REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **2024-094190**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

18/03/2025
DATE

SIGNATURE

In the matter between:

EMK PLAINTIFF

and

EMB DEFENDANT

and

Case Number: **2023-010767**

In the matter between:

DM APPLICANT

and

SJS FIRST RESPONDENT

MINISTER OF HOME AFFAIRS SECOND RESPONDENT

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be ___.*

Customary Marriage – living customary law - investigative duty of Court when applying customary law – duty on litigant to present corroborative evidence of the applicable customs and uses.

JUDGMENT

P A VAN NIEKERK, AJ

Introduction

[1] This judgment contains the reasons for orders which I have made in two matters that were enrolled on the Family Court roll of this division. Both matters were enrolled in the Family Court in terms of paragraph 29 of the Consolidated Practice Directive 1 of 2024: Court Operations in the Gauteng Division ("*CPD*"). The matter under Case no. 2024/094190 was enrolled as an unopposed divorce matter in terms of paragraph 30 of the CPD and will be referred to in this judgment as "*the divorce matter*". The matter under Case no. 2023/010767 was enrolled as an opposed "*other family law matter*" in terms of paragraph 29.9 of the CPD and will be referred to in this judgment as "*the application*".

The Divorce matter

[2] The divorce matter was enrolled as an unopposed divorce matter after the summons and particulars of claim were served personally on the Defendant who failed to enter an appearance to defend. In the particulars of claim, it is pleaded that both the Plaintiff and the Defendant are pensioners and that no minor children were born of the marriage relationship of the parties.

[3] In paragraph 4 of the particulars of claim, the following averments are pleaded in relation to the existence of an alleged customary marriage entered into between the parties, namely:

"4.

MARRIAGE:

The parties were married to each other in terms of customary law during 1990 and the above marriage still subsists. A copy of the Dowry letter in confirmation of the marriage is attached hereto marked Annexure "**A**"".

[4] the Plaintiff's particulars of claim contains prayers for an order dissolving the alleged customary marriage by an order of divorce, and for the division of the joint estate. The particulars of claim contains no further averments in relation to the alleged customary marriage, save as quoted above. For the reasons set out below, in my view, the particulars of claim lacks the necessary averments to sustain a finding that a customary marriage was entered into between the parties, which is a jurisdictional pre-requisite for granting an order of divorce. In the evidence affidavit filed on behalf of the Plaintiff, there is also no reference or evidence in relation to the existence of the alleged customary marriage, save for a reference to the annexed "dowry letter". After debating the issue with Counsel appearing on behalf of the Plaintiff, I removed the matter from the roll and mention that counsel indicated that the particulars of claim would be amended.

The Application

[5] The Notice of Motion of the application frames the relief sought by Applicant as follows:

"TAKE NOTICE THAT it is the intention of the abovementioned Applicant to on a date allocated by the Registrar, apply for an order in the following terms:

1. Declaring:

1.1. That the customary marriage between the Applicant and the First Respondent, concluded on 8 August 2009, is declared valid;

1.2. That the Second Respondent be ordered to register the marriage in terms of Section 4 of the Recognition of Customary Marriages Act 120 of 1998;

1.3. That the First Respondent pay the costs of this application if he opposes the relief sought herein;

1.4. Further and/or alternative relief".

[6] The Second Respondent joined in the application is the Minister of Home Affairs, who did not oppose the application.

[7] The relevant averments as set out in the Founding Affidavit in support of the relief as claimed in the Notice of Motion can conveniently be summarised as follows:

[7.1] During or about 1998, the Applicant and the First Respondent engaged in a relationship from which two children were born, respectively, during 2005 and 2007;

[7.2] The respective families of the Applicant and the First Respondent conducted lobola negotiations during or about August 2009; and

[7.3] The Applicant and the First Respondent did not reside together immediately after the lobola negotiations, but prior to 2011, lived together as husband and wife for a period of approximately 12 months whereafter cohabitation between them terminated, and since which date, they have not lived together.

[8] The Founding Affidavit serves to elaborate on the alleged lobola negotiations between the respective families and goes no further than that. No particulars are provided in the Founding Affidavit in relation to the specific group of African peoples to which either the Applicant or the First Respondent belongs, nor is there any reference to the applicable customs and traditions in relation to the conclusion of the customary marriage as it pertains to either of the parties. No attempt is made in the Founding Affidavit to disclose the applicable customary law which pertains to the alleged customary marriage of the

parties, nor is there an allegation that the parties complied with such customary laws or traditions.

