**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**LIMPOPO DIVISION, POLOKWANE**

**APPEAL CASE NUMBER: HCAAJJ/2024**

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 19/06/2025

SIGNATURE:

In the matter between:-

| | |
|---|---|
| **L[...] M[...] P[...]** | **APPELLANT** |
| **ID NO: 8[…]** | **(Defendant in the main action)** |
| **AND** | |
| **N[...] J[...] D[...] P[...]** | **RESPONDENT** |
| **ID NO: 7[…]** | **(Plaintiff in the main action)** |

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**JUDGMENT**

**MANGENA AJ**

[1] Marriage is a beautiful thing founded on love, care, trust and common understanding on issues of life. It is an important social contract out of which a "family" as a basic unit of society is formed. It is therefore inconceivable that two people can be married to each other but differ as to the regime applicable to their marriage. But in law, strange things happen more especially in marriages of some Black/African people.

[2] Dr Mosibudi Mangena, the former President of AZAPO and the adherent of Black Consciousness had this to say about some Black people and their marriages: When it comes to marriage, some African component of the Black population have a split personality. They do the lobola/Magadi process and then the European version through the exchange of rings, the white veil and the rigmarole that goes with it. They do the same thing twice, the African way and the western way. They do not feel that their marriage is proper or complete unless and until they have done the european part. They live in a world of double vision and poor balance. They have one foot in Africa and the other in Europe with an ocean of water beneath them and are struggling to keep their balance. They live in a twin world of blurred lines and fuzzy images. This is the worst manifestation of people without cultural integrity, character or identity. A Twin World, Maskew Miller Longman, page 95.

[3] This appeal was constituted to determine the marriage regime applicable to the parties who are both Black/African. They differ as to whether they are married according to customary law or civil law. Does it matter? Someone may ask.

[4] Of course it matters and it is a big legal issue that has pre-occupied judicial and non-judicial minds for centuries and it appears it will be like this for as long as Black people have a choice whether to marry either by customary law or civil law. This is because in African culture, a marriage is not an event but a process involving not only the parties getting married but also their families and children. It is a cultural process with legal consequences as opposed to a legal process with cultural

consequences. *Ntate* Mangena puts it as follows *"A wedding (marriage) is a ritual full of cultural meaning. Your wedding tells us who you are".*

[5] What gave rise to the dispute between the parties is compliance with the cultural process of marriage and legal consequences which flow from it.

[6] The wife who is the appellant contends that she is married to the respondent in community of property. The marriage was concluded and entered into on the 10th January 2015. The marriage is governed by the Recognition of the Customary Marriage Act 120 of 1998 and that there was no ante-nuptial contract entered into by the parties prior to its conclusion. The 10th January 2015 (according to her) is the date on which the process for the conclusion of the customary marriage was completed.

[7] The husband who is the respondent holds a completely oppose view. He denies that they agreed to enter into a customary marriage. They had always wanted to marry out of community of property and it is for that reason that they concluded an ante-nuptial agreement on **13 October 2015** before a Notary Public in Polokwane, which contract expressly excluded community of property and loss as well as the accrual system. The ante-nuptial contract was registered in the Deeds office on **30 October 2015**. Subsequent to the conclusion of the ante-nuptial contract, they got married out of community of property without accrual on **23 October 2015**. This is the marriage which exists between them as evidenced by the marriage certificate issued by the Department of Home Affairs. The marriage, according to him, is governed by the **Marriage Act 25 of 1961**.

[8] Prior to the hearing by the court a quo, the parties informed the court that they had a pre-trial conference and identified the issues in dispute as follows:-

(i) Whether the parties were married to one another on **10 January 2015** in terms of customary law, in community of property which marriage still subsists.

(ii) In the event that the Honourable Court finds that the parties were married to one another in terms of customary law whether the ante-nuptial contract entered into between the parties is valid and enforceable.

[9] When the matter came for trial and before the first witness could be called, the court was informed that they will ask the court to first rule on the existence of the customary marriage. The issues identified in the pre-trial minutes were then reduced to one, namely whether the parties had entered into a customary marriage or not. By agreement the defendant was to testify first as she bore the onus to prove the existence of the customary marriage. I must hasten to record that copies of the pre-trial minutes did not form part of the appeal record.

[10] The Defendant took stand on the **26 February 2024** and led evidence regarding both the conclusion of the alleged customary marriage as well as the circumstances under which the civil marriage and the ante-nuptial contract were concluded.

[11] She was cross-examined by Counsel for the respondent and before the cross-examination could be concluded the parties informed the court that in order to expedite the proceedings they have agreed on the following facts:-

(a) That there was a customary marriage concluded between them on **10 January 2015**.

(b) On the **13 October 2015**, the parties entered into a valid ante-nuptial contract which was registered with the Deeds office.

(c) That both marriages are now to be regarded as valid.

(d) Only the issue of enforceability of the ante-nuptial contract remains valid .

[12] This was an unusual way and at best the most casual approach adopted for the resolution of an important legal dispute. To start with, it is not legally possible for

both the customary marriage and the civil marriage to co-exist along side each other. Parties are either married by customary law or by civil law. The statement that both marriages are valid is legally untenable and provides proof that the submission was based on a wrong understanding of the law. The court a quo was wrong to allow the parties to proceed on this erroneous basis. The trial court should have guided the parties to prepare a written statement of agreed facts. Indeed the SCA and other courts have cautioned against this lackadaisical approach and implored on trial judges to always adhere to the provisions of Rule 33(1) and (2) whenever there is an appetite to the parties to proceed by way of a stated case.

[13] **Rule 33(1) and (2) of the Uniform Rules** require the parties to the dispute, who wish to have their matter adjudicated as a stated case to do the following:-

(a) Agree upon a written statement of facts which clearly sets out the facts agreed upon, the facts of law in dispute between them as well as their contentions.

