

Is the requirement of integration of the bride optional in customary marriages?

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SUMMARY

Section 3(1) of the Recognition of Customary Marriages 120 of 1998 provides for the requirements for a valid customary marriage entered into after the commencement of the Act. The requirements are, the parties must be 18 years of age or above; they must consent to being married under customary law and the marriage must be negotiated and entered into or celebrated in terms of customary law. The result of entering into or celebrating a customary marriage is the bride be integrated into her new family. The question is, may the parties agree to waive the integration of the bride? This depends on whether this is a dispensable or indispensable requirement. The article forwards two school of thoughts; the first favours the view that integration of the bride is dispensable, whereas the second forwards the view that integration of the bride is indispensable. These two schools are analysed using largely case law. The article begins from the premise that integration of the bride is an indispensable requirement. This being said, it forwards the view that integration comprises many events, some of which are dispensable; one of these event is the handing over of the bride, which cannot be waived.

1 Introduction

The recent judicial and popular treatment of customary law creates the impression that there exist uncertainty regarding various aspects of customary marriages; central to this uncertainty is the question of when is a valid customary marriage concluded? This perceived uncertainty is further fueled by the fact that, in South Africa, various ethnic groups differ in practices. Nonetheless, there are common practices such as the negotiation and payment of *ilobolo*. Does finalisation of *ilobolo* alone conclude a valid customary marriage? Is there a need for further practices such as the handing over of the bride or the integration of the bride? Is it permissible for parties to omit any of the practices? In addition, what are the consequences should any of the practice be omitted? In light of various judicial decisions, some recent, answers to these questions are not unanimous.

The purpose of this article is to investigate whether, under customary law, the parties may waive the requirement of integration of the bride. It will focus heavily on how the courts have approached matters dealing with this topic. It will open by introducing the two schools of thoughts to integration of the bride. The first school argues that integration of the

bride is a dispensable or variable requirement that parties may waive if they so choose. The second school argues the opposite – that integration of the bride is an indispensable requirement. Below it will be shown that our courts have not settled on any school.

The decision in *Mabuza v Mbatha*,¹ is central to the question of integration of the bride. Courts that have purported to follow the latter decision interpret it as authority for the view that integration of the bride is dispensable. Below, it will be argued that this is an incorrect interpretation of the judgment. It will show that the judiciary, especially the Supreme Court of Appeal (SCA), has not reached certainty on this matter. This will be illustrated using two decisions of the SCA that are opposed to each other. This article takes the position that the integration of the bride is an indispensable requirement that comprises various preliminaries, some of which may be waived, varied or abbreviated, however, complete waiver is impermissible. Among these preliminaries is the physical handing over of the bride,² which cannot be waived.³

2 Statutory requirements for a valid customary marriage

Section 3(1) of the Recognition of Customary Marriages Act (the Recognition Act)⁴ provides for the requirements for a valid customary marriage entered into after the commencement of the Act.⁵ In order to be valid, the marriage must meet three requirements: the parties must both be 18 years or above,⁶ they must consent to be married in terms of customary law,⁷ and the marriage must be negotiated and entered into or celebrated in accordance with customary law.⁸

The first requirement is straightforward. Whereas the second requirement can be a subject of dispute before courts. In *Maropane v Southon*,⁹ the court had to determine whether the parties had consented to being married in terms of customary law. The court held that by initiating *ilobolo* negotiations, an integral part of a customary marriage,¹⁰ the parties had consented to being married in terms of customary law.¹¹ It is the third requirement that has been, and continues to be, debated

1 *Mabuza v Mbatha* 2003 4 SA 218 (C).

2 Bekker and Rautenbach *Introduction to Legal Pluralism in South Africa* (2014) 52.

3 *Fanti v Boto and others* 2008 (5) SA 405 (C) para 22.

4 Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act).

5 The commencement date is 15 November 2000.

6 S 3(1)(a)(i) of the Recognition Act.

7 S 3(1)(a)(ii) of the Recognition Act.

8 S 3(1)(b) of the Recognition Act.

9 *Maropane v Southon* (755/12) [2014] ZASCA 76 (24 May 2014).

10 In this regard see Maithufi and Bekker “The Recognition of Customary Marriages Act of 1998 and its impact on family law in South Africa” 2002 *CILSA* 182 187.

