

**THE “REVOLVING DOOR” OF
REQUIREMENTS FOR VALIDITY OF
CUSTOMARY MARRIAGES IN ACTION**

***Mbungela v Mkabi* [2019] ZASCA 134**

1 Introduction

On the face of it, section 3 of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) does not look ominous. The section provides:

“For a customary marriage entered into after the 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.”

Notwithstanding the plain language of the above provision, there is abundant case law and academic articles dealing with the interpretation and/or application of section 3(1)(b) in particular. A decision of the Supreme Court of Appeal (SCA) in *Mbungela v Mkabi* ((820/2018) [2019] ZASCA 134) adds to what is fast becoming a jurisprudence of the salient issues relating to the understanding of paragraph (b) of subsection (1). The issue of the scope of this paragraph has become more relevant in the inquiry into the transfer and/or integration of the bride into the groom’s family pursuant to the conclusion of a *lobolo* agreement. In his latest academic offering, Manthwa introduces this ongoing Achilles heel of customary marriages by referencing a number of cases and academic opinions (Manthwa “Handing Over of the Bride as a Requirement for Validity of a Customary Marriage” 2019 *THRHR* 652 652–653); the references serve to justify the relevance of his work in the presence of so much jurisprudence on the topic. It is prudent to highlight also that Bakker (“Integration of the Bride as a Requirement for a Valid Customary Marriage: *Mkabe v Minister of Home Affairs* [2016] ZAGPPHC 460” 2018 21 *PER/PELJ*) provided an insightful criticism of the court *a quo* in *Mkabe v Minister of Home Affairs* ((2014/84704) [2016] ZAGPPHC 460). On the whole, it is argued here that the judgment of the SCA is incorrect in a few material respects and that the criticism by Bakker of the court *a quo* is legally sound and contributes meaningfully to the jurisprudence in this area.

As this case note demonstrates, the SCA not only incorrectly interprets and applies the law, but the judgment also unjustifiably departs from precedents relating to the transfer and/or integration of the bride. In effect therefore, it is submitted, the SCA establishes a changeable attitude relating

to the transfer and/or integration of the bride. This attitude is symptomatic of an apparent constitutional interpretation that desires a specific outcome almost at any cost (Bishop and Brickhill "In the Beginning Was the Word: The Role of Text in the Interpretation of Statutes" 2012 SALJ 681 695). As such, this case note is relevant as it captures the latest instalment of the changing attitude towards the precepts of the transfer and/or integration of the bride. Thus, there is as much a need for continuous monitoring of this revolving door of interpretation and/or application as there is for cases dealing with this aspect. The matter is therefore considered as unsettled and merits ongoing academic discourse.

This issue of unsettled law finds resonance in the pronouncements of the Constitutional Court in *Bhe v Magistrate, Khayelitsha* ([2004] ZACC 17 par 112), where the court stated:

"The problem with development [of living customary law] by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems."

In light of the foregoing, the casuistic and often contradictory jurisdiction on the issue of transfer and/or integration of the bride is considered in the context of the constitutional injunction in terms of section 39(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the facts of the case in *Mbungela v Mkabi* (*supra*).

2 The facts

The first respondent, Mr Madala Philemon Mkabi, instituted action proceedings in the High Court of South Africa Gauteng Division, Pretoria (henceforth, the court *a quo*) seeking the following orders: (a) a declaration that he and Ms Ntombi Eunice Mbungela (henceforth, the deceased) had concluded a valid customary marriage; and (b) compelling the second respondent, the Minister of Home Affairs, to register and issue a certificate of registration of that customary marriage (*Mkabe v Minister of Home Affairs supra*).

The first respondent also sued the first appellant (Mr Piet Mbungela, the deceased's elder brother and head of her family), the second appellant (Ms Thobile Carol Mkhonza, the deceased's daughter and executrix of her estate) and the third respondent (the Master of the High Court, Nelspruit, who issued the second appellant's letter of executorship as the party to the proceedings). The first respondent later withdrew action against the first appellant, Piet Mbungela. The Minister and the Master of the High Court did not file any papers to defend the action. Only the second appellant defended the action (*Mkabe v Minister of Home Affairs supra* par 2).

