]. She continued and indicated that the reasons why the 1st Respondent did not want to be married in community of property (his divorce from his previous wife left him physically, emotionally and financially drained, etc) was never mentioned to her by the 1st Respondent or anyone else.

(j) When it was put to the Applicant that the negotiations were not finalised and it was referred to paragraph 64 of the answering affidavit, she testified that the negotiations were finalised because the 1st Respondent came back and paid the balance of the lobola amount (R3000-00). However, the Applicant agreed that, in light of the wording in paragraph 64, the negotiations were not finalised, in view of the

words of the text in said paragraph 64.

(k) With regards to the lobola, she testified that there were two (2) negotiations done and that the agreed amount was R33 000-00 in total. She indicated that she was not sure that the said amount equated to nine (9) cows because she was not part of the negotiations, but was represented by four persons, namely three Mokhoros and one Masondo.

(l) She testified further that she moved in with the 1st Respondent in December 2017 and her children moved in in 2018, this, despite the 1st Respondent's submission that she and the children moved in in 2018 to the Faerie Glen property in Pretoria. She however conceded that nowhere in her founding affidavit did she mention that she moved in in December 2017 and that this information only became known during these proceedings.

(m) When quizzed on the difference between "intention" to get married and the actual action of marriage, the Applicant testified that the parties intended to get married either by traditional or civil marriage and they ended up doing the traditional marriage and the lobola and umembeso initiated the marriage, but she stated that there will not be a civil marriage between the parties in the circumstances.

(n) When confronted therewith that, if the requirements in the Act are not satisfied, then there is no marriage, she testified that she agrees with this view. With regards to the handing over requirement, she testified that it was not raised by the 1st Respondent in these proceedings, but by her and she indicated that she was duly handed over to her in-laws by her uncle, after the lobola negotiations, around December 2017. She testified that she persisted with this viewpoint even if the 1st Respondent denies that she was handed over. She stated that, according to her tradition, as soon as the lobola was finalised, her uncle gave the blessings to move in with the 1st Respondent, which was done and this does constitute handing over in her opinion.

(o) She testified that she moved in with the 1st Respondent around December 2017

after her uncle gave the blessings to do so, even though it was not mentioned in her affidavits and even if the 1st Respondent contended that she moved in in 2018, and even if it only came out during the current proceedings.

(p) With regards to the affidavit of the 1st Respondent (proof of residence required by the school), it was put to the Applicant that it was only done to assist the children to get into a school and not as proof that the parties were traditionally married, she testified that it was not done for the children, but for he family as a whole and the affidavit did help as the children was placed into school later due to the affidavit and the whole family benefitted as a result thereof.

(q) When questioned on why she left her employment to work in the 1st Respondent's business, and that the 1st Respondent would testify that he advised her to form her own company due thereto that he wanted her to be independent from him and not marry in community of property, she testified that she decided long ago that she would one day form her own business and not because the 1st Respondent advised her to do so, and further, that the question of the marriage out of community of property was never raised or discussed between the parties. She further stated that none of the parties are shareholders in the business of the other.

(r) On being asked if she requested this Court to grant the relief sought in prayers 1 and 2 of the notice of motion and whether she wants to share in the profit and losses of the 1st Respondent, she testified that is the correct position, but she also wanted confirmation/proof that she is validly married. She also testified that she did not register the traditional marriage at Home Affairs because she was advised by various law firms not to do so.

(s) She testified that she was not sure if the 1st Respondent's mother would have been aware of the handing over and why the said mother advised that she is not a wife but a girlfriend. According to the Applicant, she first met the mother in KwaZulu-Natal **("KZN")** and saw her again when she came from KZN for a meeting of the elders of the families.

(t) She testified further that she was from the Sotho culture, and the 1st Respondent from Zulu culture and that she would be married into the Zulu culture.

(u) Regarding the email for bond purposes, she testified that it was done when the parties were still on good terms, and it was done to secure a mortgage bond for a house for the parties to live in later even though she conceded that the affidavit was not factually correct by indicating that the parties were traditionally married.

(v) With regards to the 1st Respondent's contentions about umembeso, she testified that she does not deny it, and, with regards to the pictures ("STM4") she stated that the gentleman with a coat and the goat was a person from the Mokhoro family. She further testified she was not aware that the 1st Respondent's family ever asked for the goat and whether the Mokhoro family brought it because of the Sotho culture and indicated that the elders would know better about that question.

(w) With regards to the text messages that refer to the word "monster", she testified that it was not attached to her founding affidavit and that the word was used in reference to the 1st Respondent, and she only attached the messages to her replying papers in order to respond to what the 1st Respondent stated in his papers.

(x) In re-examination, the Applicant testified that she moved in with the 1st Respondent in December 2017 and her children moved in later. She stated that the Shabalala family requested her to move in after the lobola negotiations, after receiving her uncle's blessings, and no one in any of the families objected to the moving in.

(y) She further testified that she did not go with the 1st Respondent to do the affidavit at the SA Police, Garsfontein, or requested him to make the affidavit to assist in getting the children into a school and the same applies to the affidavit for the purposes of the bond. The 1st Respondent did all of those on his own and without her involvement.

(z) She further confirmed that the parties never discussed the issue of entering into

an ANG nor did they agree to do so at any stage. She further confirmed that she did not register the marriage at Home Affairs on legal advise received; that she is from the Sotho culture and the 1st Respondent form the Zulu culture; that she was handed over after the lobola was finalised and became a bride and not a girlfriend; that umembeso was from the Zulu culture and that the Shabalala family requested the umembeso and wrote the letter (annexure "STM4") which was signed by N Shabalala; that both parties attended the umembeso; that no one in any of the families objected to the goat that was provided by the Mokhoros or that part of the goat, after being cooked, was given to the Shabalala family.

(II) Mr Sipho Mokhoro's testimony:

(a) The witness testified he knows the Applicant as he is her uncle (she is his sister's daughter) and that he represented her family at the lobola negotiations together with Petros Mokhoro, Zakharia Mokhoro and Lluwani Masondo. He testified that the Shabalala family was represented by messers Manene and Mthethwa at the negotiations. He confirmed that the letter dated 04 November 2017 was in relation to lobola and the names on said letter (annexure "STM2") contained the names of all the people who attended the lobola negotiations. Every representative signed the letter excluding Mr Masondo because when the lobola money was paid the families decided that only three members of each family should sign and that is why Mr Masondo did not sign.

