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IN THE HIGH COURT OF SOUTH AFRICA

(Gauteng Division, Pretoria)

Case no: 60676/2019

Heard on: 18/10/2024

Judgment: 16/1/2025

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED.

DATE: 16 January 2025

SIGNATURE

In the matter between:

THEMBI EURIEL TLOU

PLAINTIFF

AND

STANLEY THIBE MATLALA

DEFENDANT

JUDGMENT

STRIJDOM, J

1. This action pertains to a dispute relating to the validity of a customary marriage, where the plaintiff alleges that the parties entered into a valid customary marriage on the 6th of October 2005 at Soshanguve, Gauteng Province.
2. The defendant has denied that a marriage exists between the parties and only admits that a meeting took place between the respective parties' delegates on 6 October 2005, which did not according to the defendant, result in the conclusion of a valid customary marriage between the parties. The defendant states that he and his delegation were informed of the existence of the plaintiff's daughter,

Naledi, for the first time during the lobola negotiations and that no lobola was successfully negotiated.

3. On the day of the commencement of the trial, the defendant amended his plea to the plaintiff's particulars of claim.¹The application to amend was not opposed by the plaintiff.
4. At the commencement of the trial, the defendant abandoned the two special pleas that were initially raised in his plea.
5. It is common cause that the parties are the registered co-owners of an immovable property, more fully described as: 1[...] B[...] D[...] Soshanguve.
6. In relation to the said property, defendant seeks an order, granting the plaintiff only that share and/or percentage that she was able to prove a contribution towards at trial. No evidence was led at the trial by the parties pertaining to the division of the aforesaid co-ownership.
7. The co-ownership of the property has to be dealt with, at a later stage, as the Court's finding on whether or not a valid customary marriage exists, shall have patrimonial consequences on the separate estates of both of the parties.

Common Cause Facts

8. The following facts are common cause between the parties:
 - 8.1 On the 6th of October 2005, the Tlou and Matlala families met at the Tlou homestead in Soshanguve, Gauteng, with the intention to initiate what would later become the basis for the process of negotiating lobola on behalf of the plaintiff and the defendant.

¹ Caselines: J1

8.2 The plaintiff and the defendant were involved in a romantic relationship.

8.3 No lobola letter exists and the alleged customary marriage was never registered.

8.4 The defendant does not dispute that he occasioned a delegation to approach the Tlou family with the intention to negotiate lobola on his behalf during October 2005.

8.5 The plaintiff has a daughter, Naledi, from a previous relationship who was born on 6 March 1996.

Plaintiff's case

9. The facts and evidence relied on by the plaintiff can be summarised as follows:

9.1 The plaintiff testified that she and the defendant met when she was 23 years old while she was residing with her parents at Block [...], Soshanguve in 1998. The parties began a romantic relationship shortly thereafter. The defendant was residing nearby with his mother.

9.2 During the year 2000 the parties decided to purchase an immovable property being the property located at 1[...], Block [...], Soshanguve. A joint bond in respect of the immovable property was secured as neither party was able to qualify for same on their own.

9.3 The plaintiff testified that the defendant was from the start of their relationship, aware of Naledi who eventually came to live with the parties in 2003 until 2016.

9.4 Regarding the claimed valid marriage by the plaintiff, she confirmed that Naledi was not discussed between the parties prior to the marriage negotiations.

9.5 She testified that the negotiations, integration and celebration of the parties' marriage, occurred on Sunday, 12 June 2005. She stated that the delegation sent by the defendant arrived at her parents' home at approximately 09:00. The plaintiff remained in a bedroom with her daughter Naledi while the negotiations took place.

9.6 The plaintiff listed the delegates present for the negotiations on her behalf, as follows:

9.6.1 Samson Ramokgopa (Uncle Sam);

9.6.2 Nimrod Ramokgopa (Uncle Nimrod);

9.6.3 Mulawa Mathe;

9.6.4 Rosemary Mathe

9.7 The plaintiff listed the delegation for the Matlala family as follows:

9.7.1 Granny Mthombeni (defendant's sister);

9.7.2 Peter Mthombeni (defendant's sister);

9.7.3 Sister Sassi;

9.7.4 The husband of Sister Sassi.

9.8 At one point, the plaintiff's mother entered the bedroom in which the plaintiff was informing her that the delegates had agreed on R12 000,00 in respect of lobola but that the defendant's delegates only had R6 000,00, which they paid immediately, and that the outstanding amount would be paid on a later date to be determined. The

defendant's delegates further provided gifts for the plaintiff's uncles and Granny Mthombeni, provided walking sticks and blankets.

