Tsambo v Sengadi (244/19) [2020] ZASCA 46 (30 April 2020); *Sengadi v Tsambo*; *In Re: Tsambo* (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 (GJ) (8 November 2018)

Assessing the insurmountable challenge in proving the existence of a customary marriage in terms of section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 and the misplacing of gender inequality

1 Introduction

The Recognition of Customary Marriages Act 120 of 1998 endeavoured, amongst other things, to alleviate the discriminatory and unequal treatment suffered by women in customary marriages. Women had grounds for celebration when the Recognition of Customary Marriages Act was finally enacted. The onus of proving the existence of a customary marriage still remains an insurmountable challenge and poses a threat of distorting African customs when courts attempt to ascertain the existence of a customary marriage. This challenge is reflected in the cases of *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020). *Sengadi v Tsambo*; In Re: Tsambo (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 (GJ) (8 November 2018). On 28 February 2016, Ms Sengadi and Mr Tsambo together with their families celebrated what was assumed to be a customary marriage. The Tsambo family furthermore on the abovementioned day welcomed Ms Sengadi as their bride and this according to the Sengadi family signified a handing over resulting in the conclusion of a valid customary marriage. The Tsambo family has however in the cases of *Sengadi v Tsambo*, and *Tsambo v Sengadi*, disputed the existence of a customary marriage and raised the argument that Ms Sengadi was not handed over to the Tsambo family in accordance with Setswana custom. Ms Sengadi now bears the onus to prove the existence of a valid customary marriage and this exposes the insurmountable challenge in establishing and ascertaining applicable contents of African custom. This paper seeks to assess the challenge in ascertaining the existence of a valid customary marriage and how African custom can be misplaced under the guise of gender equality with emphasis on how the handing over of the bride has been misplaced by courts in the *Sengadi v Tsambo* and *Tsambo v Sengadi* cases.

2 Facts

An application was brought by Ms Sengadi to the South Gauteng High Court wherein she sought three orders (*Sengadi v Tsambo*; In Re: Tsambo (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 (GJ)

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(8 November 2018). First, an order declaring that the customary marriage between herself and the deceased was valid (para 1). Second, that the deceased's father, who is the respondent, be prohibited from burying the deceased (para 1). Third, that the applicant is granted marital rights to the house which she had shared with the deceased (para 1). According to the facts, the deceased proposed to the applicant during 2015, which led to *lobola* negotiations taking place between the two families (para 5). The two families agreed on the payment of *lobola* of R45 000 to which R30 000 was paid to the applicant's mother (para 5). The outstanding amount was agreed to be paid in two instalments of R10 000 and R5 000 (para 5). After the abovementioned *lobola* negotiations, celebrations took place, and the applicant and deceased were clothed in similar outfits which led to the applicant testifying that a marriage ceremony had taken place simultaneously with the *lobola* celebrations (para 7). The respondent, who is the deceased's father, disputed that a valid customary marriage had been concluded. (para 13). His argument was that the transfer of the applicant to the deceased's family did not take place (para 16). The respondent alleged that "*go gorosiwa*", which refers to a handing over of the bride, had not taken place, and that a goat or lamb had not been slaughtered as required by custom for the cleansing of the couple (para 16). He also alleged that such goat or lamb also had to be consumed by the family to signify the union of the couple. According to the respondent since the above ritual did not take place, the proper transfer or handing over of the bride had not taken place. The respondent thus disputed the validity or coming into existence of the alleged customary marriage between the applicant and the deceased (para 16).

The court observed from the evidence submitted before it that a symbolic handing over of the bride had taken place. The symbolic handing over took place when the deceased's aunts congratulated the applicant on the marriage, which led to the cohabitation between the applicant and deceased (para 19). The court further held that the handing over of the bride had evolved and not remained static; thus, this requirement takes place in a practical manner since it is now a modern era (para 20).The court also mentioned that all requirements for the valid conclusion of a customary marriage as per section 3(1) of the Recognition of Customary Marriages Act are of equal importance. Thus, there should be no singling out of requirements and emphasising on the importance of other requirements while subordinating the others (para 18). The court relied on Nkosi's research that "there is no hierarchy of requirements where customary marriages are concerned" (para 22).