11 *Maropane v Southon supra*, para 28.

about by lawyers, judges and academics – that is whether a customary marriage was negotiated and entered into or celebrated in accordance with customary law.¹² Although the Recognition Act is unequivocal about this requirement, however it is silent on how exactly the marriage should be “negotiated” and “entered into” or “celebrated” in accordance with customary law. The reason for this omission lies in our beautiful rainbow nation and the different ethnic groups of South Africa.¹³ As it has been pointed out above, different ethnic groups celebrate marital unions in their unique ways; even within the same ethnic group, practices do differ.¹⁴ Therefore no good could have been achieved in the legislature prescribing how a customary marriage should be celebrated; such would have been in ignorance of the living and flexible nature of customary law. Further, it would not have been in keeping with the principle of deference when it comes to the treatment of customary law as emphasised by the Constitutional Court in *Shilubana v Nwamitwa*.¹⁵ In *Mbungela v Mkabi* the Supreme Court of Appeal reiterated:

“The Constitutional Court has cautioned courts to be cognisant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights. The courts must strive to recognise and give effect to the principle of living law, actually observed customary law, as this constitutes a development in accordance with the ‘spirit, purport and objects’ of the Constitution within the community...”¹⁶

This being said, it is accepted that “negotiated” is associated with negotiations for the payment of *ilobolo*.¹⁷ What is required is that the two

12 See also *Motsoatsoa v Roro* [2011] 2 SA 324 (GSJ) para 10 where the court states that a factual determination must be carried out in order to determine whether the requirements of s 3(1)(b) are present.

13 *Maropane v Southon supra*, para 35.

14 Nkosi, Customary marriage as dealt with in *Mxiki v Mbata in re Mbata v Department of Home Affairs and others* (GP) (unreported case no A844/2012, 23-10-2014) (Matojane J) Feb 2015 DR Feb available at <http://www.derebus.org.za/customary-marriage-as-dealt-with-in-mxiki-vmbata-in-rembata-v-department-of-home-affairs-and-others-gp-unreported-case-noa8442012-23-10-2014-matojane-j/> accessed on 13 September 2019; see also Nkosi and Van Niekerk “The unpredictable judicial interpretation of section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998: *Eunice Xoliswa Ngema v Sifiso Raymond Debengwa* (2011/3726) [2016] ZAGP]HC 163 (15 June 2016)” 2018 THRHR 345, 348; see also *Mbungela v Mkabi* unreported case number 820/2018 of 30 September 2019 (SCA) para 17 wherein variations in local practices are acknowledged.

15 *Shilubana v Nwamitwa* 2008 9 BCLR 914 214 (CC) para 49.

16 *Mbungela v Mkabi supra*, para 18.

17 Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 103. At this state one must pause to point out that *ilobolo* is referred to by other names, depending on the ethnic group involved, such as *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi* or *emabheka* (section 1 of the Recognition of Customary Marriages Act); Bekker and Rautenbach *Introduction to Legal Pluralism in South Africa* (2010) 57; Maithufi and Bakker 186.

families negotiate and reach an agreement on the payment of *ilobolo*.¹⁸ The *ilobolo* need not be paid in full; partial payment suffices.¹⁹ Whether a valid customary marriage may result, where no payment has been made towards *ilobolo* is unclear.²⁰ However, in *Fanti v Boto*,²¹ the Cape High Court found that a marriage was invalid because, *inter alia*, no *ilobolo* had been delivered.²² This judgment has been criticised for not paying attention to the requirements of a customary marriage as set out in the Recognition Act despite the year of the alleged marriage being 2005.²³ It is submitted that the groom's emissaries must pay something; otherwise, the negotiations would be an exercise in futility.²⁴

Ilobolo is merely one of the indispensable essentials of a customary marriage.²⁵ Reaching an agreement on *ilobolo* does not, on its own, conclude a customary marriage.²⁶ The purpose of *ilobolo* is not to 'buy' the bride. Any alignment to this view is demeaning as it drives the unacceptable perception, still held by unscrupulous individuals of various racial and ethnic groups, that women are a possession. Rather, *ilobolo* is a show of love, sacrifice and respect. It builds relations between the two families. It stems from the old age saying that "... where your treasure is, there the desires of your heart will also be".²⁷

In addition to the negotiation, the marriage must also be "entered into" or "celebrated" in accordance with customary law. It is submitted that entering into or celebrating a marriage is one of the same thing. This must follow the *ilobolo* negotiations and at least partial payment thereof. As stated above, each ethnic group has its own way of entering into a customary marriage. Regardless of how a customary marriage is entered into, the result must be the integration of the bride into the groom's family. In other words, the entering into or celebration of a customary marriage results in the integration of the bride into the groom's family.

18 Ngema "Considering the Abolition of *Ilobolo*: *Quo Vadis* South Africa?" 2012 *Speculum Juris* 30, 35; Bekker and Rautenbach 52.

