‘CONSENT’ AND CONFUSION CASTING DOUBT ON THE VALIDITY OF A CUSTOMARY MARRIAGE

***Mgenge v Mokoena & another* [2023] JOL 58107 (GJ)**

https://doi.org/10.29053/pslr.v17i1.5098

*by Liesl Hager**

Abstract

In Mgenge v Mokoena & another *[2023] JOL 58107 (GJ), the Gauteng High Court, Johannesburg, per Rome AJ, considered the validity of a customary marriage concluded between the bride (the first respondent) and the deceased groom with reference to the requirements outlined in section 3 of the Recognition of Customary Marriages Act 120 of 1998. The mother of the groom (the applicant) challenged the validity of the marriage certificate. The main issue under inspection is whether the applicant’s lack of participation in, consent to, or knowledge of the customary marriage is sufficient to rebut the* prima facie *proof of validity offered by the marriage certificate. In this contribution, I recount the Court’s systemic approach to determine if the applicant’s misunderstanding of the purpose or intention of the events that transpired and her absence in participating in the negotiations and entering into or celebration of the customary marriage invalidates the* prima facie *proof offered by the marriage certificate. I explore the Court’s approach to the requirements for a valid customary marriage, specifically the negotiation and celebration requirements, as well as the integration and physical handing over of the bride. I also briefly inspect the role of expert evidence and living customary law. This judgment demonstrates the dynamic and evolving nature of living*

* LLB, LLM, LLD (UP), Advocate of the High Court of South Africa, Lecturer, Department of Private Law, UP; Research, Marketing, and Publishing Assistant, Pretoria University Law Press (PULP), Centre for Human Rights, UP https://orcid.org/0009-0002-0973-0811

customary law in South Africa and the approaches adopted by the judiciary when exploring customary law issues like the validity of a customary marriage.

1 Introduction

Customary marriages in South Africa, concluded in terms of the Recognition of Customary Marriages Act 120 of 1998 (RCMA), are one of three legally recognised marriages or unions that may be concluded in the Republic of South Africa.[1] The other two are civil unions entered into in terms of the Civil Union Act 17 of 2006 and civil marriages concluded in terms of the Marriage Act 25 of 1961. Cohabitation (in the form of domestic partnerships) and universal partnerships, also attract legal recognition, which is in some ways similar to a union or marriage concluded in terms of these Acts,[2] but fall beyond the scope of this discussion. This case note focuses specifically on customary marriages and the recent case of *Mgenge v Mokoena*.[3]

In this matter, the applicant (the deceased groom's mother) sought a court order invalidating the marriage certificate recording that the groom (her deceased son) and the bride (the first respondent) had entered into a customary marriage on 17 November 2018.[4]

The applicant argued that as the single mother of the groom, she was unaware of the existence of this marriage and had not consented thereto.[5] Essentially, the applicant argued that the absence of her knowledge, participation, or consent to the customary marriage meant that the marriage certificate was invalid, as it incorrectly reflected that the groom was married to the bride per customary

1 RSA Gov 'Getting married' Date unknown https://www.gov.za/services/services-residents/relationships/getting-married#:~:text=Three%20types%20of%20marriages%20are,customary%20marriages%20and%20civil%20unions (accessed 18 March 2023). At the time of writing, the Registration of Muslim Marriages Bill (B30-2022) was referred to Portfolio Committee, see RSA Parliament 'Registration of Muslim Marriages Bill (B30-2022)' Date unknown https://www.parliament.gov.za/bill/2306910 (accessed 18 March 2023). Once enacted, Muslim marriages may be a possible fourth type of legally recognised marriages or unions in South Africa.

2 *Volks v Robinson* 2005 (5) BCLR 446 (CC) paras 107 & 120, K Madzika 'Dawn of a new era for permanent life partners: from *Volks v Robinson to Bwanya v Master of the High Court*' (2020) 53(1) *De Jure* 393–406; L Hager 'The dissolution of universal partnerships in South African law: Lessons to be learnt from Botswana, Zimbabwe and Namibia' (2020) 53(1) *De Jure* 123–139, S Sibisi 'The Supreme Court of Appeal and the handing over of the bride in customary marriages' (2021) 54(1) *De Jure* 385 with reference to De Villiers AJ in *ND v MM* unreported case number 18404/2018 SGJ (12 May 2020), A Manthwa 'An appraisal of the hurdles with ascertaining the applicable customary law when determining conclusion of a customary marriage – *ND v MM* (18404/ 2018) (2020) ZAGPJHC 113 (12 May 2020)' (2022) 36 *Speculum Juris* 223–232.

3 [2023] JOL 58107 (GJ) (*Mgenge*).

4 *Mgenge* (n 3) paras 7, 11, 16-18.

