CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 57/12
[2013] ZACC 14

In the matter between:

MODJADJI FLORAH MAYELANE	Applicant
and	
MPHEPHU MARIA NGWENYAMA	First Respondent
MINISTER FOR HOME AFFAIRS	Second Respondent
together with	
WOMEN'S LEGAL CENTRE TRUST	First Amicus Curiae
COMMISSION FOR GENDER EQUALITY	Second Amicus Curiae
RURAL WOMEN'S MOVEMENT	Third Amicus Curiae

Heard on : 20 November 2012

Decided on : 30 May 2013

JUDGMENT

FRONEMAN J, KHAMPEPE J AND SKWEYIYA J (Moseneke DCJ, Cameron J and Yacoob J concurring):

Introduction

[1] This case raises questions about the role that the consent of an existing wife (first wife) in a customary marriage plays in relation to the validity of her husband's subsequent polygynous[1] customary marriages. It also deals with the manner in which the content of an applicable rule or norm of customary law should be ascertained and, if necessary, developed in a manner that gives effect to the Bill of Rights.

[2] These issues were not central to the disposal of the case in the North Gauteng High Court, Pretoria (High Court) or on appeal in the Supreme Court of Appeal. It is thus necessary, first, to explain how they came to the fore in the application for leave to appeal before us.

Facts and litigation history

[3] The main protagonists before us are the applicant (Ms Mayelane) and the first respondent (Ms Ngwenyama). The Minister for Home Affairs is the second respondent. She played no active part in the proceedings and abides by the decision of this Court. The Women's Legal Centre Trust (first amicus), the Commission for Gender Equality

[1] Polygyny is "polygamy in which a man has more than one wife" as compared to polyandry which is "polygamy in which a woman has more than one husband". *Concise Oxford English Dictionary* 11 ed, revised (Oxford University Press, Oxford 2009).

(second amicus) and the Rural Women's Movement (third amicus) were admitted as friends of the Court.

[4] Ms Mayelane alleges that she concluded a valid customary marriage with Hlengani Dyson Moyana (Mr Moyana) on 1 January 1984. Ms Ngwenyama alleges that she married Mr Moyana on 26 January 2008. Mr Moyana passed away on 28 February 2009. Both Ms Mayelane and Ms Ngwenyama subsequently sought registration of their respective marriages under the Recognition of Customary Marriages Act[2] (Recognition Act). Each disputed the validity of the other's marriage. Ms Mayelane then applied to the High Court for an order declaring her customary marriage valid and that of Ms Ngwenyama null and void on the basis that she (Ms Mayelane) had not consented to it. The High Court granted both orders. Ms Ngwenyama took the matter on appeal to the Supreme Court of Appeal. That Court confirmed the order declaring Ms Mayelane's customary marriage valid, but overturned the order of invalidity in relation to Ms Ngwenyama's customary marriage. It found the latter customary marriage to be valid as well. Ms Mayelane now seeks leave to appeal against this latter part of the Supreme Court of Appeal's order.

[5] Although Ms Mayelane alleged in her founding papers in the High Court that Xitsonga customary law required her consent for the validity of her husband's subsequent customary marriage and that she had never consented to his marriage to Ms Ngwenyama,

[2] 120 of 1998.

this issue was not considered by either the High Court or the Supreme Court of Appeal. Both Courts determined the matter by interpreting and applying section 7(6) of the Recognition Act[3] and therefore did not consider it necessary to have regard to Xitsonga customary law on the issue of consent.[4]

[6] The High Court interpreted section 7(6) as creating an obligatory requirement for the validity of a subsequent customary marriage and held that, if the husband fails to obtain court approval of the written contract regulating the matrimonial property regime of the subsequent marriage, that marriage is void.[5] The Supreme Court of Appeal disagreed and found that the requirements for validity of customary marriages are to be found in section 3 of the Recognition Act[6] and that the consequences of non-compliance with section 7(6) were adequately met by treating subsequent customary marriages as being marriages out of community of property.[7] In other words, the Supreme Court of Appeal found that section 7(6) of the Recognition Act does not relate to the validity of customary marriages, but to the proprietary consequences thereof.

[7] By treating section 7(6) as a requirement for the validity of subsequent customary marriages, the High Court found it unnecessary to deal with the other ground for the

[3] See [31] below for the text of section 7(6).

[4] *MG v BM and Others* 2012 (2) SA 253 (GSJ) (High Court judgment) at paras 21-5 and *MN v MM and Another* 2012 (4) SA 527 (SCA) (Supreme Court of Appeal judgment) at para 11.

[5] High Court judgment above n 4 at paras 24-5.

[6] See [28] below for text of section 3(1).

[7] Supreme Court of Appeal judgment above n 4 at paras 37-8.

alleged invalidity of Ms Ngwenyama's customary marriage (that is, the failure to procure Ms Mayelane's consent in relation thereto). Although the consent issue was argued as an alternative in the Supreme Court of Appeal, that Court did not consider it necessary to deal with the question. The Court reasoned that there was no cross-appeal challenging the High Court's finding "on its acceptance of the validity of the second customary marriage."[8]

[8] This Court directed the parties to address in written argument the question of whether a cross-appeal was necessary to deal with the consent issue and the consequences if it was not. If a cross-appeal was not necessary, the Supreme Court of Appeal should have determined the consent issue.

[9] In her founding papers in the High Court Ms Mayelane stated that Xitsonga customary law requires the consent of the first wife for the validity of a husband's subsequent customary marriages and that she was never informed nor asked by her husband to consent, nor provided any consent, to his alleged customary marriage to Ms Ngwenyama. Ms Mayelane's brother-in-law (her deceased husband's brother) corroborated this under oath. Ms Ngwenyama did not deny these allegations, but sought to establish the validity of her own marriage to Mr Moyana by denying that Ms Mayelane was ever married to him and by stating that ilobolo negotiations were entered into in relation to her own marriage.

[8] Id at para 11.

[10] Ms Mayelane pointed out in the High Court that the documents to prove the validity of Ms Ngwenyama's marriage were not attached to her affidavit and that this, coupled with the failure to challenge Ms Mayelane's legal assertion regarding the content of Xitsonga customary law and her factual assertion regarding her lack of consent to the marriage, was sufficient evidence to decide the matter in Ms Mayelane's favour.

[11] Ms Ngwenyama and the amici opposed this approach, mainly on the basis that there was insufficient evidence to establish the proper content of the alleged customary rule. They contended that, from available formal sources in the legal literature, it is not clear whether, or to what extent, consent is a requirement for the validity of a subsequent marriage in Xitsonga customary law. In particular, they emphasised that there is a dearth of information on what the personal and proprietary consequences of non-compliance with any requirement of that kind may be.

Issues

[12] The material issues for determination are:

a) Should the consent issue have been determined by the Supreme Court of Appeal?

b) Is the consent of a first wife necessary for the validity of her husband's subsequent customary marriage? This entails considering—

(i) whether the Recognition Act directly prescribes the first wife's consent as a requirement for validity; and

(ii) whether living Xitsonga custom makes such a prescription.

c) If neither the express provisions of the Recognition Act nor Xitsonga customary law creates this requirement, does the Constitution require the law to be developed?

Approach

[13] We intend to deal with the issues in the following manner. The parties' contentions will be set out in summary before dealing briefly with the question whether leave to appeal should be granted. We conclude that leave must be granted. The merits of the appeal are initiated by discussing whether a cross-appeal was necessary in the Supreme Court of Appeal in order for the issue of consent to be considered. We find that it was not. We then turn to customary law under the Constitution and the Recognition Act in general, before dealing with the crucial issue of consent under both the Recognition Act and Xitsonga customary law. In the course of doing this we set out the manner in which the content of Xitsonga customary law was ascertained in this Court. We conclude that the Recognition Act is premised on a customary marriage that is in accordance with the dignity and equality demands of the Constitution and that Xitsonga customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. Because this finding might unfairly prejudice parties to existing

customary marriages, the order will only have prospective effect. We nevertheless conclude that Ms Ngwenyama's marriage was invalid because Ms Mayelane was not informed thereof, in contravention of Xitsonga customary law as it existed at the time.

The parties and their contentions

[14] The written and oral argument of the parties and amici contributed much to the substance of the judgment, and for that we wish to express our gratitude to them. We do not intend to set out their respective contentions in any detail.

[15] In brief summary the following can be stated. There was agreement that a cross-appeal by Ms Mayelane was not necessary in order for the Supreme Court of Appeal to have determined the consent issue; that constitutional matters of importance are raised in this Court in relation to the consent issue; and that it would accordingly be in the interests of justice to grant leave to appeal. Ms Mayelane argued that the consent issue could be determined on a proper interpretation of the Recognition Act, but submitted that even if the consent issue fell to be determined according to non-statutory customary law, it could be decided in her favour on the record before us. That approach found no support from any of the other participants in the proceedings. Ms Ngwenyama and all three amici contended that there was insufficient information on record to make definitive findings on whether consent was a requirement under customary law for the validity of subsequent marriages and what the personal and proprietary consequences of non-compliance in customary law were if consent was indeed required but not obtained. All agreed that

further information on these aspects was required, but differed on whether the matter should be referred back to the High Court to obtain the necessary information or whether this Court should undertake that task. There were also nuanced differences in the parties' arguments on the extent to which consent should be a requirement for subsequent customary marriages if it was not already a requirement.

Condonation

[16] There are three condonation applications before this Court: the applicant's late filing of the application for leave to appeal and the applicant's late filing of the record.[9] We discuss each of these in turn. Condonation will be granted if it is in the interests of justice to do so.[10] The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.[11]

[17] This matter raises fundamental issues regarding the relationship between customary law, legislation dealing specifically with customary law and the Constitution.

[9] In addition, the second and third amici applied for condonation for the late filing of their application to be admitted as amici. Condonation for the late filing of the application was granted by this Court in an order dated 19 October 2012.

[10] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[11] Id.

The outcome of this judgment will affect not only the parties before us but entire communities who live according to Xitsonga custom. Furthermore, this judgment may more broadly affect the courts' jurisprudence related to the development of customary law. The applicant seeks condonation for the late filing, by one day, of the application for leave to appeal and, by 13 days, of the record. Given the importance of the issues in this matter, the fairly short period of delay and the fact that there has been no prejudice as a result of the late filings, we find it is in the interests of justice to grant both of the applicant's applications for condonation.

[18] The amici have provided invaluable submissions throughout the proceedings before this Court. In particular, the amici's submissions in response to this Court's request for further information regarding Xitsonga customary law have been crucial to the outcome of this case. In addition, neither of the parties opposes the first amicus' application for condonation and the delay of approximately two weeks, while not insignificant, has been adequately explained by the first amicus. Accordingly, it is in the interests of justice to grant the first amicus' application for condonation.