The court also mentioned that the diversity of each cultural group would often result in difference in practices to suit each group (para 22). According to Nkosi, and as mentioned in the judgment, there can be no absolute adherence to rules since the practice of such rules will be diverse depending on cultural groups and also depending on the changing needs and modernity of people (para 22). Cohabitation was also pointed out by the court because it also has to be considered in the particular case since

no objection to the cohabitation have taken place between the applicant and the deceased.

The court also highlighted patriarchal supremacy where African males were "the principal interlocutors and interpreters of customary law, traditions, practices, usages, cultural norms and procedures" (para 25). This the court linked to pre-constitutional time marriages where males virtually negotiated and consented to the conclusion of marriages (para 35). It was also emphasised in the judgment that while patriarchy was a common practice in African customs, the rigidity of customary law principles often resulted in patriarchal practices that often led to gender inequality and the marginalisation of women and children (para 35). The court importantly commented on handing over of the bride that:

> "However, a customary law wife effectively has no freedom of opinion, autonomy or control over her marital life if her customary husband's family insists that her family should hand her over to validate the existence of her customary law marriage in spite that she and her customary law husband have complied with section 3(1) of the Recognition Act" (para 33).

The court emphasised more on the rigid nature in which the handing over requirement was often perceived. This the court mentioned often results in the oppression and discrimination of women. This as a result according to the court "adumbrates the patriarchal nature of the pre-constitutional customary law when the consent and opinion of women was not solicited and was irrelevant because then women were regarded as perpetual minors with no rights" (para 35). Therefore, the court held that the handing over requirement could not pass the constitutional muster (para 35).

The court ultimately held that the requirement referred to in terms of section 3(1)(b) of the Recognition of Customary Marriages Act, which required the handing over of the bride subjected female spouses to discrimination based on gender. The court held that the requirement could not pass the constitutional muster since it subjected women to unequal treatment. This was due to the consequence that female spouses' rights to freedom of control in their marriage is infringed by this requirement. The court disappointingly held that the handing over of the bride to the groom's family was not a lawful requirement for a customary marriage, and the court order was phrased as follows:

> "It is declared that the customary law custom of handing over the bride to the bridegroom's family as an essential pre-requisite for the lawful validation and the lawful existence of a customary law marriage is declared to be not a lawful requirement for a customary law marriage when section 3 (1) of the Recognition Act has been complied with" (para 42).

The *Sengadi v Tsambo* matter went on appeal to the Supreme Court of Appeal on a challenge brought by the deceased's (appellant) father that a valid customary marriage had not been concluded between the respondent, Ms Sengadi, and the deceased because all formalities for the

conclusion of a valid customary marriage had not been concluded (*Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) para 10).

According to the appellant's argument, the two families still had to decide on a date within which the respondent would be handed over to the deceased's family (para 10). The appellant averred that a ritual had to be performed, which is known as "*go gorosiwa"* whereby the respondent would be handed over to the deceased's family, and lamb or a goat would be slaughtered and consumed on that day by the families (para 10). On that basis, the appellant alleged that without the applicable ritual, the handing over did not take place.

The Supreme Court of Appeal ultimately held that the handing over was important, but it was not a key determinant in whether a customary marriage had been concluded (par 16). In support of this, the court turned to cases such as (*Mabuza v Mbatha* 2003 (4) SA 218 (C)) and (*Mbungela v Mkabi* 2020 (1) All SA 408 (SCA)), wherein it was argued that customary practices evolve and that strict adherence to ritual was never essential. The court also considered the case of *Mayelane v Ngwenyama* 2012 (10) BCLR 1071 (SCA)), wherein it was mentioned that customary law is a dynamic system (*Tsambo v Sengadi* para 15). The evidence of Prof Bennett was also relied on where some pointed out that sometimes cohabitation raised suspicion of marriage (*Tsambo v Sengadi* para 27). The fact that the respondent was welcomed and introduced as the deceased's wife and welcomed into the Tsambo family and that the couple had cohabited immediately thereafter signified that the respondent had been handed over to the deceased's family (par 26). The Supreme Court of Appeal upheld the High Court's decision that a valid customary marriage had come into existence between the respondent and the deceased (par 30).