19 Nkosi; see also *Modiko v Sethabela* unreported case number 4856/2016 FSB (4 August 2017) para 10.

20 Nkosi and Van Niekerk 346 submit that it was possible for the bride's family to waive the right to *ilobolo*; Bayi and Hawthorne "Colonialisation of *lobolo*" 2018 *THRHR* 576, 588 submit that the handing-over of the bride will only take place after partial or full performance of the *ilobolo* agreement.

21 *Fanti v Boto supra*.

22 *Fanti v Boto supra*, para 28; *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP) para 11 endorses *Fanti v Boto* in that *ilobolo* is one of the essentials of a customary marriage which non-compliance render a marriage invalid.

23 Bekker and Rautenbach 56.

24 Hlophe "The KwaZulu Act on the Code of Zulu Law, 6 of 1981 – a guide to intending spouses and some comments on the custom of *lobolo*" 1984 *CILSA* 164 166; see also Himonga and Nhlapo 103; *Fanti v Boto supra*, para 28.

25 *Fanti v Boto supra*, para 20.

26 Himonga and Nhlapo 97; *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP).

27 This saying stems from the Bible. See the book of Matthew 6:21.

This leads to a provocative question regarding the integration of the bride. The question is whether it is permissible for the parties (bride and groom or their families) to waive the integration – after all, it is a requirement that the parties must consent to be married to each other in terms of customary law.²⁸ In other words, can the parties agree that their customary marriage shall be concluded on reaching an agreement on *ilobolo*? Alternatively, that the handing over will occur at the bride's residence and not the physical handing over where the bride is accompanied to the groom's residence. The point of departure is this: for a customary marriage to be valid, it must comply with customary law. Therefore, the real question is whether customary law permits the waiving of the requirement of integration of the bride.

3 Judicial approaches to integration of the bride

Fortunately, there is a relatively rich pool of decided cases dealing with the requirement of integration of the bride in customary marriages. These cases follow the two schools of thought. To reiterate, the first school argues that the requirement is dispensable and may be waived by the parties;²⁹ and the second school argues that the requirement is indispensable and must be complied with.³⁰ What is very strange about these schools of thought is that they may be drawn from the same case as authority.³¹ The case is *Mabuza v Mbatha*. This case is discussed below followed by notable cases in the respective schools of thought.

3.1 Integration of the bride as a dispensable requirement

The notion that the integration of the bride is a dispensable requirement, which the parties may, if they so decide, waive, is attributable to *Mabuza v Mbatha*. Although, as it will be argued below, this case lends itself to both schools of thought, most court decisions that purport to follow it do so on the premise that the integration of the bride is a flexible requirement.

In *Mabuza v Mbatha* the plaintiff (the wife) sought, among others, a decree of divorce as well as ancillary relief.³² She alleged that she and the defendant had concluded a valid Swati customary law marriage. The defendant opposed the action arguing that there was no valid marriage as the *Ukumekeza* custom had not been performed. *Ukumekeza* is an old-age Swati practice that also involved the bride appearing naked before

28 S 3(1)(a)(ii) of the Recognition Act.

29 *Mkabe v Minister of Home Affairs* 2016 ZAGPPHC 460 (9 June 2016).

30 *Ngema v Debengwa* unreported case no 2011/3726 GJ (15 June 2016); *Dalasile v Mgoduka and another* unreported case no 5056/2018 ECM (2 October 2018).

31 Bekker "Integration of the Bride as a requirement for a Valid Customary Marriage: *Mkabe Minister of Home Affairs* [2016] ZAGPPHC 460" 2018 *PER/PELJ* 17.

32 *Mabuza v Mbatha supra*, para 1.

her female in-laws.³³ It was not in dispute that the parties started their relationship in 1989. This relationship soon resulted in pregnancy in September 1989. Two months later, the respondent's family approached the plaintiff's family to discuss the payment of damages and *ilobolo*.³⁴ The *ilobolo* was fixed at R2500 and subsequently paid in full by the defendant.³⁵ In 1992, the plaintiff was officially handed over by her family to the defendant and they lived like husband and wife.³⁶ Around June of year 2000, the relationship between the parties deteriorated and could not be restored.