Leave to appeal

[19] Leave to appeal is granted where the dispute raises a constitutional issue and where it is in the interests of justice to do so.[12]

[12] Section 167(3)(b) read with section 167(6) of the Constitution. See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 17 and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[20] The present matter clearly raises constitutional questions insofar as it relates to the interpretation of legislation envisaged by the Constitution[13] and the fundamental rights to equality[14] and human dignity.[15] This case also implicates the courts powers and obligations both to apply customary law[16] and to promote the spirit, purport and objects of the Bill of Rights when developing customary law.[17]

[21] Furthermore the question whether, in terms of customary law, the consent of the first wife in a customary marriage is necessary for the validity of her husband's subsequent customary marriage is an important and pressing issue. The personal and proprietary consequences for the women involved are obvious. In addition, the different conclusions reached by the High Court and the Supreme Court of Appeal regarding the interpretation of the Recognition Act indicate that a measure of authoritative certainty is appropriate and desirable. The interests of justice accordingly require this Court to hear this matter.

[13] Section 211 of the Constitution empowers Parliament to regulate customary law by way of legislation.

[14] Section 9 of the Constitution.

[15] Id section 10.

[16] Id section 211(3).

[17] Id section 39(2).

Merits of the appeal

Is a cross-appeal necessary?

[22] It has long been accepted in our law that an appeal court may support the order of the court of first instance on a basis different from the reasoning of that court.[18] No cross-appeal by the successful party in that court against any particular but adverse part of the reasoning of the judgment of the lower court in its favour is necessary. The reason for this is that the adverse part of the reasoning of the lower court does not amount to a separate "judgment or order" within the meaning of section 20(1) of the Supreme Court Act[19] that needs to be altered or amended. It seems this may have been overlooked by, or not drawn to the attention of, the Supreme Court of Appeal.

Customary law under the Constitution

[23] Section 211(3) of the Constitution states that "courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[20] Section 39(2) provides that when developing

[18] *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 18; *Minister van Polisie v Van der Vyver* [2013] ZASCA 39 at para 35; *Smith v Smith* 2001 (3) SA 845 (SCA); and *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (AD) at 278A-D.

[19] 59 of 1959.

[20] Section 211 reads:

> "(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
>
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
>
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

customary law a court "must promote the spirit, purport and objects of the Bill of Rights."[21] The Constitution thus "acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system" such that customary law "feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."[22]

[24] This Court has, in a number of decisions, explained what this resurrection of customary law to its rightful place as one of the primary sources of law under the Constitution means.[23] This includes that:

a) customary law must be understood in its own terms, and not through the lens of the common law;[24]

b) so understood, customary law is nevertheless subject to the Constitution and has to be interpreted in the light of its values;[25]

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[21] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

See also *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission For Gender Equality As* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic Of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (*Bhe*) at para 41 and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification case*) at para 197.

[22] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (*Alexkor*) at para 51.

[23] See for example *Gumede v President of Republic of South Africa and Others* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) at para 22. The other primary sources are legislation and the common law.

[24] *Alexkor* above n 22 at paras 51 and 56.

[25] Id at para 51.

c) customary law is a system of law that is practised in the community, has its own values and norms, is practised from generation to generation and evolves and develops to meet the changing needs of the community;[26]

d) customary law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life;[27]

e) customary law will continue to evolve within the context of its values and norms consistently, with the Constitution;[28]

f) the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements;[29] and

g) these aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like *ubuntu*.[30]

[25] Paradoxically, the strength of customary law – its adaptive inherent flexibility – is also a potential difficulty when it comes to its application and enforcement in a court of

[26] Id at para 53.

[27] *Bhe* above n 21 at para 81.

[28] Id at paras 46 and 81.

[29] Id at para 45.

[30] Id.

law. As stated by Langa DCJ in *Bhe*, "[t]he difficulty lies not so much in the acceptance of the notion of 'living' customary law. . . but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights."[31] This difficulty will be addressed later on in this judgment.

The Recognition Act

[26] The Recognition Act represents "a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country."[32] Past law accorded marriages under customary law recognition only as customary "unions" and this "grudging recognition of customary marriages prejudiced immeasurably the evolution of rules governing these marriages."[33] The Recognition Act is legislation "specifically deal[ing] with customary law", as envisaged in terms of section 211(3) of the Constitution. Its enactment was inspired by the dignity and equality rights and the normative value system of the Constitution.[34] It is an adaptation of customary law which "salvage[s] and free[s] customary law from its stunted and deprived past."[35]

[31] Id at para 109.

[32] *Gumede* above n 23 at para 16.

[33] Id at paras 16-7.

[34] Id at para 21.

[35] Id at para 22.

[27] The Recognition Act defines customary law as "customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those peoples"[36] and a customary marriage as "a marriage concluded in accordance with customary law".[37]

[28] Section 3(1) of the Recognition Act provides that:

> "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."

[29] Section 3(1)(a) introduces express substantive validity requirements that were not required under pre-colonial notions of customary law: the majority age and the consent of both parties to the impending marriage. This development is significant since, in pre-colonial times, "marriage was always a bond between families and not between individual spouses"[38] and the bride- and groom-to-be were thus not always the most important decision-makers with regard to their pending nuptials. Section 3(1)(b) goes on to stipulate that "the marriage must be negotiated and entered into or celebrated in accordance with customary law". Customary law may thus impose validity requirements

[36] Section 1 of the Recognition Act.

[37] Id.

[38] *Gumede* above n 23 at para 18.

in addition to those set out in subsection (1)(a). In order to determine such requirements a court would have to have regard to the customary practices of the relevant community.[39]

[30] The Recognition Act does regulate, in some detail, various aspects and incidents of customary marriages. For instance, section 6 of the Recognition Act states that:

> "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

[31] Section 7(6) goes on to provide that:

> "A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages."

[32] Importantly, however, the Recognition Act does not purport to be – and should not be seen as – directly dealing with all necessary aspects of customary marriage. The Recognition Act expressly left certain rules and requirements to be determined by customary law, such as the validity requirements referred to in section 3(1)(b). This

[39] A customary marriage is defined in section 1 of the Recognition Act as "a marriage concluded in accordance with customary law". In turn customary law is defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".

ensures that customary law will be able to retain its living nature and that communities will be able to develop their rules and norms in the light of changing circumstances and the overarching values of the Constitution.

The consent requirement: the Recognition Act

[33] As set out above,[40] Ms Mayelane has alleged that the law required her husband to have received her consent in order for his subsequent marriage to Ms Ngwenyama to be valid. Such a requirement can arise in one of three ways: as an express stipulation of the Recognition Act; as a rule of Xitsonga customary law; or as a requirement of the Constitution.

[34] Does the Recognition Act directly prescribe that a first wife must grant her consent to her husband's subsequent customary marriages in order for those marriages to be valid? We think not.

[35] We now turn to the scheme of the Recognition Act. Section 2 introduces the movement from customary "unions" to marriages properly so-called. Sections 3 and 4 introduce new requirements regarding the validity and registration of customary marriages, while section 5 makes specific provision regarding the determination of the age of an alleged minor to a customary marriage. Section 6 empowers women as equal partners in a customary marriage and establishes their "full status and capacity". This

[40] See [9] above.

provision may be seen as a direct response to the earlier statutory enactment which entrenched the perpetual minority of black women.[41] Sections 7 and 8 deal with the proprietary consequences and the dissolution of customary marriages respectively. Section 9 requires that the age of majority be established in accordance with statute rather than with the provisions of living customary law. Finally, section 10 regulates changes in the prevailing matrimonial property regime.

[36] Section 3(1)(a), even though it is contained in the section dealing with validity requirements, does not prescribe that the first wife's consent is a requirement for the validity of her husband's subsequent customary marriages. Where it does deal with consent, it speaks only of the consent of "both" "prospective spouses": the bride- and the groom-to-be.

[37] Subsections (3) and (4) of section 3 go on to deal with situations where the Recognition Act requires a third party's consent for the validity of a marriage, and stipulates that in certain circumstances the parties' parents, legal guardians or the Minister for Home Affairs must consent to the marriage.

[41] Section 11(3)(b) of the Black Administration Act 38 of 1927, as amended by section 1 of the Laws on Co-operation and Development Amendment Act 91 of 1985.

[38] It can therefore safely be concluded that the express requirements for validity stipulated in section 3 of the Recognition Act do not directly prescribe the first wife's consent to a subsequent marriage.

[39] Section 6 entrenches spousal equality by providing that a customary wife has "full status and capacity". This includes the capacity to acquire and alienate assets, the capacity to conclude contracts, the capacity to conduct litigation and such further rights and powers as may be prescribed by living customary law. This section does not purport, however, to introduce validity requirements that must be met prior to the conclusion of a marriage; rather, it imposes consequences on a marriage that has already been validly concluded.

[40] Section 7 clearly contemplates the possibility of a husband entering into more than one customary marriage. Subsection (6) thus provides that if a man wishes to conclude a further marriage, he must apply to court for approval of the matrimonial property regime governing his marriages. Subsection (8) goes on to provide that both the existing and the prospective wife must be joined to the authorisation proceedings, as parties with an obvious and protectable interest in the matter. Nevertheless, section 7 cannot be read to found a requirement of the first wife's consent for the validity of a subsequent marriage and thus cannot assist Ms Mayelane in the present circumstances.

[41] The section simply makes no mention of a first wife's consent being a requirement for the validity of the subsequent marriage: at most, the court must account for the circumstances of the family groups affected and may go no further than refusing to approve the particular matrimonial property regime put forward if, in its opinion, the interests of, amongst others, the first wife and her family would not be "sufficiently safeguarded" thereby. On a more fundamental level, section 7 does not deal with the validity requirements for a marriage at all – it deals with the applicable matrimonial property regime. To interpret it as imposing validity requirements over and above those set out in section 3 would undermine the scheme of the Recognition Act. For these reasons we endorse the Supreme Court of Appeal's interpretation of section 7(6).

[42] Pursuant to section 3(1)(b) of the Recognition Act, we must therefore turn to living Xitsonga customary law to determine whether Ms Mayelane's claim can be sustained.

The consent requirement: Xitsonga customary law

[43] This Court has accepted that the Constitution's recognition of customary law as a legal system that lives side-by-side with the common law and legislation[42] requires innovation in determining its 'living' content, as opposed to the potentially stultified version contained in past legislation and court precedent. However, to date, this Court has not engaged in an incremental development of customary law as contemplated by section 39(2) of the Constitution. In *Bhe*, the Court invalidated the customary rule of

[42] *Gumede* above n 23 at para 24.

succession regarding male primogeniture and, by a majority, replaced that rule with the statutory regime regarding intestate succession then applicable to non-adherents of customary law.[43] *Gumede* involved confirmation proceedings relating to the invalidity of legislation.[44] *Shilubana* gave recognition to and accepted the development of customary law already undertaken by traditional authorities.[45]

[44] In order to adjudicate Ms Mayelane's claim we must determine the content of Xitsonga customary law regarding a first wife's consent to her husband's subsequent marriages. The process of determining the content of a particular customary norm can present some challenges, as alluded to above.[46] In *Alexkor* it was noted that in 1988 the Law of Evidence Amendment Act[47] provided, for the first time, that all the courts were authorised to take judicial notice of indigenous law, [48] but cautioned:

> "In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. . . . Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of

[43] Above n 21 at paras 112-3. In other words, the regime, referred to above, prescribed by the Intestate Succession Act 81 of 1987.