(b) Mr S Mokhoro testified that he is from the Sotho culture, and this was the first time he participated in lobola negotiations involving people from the Zulu culture. He stated that it was discussed at the negotiations that elven (11) cows, which was demanded by the Mokoro family would be the lobola amount and that two (2) cows should be subtracted because the Applicant already had two children from a previous relationship, one of which would then be slaughtered at the bride's family home and the other at the groom's family home as part of the wedding ceremonies. He testified that R30 000-00 was first given by the Shabalala family and they would then report back to their family, and, they returned back on 09 December 2017 and paid a further R3000-00 to the Mokhoros. He stated that the lobola amount demanded was initially R35 000-00 but it was negotiated down to R33 000-00. The R30 000-00 was first paid

and the balance of R3000-00 later, after the Shabalas reported back home. According to this witness, at the initial meeting where the R30 000-00 was paid, they did not discuss on how the money would be placed.

(c) The witness testified that he thinks Mr Masondo wrote the lobola letter and the letter included only the important points and not everything discussed. He confirmed that the Shabalalas indicated that they would return after reporting back to their family at home and this was so agreed between the families, which they did on 09 December 2017. The parties would also go and register their marriage at Home Affairs or they will come and slaughter the cows and distribute the two cows between the two families, also to finalise the lobola and request that the Applicant move in with the 1st Respondent and stay together in Pretoria.

(d) On the question whether if it was agreed that the parties report back in relation to the marital system they would prefer, the witness testified that it was left to the parties (Applicant and 1st Respondent) on whether they prefer a civil or traditional marriage. He further testified that the Shabalalas requested, at the meeting of 09 December 2017, when the balance on the lobola was paid, that the Applicant moved in with the 1st Respondent in Pretoria, which was duly discussed and agreed to. He testified that both the parties were not present when this agreement was made.

(e) The witness further testified that he is not sure when the Applicant exactly moved in with the 1st Respondent, but it was definitely after 09 December 2017 and she moved in with the blessings of the Mokhoros.

(f) With regards to annexure "STM4" the witness testified that he does not know who authored the letter (which is dated 18 March 2018) and also who delivered the letter. He testified that it was the Shabalala family who requested the umembeso to be held at the bride's parental home, which was done on 07 July 2018. With regards to annexure "SM2" (pictures) he testified that he knows the person with the coat as Mr Mthethwa, who was one of the negotiators, but he was not sure who the person on the bicycle was but it looked to him as the Shabalala's younger brother. He testified that the ladies on the said picture was Shabalala family members and the picture was taken in front of the Applicant's place. According to the witness the people on the

picture arrived, singing, and bringing gifts and requested to enter the Applicant's parental home. The gifts were going to be provided to the Applicant's family and the bicycle and goat was for the stepdad. The Shabalalas were allowed to enter the premises and they were welcomed and acknowledged by the Mokhoros by singing from the inside. The Shabalalas gave the gifs to the Mokhoros and the families were also eating, drinking and dancing during the ceremony, and the parties themselves were also in attendance on the day.

(g) The witness testified that the top picture on "SM6" shows the ladies from the Shabalala family dancing and in the bottom picture was the parties posing for the picture which was taken in front of the Shabalala family home and who is seen in the background. This picture was taken after the gifts were handed over and was taken in the street in Jabulani Street. Regarding annexure "SM4" the witness indicated that the person in the top picture is Mr Mthethwa, looking at the goat and the picture was taken at Jabulani flats. The witness testified that the Shabalala family brought the goat, which was slaughtered, and it was shared between the families in that one part left with the Shabalalas and a part remained with the Mokhoros at Jabulani flats.

(h) The witness said that, after the lobola was paid, he viewed the parties as good people and as husband and wife. He indicated that when he visited the couple in Pretoria, the 1st Respondent addressed him as uncle ("malome") because the Applicant is his niece.

(i) Under cross-examination the witness confirmed that the does not know the exact date that the Applicant moved in with the 1st Respondent but averred that it was after the lobola has been paid, but he was also not sure if she (Applicant) was accompanied by any of her family members when she moved in.

(j) On the statement that the 1st Respondent will come and testify that only a traditional marriage and not any civil marriage was intended, the witness testified that he does not know what the parties discussed, and it was left to the parties to decide what they prefer to do. He further confirmed that he was a delegate on behalf of the Mokhoro family and had a mandate to do negotiations regarding lobola. He

testified further that his understanding was that the lobola negotiations were not finalised and that with regards to the R30 000-00, he was not sure that it was allocated to anything but it was paid towards the lobola amount of R33 000-00. When asked about what happened to the two (2) remaining cows, the witness indicated that one (1) was to be slaughtered at the bride's parental home and the other at the groom's .house, but this never happened as a result of the problems and current litigation between the parties. These problems stopped all further processes between the parties, and it could not be finalised.

(k) Under re-examination, the witness testified that no specific date was agreed at the lobola negotiations for the Applicant to move in with the 1st Respondent, but it was agreed that she would move in sometime in the future, it was !et to the parties to decide when the Applicant would move in.

(Ill) Mr EB Shabalala's (1st Respondent) testimony:

(a) This witness testified that he initially met the Applicant in 2014 but the relationship did not last long but later fell in love with her again in July 2016. He stated that there were plans to get married but they were not married.

(b) The witness testified further that the lobola was finalised in December 2017 when the families met and the balance of R3000-00 on the lobola was paid. He confirmed that a letter dated 18 March 2018 was sent to request umembeso for 07 July 2018.

(c) The witness confirmed that he was previously married and divorced in 2010, had to split the joint estate assets with his estranged wife as they were married in community of property. He indicated he previously worked for Shell for 21 years and has been a Shell franchisee since 2018. He testified that the relationship between him and the Applicant was initially good but changed after the umembeso.

(d) He testified that that he did discuss the future marital regime of the parties with the Applicant, and he informed about his reasons for wanting to be married out of community of property and that he did not want to make the same mistake he made during his previous marriage. He indicated that this is one of the reasons he advised

the Applicant to start her own business and he offered to help her with said business as he knows people in the HR and retail industries, to which she agreed and started her own business in July 2019.