5 *Mgenge* (n 3) para 5.

law.[6] The applicant argued that according to customary law, she was required to participate in any pre-marital negotiations between the families of the bride and the groom.[7]

In this discussion, I explore the judgment in more detail with reference to the arguments considered by Rome AJ. I also highlight the approach followed by the Court in concluding that the customary marriage was, in fact, valid, without considering the particular or specific customary traditions at play. In the following paragraph, I explore the relevant law concerning the facts of the matter.

2 The requirements for a valid customary marriage

For a customary marriage to be valid, it must comply with the requirements outlined in the RCMA.[8] Section 3 of the RCMA provides:

> (1) 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.

That is to say, failure to register a customary marriage entered into after the commencement of the RCMA (15 November 2000) does not invalidate the union.[9] The judgment did not mention this point; although it was briefly discussed by the court *a quo*.[10]

In this matter, the court ultimately held that all three requirements set out in the RCMA were satisfied, and the marriage certificate was valid.[11] Rome AJ's reasoning in coming to this conclusion is peculiar, especially considering the applicant's lack of consent and participation in the pre-marital negotiations.

From the outset, Rome AJ correctly notes:

6 *Mgenge* (n 3) paras 1-5.
7 *Mgenge* (n 3) para 5.
8 *Mgenge* (n 3) para 19.
9 The RCMA was assented to on 20 November 1998 and commenced on 15 November 2000. See also C Rautenbach *Introduction to legal pluralism in South Africa* (2021) at 101, Law, race and gender research unit, University of Cape Town 'The recognition of customary marriages in South Africa: law, policy and practice' December 2012 https://law.uct.ac.za/sites/default/files/content_migration/law_uct _ac_za/1149/files/CLS_RCMA_Factsheet_2012_Eng.pdf (accessed 18 May 2023) at 4.
10 *Mgenge v Mokoena* [2021] ZAGPJHC 58 (*Mgenge* 2021) para 4.
11 *Mgenge* (n 3) paras 19 & 52.

> The requirements appear capable of easy fulfilment. However, the prerequisite that the marriage must be negotiated and entered into or celebrated in accordance with customary law gives rise to some legal complexities.[12]

The Court did not expand on the complexities, but they are conceivably rooted in the living nature of customary law.[13] Living customary law refers to the original customs and usages of indigenous communities and their ever-changing and non-stagnant nature.[14] Living customary law is preferred to the so-called 'official' codified versions of customary law,[15] since the 'official' versions of customary law do not accurately reflect a particular community's original customs and usages.[16] These communities are continuously evolving, and the living law meets the demands of these developing communities.[17] Sometimes, expert evidence may be relied upon in court to ascertain the relevant living law.[18]

The bride and groom were both older than 18 years of age, as required in section 3(1)(*a*)(*i*), and both parties consented to be married to each other under customary law, as required in section 3(1)(a)(ii).[19] I now turn my attention to the main issue under consideration in this case, which is the requirements contained in subsection (b): 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'.[20]

The Court followed a two-step approach to determine if the marriage was negotiated and entered into or celebrated in accordance with customary law: First, Rome AJ inspected the requirement of negotiation,[21] and second the 'celebrated' or 'entered into' requirement.[22] Below, I deal with each in more detail.

12 *Mgenge* (n 3) para 19.
13 *Mgenge* (n 3) para 46 with reference to *Tsambo v Sengadi* 2020 ZASCA 46 (*Sengadi*) para 15.
14 Rautenbach (n 9) 31.
15 *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) (*Bhe*) paras 86 & 87, Rautenbach (n 9) 31.
16 *Bhe* (n 15) para 87: 'The official rules of customary law are sometimes contrasted with what is referred to as "living customary law," which is an acknowledgement of the rules that are adapted to fit in with changed circumstances. The problem with the adaptations is that they are ad hoc and not uniform.'
17 *Bhe* (n 15) para 85, Rautenbach (n 9) 32.
18 *Bhe* (n 15) para 150, Rautenbach (n 9) 31.
19 *Mgenge* (n 3) para 19.
20 As above.
21 *Mgenge* (n 3) paras 9–20.
22 *Mgenge* (n 3) paras 22–32.