[44] *Gumede* above n 23 at paras 28-31.

[45] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) (*Shilubana*) at paras 67-87.

[46] See [25] above.

[47] 45 of 1988.

[48] Above n 22 at paras 52-3.

> legal conceptions that are foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides. It is not necessary for the purposes of this judgment to decide how such conflicts are to be resolved."[49] (Footnotes omitted.)

[45] Van der Westhuizen J, writing for the Court in *Shilubana*, noted that the process of determining the content of a particular customary norm must be one informed by several factors:

a) consideration of the traditions of the community concerned;

b) the right of communities that observe systems of customary law to develop their law;

c) the need for flexibility and development must be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights; and

d) while development of customary law by the courts is distinct from its development by a customary community, the courts, when engaged with the adjudication of a customary-law matter, must remain mindful of their obligations under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights. [50]

[49] *Alexkor* above n 22 at paras 53-4.

[50] *Shilubana* above n 45 at paras 44-9.

[46] What this tells us is that caution, patience and respect are needed to ensure that, in taking its place as an institution of our democratic dispensation, living customary law reflects the rights and values of the Constitution from which it draws its legal force.

[47] The parties and amici were directed to provide further representations on Xitsonga customary law after the hearing. It may well be asked what the need for further material is. The first answer lies in the necessity to treat customary law with the deference and dignity it deserves as one of the constitutionally-recognised sources of our law. The mere assertion by a party of the existence of a rule of customary law may not be enough to establish that rule as one of law. Determination of customary law is a question of law, as is determination of the common law. It was contended that because Ms Mayelane made a factual averment in her papers that Xitsonga customary law required her consent for the validity of her husband's marriage to Ms Ngwenyama, and because Ms Ngwenyama failed to rebut or reject that averment, Ms Mayelane's averment regarding Xitsonga customary law had been sufficiently proved. Ms Mayelane also relied on the fact that her version was largely confirmed by her deceased husband's brother supporting affidavit.

[48] This cannot be correct. First, a court is obliged to satisfy itself, as a matter of law, on the content of customary law, and its task in this regard may be more onerous where the customary-law rule at stake is a matter of controversy. With the constitutional recognition of customary law, this has become a responsibility of the courts. It is incumbent on our courts to take steps to satisfy themselves as to the content of customary

law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule.

[49] Second, courts must understand concepts such as "consent" to further customary marriages within the framework of customary law, and must be careful not to impose common-law or other understandings of that concept. Courts must also not assume that such a notion as "consent" will have a universal meaning across all sources of law.

[50] Third, it is important to ensure that customary law's congruence with our constitutional ethos is developed in a participatory manner, reflected by the voices of those who live the custom. This is essential to dispel the notion that constitutional values are foreign to customary law and are being imposed on people living under customary law against their will. There is an untapped richness in customary law which may show that the values of the Constitution are recognised, or capable of being recognised, in a manner different to a common-law understanding.

[51] It should also be borne in mind that customary law is not uniform. A particular custom may have one of various acceptable manifestations of a consent requirement, together with a wealth of custom-based ancillary rules dealing with the effects of not requiring consent, including its proprietary effects, for example, in the law of succession. All those factors may be relevant in determining the validity of further customary

marriages under section 3 of the Recognition Act and its consequent effect on section 7(6).

[52] As noted earlier, neither the High Court nor the Supreme Court of Appeal considered it necessary to have regard to Xitsonga customary law on the issue of consent. Therefore, neither court gave any attention to either the adequacy of the content of Xitsonga customary law relating to consent or to whether the development of Xitsonga customary law was necessary in the circumstances. Because the issue was raised squarely before us for the first time it needed to be addressed. Remittal to the High Court would have involved an unnecessary duplication of costs and time in relation to both issues.

[53] The parties and amici were thus directed to provide further representations on Xitsonga customary law in this regard after the oral hearing.[51] They all responded,

[51] This Court's directions, dated 25 February 2013, stated in relevant part—

> "1. The parties and the amici are invited to file statements by way of affidavit or affirmation on the issues described in paragraph 2 below. The statements must be lodged by 22 March 2013.
>
> 2. The above statements must address the following questions:
>
> (i) under Tsonga customary law, is the consent of a first wife a requirement for the validity of subsequent customary marriages entered into by that first wife's husband;
>
> (ii) if so—
>
> (a) what are the requirements, if any, regarding the manner and form of this consent; and
>
> (b) what are the consequences, if any, of the failure to procure the first wife's consent or of any defects in relation to the manner or form of the consent?

except the second respondent, who filed a notice to abide. The richness and diversity of these responses provided justification for the three reasons advanced above for seeking further representation on Xitsonga customary law.

Evidence

[54] The diversity of the responses might at first seem to represent a problem, but as we shall seek to show, it does not. The affidavits filed by the parties represent four categories: (a) evidence from individuals in polygynous marriages under Xitsonga customary law; (b) evidence from an advisor to traditional leaders; (c) evidence from various traditional leaders; and (d) expert testimony, drawing conclusions from available primary material. Evidence that related to the specific circumstances of Ms Ngwenyama's marriage was also tendered, but that did not deal directly with the questions posed in the directions and we shall only deal with it in the context of the relief that should be granted.

[55] Three witnesses living in polygynous marriages filed affidavits. Their evidence is of great value as an indication of the perspective of those who ordinarily adhere to customary law. Hosi Bungeni from the Vhembe district in the province of Limpopo stated that he is married to two wives according to custom. He sought the consent of his first wife before marrying the second because that is what he understood the custom to

3. The above sworn statements must have due regard to and adequately reflect authoritative sources of customary law, which sources may include writers on customary law, case law, testimony from traditional leaders and other expert evidence."

be. Once the first wife consents she becomes involved in the process of identifying the other wife and in the events leading to the second marriage. If she does not consent the second marriage is invalid, but that will not affect the legitimacy of the children born of the second marriage. Mrs Rikhotso, the fourth wife in a customary marriage, largely confirmed his version. Mr Shirinda, a traditional healer, has six wives. He confirms that the first wife must be informed and give consent to subsequent marriages. If she does not the subsequent marriage will not be valid, but the children born of it will not be illegitimate and will not be adversely affected in inheritance. He goes further, however, to deal with the situation where consent is withheld. The elders of both families are then called in to resolve matters. If they decide there is good reason for the first wife's refusal, the husband will be informed accordingly. If they decide there is no good reason to refuse consent the first wife will be approached to persuade her to change her mind. He thus concludes that consent of the first wife is necessary, but he "cannot make this statement too strongly", because disagreements are usually resolved.

[56] Mr Mayimele, an elder and advisor to traditional leaders, stated that the "first wife may be informed, but the husband the makes decision." The first wife only becomes involved when her daughter's lobola is used as lobola for the subsequent wife. She can then direct who she prefers as a subsequent wife. When the husband dies his assets are divided equally between the wives. Dr Shilubane, a male commissioner in the Commission on Traditional Leadership Disputes and Claims, notes, however, that the decision to marry may come from three groups: the first wife, her husband, or his

relatives. In the first case no problems will arise and the first wife will be involved in the process of harmoniously proceeding to a subsequent marriage. In the other two situations the first wife must be informed. If she disagrees, but the husband's family supports him, she has a choice still to be involved in the marriage process. If she fails to do that the family proceeds without her. If she is not informed at all the second woman will be regarded as a concubine if the husband's relatives do not support the husband.

[57] Further evidence was provided through the testimony of traditional leaders. Reference has already been made to Hosi Bungeni's evidence. According to former Acting Headman Sethole of Nkovane village the husband must inform the first wife of his intention to marry. He will often mandate her to assist in identifying the appropriate woman. If he had already done that himself, he will ask the first wife to be one of the emissaries in the lobola negotiations. This is done to create harmony between all concerned. The first wife is always expected to agree to a husband taking a second or subsequent wife. If she unreasonably withholds consent she would be sent to her parents homestead to reconsider. If she then returns to her husband but remains unreasonable in refusing co-operation the husband may marry without consent or divorce her. The dissolution of the marriage, however, cannot take place by the husband simply leaving the first wife. For a proper divorce he must call the two families together for a decision concerning the divorce. If the fault is his, he is expected to leave the house for the first wife and children and build his new house elsewhere. If he persists in living with the second woman without the approval of the extended family and his first wife, the second

marriage is not recognised. The same applies where the first wife was never informed and the husband left to go and live with the second woman. If there is agreement on the divorce the lobola is returned to the husband's family. If this is not done the divorce is not complete unless the husband elects to abandon the return of the lobola. Where there are children from the first marriage, the lobola would normally not be returned.

[58] Headman Maluleke does not regard consent of the first wife to be necessary. Because lobola negotiations take place openly between families it is unlikely that the first wife will ever be unaware of an impending second marriage. He cautions that if this Court decides that consent is or must be a requirement for the validity of a subsequent marriage it will have a hugely disruptive effect on existing arrangements if the order operates retrospectively. The issue of retrospectivity will be considered when dealing with remedy.

[59] That brings us to the experts. They come to different conclusions as to whether consent is a requirement for the validity of a subsequent marriage. Professor Boonzaaier, an anthropologist with extensive research experience in the field of Xitsonga customary law, comes to the conclusion that consent is not a requirement and relies for this on a case that appeared to confirm that the consistent refusal of a first wife would lead to a divorce, with lobola to be returned, but the husband would not require the consent to conclude the subsequent marriage. Dr Mhlaba, a senior lecturer in law and jurisprudence, comes to a different conclusion, but his treatment of the consequences of refusal to consent conforms

to a large extent with the evidence that when the first wife does not consent the families become involved in order to resolve the matter. He considers it uncertain whether a marriage in the face of persistent refusal of consent is valid or not, and what the consequences for children are. Lastly, it is necessary to record that there appears to be agreement that polygynous marriages are not the norm in Xitsonga society. Dr Mhlaba, for example, provides a helpful context to the problem, by stating that "most Tsonga families are fully nuclear; a typical Tsonga family comprises of a husband, wife and children." But the choice of further marriages is still available to VaTsonga men.

[60] We do not think this picture of Xitsonga customary law that the further evidence has given us should be viewed as presenting a difficulty in deciding the case before us. It is a necessary process that courts must go through to give customary law its proper place. We thank the members of the community, advisors, and traditional leaders who have assisted us, for the dignified way in which they have explained their customs to us. The further evidence has shown that there are nuances and perspectives that are often missed or ignored when viewed from a common-law perspective. Nevertheless, while we must treat customary law with respect and dignity, it remains the courts' task to bring customary law, as with the common law, in line with the values of the Constitution.

[61] The perspective we gain from the evidence is not one of contradiction, but of nuance and accommodation. It seems to us that one can safely say the following: (a) although not the general practice any longer, VaTsonga men have a choice whether to

enter into further customary marriages; (b) when VaTsonga men decide to do so they must inform their first wife of their intention; (c) it is expected of the first wife to agree and assist in the ensuing process, leading to the further marriage; (d) if she does so, harmony is promoted between all concerned; (e) if she refuses consent, attempts are made to persuade her otherwise; (f) if that is unsuccessful, the respective families are called to play a role in resolving the problem; (g) this resolution process may result in divorce; and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but the children of the second union will not be prejudiced by this as they will still be regarded as legitimate children. It is not necessary to go further than this and it must be emphasised that, in the end, it is the function of a court to decide what the content of customary law is, as a matter of law not fact. It does not depend on rules of evidence: a court must determine for itself how best to ascertain that content.