[9] The application was opposed by the First Respondent who denies the existence of a customary marriage. The First Respondent raised a material dispute of fact on the version as advanced by the Applicant, and further disclosed in the Opposing Affidavit that the Applicant, during 2013, instituted a divorce action against the First Respondent in the Regional Court, Ga-Rankuwa, in which action, the First Respondent filed a Plea and therein also disputed the existence of the customary marriage which the Applicant sought to be dissolved by way of a decree of divorce. According to the First Respondent's answering affidavit, the Applicant did not pursue this divorce action any further in the Regional Court, Ga-Rankuwa.

Issues arising from the matters

[10] The aforesaid matters raise the following issues, namely:

[10.1] What is the evidential burden of a litigant who relies on the existence of a customary marriage in support of a cause of action?

[10.2] Did the particulars of claim in the divorce action disclose a proper cause of action? If not, what must be pleaded by a litigant who's cause of action is based on the existence of an alleged customary marriage?

[10.3] Did the Applicant in the application prove the existence of a customary marriage, as a result of which a declaratory order may be granted as prayed for by the Applicant?

[10.4] On the evidence as set out in the founding affidavit in the application, is it competent to order the Minister of Home affairs to register such marriage?

[11] In order to address the aforesaid, the Recognition of Customary Marriages Act[1] will be analysed insofar as the issues above are relevant, and reference will be made to

[1] Act 120 of 1998.

authorities in the form of caselaw and academic publications in relation to the evidential burden of a litigant who pleads the existence of a customary marriage with specific reference to the burden to plead and/or prove the customary law relied on by such litigant. The duty of a litigant in terms of pleadings will also be analysed and the duty of a Court which is called on to apply customary law will also be considered.

The Recognition of Customary Marriages Act

[12] The Recognition of Customary Marriages Act ("*RCMA*") provides for the Recognition of Customary Marriages and also serves to regulate the conclusion of such marriages, the legal *sequelae* of such marriages, and the dissolution of such marriages by way of a decree of divorce.[2]

[13] The RCMA distinguishes between customary marriages entered into before or after the commencement of the Act in that it provides for the recognition of customary marriages entered into before the commencement of the Act, which existed at the time when the Act commenced[3] and recognises customary marriages entered into after commencement of the Act which complies with the requirements of the Act.[4]

[14] In the divorce matter, the parties were allegedly married in terms of customary law before the commencement of the RCMA as a result of which such marriage would fall to be recognised in terms of Section 2(1) or 2(3) of the RCMA, whereas in the application, the customary marriage was allegedly entered into between the parties after the commencement of the RCMA and would thus be recognised if the marriage complies with the requirements set out in Section 3 of the RCMA.[5]

[15] In terms of Section 1 of the RCMA, a customary marriage is defined as "*... a marriage concluded in accordance with customary law*". Customary law is defined in Section 1 as follows:

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[2] Preamble to the RCMA.
[3] Section 2(1) and 2(3) of the RCMA.
[4] Sections 2(2) and 2(4) of the RCMA.
[5] Sections 2(2) and 2(4) read with Section 3 of the RCMA.

"'Customary law' means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples."

[16] The existence of a customary marriage duly recognised by virtue of the provisions of the RCMA has extensive legal *sequelae*. In terms of Section 2 of the RCMA, the recognition of a customary marriage, for all purposes as a marriage, elevates the position of a customary marriage, which was previously not recognised as a "*marriage*" in terms of the existing pre-democratic common law of South Africa, to a marriage on equal footing with the so-called civil marriage concluded in terms of the Marriage Act.[6] The recognition of such marriages therefore affects the status of persons married in terms of customary law and materially affects their rights and expectations as spouses to a legally recognised marriage. The recognition of such marriages substantially affects parties thereto in relation to the laws of succession; the patrimonial consequences of the customary marriage; the *modus* of termination of a customary marriage; and the patrimonial consequences following termination of such a marriage either by death or divorce. The marital status of such spouses has the potential to create legal rights such as the right to maintenance; claims to pension interests in terms of the applicable legislation; and claims in terms of property owned by the respective spouses as referred to above.

[17] Section 7 of the RCMA regulates the proprietary consequences of a customary marriage and the contractual capacity of spouses. This section allows spouses to select a proprietary regime applicable to their marriage by entering into an Antenuptial Contract including or excluding the accrual system as regulated in terms of Chapter 1 of Matrimonial Property Act,[7] or having failed to enter into an Antenuptial Contract, regulate such customary marriage to be a marriage in community of property.

