**IN THE HIGH COURT OF SOUTH AFRICA**
**[GAUTENG DIVISION, PRETORIA]**

Case No: 052246/2023
(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED: **NO**
DATE: 12 January 2024
SIGNATURE:

In the matter between:

| | |
|---|---|
| TSHILIDZI PETRONELLA KHASHANE<br>(ID No: 6[...]) | APPLICANT |
| And | |
| THE MINISTER OF HOME AFFAIRS | FIRST RESPONDENT |
| THE DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS | SECOND RESPONDENT |
| THE MASTER OF THE HIGH COURT GAUTENG HIGH COURT: PRETORIA MASTER'S REFERENCE NO: 004534/2022 | THIRD RESPONDENT |

Registration of a customary marriage-Department of Home Affairs refuses without giving reasons- families admit to the existence of customary marriage-lacuna is legislation to deal with instances where one spouse is deceased before registration of a customary marriage

**JUDGMENT**

**KHWINANA AJ**

**INTRODUCTION**

[1] This is an application in terms of sections 2(1) and 4(7) of the Recognition of Customary Marriages Act 120 of 1998 by Tshilidzi Petronella Khashane for the posthumous registration of a customary marriage.

[2] An order sought in the Notice of motion is to direct the respondents as follows:

1. Condonation of the late registration of a customary marriage entered between the applicant Tshilidzi Petronella Khashane, and the late Nditsheni Samuel Mutswari,

2. Register the marriage between the applicant, Tshilidzi Petronella Khashane, and the late Nditsheni Samuel Mutswari, as a valid customary marriage in terms of section 4 (7) of Recognition of Customary Marriages Act 120 of 1998;

3. An order directing the third respondent to register the estate of the late Nditsheni Samuel Mutswari, and appoint the applicant Tshilidzi Petronella Khashane, as the executrix of the said estate;

4. No order as to costs unless in the event of opposition.

[3] I am ceased to determine if the death of the deceased before registration of the customary marriage invalidates customary marriage.

**BACKGROUND**

[4] The applicant says that in February 1990, she and the deceased NDITSHENI SAMUEL MUTSWARI met and became romantically involved whilst they were both at the age of majority. She says that in December 1991, the deceased indicated his intentions to marry her. She says he informed her that he would like to send a delegation of his family members to meet with her family and begin lobola negotiations. She says she agreed to this, and a date was arranged for both families to meet and commence the lobola negotiations.

[5] She says the date agreed upon was 21 November 1992 for a meeting to be held at her parent's home. She says both families were represented and participated in the lobola negotiations. She says both families agreed to the following:

5.1. an amount of R4 000, which included 8 cows valued at R500 each;

5.2. a jacket for the bride's father;

5.3. two blankets;

5.4. a stick;

5.5. a hacksaw; and

5.6. a knife.

[6] She says the deceased's family paid R1 000 and had an outstanding balance of R3 000. On the 6th day of February 1993, the families gathered again to finalize the lobola negotiations, the balance of R3 000 was paid in full and all the abovementioned gifts were handed over to the Applicant's family. She says the families concluded the lobola letter annexed and marked "MK1" and "MK 1.1" and celebrated.

[7] She says on the evening of the 6th day of February 1993, she was taken to the deceased's family home wherein she was welcomed by the deceased's family as their daughter-in-law. She says her family representative is her sister and the deceased's family is represented by his sister who has deposed to affidavits that confirm the existence of the customary union between the deceased and the applicant. The said affidavits have been submitted and marked "MK 2" and "MK 3".

[8] She says that she and the deceased were blessed with two children born out of the marriage relationship namely Vhahangwele Mustwari aged 28 a major and R[...] M[...] aged 17 a minor. She says she and the deceased stayed together as husband and wife at Motse in Limpopo from the 07th day of February 2001. She says that in 2001 they moved to The Reeds, in Gauteng Province, and continued to share a bed and stay together as husband and wife.

[9] She says the deceased passed on the 27th day of February 2022 and "MK4" is the death certificate. She says she was not aware that she was to register the customary marriage. She attempted to register the estate of her late husband at the Master's offices in Pretoria but she was denied because did not possess a marriage certificate. She now seeks an order that her customary marriage be registered in terms of the notice of motion.

**THE LAW**

[10] The Applicant approaches this Honourable Court in terms of section 2(1) as her marriage to the deceased existed and was recognized as a marriage before the commencement of this Act. In terms of Section 2(1) of the Recognition of Customary Marriages Act "A marriage which is a valid marriage at Customary law and existing at the commencement of this Act is for all purposes recognized as a marriage".

[11] As the court, you would need to assess the evidence presented by the Applicant to determine the validity of the marriage at customary law. This may involve considering customary practices, rituals, and any other relevant factors that establish the marriage as valid under customary law. The timing of the marriage concerning the commencement of the Act is also a crucial factor to consider.

