MABENA v LETSOALO 1998 (2) SA 1068 (T)

Citation	1998 (2) SA 1068 (T)
Case No	A226/96
Court	Transvaal Provincial Division
Judge	Van der Walt AJP, Du Plessis
Heard	October 24, 1997
Judgment	November 20, 1997
Counsel	J C Bekker for the appellant P M Mtshulana for the respondent
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Customary law - Marriage - Validity of - Lobolo - Customary marriage comprising two distinct legal actions, viz (1) marriage agreement and (2) lobolo agreement with handing over of bride - For (1), consent of bride, bridegroom and 'guardian' of bride required - For (2), consent of guardian of bridegroom and guardian of bride required - No reason why independent, adult bridegroom should require consent of parents to marry or should not himself negotiate for payment of lobolo - Accordingly, if father of bridegroom not involved in lobolo agreement, consent of bridegroom himself and bride's guardian required - Traditionally not possible for mother of bride to be her daughter's guardian - However, in practice not repugnant to customary law of marriage for mother who is head of family to negotiate for and receive lobolo - Court recognising such principle.

Headnote : Kopnota

When one M, the appellant's son, died, the administration of his estate became the responsibility of the local magistrate in accordance with the provisions of s 23 of the Black Administration Act 38 of 1927. The respondent averred that she and M had been parties to a customary marriage. Regulation 2*(d)* of the regulations promulgated under the Act provided that the Minister of Justice could, where a deceased person had been party to a customary marriage, determine that the property of the deceased should devolve as if he or she had been married out of community of property. The magistrate requested the Director-General of Justice in turn to request the Minister of Justice to declare that M's property should so devolve. The Director-General instructed the magistrate to obtain confirmation of the existence of the marriage from M's parents and to hold an enquiry into the existence of the marriage should such confirmation not be obtained. M's parents denied the existence of the marriage but the magistrate went on to find that it had indeed existed. M's father then lodged the instant appeal against the magistrate's decision. It was common cause that M's parents had refused to agree to a customary marriage between the respondent and M. M had himself then entered into negotiations with the respondent and her mother. A R600 lobolo had been agreed upon. As the respondent's father had abandoned the family, an uncle of the respondent had been present to receive the lobolo. The essential issue was whether the magistrate had been correct in holding that a customary marriage had existed between the respondent and M. The appellant contended

that the marriage was void because (1) he himself had never consented to it and (2) the respondent's father had not been involved in the lobolo negotiations. The Court pointed out that the customary marriage comprised two distinct legal actions: (i) the marriage agreement, which traditionally required the consent of the bride, the bridegroom and the guardian of the bride, and (ii) the lobolo agreement, which traditionally required the consent of the guardian of the bride and the guardian of the bridegroom. (At 1073F--G/H.)

Held, as to (1), that the consent of the father or guardian of the bridegroom, or his participation in the negotiations regarding the lobolo, was not essential

to the existence of a customary marriage. There was no reason to hold that an independent, adult man should not be entitled to negotiate for the payment of lobolo in respect of his chosen bride, nor was there any reason to hold that such a man needed the consent of his parents to marry. (At 1072D/E and 1073A--B/C.)

Held, accordingly, that the fact that the appellant had not consented to the marriage had no effect on its validity and that by the same token his lack of involvement in the lobolo negotiations was of no consequence. (At 1073C.)

Held, further, as to (2), that, although it was according to traditional law impossible for the mother of the bride to be her daughter's guardian, there existed instances in practice where mothers negotiated for and received lobolo and consented to the marriage of their daughters. That a woman who was head of her family could negotiate for and receive lobolo was thus not repugnant to the customary law of marriage as actually practised. (At 1073I and 1074F--G.)

Held, further, that such a principle of living, actually observed law (as opposed to the 'official version' as documented by writers) had to be recognised by the Court as it would constitute a development in accordance with the 'spirit, purport and objects' of chap 3 of the Constitution of the Republic of South Africa Act 200 of 1993. (At 1074H/I--1075B/C, paraphrased.)

Held, accordingly that respondent's mother had in law been entitled to negotiate for and receive lobolo in respect of respondent. She had also been entitled to act as respondent's guardian and to consent to her marriage. (At 1075D/E--E.) Appeal dismissed.