(e) He testified further, with regards to the meaning of wedding (as mentioned in paragraph 18 of his answering affidavit), that the requirements of a traditional marriage was not concluded as the five (5) stages of such a marriage has not been complied with. He denied what the Applicant stated when she testified that the marriage was finalised, including umembeso and umabo, and indicated that said five stages has not been completed.

(f) With regards to the lobola letter ("STM4"), dated 18 March 2018, he testified that it was a letter from his family requesting umembeso at the Applicant's place in July 2018. According to the witness the lobola happened in December 2017, and the umembeso in July 2018, but no other traditions were concluded, including umbondo, umgcagco and umabo. He testified further that he is from the Zulu culture and is well acquainted with the traditions and customs of his culture. He explained that umabo is a Zulu tradition which is held to give respect to and gifts to the "in-laws" and he viewed umabo as the final process to conclude a Zulu traditional marriage. He disputed the view that umembeso and umabo is the same thing as alleged by the Mokhoro family members.

(g) He further testified that the parties did discuss which kind of marriage they prefer, eg civil or traditional. He stated that they will marry out of community of property in a traditional marriage, and which was agreed to before the lobola negotiations. When referred to annexure "STM3" with regards to the payment of the balance of the lobola amount (R3000-00) and that said payment concluded the traditional marriage, he denied that that is correct.

(h) With regards to the details of the moving in, he testified that the parties never stayed together in 2017, but rather in December 2018, and her children also moved in during the same period. When referred to annexure "STM5", he confirmed that the signature on said document was his and that some of the contents are factually incorrect. He stated that the reference in this document to "with my wife", "and two

children" and "just got married traditionally "was not factually correct and he did not tell the truth with regards to same because he wanted to assist the Applicant to find placement for her children in a school in the Pretoria area, and not to confirm that they were married. He testified that the Applicant, even though she denied it, was well aware of the document and she was the one who told him (witness) what to say therein.

(i) When referred to annexure "STM7" and certain of the words used therein, he testified that the Applicant approached the estate agents for a new house, not him, and that the words "Shawn and I wedded traditionally and that she is my wife" is not factually correct and confirmed that he used those words when the Applicant informed him that it was required by the estate agent to get the bond approved by the bank for the new house.

(j) He testified further .that the Applicant met his mother (mom Shabalala) two times before the lobola negotiations started because he wanted to introduce her to his mom as the lady he intended to marry, and his family were not present at any of these meetings and introductions. He further stated that his mother first met the Mokhoro family in April 2019 after he called his mother and requested a meeting between the families of the parties as they encountered relationship problems. The family meeting was called in an attempt to resolve the issues between the parties. He indicated that he fetched his mother from KZN and brought her to Gauteng for the said family meeting. According to the witness his mother stated that she will not hear any of the issues because the parties are, in her view, girlfriend ad boyfriend and she will only intervene when they are husband and wife and that is not the case as umabo was not done yet. The witness denied that he was married to the Applicant and agreed with is mother's views on the latter. He went on to testify that his mother was not happy that the parties moved in together, wanted him to send the Applicant's children back to their previous home and reprimanded him that she did not approve of the parties staying together.

(k) The witness denied that there were blessings given by the Applicant's uncle to move in with him in December 2017. He indicated that he was not aware of any such blessings, and he was never informed about it. Regarding the handing over

requirement, he denied any such handing over of the Applicant to his family because it would have been done at his parental home in Newcastle, KZN, which was not done.

(l) Under cross-examination the witness confirmed that him and the Applicant was in a romantic relationship, that he proposed marriage to her and that they would be married by way of traditional marriage. He confirmed further that they agreed to be married out of community of property. He also confirmed that the families of the parties started to engage each other on the traditional processes to be followed. He indicated that he was not present at the lobola negotiations, but his family kept him informed of the developments during the said negotiations. He confirmed that there were two dates upon which the lobola negotiations happened, to wit, July and December 2017.

(m) The witness went on to confirm that lobola and umembeso was concluded, but not the other steps of the traditional Zulu marriage, including umabo. When asked what umbondo is, he replied that it was the process where the man would buy food to the bride and which is aimed at the bride to show that she can cook. He further explained what umgcagco is advising that it happens after umbondo and is not held at the bride's family. He went on to testify that if any of the traditional steps are left out no valid marriage would be existent.

(n) With regards to annexure "STM4" the witness testified that even though his family requested umembeso, both families agreed that it be done. On being put to the statement that umembeso and umabo is one and the same thing as alleged by the Applicant, the witness denied this to be correct and advised that they are two different things.

(o) The witness testified that he was not aware that the Applicant's family gave her the blessings to move in with him and he has not been informed of same, but he confirmed that he and the Applicant discussed and agreed the details of her moving in. He explained that even if the moving in was against his culture and customs he nevertheless agreed thereto cause the Applicant continuously complained about the long commute to and fro work every day from Pretoria to Johannesburg and he

wanted to accommodate the Applicant.

(p) When asked why he and his mother both used words that are more applicable to married spouses, eg, "bride", "bridegroom", he testified that he was not married to her even though these words were used, and he was not sure why his mother used the word "bride" but she will come and explain to court why she used it.

(q) He testified that he did not enter the house where the umembeso ceremony was held, but remained with some of his family members nearby, even though he was pictured outside the Applicant's parental home with his family members and that the parties were hugging in the picture. The Applicant came with the family of the witness, so it was unavoidable to see her at the ceremony. When it was put to him that he is unreliable and selective in his answers (eg relating to the factual incorrectness of his affidavits to the school and the bank) he denied this and said he explained all of this conduct before, and denied that all the requirements for a valid marriage has been complied with.

(r) In re-examination, the witness testified that he would not have done the affidavits he did if the Applicant did not come into his life. He confirmed that he only did it to assist the Applicant and her children and that she benefitted most from his conduct.

(s) He further confirmed that umembeso and umabo was not the same thing in his culture and there was a difference between the two customs. He also confirmed that he heard the Applicant state that umabo did not take place, to which he replied that he was aware of what she stated and he agreed with what she said as it was true that the parties had issues/problems which prevented them from proceeding with umabo.

(IV) Mr Mthethwa's testimony:

(a) The witness testified that he was the lead negotiator for the Shabala family at the lobola negotiations and confirmed that the 1st Respondent is his aunt's son. He indicated that he is from the Zulu tradition and was an experienced lobola negotiator.