3 Discussion

Some flaws in the *Sengadi v Tsambo* and *Tsambo v Sengadi* judgments have inevitably led to the misplacing of gender equality for African culture, and this blind misplacement might not necessarily yield fair and just outcomes for women in customary marriages. There is furthermore an infringement to ones right to exercise their right to culture generally despite gender.

3 1 Failure to ascertain living customary law

The judgments first fail to ascertain the correct meaning of the requirement for the handing over of the bride, and the judgment in *Mayelane v Ngwenyama,* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013) has assisted in providing guidelines in ascertaining a living customary law practice. In *Mayelane,* the court employed *amicus curiae* such as the National Movement of Rural Women in ascertaining whether the first wives' consent is a validity requirement for a man's subsequent polygamous marriage. In

ascertaining the applicable cultural requirement, the court took cognisance of African women's right to equality and dignity, and this demonstrates that African cultural practices can also accommodate African women's rights to dignity and equality, especially if the custom is carefully ascertained. The *Sengadi* and *Tsambo* judgments appears to have misplaced the correct meaning of the handing over requirement, and also failed to determine whether African community and family had dispensed of this requirement (see Osman "The consequences of the statutory regulation of Customary law: An examination of the South African Customary Law of Succession and Marriage" 2019 *PER/PLJ* 13), and this has inevitably led to the distortion of culture.

The courts had in *Sengadi* and *Tsambo* the obligation to ascertain the integration of the bride into the husband's family (*Mayelane v Ngwenyama* para 24). It was incumbent on the courts to satisfy itself on the content of the African custom, and where necessary, to evaluate local custom to ascertain the content of the relevant legal rule (*Mayelane v Ngwenyama* para 48). The judgment in *Mayelane*, can be commended for its attempt in proposing how courts should go about when ascertaining and applying customary rules or principles. The court in *Mayelane* held that section 3 of the Recognition of Customary Marriages Act does not answer whether the first wife's consent is a validity requirement (*Mayelane v Ngwenyama (*para 38).

Therefore, according to the majority judgment the court held that it should turn to Xitsonga living customary law to determine the issue *Mayelane v Ngwenyama (*para 42).The court turned to four categories of evidence, namely; (i) evidence from individuals in polygynous marriages; (ii) evidence from an adviser to traditional leaders; (iii) evidence from various traditional leaders and lastly; (iv) expert testimony drawing conclusions from primary material (*Mayelane v Ngwenyama* para 54.

However, Zondo J in his minority judgment criticised the calling of additional evidence, because it could lead to contradictory evidence. Zondo J articulates that, the ascertaining of the Xitsonga custom could take place through "evidence from a person or persons with knowledge of the custom" and not necessarily an expert. Nevertheless, there is consensus from both the minority and majority judgment on the court having an obligation to satisfy itself as to the true content of the living customary law as opposed to merely seeking an answer through applying legislation and case law. The Constitutional Court's outcome can be commended for taking the real contents of customary law into account as opposed to merely focusing on legislation. This in an important lesson towards promoting living customary law. In the judgment of *Mayelane v Ngwenyama*, the court invited various *amici curiae* to assist in establishing the content of Xitsonga customary law regarding whether the consent of the first wife is a requirement for the conclusion of a subsequent polygamous customary marriage. The court in *Mayelane v Ngwenyama* acknowledged the originality and distinctiveness of indigenous law and as an independent legal system (*Mayelane v Ngwenyama* para 23). In