The court accepted that according to isiSwati (both parties were Swati) customary law, there were three requirements for a valid customary marriage: the payment of *ilobolo*, *ukumekeza* and the formal handing over of the bride to the bridegroom's family.³⁷ It was common cause that these requirements had been met except *ukumekeza*. Was *ukumekeza* a *sine qua non*? Both the parties answered this in the affirmative; the plaintiff explained that, essentially, they regarded themselves as married. She regarded herself as the defendant's wife and the defendant regarded her as his wife. She had all the benefits of being the defendant's lawful wife.³⁸ Further, the defendant had said that he was happy with the type of marriage that they had and there was no need for *ukumekeza*.³⁹

The defendant testified that non-compliance with *ukumekeza* was a fatal blow to the validity of a Swati customary marriage.⁴⁰ He also denied that he had waived *ukumekeza*.⁴¹ He added that *ukumekeza* had not taken place because the plaintiff did not co-operate. He failed to address the court as to the manner in which the plaintiff did not co-operate.⁴² The court also pointed out the following: the defendant had on numerous occasions referred to the plaintiff as his wife,⁴³ and he had previously sought a divorce in terms of customary law.⁴⁴ The defendant could not explain this, instead he "was very evasive" and unable to "proffer any

33 *Mabuza v Mbatha supra*, para 2. One must caution against this misguided reference to *ukumekeza*. What really happens is that the bride, accompanied by maidens, will sing around the kraal at the groom's residence.

34 The damages related to the fact that the defendant had impregnated the plaintiff out of wedlock. See para 4.

35 *Mabuza v Mbatha supra*, paras 4 and 7.

36 *Mabuza v Mbatha supra*, paras 4 and 7.

37 *Mabuza v Mbatha supra*, para 9.

38 *Mabuza v Mbatha supra*, para 8.

39 *Mabuza v Mbatha supra*, para 9.

40 *Mabuza v Mbatha supra*, para 17.

41 *Mabuza v Mbatha supra*, para 17.

42 *Mabuza v Mbatha supra*, para 17.

43 *Mabuza v Mbatha supra* para 18. The defendant had deposed to an opposing affidavit in terms of the Domestic Violence Act 116 of 1998 and in that affidavit, he referred to the plaintiff as his wife that he had married according to custom.

44 *Mabuza v Mbatha supra*, para 5.

sensible explanation". In the court's view, he was "being economical with the truth."⁴⁵

The court held that the practice of *ukumekeza* has no doubt evolved and could thus be waived.⁴⁶ The court found that there was, in fact, a valid isiSwati customary marriage between the plaintiff and the defendant.⁴⁷ The court went on to note that prior to the Constitution of 1996, customary law was not allowed to develop and therefore take its rightful place.⁴⁸ It was only recognised if it was not repugnant to public policy or natural justice.⁴⁹ With the advent of a supreme Constitution based on equality, any form of discrimination cannot be countenanced. Any cultural practice that fell short of the spirit, purport and object of the Bill of Right had to be developed.⁵⁰ Whether the court developed isiSwati customary law in as far as the practice of *ukumekeza* is concerned is unclear.

It has been pointed out above that the court found that in terms of isiSwati customary law there are three requirements for a valid marriage: *ilobolo*, *ukumekeza* and the formal handing over of the bride. Accordingly, the court was of the view that *ukumekeza* and the formal handing over of the bride were two distinct requirements. The court settled with *ukumekeza* as the integration of the bride into the groom's family and the handing over as a separate act. The finding that parties may waive compliance with *ukumekeza* inevitably led to the conclusion that parties could waive compliance with the integration of the bride into the groom's family.

It is submitted that the finding above is flawed because it loses sight of the fact that customary marriages are not a once-off event, but a process of many events or preliminaries.⁵¹ It is submitted that the correct position is that in terms of isiSwati customary law, the requirements for a valid marriage are *ilobolo* and the integration of the bride.⁵² These requirements are non-dispensable.⁵³ However, the integration of the bride comprises a series of event, some of which may be waived, condoned or abbreviated by the parties.⁵⁴ For instance, in isiSwati customary law, the necessary integration rituals that must be observed include, among others, *ukumekeza* and the handing over of the bride. It

45 *Mabuza v Mbatha supra*, para 20.

46 *Mabuza v Mbatha supra*, para 25.

47 *Mabuza v Mbatha supra*, para 27.

48 *Mabuza v Mbatha supra*, para 28.

49 *Mabuza v Mbatha supra*, para 28.

50 See also Sibisi "Breach of promise to marry under customary law" 2019 *Obiter* 340 341.

51 Nkosi; see also Himonga and Nhlapo 97.

52 Bekker 9.

53 It is essential to point out that these requirements are uniform in all customary marriages, however the ethnic groups approach integration differently.