Equality and dignity

[62] Section 9(1) of the Constitution provides that everyone is "equal before the law and has the right to equal protection and benefit of the law."

[63] Section 9(3) proceeds to list grounds on which a person may not unfairly be discriminated against, and expressly includes gender as one of those grounds. In *Harksen v Lane*, this Court confirmed that discrimination on a listed ground is de facto

unfair discrimination.[52] Thus, any gender-based discrimination is presumed to be unfair under section 9 of the Constitution.

[64] This Court has repeatedly emphasised the importance of the right to equality as a cornerstone of our constitutional democracy. As noted in *Hugo*:[53]

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."

[65] In *Fraser* this Court stated:[54]

> "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '. . . need to create a new order . . . in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'." (Footnote omitted.)

[66] The Constitution demands equality in the personal realm of rights and duties as well. Legislative recognition of equality takes many forms. The Domestic Violence

[52] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 54 (*Harksen v Lane*).

[53] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41.

[54] *Fraser v Children's Court, Pretoria North and Others* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20.

Act[55] provides specific protection to spouses[56] when they are or have been subjected to domestic violence. The husband's common law marital power with regard to the person and property of the wife in civil marriages was abolished even before the advent of the Constitution,[57] as was the common-law position of the husband as the head of the family. Both parents have full parental responsibilities and rights of the children born of their marriage.[58]

[67] Section 10 of the Constitution enshrines the right to human dignity in that everyone "has inherent dignity and the right to have their dignity respected and protected."

[68] The right to dignity, together with the right to life, has been held by this Court to be "the most important of all human rights, and the source of all other personal rights" in the Bill of Rights.[59] This Court has further clarified that dignity is not merely a value, but a "justiciable and enforceable right that must be respected and protected."[60]

[55] 116 of 1998.

[56] Or any person who is or has been in a domestic relationship.

[57] By the General Law Fourth Amendment Act 132 of 1993.

[58] Sections 18-20 of the Children's Act 38 of 2005.

[59] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 144.

[60] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35 (emphasis removed).

[69] It is in the light of these constitutional guarantees that we must determine whether the Constitution demands that the consent of the first wife be given before a subsequent customary marriage can validly be entered into.

Xitsonga customary law and consent

[70] There is no doubt that the exercise to determine the content of Xitsonga customary law has shown that it displays a generous spirit that is rooted in accommodating the concerns of the first wife and her family when the husband seeks to enter into another marriage. But it remains his choice to marry again. She does not have that choice. It requires little imagination or analysis to recognise that polygynous marriages differentiate between men and women. Men may marry more than one wife; women may not marry more than one husband. Nevertheless, the validity of polygynous marriages as a legal institution has not been challenged before us and, for present purposes, we must work within a framework that assumes its existence and validity.

[71] Are the first wife's rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that "even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave

disadvantage of women and children".[61] While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution.

[72] Second, where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.

[73] Third, the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity.[62] However, a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent. Respect for human dignity requires that her husband be obliged to seek her consent and

[61] *Gumede* above n 23 at para 19. See also Nhlapo "African customary law in the interim Constitution" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (Community Law Centre: University of the Western Cape, Cape Town 1995) at 160.

[62] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57.

that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage.

[74] Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent.

[75] In accordance with this Court's jurisprudence requiring the determination of living customary law that is consistent with the Constitution, we thus conclude that Xitsonga customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. This conclusion is in accordance with the demands of human dignity and equality. These demands are evident from the terms of the Recognition Act, which we shall now consider.

[76] Section 3(1)(b) provides that one of the requirements for a valid customary marriage entered into after the commencement of the Recognition Act is that "the marriage must be negotiated and entered into or celebrated in accordance with customary law." The application of customary law is subject to the Constitution[63] and its development must promote the spirit, purport and objects of the Bill of Rights. The achievement of human dignity and equality is one of the founding values of the

[63] See section 211(3) of the Constitution, quoted above n 20.

Republic[64] and those values are also fundamental rights under the Bill of Rights.[65] When section 3(1)(b) thus speaks of customary law marriages, it necessarily speaks of marriages in accordance with human dignity and fundamental equality rights upon which our Constitution is based. It is no answer to state that the definition of customary law and customary marriages in the Recognition Act does not expressly state this. Those definitions must be read together with the Constitution and this Court's jurisprudence.

[77] In *Gumede* this Court stated that the Recognition Act not only makes provision for recognition of customary marriages, but "[m]ost importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses."[66] Further on in *Gumede* Moseneke DCJ states:

> "Beyond the Constitution, the Recognition Act is the starting point of this equality analysis. It must be understood within the context of its legislative design. Its avowed purpose . . . is to transform spousal relations in customary marriages. The legislation not only confers formal recognition on the marriages but also entrenches the equal status and capacity of spouses and sets itself the task of regulating the proprietary consequences of these marriages. In doing so, the Recognition Act abolishes the marital power of the husband over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise."[67]

[64] Id section 1.

[65] Id sections 9 and 10.

[66] *Gumede* above n 23 at para 24.

[67] Id at para 32.

[78] Four things need to be noted from the provisions of section 6 of the Recognition Act. The first is that the section affords "full status and capacity" to a wife "in a customary marriage". After the commencement of the Recognition Act that meant a customary marriage based on the consent of both spouses to the marriage.[68] The second is that the wife's full status and capacity stems from "the basis of equality with her husband". The third is that the basis of equality is subject only to "the matrimonial property system governing the marriage", a system which would either have been consented to by the wife or would have been in community of property and of profit and loss between the spouses by virtue of the law.[69] The fourth is that the full status and capacity of a wife in a customary marriage is not restricted by the wording of the section.[70]

[79] The legal status of persons refers to their standing in the law, their "overall legal position in relation to other persons and the community: the aggregate of [their] various rights, duties and capacities".[71] Under the Constitution the legal status of persons is based on everyone being equal before the law and having the right to equal protection and benefit of the law.[72] This would, in ordinary terms, mean that under the Constitution and section 6 of the Recognition Act the equal status of a husband and a wife in a

[68] Section 3(1)(a)(ii) of the Recognition Act.

[69] For customary marriages entered into after the commencement of the Recognition Act see section 7(2).

[70] Section 6 of the Recognition Act.

[71] Van Heerden, Cockrell and Keightley (eds) *Boberg's Law of Persons and the Family* (Juta & Co Ltd, Kenwyn 1999) at 65.

[72] Section 9(1) of the Constitution.

customary marriage would be disturbed if the one may, by law, have more rights than the other.

[80] That the first wife in a customary marriage has a material interest in the matrimonial property system regulating further marriages is given cognisance in the Recognition Act. Section 7(4)(b) and (8) require existing spouses to be joined in proceedings relating to proposed changes flowing from further customary marriages entered into before and after the commencement of the Recognition Act by their husbands.

[81] But a marriage is about much more than property. In marriage, the status of the parties undergo a change recognised at various levels of the law, for example, in the law of succession,[73] certain aspects of citizenship,[74] the attainment of majority,[75] and in the marital privilege not to be compelled to disclose the content of communications between spouses during the marriage.[76] These provisions reflect the recognition given to the personal rights and duties of spouses in a marriage.

[73] Section 2(2)(b) and (c) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

[74] Section 5(5) of the South African Citizenship Act 88 of 1995.

[75] Section 26 of the Marriage Act 25 of 1961.

[76] Section 10 of the Civil Proceedings Evidence Act 25 of 1965.

[82] When section 6 of the Recognition Act states that a wife in a customary marriage has, on the basis of equality with her husband, full status and capacity,[77] it means that she also has full status and capacity in relation to the personal consequences of marriage.

[83] The Recognition Act is thus premised on a customary marriage that is in accordance with the dignity and equality demands of the Constitution. A customary marriage where the first wife has consented to the further marriage conforms to the principles of equality and dignity as contained in the Constitution. Where the first wife does not give consent, the subsequent marriage would be invalid for non-compliance with the Constitution.

[84] The facts of this matter concern the situation where there is only one existing wife in a customary marriage and her husband purports to enter into a subsequent customary marriage. The mere fact that there may be situations where there is more than one wife in an existing customary marriage cannot mean that the constitutional norm of equality cannot find application in those cases. But that situation is not before us. That is one reason why we should not determine that issue here. Another, no less important reason, is that living customary law should be allowed its own space to adjust to that requirement to the extent that it may not yet do so.

[77] This is subject only to the matrimonial property system governing the marriage.

Retrospectivity

[85] The finding that the consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of section 3(1)(b) of the Recognition Act means that, from now on, further customary marriages must comply with that consent requirement. A subsequent marriage will be invalid if consent from the first wife is not obtained. One potential difficulty raised in argument is that the effect of the judgment may not become widely and promptly known. To this end the order makes provision for its wider publication and distribution.

[86] Another problem is that we are not able to determine what the position in customary law systems other than the Xitsonga system is. It may be that consent was not a requirement in some customary law systems and in those cases retrospective application may have inequitable consequences for women who entered into a further customary marriage without knowing that consent was a requirement for the validity of those marriages. In those cases it would be unfair to deprive wives in a further marriage of the protection that recognition of validity of their marriage under the Recognition Act would bring. And as Hosi Maluleke has pointed out, existing arrangements in Xitsonga customary law will also be adversely affected by a retrospective order. Our order makes it clear that the general requirement of consent operates only prospectively, to customary marriages entered into after this judgment has been published in the form set out in the order of this Court.

[87] With regard to the particular facts of this case, it is clear, from the further affidavits filed in this Court, that Xitsonga customary law, even before its development in this judgment, required that the first wife be informed of her husband's impending subsequent marriage. There is no evidence to suggest that Ms Mayelane was ever informed of the impending further marriage of Mr Moyana to Ms Ngwenyama. It is therefore clear that the latter marriage is invalid for want of compliance with the requirements of Xitsonga customary law as they existed at the time of the purported marriage.

Costs

[88] The Supreme Court of Appeal considered that this is a case where, on appeal, no party should be mulcted in costs for vindicating a right under the Bill of Rights. We see no reason why the same approach should not be followed in this Court, or why a similar order on costs should not have been made in the High Court.

Order

[89] The following order is made:

1. Leave to appeal is granted.
2. The applicant's and first amicus applications for condonation are granted.
3. The appeal is upheld.
4. Paragraph 1(a) of the order in the Supreme Court of Appeal is set aside and replaced with:

"The customary marriage between Hlengani Dyson Moyana and the first respondent, Mphephu Maria Ngwenyama, is declared null and void."

5. Xitsonga customary law is developed to require the consent of the first wife to a customary marriage for the validity of a subsequent customary marriage entered into by her husband.

