THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 755/2012
Not Reportable

In the matter between

MOHAU JACKSON MOROPANE **APPELLANT**

and

ELIZABETH SOUTHON **RESPONDENT**

Neutral citation: *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014)

Coram: Mthiyane DP, Maya, Bosielo and Theron JJA and Van Zyl AJA

Heard: **03 March 2014**

Delivered: **29 May 2014**

Summary: Customary law – Recognition of Customary Marriages Act 120 of 1998 – requirements for a valid customary marriage - Section 3(1) – whether the requirements for a valid customary marriage were met.

ORDER

On appeal from: The South Gauteng High Court, Johannesburg (Saldulker J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Bosielo JA (Mthiyane DP, Maya and Theron JJA and Van Zyl AJA concurring):

[1] At the heart of this appeal is the question, when does a customary marriage entered into after the commencement of the Recognition of Customary Marriages Act 120 of 1998 (the Act) become valid? One would have thought that the simple answer lies in s 3(1) of the Act. However, this case proves that the answer to this question might not be as easy as it appears.

[2] The respondent avers that on 17 April 2002, the appellant, Mr Mohau Jackson Moropane, sent a delegation led by his brother, Mr Strike Moropane, (Strike) to the respondent's, Ms Elizabeth Southon, parental home in Seshego, Polokwane. Certain negotiations were carried out between the two families which culminated in an agreed amount of

R6 000 being paid by the appellant's delegation to her family. What this payment was for is in dispute. The respondent avers that it was for her lobola, agreed upon by the representatives of their respective families. The appellant disputes this vigorously. He asserts that the payment was merely a symbolic gesture for opening negotiations (go bula molomo/go kokota) for the respondent as his future wife.

[3] According to the respondent from 17 April 2002 until she left in November 2009, they lived together in a common home in Johannesburg as man and wife. The respondent avers that their cohabitation was a customary marriage whereas the appellant asserts that it was a mere cohabitation. This dispute culminated in a case which was heard by the South Gauteng High Court (Saldulker J) which held that a valid customary marriage was concluded. Aggrieved by this finding, the appellant appeals to this Court, with leave of the high court.

[4] For a proper understanding of the dispute in this case it is necessary to set out in full the background facts. It is common cause that the parties met and fell in love during 1995. At that time, the appellant was still married to his former wife whom he divorced in October 2000 after which the respondent moved in with the appellant. From this date they both lived together at the appellant's house in Morningside Manor, Johannesburg.

[5] In early 2002, the appellant proposed marriage to the respondent, who accepted. Although the parties are agreed on the intended marriage they differ as to its nature. Were they going to be married according to customary law or civil rites? The respondent maintains that it was to be

by customary law whilst the appellant stands firm that it was to be by civil rites. The determination of this dispute is pivotal to the question whether a customary marriage or civil marriage came about.

[6] What follows is broadly the respondent's evidence supported by three witnesses. She testified that after having lived together for some time the appellant proposed to marry her by customary rites which proposal she accepted. Following this, the appellant, as already mentioned, sent his emissaries, comprising of Strike, Jojo, his sister, his father's sister, Mmantoa Moropane, his brother-in-law, Thipe Seema, and his cousin Billy Moropane to respondent's home in Seshego, Polokwane to enter into negotiations with her family for purpose of marrying her (go batla sego sa metsi)[1] as it is custom. Her family was represented by a delegation of some elders led by her brother, Mameta Gilbert Mamabolo. The delegation included her sister, Rethabile Pauline Phashe, her mother's cousin, Mmaphefo Francina Malotane, Ragele Rachel Sefefe, her uncle, Makgathi Ernest Mamabolo and a family friend Tebedi John Mokomo.