(b) He testified that leading up to the lobola negotiations, it was agreed that an amount or R30 000-00 or seven (7) cows would be payable to the Mokhoro family and further that 2 cows was to be slaughtered on the wedding day, but no wedding date was agreed upon. He testified that his family representatives return to the Mokhoros and paid a further R3000-00 for the lobola.

(c) He confirmed that the Mokhoro family requested the umembeso and everyone was given their presents and they stated that they will be back and discuss the wedding date. He went on to state that at the umembeso on 18 March 2018 they did not give any present or blanket to the Applicant agreed to come back later, two weeks before the date of marriage. He explained that umabois the ceremony wherein the Applicant will give gifts to the husband's family, such as mats, blankets, etc and is intended to make the wife's family know the man's family. He testified that umabonever happened, as a result of which the marriage was never concluded. He confirmed that the parties were not traditionally married.

(d) When being asked if the recognised the persons I the picture in "SM4", he recognised the person in the long jacket as himself and indicted that he did not know who brought the goat but they showed it to him - they did not explain anything about the goat to him and they did not expect a goat but a cow to be slaughtered. He testified that it appears to him that even though they (Shabalala family) explained to the Mokhoro family what is required, there was a misunderstanding by the Mokhoro relating to what was required to comply wit a valid traditional marriage.

(e) The witness testified that the Applicant was properly introduced to the Shabalala family traditions but confirmed that she never visited the Shabalala homestead as the wedding date was no yet agreed to. The traditional processes was not concluded to date.

(f) Under cross-examination the witness confirmed that the R30 000-00 was paid for seven cows and two cows were to be slaughtered o the wedding day. It was also agreed that two cows were to be added because the Applicant had two children which two cows would be slaughtered, one of which would be slaughtered at the woman's

home and the other at the man's home. He testified that the balance of R3000-00 were paid on 03 December 2017 in addition to the R30 000-00 allocated. He confirmed that the total R33 000-00 were allocated to seven cows. On the question whether the full lobola amount was paid up with the R33 000-00 for the seven cows he replied that was not correct. He indicated that the two living cows was still outstanding but the R33 000-00 was paid up.

(g) With regards to the goat in the pictures, he testified that it was not bought by the Shabalals because they expected one cow to be slaughtered as agreed. He testified that he did not know if the goat was slaughtered or not and confirmed that the Shabalalas did not receive any part thereof. He further stated if the umabo ceremony was not done, no marriage would ensue. He also confirmed that it was the Mokhoros that requested the umembeso.

(h) When referred to paragraph 5 of annexure "STM2" and asked if he noted what the Mokhoros requested and if they requested umabo, he testified that the did not know but that he also signed on the said document as part of the delegates to the lobola negotiations. He further confirmed that umembeso and umabo is not the same irrespective that Mr Sipho Mokhoro testified that they are the same. He went on to testify that annexure "STM4" was signed by N Shabalala and it came from the Shablala family. He again confirmed, in view of the contents of "STM4" that it is not correct that umembeso and umabo is one and the same thing and that if the umabo ceremony is not done, then there is no marriage. He further confirmed that if the bride did not have money for umabo then there would not be a marriage. When it was put to him that Mr Sipho Mokhoro understood umembeso and umabo to be the same, the witness denied the correctness of this understanding and confirmed that there is a difference in the understanding of these two customs between the two families.

(i) Under re-examination, the witness confirmed that it was agreed that two cows would be slaughtered, on at the house of the bride and the other at the home of the groom. He testified, on being asked if it would be fair to the bride to wait 5-10 years to be married if she did not have money for the ceremony, he testified that this was not discussed at the lobola negotiations. He went on to testify that it was not correct that Mr Sipho Mmokhoro was silent at the lobola negotiations. He stated that Mr Masondo

was the one talking mostly but Mr Sipho Mokhoro did speak when necessary and that they spoke in Zulu as the Shabalalas were Zule.

(V) Mrs N Shabalala's testimony:

(a) She testified that she is the mother of the 1st Respondent, 92 years old and he is her first-born child. She confirmed that it was her signature on the bottom of "STM4", and also confirmed the contents of paragraph 6 of her affidavit [pg 012-23] in relation to.

(b) She testified that she sent Nana Shabalala, Kaki and Manele to the lobola negotiations on behalf of the Shabalala family. She confirmed that initially a part of the lobola was paid and two cows were reserved to be paid for on the date of the marriage but that none of the cows were ever slaughtered.

(c) She testifies that the 1st Respondent requested her to attend a meeting with the Mokhoro family but he did not specify the reason for the meeting, just that he will fetch her from KZN. She testified during the meeting she indicated that she is not prepared to intervene into the issues between the parties as she regarded the parties as girlfriend and boyfriend, not husband and wife. With regards to the words Yokomthela .... at paragraph 8 of her affidavit, she testified that if a person is to be married, her sons will fetch the bride and her father will introduce the bride to her in the morning and she will be accepted and she will pow the gall of a cow over the head and hands of the bride to explain to the ancestors that the bride be accepted as their own makoti, and thereafter the makoti will dance and the umabo will be performed thereafter. She testified further that umembeso and umabo is not the same thing in her view.

(d) With regards to the pictures in annexure "SM1" she testified that she did not recognise the person holding the bicycle because she cannot see properly anymore. She testified further that after umembeso, the parent of the makoti receives presents but not the makoti. She explained that umabo is when to bride enters into the Shablalas house, is introduced and she (bride) gives presents to the Shabalala family and at this stage she will be married to her son. She confirmed that umabo never happened.

(e) On the question that the Applicant was surprised that the witness indicated that she (witness) would not intervene into problems between girlfriend and boyfriend, she testified that she did say so and confirmed that the parties were not married. She testified that during the meeting of April 2019, the Applicant, her so and the parents of the Applicant were present.

(f) Under cross-examination, she confirmed that she was not present at the lobola negotiations and sent delegates provided feedback on the developments to her. She confirmed that the delegates reported back to her that the lobola monies were paid and accepted. She stated that she cannot remember all the details regarding the exact lobola amount due to her old age, but they advised her that two cows were outstanding, and these will be slaughtered at the homes of the families later.

(g) With regards to annexure "STM4", she testified that she signed the document, but she did not write it herself, someone else did so on her behalf. She indicated that the letter was read to her and she agreed to the contents thereof. She stated that she agreed that umembeso was requested by her in that letter. She agreed that the letter confirmed that there was an agreement to do umembeso.