6. The order in paragraph 5 shall operate prospectively.

7. The Registrar of this Court is directed to send a copy of this judgment and summary (attached as annexure A) to Houses of Traditional Leaders and the Minister for Home Affairs with a request that they distribute them in any way they deem appropriate.

ZONDO J:

Introduction

[90] I have had the opportunity of reading the judgments prepared by Froneman, Khampepe and Skweyiya JJ (main judgment) and Jafta J. I agree that leave to appeal should be granted. I also agree with their conclusion that the appeal should be upheld. The order I would make would be one of setting aside the part of the order of the Supreme Court of Appeal made in favour of the first respondent and replacing it with an order dismissing the first respondent's appeal. My approach to the determination of this matter differs from that adopted in the main judgment. I shall, therefore, set out below my approach and my reasons for the order that I would make.

[91] The main judgment has correctly set out the facts of this case. Consequently, I do not propose to engage in the same exercise except to the limited extent necessary to ensure a proper understanding of this judgment. The applicant was married to the late Mr Hlengani Dyson Moyana by customary law. Their marriage took place at Nkovani Village, Limpopo Province. Mr Moyana died on 28 February 2009. Subsequent to Mr Moyana's death it appears that a dispute arose between the applicant and the first respondent. The first respondent claimed to have also been married to Mr Moyana by customary law.

[92] The applicant then brought an application in the North Gauteng High Court, Pretoria (High Court) for an order declaring invalid any marriage that Mr Moyana may have concluded with the first respondent on, among others, the basis that by the custom of the Vatsonga[78] the deceased needed to obtain her consent before he could enter into a further customary marriage which he did not obtain. The applicant was supported on this point by the deceased's elder brother, Mr Mzamani Temson Moyana. The first respondent opposed the application and contended that the applicant's own marriage to the deceased was invalid. She did not dispute the applicant's version that according to custom the consent of the first wife was a requirement for the validity of her marriage. The High Court granted the order.[79] There was an appeal to the Supreme Court of

[78] Vatsonga refers to the Tsonga people. The Vatsonga speak Xitsonga.

[79] The order of the High Court read thus:

Appeal which held the applicant's customary marriage to be valid but overturned the order of invalidity in relation to the first respondent's customary marriage. The Supreme Court of Appeal directed the Minister to register the applicant's customary marriage to her deceased husband. Thereafter the applicant applied to this Court for leave to appeal against the order of the Supreme Court of Appeal overturning the High Court's order of invalidity of the first respondent's alleged customary marriage to the deceased.

The question for determination

[93] The question for determination is whether, if it is true that the deceased and the first respondent were married to each other by customary law when the deceased died, that marriage was valid despite the fact that the first respondent did not give her consent to that marriage. Before one can answer that question, one must determine what the requirements for a valid customary marriage are.

[94] When we heard argument in this matter, the record before us was the same record that was before the High Court and the Supreme Court of Appeal. However, subsequent to the hearing and after judgment had been reserved, this Court asked the parties and amici to deliver further affidavits on the question of whether among the Vatsonga the first

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"It is ordered:

1. Declaring a customary marriage between Hlengani Dyson Moyana 'the deceased' and first respondent null and void *ab initio.*
2. Directing the second respondent to register the marriage between the applicant and the deceased Hlengani Dyson Moyana, Id. No. 570108 5803 08 6.
3. That the costs of this application if opposed."

wife's consent is a requirement for the validity of her husband's further customary marriage with another woman. The parties and amici delivered further affidavits on the issue. I shall deal later with the question whether or not this Court should have called for additional evidence.

[95] Since I am of the view that the additional affidavits should not have been called for and this Court should have decided the matter on the same record that was before the High Court and the Supreme Court of Appeal, I propose to deal first with this matter on the basis of the same record that was before the High Court and the Supreme Court of Appeal. Thereafter, I shall consider the impact of the new evidence to see whether the presence of the additional affidavits affects the result. In other words, I shall decide the matter both in the way in which I think it should be decided if one leaves the additional evidence out of account and also in the manner in which I think it should be decided even with the additional evidence, assuming that the Court was right in calling for additional affidavits.

How the matter should be decided on the same record that was before the Court a quo

[96] Section 211(3) of the Constitution enjoins courts to "apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." The validity of a customary marriage is governed by the

provisions of the Recognition of Customary Marriages Act[80] (Recognition Act). According to the preamble, the objects of the Recognition Act include "[t]o make provision for the recognition of customary marriages" and the specification of "the requirements for a valid customary marriage".

[97] Before setting out the requirements for a valid customary marriage, it is necessary to have regard to the definition of a "customary marriage" in the Recognition Act. The Recognition Act defines a customary marriage as a "marriage concluded in accordance with customary law". The effect of this definition is that a marriage that is not concluded in accordance with customary law is not a customary marriage. Of course, this definition makes it necessary to also have regard to the definition of "customary law". The Recognition Act defines "customary law" as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". This means that, whenever it is sought to establish what the customary law position is on a certain issue in the context of the Recognition Act, it must be established what "the customs and usages traditionally observed among" the relevant group of the indigenous African peoples are which "form part of the culture of" that group of people.

[98] The result of the exercise referred to above will be the customary law of that group of people on that issue. That can be established by way of evidence from a person or

[80] 120 of 1998.

persons who have knowledge of the relevant custom or customs and usages as contemplated in the definition of "customary law". A person who gives evidence about such matters need not be an expert witness nor does such a person need to occupy a particular position of authority in the relevant group of people. Anyone who has knowledge of the relevant custom or customs and usages may give evidence about them. I now turn to the requirements for a valid customary marriage.

[99] This Court stated in *Shilubana and Others v Nwamitwa*[81] that "the practice of a particular community is relevant when determining the content of a customary-law norm."[82] It then said: "As this court held in *Richtersveld, the content of customary law must be determined with reference to both the history and the usage of the community concerned*."[83] (Emphasis added.) After acknowledging that the determination of "[l]iving" customary law is not always easy and that, sometimes, it may not be possible to determine a new position with clarity, this Court said that where there is a "dispute over the law of a community, *parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred*."[84] (Emphasis added.) At the end of its consideration of the preliminary question, this Court

[81] [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC).

[82] Id at para 46.

[83] Id (footnote omitted).

[84] Id.

said: "To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community."

[100] Section 2 of the Recognition Act governs the recognition of customary marriages whereas section 3 governs the requirements for the validity of a customary marriage. Section 2 reads as follows:

> "(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.
> (2) A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.
> (3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.
> (4) If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages."

In my view, the phrase "which complies with the requirements of this Act" in section 2(2) refers to the requirements of this Act concerning the validity of a customary marriage. In other words the phrase does not refer to requirements of the Recognition Act which have nothing to do with the validity of a customary marriage.

[101] Section 3 of the Recognition Act governs the validity of a customary marriage. Section 3 reads in relevant part:

> "(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."

[102] In this case the requirements in section 3(a)(i) and (ii) are not in issue. The requirement in section 3(1)(b) is in issue. It is under this provision that the requirement of the consent of the first wife would fall if it is a requirement for the validity of a second or further customary marriage involving her husband. The question to be asked in determining whether a customary marriage has complied with the requirement in section 3(1)(b) is: was the marriage negotiated and entered into or celebrated in accordance with the customs and usages traditionally observed by the relevant group of the indigenous African peoples which form part of the culture of that group of people?[85] If the answer is yes, the requirement has been complied with and the second or further customary marriage is valid. If the answer is no, the requirement has not been complied with and the marriage is not valid.

[85] The reason why I refer to the customs and usages traditionally observed by the relevant group which forms part of the culture of that group is the definition of "customary law" in section 1 and the fact that the requirement in section 3(1)(b) of the Recognition Act refers to customary law.

Is the consent of the first wife a requirement for the validity of a customary marriage between a man and his second wife?

[103] Whether or not the consent of the first wife was required for the validity of the alleged customary marriage between the deceased and the first respondent depends upon whether "the customs and usages traditionally observed among" the Vatsonga "and which form part of the culture" of the Vatsonga require that the consent of the first wife be obtained when a second or further customary marriage involving her husband is "negotiated and entered into or celebrated". If, in terms of those customs and usages, the consent of the first wife is required, then that is the customary law of the Vatsonga. If, in terms of those customs and usages, the first wife's consent is not required, then that is the customary law of the Vatsonga. In other words what the customary law of the Vatsonga people is on this issue is determined by what the customs and usages are that are traditionally observed among the Vatsonga which form part of their culture.

[104] The applicant said in her founding affidavit that: "If any marriage was concluded, I submit that the marriage was void *ab initio* because I never consented to such marriage." At the end of the same paragraph she reiterated that she never consented to the marriage between the deceased and the first respondent.

[105] In a supporting affidavit the deceased's elder brother, who was 71 years old when he deposed to the affidavit, says:

> "In terms of our custom the first wife must be consulted and consent to the marriage of the second wife. Secondly, the blood relatives of the husband must be present to witness the marriage. I have spoken to all my siblings and they all deny that they paid lobola to the 1st Respondent. I have spoken to one Mphephu Matsembi who the 1st respondent alleges witnessed the marriage. She explained to me that on the date mentioned on annexure 'C' she did go to the 1st Respondent's house at the invitation of the deceased. She explained that the deceased wanted to pay some introduction fee, not lobola, to the 1st respondent's parents. As 1st respondent was previously married and was old and had five children from her previous marriage, no lobola can be paid for her according to custom. The intention was to introduce my brother to the parents of the 1st respondent as he was staying with her and sleeping there because it was closer to his work."

[106] In her answering affidavit the first respondent did not deny the evidence given by the applicant and the deceased's elder brother. She also did not put in dispute the deceased's elder brother's further evidence that the blood relatives of the husband must be present to witness a marriage involving their relative. In this regard the elder brother's evidence is that he spoke to all his siblings and they all denied that the deceased paid ilobolo for the first respondent. The first respondent said that she was attaching to her affidavit "a copy of the lobola negotiation marked annexure 'A' as well as the affidavits of the witnesses who were present during the lobola negotiations marked annexure 'B' and 'C'." However, no such annexures were attached to her affidavit.

[107] There is no reason to doubt the deceased's elder brother's evidence about what the custom of the Vatsonga is with regard to the consent of the first wife when her husband wishes to enter into a further customary marriage with another woman. As the first respondent has not challenged the applicant's and the deceased's elder brother's evidence

about the first wife's consent being a requirement for the validity of her husband's further marriage to another woman, this matter must be dealt with on the basis that on this issue the applicant's evidence is undisputed. I cannot see on what basis we can decide the matter on a different factual basis than that which is common cause between the applicant and the first respondent on the record before us. There is no basis upon which it can be suggested that the deceased's elder brother does not know the custom in connection with which he has given evidence in his affidavit.

[108] The first respondent bears the onus to prove that there was a marriage between her and the deceased and that that marriage "was negotiated and entered into or celebrated" in accordance with the custom and usages traditionally observed among the Vatsonga and which form part of their culture. After all, if a marriage did take place between herself and the deceased, she is the one person who should have personal knowledge of what procedure was followed and how the marriage was negotiated, entered into or celebrated. She adduced no evidence to show that such a marriage took place and, if so, how it was negotiated and entered into or celebrated or who represented the deceased's family in the negotiations and who witnessed such marriage. In the absence of evidence supporting her claim on these issues, not only has the first respondent failed to show that there was a customary marriage but she has even failed to show that there was a marriage of any kind between herself and the deceased. Accordingly, I conclude that no marriage has been proved to have existed between the deceased and the first respondent at the time of the former's death but, if a marriage did exist, it was not a valid customary marriage.