54 *Mbungela v Mkabi* unreported case number 820/2018 of 30 September 2019 (SCA) para 21.

is open for the parties to waive *ukumekeza*, being one event towards the integration of the bride.⁵⁵ However, it is not open to parties to waive compliance with the entire integration requirement. At least some aspect of integration must be complied with. In the words of Professor Bekker “It is not the essential requirements that can be waived but rather the rituals associated with the essential requirements.”⁵⁶ The judgment is also criticised for overlooking the real issue.⁵⁷ According to Bekker, the real issue was whether the bride had been integrated into her in-laws and not whether *ukumekeza* is practiced differently than what it was centuries ago.⁵⁸

3 2 A symbolic handing over of the bride

What should be observed is that the bride must at least be handed over to her in-laws in compliance with the integration requirement. This has to take place at the groom’s home.⁵⁹ The bride is welcomed and counselled by her in-laws. A beast is slaughtered; gull may be smeared or anointed on her. The families celebrate this occasion. This way she is integrated.⁶⁰ With this said, and taking into account the flexible nature of customary law,⁶¹ has customary law evolved to such an extent that a bride may now be integrated into the groom’s family at her own residence? In other words, may the families agree that the bride will not be physically handed over; instead, a “symbolic handing-over” will be preferred.

In *Sengadi v Tsambo; In re Tsambo*,⁶² the court set precedent symbolic handing over. The *Sengadi v Tsambo* case follows the death of popular rapper HHP (Jabulani Tsambo). The deceased met the applicant during their days at the Witwatersrand University. They soon cohabited. A few years into their relationship, the deceased’s father dispatched a letter to the applicant’s mother requesting the families to meet “to discuss the union of their son and her daughter.”⁶³ The families met and reached an agreement on the *ilobolo*, partial payment was made. On the same day, the deceased changed into an attire. The applicant was taken into a room where she was given a dress to wear. The dressed matched the deceased’s attire. The families then celebrated and congratulated the parties. The celebrations were captured on video.⁶⁴ The parties resumed

55 Bekker 10.

56 Bekker 10.

57 Bekker and Rautenbach 52.

58 Bekker “The requirement for the validity of a customary marriage: *Mabuza v Mbatha*” 2019 *THRHR* (2004) 146, 149.

59 *Motsoatsoa v Roro supra* para 19; *Mxiki v Mbata, In re: Mbata v Department of Home Affairs* unreported case no A844/2012 GNP of 23 October 2014 para 10.

60 Himonga and Nhlapo 103.

61 *Mabena v Letsoalo* 1998 2 SA 1068 (T) 10741.

62 *Sengadi v Tsambo; In re Tsambo* 2019 1 All SA 569 (GJ). The case is also reported as *LS v RL* 2019 4 SA 50 (GJ).

63 *Sengadi v Tsambo; In re Tsambo supra*, para 5.

64 *Sengadi v Tsambo; In re Tsambo supra*, para 7 and 8.

cohabitation. Following the death of HHP, and before the burial, the deceased father, the respondent, rejected the applicant. She approached the South Gauteng Division of the High Court, Johannesburg for, amongst other things, a declaratory confirming that she was the customary law wife of the deceased.

The respondent (the deceased's father) admitted that *ilobolo* negotiations were concluded between the families, however a customary marriage was not concluded as the applicant was not handed over to her in-laws.⁶⁵ This, according to the respondent, is a crucial part of a customary marriage. He further contended that the families intended to conclude the marriage on a subsequent date, on this date, the applicant would be handed over to her in-laws and thus integrated into the family. According to custom (not clear of what group the deceased belonged to), marriage is concluded by the handing over of the bride, and on this day a lamb or goat is slaughtered and the bile is smeared on both intending spouses to cleanse them and to join the two families.⁶⁶ It was common cause that these pertinent events had not taken place.

In finding that there was a valid customary marriage, the court noted that the handing over of the bride is not an “indispensable sacrosanct *essentia*” for a lawful customary marriage. It further noted that in this particular case, the deceased's family had tacitly waived the compliance with the handing over by allowing the parties to cohabit,⁶⁷ and opted for a “symbolic handing over” after the conclusion of *ilobolo* negotiations.⁶⁸ In particular, the court held that the parties had complied with the requirements of section 3(1) of the Recognition Act.⁶⁹ This suggests that a valid marriage was concluded upon reaching agreement on *ilobolo* negotiations. Citing *Mabuza v Mbatha*, the court went on to say that the handing over of the bride is unconstitutional and discriminates against women as it undermines values such as freedom, equality and dignity in as far as non-compliance invalidates a marriage.⁷⁰ Therefore, the question of whether the integration of the bride is optional has not been settled.