2.1 The negotiation requirement

The bride produced a copy of the *lobola* agreement to prove the negotiation requirement was satisfied.[23] In the judgment, the contents of the *lobola* agreement is outlined:

> The lobola document was signed on 17 November 2018 and read thus as translated:
>
> 'Below are the marriage agreements between the family of Mokoena and the family of (Mahlangu) Mgenge.
>
> The Mahlangu's and the Mokoena's agreed on ten (10) cattle whereby one cattle will cost Three Thousand Five Hundreds Rands (R3,500.00) ...
>
> The Mahlangu's paid the amount of Ten Thousand Rands (R10,000.00) and the balance is Eighteen Thousand Rands (R18,000.00) And Two living cattle.'[24]

Thus, R10 000 of the *lobola* was paid to the bride's family on 17 November 2018 by an uncle of the groom on behalf of the groom.[25] Rome AJ held that this part-payment of the *lobola* and the wording of the *lobola* agreement itself meant that the parties 'successfully negotiated a customary marriage' on 17 November 2018.[26]

The *lobola* agreement amounts to more than a mere introduction or commencement of discussions about a possible marriage (as averred by the applicant),[27] and the applicant's assertion that the *lobola* agreement did not indicate successful negotiation was negated by the *lobola* agreement's wording and the part-payment of the *lobola*.[28]

From the above, it is thus clear that the wording of the *lobola* agreement and the part-payment of the *lobola* is sufficient to satisfy the negotiation requirement in this case.[29] The next step of the two-step approach followed by Rome AJ refers to the 'celebration' requirement.

2.2 The celebration requirement

The Court explored the celebration requirement under the heading of 'integration'.[30] This is likely so because section 3(1)(*b*) of the RCMA states that 'the marriage must be negotiated *and* entered into *or*

23 *Mgenge* (n 3) para 20.
24 *Mgenge* (n 3) para 17.
25 *Mgenge* (n 3) paras 15 & 18.
26 *Mgenge* (n 3) para 21.
27 *Mgenge* (n 3) para 20.
28 As above.
29 *Mgenge* (n 3) para 21.
30 *Mgenge* (n 3) para 22.

celebrated in accordance with customary law'.[31] In this case, 'entered into' *or* 'celebrated' falls under the auspice of 'integration'.[32]

In discussing the 'integration of the bride into the groom's family',[33] Rome AJ did not elaborate on what integration means in this context.[34] It is only later in the judgment that Rome AJ explained that he is dealing with the handing over of the bride.[35] For present discussion, I consolidate these two discussions in the judgment to illustrate how the Court concluded that the celebration requirement was met.

Semantics aside, the Court considered the celebration of the marriage against the expert evidence of Professor Thandabantu Nhlapo.[36] As mentioned above, expert evidence may be relied upon in certain cases to ascertain the relevant living law.[37] Professor Nhlapo testified on the following three questions:[38]

> (a) Whether the deceased [groom] when marrying ought to have followed the traditions of his biological father being the Ndebele customs. (b) Whether the deceased [groom], when marrying ought to have follow [*sic*] the traditions of his mother being the Zulu customs. (c) The requirements to be satisfied for a valid customary marriage in terms of the Sesotho, isiNdebele and isiZulu customs.

On the question of which custom applied (Sesotho, isiNdebele, or isiZulu), Rome AJ concluded that according to the compelling reasoning of Professor Nhlapo, the 'marriage had to be celebrated in accordance with Sesotho customs'.[39]

Professor Nhlapo added that 'it would be more appropriate that the search for the living law should be directed at where the bride's home community is situated and not anywhere else.'[40] This is an

31 Own emphasis added.
32 *Mgenge* (n 3) paras 21–22. The RCMA does not define 'entered into' or 'celebrated'.
33 *Mgenge* (n 3) paras 22–32.
34 For a more detailed discussion on the handing over of the bride, see Sibisi (n 2) 370–386 & 383: The handing over signifies the unification of families. See also P Bakker 'Integration of the bride and the courts: is integration as a living customary law requirement still required?' (2022) 25 *Potchefstroom Electronic Law Journal* 3.
35 *Mgenge* (n 3) paras 41–42.
36 *Mgenge* (n 3) para 23: Professor Nhlapo 'holds the following law degrees. A BA (Law) from the National University of Lesotho (1971), LLB (Honours) from the University of Glasgow (1980) and a PhD in Family Law, which he obtained from Oxford University in 1990. He was Deputy Vice-Chancellor at the University of Cape Town for ten years, where he had served as Professor and Head of the Department of Private Law.' See *Mgenge* (n 3) paras 22–32 for the expert evidence.
37 *Bhe* (n 15) para 150, Rautenbach (n 9) 31.
38 *Mgenge* (n 3) para 24.
39 *Mgenge* (n 3) para 30.
40 *Mgenge* (n 3) para 27.

important statement, as the applicant contended that the marriage was invalid because it was not celebrated in terms of either isiZulu or isiNdebele custom.[41] Hence, according to the testimony of Professor Nhlapo, the search for the living law should be directed at where the bride's home community is situated (in this case, Sesotho customary law)[42] and not isiZulu or isiNdebele customs, as argued by the applicant.[43]

Rome AJ also distinguished between the consummation of the customary marriage and the handing over of the bride.[44] On this point, Professor Nhlapo added that when the beast is slaughtered at the *lobola* negotiation it signifies the father's acceptance of the groom as his daughter's husband and the consummation of the customary marriage.[45] However, the bride is not yet actually handed over at this time.[46] Here, Professor Nhlapo clearly distinguishes the father accepting the groom as his daughter's husband and the handing over of the bride. The Court, however, did not explore this distinction further in its judgment.