Annotations:

Reported cases

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC) (1996 (5) BCLR 658): dictum at para [59] (884F--885D) applied.

Statutes Considered

Statutes

The Black Administration Act 38 of 1927, s 23: see *Juta's Statutes of South Africa 1996* vol 5 at 1-48.

The Constitution of the Republic of South Africa Act 200 of 1993, s 35(3): see *Juta's Statutes of South Africa 1996* vol 5 at 1-137.

Case Information

Appeal from a decision of a magistrate on the validity of a customary marriage. The facts appear from the judgment of Du Plessis J.

J C Bekker for the appellant.

P M Mtshulana for the respondent.

Cur adv vult

Postea (November 20).

Judgment

Du Plessis J: The late Mr Joseph Mabena passed away on 23 April 1994. His estate was administered by the magistrate, Pretoria-North in accordance with the provisions of s 23 of the Black Administration Act 38 of 1927 and of the regulations promulgated thereunder (GN R200 of 6 February 1987). The respondent in this appeal avers that she and the late Mr Mabena had been parties to a customary marriage. Regulation 2*(d)* of the regulations referred to above provides that the Minister of Justice may in certain circumstances, where a deceased person had been a party to a customary marriage, determine that property of the deceased person shall devolve as if he had been married out of community of

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property. The magistrate of Pretoria-North addressed a letter to the Director-General of Justice requesting that official in turn to request the Minister to act in terms of reg 2*(d)*. In reaction to this request, the Director-General wrote to the magistrate instructing her to obtain from the late Mr Mabena's parents confirmation of the respondent's averment that she and the deceased had been parties to a customary marriage. Should such confirmation not be obtained, the Director-General wrote, the magistrate was to hold an inquiry in order for her to ascertain whether the marriage existed or not. Mr Mabena's parents denied the existence of such a marriage, and a formal inquiry was held. The learned magistrate found that a customary marriage between the respondent and the deceased had existed. The father of the deceased lodged an appeal to this Court against the finding of the learned magistrate. That appeal is now before us. All concerned accepted that the magistrate's finding is appealable. Whether it is, was not argued before us. I assume without finding that the appeal is properly before us. (But see s 83 of the Magistrates' Courts Act 32 of 1944.)

Before the magistrate the respondent testified that she became pregnant in 1988. The late Mr Mabena was the father. Apparently in accordance with customary law the parents of the deceased paid R200 'damages' in respect of the pregnancy to the family of the respondent. (The evidence later was that the respondent's father had deserted the family long ago. However, the respondent did say that her father was involved in the negotiations regarding these damages. In view of the unequivocal evidence that he had abandoned the family, this probably is an error.) A child was born to the couple. In 1988 the deceased purchased a house in Mamelodi, a township in the urban area of Pretoria. Since about March or May

1989 until Mr Mabena died, the respondent and the child lived with him in the house. The couple decided to regularise their relationship because, to quote the respondent 'we could not proceed staying together whereas no lobolo was paid for me'. However, relations between the respondent and the parents of the deceased were poor, and the latter were not prepared to agree to a customary marriage between the respondent and the deceased. The deceased then 'entered into negotiations' with the respondent and her mother, and an amount of R600 in respect of lobolo was agreed upon. The deceased arranged with two of his friends to go and pay the lobolo to the respondent's mother. As the respondent's father had abandoned his family an uncle of the respondent was by arrangement present to receive the lobolo. Those present then had a 'small party'. The respondent and the child thereafter returned to the common home in Mamelodi.

The respondent is a Pedi while the deceased was a Ndebele. The respondent said that their marriage was performed according to Pedi custom. However, she also said:

> 'My people and I, we do not engage in these customary traditions. We did it as it pleased my mother. It is how we do it at home, it is how we do it according to our custom.'

When it was put to her in cross-examination that they did in several respects not properly follow the Pedi customs, she replied:

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> 'Well, customs differ, it depends on an individual, how does he or she want to do it.'