3.3 Some observations about *Sengadi v Tsambo* judgment

In *Sengadi v Tsambo*, the court placed much emphasis on the parties' cohabitation. In doing this, it is submitted, the court misdirected itself. Although it is accepted that cohabitation usually denotes consummation of a marriage, nothing turns of the cohabitation in this case as it had occurred some three years prior to the *ilobolo* negotiations. The parties

65 *Sengadi v Tsambo: In re Tsambo supra*, para 14.

66 *Sengadi v Tsambo: In re Tsambo supra*, para 16.

67 *Sengadi v Tsambo: In re Tsambo supra*, para 17.

68 *Sengadi v Tsambo: In re Tsambo supra*, para 18 and 19.

69 *Sengadi v Tsambo: In re Tsambo supra*, para 20.

70 *Sengadi v Tsambo: In re Tsambo supra*, para 24; Schulze “The law reports” May 2019 DR available at <http://www.derebus.org.za/the-law-reports-may-2019/> accessed on 17 October 2019.

simply continued from where they left off. This case must be distinguished from *Mabuza v Mbatha* in this respect. In the latter the case, cohabitation took place after the marriage and therefore it was a strong pointer to consummation of a marriage. Further, the cohabitation followed the formal handing over of the bride to the respondent.⁷¹ The only thing that was missing was *ukumekeza*.

That the parties had complied with section 3(1) of the Recognition Act is flawed. As noted above, this section provides for a valid customary marriage entered into after the commencement of the Act. It requires that the parties must be 18 years and over, they must consent to be married in terms of customary law and the marriage must be negotiated and entered into or celebrated in accordance with customary law. That the first two requirements were met is clear. However, it is the third requirement that requires scrutiny. That the marriage was negotiated is clear. However, was the marriage entered into or celebrated in accordance with customary law? The final act of a customary marriage is the handing over of the bride. This did not occur; therefore, the marriage was not entered into in accordance with customary law.

The court's finding that the practice of handing over the bride was not in keeping with living customary law in as far as non-compliance invalidated a marriage is problematic because none of the parties questioned this practice. The applicant's case was that the marriage had been concluded on the same day as the negotiations. Moreover, the respondent contended this arguing that the applicant was not handed over to the deceased's family. The handing over is crucial. It is therefore unclear what the judgment is referring to by 'living customary law'. Further, no evidence regarding living customary law of the tribe(s) to which the parties belonged was led before court. Therefore, to say that the handing over was not in keeping with living customary law is misguided.

It is hereby argued that the real question in the case was whether, in terms of living law, custom had evolved to such an extent that a bride might be handed over at her own homestead, instead of the groom's home. None of the parties made this averment. It is surprising that the court was able to make a finding in this regard in the absence of ascertaining living custom. One does appreciate that this was an urgent application; however, the court should have confined itself to the *Plascon-Evans* rule.⁷² The correct approach was to dismiss the application.

It is submitted that the judgment above followed a wrong interpretation of *Mabuza v Mbatha*. This interpretation is that *Mabuza v*

71 *Mabuza v Mbatha supra*, paras 4 and 7.

72 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A). In *Modiko v Sethabela* unreported case 4856/2016 of 4 August 2017 (FSB) at para 6 the court endorsed the *Plascon-Evans* approach for a case with related facts. See also *Gama v Mchumu* 2012 2 SA 253 (GSJ) para 9.

Mbatha is authority for the view that the *ukumekeza* and the handing-over are unrelated acts and any of them may be dispensed with. This is incorrect. These separate events comprise the integration of the bride. The handing-over is an integral part of the integration of the bride. The parties cannot waive this requirement.⁷³ Correctly interpreted, *Mabuza v Mbatha* is authority for an assertion that *ukumekeza* may be waived; all that is required is the handing over of the bride.⁷⁴

3 4 Integration of the bride as an indispensable requirement

The second school of thought argues that the integration of the bride is an indispensable requirement that culminates in the handing over of the bride.⁷⁵ In *Maropane v Southon* the Supreme Court of Appeal (SCA) had to decide whether the requirements of a valid customary marriage had been complied with. In this case, the appellant sent his emissaries to the home of the respondent on 17 April 2002. This resulted in the payment of an amount of R6 000. The parties were in dispute regarding the purpose of this payment.⁷⁶ The respondent averred that it was for the purposes of negotiations for marrying her (*go batla sego sa metsi*),⁷⁷ and the appellant disagreed, arguing that it was given as a symbolic gesture for opening negotiations, the so-called *go bula molomo/go kokota* (which literally means to open mouth).⁷⁸

In addition to the payment, the two families exchanged gifts in accordance with baPedi custom. The appellant's family gave the respondent's family two blankets, cutlery and money.⁷⁹ In return, the respondent's family gave a sheep, which was slaughtered and shared between the two families.⁸⁰ The appellant's family draped the respondent in a blanket and the families celebrated. Her elders on what is expected of her as a bride counseled the respondent. She was then driven to the appellant's family home where the appellant's sisters who counselled her regarding what was expected of her received her. This too was followed by celebrations.⁸¹ The celebrations were captured in photographs.⁸²

73 *Maropane v Southon supra*, para 40; Bakker 3.