Despite the credible and compelling evidence of Professor Nhlapo, Rome AJ decided that it was not necessary, on the facts before the Court, to determine the outcome of the dispute on the basis that Sesotho customs applied.[47] Interestingly, the judgment contains eight paragraphs of Professor Nhlapo's testimony, and still, the Court decided it need not be considered.[48] Furthermore, the judgment provides no reason for not deciding the outcome of the dispute based on Sesotho customs. I submit that the only reasons for not considering Sesotho customs are perhaps necessity and convenience. For example, Rome AJ did not deem it *necessary* to determine the outcome of the dispute on the basis that Sesotho customs applied. Rome AJ explained this: '[t]he question of whether the requirement of handing over was met can be determined on the basis of the following more general considerations'.[49] Hence, Rome AJ did not consider the outcome of the dispute (specifically if the handing over requirement was met) based on Sesotho customs, because of the more easily accessible (and perhaps convenient) 'general considerations'.

To answer the question of whether the handing over requirement was met, Rome AJ referred to more general considerations like (1) the

41 *Mgenge* (n 3) paras 10–13.
42 *Mgenge* (n 3) para 26, i.e., the '*lex loci domicilii* of the bride's father'.
43 *Mgenge* (n 3) paras 10, 11, 22 & 24.
44 *Mgenge* (n 3) para 29.
45 *Mgenge* (n 3) paras 28–30.
46 *Mgenge* (n 3) para 29. For a detailed discussion on the delivery of the bride, see DS Koyana 'Delivery of the bride as a requirement for the validity of a customary marriage — the final verdict' (2022) 36 *Speculum Juris* 1–16.
47 *Mgenge* (n 3) para 31.
48 *Mgenge* (n 3) paras 31–32.
49 *Mgenge* (n 3) para 32.

marriage certificate as *prima facie* proof of the marriage,[50] and (2) if the bride's actual *physical* handing over is a requirement for the conclusion of a customary marriage.[51] This more general approach was thus favoured and followed by Rome AJ, as opposed to considering any particular customary traditions like the Sesotho customs, as recounted by Professor Nhlapo under the integration discussion.[52]

In the following paragraphs, I deal with this two-prong 'general' approach followed in the judgment. First, I consider the marriage certificate as *prima facie* proof of the marriage; thereafter, I look at whether the bride's actual, physical handing over is a requirement for the conclusion of a customary marriage.

3 The marriage certificate as *prima facie* proof of the marriage

Rome AJ correctly held that the marriage certificate amounts to *prima facie* proof of the marriage,[53] in terms of section 4(8) of the RCMA. The Court had to determine whether the applicant, as the mother of the groom, had to 'consent' for the customary marriage to be valid. This wording might be somewhat misleading. A person aged 18 and above has the full capacity to act[54] and legal capacity[55] and may enter into various agreements, including a marriage contract.

As mentioned above, the bride and groom in this case were both older than 18 years of age, as required in section 3(1)(a)(i) and both parties consented to be married to each other under customary law, as required in section 3(1)(a)(ii).[56] The age and consent requirements were not in dispute.

In this case, the applicant averred that as the mother of the groom, she did 'not have *knowledge* of the marriage and had not *consented* thereto'.[57] I submit that this averment does not relate to the 'consent' requirement in section 3(1)(a)(i) of the RCMA. The 'consent' requirement, as averred by the applicant, is entwined with

50 *Mgenge* (n 3) paras 33–40.
51 *Mgenge* (n 3) paras 41–50.
52 *Mgenge* (n 3) paras 22–30.
53 *Mgenge* (n 3) para 33. See also Rautenbach (n 9) 101 with reference to *Baadjies v Matubela* 2002 (3) SA 427 (W).
54 T Boezaart *Law of persons* (2010) at 7: 'The capacity to act can be defined as the judicial capacity to enter into legal transactions.'
55 Boezaart (n 54) at 7: 'Legal capacity is the judicial capacity that vests the individual with legal subjectivity and enables him or her to hold offices as a legal subject.'
56 As above.
57 *Mgenge* (n 3) para 5. Own emphasis added.

the 'negotiated and entered into' facet of a customary marriage (as outlined in section 3(1)(b) of the RCMA).