[18] In terms of Section 8(1) of the RCMA, a customary marriage may only be dissolved by a Court issuing a decree of divorce on the grounds of the irretrievable breakdown of the marriage. Further, this section stipulates that the Court that dissolves a customary

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[6] Act 25 of 1961.
[7] Act 88 of 1984.

marriage has the same powers as those powers contemplated in Sections 7, 8, 9 and 10 of the Divorce Act[8] and Section 24(1) of the Matrimonial Property Act.[9]

[19] On an analysis of the RCMA and especially Sections 6, 7 and 8 thereof, it is thus clear that the existence of a customary marriage, if duly entered into, has material legal consequences for the parties in terms of status, contractual capacity, ownership of assets and the duty to maintain. The consequences may further extend after termination of such marriage by death or divorce. It is therefore clear that the issue of whether a duly recognised customary marriage in terms of the RCMA was entered into between parties, is an important issue which has substantial legal consequences, and should thus be approached and dealt with by a Court with circumspect.

[20] Section 4(7) of the RCMA reads as follows:

> "4(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."

From the wording of Section 4(7) above, it is clear that a court is enjoined to institute an investigation before an order may be made for the registration of a customary marriage or the cancellation or rectification of any registration of a customary marriage effected by a registering officer. Section 4(7) follows on the provisions of Sections 4(4) and 4(5) of the RCMA which refer to the requirement that a registering officer must be satisfied that a valid customary marriage was entered into by the spouses before such a registering officer registers a customary marriage. From the wording of these provisions, it is clear that either the registering officer referred to in Section 4 or the Court referred to in Section 4(7), must be satisfied that a valid customary marriage, which complies with the requirements of the RCMA as set out above and the applicable customs and traditions

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[8] Act 70 of 1979.
[9] Above n 7.

which informs the applicable customary law pertaining to the specific marriage under scrutiny by the court or the registering officer, was entered into.

[21] In the divorce matter, the Plaintiff seeks an order of divorce and an order for division of the joint estate. As a jurisdictional pre-requisite to such relief being granted, the Court must be satisfied that a customary marriage was entered into between the parties and must, further, have regard to the applicable patrimonial regime of such customary marriage if it is found to exist. In the application, a declaratory order is sought that the parties entered into a customary marriage and a further order is sought that the Second Respondent be ordered to register such marriage in terms of Section 4 of the RCMA. Once the declarator is issued that a customary marriage does exist, in both matters, the legal *sequelae* as referred to in paragraphs 18 and 19 of this judgment results. It is thus clear that in both matters, the existence of a valid customary marriage is the jurisdictional prerequisite for the respective causes of action of the claimants, and only once the existence thereof have been proved, further relief as claimed may follow.

Onus to prove a customary marriage

[22] In the majority judgment of *MM v MN and Another ("MM v MN"),*[10] the Court approached the matter on the basis of whether or not the existence of a customary marriage and/or compliance with the alleged customs applicable to the specific group of peoples were proven by the party who relied thereon. In the minority judgment,[11] Zondo J held:

> "The first respondent bears the onus to prove that there was a marriage between her and the deceased and that that marriage was 'negotiated and entered into or celebrated' in accordance with the custom and usages traditionally observed among the Vatsonga, and which form part of their culture."

Furthermore, on the same paragraph, it was held:

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[10] 2013 (4) SA 415 (CC).
[11] *MM v MN* id at para 108.

"She adduced no evidence to show that such marriage took place and, if so, how it was negotiated and entered into or celebrated or who represented the deceased's family in the negotiations and who witnessed such marriage. In the absence of evidence supporting her claim on these issues, not only has the first respondent failed to show that there was a customary marriage, but she even failed to show that there was a marriage of any kind between herself and the deceased."

[23] In *Manwadu v Manwadu & Others ("Manwadu")*[12] the majority judgment held as follows:

"To prove the existence of the marriage, the respondent had to advance collateral evidence that there was a marriage. The respondent was obliged to show that all legal and customary requirements were adhered to."