On 2 April 2010, the first respondent sent his family to the deceased's home in order to negotiate *lobolo* for the deceased. The families agreed that he would pay an amount of R12 000 as *lobolo*. Pursuant to that agreement, an amount of R9 000, a cow, a suit, hat and shoes for the father-in-law, a blanket, two-piece costume for the mother-in-law, snuff, liquor, beers and other drinks were handed to the family of the deceased. The first respondent

contended that he had no plans for any celebration of the marriage or handover ceremony of the bride to his family since he had been living with the deceased from 2007 (*Mkabe v Minister of Home Affairs supra* par 6).

The appellants argued that no valid customary marriage had been concluded between the respondent and the deceased because there had been no handing over of the deceased to the respondent's family. Furthermore, the *lobolo* had not been paid in full, and thus the requirements for a valid customary marriage as contemplated under section 3(1)(b) were not met (par 16). The court concluded that a valid customary marriage had been entered into between the first respondent and the deceased on 2 April 2010 even though there had been no formal handing over of the bride to the family of the plaintiff (*Mkabe v Minister of Home Affairs supra* par 40). The appellants were granted leave to appeal against the order of the court *a quo*. The appeal is chiefly based on section 3(1)(b) of the RCMA.

3 The decision

According to the SCA, per Maya P, there was sufficient evidence before the court to enable it to resolve the matter with ease (*Mbungela v Mkabi supra* par 23). Notwithstanding this confidence, it is submitted that the decision as a whole does not display the apparent ease of which the court speaks. If anything, the judgment, read as a whole, indicates that the court was persuaded by facts and events that in our opinion have no bearing on the legal and factual considerations for the transfer and/or integration of a bride.

First, the court noted that the attendances by a delegation of each of the respective families at each other's funerals signified the existence of a marital bond between the Mkabi and Mbungela families (*Mbungela v Mkabi supra* par 23). While this may have been important circumstantial evidence in coming to some conclusions about the families' relationship, this fact stands in a context that is far removed from the celebration of a marriage. Suffice it to say that while funerals and weddings are both steeped in tradition and custom in indigenous communities, funerals share no discernible similarities to the transfer and/or integration of a bride. This point, therefore, should have no material effect on the case. Secondly, the court found itself persuaded by the celebration of the marriage in a church (*Mbungela v Mkabi supra* par 24). In the words of the court, "there can be no greater expression of the couple's consummation of their marriage". Thirdly, the court ignored the fact, as soundly aired by Bakker, that integration of the bride is the final step parties must take before they are regarded as legally married under customary law (2018 *PER/PELJ* 7). In effect, this step is peremptory and cannot be waived at will by the parties. In advancing this argument, Bakker relied on the academic works of others and on *Motsoatsoa v Roro* ([2010] ZAGPJHC 122) in particular (2018 *PER/PELJ* 7). Despite this precedent and the correct interpretation by Bakker and others, the SCA found the transfer and/or integration of the bride to be not necessarily key in the determination of the validity of a customary marriage (*Mbungela v Mkabi supra* par 30). According to it, this ranked below the parties' "clear volition and intent" to marry.

In the discussion below, the judgment is analysed in light of the above findings.

4 Discussion of the judgment

“The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result, may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value.” (*Bhe v Magistrate, Khayelitsha supra* par 154)

The SCA, through its judgment, affirmed the above statement made by Ncgobo J more than a decade ago. The court failed to ascertain the true indigenous law practice of handing over of the bride, thus exposing the practice to a possible abuse and distortion. The flexibility, evolution and adaptability of customary law is something that has been written about (see Moore and Himonga “Living Customary Law and Families in South Africa” 2018 *South African Child Gauge* 61; Bakker 2018 *PER/PELJ*; Manthwa 2019 *THRHR* 652). It is worth noting that such flexibility, evolution and adaptability should not amount to and/or be construed as being tantamount to a complete disregard of lived customary law principles and practices. To this end, Manthwa very sensibly cautions against the creation of “paper law” at the expense of an authentic system of living customary law by which litigants and communities may be living (2019 *THRHR* 657). Inevitably, this puts into focus the appreciation of the distance between the courts and the communities whose law they seek to interpret and develop (Manthwa “Proof of the Content of Customary Law in Light of *MM v MN: A Constitutional Approach*” 2017 *THRHR* 300 304).