I submit that this case essentially pivots on the applicant's misunderstanding of the events. The applicant believed that the events that transpired (like the family delegation that travelled to QwaQwa on 17 November 2018) were intended to be mere introductions.[58] Furthermore, the applicant persisted that 'the *lobola* document merely evidenced an intention to commence initial marriage negotiations.'[59] Initiating *lobola* negotiations is integral to a customary marriage.[60]

As noted above, Rome AJ held that these were more than initial introductions or negotiations.[61] The *lobola* agreement and the events of 17 November 2018 were indicative of negotiating and entering into/celebrating the customary marriage between the bride and the groom.[62]

Rome AJ worded it as 'consent' being absent, meaning that the applicant did not 'consent' to the marriage, which was therefore invalid.[63] Perhaps a better phrasing would be that the applicant claimed the marriage was invalid because of her lack of knowledge of and participation in the negotiation and entering into/celebration of the customary marriage. In this case, it was not about 'consent' as such but rather a misunderstanding of the visit to QwaQwa on 17 November 2018 and the purpose of that visit. The applicant understood the meaning of the visit as being an introduction.[64]

Essentially, the issue revolves around whether the applicant's knowledge and participation (rather than consent) are required for the validity of the customary marriage. Hence, the question here is if the applicant's participation and knowledge, as the single mother of the groom,[65] was required for the valid negotiating and entering into/ celebration of the customary marriage between the bride and the groom. Rome AJ did not explain if the absence of the applicant's participation in the events or her lack of knowledge, supported by sufficient evidence, could lead to a rebuttal of the *prima facie* proof offered by the marriage certificate.

58 *Mgenge* (n 3) paras 8 & 11.
59 *Mgenge* (n 3) para 8.
60 S Sibisi 'Is the requirement of integration of the bride optional in customary marriages?' (2020) 53(1) *De Jure* 91.
61 *Mgenge* (n 3) para 20.
62 *Mgenge* (n 3) para 21.
63 *Mgenge* (n 3) paras 5 & 36.
64 *Mgenge* (n 3) para 8.
65 The applicant described herself as a single parent, despite the fact that the biological father of the deceased groom was still alive at the time of the marriage negotiations and celebrations; see *Mgenge* (n 3) paras 25–26.

Instead, Rome AJ concluded that the applicant's misunderstanding of the purpose or intention of the events that transpired and her absence in the negotiations and entering into or celebrating the customary marriage between the bride and the groom does not invalidate the *prima facie* proof offered by the marriage certificate.[66] Here, Rome AJ considered if the *prima facie* proof provided by the marriage certificate could be rebutted by the evidence and concluded that it did not.[67]

In the introduction to this note, I mention that the 'consent' requirement under examination is better suited under the auspice of the 'negotiated and entered into' facet of a customary marriage.[68] However, Rome AJ, in this case, did not consider the applicant's absence of knowledge and participation as a separate requirement under the auspice of 'negotiated and entered into' as outlined in section 3(1)(b) of the RCMA. As mentioned, Rome AJ approached the applicant's absence of knowledge and participation against the backdrop of rebutting the *prima facie* proof offered by the marriage certificate.

To determine whether the marriage certificate is *prima facie* proof of the marriage, the Court referred to the evidentiary nature of a marriage certificate set out in *W v W*,[69] as established in *Gumede v S*.[70] Rome AJ considered the claims of the applicant, and the reasons why they were insufficient to rebut the *prima facie* proof offered by the marriage certificate.[71] The Court concluded that the applicant's version of events offered insufficient evidence to rebut the *prima facie* proof offered by the marriage certificate.[72] Seeing as the marriage certificate serves as *prima facie* proof of the marriage, the second factor inspected by Rome AJ was if the *physical* handing over of the bride was required.[73]

4 Integration and the *physical* handing over of the bride

In addition to the knowledge, consent, and participation argument, the applicant also argued that the 'events in QwaQwa did not comply with the requirement of the handing over of the bride', and because of this, the marriage had not been concluded under customary law.[74]

66 *Mgenge* (n 3) paras 21, 33–35 & 52.
67 As above.
68 S 3(1)(b) of the RCMA.
69 1976 2 All SA 529 (W). See also *Mgenge* (n 3) paras 33–34.
70 2021 ZAMPMHC 21 (24 May 2021). *Gumede* did not deal with customary marriages.
71 *Mgenge* (n 3) paras 36-40.
72 As above.
73 *Mgenge* (n 3) para 41.
74 As above.