[24] It was further held that the onus rested on the Respondent to prove the following:

"Before a customary marriage can be recognised as valid and registered it must satisfy certain requirements. As is evident from Section 4(4)(a) of the RCMA, and the customary law requirements referred to above, before registering the marriage, the registering officer had to be satisfied that the marriage must have been concluded in accordance with customary law, meaning the customs and usages traditionally observed among the indigenous African peoples of South Africa, which form the culture of those people, must have been adhered to. The marriage negotiations, rituals and celebrations must be according to customary law. The spouses were required to be assisted by a guardian if under 21 years old. It was thus incumbent upon the respondent to offer proof, other than her id document, to prove the customary marriage. The respondent failed to deal with these vital omissions in reply. If the id document itself was prima facie proof of the marriage, once it was challenged, the respondent had to prove the marriage through extraneous evidence."[13](footnotes omitted)

[25] In the aforesaid judgment, the fact that the onus of proof lies on the party alleging the existence of a customary marriage thereof, was repeated in paragraphs 48 and 50, and in the minority judgment as follows:

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[12] [2025] ZASCA 10 at para 45.
[13] *Manwadu* id at para 46.

"If the document is an endorsement of the marriage and demonstrates, prima facie, the existence of a marriage as he held, the appellant was required to adduce evidence in rebuttal to disturb the prima facie evidence. She did not. In the absence of any such evidence by the appellant, the prima facie case became conclusive. This obviated the need for the respondent to prove all requirements of the RCMA such as lobola negotiations, the payment thereof, celebrations, etc."[14](footnotes omitted)

[26] Whereas it is clear that the onus to prove the existence of a customary marriage falls squarely on a litigant who relies on the existence of such a customary marriage, it is necessary to determine what is required to be proved in such instance.

[27] The definition of customary law as quoted earlier in paragraph 16 of this judgment, clearly implies the application of law which is found on the customs and usages of the indigenous peoples of South Africa and which forms part of their culture. The authors Bekker and Van der Merwe, in a paper published during 2011, pointed out the problems with the ascertainment of customary law[15] and therein, inter alia, stated the following:

"As a result there are now three forms of customary law. Ngcobo J. in his dissenting judgment, in *Bhe v Magistrate Khayelitsha; shibi v Sithole; S A Human Rights Commission v President of the Republic of South Africa*, summed it up as follows:

> It is now generally accepted that there are three forms of indigenous law:
>
> (a) that practised in the community and [living];
>
> (b) that found its statutes, case law or textbooks and indigenous law (official); and
>
> (c) academic law that is used for teaching purposes.

All of the above forms of customary law differ, which makes it difficult to identify the true customary law. The evolving nature of customary law thus only compounds the difficulty of identifying it. The South African Law Reform Commission discussed this issue at length and came to the conclusion that, in the absence of evidence that proves a new or more authentic

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[14] *Manwadu* id at para 107.
[15] Bekker & Van der Merwe "Proof and Ascertainment of Customary Law" (2011) Vol 26 *SAPL* 115 at 121.

custom, the official version will prevail. The presentation of evidence might thus, in some instances, be essential for a finding of the true customary law". (footnotes omitted)

[28] In *MM v MN,*[16] it was accepted by the Court that "*living customary law*" must be applied. In paragraph 25 of the aforesaid judgment it was held:

"Paradoxically, the strength of customary law – its adaptive inherent flexibility - is also a potential difficulty when it comes to the application and the enforcement in a court of law. As stated by Langa DCJ in *Bhe*, " '(t)he difficulty lies not so much in the acceptance of the notion of 'living' customary law … but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights.'"

[29] In paragraph 29 of the aforesaid judgment, it was also held:

"Customary law may thus impose validity requirements in addition to those set out in sub-section (1)(a). In order to determine such requirements a court will have to have regard to the customary practices of the relevant community." (footnotes omitted)

[30] Further, it was held that the living nature of customary law allows communities to be able to develop their rules and norms in the light of changing circumstances and the overreaching values of the constitution.[17] In order to determine validity requirements, a court will have to have regard to the customary practices of the relevant community,[18] which clearly confirms the application of so-called "*living customary law*" by the Courts. In explaining the concept of "*customary law*" as a primary source of law under the constitution, a summary of decisions dealing with the notion of "*customary law*" was provided in that judgment which reads thus: [19]

"This Court has, in a number of decisions, explained what this resurrection of customary law to its rightful place as one of the primary sources of law under the Constitution means. This includes that -

(a) customary law must be understood in its own terms, and not through the lens of the common law;

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[16] Above n 10.
[17] *MM v MN* above n 10 at para 32.
[18] *MM v MN* above n 10 at para 29.
[19] *MM v MN* above n 10 at para 24.