74 Ngema 35 submits the opposite. According to his interpretation of the judgment, it is the handing-over of the bride that is not an essential requirement. As noted above, this view is followed by the *Sengadi v Tsambo supra*, case.

75 *Motsoatsoa v Roro supra* para 20; this school of thought also finds support in *Fanti v Boto supra*, para 22; *Mxiki v Mbata*, *In re: Mbata v Department of Home Affairs* para 10.

76 *Maropane v Southon supra*, para 2.

77 *Maropane v Southon supra*, para 6.

78 *Maropane v Southon supra*, para 2.

79 *Maropane v Southon supra*, para 7. Money was given in place of a missing gift due to the respondent's father.

80 *Maropane v Southon supra*, para 8.

81 *Maropane v Southon supra*, para 11.

82 *Maropane v Southon supra*, para 9.

The court *a quo* (the South Gauteng High Court) found that a valid marriage had been concluded.⁸³ On appeal, the SCA found that besides the 17 April 2002, there were various subsequent events that warranted an explanation from the appellant in support of his contention that no customary marriage had been concluded by him and the respondent:

“Amongst these are that the appellant bought the respondent an 18 carat yellow ring which he arranged with a jeweler to redesign as a wedding ring; he organized a lavish 50th birthday for her which was captured on a DVD; he admitted that at this birthday he freely referred to her as his customary law wife; Strike also referred to her as the appellant’s wife at this party; the appellant further referred to her mother as his mother-in-law and Gilbert, as his brother-in-law; when he applied for her to be a member of the prestigious Johannesburg Country Club, he described her as his customary law wife and also when he applied for a protection order against her at the Rensburg Magistrates’ Court, he described her as his customary law wife. Crucially all these events are not in dispute.”⁸⁴

The court rejected the appellant’s explanation that he referred to the respondent as his wife because it was embarrassing for an older person to be referred to as a girlfriend. He also said that he was entitled to refer to her as his wife because he had “ring-fenced” her by paying the R6 000. It is submitted that it is common among Africans to refer to a fiancé as a wife. Therefore, reference to a person as a wife on its own should not necessarily be regarded as a concession that a customary marriage did take place. Nonetheless, the court held that according to baPedi custom, the handing over of the bride to her in-laws is the most crucial part of a marriage. Through this practice, the bride is welcomed and integrated into her new family.⁸⁵ This having being complied with, there was a valid Pedi customary marriage.⁸⁶

3 5 The approach of the Supreme Court of Appeal

Despite its decision in *Maropane v Southon*, the SCA has decided that the parties had validly waived the requirement of handing over of the bride. In *Mbungela v Mkabi* the parties had concluded *ilobolo* negotiations and then exchanged gifts. The bride was not physically handed over to the groom’s family. The court endorsed the decision of the South Gauteng Johannesburg Division in *Sengadi v Tsambo* above, in that the handing over of the bride ritual could be waived.⁸⁷ Perhaps, like *Sengadi v Tsambo*, the court had a symbolic handing over in mind. Take another similarity between *Sengadi v Tsambo* and *Mbungela v Mkabi* is that, although there was cohabitation in both cases, such cannot, on its own, as consummation of a marriage because it pre-existed the *ilobolo*

83 *Maropane v Southon supra*, para 4.

84 *Maropane v Southon supra*, para 17.

85 *Maropane v Southon supra*, para 40.

86 See Mwambene “The essence vindicated? Courts and customary marriages in South Africa” 2017 *AHRLJ* 35 50.

87 *Mbungela v Mkabi supra*, para 26.

negotiations. The parties simply resumed cohabitation after the *ilobolo* negotiations.