(b) The statement shall be divided into consecutively numbered paragraphs.

(c) Copies of the documents necessary for the adjudication of the dispute shall be annexed to the statement.

(d) The statement shall be signed by the parties, if in person or by their legal representatives.

[14] None of the requirements listed above were complied with and it remains unclear what issue was the court called upon to adjudicate. In its judgment the court a quo recorded the issue for determination as follows: -

*"The court was requested to determine whether the parties were married to one another on the 10th of January 2015 in terms of customary law in community of property which marriage still subsists and that in the event the court finds that the parties were married to one another in terms of customary*

*law, whether the ante-nuptial contract entered into between the parties is valid and enforceable or not".*

[15] As stated in paragraph 11 above, the parties had already agreed that there was a customary marriage concluded on **10 January 2015**. Once the parties agree on an issue, it is no longer open to the court to determine it. This is so because the court does not adjudicate on issues which are no longer of practical effect to the parties or do not present a live controversy between them.

[16] Had the parties prepared a written statement of facts as required by Rule 33, the court a quo would have been enlightened about the nature of the dispute and exercised its judicial discretion whether to allow the parties to discontinue the leading of oral evidence on the disputed legal issue.

[17] As I see it, the central issue for determination, notwithstanding the imperfect stated case, is the validity of the alleged customary marriage. This issue cannot be resolved by way of a stated case. It required the parties to present their evidence in the absence of the agreed facts.

[18] **Wallis JA** explained the importance of compliance with the provisions of **Rule 33** in ***Minister of Police v Mboweni and Another 2014(6) SA 256 SCA*** as follows: -

*"It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasized in Bane v D'A Mbrosi where it was said that deciding a case on assumptions as to facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part of the evidence. A Judge faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request." To proceed with a stated case in circumstances where there is a need for oral evidence constitutes an error of law. Murphy AJA writing in the LAC echoed the same sentiments in the matter of* ***Arends and Others v South African Local Government Bargaining Council and Others, (2015) 36 ILJ 1200 (LAC)****. He was more forthright and said: "An oral stated case predicated upon poorly ventilated and potentially*

*unshared assumptions as to facts defeats the purpose of the requirements of a stated case, and will lead to problematic results.*

[19] Like **Murphy AJA**, I hold the view that the parties in this case were authors of their own misfortune. They should not have allowed the preliminary views of the court to persuade them to abandon the course they had taken to present facts upon which the court was required to make a conclusive legal finding on the marriage system applicable to their clients.

[20] In view of the order I propose to make, it is not necessary to deal with all other issues raised by the parties regarding the validity or otherwise of the ante-nuptial contract and the subsequent conclusion of the civil marriage.

[21] On the pleadings as they stood at the time the matter was called for hearing, there was a material dispute of fact regarding the existence of the customary marriage and this issue was not adequately addressed in the purported stated case. The court a quo did not have facts upon which to conclude that there was indeed a valid customary marriage concluded between the parties.

[22] To the extent that it may be argued that the parties made concessions on the respective positions they held prior to their agreement to proceed by way of a stated case, I am not persuaded that there were any concessions made. For the record, **Adv Ferreira** never conceded that there was a customary marriage. If there was any concession at all, same was conditional upon the defendant equally conceding that there was a valid ante-nuptial contract and a valid civil marriage concluded between the parties. Ms De Klerk did not accept that the conditional concession nor did she on behalf of her client accept/admit or concede that both marriages as well as the ante-nuptial contract are valid. She could not by any stretch of imagination have admitted to these two "concessions" as that would have meant the end of her case. In short there were no concessions made by either side.

[23] In any event the Constitutional court tells us that it is trite that a court is not bound by a legal concession if it considers it to be wrong in law. A legal concession can also be rejected by the court if improperly made. This is the case in this matter.

The court a quo should have heeded the caution of the SCA and insisted on a detailed written statement of agreed facts clearly proving all the requirements for a customary marriage. It should not have allowed conditional concessions and assumptions to prevail. I am fortified in my view by what the constitutional court said in ***Kruger v President of the Republic of South Africa, 2009 (1) SA 417*** at para 102. It said:

> *"Ordinarily a court accepts, without. deciding, factual concessions made by the parties because the effect thereof is that the conceded issue is no longer in dispute. This rule extends to legal concessions but only to the extent that a court is satisfied that a concession was properly made. If the court is of the view that a legal concession was improperly made, it is entitled to reject it and decide the issue as if it remained in dispute"*

[24] On the facts of this case, my preponderant view is that there were no concessions made and if any same were not properly made and are therefore not binding on this court. The issue regarding the existence of the customary marriage is still in dispute. We cannot decide it on appeal.

[25] In the circumstances I am inescapably directed to make the following orders:-

**1. The appeal is upheld with no order as to costs.**

**2. The order of the court a quo is set aside.**

**3. The matter is remitted to the court *a quo* for hearing of further evidence on the existence or otherwise of the customary marriage.**

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**M. MANGENA**
**ACTING JUDGE OF THE HIGH COURT**
**LIMPOPO DIVISION, POLOKWANE**

**M.F. KGANYAGO**
**JUDGE OF THE HIGH COURT**
**LIMPOPO DIVISION, POLOKWANE**

**J.T. NGOBENI**
**JUDGE OF THE HIGH COURT**
**LIMPOPO DIVISION, POLOKWANE**

**APPEARANCES**

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|---|---|---|
| **FOR APPELLANT** | **:** | **DDKK ATTORNEYS INCORPORATED** |
| **FOR RESPONDENTS** | **:** | **VZLR INC** |
| **HEARD ON** | **:** | **25 APRIL 2025** |
| **DELIVERED ON** | **:** | **19/06/2025** |