(h) Concerning annexure "STM2" (dated 04 November 2017) she confirmed that this letter stated that umabo will be discussed, which people should attend and what presents will be brought to umabo. According to the witness umembeso belongs to the parents and family of the bride and umabo to that of the groom. She went on to dispute Mr Sipho Mokhoro's testimony that umenibeso and umabo was one and the same thing, explaining that the two families may have a different view on this issue.

(i) With regards to the meeting of the families in April 2019 she testified that her son (1st Respondent) did not inform her why she was called to attend the meeting but that the Applicant and her family would be attending. She testified that, at the said meeting, they were informed of the relationship problems and issues between the parties. It was during this meeting she informed the other attendees that she would not be drawn into the affairs of unmarried persons.

(j) During re-examination, in relation to annexure "STM2" (paragraph 3) she

testified that it was the Mokhoros who asked of her to write a letter but the umabo never happened. With regards to the meeting of April 2019, she testified that she was never informed of the reasons for the meeting, and she only heard about the relationship issues and problems during said meeting, not before it was held.

G. LEGAL PRINCIPLES/EVALUATION:

[12] The legal principles and authorities consulted will be apparent from the evaluation below.

(a) According to section 1, read with section 2 (2) of the Act, any marriage that is concluded in accordance with customary law after commencement of the Act (15 November 2000) is a marriage for all purposes. Section 3 of the Act provides that a customary marriage will be valid if the following requirements are met: (i) if both of the prospective spouses are over 18 years old, (ii) if both consented to be married to each other under customary law and (iii) if the marriage is negotiated and entered into or celebrated in accordance with customary law. In Ngwenyama, *supra,* it was held that once all three these requirements have been fulfilled, a customary marriage, whether monogamous or polygamous comes to existence between the parties [also refer to Tsambo, *supra,* at para 15].

(b) Section 7 (2) provides that "a *customary marriage entered into after the commencement of the Act in which* a spouse is *not* a *partner in any other existing customary marriage,* is a *marriage in community of property and of profit and* loss *between the* spouses, *unless such consequences are specifically excluded by the* spouses *in an antenuptial contract which regulates the matrimonial property* system *of their marriage."*

Section 4 (7) of the Act provides that 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) …

(c) With regards to the first requirement under section 3 of the Act for a valid customary marriage, namely that both parties should be older than 18 years old at the time of the intended customary marriage, there is no dispute between the parties. Accordingly, there was due compliance with the Act in relation to this requirement.

(d) The second requirement, that the parties both consented to be married in terms of customary law have been canvassed by the parties in their papers and in the witness testimonies. The issue of consent is well established in customary law as a requirement for a valid marriage. Prof JC Bekker in Seymour's Customary Law in Southern Africa recognises the consent of the bride's guardian, consent of the bride and consent of the bride as essentials for a valid customary marriage [(5th ed) 1989 at pg 113-114 and MM v RAN (A07/2022)[2023] ZALMTHC 2 (03 March 2023) at para 11].

(e) The Applicant submitted that in paragraph 8.1 to 8.5 of her founding affidavit that the parties consented to the customary marriage when they requested and mandated their families to proceed with the lobola negotiations and when the 1st Respondent, in paragraph 60 of his answering affidavit, admitted these allegations in the said founding affidavit to be correct. The Applicant relies on annexures "STM1" and "STM2" of her founding affidavit to substantiate her submissions. The 1st Respondent, in his contentions, submitted that it was common cause between the parties that they (parties) had intended (and carried out their intentions by consenting) to get married to each other.

(f) In her testimony under cross-examination, the Applicant, when it was put to her that the 1st Respondent will testify that he denies being married to her, she testified that she was aware of the 1st Respondent's denial of the marriage and confirmed that she admits to an intention of getting married to the 1st Respondent and that she complied with the requirements of section 2 (2) of the Act. Mr Sipho Mokhoro corroborated that he was mandated to represent the Mokhoro family at the lobola negotiations and that he signed the lobola letter ("STM2") with the other delegates at the said negotiations, which took place on 04 November 2017 and 09 December 2017.

(g) The 1st Respondent testified that there were plans to get married and that his family sent representatives to the !obola negotiations. He further confirmed that the parties (Applicant and 1st Respondent) discussed their proposed marital regime and that he preferred to be married out of community of property and profit and loss. Under cross- examination he testified that the parties were in a romantic relationship, that he proposed marriage, that they would be married by way of customary marriage and that his family representatives were mandated to proceed with lobola negotiations and the traditional processes to be followed in relation to the proposed marriage.

(h) Mr Mthethwa, a delegate of the Shabalala family confirmed that he had been mandated to attend the lobola negotiations and to negotiate on the traditional processes to be followed to conclude the marriage between the parties.

(i) The 1st Respondent's mother (Mrs N Shabalala) also confirmed that she delegated representatives to negotiate on behalf of the Shabalala family at the lobola negotiations.

(j) The parties further confirmed and testified that they lived together for a period of time, either from December 2017 or January 2018, after the Applicant and her children moved in with the 1st Respondent in their house in Faerie Glen, Pretoria.

(k) In the said MM decision, *supra,* at para 19, the court noted that cohabitation naturally presumes the consent of the spouses, quoting the work of Bekker *supra.*

(l) Concerning the question of consent, the Constitutional Court, in MM v MN and Another [2013 (4) SA 415 (CC)] cautioned (albeit in the context of polygamous marriages) that:

"... *courts must understand concepts such as "consent" to further customary marriage within the framework of customary law and must be careful not to impose common - law or other understandings of that concept. Courts must* also *not assume that such a notion as "consent" will have universal meaning across all sources of*

law."

(m) In the view of this Court, it is common cause between the parties that they consented and intended to get married by customary law. The fact that they mandated their family members to negotiate lobola and other processes for purposes of the intended marriage (eg umembeso) confirms their consent to be married to each other. In addition, their cohabitation provides the impression that the parties consented to be married, as indicated by Bekker and MM *supra.*

(n) In light of the relevant contents of the papers of the parties, their submissions and contentions referred to above and the law and authorities cited, this Court is of the view that both parties consented to be married under customary law and therefore complied with the particular requirement under Section 3 of the Act.