developing customary law, the judgment of *Mayelane v Ngwenyama* importantly took cognisance of African women's right to dignity and their right to equality as the South African Constitution prescribes (*Mayelane v Ngwenyama* para 75). The court's approach in *Mayelane v Ngwenyama* was commended for its good attempt in closing the gap of customary law jurisprudence related to determining the content of customary law (See Kruuse and Sloth-Nielsen "Sailing beween Scylla and Charybdis: Mayelanve v Ngwenyama "2014 *PER/PLJ* 1731). In ascertaining the African custom, as mentioned in *Mayelane v Ngwenyama,* the court requires a determination of whether the alleged African custom or practice is law as defined by the community (See Himonga and Pope "*Mayelane v Ngwenyama and Minister of Home Affairs*: a reflection on wider implications" 2013 *Acta Juridica* 328). The court's approach points out that the community must contribute in establishing the actual custom or practice (See Osman "Ascertainment of Customary law: MM v NM" 2017 *Southern African Public Law* 244). Furthermore, the court's approach assisted in highlighting that the source of living customary law is the community (See Osman 2017 *Southern African Public Law* 244). This requires for the African custom or practice to be viewed through the eyes of that community through a sample that represents that community (See Himonga and Pope "*Mayelane v Ngwenyama and Minister of Home Affairs*: a reflection on wider implications" 2013 *Acta Juridica* 328). The court's approach highlighted the caution that section 3(1)(b) of the Recognition of Customary Marriages Act should not be viewed as an opportunity to create post-colonial apartheid customary law that is disconnected from the community. The *Mayelane v Ngwenyama* judgment could help in avoiding that approach in future (See Himonga and Pope 2013 *Acta Juridica* 329).

3 2 Misplacing African culture under the guise of gender equality

The misplacing of gender equality was prevalent in the *Sengadi v Tsambo*, and *Tsambo v Sengadi* judgments. Integrating the bride into her groom's family signifies the broadcast and acceptance of *makoti* (daughter in law) by her husband's family, and it also signifies the *makoti's* willingness to be part of her husband's family (See Bakker "Integration of the Bride as a requirement for a valid customary marriage: Mkabe v Minister of Home Affairs 2016 ZAGPPHC 460 2018 *PER/PLJ* 7). Furthermore, this integration, as mentioned by Bakker, is also a way of introducing the bride to her husband's ancestors to obtain ancestral blessings (See Bakker 2018 *PER/PLJ* 7).

The misplacing of the customary marriage essential requirement of the handing over of the bride also took place in *Mkabe v Minister of Home Affairs (2014/84704) [2016] ZAGPPHC 460),*wherein a husband sought an order from the High Court declaring that he was married to his "deceased wife" in accordance with customary law (*Mkabe v Minister of Home Affairs* para 1). Although the requirement for the handing over of the bride had not been fulfilled, the court appeared to have merely supported

the waiving of the requirement (See Bakker 2018 *PER/PLJ* 6). The courts' decision has been criticised for erroneously misinterpreting African customary law. Only ceremonies for the handing of the bride can be abbreviated, but the handing over is an essential requirement that cannot be waived (See Bakker 2018 *PER/PLJ* 12).

According to the facts, an unemployed male instituted an action against the Minister of Home Affairs for an order declaring that he was married to the late Eunice Mbungela in accordance to customary law (*Mkabe v Minister of Home Affairs* par 1). It was common cause in this case that Eunice was never handed over to the plaintiff's family as required in terms of African customary law, and section 3(1) of the RCMA, particularly sub-section (b) thereof (*Mkabe v Minister of Home Affairs* para 36).*Lobola* was negotiated and paid by the plaintiff, but he alleged that he was not advised of the need to conduct a handing over of the deceased to his family (*Mkabe v Minister of Home Affairs* para 3).

The plaintiff also argued that he and the deceased were from different cultural groups. Therefore, he was not certain on this issue of the handing over regarding a cultural group distinct from his *(Mkabe v Minister of Home Affairs* paras 8 & 12). The plaintiff also alleged that he and the deceased had cohabited, but this has been challenged by the deceased's children (*Mkabe v Minister of Home Affairs* para 20).

In further proving the existence of the marriage, the plaintiff alleged to have taken the deceased to a traditional healer upon the deceased's brief illness, but the deceased's daughter alleged that she took the deceased from the traditional healer to a hospital (*Mkabe v Minister of Home Affairs* para 21). The deceased met her death while in hospital and the families were in dispute about whether the plaintiff visited the deceased in hospital (*Mkabe v Minister of Home Affairs* para 20).In his defence, the plaintiff alleged that he only visited the deceased in hospital a few occasions and desisted after the deceased's brother made threats towards him (*Mkabe v Minister of Home Affairs* para 8).