- 9.9 The plaintiff and Naledi were then summoned and displayed in front of the delegation, at which point Sister Sassi and Granny Mthombeni exclaimed "we see the makoti and her child, who is known to us ..."
- 9.10 The delegation then enjoyed lunch at the Tlou homestead after which the plaintiff was informed to prepare to leave to attend the defendant's family homestead. The plaintiff then left for the Matlala homestead with members of her family. Plaintiff stated that Naledi did not accompany her to the Matlala homestead.
- 9.11 The plaintiff recalled upon entering the dining room of the Matlala homestead, that she was accompanied by the defendant. She further testified that she proceeded to meet the defendant's father, Frans Matlala and his wife. The celebration then continued where eating and drinking took place.
- 9.12 When asked about whether any photographs or videos were taken of the claimed celebration, the plaintiff stated that a video was recorded by a friend of the defendant named Clement. She asserted that the video remained behind at the Block D[...] immovable property when she vacated same.
- 9.13 Regarding the existence of the lobola letter, the plaintiff stated that the letter was drafted on the day of the celebrations and that she had sight of same the following day. She testified that the lobola letter included an "X" amount to be paid as well as the arrears, which had been deferred to a later date. The letter did not include anything pertaining to

Naledi. The letter was subsequently lost at the Tlou homestead during 2021.

9.14 The plaintiff testified that at no stage during the parties' relationship did her family elders object to her residing with the defendant at their jointly owned property. While residing together the parties would share household expenses. She would pay the bond while the defendant would pay the property rates and taxes.

10. Mr Samson Ramokgopa testified on behalf of the plaintiff. His evidence can be summarised as follows:

10.1 He was the leader of the Tlou delegation in respect of the marriage negotiations between the parties on 12 June 2005.

10.2 The witness expressed that due to his advanced age, he suffers from memory lapses, for which he takes various prescribed medications on a daily basis.

10.3 He testified that the purpose of the negotiations was to pay lobola; an amount of R12 000,00 was agreed upon; the Matlala delegation only had R6 000,00, which was paid on that day and the balance thereof was deferred to a date to be determined.

10.4 Gifts were provided to the plaintiff's delegation, which included 2 coats, 2 shoals, and a walking stick. Slaughtering of animals took place with half of the meat thereof to be divided between the parties' families.

10.5 Mr Ramokgopa testified that a lobola letter was drawn up by himself and Jan Harold Ramokgopa. They both signed the letter. Granny Mthombeni and another member of the Matlala delegation also signed

the letter. What happened to the said letter was unknown to the witness.

- 10.6 The witness stated that nothing was discussed regarding Naledi.
- 10.7 After lunch was held at the Tlou homestead, a celebration then followed at the Matlala homestead.
- 10.8 He further confirmed that he was not opposed to the plaintiff and the defendant residing together. Although he never visited the parties at the Block D[...] immovable property, he stated that they appeared to be happy together.

11. Professor Pieter Bakker provided expert testimony on behalf of the plaintiff. His evidence can be summarised as follows:

- 11.1 The professor took the Court through his report dated 17 May 2024,² highlighting the most relevant findings, in particular covering:
 - 11.1.1 The presence of an agreement between the parties;
 - 11.1.2 The payment of lobola;
 - 11.1.3 The integration of the two families, and;
 - 11.1.4 The legal presumption of a valid customary marriage.
- 11.2 In light of the defendant's amendment of his plea, in which the defendant pleads that lobola negotiations could not be finalised, the professor was not privy to this specific pleading and the claimed issues surrounding Naledi's role in the lobola negotiations did not form part of his expert report.