(b) so understood, customary law is nevertheless subject to the Constitution and has to be interpreted in the light of its values;

(c) customary law is a system of law that is practised in the community, has its own values and norms, is practised from generation to generation and evolves and develops to meet the changing needs of the community;

(d) customary law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves and the peoples who live by its norms change their patterns of life;

(e) customary law will continue to evolve within the context of its values and norms consistent with the constitution,

(f) the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements; and

(g) these aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like *ubuntu*." (footnotes omitted)

[31] In summary: Customary law may be difficult to determine, finds its application through usages and customs of different groups of African peoples, may differ from time and place, and is applied by the Courts in its "*living*" form. As an example, in *MM v MN,*[20] the Constitutional Court found it necessary to call for further evidence on Xitsonga Customary Law in relation to the issue of whether the consent of a first wife was required for the validity of a second customary marriage entered into by her husband. A reading of that judgment in relation to the dissent between the majority judgment and minority judgment on the modus of resolving conflicting versions in the evidence on the applicable customs and usages of the relevant group of peoples cogently, illustrates the difficulties a court may face in determining customary law.

Duty of the Court

[20] Above n 10.

[32] A Court is enjoined by virtue of the provisions of Section 211(3) of the Constitution to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. In the matter of *Shilubana and Others v Nwamitwa* ("*Shilubana*"),[21] Van der Westhuizen J, emphasising the need that evidence must be led where necessary to determine customary law, held as follows:

> "'Living' customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred." (footnotes omitted)

[33] In terms of section 4(7) of the RCMA, a Court is enjoined to investigate whether a valid customary marriage was entered into before an order can be made for registration thereof. In any instance, where a Court is faced with the challenge of determining the validity of an alleged customary marriage, it is imperative that a Court should carefully consider and evaluate customary law in order to make provision for its diversity, adaptability and specific application to different groups of African peoples in order to avoid customary law being morphed into a formal form of law, established through *de facto* judicial notice of customary law by Judges not familiar with customary law, without due regard to the origin, content and diversity of such customary law. The dangers of judicial notice as a means of determining customary law, whether it is done intentionally or unintentionally, was the subject of an informative paper of the author Rebecca Badejogbin of the Nigerian Law school, Abuja, Nigeria, titled "*The Conundrum of Judicial Notice as a Means of Ascertaining Customary Law in Nigerian and South African Courts amid the Convergence of Positivism and Legal Pluralism*" published on 12 December 2019.[22] The learned author opines that formal recording of customary law, which would facilitate and enable judicial notice thereof, may have the result that the proper application of living customary law and the natural evolvement thereof may be stymied. The issue of judicial notice as a source of law was also referred to in the well-researched judgment of De Villiers AJ in the unreported judgment of *ND v MM*.[23]

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[21] 2009 (2) SA 66 (CC).

[22] (2019) Vol 22 *PER / PELJ* 38.

[23] [2020] ZAGPJHC 113 at paras 13 and 31 – 40.

[34] The majority of peoples in South Africa are affected by customary law, which has evolved over many generations through customs and usages that are part of their respective traditions and forms part of the fibre that holds their societies and families together. It is the duty of a court to respect this fact as it is a Constitutionally protected right of a litigant who relies on customary law in support of a cause of action to have a dispute resolved through the application of a recognised system of laws and rules which finds their origin in the customs and practices of the specific cultural group to which that litigant belongs. Calling for evidence on the applicable customary law as it pertains to a litigant in a matter where customary law applies, as was done by the Constitutional Court in *MM v MN,*[24] constitutes compliance with that duty.

The duty of a litigant

[35] It is the duty of a litigant to place before Court a cause of action properly defined within the applicable legal framework. For this very reason, the Rules of Court provide prescripts relating to the formulation of pleadings and defining issues to be adjudicated before a Court and Courts have repeatedly warned that a Court cannot venture outside the perimeters of an issue as defined by the parties in their respective pleadings.

[36] Considering the fact that the application of customary law is a challenging process as is evidenced by the authorities referred to in this judgment, and the duty of care that is bestowed on a Court to apply customary law in its living form on an equal footing to existing common law which is readily ascertainable, a litigant who relies on customary law in support of a cause of action not only has the onus to prove such customary law, but in my view, is required to plead the applicable customary law to such an extent that the contents and application thereof clearly emerge from the pleadings. By referring to content, it is meant that the specific customs, usages or tradition as a factual averment should be pleaded. By referring to application, it is meant that the specific cultural group of indigenous peoples with reference to time and location in relation to the applicable

[24] Above n 10.

customary law should be pleaded. The unreported judgment of *ND v MM*[25] provides an example of the difficulties faced by a court where no clear evidence on the content of the applicable customary law has been placed before the Court, inevitably resulting in an order of absolution from the instance.