Mr M R Madisa, a friend of the deceased testified that the deceased sent him together with Mr Skosana and Mr Mkobane to go and pay the lobolo to the family of the bride. He realised that it was the deceased and not his family who was sending them. When asked whether that is customary, he said that it did happen in the case of a groom who 'has his own house'.

Mr Michael Mkhwebane is an uncle of the respondent. He was requested by the Letsoalos to be present to receive the lobolo. He did that. Although he had known the deceased for a long time, he said that he did not know that the men bringing the lobolo were not of the Mabena-family.

The respondent's mother testified that the respondent and the deceased lived together after the birth of their child. The deceased told her that they wished to marry. The witness knew that the parents of the deceased were opposed to the marriage. In the circumstances she and the deceased did the best they could; the deceased arranged with her that he would come and pay lobolo. The respondent returned to the home of the witness. A date for payment of lobolo was arranged. The witness arranged for her brother and other family members to be present. The lobolo was paid as testified to by the other witnesses. After the ceremony, the respondent resumed living with the deceased. The witness confirmed that Mr and Mrs Mabena were unaware of the payment of the lobolo.

The appellant, who it will be recalled was the father of the deceased, testified that the deceased never asked him if he could marry the respondent. He denied any knowledge of the alleged customary marriage. He also denied that the couple had been living together. His version was that the respondent and the child moved into the house after the death of the deceased.

Mrs Christina Mabena is the mother of the deceased. She testified that she and her husband were never asked whether they would consent to a marriage of their son to the respondent. She also said that the two did not live together.

The learned magistrate held that the deceased and the respondent had lived together. She rejected the contrary evidence of the appellant and his wife. This finding was attacked on appeal. The evidence of the respondent, her mother and the other witnesses that the parties went through a ceremony at least purporting to have been a customary marriage is undisputed. It must clearly be accepted. That being so, it is quite improbable that the respondent and the child would not have lived with the deceased. Moreover the evidence of the appellant and his wife that the deceased bought the house only because he wanted to be nearer to the railway station does not bear scrutiny; it is common cause that he had a child with the respondent when he bought the house and it is clear that he still felt enough for them to go through the marriage ceremony. In those circumstances, the probabilities indicate that he bought the house so that the respondent and the child could live with him. The learned

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magistrate was with respect correct in rejecting the evidence of the appellant and his wife, and in accepting the evidence that the couple did live together.

The essential issue is whether the learned magistrate was correct in holding that a customary marriage existed between the respondent and the deceased.

Mr *Bekker* for the appellant submitted that 'the essence of a customary marriage is unification of the two family groups', ie those of the bride and the bridegroom. In this instance it is common cause that the parents of the bridegroom did not consent to the marriage nor participated in the negotiations regarding the marriage and the lobolo. Mr *Bekker* argued that the absence of a relationship between the two family groups is fatal to the existence of a customary marriage.

It is true that a customary marriage is not purely a matter between the bride and the bridegroom. It also is 'a group concern, legalising a relationship between two groups of relatives'. (M"nnig *The Pedi* at 129; see also Olivier *Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 3rd ed at 9; *Seymour's Customary Law in Southern Africa* 5th ed by Bekker at 96.) However, it does not follow that the father of the bridegroom's consent or his participation in the negotiations regarding the lobolo is essential to the existence of a customary marriage. *Olivier* (*op cit* 45 and 46) says that, traditionally, a young man would not have possessed sufficient means to deliver the lobolo for his first wife. From that it followed, writes the author, that the father ordinarily ('gewoonlik') provided the lobolo for his son's first wife and thus consented to the marriage and participated in the negotiations. The author continues:

> 'Onder die hedendaagse omstandighede is dit egter wel denkbaar dat 'n man genoegsame vermoëns in sy eie naam besit om self in te staan vir die vereiste lobolo. Dit is nie duidelik of, in so 'n geval, die toestemming van die vader nog as vereiste gestel sou kon word nie; dit skyn logies om aan te neem dat sodanige toestemming nie meer nodig is vir die sluiting van 'n regsgeldige huwelik nie, aangesien die jonkman dan self as party kan optree in die huweliksooreenkoms met die vader van die meisie.'

