Ascertainment of customary law: case note on *MM v MN*

1 Introduction

Froneman J states in *MM v MN:*[1] 'The process of determining the content of a particular customary norm can present some challenges.' This case gives rise to a number of issues which have been discussed in some part elsewhere,[2] however this note considers the Constitutional Court's approach in *MM v MN* in ascertaining customary law and the difficulties the Court experienced.

The issue in *MM v MN* was whether a polygamous customary marriage was validly concluded in Tsonga customary law and. in particular, whether the first wife's consent was required for the subsequent customary marriage. This note scrutinises how the Constitutional Court ascertained the Tsonga customary law on the issue. Tentative conclusions include that innovation and respect for customary law may not be enough for the judgment to stand as good precedent.

2 Constitutional Court

Neither the High Court[3] nor Supreme Court of Appeal[4] considered the issue of whether the first wife's consent is required for a subsequent customary marriage though it was raised by the applicant in her founding papers to the High Court. The High Court and Supreme Court of Appeal decided the matter on the basis of section 7 (6) of the Recognition of Customary Marriage Act 120 of 1998 ('RCMA') which requires a court to approve a written contract regulating the future matrimonial property regime of the two marriages. Consequently, the Constitutional Court requested the parties and amici to provide further representations on Tsonga customary law.[5] The request would prove to be a contentious issue, giving rise to a minority judgment.

2.1. Majority judgment

The majority asserted that further representations on Tsonga customary law were necessary to treat customary law as a source of law.[6] It found that the mere assertion by a party of a rule was insufficient to establish it as law and that the determination of customary law, like common law, was a question of law.[7] Accordingly, the majority rejected the argument that a customary rule could be established on the basis of the applicant's averment that Tsonga customary law

1 *MM v MN* [2013] 4 SA 415 (CC) para 44.
2 Gardiol van Niekerk, 'The courts revisit polygyny and the Recognition of Customary Marriages Act 120 of 1998: case note' (2013) SAPL 369; Chuma Himonga and Anne Pope, 'Mayelane v Ngwenyame and Minister of Home Affairs: a reflection on wider implications' (2013) Acta Juridica 318; Helen Kruuse and Julia Sloth-Nielsen, 'Sailing between Scylla and Charybdis: Mayelane v Ngwenyame' (2014) 17 (4) 1710; Pappa Maithufi, 'Modjadji Florah Mayelane v Mphephu Maria Ngwenyama [2013] ZACC 14' (2013) De Jure 1078.
3 *MM v MN* [2010] 4 SA 286 (GNP).
4 *MN v MM* [2012] 4 SA 527 (SCA).
5 *MM v MN* (n 1) para 47.
6 ibid.
7 ibid.

required the consent of the first wife, which was supported by her brother-in-law's affidavit and the respondent's failure to rebut the averment.[8] The majority held that the court is obliged to satisfy itself as a matter of law as to the content of customary law.[9] The majority acknowledged that this may be onerous when a rule is controversial but maintained that this is the court's responsibility.[10] The majority emphasised that the court must determine the content of customary law as a matter of law rather than fact, and that this determination is not dependent on the rules of evidence. Instead, the court must decide for itself how best to determine the content of the law.[11]

The further representations comprised of evidence from a cross section of the community. Affidavits were filed by individuals in polygamous marriages; advisors to traditional leaders; traditional leaders, including headmen; and experts in the field, including an anthropologist and senior lecturer in law and jurisprudence.[12] Unsurprisingly, the evidence was unclear. Some informants said the first wife's consent was required, others said the first wife merely had to be informed of the subsequent marriage.[13] The evidence also revealed that wives can be persuaded to consent[14] and that the reasonableness of withholding consent may be an issue.[15] The majority, however, held that it did not view the contradictory evidence as presenting a difficulty in deciding the case[16] and described the contradiction as an example of 'nuance and accommodation'.[17] Ultimately, the majority found that Tsonga customary law required the first wife to be informed of the subsequent marriage but her consent is not required.[18] Thus the majority, based on the facts, held the second marriage was invalid as the first wife was not informed of the second marriage as required by Tsonga customary law.[19] Furthermore, the majority held that in order to protect the first wife's rights to equality and human dignity Tsonga customary law should be developed prospectively, so that, to the extent that it does not currently do so, it requires a first wife's consent to a subsequent customary marriage.[20] This requirement goes to the validity of a subsequent marriage.