[7] The respondent's aunt Monica Malaza acted as a facilitator or go-between (Mmaditsela) for the respondent's family (the Mamabolos) whilst Strike played the same role for the appellant's family (the Moropanes). Initially the respondent's family demanded R10 000 for lobola. Following some intense negotiations this amount was ultimately reduced to R6 000 which the appellant's family accepted and duly paid. After the lobola was paid, the two families exchanged gifts in accordance with the Pedi custom. The Moropanes gave the Mamabolos two blankets,

[1] The literal meaning whereof is to request to marry a would be bride (my translation).

one for the respondent and the other one for her mother as well as knives and cutlery. In terms of their Pedi culture the Moropanes should also have brought a present for the respondent's father but as they did not have it, they paid money in its stead.

[8] In the course of the day's event, the Mamabolos gave the Moropanes a sheep which was then slaughtered to signify the new union between the two families brought about by the customary marriage between the appellant and the respondent. The sheep was shared between the two families and the remaining portion was cooked and served to the people who attended the ceremony.

[9] This was followed by some festivity during which the two families and the people who had gathered at the Mamabolos' residence sang, danced, ululated and partook in food and drinks in celebration of the customary union. As it is taboo in their Pedi culture for the respondent to be seen by her new in-laws in ordinary clothes Jojo draped her with the blanket which the Moropanes had bought for her. This festivity was captured in a number of photographs which were tendered and accepted as exhibits by the court below. All these events give character to a customary union.

[10] Later that day a closed meeting was held between the two families when the appellant's delegation requested the respondent's family to permit the newly wed bride (makoti) to be delivered to their home. As part of the Pedi custom, the respondent's elders then counselled her (go laiwa) regarding how she was expected to comport herself at the appellant's family home as the bride (makoti). This cultural ritual as

testified to by experts who gave evidence is essential and deeply embedded in the institution of customary marriage. Later on the respondent was driven to the appellant's home in Atteridgeville, Pretoria. She was accompanied by Ms Malotana, who acted as her envoy and delivered her to her in-laws. Jojo travelled with them.

[11] Upon their arrival at the appellant's home in Atteridgeville, later that evening, the respondent was received into the house by the appellant's sisters. This was preceded by a celebratory reception with people singing, ululating and dancing for the couple in the street. Later on the appellant's sisters, Jojo and Dikeledi welcomed the respondent into their home as the makoti and counselled her (go mo laya)[2] in accordance with their culture about how they expected her to behave in their home as the makoti in line with their culture.

[12] After these customary rituals, the respondent left for the parties' common home accompanied by Ms Malotana. From this day, the couple lived together as man and wife at the appellant's residence until their marriage experienced serious problems. These culminated in the respondent leaving the appellant permanently and returning to her home in Polokwane during November 2009.

[13] It suffices to state that the respondent's version is confirmed in all material respects by her witnesses Ms Malotane, Mameta Gilbert Mamabolo and Monica Malaza. Essentially, all three of them testified that a customary marriage was concluded and celebrated in terms the customary law on 17 April 2002 between the appellant and the

[2] The literal translation is to counsel or give advice on how to behave at her in-laws (own translation).

respondent. Importantly, they testified that the customary marriage was sealed officially by the transfer of the respondent from her family and delivery to her in-laws by Ms Malotana, acting on behalf of the respondent's family that evening in Atteridgeville.

[14] Contrariwise, the appellant's version is as follows. In essence he disputes that a valid customary union was negotiated and concluded between him and the respondent as alleged by the respondent. Although he agrees that he had sent Strike, as his emissary to the respondent's place to begin exploratory discussions with them about lobola on 17 April 2002, he denies that he had instructed him to pay lobola and conclude a customary marriage. According to him his mandate to Strike was to pay pula molomo/go kokota,[3] being the equivalent of opening negotiations only. He testified that Strike was alone. He was emphatic that there was no delegation which had accompanied Strike to Seshego.

[15] Although he admitted that the respondent, accompanied by her aunt, came to his home in Atteridgeville that night, he maintained that she had brought Jojo home and not for her to be delivered as a makoti. According to the appellant the cohabitation with the respondent subsequent to 17 April 2002 was based on the fact that he had paid R6 000 for her. In his understanding he had 'ring-fenced' her which accorded him certain privileges, including treating her as, and calling her his wife.