Although this 'submission was not based on the contents of the founding affidavit',[75] Rome AJ indulged this averment and commented that on the evidence, he was satisfied that the integration, or handing over, requirement was fulfilled on 17 November 2018.[76]

Rome AJ also commented that it had to be borne in mind that integration, or handing over, comprises a series of events, and *some* of these events under the banner of integration may be waived, condoned, or abbreviated by the parties.[77] Rome AJ concluded that 'what is required is that the bride must at least be handed over to her in-laws in compliance with the customary integration requirements.'[78]

Citing *Sengadi v Tsambo*,[79] the Court indicated that where the handing over consisted of a part-payment of *lobola* and, on the same day, changing the bride into traditional attire, giving her a traditional dress, slaughtering a lamb, and the smearing of the bile, a bride would have been successfully handed over.[80] In *Mgenge*, the handing over was signified symbolically by allowing the parties to cohabitate after the conclusion of the *lobola* negotiations.[81]

Rome AJ also mentioned that the 'handing over of the bride is not an "indispensable sacrosanct *essentialia*" for a lawful customary marriage'.[82] Some authors however, argue that this requirement is *not* dispensable and that the handing over of the bride *cannot* be waived.[83] South African courts are also divided on this issue.[84] For purposes of present discussion, it is worth noting that whether handing over is a requirement, was not in dispute in *Mgenge*. For this

75 As above.
76 As above.
77 *Mgenge* (n 3) para 42. See also Sibisi (n 2) 98.
78 As above.
79 2019 1 All SA 569 (GJ) (*Sengadi* GJ) as cited in *Mgenge* (n 3) para 43.
80 As above.
81 *Mgenge* (n 3) para 45, see also Sibisi (n 2) 384: the payment 'of *ilobolo* following cohabitation seems to strengthen the idea of a symbolic handing over'.
82 *Mgenge* (n 3) para 44 with reference to *Sengadi* GJ (n 79), see also Sibisi (n 2) 98, Koyana (n 46) 15, F Osman 'Precedent, waiver and the constitutional analysis of handing over the bride [discussion of *Sengadi Tsambo* 2018 jdr 2151 (GJ)]' (2020) 31(1) *Stellenbosch Law Review* 84 (with reference to *Msutu v Road Accident Fund* GPPHC 10-07-2014 case no 18174 of 2014 para 44): '[h]anding over of the bride was thus not required by the court in *Msutu* as the couple had lived together with the knowledge of both spouses' families'.
83 See Sibisi (n 2) 100-102 with reference to *Moropane v Southon* (755/2012) [2014] ZASCA 76 (*Moropane v Southon*), and *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) (*Mbungela v Mkabi*). See also Sibisi (n 2) 103: 'living customary law […] still requires that the bride should be integrated into her in-laws; failing this, there is no customary marriage […] judgments that follow the narrative that integration of the bride is dispensable have not enjoyed the benefit of proof to this effect'. See also Bakker (n 34) 4.
84 Sibisi (n 2) 103: '[t]he SCA in *Moropane v Southon* (n 83) has held that integration of the bride is mandatory in customary marriages; whereas the very same court in *Mbungela v Mkabi* (n 83) decided the opposite'.

reason, I do not delve into the detailed debates surrounding if the handing over requirement is unconstitutional or dispensable *in toto*.[85] I agree with Sibisi's suggestion on this point — the way forward is that the High Court 'must take each case on its facts', and the Supreme Court of Appeal or Constitutional Court must pronounce on this uncertainty.[86] Bakker and Sibisi suggest that the bride's handing over, or integration, *is* a requirement.[87]

Despite Rome AJ's observation that the 'handing over of the bride is not an "indispensable sacrosanct *essentialia*" for a lawful customary marriage',[88] Rome AJ accepted the handing over of the bride as a requirement.[89] This is perhaps so, as Bakker correctly points out because Mokgoathleng J[90] possibly meant that 'the physical act of transferring the bride to the bridegroom's family' is not an indispensable sacrosanct *essentialia* and symbolic handing over may suffice.[91] Hence, the bride's handing over (or integration) remains a requirement, but it need not necessarily be the *physical* handing over — symbolic handing over may suffice.

As commented above, 'celebrated' falls under the auspice of 'integration' in this case. Rome AJ commented that the RCMA is silent on the requirements of 'celebration'.[92] This is perhaps an intentional and purposeful omission by the legislature to defer to living customary law.[93] Here, the requirement seems to be that the 'celebration' requirement is fulfilled 'when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstances.'[94]

Accordingly, it is accepted that physical handing over of the bride is not required,[95] and symbolic handing over may suffice.[96] According to Rome AJ, 'integration', as part of the ceremony, merely marks the 'beginning of the couple's customary marriage' and 'introduces the