Seymour (*op cit* at 112) puts it even stronger:

> 'When he disapproves of his son's choice for a first wife, the bridegroom's guardian may refuse to pay lobolo; although he may thus dissociate himself from the customary marriage, he cannot prevent it, if the bridegroom is able to find lobolo himself. The consent of the bridegroom's guardian, therefore, affects only his liability or otherwise . . . in the matter of lobolo, but seems to have no bearing on the validity of the customary marriage completed without his help or approval.'

Neither of the latter two authors, when enumerating the essentials of a customary marrige, mentions the consent of the bridegroom's father or guardian as an essential. (*Olivier* (*op cit* at 44) and *Seymour* (*op cit* at 105).) See also the South African Law Commission's *Report on Marriages and Customary Unions of Black Persons* (Project 51, dated October 1986 at 26 and 27). *M"nnig* (*op cit* 131) writes that, if the father does not consent to the marriage 'the decision of the parents is accepted as final by the Pedi'. C L Harries *Notes on Sepedi Law and Customs* at 6--7 makes no mention of the possibility that the father might refuse consent once

his son has made known his choice of a wife. He does say that the bridegroom is not supposed to involve himself in the negotiations. The latter two authors are clearly writing about the law as it was in a traditional society. At present many unmarried men live on their own and fend for themselves. There is no reason to hold that an independent, adult man is not entitled to negotiate for the payment of lobolo in respect of his chosen bride, nor is there any reason to hold that such a man needs the consent of his parents to marry. That that is how the customary law has developed is evident from what *Seymour* and *Olivier* write. It is in addition borne out by the evidence of Mr Madisa that a man could negotiate for lobolo if he 'has his own house'. It is accordingly held that the fact that the appellant did not consent to the marriage under discussion has no effect on the validity of the marriage. By the same token his lack of involvement in the lobolo negotiations is of no consequence.

It is an essential requirement of a customary marriage that the bride must be handed over to the bridegroom. (*Seymour* (*op cit* at 105); *Olivier* (*op cit* at 41); *Law Commission Report* at 27.) Mr *Bekker* submitted that the bride in the present case was not handed over to the bridegroom, and that the customary marriage is accordingly void. Subject to what is said later regarding the lack of involvement of the respondent's father, the submission is not in accordance with the proven facts: The respondent did go and live with the deceased after the marriage. As the customary law at present requires no formalities in respect of the handing over, Mr *Bekker's* submission cannot be upheld. (As to formalities, see *Seymour* (*op cit* at 108--9).)

Mr *Bekker's* final argument was that because the respondent's father did not consent to the marriage and was not involved in the negotiations regarding the lobolo, the marriage is void. The customary marriage comprises two distinct legal actions: there is on the one hand the marriage itself. On the other hand there is the lobolo agreement with the handing over of the bride. For the first the consent of the bride, the bridegroom and the 'guardian' of the bride is required. For the second, where the father of the bridegroom is not involved, the consent and agreement of the bridegroom and the guardian of the bride is required; the bride is not involved in the lobolo agreement. The thrust of Mr *Bekker's* argument is this: in terms of customary law a female person cannot be the guardian of the bride, it has to be a

male person, in the ordinary course her father. As the lobolo agreement *in casu* was contracted by the respondent's mother, no valid customary marriage ensued.

It is manifest that all the authorities on customary law accept that only the father of the bride or another male guardian could validly contract for and receive lobolo. (See all the authorities quoted above.) According to traditional customary law the mother of the bride could not be the guardian of her daughter; she was herself under the guardianship of her husband or of her own father or of their successors. (See Olivier in Joubert (ed) *The Law of South Africa* vol 32 para 4 and para 148.)