[16] The appellant asserted that he could not have agreed to marry by customary law as he does not live his life according to African customs

[3] The literal translation is to open negotiations for lobala (my translation).

more so as he had been married by civil rites before. His explanation as to why he agreed to pay lobola which is inarguably an African cultural practice is that 'it is a small part of the tradition that we take out' implying that it was meaningless for him.

[17] I interpose here to state that there are a number of important events which took place between 2002 and November 2009 whilst the parties lived together in Johannesburg which merit special consideration. Amongst these are that the appellant bought the respondent an 18 carat yellow ring which he arranged with a jeweller to redesign as a wedding ring; he organised a lavish 50th birthday for her which was captured on a DVD; he admitted that at this birthday he freely referred to her as his customary law wife; Strike also referred to her as the appellant's wife at this party; the appellant further referred to her mother as his mother-in-law and Gilbert, as his brother-in-law; when he applied for her to be a member of the prestigious Johannesburg Country Club, he described her as his customary law wife and also when he applied for a protection order against her at the Randburg Magistrates' Court, he described her as his customary law wife. Crucially all these events are not in dispute.

[18] On being asked why he referred to the respondent as his wife, he prevaricated. First, he said that it is because as a person of advanced age it would have been embarrassing to call her his girlfriend. Secondly, he asserted that he called her his customary law wife because he was entitled to call her that as he had 'ring-fenced' her.

[19] Strike then testified for the appellant. He confirmed that he went to the respondent's place on 17 April 2002 as per the appellant's

instructions. His mandate was not to pay lobola for the respondent but to open negotiations for lobola (go kokota/go bula molomo), so he testified. According to him, he never had instructions from the appellant to conclude any customary marriage with the respondent. He denied that he was with a delegation. His evidence was that he paid R6 000, not as lobola but as a customary token to open negotiations (go kokota/go bula molomo). Concerning the presence of Jojo at the respondent's place, he explained that she was there because she is friends with the respondent. He denied that Jojo was part of the delegation. He also denied having discussed the purpose of his visit there with Jojo on that day.

[20] When confronted with photographs which showed members of his family and the respondent's family participating in festivity at the respondent's home that day, Strike denied that there was any celebration for a customary marriage. Similarly, he denied that there was a similar celebration at his parental home in Atteridgeville to welcome the respondent as the makoti later that night.

[21] The appellant and Strike were subjected to a searching cross-examination. They were also confronted with photographs which were taken on this day as well as the various public utterances during which the respondent was referred to as the appellant's wife. It is not surprising that they did not come out unscathed from their forensic sparring match with the respondent's counsel.

[22] Strike had serious problems to explain the presence and role played by Jojo during the ceremony at Seshego on 17 April 2002. He testified that she was there on a frolic of her own.

[23] The falsehood in both Strike and the appellant's persistent denial that the latter had sent a delegation was exposed by the appellant, who in his answering affidavit suffered a Freudian slip when he stated that:

'A delegation had been sent as previously stated, headed by my brother who the Applicant refers to as Strike. I was not present and do not know who was part of the delegation.'

It is noteworthy that Strike, despite his persistent denial that he was accompanied by a delegation confirms the appellant's assertion as correct in his confirmatory affidavit.

[24] It is clear from the record that Strike was not a reliable witness. He came across as very arrogant, evasive, longwinded and argumentative. At some stage when he got himself into a knot, he sought some refuge in boasting that he has three degrees. The relevance of this response still evades me.

[25] The appellant himself did not perform better during his cross-examination. He, too, was evasive and unconvincing with his responses. He also came across as being unnecessarily argumentative and longwinded. He offered no plausible response to the damning photographs taken at Seshego on that day save to allege that this was a cleansing ceremony which had been arranged for the respondent by her family, which Strike and her sister attended. However he asserted that he was not present. He also had serious difficulties to explain why on more than one occasion he referred to the respondent as his wife.

[26] On the other hand, the record showed the respondent to have been an honest and candid witness. She was never evasive or hesitant in her responses. She gave a clear and coherent account of the events. The same can be said about all her witnesses. Crucially, they corroborated the respondent's version in all its material respects.