2.2. Minority judgment (per Zondo J)

The minority agreed that the second marriage was invalid but disagreed with the majority's approach in ascertaining the law. Establishing the customs of a group of people is a question of fact and not law.[21] Anyone with knowledge may provide evidence as to the customary law position on any point.[22] The person need not be an expert or occupy a position of authority.[23] The applicant and her brother-in-law provided evidence that the consent of the first wife was required for a subsequent marriage, which the respondent did not dispute. This should have

8 ibid.
9 id para 48.
10 ibid.
11 id para 61.
12 id para 54 and 59.
13 id para 55–59.
14 id para 55.
15 id para 57–59.
16 id para 60.
17 id para 61.
18 ibid.
19 id para 87.
20 id para 75.
21 id para 126.
22 id para 98.
23 ibid.

been sufficient to establish the first wife's consent as a requirement.[24] The applicant's evidence was undisputed and the matter should have been decided on the common cause facts between the parties on the record before the court.[25]

The minority criticised the call for further evidence about Tsonga customs. Evidence of the customs and practices of a community is factual, which could lead to contradictory evidence being presented which the court would have no way of resolving.[26] The Constitutional Court is not a trial court, which listens to oral evidence and cross examination of witnesses to reveal disputes of facts in the affidavits,[27] but is confined to deciding the matter on the same evidence that was before the court *a quo*.[28] Real difficulties are associated with admitting new evidence that may be disputed.[29] Furthermore, when sitting as a court of appeal, the court's function is to decide, using the same evidence as before the court *a quo* whether that court's decision was right or wrong.[30] While a court may call for new evidence in exceptional circumstances, this case was not made out in the main judgment.[31] As the parties had ample opportunity to present or challenge evidence on the issue in the High Court, the Constitutional Court should be confined to deciding the matter on the basis of the evidence that was before the High Court.[32] If the evidence was insufficient the appeal should have been dismissed.[33]

The minority judgement points out the additional evidence is unclear as to whether consent of a first wife is required for a valid subsequent customary marriage.[34] Consequently, it is difficult to follow the legal basis on which the majority could prefer one version over another.[35] The proper approach would have been to hold that Tsonga customary law requires either that a first wife must consent or that she must be informed that her husband intends to enter into a further customary marriage.[36] As it is not disputed that the first wife did not consent and that she was not informed about the subsequent customary marriage, the respondent's customary law marriage with the deceased could not be valid.[37]

2.3. Minority judgment (per Jafta J)

A separate judgment held that the respondent's marriage to the deceased was invalid on the basis that the first wife had not consented as required by Tsonga customary law,[38] further, that it was not necessary to develop Tsonga customary law to require consent as it was not disputed that consent is required. The majority of deponents that provided evidence on this matter supported this position.[39] Since development of the customary law had not been raised in the High Court or Supreme Court of Appeal, it is undesirable for the Constitutional Court to act as a court of first and last instance.[40]

---

24 id para 104–107.
25 id para 107.
26 id para 112.
27 ibid.
28 id para 113–114.
29 id para 113.
30 id para 114.
31 ibid.
32 id para 115.
33 ibid.
34 id para 116–123.
35 id para 126.
36 id para 127.
37 ibid.
38 id para 141.
39 id para 134–135.
40 id para 142.

3 Analysis

The majority and the minority per Zondo J differ with regard to the required approach in ascertaining customary law. The majority asserts that determining customary law is a matter of law but does not explain what this means. Himonga and Pope argue that this determination suggests that the Court will not accept a version of the rule from the applicant and her witnesses, but wants to satisfy itself as to the content of the law by examining whether the community whose customary law is in issue considers the practice to be a customary rule.[41] In contrast, the minority per Zondo states that ascertaining customary law is a question of fact and not law. This means that customary law is determined by the evidence and that anybody with knowledge of the custom can provide evidence to the court.[42] Thus, the minority was prepared to accept that consent of the first wife was required on the basis that the applicant's averments and the supporting evidence of her brother-in-law were undisputed. It was not necessary to consider whether the community considered the consent of the first wife to be a requirement. The minority's approach, though it represents the court's historical approach to the ascertainment of customary law,[43] is problematic.