[109] So far, I have dealt with this matter in the manner in which, in my view, it ought to be dealt with in the absence of the new evidence. However, since there is new evidence that has been delivered by way of affidavits by the parties and amici pursuant to the directions of this Court, I will also consider the matter in the light of the additional evidence.

Deciding the matter in the light of the additional affidavits

Directions calling for additional evidence

[110] The main judgment deals with the matter in the light of the directions this Court issued to the parties and amici inviting them to deliver evidence by way of affidavits on whether, in terms of Xitsonga customary law, the consent of the first wife is a requirement for the validity of a further customary marriage that her husband may wish to conclude with another woman. The question that arises is whether this Court should have issued those directions. I now propose to consider whether this Court should have called for the further evidence and to then deal with the matter in the light of that evidence.

Should this Court have called for new evidence?

[111] In my view this Court should not have issued the directions. As I have said earlier, the effect of the definition of "customary law" in the Recognition Act is that customary law is determined by ascertaining what the customs and usages of the relevant indigenous group of South African peoples are in relation to a particular point. Once you have

established what the relevant custom and usages of the relevant group are, you have the customary law position of that group of people on the point in question.

[112] Viewed in this context, it is clear that the directions issued by this Court called for evidence about what the custom and usages or practices of the Vatsonga are on whether the consent of the first wife is a requirement for the validity of a further customary marriage between her husband and another woman. This could only be factual evidence about what the customs and practices of the Vatsonga are. The responses to such directions could contain contradictory evidence on what the custom and usages or practices are and this Court could find that it has no way of resolving the conflict in the evidence. It would not have a way of resolving that conflict because, realistically, this Court would not sit as a trial court and listen to oral evidence of witnesses who would need to be subjected to cross-examination if there was a dispute of fact in the affidavits.

[113] This Court would also not be able to use the *Plascon-Evans*[86] approach to resolve material disputes of fact that may arise out of affidavits delivered in response to such directions. The Court could not use the *Plascon-Evans* approach because that approach normally applies where the applicant has had the opportunity in the court of first instance to apply that a material dispute of fact be referred to oral evidence but elected not to make that application. Where it is this Court that calls for additional evidence, there would be no basis for invoking the *Plascon-Evans* approach when the party who may be

[86] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C (*Plascon-Evans*).

disadvantaged by the use of that approach has not had the opportunity to ask for the issue to be referred to oral evidence. An appreciation of the difficulties associated with the admission of disputed new evidence in this Court seems to me to be the rationale behind the requirement in Rule 31[87] that new material or evidence that a party or amicus may apply to have admitted to this Court must be undisputed evidence.

[114] Another reason why this Court should not have called for further evidence is that in this matter it is sitting as a court of appeal and its function is to decide whether on the same evidence that was before the Court a quo the decision of that Court was right or wrong.[88] Sitting as such and performing that function, this Court should not, in my view, *mero motu* call for new evidence except, maybe, in exceptional circumstances. The main judgment does not set out any exceptional circumstances justifying the admission of new evidence on appeal.

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[87] Rule 31 reads as follows:

> "(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
>
> (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

[88] *Health Professions Council of SA v De Bruin* [2004] 4 All SA 392 (SCA) at para 23. See also *Tikly and Others v Johannes, N.O., and Others* 1963 (2) SA 588 (T) at 590H and *Commercial Staffs (Cape) v Minister of Labour and Another* 1946 CPD 632 at 638-41.

[115] A further reason why this Court should not have issued the directions is that the parties in this matter had had ample opportunity in the High Court to present evidence by way of affidavits on the issue under consideration and none of the parties was not afforded enough opportunity in the High Court to present as much evidence as it wanted to in order to prove its case. That being the case this Court should decide this appeal on the basis of the evidence that was before the High Court. If that evidence was not enough to justify making an order declaring invalid any customary marriage that may have existed between the first respondent and the applicant's late husband, the applicant's appeal should have been dismissed. If the evidence was enough, then this Court would uphold the appeal, set aside the relevant order of the Supreme Court of Appeal and, for it, substitute a declaratory order to the effect referred to in the preceding sentence. Where parties have no complaint about the adequacy of the opportunity they had in the High Court of filing whatever affidavits they wished to file and that Court decided the matter on the evidence before it and the Supreme Court of Appeal also decided a subsequent appeal on that evidence, this Court should generally decide the appeal on the same record as the High Court and the Supreme Court of Appeal did. There was no warrant for this Court to call for new evidence in respect of which it would sit as a court of first and final instance.

The new evidence

[116] I do not propose to detail the evidence contained in the various additional affidavits delivered pursuant to the directions of this Court. I propose to make only two

or three observations about the evidence. The evidence can be grouped under three categories. The first category is that of evidence that is to the effect that among the Vatsonga, the consent of the first wife is a requirement for the validity of her husband's further customary marriage to another woman. The second category is that of evidence that is to the effect that the first wife's consent is not a requirement and the husband only needs to inform her of his intention to marry another woman. The third is that of two deponents. The one deponent is Mr Chavane Samson Sethole. He is a member of the Vatsonga. His evidence is in effect that the first wife's consent is required but it may not be withheld unreasonably and, if it is withheld unreasonably, the husband may enter into a further customary marriage without the first wife's consent or divorce her. The other deponent is Professor Carl Boonzaaier, an anthropologist. Professor Boonzaaier puts himself in the category of the witnesses who say that the first wife's consent is not a requirement but the basis upon which he states this supports the notion that the first wife's consent is a requirement.[89]

What is to be done with the new evidence?

[89] It is clear from Professor Boonzaaier's evidence that his statement that the consent of the first wife is not a requirement is based on the case on which he has relied for that statement. However, in my view that case does not provide support for Professor Boonzaaier's view. The case actually supports the opposite view. Logic dictates that, if the first wife's consent was not a requirement for the validity of a subsequent marriage between her husband and another woman, it would not be necessary to end her marriage to her husband before he could enter into another marriage with another woman. The man could simply enter into a further marriage with another woman while his marriage with his first wife continued. A divorce or termination of the first wife's marriage would be required only if the wife's consent was a requirement. The divorce would be resorted to in order to enable the man not to need her consent for his marriage to another woman because, once her marriage has been ended, she would no longer be his first wife or wife and, therefore, her consent would no longer be required. I, therefore, conclude that the basis advanced by Professor Boonzaaier for his statement that the first wife's consent is not required is not sound.

[117] The main judgment approaches the new evidence on the basis that there are no contradictions in the additional affidavits. It says that the perspective gained from the new evidence is "not one of contradiction, but of nuance and accommodation."[90] It then proceeds to state what it says can be safely said in light of that evidence.[91] The following is what the main judgment then states as emerging from the new evidence, namely:

> "(a) although not the general practice any longer, Vatsonga men have the choice whether to enter into further customary marriages; (b) when they decide to do so they must inform their first wife of their intention; (c) it is expected of the first wife to agree and assist in the ensuing process, leading to the further marriage; (d) if she does so, harmony is ensured between all concerned; (e) if she refuses consent, attempts are made to persuade her otherwise; (f) if that is unsuccessful, the families are called in to resolve the problem; (g) this resolution process may result in divorce; and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but the children of the second marriage will not be prejudiced by this as they will still be regarded as legitimate children."[92]

It is stated in the main judgment that it is not necessary to go further than the above conclusions. It says it must be emphasised that "in the end, it is the function of a court to decide what the content of customary law is, as a matter of law not fact." It continues: "It does not depend on the rules of evidence: a court must determine for itself how best to ascertain that content." On the basis of the additional affidavits the main judgment concludes that the first wife needs to be informed of the husband's intention to conclude a further marriage with another woman.

[90] Main judgment at [61] above.

[91] Id.

[92] Id.

[118] I am unable to agree with the main judgment that there are no contradictions or disputes of fact in the additional affidavits. When I read those affidavits, the single most material dispute of fact, namely, whether, among the Vatsonga, a man needs to obtain his first wife's consent before he can enter into a second or further customary marriage with another woman, seems to be quite prominent. The main judgment's conclusion that there are no disputes of fact on the issue under consideration runs contrary to the contents of the affidavits. I demonstrate this by way of reference to the contents of the affidavits below.

The deponents who say the first wife's consent is a requirement

[119] In his affidavit Mr Nkanyani inter alia says:

> "It is the custom of the Xitsonga/Shangaan speaking people for the husband to first obtain willingness or permission of the first wife to enter into marriage with the second and subsequent wives."

In his affidavit Dr Mhlaba inter alia says:

> "In all Vatsonga communities, consent of the first wife is an essential requirement for the husband to conclude a second marriage. If the man already has more than one wife, only the first wife must consent to a subsequent marriage. It is the first wife's duty to discuss the subsequent marriage with the other wives, but there is no requirement that they agree."

In his affidavit Mr Shirinda inter alia says:

> "In my experience, which I believe accords with custom, the first wife must give consent before the husband takes a second wife or subsequent wives. It is wrong, according to our custom for a man to marry a subsequent wife without discussing the proposal with the first wife and without the first wife giving her consent to the marriage."

The witnesses who say that the first wife's consent is not required and that she only needs to be informed of her husband's intentions

[120] In his affidavit Dr Paul Shilubane says that a man is required to inform his first wife of his intention to enter into a further customary marriage with another woman but does not need to obtain her consent. He says that a failure by a man to inform his first wife of his intention to marry another woman results in the invalidity of the further marriage.

[121] In his affidavit Mr Mayimele says: "The first wife may be informed, but the husband makes the decision."

[122] In his affidavit Mr Maluleke says:

> "As regards the tradition and practice of taking subsequent wives under Tsonga custom, the prospective bridegroom should inform his existing wife about his intentions to marry another wife. He informs her so that she should not be surprised in seeing another wife. It is not a requirement to even advise as to the identity of the prospective subsequent wife. Whether she gives her consent or not, the prospective bridegroom will proceed with his plan to marry another wife."

Mr Maluleke also says in another paragraph: "It is not a requirement that the existing wife must give consent to a prospective subsequent marriage by the husband."

[123] It is clear from the excerpts and references to the contents of the affidavits of some of the persons who deposed to the additional affidavits that there are clear contradictions between, on the one hand, the first set of witnesses referred to above who say that the first wife's consent is a requirement and, on the other, the second set of witnesses, who say that, according to Xitsonga custom and practice, the first wife's consent is not required but she only needs to be informed. One deponent even says in effect that the first wife's consent is required but, if she unreasonably refuses to give it, the man may go ahead and enter into a further customary marriage with another woman.