[27] The appellant's counsel launched a two-pronged attack against the judgment of the court below. In the main, he submitted that there is no evidence that the parties had ever agreed to conclude a customary marriage, thus suggesting that the requirement in s 3(1)(*b*) of the Act was not met; second, that the appellant would not have married by custom as neither of the parties lived their lives in accordance with customary law or culture. Although he could not dispute that the two families met and had negotiations, he contended that all that happened on 17 April 2012 was meant to be preliminary or exploratory discussions about lobola (go kokota or go bula molomo) and not to conclude a customary marriage.

[28] However, the appellant's counsel had serious difficulty explaining why the appellant would pay R6 000 to open negotiations for lobola (go kokota/go bula molomo) which is admittedly an important cultural practice integral to a customary marriage if he does not live his life according to African culture. He contended further that as there was no common intention between the parties to marry by customary rites, there could never have been a valid customary marriage.

[29] Respondent's counsel countered this contention by submitting that the evidence as a whole points overwhelmingly to no other conclusion than to the existence of a valid customary marriage. He submitted that it

is clear from what occurred on 17 April 2002, that all the legal requirements of a customary marriage as set out in s 3(1) of the Act were met.

[30] Respondent's counsel submitted further that as a final step to validate a customary marriage, the respondent was later that evening taken to Atteridgeville at the appellant's home accompanied by an envoy Mrs Malotana, her uncle's wife, for her to be formally handed over to the Moropanes, her in-laws. Further, that upon her arrival at Atteridgeville, she was welcomed by the appellant's sisters, who after some festivity accompanied by singing, ululating and dancing also counselled (laya) her in terms of their culture, this being the official seal of a customary marriage.

[31] He also contended that as further proof of the customary marriage, both the appellant and the respondent drove to the appellant's home in Morningside late that evening, where they cohabited as man and wife until on 16 November 2009, when she left as their marriage had broken down irretrievably.

[32] In conclusion, he contended that the appellant's utterances and behaviour towards the respondent after 17 April 2002 as fully set out above are irrefutable testimony that the parties were married according to customary law and, importantly, that he publicly acknowledged her as such.

[33] Ultimately the resolution of the dispute between the parties comes down to the question whether the high court erred in finding, on a

conspectus of the evidence, that a valid customary marriage was concluded between the parties on 17 April 2002. To my mind, the answer to this question lies in s 3(1) of the Act which provides that:

'For a customary marriage entered into after the commencement of the 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'.

[34] It is clear from the above section that these are the only three basic statutory requirements for the validity of a customary marriage, the so-called jurisdictional requirements.

[35] The requirement in s 3(1)(*b*) that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law' is clear and unambiguous. Even the Legislature did not consider it necessary to define it. This is understandable as customary law is as diverse as the number of different ethnic groups we have in this beautiful country. Although Africans in general share the majority of customs, rituals and cultures, there are some subtle differences which, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, VhaVenda and the Vatsonga. This is due to the pluralistic nature of African societies.

[36] Furthermore, African law and its customs are not static but dynamic.[4] They develop and change along with the society in which they are practised. This capacity to change requires the court to investigate the

[4] *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC).

customs, cultures, rituals and usages of a particular ethnic group to determine whether their marriage was negotiated and concluded in terms of their customary law at the particular time of their evolution. This is so particularly as the Act defines 'customary law' as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those people.

[37] It follows that it would be well-nigh impossible and undesirable to attempt an exhaustive and all-inclusive definition of a phrase which is susceptible to variations depending on which particular ethnic group it relates to. The most salutary approach to ascertaining the real meaning of this requirement is by examining the current cultural practices and customary law of that particular ethnic group as the Constitutional Court did in *MM v MN*.[5] When confronted with the problem concerning the role which the consent of the first wife plays in relation to the validity of her husband's subsequent polygamous customary marriage of the Vatsonga in terms of Xitsonga customary law the Constitutional Court stated as follows at para 48:

'It is incumbent on our courts to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant rule'.