The minority's approach may result in distortions of customary law. Treating customary law as a matter of fact to be established by the evidence means that courts may recognise and enforce customary rules which are pleaded by litigants but do not reflect the customary law of the community. The High Court in *Mabuza v Mbatha* and *Mabena v Letsoalo* was in fact criticised for recognising practices as customary law when there was scant evidence that the communities in question had adopted them.[44] Himonga and Pope thus argue that the approach of the majority is preferable as it links the alleged rule to its source. Thus the community must contribute so that the Court may consider, as objectively as possible, what is actually customary practice. The consideration of the practice through the eyes of a representative sample of the community is more likely to yield an accurate and reliable account of the law.[45] This of course would be the ideal as it avoids the court's reliance on the evidence of a litigant with a vested interest in a case (or a single witness), which evidence may be distorted. The approach of the majority reinforces that customary law can be ascertained only by consulting with the community that practices it and demonstrates a serious commitment by the court to ascertaining customary law.

However, the majority's robust approach to ascertaining customary law does not address the minority's concerns regarding whether the court should have called for further representations. Rules 10 and 31 of the Constitutional Court allow amici to lodge written arguments which raise new contentions and factual material that is common cause, incontrovertible or easily verifiable.[46] As discussed earlier the affidavits on customary law were contradictory and open to dispute and thus arguably fell foul of the rules of court. Indeed in previous cases the Constitutional Court, in accordance with the rules of court, has decided the matter on the basis of the customary law pleaded and not called for further representations on

41 Himonga and Pope (n 2) 327–328.
42 *MM v MN* (n 1) para 98.
43 *Mabuza v Mbatha* [2003] 4 SA 218 (C) and *Mabena v Letsoalo* [1998] 2 SA 1068 (T).
44 Tom Bennett, 'Re-introducing African customary law to the South African legal system' (2009) 57 American Journal of Comparative Law 1 at 13.
45 Himonga and Pope (n 2) 327–328.
46 Rule 10 and 31 of the Constitutional Court Rules (Reg 1675 of 2003).

the law. For example, in *Bhe* the Constitutional Court decided the case based on the official rule of male primogeniture though it acknowledged that this may differ significantly from the living customary law.[47] In *Shilubana* the Constitutional Court rejected the arguments of the National Movement of Rural Women regarding the flexible nature of customary law and its varied application depending on the circumstances on the basis that the arguments were not before the High Court and Supreme Court of Appeal and their evidence on the point was not clear.[48] One may thus have reasonably expected the Constitutional Court to follow its previous approach in adjudicating customary law disputes: to decide the matter based on the law pleaded and the arguments that were before the High Court and Supreme Court of Appeal. At the very least, the court should have explained its deviation from its aforementioned approach, to what extent the rules of court and evidence do not apply in ascertaining customary law and how it would approach the matter in the future. The majority merely stated that the ascertainment of customary law does not depend on the rules of evidence[49] without any further explanation.

The majority's decision is troubling because it does not address the issue with the rules of court directly. A proper explanation of its approach would have given the majority's judgment greater credibility. In this regard the majority could have explained that customary law, even if a system of law, is found in the practices of people and is ascertained through the presentation of evidence. Accordingly, in finding customary law the court inevitably deals with factual evidence. Thus, rules designed for common law proceedings, which proscribe the presentation of disputed factual evidence at an advanced stage in proceedings, may be ill-suited to the adjudication of customary-law disputes where the evidence contains the law. Rules should not hinder courts from finding customary law in order to be able to apply it. Courts are the final arbiters of the law and should be allowed to call for evidence when there is uncertainty about that law.

Furthermore, it is interesting to note then that a woman filed only one of the nine affidavits discussed by the majority. One would think that the evidence of more women would be considered on an issue that directly affects women. The majority, however, never discusses whether the sample constitutes a representative sample of the community.

4 Conclusion

This note has discussed the manner in which the Constitutional Court in *MM v MN* ascertained customary law. First, it highlighted that the majority and Zondo J differed as to whether the ascertainment of customary law is a question of law or fact. Secondly, it argues that the majority's approach ensures a more accurate account of customary law. In this regard, courts should be cautious in relying solely on a litigant's version of customary law. Litigants may easily manipulate such subjective accounts of the law to advance their own interests. In order to avoid such bias courts should look, as the majority has done, to ascertain whether the community considers the practice to be a customary law rule. Nonetheless, the majority judgment is not without difficulties. It does not address satisfactorily how it was able to call for further evidence in light of the constraints of the rules of court nor why it deviated from its previous approach to the ascertainment of customary law. It is perhaps necessary that the

47 *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole* [2005] 1 SA 580 (CC) para 109.
48 *Shilubana and others v Nwamitwa* [2009] 2 SA 66 (CC) para 65.
49 *MM v MN* (n 1) para 61.

court in future provide a clear explanation as to its approach to the ascertainment of customary law.

F Osman
University of Cape Town