85 Sibisi (n 2) 98; Osman (n 82) 80–90.
86 Sibisi (n 2) 103.
87 As above. See also Sibisi (n 2) 380; and Bakker (n 34) 17: '[f]amily participation, a *lobolo* agreement, and the bride's integration into the husband's family are the living customary law requirements for a valid customary marriage under [s] 3(1)(b) of the Act'.
88 *Mgenge* (n 3) para 44. See also Sibisi (n 2) 98.
89 *Mgenge* (n 3) para 41.
90 *Sengadi* GJ (n 79) para 18
91 Bakker (n 34) 5.
92 *Mgenge* (n 3) para 46 with reference to *Sengadi* SCA (n 13) para 15.
93 As above.
94 *Mgenge* (n 3) para 46 with reference to *Sengadi* SCA (n 13). However, it is worth noting that a celebration that follows *lobola* negotiations does not automatically constitute a marriage, see Sibisi (n 2) 383: 'the fact that a celebration ensues after the *ilobolo* negotiation does not make an event a marriage'.
95 *Mgenge* (n 3) para 47.
96 Sibisi (n 2) 380: '[i]t is unclear what constitutes a symbolic handing over'. See also Osman (n 82) 84, and Bakker (n 34) 6: '[w]here the actual physical handing over did not occur, they had to devise another way to recognise the marriage — symbolic or constructive handing over'.

bride to the groom's family'.[97] For example, accepting the *makoti* (daughter-in-law) is sufficient for the handing over of the bride.[98]

Accepting that the bride's physical or symbolic handing over (or integration) is a requirement, the issue, in this case, pivots around the applicant's involvement and participation regarding the handing over or integration of the bride. Worded differently, was the handing over requirement met, despite the applicant's lack of knowledge and participation in the events? The short answer is yes, as the integration requirement was satisfied.[99]

Although the applicant did not participate in the bride's handing over, the groom's estranged biological father did. The groom's father 'had travelled to QwaQwa as part of the delegation that would represent the deceased [groom] in their meeting with the first respondent's [the bride's] family'.[100] Rome AJ held that the integration requirement had thus been met.[101]

Rome AJ also added that the applicant's failure to object to the cohabitation of the groom and the bride after the events of 17 November 2018 cast doubt on the applicant's version that the 'customary requirement of the integration of the applicant [*sic*] into the deceased's [the groom's] family had not been satisfied'.[102] Rome AJ considered various factors to determine whether the *integration* requirement was satisfied. These factors, or events, include the

> successful conclusion of a *lobola* agreement, part payment of *lobola*, the observance of customary rituals such as the slaughtering of a sheep, the rubbing of fat on the groom, the families thereafter partaking in a celebratory meal and the gifting of the remaining part of the sheep.[103]

The factors mentioned above and the series of events which resulted in the conclusion of a customary marriage on 17 November 2018, together with the applicant's failure to object to the cohabitation,

97 *Mgenge* (n 3) para 47 with reference to *Sengadi* SCA (n 13), per Molema JA, paras 26–27. See also Sibisi (n 2) 380: '[i]ntegration of the bride takes place at the groom's home'.

98 *Mgenge* (n 3) para 47. See also Sibisi (n 2) 381 with reference to *Sengadi* SCA (n 13) para 26: 'the appellant had embraced the respondent — thus welcoming her into his family. This was, according to the court, a declaration of acceptance of the respondent as his daughter-in-law, in compliance with the "flexible" requirement of the handing over'. See also Osman (n 82) 88.

99 *Mgenge* (n 3) para 50.

100 *Mgenge* (n 3) para 37.

101 *Mgenge* (n 3) para 50.

102 As above. The court perhaps made a typo by referring to the integration of the '*applicant* into the deceased's family' when it is in fact the integration of the *first respondent* (the bride). See also Osman (n 82) 87: 'it is arguable that the cohabitation coupled with the celebrations where the applicant was introduced as the customary-law wife suggest that handing over had been waived by the families'.

103 *Mgenge* (n 3) para 48.

satisfied the Court that the customary requirement of the integration into the groom's family had been met.[104]

In light of the above, it is clear that the Court considered the participation of the groom's father (who travelled to QwaQwa as part of the delegation that would represent the groom in their meeting with the bride's family), in addition to the applicant's failure to object to their cohabitation as husband and wife. As mentioned above, the integration, or handing over, comprises a series of events, and some of these events under the banner of integration may be waived, condoned, or abbreviated by the parties.[105] Rome AJ did not expressly stipulate or explain if these events were shortened or if the applicant's failure to object to their cohabitation constituted a condonation or waiver. However, in *Sengadi*, the deceased groom's family tacitly waived the physical handing-over requirement by allowing the parties to cohabitate.[106] This case must be distinguished from *Mgenge*. In *Sengadi*, the parties cohabited some three years before the *lobola* negotiations.[107] Sibisi suggests that when the cohabitation takes place after the marriage, it is more indicative of the consummation of the marriage (like in *Mabuza v Mbatha*[108] if cohabitation followed the formal handing over of the bride).[109]

The Court in *Mgenge* did not expressly attach any more weight to one factor (like the slaughtering of the sheep, the part-payment of *lobola*, or the failure to object to their cohabitation, etcetera) in finding that the customary requirement of the integration into the groom's family had been satisfied. It would appear that all these factors were collectively indicative of a valid customary marriage. In the following paragraphs, I briefly reflect on the role of Sesotho custom in this case, before concluding this case note.