Importantly the Constitutional Court expressed a salutary warning at para 51 as follows:

'It should also be borne in mind that customary law is not uniform'.

[38] How then does a court determine what the current customary law, called 'the living customary law', applicable to a particular case is? This question has proved to be problematic for our courts. Whilst grappling

[5] *MM v MN* 2013 (4) SA 415 (CC) para 48.

with this polemic, the Constitutional Court lit the dark pathway in *Bhe v Magistrate, Khayelitsha* above at para [150] where it stated:

'How to ascertain indigenous law?

[150] There are at least three ways in which indigenous law may be established. In the first place, a court may take judicial notice of it. This can only happen where it can readily be ascertained with sufficient certainty. Section 1(1) of the Law Evidence Amendment Act 45 of 1988 says so. Where it cannot be readily ascertained, expert evidence may be adduced to establish it. Finally, a court may consult text books and case law.

[151] Caution, however, must be exercised in relying on case law and text books. In *Alexkor* we emphasised the need for caution and said:

"(not clear where this quote ends) Although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term "customary law" emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people.

[152] It is now generally accepted that there are three forms of indigenous law: (a) That practiced in the community; (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for teaching purposes. All of them differ. This makes it difficult to identify the true indigenous law. The evolving nature of indigenous law only compounds the difficulty of identifying indigenous law.

The evolving nature of indigenous law

[153] Indigenous law is dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates. It is not a fixed body of classified rules. As we pointed out in *Alexkor*:

"In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution".'

[39] Two expert witnesses, Mr Sekhukhune for the appellant and Professor Mokgatswane for the respondent, were called to testify on Pedi customary marriages in an attempt to assist the court to determine whether the marriage between the parties was 'negotiated and entered into or celebrated in accordance with customary law' of the Bapedi people. This is in line with the authority of *Masenya v Seleka Tribal Authority & another,*[6] and *Hlophe v Mahlalela & another*.[7] Except for minor and inconsequential differences on cultural rituals, both experts were agreed that the current customary requirements for a valid customary marriage amongst the Bapedi people include amongst others, negotiations between the families in respect of lobola; a token for opening the negotiations (go kokota or pula molomo); followed by asking for the bride (go kopa sego sa metsi); an agreement on the number of beast payable as lobola (in modern times this is replaced by money); payment of the agreed lobola; the exchange of gifts between the families; the slaughtering of beasts; a feast and counselling (go laiwa) of the makoti followed by the formal handing over of the makoti to her in-laws by her elders.

[40] Importantly, the two experts agreed that the handing over of the makoti to her in-laws is the most crucial part of a customary marriage.

[6] *Masenya v Seleka Tribal Authority & another* 1981 (1) SA 522 (TPD) at 524;
[7] *Hlophe v Mahlalela & another* 1998 (1) SA 449 (TPD) at 457E-F.

This is so as it is through this symbolic customary practice that the makoti is finally welcomed and integrated into the groom's family which henceforth becomes her new family. See *Motsotsoa v Roro & another*[8] and The Current Legal Status of Customary Marriages in South Africa, I. P. Maithufi and GBM Moloi, Journal of SA Law, 2002, p599, and Bennett (above) at p217.

[41] However, the two experts had some differences of opinion on certain cultural practices of the Bapedi concerning customary marriages. They filed a joint minute recording their differences. To my mind, these are insignificant variations which do not detract from the validity of a customary marriage. These relate to amongst others, whether money can be used as lobola in the place of cattle; whether it was in accordance with Pedi culture to slaughter a sheep instead of a cow; whether the ribs (letlhakore) was given to the tribal Chief; whether the groom's people were given the front limb (letsogo); whether a calabash of African beer was given to the groom's people.

[42] Mr Sekhukhune testified to a large extent about the Bapedi customary marriage as it is practised and observed in rural areas, in other words a traditional Pedi customary marriage which has not been influenced by modern developments like urbanisation, western culture and the all-pervasive Christianity. He conceded, however, that the position in urban areas is different as the people there are 'sort of cosmopolitan type of African people'.