[37] Pleading the content and application of customary law will assist the Court, in unopposed matters, to verify the applicable customs or traditions which the litigant avers to be the applicable customary law more readily than a bold statement that customary law applies, as is often done in pleadings. When such a matter becomes opposed, the other party may admit the pleaded customary law or admit part of the averments which may assist in narrowing and defining the true nature of the dispute. As an example, in *MM v MN,*[26] the application of Xitsonga customary law was common cause on the pleadings (affidavits), but the factual issue of whether traditional Xitsonga marriage negotiations required the consent of the first wife for a subsequent valid second customary marriage of the husband, was the determinative issue. The Court thus called for evidence on that issue and evidence on the full spectrum of the content of the applicable customary law was not required.

[38] From the contents of paragraph 28 of this judgment, it is clear that reliance on formal customary law carries inherent risks and that living customary law must be applied. The sources of such law are diverse. In *MM v MN*,[27] the Constitutional Court relied on evidence in the form of affidavits deposed to by the following:

[38.1] Individuals in polygamous marriages under Xitsonga customary law;

[38.2] An advisor to traditional leaders;

[38.3] Various traditional leaders; and

[38.4] Expert testimony drawing conclusions from primary material.

[39] A Court may accept any evidence which is permissible and relevant in order to adjudicate an issue. The aforesaid evidence accepted by the Constitutional Court serves

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[25] Above n 25.
[26] Above n 10.
[27] Above n 10.

as examples of evidence allowed into the proceedings and evaluated to dispose of the issue of required consent as it evolved before that Court. Whereas the Constitutional Court called for further evidence, in my view, it is incumbent upon a party who approaches the Court with a cause of action based on customary law, not only to fully plead such customary law in terms of content and application, but to provide the Court with corroborative evidence in support of the customary law as pleaded, even in matters which are unopposed, for the following reasons:

[39.1] It will result in the application of living customary law without intentionally or inadvertently taking judicial notice of customary law;

[39.2] Customary law can only receive the recognition and respect it deserves as a legal system equal in status to common law, when it is applied with a measure of certainty with due regard to the applicable customs and traditions which inform such customary law;

[39.3] Relying on evidence of witnesses who are able to provide an accurate understanding of the applicable customs and traditions which informs the applicable customary law will assist in building up a reliable source of legal precedent which will assist in access to customary law when necessary; and

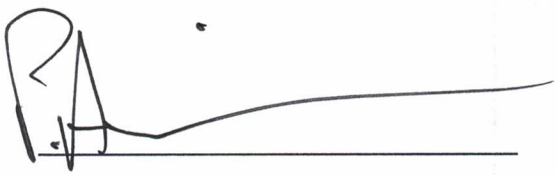
[39.4] Litigants will be prevented from placing distorted versions of customary law before Courts who are in a disadvantageous position to verify or source customary law, often under pressure of a burdened roll.

Conclusions

[40] In the divorce matter, the Plaintiff failed to plead the applicable customs and traditions which informs the customary law relied on. There is no allegation that such customs were complied with. The reference to a dowry letter does not constitute evidence, prima facie or otherwise, that all required customs and traditions as followed by the group of peoples to which she and the Defendant belongs were complied with. The particulars of claim therefore lacks averments essential to sustain a cause of action based on the existence of a customary marriage. There was no evidence made available to the Court in relation to the validity of the alleged customary marriage, and this Court therefore was unable to grant an order for divorce in that matter.

[41] In the application, no evidence was provided on the applicable customs and traditions which informs the customary law that the Applicant relies on. The conduct of lobola negotiations, in isolation, does not prove a customary marriage. There was no evidence in relation to the required customs and traditions to establish a customary marriage. The Second Respondent could not be ordered to register the alleged customary marriage unless this Court was able to investigate the validity of the alleged customary marriage, which this Court was unable to do on the evidence before it. The application was therefore dismissed.

[42] In the premises, the orders that I made were informed by the reasons as they appear from this judgment.



P A VAN NIEKERK
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Plaintiff:	ADV FF Muller
Instructed by:	Hack Stupel and Ross Attorneys
For the Defendant:	No Appearance
Instructed by:	
For the Applicant:	ADV Reon Van Der Westhuizen
Instructed by:	Burger and Hlongwane attorneys
For the First Respondent:	No Appearance
Instructed by:	

Date of the hearing: 10 February 2025
Date of judgment: 18 March 2025

Date of the hearing: 11 February 2025
Date of judgment: 18 March 2025