The court endorsed *Mabuza v Mbatha* as authority for the assertion that non-observance of the handing over of the bride does not invalidate a marriage,⁸⁸ as submitted above, in doing this, the court followed the arguably incorrect, albeit popular,⁸⁹ interpretation of *Mabuza v Mbatha*. The latter decision is only authority for the view that non-observance with *ukumekeza* (being but one of the events towards the integration of the bride) does not invalidate a marriage. This is the case if the bride is physically handed over to her new family, as was the case with *Mabuza v Mbatha*. The SCA did not acknowledge *Maropane v Southon*, its own decision.⁹⁰ The proper approach was to deal with *Maropane v Southon* and reject it if need be.

3 6 What is the correct legal position regarding the integration of the bride?

Judicial precedent requires courts to follow previous decisions. It also requires lower courts to follow decisions of higher courts on similar matters.⁹¹ However, in matters relating to customary marriages it is important not to lose sight of ethnicity. For instance, *Mabuza v Mbatha* is precedent for Swati customary marriages in the Western Cape. *Mbungela v Mkabi* is also authority for Swati marriages - although in this case the wife was of Shangaan origin, however, the *lex loci domicile* prevails. The Constitutional Court in *MM v MN* resorted to a similar approach.⁹² In this case, the court confined the requirement of consent of the first wife for the husband's subsequent polygamous marriage to only Tsonga marriages.⁹³

This being said, what is the correct legal position regarding the integration of the bride in customary marriages. Is it mandatory to comply with this practice? The divisions of the High Court are not unanimous.⁹⁴ In such cases, the Supreme Court of Appeal or the Constitutional Court should pronounce decisively on that matter. This

88 *Mbungela v Mkabi supra*, para 21.

89 Bekker 8 observed that this interpretation is followed by *Msutu v Road Accident Fund* 2011 ZAGPPHC 232 (10 July 2011); *C v P* 2017 ZAFSHC 57 (6 April 2017) and *Mkabe v Minister of Home Affairs* 2016 ZAGPPHC 460 (9 June 2016). One may add *Sengadi v Tsambo supra*.

90 The case is simply referred to in note 7 as authority for the accepted view that different cultures have a lot in common.

91 Ryan "The Balance between Certainty and Flexibility in Horizontal and Vertical *Stare Decisis*: *Bosch v Commissioner for South African Revenue Services*" 2015 SALJ 230, 233. See also Wallis "Whose *decisis* must we stare?" 2018 SALJ 1.

92 *MM v MN* 2013 4 SA 415 (CC).

93 Bekker "The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to section 3(1)(b) and 7(6) - Part 2" 2016 THRHR 357, 364.

94 *Mabuza v Mbatha supra* and *Sengadi v Tsambo supra* say it is not mandatory; whereas *Ngema v Debengwa supra*; *Dalasile v Mgoduka supra* say otherwise.

has not been the case with the integration of the bride. The SCA in *Maropane v Southon* has held that integration of the bride is mandatory in customary marriages; whereas the very same court in *Mbungela v Mkabi* decided the opposite. A careful study of both these cases shows that they speak for all customary marriages and not just a specific tribe (unlike *Mabuza v Mkabi*) – it is accepted that customary marriages have a lot in common despite the diverse ethnic groups.⁹⁵

In the midst of the prevailing uncertainty, what is the way forward? In other words, how should a court deal with matters where the integration of the bride is at issue? Should it follow *Maropane v Southon* or *Mbungela v Mkabi*? None of these decisions has been overturned. The solution is that the divisions of the High Court must take each case on its facts. However, the position is different with respect to the SCA; here the court has to pronounce of uncertainly due to *Maropane v Southon* and *Mbungela v Mkabi*.

4 Conclusion

The requirements for marriages concluded after the effective date of the Recognition Act are clear. If the parties are of age, and in addition to consenting to being married in terms of customary law, the marriage must be negotiated and entered into or celebrated in terms of customary law. The customary marriages is finally concluded with the bride being integrated into the groom's family. The integration is not a once-off event, but a series of events. Some of these events may be waived, varied or abbreviated by time or parties; however, it is not open to the parties to waive integration completed, at least some aspect of integration must be complied with, usually the handing over of the bride into the groom's family.

In light of the above, it is submitted that the SCA in *Mbungela v Mkabi* did not interpret the decision in *Mabuza v Mbatha* correctly. Instead, the correct approach is that of *Maropane v Southon*. This approach is in line with living customary law, which still requires that the bride should be integrated into her in-laws; failing this, there is no customary marriage. This approach is most efficient because it has the potential to eliminate all uncertainty; if a party alleges that integration of the bride is not a requirement within a particular ethnic group, they must prove this. So far, the judgments that follow the narrative that integration of the bride is dispensable have not enjoyed the benefit of proof to this effect.

95 *Mbungela v Mkabi supra*, para 17.