[8] *Motsotsoa v Roro & another* [2011] All SA 324 (GSJ).

[43] On the other hand, the testimony of Professor Mokgatswane, was more about current customary practices which apply in 'modern cosmopolitan times in the cities'. Essentially, his evidence was that traditional customary practices have evolved over time as Africans left rural villages and migrated to urban areas and became exposed to other cultures.

[44] Some brief comments on the Act are apposite. It has great significance for the African people in general. As its Preamble clearly specifies, its primary objective is to give customary marriages recognition which was not the case under the past odious apartheid regime. It aspires to rid customary marriage of the pariah-status and stigma attached to it by the apartheid regime and accord it dignity and legal validity. As the Constitutional Court remarked rather poignantly in *Gumede v President of Republic of South Africa & others:*[9]

'… it [the Recognition Act] represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country'.

[45] That customary law and it various institutions, including marriage is the subject of an evolutionary process and continues to be so, to which factors such as urbanisation, exposure to western culture and other religious practices contributed, is correct. This important characteristic of African law as a living law is widely acknowledged by our courts and some academic writers like T. W. Bennett: A Sourcebook of African Customary Law of Southern Africa at p204-223; *Mabena v Letswalo*

[9] *Gumede v President of Republic of South Africa & others* 2009 (3) SA 152 (CC) at 160B.

1998 (2) SA 1068 T(PD) at p1074H-J and the Constitutional Court in *Bhe v Magistrate, Khayelitsha* (above) para [154].

[46] I can only hope that this unashamedly aspirational piece of legislation will serve the laudable purpose of freeing people from the shackles of colonial tendencies which sought to relegate marriages negotiated, concluded and celebrated in accordance with customary law to a status less than that of marriages concluded and solemnised by civil rites. African customary marriages deserve to be put on the same pedestal as civil marriages. These same sentiments were echoed by the Constitutional Court in *Gumede* (above) at para [22] as follows:

'… Secondly, the adaptation would salvage and free customary law from its stunted and deprived post. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution. In this regard we must remain mindful that an important objective of our constitutional enterprise is to be united in our diversity. In its desire to find social cohesion, our Constitution protects and celebrates difference…'

[47] To sum up, it is not in dispute that both parties are above the age of 18 years. The only two issues which are seriously contested are lack of consent by the appellant to marry by customary law (s 3(1)(*a*)(*ii*) of the Act) and, whether the marriage was negotiated and entered into in accordance with customary law (s 3(1)(*b*) of the Act).

[48] How then does one resolve these two contentious issues which the appellant placed in dispute? Sufficient evidence was adduced by both parties regarding amongst others, their relationship, the circumstances and events which took place on 17 April 2002, and importantly, the behaviour of the parties after this day. In addition some photographs

recording the events of 17 April 2002 and a video cassette showing a celebration of respondent's 50th birthday were accepted as exhibits.

[49] Contrary to the evidence by both the appellant and his brother Strike, that there was no delegation, it is clear from the evidence and photographs which were admitted as exhibits that there was a strong delegation of the appellant's family which travelled from Atteridgeville to the respondent's home in Seshego on 17 April 2002. Furthermore, it is not in dispute that there were negotiations between the two families as a consequence of which an amount of R6 000 was paid by the Moropanes to the Mamabolos. Crucially, photographs show the appellant's sister, Jojo draping the bride with a blanket and clear evidence of celebration.