[11] In terms of Section

4 ( I ) The spouses of a customary marriage must ensure that their marriage is registered.

[12] This subsection imposes a duty on both spouses of a customary marriage to ensure that their marriage is registered. It signifies the importance placed on formalizing customary marriages through the official registration process.

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

[13] Either spouse has the right to initiate the registration process. The application should be made to the registering officer, and it must be in the prescribed form. This implies that there is a specific format or set of documents that need to be submitted. The registering officer has the discretion to request additional information to satisfy themselves about the existence of the marriage. This implies that the registering officer plays a role in ensuring the accuracy and legitimacy of the information provided.

(3) A customary marriage-
(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of I2 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or

[14] The provision makes it mandatory for customary marriages that were not registered under any other law to be registered within a specified timeframe. The inclusion of the Minister's authority to prescribe a longer registration period adds flexibility to accommodate different circumstances. Any extension of the registration period must be communicated through a notice in the Gazette, a common practice in legal and regulatory matters.

(b) entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such

longer period as the Minister may from time to time prescribe by notice in the Gazette.

[15] The provision underscores the importance of timely registration for customary marriages entered into after the commencement of the Act. The requirement for the Minister to prescribe any extension through a notice in the Gazette ensures that changes in the registration period are communicated to the public in a standardized and widely accessible manner.

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

[17] The term "must" indicates that once the registering officer is satisfied with the validity, they are obligated to register the marriage. The provision specifies the information that must be recorded during the registration process, including:

- Identity of the spouses.
- Date of the marriage.
- Lobolo agreed to

* Any other particulars prescribed

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

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

[18] By allowing any person with a sufficient interest to apply, the provision ensures a degree of openness and accessibility regarding the existence of unregistered customary marriages.

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

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

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

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

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

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

**APPLICATION OF THE LAW TO THE FACTS**

[19] The Applicant submits that her marriage with the deceased need not comply with the requirements of the above section, because she was married in the year 1993 and this Act came into operation on 15 November 2000. Therefore, the customary marriage entered by the Applicant and her deceased husband ought to be recognized and registered by the respondents.

[20] Marriages entered before the Recognition of Customary Marriages Act were for all intents and purposes regarded as husband and wife in a monogamous customary marriage. The applicant asserts that her union was concluded in terms of customary law practices and, as such, should be recognized and registered despite the subsequent demise of her husband.

[21] The evidence provided by the applicant, which includes affidavits from family representatives, lobolo agreement, and gifts, suggests that all the requirements as per the Act were fulfilled. It is also not in dispute that the marriage celebration took place before the death of the late Nditsheni Samuel Mutswari, the husband.

[22] The issue to be determined is whether the death of the husband after the celebration of the marriage, but before the registration of the customary marriage invalidates its existence. The Act is silent on the effect of the death of either party before the registration of a customary marriage.

[23] However, it is imperative to look at the spirit and purpose of the Act. The legislature intended to recognize and validate customary marriages in the eyes of the law, granting them equal status with civil marriages, thus in terms of section 3 the legislature allows anyone to approach the Department of Home Affairs officials provided they can prove the existence of the marriage.

[24] A narrow interpretation of the Act, which would result in the non-recognition of the marriage due to the subsequent death of one of the parties, is not in line with the broader societal and constitutional imperatives of recognizing and protecting customary rights and practices.

[25] It must be highlighted that the purpose of registration is to provide formal recognition and documentation of what is, in essence, an already valid marriage. To deny the applicant this recognition, simply because her husband passed away before the administrative act of registration, would not only be punitive but would also undermine the very essence and objectives of the Act.

[26] This case serves as a salient reminder to all government officials that they must strictly adhere to the laws and regulations of this country without prejudice or bias. The law exists to serve and protect all its citizens equally, without any differentiation. It is of paramount importance that officials discharge their duties impartially and ensure that the rights and dignity of civilians are always upheld.

[27] Disparate treatment not only erodes public trust but is antithetical to the principles of justice, equality, and fairness enshrined in our Constitution. Government officials are strongly warned against such behaviour, and it is hoped that lessons are drawn from this matter to prevent similar future oversights.

[28] Further to the above, I wish to specifically address a concerning trend that this case brings to the fore. In terms of section 4(9) of the Act failure to register a customary marriage does not invalidate the marriage. According to the applicant it was the Master's office that turned her away despite that she brought proof that a marriage existed.

[29] It is encumbered upon the master's office to assist the applicants who are faced with this type of situation considering what the act says. However, it is imperative to note that the first and second respondent have agreed to abide by the decision of this court. One would anticipate a harmonious collaboration between the Department of Home Affairs and the Department of Justice and Constitutional Development. If such synergy is lacking, it is imperative to cultivate it to better assist individuals, such as the applicant.

[30] It's as clear as day that the first and second respondents are caught without a leg to stand on, considering the prerequisites hinted at for registering the marriage. The details are laid out plainly, and the ball was in the court of the first and second respondents to register the marriage, rather than adopting a wait-and-see approach for a court outcome, dragging their feet while holding all the cards needed to assist the applicant.