(o) The third requirement contained in section 3 of the Act appears to this Court to have two elements to it, the first element being that the marriage be negotiated in accordance with customary law and the second that the marriage be entered into or celebrated in accordance with customary law.

(p) The first element of the negotiation of the marriage involves that the parties each mandated family members as representatives to negotiate the marriage between the parties and the processes that needs to be followed under their customs and traditions. The Applicant, relying on the article of S Sibisi, *supra,* contended that the legislature, if regard is had to the use of the words "must be negotiated" in the section, intended for lobola and ancillary matters to be negotiated.

(q) The Applicant testified that there were two lobola negotiations held and that the lobola amount was agreed upon between the families of the parties. She further testified that the negotiations were finalised as family of the 1st Respondent paid the first instalment of R30 000-00 in respect of the lobola and then returned back, as was agreed, to pay the balance of the lobola amount (R3000-00). Mr Sipho Mokhoro, the Applicant's uncle, also a lobola negotiator, confirmed that he attended and participated all the lobola negotiations on behalf of the Mokhoro family together with messers Manele, Petros Mokhoro, Zakharia Mokhoro and Lluwani Masondo and

signed the lobola letter of 04 November 2017 (annexure "STM2"). He confirmed that the lobola amount was agreed (R33 000-00) and that it was paid in two installments, the first of R30 000-00 and the balance of R3000-00. He also testified on the families agreed to proceed further regarding the slaughter of cows at the celebrations and the moving in of the Applicant with the 1st Respondent. He testified further that the family delegates agreed to leave it to the parties to decide which matrimonial dispensation they would prefer although none of the parties attended the actual negotiations in person.

(r) The 1st Respondent testified that his family, at his request, also mandated representatives to negotiate lobola and ancillary matters/ceremonies with the Applicant's family. He confirmed that the agreed lobola amount was duly paid in two instalments of R30 000-00 and R3000-00 respectively. He further testified that he agreed to and consented that the families proceed to engage each other on the traditional processes to be followed. He conceded that the lobola negotiations did take place and was finalised, that lobola and umembeso were held, but that umabo and other processes were not finalised due to the relationship problems and issues that happened between the parties.

(s) Witness Mr Mthethwa also confirmed the negotiations between the representatives of the two families with a view of facilitating the marriage between the parties, including the agreement of the lobola amount, the payment thereof, that the umembeso was held and how the celebrations (including the slaughtering of the cows) were to be done.

(t) Witness N Shabalala (1st Respondent's mother) testified that family representatives were mandated to attend the negotiations on behalf of the Shabalala family. She confirmed that lobola and umembeso was done and finalised, and that cows were reserved to be slaughtered for traditional ceremony celebrations.

(u) The Applicant contended (refer to her Heads of Argument/Closing arguments) that, the following are common cause between the parties: the parties were romantically involved, the 1st Respondent proposed marriage to her and engaged her around July 2017, then sent the lobola letter to the Applicant's family ("STM1"),

the representatives of the two families met on 04 November 2017 to begin the lobola negotiations in accordance with their traditions and customs and met again on 09 December 2017 and the final amount of the agreed lobola was paid in full and that by entering into these negotiations the parties agreed to be married in terms of customary law.

(v) The 1st Respondent (in his HOA and closing submissions) also submitted the lobola negotiations were held on 04 November 2017 and 09 December 2017 and that he and the Applicant intended and consented to a marriage in terms of their customs and traditions.

(w) If regard is had to the testimonies and contentions of the parties and witnesses, and the papers filed, this Court is convinced that the parties and their families, following the romantic relationship and engagement around July 2017, were requested and mandated family representatives to do the necessary traditional customs to facilitate the intended marriage between the parties. The said representatives proceeded to engage each other with regards to several aspects of these customs and traditions to be followed. They negotiated with each other regarding the lobola to be paid, the ceremonies to be held and traditional processes to be followed to enable the parties to be validly married. The lobola amount was set by agreement, fully paid up and the ceremony of umembeso was also held and concluded. In the view of this Court, negotiations were fully held and finalised, and this first element referred to, was complied with in terms of the provisions of section 3 of the Act.

(x) The second element of the third requirement of section 3 of the Act, that the marriage be entered into or celebrated in accordance with customary law, seems to be the main point of contention between the parties, hence in Mgenge v Mokoena and Another [(4888/2020)[2021] ZAGPJHE 58 (21 April 2021) at para 8] it was stated that this requirement give rise to some legal complexities. In said decision (Mgenge) it was held that this requirement entails whether the customs, traditions, or rituals, that have to be observed in the negotiations and celebration of customary marriages have been complied with [at para 8 *supra;* refer also to Moropane v Southon [2014] JOL 32172 (SCA)]. These include the negotiations leading to the

lobola agreement, its actual provision, and the handing over of the bride to the groom's family or the groom himself as well as any other tradition custom or ritual associated with these. In the Fanti decision *supra* as well as Rasello v Chali in re: Chali v Rasello 2013 JOL 30965 (FB) it was held that if a customary marriage has not been concluded in accordance with customary law, it cannot be regarded as valid even if all other requirements have been met.

(y) With regards to this second element (of the third requirement), in the Mbungela decision *supra* [at para 17], the court noted that:

"no hard and fast rules can be laid down, this is because customary law is a flexible, dynamic system, which continuously evolve within the context of its values and norms, consistently with the constitution, so as to meet the changing needs of the people who live by its norms ... because of variations in the practice of rituals and customs in African society, the legislature left it open for the various communities to give content to section 3 (1)(b) in accordance with their lived experiences.

(z) As indicated above, the Applicant is adamant that all the requirements for a valid customary marriage between herself and the 1st Respondent has been met, and that the 1st Respondent disputes this assertion. It seems to this Court that the main issues on which the 1st Respondent's disputes are based, is that various customs in terms of the Zulu tradition has not been performed and that the Applicant was never handed over to his family or himself. According to the 1st Respondent, all the requirements for a valid Zulu customary marriage have not been complied with. Both parties acknowledged that lobola and umembeso has been concluded. The 1st Respondent submitted that umbondo, umgcagco and umabo has not been done, which was admitted to by the Applicant. This latter submission by the 1st Respondent was confirmed by the Applicant during her testimony when she testified that umabo was not done seemingly because of the relationship problems between the parties. The Applicant's testimony in this regard was corroborated by her uncle, Mr Sipho Mokhoro, who confirmed that lobola and umembeso was done but none of the other ceremonies due to the relationship issues between the parties. The 1st Respondent also confirmed that only lobola and umembeso was done, but not the

other customs including umabo. Mr Mthethwa also corroborated the version of the 1st Respondent's and his mother (Mrs N Shabalala) also admitted that lobola and umembeso was done, but denied that other customs was held, including umabo. The said testimonies of the above witnesses was also confirmed in their contentions mentioned above. *It* is therefore clear that whilst lobola and umembeso has been finalised, the 1st Respondent's argument is that, because the other customs had not been concluded, there was no valid marriage.