[124] Even if there were no contradictions or disputes of fact in the additional affidavits and the contents of the additional affidavits were all to the effect that the consent of the first wife is not a requirement and the first wife only needs to be informed of her husband's intentions, the matter could still not be adjudicated on the basis that there are no contradictions or that there is no dispute of fact in this matter. There would still be a material dispute of fact because the applicant and the deceased's elder brother, said in their respective affidavits filed in the High Court that, according to Xitsonga custom, the first wife's consent is a requirement for the validity of a subsequent marriage between her husband and another woman and more than half of the additional affidavits that have

been filed say the same thing and, therefore, support the applicant's and the deceased's elder brother's evidence in this regard.

[125] In summarising what emerges from the additional affidavits the main judgment states that, when Xitsonga men enter into further customary marriages "they must inform their first wife of their intention" and "if the first wife is not informed of the impending marriage the second union will not be recognised".[93] This means that the main judgment prefers the evidence of Mr Maluleke and Dr Shilubane on the issue under consideration. Both said in their affidavits that, according to Xitsonga custom and practices, the first wife must be informed of her husband's intention to marry another woman. Mr Mayimele said that the first wife may be informed.

[126] It is clear from the contradictory nature of the evidence that emerges from the additional affidavits that we are faced with a material dispute of fact in the affidavits on whether the first wife's consent is a requirement or whether the requirement is that she be informed of her husband's intention to marry another woman. We are dealing with an appeal in a matter brought to the High Court by way of motion proceedings. I am unable to see the legal basis upon which we can prefer one version over another on this dispute of fact in a motion matter. In this regard we have to remember that we are dealing with section 3(1)(b) of the Recognition Act and trying to establish whether, if there was a marriage between the deceased and the first respondent, for that marriage to constitute a

[93] (a) read with (b) and (h) in the main judgment at [61] above.

valid customary marriage, the deceased needed the applicant's consent or he only needed to have informed her. Establishing that requires us to establish the customs and usages traditionally observed by the Vatsonga which form part of their culture. Customs and usages "traditionally observed" by any group of people is a question of fact and not of law. When there is a material dispute of fact in a matter brought to court by way of motion proceedings, it cannot be decided on the papers without the use of the *Plascon-Evans* approach in circumstances where the dispute is not referred to oral evidence.

[127] If the matter is to be decided on the basis of all the affidavits before the Court, the proper approach would not involve preferring one version over the other. It would simply be that, on the evidence before the Court, the position is that the customary law applicable to the Vatsonga either requires the first wife's consent or requires that the first wife be informed of her husband's intention to enter into a further customary marriage with another woman. In the present case it is undisputed that the applicant did not give her husband her consent nor has it been shown that the deceased informed the applicant of his intention to marry the first respondent. Accordingly, on either basis the first respondent had no valid customary marriage with the deceased at the time of the latter's death.

[128] I have pointed out that the first respondent bore the onus of proving that she and the applicant's deceased husband had concluded a valid customary marriage which was in existence when the deceased passed away. In this case the first respondent did not

even prove that a marriage of whatever kind was concluded between herself and the deceased. The first respondent was required to set out what the requirements of a valid customary marriage are and to show by way of evidence how those requirements were met in the case of her relationship with the deceased. She did not do so. Other than saying that there had been ilobolo negotiations, she said nothing else. Since she did not say that ilobolo negotiations are the only requirement for a valid customary marriage with a man who is already a party to another customary marriage, it cannot be held, even on her own case, that her relationship with the deceased constituted a customary marriage. That being the case an order to the effect that no valid customary marriage existed between her and the deceased at the time of the latter's death is fully justified.

[129] I note that, when affidavits were filed pursuant to the directions of this Court, the first respondent opportunistically filed affidavits which she did not file in the High Court which seek to show that there was a marriage between herself and the deceased and that there were certain people who attended the wedding and that it was conducted in accordance with the customs of the Vatsonga. She did not make an application for the admission of those affidavits nor has she proffered any explanation why they were not filed in the High Court and why they should be admitted at this stage. This Court should not allow chaotic litigation which is what we will have if litigants disregard the Rules of this Court and Court directions and do as they please. There are good reasons why there are rules for the conduct of litigation in the courts and they should be observed and should only be departed from when there is good cause for such deviation or where it is

in the interests of justice to do so. A party cannot elect not to file affidavits in the High Court and be content to have the case adjudicated without such affidavits in that Court and in a subsequent appeal to the Supreme Court of Appeal but, when the matter is before this Court, file affidavits under the pretext that they are filed pursuant to the directions of this Court when in fact they were not being filed pursuant to those directions.

[130] On the approach I adopt in deciding this matter, like Jafta J, I am of the opinion that the development of Xitsonga customary law is not necessary to reach the conclusion that, in so far as the first respondent may have had a marriage with the deceased, such marriage was invalid. This is the case irrespective of whether one takes into account the additional affidavits. I am also in full agreement with the views expressed by Jafta J in [142]-[150] of his judgment.

[131] Whether I deal with the matter on the basis of the affidavits that were before the High Court and the Supreme Court of Appeal or on the basis of those affidavits plus the additional affidavits, I would grant leave to appeal, uphold the appeal, set aside the relevant part of the order of the Supreme Court of Appeal and replace it with an order declaring that there was no valid customary marriage between the first respondent and the deceased at the time of the latter's death.

JAFTA J (Mogoeng CJ and Nkabinde J concurring):

[132] I have read the main judgment[94] and the judgment of Zondo J in this matter. I agree with the main judgment that leave to appeal must be granted and the appeal be upheld. I also agree that the second customary marriage should be declared invalid because it was not "negotiated and entered into or celebrated in accordance with customary law" that applied to the community to which the "spouses" in that marriage belong.

[133] However, I differ with the main judgment in relation to the development of customary law on whether consent should be given before a husband can marry another wife in terms of Xitsonga customary law. The main judgment develops Xitsonga customary law to the extent that it does not include a requirement that "the consent of the first wife is necessary for the validity of a subsequent customary marriage."[95]

[134] My dissent is based on these reasons. First, the parties to the dispute (both the applicant and the first respondent) did not ask for the development of Xitsonga customary law, not in the High Court or the Supreme Court of Appeal and not in this Court. The reason for this stance is simply that it is not disputed between them that consent of the first wife is a requirement for the validity of a subsequent customary marriage under

[94] The judgment prepared by Froneman, Khampepe and Skweyiya JJ.

[95] Main judgment at [75].

Xitsonga customary law that governs them. The applicant averred in her founding affidavit that in terms of Xitsonga custom consent of the first wife is a requirement for the validity of a subsequent marriage. In this regard she was supported by the affidavit of her brother-in-law, Mr Moyana, the details of which are quoted in the judgment of Zondo J.[96]

[135] As it appears in the main judgment, this Court was of the view that the evidence was inadequate to establish the existence of the Xitsonga customary law rule relied on by the applicant. Directions were issued calling for further evidence after the hearing of the matter. Such evidence was furnished to the Court in the form of various affidavits which are summarised in the main judgment. The majority of deponents to those affidavits confirmed and supported the applicant and her brother-in-law in asserting that in terms of Xitsonga custom, consent of the first wife is required for a subsequent customary marriage to be valid.

[136] These deponents include traditional leaders who practise and follow the custom in question. The first traditional leader is Hosi Bungeni who has two wives married according to Xitsonga custom. Before marrying his second wife he sought and obtained the consent of the first wife. He stated that if the first wife refuses to consent, the subsequent marriage becomes invalid. This pronouncement is supported by another traditional leader, Hosi Sethole. He said the husband is required to inform his first wife

[96] Zondo J's judgment at [105].

who must consent to a subsequent marriage. If the first wife withholds her consent she is sent to her maiden home and if upon her return she still refuses to consent the husband may marry without it, if consent was unreasonably withheld. Alternatively, the husband may divorce the first wife.

[137] Further support is found in the evidence of Hosi Nkanyani, a senior traditional leader in the Vhembe district, Limpopo Province. He, too, stated that a husband must first obtain consent of the first wife before he can enter into a subsequent customary marriage. This evidence is reinforced further by the affidavit of Dr Mhlaba, a senior lecturer in the School of Law at the University of Limpopo. He was asked by the lawyers for the second and third amicus curiae to investigate the matter. In his investigation, he interviewed two traditional leaders, Hosi Nxumala (by representation through Nduna Mayinga) and Hosi Mohlaba II. He also interviewed Nduna Mohlaba as well as Mr Mabunda, a tribal councillor and Mr Mkhawana, a chief's adviser. His selection of these individuals, he says, was based on their knowledge of customary law. Based on the interviews he had Dr Mhlaba said:

> "In all Vatsonga communities, consent of the first wife is an essential requirement for the husband to conclude a second marriage. If the man already has more than one wife, only the first wife must consent to a subsequent marriage. It is the first wife's duty to discuss the subsequent marriage with the other wives, but there is no requirement that they agree."

[138] The evidence supporting the applicant in her assertion of the customary law rule on consent is overwhelming. In addition to the evidence of traditional leaders, there is testimony of Mrs Rikhotso who is a fourth wife in a customary marriage setting and Mr Shirinda, a traditional healer with six wives. In his affidavit Mr Shirinda emphatically states:

> "It is wrong, according to our custom for a man to marry a subsequent wife without discussing the proposal with the first wife and without the first wife giving her consent to the marriage."

[139] In the light of this evidence, it has been established that the custom observed by the community to which the applicant and her late husband belong requires consent of the first wife for a subsequent marriage to be valid. This meets the concern that the Court had on the adequacy of evidence establishing the customary law rule relied on by the applicant. Accordingly, there is no need for developing Xitsonga customary law in so far as the present case is concerned. I reach this conclusion mindful of the fact that in the evidence gathered by the Court, there is also testimony to the effect that the custom normally requires the first wife to be informed of her husband's decision to enter into a subsequent marriage. What is important to keep in mind is that none of the witnesses who testified differently have said that the custom, as known to them, is practised and followed by the applicant's community which is relevant to these proceedings.

[140] It is not unheard of that within the same broader group of African people we find customary law rules which differ. This may occur as a result of development that takes place in various communities within a group. An example of this happened in *Shilubana.*[97] At issue in that case was the enforcement of the customary law rule of primogeniture in terms of which only male children of a chief may inherit the chieftainship. The Valoyi community within the Vatsonga ethnic group had developed the rule to include female children. This Court recognised and upheld the developed customary law rule and held that a daughter could succeed her father and become a chief. The rule did not apply to the whole Vatsonga group but to that particular community.

[141] Having regard to the body of evidence as a whole, the objective sought to be attained by the Court has been achieved. The custom followed by the applicant's community when a husband wishes to conclude a subsequent customary marriage is established. For a subsequent marriage to be valid, the first wife must give her consent. The facts on record show that the applicant's consent was not obtained before the purported customary marriage between her husband and the first respondent was concluded. It follows that the first respondent's marriage is invalid.

[142] But the main judgment goes further to develop Xitsonga customary law, to the extent that it does not already require consent of the first wife. As is apparent above, this

[97] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) (*Shilubana*).

development is not necessary for reaching the outcome in the present case. In fact the development falls outside the scope of the current case. As mentioned earlier none of the parties have asked for it. But even if one of them did, it would have been inappropriate to raise the development of customary law for the first time in this Court. It was not raised in the High Court. Nor was it raised in the Supreme Court of Appeal. Therefore, this Court deals with the development of Xitsonga customary law as a court of first and last instance. That is undesirable and where it is not necessary for a determination of a dispute, in my view, it should not be done.