² Caselines:E10-E18

- 11.3 The professor testified that the obligation to disclose the existence of Naledi to the Matlala family, was not necessary if in fact Naledi, had already been residing with the parties and was known to the Matlalas.
- 11.4 The witness stated that the obligation to disclose the existence of a parties' child from a previous relationship, is subjective as it depends on the families in question.
- 11.5 The witness testified that the question of the adoption of a child from a party's previous relationship should be decided and confirmed by the delegation of the family who would be adopting such child. In the event that they do not accept the child, then the negotiations could either continue in the absence of adopting the child, or the negotiations could be called off entirely.
- 11.6 The professor continued, testifying that the payment of lobola whether in part or in full is not a requirement for a valid customary marriage. What is, however, important is that there must be an agreement between the families on the amount of lobola to be paid.
- 11.7 Professor Bekker opined that where the respective delegates of the families are unable to agree on lobola, then there is little to almost no probability of there being a conclusion of a valid customary marriage. Where lobola negotiations have ultimately broken down, the elders of the respective families would not allow the parties to reside together.

Defendant's case:

12. The defendant's evidence can be summarised as follows:

- 12.1 He testified that he was in a romantic relationship with the plaintiff from about 1999 to 2019. He conceded that he and the plaintiff are co-owners of an immovable property.
- 12.2 He testified that he was solely responsible for the monthly bond repayments of the said property and that the plaintiff never resided with him at the property but would rather occasionally visit over weekends.
- 12.3 He further testified that when he met the plaintiff, she was residing with a friend at Block [...], Soshanguve. He has no children with the plaintiff and he was residing with his children at the joint property between 2005 to 2014.
- 12.4 The defendant testified that during 2005, he intended to marry the plaintiff and sent a delegation to the family of the plaintiff to enquire how much lobola they would charge him in the event that he and the plaintiff were to marry. He did not give any money to the Mthombeni's on the said day.
- 12.5 The Mtombeni's returned to his mother's homestead and advised him that the plaintiff had a child from a previous relationship.
- 12.6 The defendant testified that he was not aware that the plaintiff had a child and advised his family that he no longer wished to proceed to marry the plaintiff. No further meeting was held between the Matlala and Tlou family and the defendant terminated the relationship between the plaintiff and himself.
- 12.7 He testified that he confronted the plaintiff about the child. She apologised and stated that she was scared that he would have changed his mind about wanting to marry her. Around 2005 the plaintiff called

him, once again apologising. He then forgave her and they resumed their relationship.

12.8 He testified that the plaintiff continued to visit him over weekends from 2006. After the resumption of the relationship he would occasionally assist the plaintiff with Naledi's expenses, as and when requested by the plaintiff.

12.9 His relationship with the plaintiff was terminated in 2019 after he found the plaintiff with a male companion at the joint property.

Mrs Granny Mthombeni and Mr Peter Nthombeni

13. The Mthombeni's testified that they were delegated by the defendant to approach the plaintiff's family with the intention of negotiating lobola on behalf of the defendant, in particular to enquire how much the Tlou family would seek from defendant in respect of lobola.

14. They testified that they attended to the plaintiff's homestead during October 2005, and were the only two delegates that were present on behalf of the Matlala family.

15. They testified that they were given permission to enter the Tlou homestead by a gentlemen known as Nimrod. They entered the home and introduced themselves to Nimrod and two ladies. Nimrod advised that they should proceed with their discussions and that the elder uncle would find the negotiations ahead. The elder uncle later arrived and introduced himself as Sam. The Mthombeni's stated the reasons for their presence which was to find out from the Tlou family as to the amount of lobola they would require as well as what gifts they would need.

16. The Tlou family informed the Mthombeni's that they would require R18 000,00 for lobola. The Tlou delegation were willing to lower the amount to R14 000,00 to which the Mthombeni's responded by pleading with the Tlou's to further reduce the amount. Sam then responded to the Mthombeni's that it seems like they were there to play. He further stated that a cow cannot be severed from its calf.
17. The Mthombeni's then responded that they were not aware that the cow had a calf. It was at this point that the Mthombeni's felt that they could not conclude any discussion without taking a mandate from the defendant.
18. The Mthombeni's intimated to the Tlou delegation, that for the sake of the original mandate, they wish to finalise the discussion on what would be required of the defendant in the event that they would return to negotiate and pay lobola.
19. Both Nimrod and Sam left the room and returned to advise the Mthombeni's that the elders had agreed to lower the amount of lobola to R12 000,00.
20. Mr Mthombeni testified that they informed the Tlou delegation that before they could discuss the gifts that they were not there to pay lobola, but merely to discuss what was expected of them. They further informed the Tlou family that they did not have any money with them. The Mthombeni's were then served food, they began to eat and did not finish, as they felt they are no longer welcome and left.
21. They testified that they were at no point introduced to the plaintiff or her minor child and there was no exchange of gifts. They also testified that at no point was the plaintiff taken to the Matlalas' homestead and there was no celebration of any kind. They further testified that there was no letter that was written to record the events of the meeting.