Section 3(1)(a) of the RCMA was not contested in this case. The decision revolved around whether the handing over of the bride is a peremptory, directive or even optional silent requirement in terms of section 3(1)(b). While there seems to be no agreement on the exactness of the answer to this inquiry, the changing attitudes in different cases towards what is required for validity create the unstable impression of a revolving door for validity requirements. In *Sengadi v Tsambo* ([2018] ZAGPJHC 613), it was remarked that the insistence on the aspect of handing over as an integral part of customary marriages cannot be sustainable (*Sengadi v Tsambo supra* par 20). This, to the court’s mind, was largely because of the much-spoken-about flexibility, evolution and adaptability of customs. This flexibility, evolution and adaptability is further highlighted by the decision of *C v P* ([2017] ZAFSHC 57) where the court acknowledged something called “constructive delivery” of the bride (*C v P supra* par 52). In keeping with this trend, the court *a quo* noted that the transfer and/or integration requirement cannot be given more weight such that its absence invalidates a customary marriage (*Mkabe v Minister of Home Affairs supra* par 38). This legally incorrect interpretation of section 3(1)(b) was endorsed by the SCA as already highlighted above (*Mbungela v Mkabi supra* par 30).

This change in attitude is a departure from the earlier decisions of the High Courts and the SCA in *Motsoatsoa v Roro* (*supra*) and *Moropane v Southon* ([2014] ZASCA 76) respectively. The importance of this practice as an integral part of the conclusion of a customary marriage was advanced in the case of *Motsoatsoa* in the following express terms:

“Handing over of the bride is not only about celebration with the attendant feast and rituals. It encompasses the most important aspect associated with married state namely go *laya/ukuyala/ukulaya* in vernacular. There is no English equivalent of this word or process but loosely translated it implies “coaching” which includes the education and counselling both the bride and the groom by the elders of their rights, duties and obligations which a married state imposes on them. This is the *most important and final step in the chain of events* happens in the presence of both the bride and the groom’s families. *One can even describe this as the official seal in the African context, of the customary marriage.* The handing over of the bride is what distinguishes mere cohabitation from marriage. Until the bride has formally and officially handed over to the groom’s people there can be no valid customary marriage.” (par 19) (authors’ own emphasis)

The position adopted above was previously heeded by the SCA. In *Moropane*, the court found, relying on expert testimony, that the transfer and/or integration of the bride “is the most crucial part of a customary marriage” (par 40). While agreeing with the decision in *Moropane*, it is safe to say that the case was confined to the Bapedi tribe in ascertaining the requirements for a valid customary marriage. However, what is of significance from that judgment is that the court invited expert testimony to assist it in ascertaining the position. In *Mkabe v Minister of Home Affairs* (court *a quo*), however, there is nothing to indicate that the services of an expert witness were employed. If anything, the judgment read as a whole indicates that the court proceeded to give judgment without a thorough inquiry into the position of the parties’ indigenous practices of customary marriage.

Furthermore, the court *a quo*, and subsequently the SCA in *Mbungela*, presented the practice they condoned as if it is a general practice pertaining to customary marriages.

Despite a precedent set by the case of *Moropane*, the court *a quo* ignored the principle of *stare decisis* without even attempting to highlight that the judgment was bad in law (Manthwa 2019 *THRHR* 656). It is in keeping with the *stare decisis* principle that decisions of the higher courts are binding on lower courts and that lower courts can only depart from a precedent if it is shown to be bad in law.