In answering whether a customary marriage had existed between the plaintiff and the deceased, Twala AJ concluded that the plaintiff was a reliable witness as opposed to the defendant, and in particular, the deceased's brother was allegedly also part of the *lobola* negotiations (*Mkabe v Minister of Home Affairs* para 26).He pointed out that the fact that the plaintiff had the couple's two vehicles proved that they had cohabited, and the fact that the plaintiff was the first to respond to the deceased's illness by taking her to a traditional healer (*Mkabe v Minister of Home Affairs* para 32). Although the defendant's counsel argued that, the plaintiff as not a beneficiary of either the deceased's medical and pension fund scheme, Twala AJ considered that evidence as not crucial in assessing the existence of the customary marriage (*Mkabe v Minister of Home Affairs* par 30). He simply mentioned that perhaps the plaintiff's belief in traditional healers indicated that he was not in need of doctors (*Mkabe v Minister of Home Affairs* par 31).

Twala AJ relied heavily on the case of , *Mabuza v Mbatha* 2003 (4) SA 218 (C) which emphasised the flexible nature of customary law. In *Mabuza* a ruling was made that the ceremony for the handing over of the bride named *ukumekeza* had evolved and can be waived by agreement between the parties (*Mkabe v Minister of Home Affairs* para 34). He furthermore pointed out as follows as stated in *Mabuza*:

> "There is no reason failure to observe some rituals or ceremonies cannot be waived or condoned by parties in terms of an agreement between them" (*Mkabe v Minister of Home Affairs* para 37).

It appeared in *Mkabe v Minister of Home Affairs* that Twala AJ dispensed the handing over requirement, and not the ceremonies attached to the handing over (See Bakker 2018 *PER/PLJ* 12). The authority in *Mabuza v Mbatha 2003 (4) SA 218 (C)* relates to the abbreviation of rituals and not of essential requirements. Thus, Twala AJ misinterpreted the authority or legal principle in the judgment (See Bakker 2018 *PER/PLJ* 8). This outcome does not do so much for gender equality. It demonstrates how a man was subject to a lesser threshold as compared to women in the past that appeared to have a higher burden in proving the existence of a customary marriage without a handing over. Remarkably, in the presence of opposing evidence from three witnesses, the court appeared to emphasise the plaintiff's evidence (See Bakker 2018 *PER/PLJ* 5). The cases discussed in this section indicate how sometimes the handing over of the bride has been misplaced by courts, and this has led to the challenge of the court failing to incorporate African principles into African disputes instead of merely applying official law.

4 Conclusion

The judgments in both *Sengadi v Tsambo* and *Tsambo v Sengadi* highlight the challenge regarding ascertaining the validity or existence of a customary marriage in accordance to section 3 (1) (b) of the Recognition of Customary Marriages Act. In accordance with section 3 (1) (b) of the Recognition of Customary Marriages Act it required for courts to establish in terms of living customary law whether the requirements for the conclusion of a valid customary marriage have been complied with. This challenge appears to result in the distortion of African custom and requires for means to be considered in assisting the judiciary towards establishing the existence of a customary marriage concluded in terms of custom. This challenge further could result in the manipulation of African custom and practice under the pretence of the promotion of gender equality, this transpired in the matter of *Mkabe v Minister of Home Affairs* where the tradition of handing over a pride was misplaced. It is submitted that failure to observe African traditional practices could also result in inequitable results for women themselves in customary marriages where multiple marriages have been concluded.

As per the judgment of *Mayelane v Ngwenyama* courts should apply a less strict interpretation of section 3(1)(b) of the Recognition of Customary Marriages Act and aim to establish living customary law

through involving traditional African societies as transpired in *Mayelane v Ngwenyama*. Living customary law is defined as customs and usages, which regulate the day-to-day lives of indigenous people (See Maithufi *et al African Customary Law in South Africa* (2014) 27). This definition of living customary law consists of four key elements. First, the law must consist of customs and usages traditionally observed (See Bekker, Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa* (2018) 20).