Assessment of Evidence

22. Ordinarily, the party who bears the onus can discharge it only if that party had adduced credible evidence, particularly where there are mutually destructive versions.³
23. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses (b) their reliability; and (c) the probabilities.⁴
24. What must be borne in mind, however, is that the conclusion which is reached must account for all the evidence.
25. The plaintiff did not impress me as a reliable witness. She contradicted herself on material aspects and there appear to be several inconsistencies in her evidence. It is further evident from her evidence that her memory does not serve her well.
26. She testified that the defendant's delegation approached her family to negotiate lobola on the 12th of June 2005, whereas her particulars of claim indicate that the alleged lobola negotiations occurred on 6 October 2005.
27. The plaintiff testified that lobola was successfully negotiated. It was the testimony of the plaintiff that she was not present during the alleged lobola negotiations and that she was only later advised of what had transpired during the alleged negotiations.
28. She testified that after the lobola negotiations, she and her daughter (Naledi) were introduced to the Matlala delegation. During cross-examination she conceded that her daughter did not accompany her to the Matlala homestead.

³ *National Employers' General Insurance v Jagers* [1984] 4 All SA 622 [E] 624-625; 1984 (4) SA 437 € 440 D-G.

⁴ *SFW Group Ltd and Another v Martell et (Cie & Others* [2002] OL 10175 (SCA); 2003 (1) SA 11 (SCA).

29. Plaintiff testified that a lobola letter was executed at the end of the alleged negotiations. When asked during cross-examination why she did not use the lobola letter in support of her claim, she answered that the letter went missing in 2021, when renovations were being done at her parental home.
30. The summons in this matter was issued in 2019, two years before the letter was allegedly lost. It is highly improbable that if such a letter existed when the summons was issued, it was not disclosed or used to support the plaintiff's claim.
31. The plaintiff testified that the lobola letter remained at her homestead whereas Sam Ramokgopa testified that the letter was given to the Matlala delegation as proof to be shown to the rest of the Matlala family.
32. During cross-examination the plaintiff testified that pictures and a video were taken of the celebrations by the defendant's friend. She failed to adduce into evidence a letter of lobola, or any pictures of the alleged celebration. She also failed to file any affidavit by the other members of her delegation, despite testifying during cross-examination that many of them were still alive and could have been of assistance to the court in establishing what transpired at the meeting.
33. The plaintiff contradicted herself during cross-examination on the date of the alleged negotiations the date upon which she met and entered into a romantic relationship with the defendant.
34. She further contradicted the evidence of Sam Ramokgopa. She testified that an animal was slaughtered at the abattoir, whereas Mr Ramokgopa testified that an animal was slaughtered at the Tlou homestead.

35. The evidence of Mr Ramokgopa must be treated with circumspection. During cross-examination, he informed the court that he is “a person of some memory lapses” and further stated that he remembers some details and others he does not. He takes various prescribed medications for the memory lapses on a daily basis.
36. His evidence contradicted that of the plaintiff in material respects. In respect of what transpired during the negotiations his evidence cannot be corroborated by the evidence of the plaintiff. The plaintiff was not present during the negotiations. The plaintiff relied on the information that was conveyed to her by Mr Ramokgopa.
37. With regard to the lobola negotiations, Mr Ramokgopa must be treated as a single witness. Taking into consideration his memory lapses. The Court cannot attach much weight on his evidence.
38. Professor Bakker in my view was a honest and reliable witness. His expertise was not disputed by the defendant.
39. He testified that the report he had compiled, was based on an interview he had with the plaintiff. He conceded during cross-examination that he did not interview any other persons for the purpose of compiling his report. He further conceded that no lobola letter, no pictures of the alleged celebration were provided to him by the plaintiff. No collateral information was furnished to him.
40. The professor testified that the plaintiff had not disclosed to him that she had a child.
41. When asked during cross-examination whether or not the existence of a child on part of a woman, that was not known to a man’s family prior to initiation of lobola negotiations, the expert conceded that it might be an issue, if the man’s family

subsequently becomes aware of the existence of a child that was not initially disclosed. The revelation of this nature may cause issues in the negotiation process.