[50] It is clear that the versions of the appellant and the respondent are incompatible. In order to resolve this impasse, the trial judge had to consider and weigh the probabilities to determine which version is more probable than the other. She also had to consider the credibility and reliability of the various witnesses. The test to be applied in such a case was enunciated lucidly as follows in *National Employers' General Insurance v Jagers*:[10]

'It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether

[10] *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (ECD) at 440D-441A.

that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens* (supra) and *African Eagle Assurance Co Ltd v Cainer* (supra). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case., as though the two aspects constitutes separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

[51] Having regard to the above dictum, the finding by the trial judge of serious improbabilities in the appellant's version was correct. For instance, as indicated above, a series of photographs proved without doubt that there were some people at the respondent's home on this day; Jojo, the appellant's sister is depicted draping the respondent with a blanket; some photographs showed clear evidence of some celebration at the respondent's home on that day. Importantly, it is common cause that an amount of R6 000 was paid to the Mamabolos by the Moropanes on that day. The appellant's version that this was a mere token to open

negotiations is discredited by the combined version of the two experts, Mr Sekhukhune and Professor Mokgatswane to the effect that only a nominal amount is normally paid go kokota/go bula molomo.

[52] The following questions remain unanswered if the appellant's version is to be believed: why was there such a big delegation of the appellant at the respondent's place on the day; If this was not a customary marriage why did the families exchange gifts; why did Jojo drape the respondent in a blanket; why was a sheep slaughtered; why was the respondent counselled (go laiwa) that night; why was the respondent delivered to the appellant's home that night; why would the respondent cohabit with the appellant as husband and wife for almost 8 years; why would the appellant, on his own, on diverse occasions and in public refer to the respondent as his customary law wife; why would the appellant buy the respondent a wedding ring valued at R91 850 if he did not regard her as his customary law wife and, finally, why did the appellant organise such a lavish 50th birthday party for her where he referred to her in public as his customary law wife? It is not surprising that the appellant could not proffer any satisfactory or credible answer to these questions.

[53] The trial judge made positive findings on the credibility of the respondent and her witnesses. On the contrary, she found the evidence of the appellant and his witnesses unreliable and not credible. The trial judge had the advantage of observing the various witnesses whilst they testified before her. This gave her an advantage which this Court, sitting as a court of appeal, does not have. As the saying goes, she was steeped in the atmosphere of the trial. Absent any evidence of a misdirection, I am therefore not at large to interfere with her findings even more so that I

cannot find any fault with her assessment and evaluation of the evidence in its totality.

[54] I have already pointed out serious contradictions and improbabilities in the version of the appellant and Strike as dealt with by the trial judge. These contradictions go to the heart of this matter. Another telling blow is the letter dated 21 December 2007 which the appellant wrote to the respondent which is replete with expressions like 'to my darling wife'; 'my beautiful and ever looking your wife'; 'my lovely wife'; 'our wedding ring'. This letter refers to the ring which the appellant admitted he had instructed a jeweller to restyle as a wedding ring. To my mind, this is the proverbial nail in the appellant's coffin. It suffices to state that the appellant's mendacity was exposed by his various references in various places and the video recording of her 50th birthday party to the respondent as his wife.

[55] Against this backdrop, I am satisfied that the essential requirements for a valid customary marriage according to the customary law of the Bapedi people have been met. To my mind, this is in line with the requirements in s 3(1) of the Act.

[56] To sum up, having analysed the evidence carefully, I find the respondent's version, as fully corroborated by her witnesses, the independent and objective evidence of photographs and the behaviour of the parties from 17 April 2002 until she left in November 2009, and importantly the evidence of the two expert witnesses, to be consistent with the existence of a valid customary marriage.

[57] Consequently, I find the respondent's version not only more probable but reliable and credible and that of the appellant to be so seriously improbable to be false. I agree with the conclusion reached by the judge a quo. It follows that the appeal is without merit.

[58] A brief comment about the status of the appeal record is necessary. Portions of the record represented a reconstruction of the evidence. At the hearing of the appeal this was raised with counsel for the respective parties. They both assured us that they were satisfied with the record as is and that it can be accepted as correctly reflecting the evidence placed before the trial court.

[59] In the result, the appeal is dismissed with costs.

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L.O. BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	M Khoza SC (with him Z Gumede) Instructed by: Routledge Modise Inc; Johannesburg Lovius Block Attorneys, Bloemfontein
For Respondent	:	FJ Nalane Instructed by: Maesela Incorporated; Johannesburg NW Phalatsi & Partners; Bloemfontein