5 The role of Sesotho custom

As explored above, the RCMA is silent on the requirements of 'celebration'[110] and this omission by the legislature defers it to living customary law.[111] In light of this, it is unfortunate that Rome AJ did

104 *Mgenge* (n 3) para 50.
105 Sibisi (n 2) 98.
106 *Sengadi* GJ (n 79) para 17. For criticism of the court's approach in *Sengadi* GJ (n 79), see Sibisi (n 2) 98. See also Bakker (n 34) 17 fn 94: 'the SCA rejected the decision of the court *a quo* because it did not find that integration can be waived, although it did support the factual decision of the court *a quo* that physical handing over can be replaced by symbolic handing over'.
107 Sibisi (n 2) 98.
108 2003 (4) SA 218 (C).
109 Sibisi (n 2) 99. See also Osman (n 82) 87: 'it is arguable that the cohabitation coupled with the celebrations where the applicant was introduced as the customary-law wife suggest that handing over had been waived by the families'.
110 *Mgenge* (n 3) para 46 with reference to *Sengadi* SCA (n 13) para 15.
111 As above.

not specifically consider Sesotho custom and the testimony of Professor Nhlapo when deciding the question of integration and handing over.

I submit that even if it was not 'necessary on the facts of this matter definitively to determine the outcome of the dispute on the basis that Sesotho customs applied',[112] the Court could have meaningfully considered Sesotho custom in addition to the 'more general considerations'[113] like the physical handing over and the *prima facie* proof.

I do not suggest that Rome AJ should have relied on Sesotho custom only, but it could have been meaningfully considered in addition to the more general considerations. For example, Rome AJ could have ruled that according to Sesotho custom and the prescripts of ascertaining living customary law, the slaughter of a sheep, at the time when the *lobola* was concluded, signified the conclusion of the marriage between the families of the bride and groom. This is so because Sesotho customs did not require anything more than the ceremonial slaughter of a beast after the conclusion of the *lobola* agreement.[114]

I do not suggest that Sesotho custom be the only consideration.; Sesotho custom, in this case, merely reaffirms the correctness of a finding that the marriage was in fact valid, in addition to the more general considerations. Considering Sesotho custom in this case does not exclude the consideration of more general considerations, and *vice versa* — both approaches indicate that the marriage was valid. These two approaches to determining the validity of the customary marriage are not mutually exclusive and Sesotho custom could have been used in addition to, or complementary to, the more general considerations.

6 Concluding remarks

This case makes an important contribution to the existing case law on customary law, especially in the context of the participation in and knowledge of the events leading up to the wedding (like the negotiations) and the entering into or celebration of the customary marriage.

This case illustrates the dynamic and evolving nature of living customary law in South Africa and the approaches adopted by the judiciary when exploring customary law issues like the validity of a customary marriage.

112 *Mgenge* (n 3) para 31.
113 *Mgenge* (n 3) para 32.
114 *Mgenge* (n 3) para 30.

Rome AJ concluded that 'the marriage certificate correctly recognises the existence of a marriage between the first respondent [bride] and the deceased [groom] *during the lifetime of the deceased*.'[115] This implies that the groom's death dissolved the customary marriage, and it was unnecessary to consider *ukungena*, *kungena*, or *kenela*.[116]

In conclusion, the evidence presented by the applicant did not 'cast any doubts on the validity of the marriage certificate and the correctness of its contents'.[117] By relying on more general considerations, Rome AJ correctly held that the marriage was valid and that the certificate correctly recognised the existence of the marriage between the bride and the groom during his lifetime.[118] The application was accordingly dismissed with costs.[119]

115 Own emphasis.
116 P Maithufi et al *African customary law in South Africa* (2014) 260. Perhaps a point for further discussion elsewhere would be if the participation and knowledge, similar to that under inspection in this case, is necessary for the continuance of a customary marriage, after death, as in the case of *ukungena*, *kungena* or *kenela*. Rautenbach (n 9) 113 explains that levirate (also known as *ukungena*, *kungena* or *kenela*) refers to the 'practice where a man's widow cohabits with one of his brothers or some other nominated male relative, for the purposes of raising an heir.'
117 *Mgenge* (n 3) para 52.
118 *Mgenge* (n 3) paras 51-52.
119 *Mgenge* (n 3) para 53.