The importance of the transfer and/or integration has also been underscored by Bennett (*Customary Law in South Africa* (2004) 217). This character of customary marriages, Bennett asserts, is necessary to distinguish customary marriages from “on the one hand, an informal partnership and, on the other, from a marriage according to other cultural or religious traditions”.

The SCA made a few telling statements regarding the chain of events in the negotiation of the marriage between the first respondent and the deceased, none more significant than that noting that the parties had a white

wedding at the deceased's church (*Mbungela v Mkabi supra* par 7). It is common cause that a white wedding is not, for all intents and purposes, a customary marriage – this notwithstanding the fact of their proliferation in Black communities in recent years. It is unfathomable how the court reached a conclusion that parties who voluntarily opted to conclude a white wedding in a church have complied and/or waived the transfer of a bride requirement that is important for the conclusion of a customary marriage. In essence, therefore, it is our submission that the association of a white wedding with the completion of a valid customary marriage gives rise to three incorrect implications of both fact and law: first, that the conclusion of a white wedding by the parties is tantamount to handing over of the bride in terms of customary law irrespective of the location of that ceremony; secondly, that the conclusion of a white wedding by the parties waives a customary law practice of handing over; and thirdly, the parties' clear volition and intention to marry suffices if the section 3(1)(a) requirements are complied with (*Mbungela v Mkabi supra* par 30).

Whichever way these implications are looked at, there is no doubt that the inferences drawn here are not supported by the lived realities of the ethnic groups here involved – namely, the Swati and Tsonga people. This has the tendency of producing an ineffective “paper law” to which Manthwa sensitises us (2019 *THRHR* 657) and leads to the distortion, abuse and divergence of customary law principles and practices as cautioned by Ngcobo J in *Bhe* (*supra* par 154).

5 Invoking the Constitution

The injunction in section 39(2) of the Constitution has long been recognised as not merely discretionary but as creating also a general obligation on the court to interpret legislation, or develop both the common law and customary law, in a manner that promotes the spirit, purport and objects of the Bill of Rights (*Carmichele v Minister of Safety and Security* [2001] ZACC 22 par 39). Armed with this general obligation, the SCA concludes that the provision for the transfer and/or integration of the bride has been waived. According to the court, this finding “does not offend the spirit, purport and objects of the Bill of Rights” (*Mbungela v Mkabi supra* par 26). Devenish opines that this injunction creates a “value-based” theory of interpretation (“*African Christian Democratic Party v Electoral Commission: The New Methodology and Theory of Statutory Interpretation in South Africa*” 2006 *SALJ* 399 401) which flows necessarily from the so called “*Hyundai*-inspired” interpretation. The “*Hyundai*-inspired” interpretation obliges the courts to interpret, where possible, legislation in conformity with the Constitution (Maseko “The Inconsistency of the Constitutional Court on the Application of the *Hyundai*-Inspired Interpretation” 2017 *Obiter* 664). Essentially, this interpretation promotes constitutionalism and its values. Before one delves into the value system that is the hallmark of the constitutional interpretation, it is important to highlight that Devenish avers that the process of interpretation is “dependent also to some extent on the jurisprudential disposition of the judge(s)” (Maseko 2017 *Obiter* 408). Notwithstanding *Hyundai*-inspired interpretation, it must be noted that while such interpretation is entrenched in

our law, it is equally important for the court not to assume that every matter requiring interpretation of legislation or the development of customary law for that matter raises constitutional issues (Marais “A Common-Law Presumption, Statutory Interpretation and Section 25(2) of the Constitution – a Tale of Three Fallacies: A Critical Analysis of the Constitutional Court’s *Arun* Judgment” 2016 *SALJ* 629 661).

Against this backdrop, two questions then arise. First, what is the scope of this value judgment on constitutional interpretation? Secondly, what is the jurisprudential disposition of presiding officers in customary law matters?