[31] This inconsistency not only jeopardizes the rights of women and children but also undermines the integrity and credibility of both departments. In this case, it is mentioned that the Master declined to assist the applicant, despite the provided information. However, the response from Home Affairs is not disclosed, except for the argument raised by counsel regarding the department's failure to provide reasons for the non-registration of the marriage. I must implore upon the Ministers to ensure the establishment of a standardized approach, aligning with the laws and regulations of our country, to prevent potential future discrepancies or injustices.

[32] Guided by the principles of proper training, regular evaluations, and unwavering commitment to the rule of law, all officials should uphold their responsibilities. The citizens of this country entrust the Master's office to safeguard their inheritance, yet there are instances where letters of authority or executorship are granted to individuals who may not be deserving. Additionally, citizens anticipate and hope that the Department of Home Affairs and every official working within it will uphold and respect the rule of law.

[33] I am inclined to agree with the applicant’s counsel that “It makes no sense why ordinary citizens are forced to institute legal proceedings against the Respondents to have their customary marriages recognized, despite all the requirements having been met”. It is also a concern that no reasons are forwarded by the Home Affairs officials why particularly the marriage of the applicant and the deceased was not registered even after the application was served on them.

[34] It is encumbered upon the first and the second Respondents particularly the Minister to start addressing these shortcomings. In the Department of Justice and Constitutional Development, this is stated Customary marriages are registered by completing BI-1699 and paying the required fees. An acknowledgment of receipt BI-1700 will then be issued by the Department of Home Affairs. And that “The registering officer will inform you if he or she refuses to register a customary marriage as contemplated, stating the reasons for the refusal”. I haven't stumbled upon a case with reasons safe for notice to

abide from the State Attorney. Communities should also be educated about what's accessible on these websites.

[35] The procedure outlined is as follows:

"The following people should present themselves at either a Home Affairs office or a traditional leader in order to register a customary marriage:

- the two spouses (with copies of their valid identity books and a lobola agreement, if available)
    - at least one witness from the bride's family
    - at least one witness from the groom's family
    - and/or the representative of each of the families

[36] It cannot be heard that since the inception of the act the lacuna that exists concerning where the spouse is deceased nothing has been done. It is imperative that same is addressed in the act to alleviate the stress that the surviving spouses must deal with in asserting their rights to benefit from the deceased estate.

[37] It is crucial to note that in amicable situations between the two families, the lobolo document is finalized and signed by the entourage. However, when relations turn sour, the involved parties often tend to disavow any awareness of the customary marriage, even though they were active participants in the negotiation and conclusion of the process.

[38] These challenges can be mitigated by ensuring that those employed to carry out duties at Home Affairs have a comprehensive understanding of the act, especially concerning the registration of customary marriages. Another approach is the creation of a standardized document that can be utilized in

lobolo negotiations, regardless of whether they occur before, during, or after the negotiations.

[39] This would provide valuable assistance to African communities that engage in customary marriages exclusively. The document can also provide for Home Affairs to give a date for registration and the parties can after having finalized the process proceed to the offices of the first and second respondent to register similar to what is being done by the parties entering into a civil union.

[40] The Minister should also explore the possibility of developing a document for parties entering lobolo negotiations, which would form a crucial part of the customary marriage registration process. This document could include explicit guidelines on its content and be made readily available at Home Affairs offices, Tribal Authorities, and Churches before lobolo negotiations.

[42] This judgment holds significance for the Minister of Home Affairs, Minister of Justice, Deputy Minister of Constitutional Development, and the South African Law Reform Commission to ponder. It underscores the need to consider the registration of customary marriages, particularly in situations involving the death of one spouse or when one family refuses to acknowledge the marriage.

[43] In conclusion, based on the evidence provided, it is clear that the marriage between the applicant and Nditsheni Samuel Mutswari, was validly concluded in terms of customary law. The subsequent death of the husband should not be a bar to the registration of the marriage.

**ORDER**

[44] The first and second respondent, the Department of Home Affairs, is hereby directed to:

1. Condonation of the late registration of the customary marriage between the applicant and Nditsheni Samuel Mutswari, the late

2. Register the marriage between the applicant, Tshilidzi Petronella Khashane, and the late Nditsheni Samuel Mutswari, as a valid customary marriage;

3. Issue the applicant with a marriage certificate attesting to the said registration within 30 days of this order.

4. The respondent is ordered to pay the costs of this application.

**ENB KHWINANA**
**ACTING JUDGE OF NORTH GAUTENG**
**HIGH COURT, PRETORIA**

**APPEARANCES:**

Counsel for Applicant: Tshepang Segage
Instructed by: Mgiba kgabi Attorneys

Date of Hearing: 13 October 2023
Date of Judgment: 12 January 2024