42. When questioned by the Court on what the consequences of lack of consensus by delegates at a lobola negotiation were, the expert testified that no valid marriage would be concluded.

43. The defendant gave a detailed and thorough account of the incident in a straightforward manner. Under cross-examination he was able to logically substantiate his evidence thereby reinforcing it. He made a favourable impression on the Court as an intelligent witness whose account was truthful and reliable. He did not contradict himself in any material way. His evidence is also corroborated on material aspects by the evidence of the Nthombeni's.

44. Granny Nthombeni impressed the Court as a good witness and there is nothing to cast doubt on her veracity concerning the lobola negotiations and subsequent events. Her evidence was credible and free from contradictions and discrepancies concerning the details. There are also no inherent improbabilities in her evidence. Her evidence was not seriously contested during cross-examination. Her evidence was corroborated by the evidence of Peter Mthombeni on all material aspects.

45. Pieter Mthombeni also made a favourable impression on the Court. In my view he was a truthful and reliable witness. He did not contradict himself in any material way. His evidence was not seriously contested during cross-examination. His evidence was also corroborated by the evidence of Granny Mthombeni on all material aspects.

46. There were certain facts of the defendant's version that were not put to the plaintiff during cross-examination. In my view all the material aspects of the

defendant's version were put to the plaintiff and Mr Ramokgopa during cross-examination. The court must also take in consideration that the version of the plaintiff was not put to the Mthombeni's during cross-examination.

47. It is trite that the purpose of cross-examination is to challenge the evidence of a witness and the failure to do so may affect the findings of the court on that specific issue.

48. If a point in dispute is left unchallenged a witness's testimony is accepted as correct.⁵

49. It was submitted by the plaintiff's counsel that the plaintiff and her uncle were candid, made reasonable concessions, remained calm and were able to provide reasonable and acceptable explanations and responses. Their versions accorded with one another in material respects.

50. On a preponderance of probabilities, I am not persuaded that the version of the plaintiff is true and accurate and that the defendant's version is false. In my view the balance of probabilities does not favour the plaintiff.

Customary marriages

51. In terms of section 2(1) of the Recognition of Customary Marriages Act, Act 120 of 1998 (hereinafter referred to as "the Act"), the provisions of the Act apply to all valid customary marriages which existed at the time of commencement of the Act.

52. The Act was assented to on 20 November 1998 and came into operation on 15 November 2000.

⁵ RSA v South African Rugby and Football Union 2000 (1) SA (CC) at para 61-65

Section 2(1) of the Act provides that:

“2(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes reckoned as a marriage.”

53. The requirements for a valid customary marriage are set out in section 3 of the Act as follows:

“3. Requirements for validity of customary marriages:

(1) For a customary marriage entered into after commencement of this Act to be valid-

(a) The prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and;

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

54. According to Prof Bakker’s expert report, the essential requirements for the conclusion of a valid customary marriage are similar in all tribal groups within South- Africa.

55. The plaintiff is required to prove, on a balance of probabilities, that the requirements for a valid customary marriage has been met.

56. It was argued by counsel for the plaintiff that the process of consent commences with the negotiation of lobola. An agreement to pay lobola is sufficient and as such, it becomes clear that the parties intend to be married in terms of customary law. It was further submitted that the plaintiff has proven that the parties concluded a valid and binding customary marriage and that the plea of the defendant stands to be dismissed with costs.

57. Having accepted the version of the defendant and his witnesses, I conclude that the plaintiff has failed to prove the requirements of a valid customary marriage.

58. In the result, the action is dismissed with costs, which costs are to be taxed in accordance with scale B.

JJ STRIJDOM
JUDGE OF THE HIGH COURT OF
SOUTH-AFRICA, GAUTENG DIVISION,
PRETORIA

APPEARANCES:

For the applicant:	Adv JB Themane
Instructed by:	Abrams Madira Inc Attorney
For the Respondent:	Adv Z Marx Du Plessis
Instructed by:	Shapiro & Ledwaba Inc Attorneys