The first inquiry falls to be interrogated briefly. It is submitted that there is no clear meaning, and nor is it desirable to formulate a specific meaning, of the spirit, purport and objects of the Bill of Rights. The historical context of the legislation, the South Africa envisioned by the Constitution and the interpretative canons must provide clear guidelines. Nonetheless, the wording of legislation cannot and should not be disregarded (Bishop and Brickhill 2012 *SALJ* 682). After all, words do have meaning. Therefore, the court should not interpret legislation as if it were unwritten. A clear disregard of this cautionary rule appears in *Mbungela v Mkabi* (*supra* par 27) where the court, in less subtle terms, implies that compliance with the consent requirement in particular is sufficient for the validity of customary marriages. However, the authors align themselves with Manthwa who points out that consent is two-fold in customary marriages as distinct from other types of marriage (2019 *THRHR* 660). Thus, not only does a party consent to the marriage itself, but also to be married under customary law. To decide that the transfer requirement may adversely impact on the values of the Constitution without substantiating further is to question the constitutionality of the RCMA without both merit or reason. It would seem, unfortunately, that the court wanted to reach its decision at any cost. Our uncertain jurisprudence in this area could have benefitted from a well-reasoned and justified statement about the values underpinning the judgment.

The second inquiry relates to the jurisprudential disposition of judges. Manthwa opines that “courts will always try to justify decisions they make on customary law based on the Constitution” (2017 *THRHR* 306). This proposition is loaded and should be treated with circumspection. This is especially true if the courts have not erred in every judgment on customary law. Manthwa’s view cannot be correct in light of judgments like *Motsoatsoa* and *Moropane*. However, in respect of the judgment under discussion, the authors are hard-pressed not to echo the views of Manthwa and submit that the SCA simply used the Constitution to justify its outcome. It is submitted that the judgment’s conclusion is not sufficiently reasoned to support a “*Hyundai*-inspired” interpretation. This submission is supported by the summary that follows in the conclusion.

6 Conclusion

The perilous consequences of uncertainty in the interpretation and/or application of section 3(1)(b) of the RCMA no doubt will continue to breed opportunistic litigation by parties whose motives cannot always be good

(Manthwa 2019 *THRHR* 658). While this may not always be controlled by the courts, except to give punitive cost orders where appropriate, it is our view that judgments have to stamp out the revolving door attitude and ought to be good in law. Regrettably, the decision of the SCA is not an example of a judgment good in law. First, the court notes the attendance of a funeral by both families as significant (*Mbungela v Mkabi supra* par 23). There is no link between handing over of a bride and a funeral. In fact, it is not uncommon for families to attend functions and funerals of people who are merely dating. In effect, this point proves nothing and is therefore irrelevant. Secondly, the court entangles itself in the idea of the church wedding as an expression of the consummation of the marriage (*Mbungela v Mkabi supra* par 24). It would be ill-advised to argue that purported customary marriages cannot be concluded in a church. However, for the validity of a customary marriage to be established, the transfer and/or integration aspect must occur expressly in line with the specific community and ethnic group's customs. To simply celebrate in a church is not sufficient for the conclusion of a customary marriage. It is our view that a marriage between the first respondent and the deceased was concluded, or at least was purported to have been concluded. However, on the facts, there is nothing to justify a conclusion that the marriage is a customary one. Thirdly, the value-judgment consideration in paragraph 26 jumps out of nowhere, so to speak. There is nothing in context for that conclusion to be drawn except, the authors submit, the fact that the court wanted to lay claim to the injunction in section 39(2) of the Constitution. Unfortunately, the court is guilty of the habit described by Manthwa of using the Constitution to justify its decisions on customary law in general (2017 *THRHR* 306). Finally, but by no means least, the court makes an error of law in an effort to caution against the possible dangers of opportunistic litigation (*Mbungela v Mkabi supra* par 28). The court ought to have known that the children born of marriages that do not meet the threshold for validity are in fact protected by intestate succession laws (Jamneck and Rautenbach *The Law of Succession in South Africa* 3ed (2017) 29). A reading of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 in section 1 answers the hypothetical inquiry of the court.

In conclusion, the judgment is bad in law and not satisfactorily justified. In the end, the question that needs further interrogation by scholars is just how flexible are the requirements for the validity of customary marriages? At some point, the authors submit, the revolving door for validity requirements must be settled.

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