[143] There are good reasons for the principle that the claim for the development of the common law, and by parity of reasoning customary law, should be pleaded in the High Court and failing which to be raised in the Supreme Court of Appeal. A properly pleaded claim allows the other parties to meet it head on and place before a court evidence necessary for assessing the propriety of the development. In this case we do not know why the other Vatsonga communities follow the custom of simply informing the first wife instead of requiring her consent. On the face of it, the rule appears to be inconsistent with the rights to dignity and equality, entrenched in the Bill of Rights. But we know that under appropriate circumstances these rights can be limited. Because the case was not about the validity of the developed rule, we do not know if there is justification for it.[98] In the circumstances of this case it would be dangerous to assume

[98] *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission For Gender Equality As* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic Of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (*Bhe*)

that there is no justification. There can be little doubt that the rule under development here constitutes a law of general application within the relevant community and that it may impose a reasonable and justifiable limitation on the rights mentioned.[99]

[144] Moreover, Xitsonga customary law as developed in the main judgment appears not to be in line with the Constitution. To require the consent of the first wife only is not consistent with the equality clause. And if the rule is to be developed to require consent of all existing wives, there may be difficulties arising out of its application. Take for example the case of a man with 13 wives who wishes to marry another wife. If he marries with consent of 12 wives only because one of them did not consent, can it be said that the marriage is invalid? Would the lack of consent by one wife vitiate a marriage concluded with the consent of 12 other wives? These issues were not canvassed because of the manner in which the case was prosecuted in other courts and in this Court.

[99] Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[145] With regard to the development of the common law, this Court has refused to undertake it in circumstances where one of the parties asked for the development for the first time in this Court. The Court pointed out that a development of that kind makes this a Court of first and last instance on the issue. A development of the common law in circumstances where it was not raised in the other courts is permissible only in exceptional circumstances. I can think of no reason why the development of customary law should be treated differently. Section 39(2) of the Constitution in terms of which the main judgment undertakes the development provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[146] Clearly section 39(2) refers to both the common law and customary law in one breath. It requires every court to promote the "spirit, purport and objects of the Bill of Rights" in developing either the common law or customary law. Consequently, there can be no justification in treating them differently when it comes to circumstances under which development may be undertaken.

[147] In *Lane and Fey NNO v Dabelstein and Others*[100] this Court affirmed that a party will be allowed to seek the development of the common law if the request is made for the first time in this Court, under special circumstances. In that case this Court said:

[100] [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) (*Lane*).

> "Where the development of the common law is the issue, the views and approach of the ordinary courts, and particularly the SCA, are of particular significance and value. Save in special circumstances, this Court should not consider this kind of matter as a court of first instance. No relevant factors have been raised by the applicants that would constitute such special circumstances."[101] (Footnotes omitted.)

[148] The fact that the customary law rule under consideration for development here implicates the rights to dignity and equality does not distinguish this case from *Lane.* In that case, too, rights in the Bill of Rights, including the equality clause, were relied upon in motivating the request for the development of the common law. That notwithstanding, this Court refused to develop the common law for reasons already mentioned. Therefore, in these circumstances there is no justification I can think of for departing from the precedent in *Lane*. Duplication of costs and time do not, in my view, constitute special circumstances justifying this Court to deal with the development of Xitsonga customary law as a court of first and last instance. More so because no party has asked for it.

[149] Recently, this Court reaffirmed this principle in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd.*[102] In that case Moseneke DCJ said:

> "Everfresh has to establish special circumstances that would justify this Court being a court of first and last instance in a matter that implicates the development of the common law of contract. It has not done so. It will be recalled that Everfresh did not even advance any grounds why it is in the interests of justice to grant leave to appeal. If

[101] Id at para 5.

[102] [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC).

> anything, several factors point against this Court tackling the wide ranging commercial intricacies related to renewal clauses in existing leases. The adaptation of the common law Everfresh urges upon us includes at least four possibilities: recognising the validity of a lease at a reasonable rental; recognising an implied (*ex lege*) term that rental is reasonable; requiring contracting parties who have a discretion to negotiate to do so reasonably (*arbitrio boni viri*); or imposing a duty on the parties to negotiate in good faith. All this we are urged to do without the benefit of the views of the High Court and of the Supreme Court of Appeal.
>
> . . .
>
> Everfresh has not advanced nor can I find any special circumstances which would render it in the interests of justice for this Court to hear a claim for the development of the common law of contract relating to a renewal clause in a lease, as a court of first and final instance."[103]

[150] Unlike the two cases referred to above where the applicants raised for the first time in this Court the issue of developing the common law, in this case the applicant did not seek the development of customary law. Nor was it sought by the respondents. Instead, the issue was raised by the amicus. In my view, an amicus cannot raise an issue which the parties themselves are not permitted to raise. Moreover, no special circumstances have been shown which justify the development of customary law by this Court as a court of first and last instance. The same outcome of the case may be reached without the development in question.

[151] In the present circumstances the alleged customary marriage between Ms Ngwenyama and the applicant's late husband may be declared invalid only on two

[103] Id at paras 64 and 67.

grounds. First, it may be annulled because Ms Ngwenyama has failed to prove that the marriage came into existence. Second, it may be declared invalid because it was not "initiated and celebrated" in terms of Xitsonga customary law in that consent of the first wife was not obtained before it was concluded. The declaration of invalidity based on either ground renders the development of the relevant rule unnecessary. But a reliance on the latter ground would mean that the main judgment accepts that as at the time of conclusion of the marriage concerned, consent of the first wife was an essential requirement. This is so because the main judgment directs that the rule, as developed by it, will apply prospectively. Therefore, the declaration cannot be based on the developed rule.

[152] However, the main judgment finds that on the facts of this case, there was no compliance with the customary law rule that required the first wife to be informed of the impending marriage, before the second marriage was concluded.[104] Therefore, the second marriage is considered to be invalid "for want of compliance with the requirements of Xitsonga custom as it existed at the time of the purported marriage."[105] The difficulty with this finding is that it is based on the customary law rule that required the first wife to be informed. There is no evidence establishing that this particular rule applied to the community of Ms Mayelane and her late husband. On the contrary, there is overwhelming and undisputed evidence to the effect that before the second marriage

[104] Main judgment at [86].

[105] Id.

Xitsonga custom followed by that community required consent of the first wife for a subsequent marriage to be valid. In my view this evidence ought not to be overlooked nor are there grounds I can think of on which it may be rejected when it is not disputed by Ms Ngwenyama or the second respondent.

[153] Therefore the undisputed facts show that Xitsonga customary law followed by the relevant community already requires consent of the first wife. This alone renders the development of the rule unnecessary. This is more so, if the reason given by the main judgment for not dealing with a situation where there is more than one wife, is taken into account. The main judgment declined to consider how the developed rule will be applied in a case where a man has two or more wives, on the basis that such a case is not before us. The rule that requires the first wife to be informed is similarly not before us and by parity of reasoning it ought not to be developed.

[154] The principle that the Court should not determine a dispute as a court of first and last instance is rooted in the proposition that the losing party is denied an opportunity to appeal which is guaranteed by the Constitution.[106] Developing the customary law rule in present circumstances where we have no information from those who follow the rule will seriously disadvantage communities in which the rule applies. Our request to these communities was for them to state the rule for the benefit of the Court. The directions we

[106] *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC).

issued did not warn them that should we find the rule furnished to be inconsistent with the Constitution, we will develop it without giving them a hearing.[107]

[155] However, what is stated in this judgment must not be taken as insulating customary law from development. Indeed, our Courts are obliged to develop both the common law and customary law if they are found to be inconsistent with the Constitution. The question is whether the proper approach is followed. As was observed in *Carmichele v Minister of Safety and Security*,[108] the principles laid down by this Court[109] "become singularly compelling when the issue is whether or how the common law is to be developed under section 39(2) of the Constitution, particularly when this Court has not

[107] The directions issued by the Court provided in relevant part:

> "1. The parties and the amici are invited to file statements by way of affidavit or affirmation on the issues described in paragraph 2 below. The statements must be lodged by 22 March 2013.
>
> 2. The above statements must address the following questions:
>
> (i) under Tsonga customary law, is the consent of a first wife a requirement for the validity of subsequent customary marriages entered into by that first wife's husband;
>
> (ii) if so—
>
> (a) what are the requirements, if any, regarding the manner and form of this consent; and
>
> (b) what are the consequences, if any, of the failure to procure the first wife's consent or of any defects in relation to the manner or form of the consent?
>
> 3. The above sworn statements must have due regard to and adequately reflect authoritative sources of customary law, which sources may include writers on customary law, case law, testimony from traditional leaders and other expert evidence."

[108] [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

[109] *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 35 and *Christian Education South Africa v Minister of Education* [1998] ZACC 16; 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 9.

previously been required to do so."[110] In *Christian Education South Africa* this Court said:

> "[T]he exclusion of other courts from the exercise of a jurisdiction given to them by the Constitution would clearly not be in the general interests of justice and the development of our jurisprudence."[111]

[156] The principles referred to above cannot be outweighed by considerations of costs and time which were not raised by any of the parties to the present litigation. Moreover, the argument that considerations of costs and time may justify the development of the common law in this Court as a court of first and last instance was rejected in *Amod*.[112] All the cases referred to here constitute binding authority which this Court must follow unless it is convinced that they were wrong. The main judgment does not say they were wrong nor does it distinguish them from the present case.

[157] For these reasons I would not grant the orders relating to the development of Xitsonga customary law.

[110] *Carmichele* above n 14 at para 53.

[111] *Christian Education South Africa* above n 15 at para 9.

[112] Above n 15 at para 33. A unanimous judgment by Chaskalson P.

Annexure A

Summary of *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama and Another* 2013 ZACC 14 for information purposes only.

The South African Constitution guarantees that all people must be treated equally and with human dignity. This means that husbands and wives must have equal rights in a marriage.

The Constitutional Court has held that, if a man wishes to marry more than one wife under Xitsonga custom, he must get consent from his existing wife. This means that his first wife must first agree to allow her husband to marry another woman before he may do so.

If the husband's first wife does not agree to allow him to marry another woman and the husband decides to marry again without her agreement, the new marriage is not valid under law. This means that the new marriage is not legal and the second woman will not be considered the husband's wife under the Recognition Act (120 of 1998).

This rule applies to all Xitsonga Customary marriages concluded after 30 May 2013. Any Xitsonga customary marriages concluded before this date are not affected by this judgment.

For the Applicant:	Advocate C da Silva SC and Advocate T Masevhe instructed by Rammutla at Law Inc.
For the First Respondent:	Advocate N Maenetje SC and Advocate T Ntsonkota instructed by Legal Aid South Africa.
For the First Amicus:	Advocate S Cowen and Advocate N Mji instructed by the Women's Legal Centre.
For the Second and Third Amici:	Advocate T Ngcukaitobi instructed by the Legal Resources Centre.