

Legal update 5 of 2023: Case law on customary marriage and spousal maintenance

Introduction

This update deals with peculiar cases about when a customary marriage is valid and when spousal maintenance can be suspended.

Summary

Case 1: Lijane v Kekana and Others (21/43942) [2023] ZAGPJHC 5 (3 January 2023)

Is a customary marriage, which was negotiated and entered into in terms of customary law, valid even if not all the customary marriage rites were performed?

- **The finding:** Yes. Although not all the customary marriage rites were performed, the intent of the parties to enter into a customary marriage was clear.
- **Practical application:** A marriage will be a valid customary marriage if it was negotiated and entered into in terms of customary law.

Case 2: V v V (2019/26732) [2023] ZAGPJHC 4 (9 January 2023)

Can a spousal maintenance order be suspended based on allegations that the former spouse is receiving a substantial income?

- **The finding:** No. To prove that a former spouse no longer needs the maintenance ordered in terms of a divorce order, the evidence must be comprehensive and factual in nature.
- **Practical application:** An order for spousal maintenance will remain in force for as long as the maintenance claimant needs the maintenance. Only once evidence to the contrary is provided on a balance of probabilities can an order for spousal maintenance be suspended.

More details on Case 1

Case 1: Lijane v Kekana and Others (21/43942) [2023] ZAGPJHC 5 (3 January 2023)

- **The facts**

The applicant (Mr Lijane) sought a declaration that the customary marriage he entered into with Ms GK Sauls, who is now deceased (the deceased), was valid. Mr Lijane was Sotho and the deceased was coloured. The deceased's two daughters, B and M Sauls (the respondents) opposed the application.

Section 1, read with section 2(2) of the Recognition of Customary Marriages Act (the Act) states **that any marriage concluded in accordance with customary law is a marriage for all purposes**. Section 3(1) of the Act further states that a customary marriage is valid if the prospective spouses are both over the age of 18, both consented to be married to each other under customary law and if the marriage is negotiated and entered into or celebrated in accordance with customary law.

The respondents argued that the Basotho tradition of 'go-shobedisa', the 'handing over' of the bride to the groom's family was not performed. They further contended that the deceased dressing herself in the traditional attire and not by Mr Lijane's family, as required in Basotho culture, also rendered the marriage invalid. They also stated that although the families agreed to the payment of *lobolo* of R10 000, the Sauls family did not accept the payment as *lobolo* but as some form of dowry. Lastly the respondents contended that as Mr Lijane was a black man and the deceased was a coloured woman, their interracial marriage could not be entered into under customary law. The marriage was therefore not a valid customary marriage.

- **The finding**

The court noted that the respondents did not dispute that meetings were held between the families of Mr Lijane and the deceased, where at least some customary marriage rites were performed. The court found that *LS v RL* 2019 (4) SA 50 (GJ), held that the practice of 'handing over' the bride to the groom's family can no longer be considered a prerequisite for the validity of a customary marriage. Furthermore, in *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) the Supreme Court of Appeal held that the handing over of a bride cannot be placed above the couple's clear intent to marry in which their families were involved and acknowledged the formalisation of their marital relationship without specifying that the marriage would be valid only upon the handing over of the bride.

The court further found that the respondents did not provide any evidence to support the contention that the deceased was not dressed by Mr Lijane's family, which affected the validity of the marriage. It added that it seemed more likely to be nothing more than a minor ritual error.

The court then addressed the respondents' third contention by quoting the *Mbungela* case once more and found that while the Lijane family offered a *lobolo* payment and the Saul family accepted it as something else, neither family thought they were concluding anything other than a customary marriage.

In addressing the respondents' final contention, the court found that the argument that interracial marriages cannot be customary marriages was far-reaching. The error in the argument is that the Act makes it clear that being native to South Africa and culture are attributes of customary laws themselves, not the people who choose to be governed by them. Therefore, as long as those laws have their origins in indigenous African cultural practices, any marriage entered into in accordance with those laws and practices would be a customary marriage. Additionally, it would be in conflict with the spirit, intent and objects of the Bill of Rights in the Constitution 1996 to limit customary law to one racial group. The court declared the customary marriage of Mr Lijane and the deceased valid.

More details on Case 2

Case 2: V v V (2019/26732) [2023] ZAGPJHC 4 (9 January 2023)

- **The facts**

Mr V, the applicant, applied to the High Court to reduce the maintenance he had to pay to Ms V on the basis that Ms V, the respondent, no longer needed maintenance as she was an escort who earned between R88 000 and R153 000 per month. Mr V based his request on a report he received from a private investigator he hired to investigate Ms V and several internet advertisements for Ms V's services.

Ms V did not deny that she was an escort. However, she stated that the income she earned as an escort was only a few thousand rands per month.

- **The finding**

The court found that Mr V's allegations were largely based on conclusions drawn from the private investigator's report, which had not been confirmed under oath. The court stated that the report was not enough to make a finding and it was reluctant to make an order that would result in undue financial hardship for Ms V, especially because that would cause hardship to the parties' minor child.

The court looked at Ms V's financial disclosures and found that it did not provide any indication that Ms V earned a regular or substantial income from being an escort or any other source, other than Mr V's maintenance payments.

The court found that Mr V's speculations that Ms V was hiding additional bank accounts and income sources from the court may be true, but the lack of evidence to support his claims could not relieve him of his maintenance obligations. Mr V did not prove on a balance of probabilities that Ms V's income had substantially changed or increased.

The court dismissed Mr V's application and ordered that he continue to pay maintenance to Ms V in terms of the existing order.

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