(aa) To substantiate his submissions, the 1st Respondent relied, *inter alia,* to the Tsambo and Mabuza decisions, *supra,* when he contended that he does recognise that customs evolve, but maintained that it is still being practised today even if differently than centuries ago, and that these customs cannot be waived unilaterally by the Applicant and her family [referring also to the Fanti decision, *supra, at* para 24]. He further submitted that the courts, particularly in the Mabuza, Mbungela and Tsambo decisions, *supra,* accepts the importance of traditional customs and usages and that they be observed, and it cannot be completely nullified by the Applicant. He went on to argue that the court, in Tsambo, *supra,* refused not to recognise the validity of customary marriages on the non-performance of just one ritual. In the opinion of the 1st Respondent, the most crucial of traditional customs were not observed, namely: no agreement on the lobola amount, no hand over of the bride and no performance of umbondo, umgcagco and umabo.

(bb) The Applicant contended that the Act does not specify that more than one celebration should be done, but merely that a celebration in accordance with the Act should be done and, in light of this, she submitted that she complied with this requirement of the Act [relying on the Ngwenyama decision, *supra].*

(cc) In said Ngwenyama decision, *supra,* it was held that the Act does not specify the requirements for the celebration of a customary marriage. She further argued that the Act does not require that more than one celebration should take place, but merely that it must be celebrated in accordance with customary law. In this regard, the Applicant submitted that umembeso was celebrated and concluded by both families at the ceremony on 07 July 2018, and in her view, from the definition of the word itself, it is clear that at the time of the ceremony, she is already regarded as the bride.

Accordingly, she argued, she complied with this "celebration" element of the requirement, and that therefore, a valid marriage came into existence.

(dd) As indicated before, it is common cause between the parties that umembeso was held, celebrated and finalised, and the witnesses for both sides testified to that effect. Further, in the article of Mmagubane, *supra,* the learned author opined that the performance of pre-marital ceremonies may assist in this determination of what constitutes a valid customary marriage, but failure to complete these ceremonies cannot result in the marriage being declared as invalid.

(ee) The Applicant submitted that the families of both parties attended the umembeso and referred to annexures "SM1" in this regard. Witness Mr Sipho Mokhoro confirmed the people on annexure "SM1" to be family members of the Shabalalas, which was taken before the Applicant's parental home. He further testified that on the day of the umembeso, people arrived singing and bringing gifts, was requested to enter and was subsequently welcomed and acknowledged by the Mokhoros by singing from the inside, also that the gifts were given to the Mokhoros and the families were eating, drinking and dancing together during the ceremony. None of the testimonies on behalf of the 1st Respondent appears to refute this part of the testimonies of the Applicant and Mr S Mokhoro.

(ff) In the view of this Court, there is no doubt that at least umembeso was done and celebrated by the families [refer to annexures "SM1", "SM4", "SM5" and "SM6"]. This is common cause between the parties. This Court also agree with the Applicant's contention that since the Act does not detail the specific celebrations that must be performed to comply with the Act or require that more than one traditional ceremony should be celebrated, that there was compliance with the relevant part of the requirement under the Act. The Applicant's contentions regarding this element of the requirement accords fully with the principles outlined in the Ngwenyama decision and the article by Mmagubane, *supra.* In light of the principles set out in the said authorities, the contentions of the parties and the testimonies of the witnesses, this Court is convinced that there was compliance with this particular element of the third requirement section 3 of the Act.

(gg) In relation to the handing over of the Applicant to the 1st Respondent/his family, the 1st Respondent disputed that this crucial custom was complied with and as a result a valid customary marriage did not come into existence.

(hh) The Applicant remained adamant that she was handed over to the 1st Respondent's family and allowed by both families to move in with the 1st Respondent as husband and wife in 2017, with the blessings of her family, alternatively in 2018. She submitted further that the requirement of handing over can also be inferred from the cohabitation by the parties, irrespective of how they came to stay together [relying on Mbungela *supra,* at para 25 and Tsambo at para 27]. All witnesses that testified on behalf of each of the parties confirmed that the parties did move in together although they were not sure how it came about and exactly when the Applicant moved in with the 1st Respondent, and none of them, including the parties themselves, testified that anyone from both families raised any objection to such moving in. This latter point was also contended for by the Applicant, who referred to said Mbungela Mavhali [at paras 35-36] and Mabuza decisions *supra,* to substantiate her point. In said Mabuza decision, the court relied on the views of the learned authors Prof De Villiers and TW Bennett who both indicated that many customs has evolved and was always practical in their application, and that strict adherence thereto was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity or a value. The Applicant submitted further that whilst it was important to observe traditional customs and usages and that the value of the custom of the bridal transfer can not be denied, it must also be recognised that inflexible rules, that no valid customary marriage exist just because one ritual has not been observed, even if other requirements under section 3 of the Act has been satisfied, could yield untenable results [relying on Mbungela, *supra,* at paras 25 and 27-30]. The Court in Mbungela went on to indicate that:

"To sum up: The purpose of the ceremony of handing over of a *bride is to mark the beginning of* a *couple's customary marriage and to introduce the bride to the groom's family. It is not an important but not necessarily* a *key determinant of* a *valid customary marriage."*

(ii) The 1st Respondent submitted that it was confirmed in said decision of Tsambo

that the importance of observance of traditional customs and usages was recognised and cannot be nullified by the Applicant [also relying on the Mabuza and Mbungela decisions, *supra].* The viewpoint of the 1st Respondent was also held in Motsoatsoa v Roro and Another 2010 ZAGPJA 122; [2011] 2 All SA 324 (GSJ) and Mxiki v Mbata In re: Mbata v Dept of Home Affairs and Others [2014] ZAGPPHC 825, where it was found that there can be no valid customary marriage until the bride has been formally and officially handed over to the bridegroom's family. In relation to the handing over of the Applicant to the 1st Respondent/his family, the 1st Respondent disputed that this crucial custom was complied with and as a result a valid customary marriage did not come into existence.