The evidence in this case is that the respondent's father had abandoned the family. The evidence further is that the respondent's mother as a matter of fact functioned as head of the family (consisting as far as

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one can ascertain from the evidence, only of the two women). No authority was quoted to us as to what the rule of customary law is in such circumstances. Mr *Bekker's* argument proceeded on the assumption that such a state of affairs cannot exist where people apply customary law. However, those are the facts in this case, and that is what we have to deal with. The respondent said that they performed the marriage according to their custom. Her evidence in this respect is somewhat ambiguous: she might have been referring to a custom practised by her and her mother and not to a general custom she knows about. However, there are authorities which indicate that the circumstances of this case are not unique. The learned author Labuschagne 'Regsakkulturasie, Lobolo-Funksies en die Oorsprong van die Huwelik' (1991) 54 *THRHR* 541 at 551 writes:

> 'Dit gebeur in praktyk reeds dat die vrou self die lobolo aan haar man terugbetaal as sy nie met die huwelik wil voortgaan nie. Dit gebeur soms dat die man sy vrou en kinders vir 'n lang tydperk verlaat. In sodanige omstandighede ontvang die vrou soms haar dogter se lobolo om haarself en die kinders te onderhou.'

The South African Law Commission Project 90 'The Harmonisation of the Common Law and the Indigenous Law' *Discussion Paper 74* at 64 discusses the need for the consent of the bride's father and submits that the consent of the mother (in the case of minors) should also be required. They then state:

> 'If a mother is entitled to supply the consent to her ward's marriage, then she would also be entitled to arrange the bride wealth. Under the KwaZulu/Natal Codes (s 59) *de jure* emancipated women already have this power.'

It must therefore be accepted that there are instances in practice where mothers negotiate for and receive lobolo, and consent to the marriage of their daughters. The present case is clearly not an isolated one. Seen against that backdrop, the respondent was probably referring to the custom followed by people in similar circumstances to their own. A rule that a woman who is the head of her family may negotiate for and receive lobolo is not repugnant to the customary law of marriage. This is clear from the views expressed by the Law Commission. Customary law does recognise that a woman may act as head of a family in certain circumstances. (See Labuschagne 'Regspluralisme, Regsakkulturasie en Deflorasie in die Inheemse Reg' (1983) 1 *TSAR* 1 at 4 para 1.1.2.4.)

From what has been said regarding the bridegroom's entitlement to negotiate for and pay

lobolo, it is evident that customary law is, as any system of law should be, in a state of continuous development. It has been able to develop the rule that a bridegroom can negotiate for and pay lobolo and thus has met the actual demands of society. Moreover, customary law exists not only in the 'official version' as documented by writers; there also is the 'living law', denoting 'law actually observed by African communities'. (Law Commission Project 90 at 12 para 2.3.2; see also T R Nhlapo 'The African Family and Women's Rights: Friends or Foes' 1991 *Acta Juridica* 135.) The quoted passages by *Labuschagne* and the Law Commission seem to be the first notations (there might of course be more) of a rule of the 'living law' actually observed by the community and testified to by the respondent. It might be argued that

because of the dearth of authority on the point, the rule cannot be 'ascertained readily and with sufficient certainty' as is provided for in s 1(1) of the Law of Evidence Amendment Act 45 of 1988, and that the Court cannot take judicial notice thereof. The evidence of the respondent, admissible in terms of s 1(2) of the said Act, lends support to what the authorities say. This Court should accordingly recognise the rule. Such recognition would constitute a development in accordance with the 'spirit, purport and objects' of chap 3 of the Constitution of the Republic of South Africa Act 200 of 1993. (See s 35(3) of the 1993 Constitution, read in particular with s 8 thereof. See further *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) (1996 (5) BCLR 658) *per* Kentridge AJ at para [59] (at 884F) *et seq*.). This case was pending when the Constitution of the Republic of South Africa Act 108 of 1996 came into effect. Accordingly the case falls to be dealt with in accordance with the 1993 Constitution; see para 17 of Schedule 6 to the 1996 Constitution. I should perhaps add that the applicability or otherwise of the 1993 or 1996 Constitutions was not debated before us. Even if the 1996 Constitution should be applicable, it would not affect the conclusion to which I have come.

It is held that on the facts of this case the respondent's mother was in law entitled to negotiate for and receive lobolo in respect of the respondent. She was also in law entitled to act as guardian and consent to the marriage of the respondent.

The appeal is accordingly dismissed with costs.

Van der Walt AJP concurred.

Appellant's Attorneys: *Moabi & Tladi.* Respondent's Attorneys: *Legal Resources Centres*, Johannesburg and Pretoria.