Second, indigenous African people of South Africa must observe these customs or usages (See Bekker, Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa* (2018) 23). Third, these customs or usages must form part of the culture of African people (See Bekker, Rautenbach and Goolam *Introduction to Legal Pluralism in South Africa* 24). Fourth, these customs and practices must emanate from social practices accepted (See Maithufi *et al African Customary Law in South Africa* 28) and they also encompass elements of "flexibility and adaptability to nurture communitarian traditions" (See Ndima 2014 *SA Public Law* 310). Since these customs are based on social arrangements and dependant on social context, this emanates from what people do and not so much from legal experts (See Ozoemena 2014 *Constitutional Court Review* 151). Living customary law is the life-world of African people, and as the people change, the law changes too (See Sanders 1987 *CILSA* 409). Prior to disregarding a custom courts have to ascertain the purpose of such custom and how it is practiced by traditional African societies.

The proper and careful ascertaining of living customary law could also prevent the misplacing of culture under the guise of gender equality. Accordingly, only mere ceremonial activities can be disregarded and abbreviated, however essential requirements must still be observed in accordance to culture for instance a handing over still has to take place. In terms of establishing whether a handing over had indeed taken place the viewpoints of traditional African societies have to be carefully considered in an attempt to prove whether culture has been observed. In remedying this problem, I make the following recommendations for the incorporation of guidelines in the Recognition of Customary Marriages Act that could assist in the interpretation of section 3 (1) (b). For instance, essential requirements for a valid customary marriage should be distinguished from mere ceremonial activities. The essential requirements are the indispensable formalities crucial in the conclusion of a valid customary marriage, this for purposes of the article is the handing over of the bride. The handing over of the bride, signifies the integration of the bride into the bridegroom's family which is crucial towards the conclusion of a valid customary marriage. Meanwhile ceremonial activities signify mere celebrations involved in the conclusion of a customary marriage. Secondly, the legislature could with the assistance of relevant cultural bodies codify each South African custom in relation to the essential validity requirements for the conclusion of a specific customary marriage. This legislative approach should be based on understanding the intention of African customary law. This entails

that the goals and values of African customary law should be established as held and practiced by South African indigenous people or traditional African communities. Furthermore, African custom in the codification should strive towards employing a flexible approach in providing guidelines towards ascertaining African customary law in its true light. Codification must be fully incorporate cultural tenets and the customs of indigenous people. In order to ensure that this codification does not defeat the living nature of Customary law, this codification should serve as a mere guideline towards establishing living customary law. For instance, guidelines detailing that in ascertaining living customary law evidence will be required from relevant family and community. In the cases of *Sengadi* v *Tsambo* and *Tsambo* v *Sengadi* it was required for the court to ascertain from the relevant family and community on what the handing over requirement entails.

The handing over requirement remains a significant requirement towards the conclusion of a valid customary marriage. Families must agree on what constitutes the handing over of a bride. The judgments in *Sengadi v Tsambo* and *Tsambo v Sengadi* can be commended for not following an overly stringent approach towards ascertaining the existence of a valid customary marriage. However, the judgments created wrongful precedence in the form of disregarding the handing over requirement and this is evident from the High Court's position that the handing over is not a lawful requirement for the existence of a customary marriage. This decision emanates from the High Court's finding that the handing is discriminatory on grounds of gender and equality. Furthermore, the Supreme Court of Appeal confirmed the High Court's decision and ruled that the handing over of the bride is not a key determinant of a valid customary marriage. These decisions were not in accordance to living customary law since as reiterated in this note, further evidence regarding living customary law of the relevant family and ethic groups to which the parties belong was not led before both the High Court and the Supreme Court of Appeal. The argument that the handing over is discriminatory is also misguided since the position of living customary law has not been adequately assessed in arriving at that conclusion. Although the court's outcomes in both *Sengadi v Tsambo* and *Tsambo v Sengadi* appear to be promoting gender equality the discarding of culture cannot be argued to automatically promote gender equality and this challenge will pose a serious issue especially in cases involving multiple marriages or alleged polygynous marriages, women who find themselves in such marriages cannot be said to be protected by the discarding of a crucial essential requirement for the conclusion of a valid customary marriage.

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