(jj) In LS v RL 2019 (4) SA 50 (GJ) it was held that handing over can no longer be considered as a prerequisite for the validity of a customary marriage. In said Mbungela *supra,* the SCA held that the handing over of a bride "cannot be placed above the couple's volition and intent where ..... their families were involved in, and acknowledged, the formalisation of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer" [at para 30; Lijane v Kekana and Others (21/43942)[2023] ZAGPJHC 5 (03 January 2023) at paras 7-8].

(kk) This Court is convinced that the Applicant was handed over to the 1st Respondent/his family when she was allowed to move in with the 1st Respondent, with her children, into the 1st Respondent's property in Pretoria, particularly when the 1st Respondent, his family or anyone else did not object to such moving in or demanded a fine for doing so. This Court is in agreement with the authorities cited above that the traditions and customs relating to marriages is important and should be observed but they are not necessarily a key determinant for a valid customary marriage, and, it cannot further be recognised as a prerequisite for the validity of a customary marriage [refer to Mbungela and LS *supra].* This Court aligns itself with the finding in Mbungela, *supra,* that handing over cannot be claimed as a precondition for a valid customary marriage, particularly where it was not specified the marriage would only become valid upon such handing over. In *casu,* this prerequisite was clearly not agreed to by any of the parties and/or their families. Therefore, this Court is of

the view that there was proper handing over in the circumstances. Accordingly, this Court concurs with the sentiments of the SCA in Tsambo where it stated that handing over of the bride is not an "indispensable sacrosanct essentialia" of a valid customary marriage.

(ll) The parties submitted different versions in relation to whether or not there was an agreement between them about the matrimonial regime their marriage would be subjected to. On the one hand, the 1st Respondent submitted that the parties discussed the issue and he explained to the Applicant his reasons and circumstances why he could not marry her in community of property and profit and loss. He submitted that the parties then agreed that their marriage would be out of community of property and of profit and loss. As indicated before, his reasons were that he suffered emotional and financial difficulties as a result of his previous marriage, which was in community of property and that he has a child that he needs to care for. The Applicant disputed the 1st Respondent's version, stating that their intended matrimonial system was never raised by the 1st Respondent, never discussed and agreed to between the parties or their families.

(mm) This Court is of the view that it seems unlikely that such an important matter would not have been discussed between the parties given the serious nature of the impact it would have on the 1st Respondent's position, be it financial or otherwise. This Court is of the opinion that for the same reasons it was important for the 1st Respondent to have discussed these crucial concerns with the Applicant, he should have ensured that a proper antenuptial contract was concluded at least before the engagement and the lobola negotiations. Nothing precluded him from taking the necessary steps to safeguard his estate from a marriage in community of property. In light of the above, this Court's viewpoint is that the 1st Respondent only has himself to blame for not enforcing his rights and to protect his interests by being proactive in the process, and he can not now blame the Applicant for his own faults regarding this issue. Accordingly, this Court is not persuaded by the 1st Respondent's contention in this latter regard.

(nn) There is one other aspect raised by the 1st Respondent, when he submitted

that the Applicant is not entitled to declaratory relief based on abstract issues, that need to be examined [relying on the Ex parte Attorney General Witwatersrand Local Division and Noriskin decision *supra].* In Noriski it was stated that:

"when considering the grant of declaratory relief, the court will not grant such order where the issue raised before it, is hypothetical, abstract and academic, or where the legal position is clearly defined by statute."

(oo) As indicated above, the 1st Respondent contended that the relief sought by the Applicant is abstract in nature and therefore legally incompetent and, if other factors are taken into account, said relief would serve no practical significance because it is sought to open a way to institute divorce proceedings in order to gain a half share of the 1st Respondent's estate, which is contrary to public policy, justice and convenience.

(pp) The Court is not persuaded by this argument of the 1st Respondent. Firstly, the issue of whether the Applicant is married or not is not that important. The determination of her status is not only a question that affects her right to dignity but also implicates her right to equality and protection under the law. Such determination impacts not only her patrimonial rights but also her future rights, including the freedom to form other relationships, marry and determine the marital system of the next marriage, should she prefer to do so in future. Under current circumstances, the Applicant's marital status has important consequences for her. It is in the opinion of this Court, the issues in this matter seems to be very real and concrete to the Applicant and not hypothetical, abstract or academic as alleged. It is not fair that the 1st Respondent seems to imply with his said argument, that the Applicant is a gold digger, seeking a half share of the 1st Respondent's estate through the relief sought in this application. This Court is of the view that the 1st Respondent's submission, in this particular case, is not sustainable and that declaratory relief is appropriate in the circumstances.

In light of the aforementioned, this Court is satisfied that the essential requirement for the conclusion of a valid customary marriage in terms of the provisions of the Act has been fulfilled and accordingly, the application must succeed.

H. COSTS:

[13] With regard to costs, the following is applicable:

(a) The general principle is that cost follow the result unless there are good grounds to deviate from this principle [Myer v Abrahmson 1951(3) SA 348 (C) at 455].

(b) There are, in the view of this Court, no grounds to deviate from the said general principle.

I. ORDER:

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

(a) The customary marriage entered into between the parties on 09 December 2018 is declared to be valid and of effect in terms of the provisions of the Act 120 of 1998 and in community of property and profit and loss.

(b) The 2nd Respondent is ordered to register the marriage between the parties in terms of the provisions of said Act.

(c) The 1st Respondent is ordered to pay the costs of this application, including the costs in respect of 17 November 2022, and costs of counsel.

B CEYLON
Acting Judge of The High Court of South Africa
Gauteng Division, Pretoria

APPEARANCES

1. FOR THE APPLICANTS: Adv MG Senyatsi

2. INSTRUCTED BY: SGA Law Africa

		Pretoria
3.	FOR RESPONDENT:	Adv KM Kgomongwe
4.	INSTRUCTED BY:	DL Rapetsoa Attorneys Pretoria
5.	DATE OF HEARING:	21 & 24 February 2023, 22 March 2023 Written closing arguments on 06 April 2023
6.	DATE OF JUDGMENT:	05 September 2023