# Integration of the Bride and the Courts: Is Integration as a Living Customary Law Requirement Still Required?

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## Abstract

After 15 November 2000, a customary marriage must satisfy the provisions of section 3(1) of the *Recognition of Customary Marriages Act* 120 of 1998. Section 3(1)(b) incorporates the living customary law requirements into the Act. This article explores whether the handing over of the bride to the bridegroom's family is still required, based on two recent judgements from the South African Supreme Court of Appeal: *Mbungela v Mkabi* 2020 1 SA 41 (SCA) and *Tsambo v Sengadi In re: Tsambo* (244/19) [2020] ZASCA 46 (30 April 2020). The author argues that a clear distinction must be made between rituals or customs and legal requirements when determining whether a customary marriage is valid under the living customary law. The author argues that *Mbungela v Makabi* is wrong in law and therefore not authority that "handing over in the wide sense" (or integration) is not required for the conclusion of a valid customary marriage. *Tsambo v Sengadi In re: Tsambo* is correct. Concluding that although the rituals of handing over (handing over in the narrow sense) can be amended, abbreviated, or waived the parties still must comply with the integration of the bride into the bridegroom's family for a valid customary marriage to take place. The author supports the revival by the Supreme Court of Appeal in *Tsambo v Sengadi In re: Tsambo* of the presumption of a valid customary marriage if the couple cohabited after the *lobolo* negotiations were completed and the woman's family did not object.

## Keywords

Customary law; living customary law; requirements for customary marriage; handing over; integration; *Recognition of Customary Marriages Act*.

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## 1 Introduction

A customary marriage concluded after 15 November 2000 must comply with the requirements in section 3(1) of the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the Act). Section 3(1) consists of two sets of requirements. The formal requirements are regulated under section 3(1)*(a)*. The parties must be over the age of 18 or have the appropriate consent. They must further consent to be married in accordance with customary law. Section 3(1)*(b)* contains the customary law requirements. Section 3(1)*(b)* incorporates the living customary law requirements into the Act.[1] The most contentious requirement is the requirement of integrating the bride into the bridegroom's family, as a requirement under section 3(1)*(b)*.[2] In *Moropane v Southon,* the Supreme Court of Appeal (hereafter the SCA) confirmed that integration is an essential living customary law requirement for a valid customary marriage.[3]

*Sengadi v Tsambo In re: Tsambo*[4] (hereafter *Sengadi v Tsambo*) sparked a media frenzy, partially because the deceased was a popular musician; but also because the court ruled that integration is not a requirement for a valid customary marriage and even declared integration unconstitutional, albeit *obiter*.[5] The SCA ruled in *Mbungela v Mkabi,*[6] a year after the contentious judgement, that the "handing over" of the bride as a requirement for a valid

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1 *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) (*Gumede v President of the RSA)* para 29; Bakker 2013 *Obiter* 582-583.

2 Bekker and West 2012 *Obiter* 351, 354.

3 *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014) para 40. The court referred to a "formal handing over" as a requirement. It is unclear, however, what is meant by this. According to the facts, the respondent was handed over in the narrow sense and the court declared that she complied with all the customary requirements for a valid marriage.

4 *Sengadi v Tsambo In re: Tsambo* 2019 4 SA 50 (GJ) (*Sengadi v Tsambo*).

5 *Sengadi v Tsambo* paras 35-37, 42. Thakurdin and Msibi 2018 https://www.timeslive.co.za/tshisa-live/tshisa-live/2018-11-02-just-in-court-rules-that-lerato-sengadi-is-hhps-customary-wife-denies-interdict-to-stop-funeral/; Koko 2018 https://www.iol.co.za/news/south-africa/hhpfuneral-lerato-sengadi-feeling-very-blessed-after-court-ruling-17752390; Seneke 2018 https://www.sowetanlive.co.za/sundayworld/lifestyle/talk/ 2018-11-13-judge-got-it-all-wrong-in-sengadi-tsambos-case/; Nkosi 2020 https://www.iol.co.za/the-star/news/hhps-father-takes-lerato-sengadi-to-appeals-court-over-customary-marriage-ruling-42022925.

6 *Mbungela v Mkabi* 2020 1 SA 41 (SCA). For a discussion see Bapela and Monyamane 2021 *Obiter* 186.

customary marriage can be waived. In *Tsambo v Sengadi In re: Tsambo*[7] (hereafter *Tsambo v* Sengadi), the SCA refers to *Mbungela v Mkabi* with approval and partially upholds the decision in *Sengadi v Tsambo* to the extent that parties can waive certain rituals when concluding a customary marriage. The three judgements are a combination of legal error, the resurrection of legal concepts from former Native Appeal Court decisions, and an overreliance on the flexible nature of customary family law. This article will attempt to disentangle the web of ambiguity created by the three decisions regarding "handing over" and will ultimately resolve the question of whether a bride must still be incorporated into the bridegroom's family for a customary marriage to be recognised under the Act.

A note on terminology is required. The phrase "integration" is preferred to the phrase "handing over". "Integration" refers to a series of rituals that symbolise the bride's final acceptance into the bridegroom's family.[8] The term "handing over" is used by the courts in both a narrow and a wide sense, and as will be seen, the two meanings are frequently confused. In the wide sense, "handing over" refers to the integration process, comprising of various rituals. Regardless of the rituals practiced, actual integration is required to enter a valid customary marriage. "Handing over" in the narrow sense refers to the actual transfer of the bride to the bridegroom's family, which is one of the rituals of the integration process ("handing over" in the wide sense).[9] The phrase used by the specific court will be used in the discussion, with the intended meaning indicated where possible.

## 2 Where it all started

The first case in the trio of cases that dealt with the question whether integration is a requirement for a valid customary marriage is the High Court decision of the Gauteng Local Division, Johannesburg in *Sengadi v Tsambo*.

In *Sengadi v Tsambo* the parties successfully concluded the *lobolo* negotiations at Ms Sengadi's family home. The parties agreed on R45 000 *lobolo* of which R30 000 was to be delivered immediately and the remaining R10 000 and R5 000 instalments would be delivered at a later date.[10] The deceased made an immediate delivery of R35 000 as part of the *lobolo*. On the same day, at the Sengadi family home, she was requested to put on a wedding dress brought by the deceased's aunts. Ms Sengadi was introduced to everyone present as the deceased's wife and welcomed into the deceased's family. Ms Sengadi argued that the marriage was completed

7 *Tsambo v Sengadi In re: Tsambo* (244/19) [2020] ZASCA 46 (30 April 2020) (*Tsambo v Sengadi*).
8 Bakker 2018 *PELJ* 4 fn 11.
9 Bennet *Customary Law* 217; Bakker 2018 *PELJ* 7-11.
10 *Tsambo v Sengadi* para 4.

on the day of the *lobolo* negotiations. She claimed she did not realise the deceased wanted to marry her on the same day until the deceased's aunts brought her wedding dress and the deceased dressed in formal clothing that matched her wedding dress.[11] Evidence was supplied in the form of photographs and a video. The deceased's father embraced Ms Sengadi in the video and congratulated her on her customary wedding.[12] The deceased and Ms Sengadi left the celebration together and returned to their joint home. The couple had been cohabiting for three years prior to the wedding and continued to live together as husband and wife until their relationship deteriorated.[13]

The deceased's father (the respondent in the court *a quo* and the appellant in the SCA case) denied that Ms Sengadi and the deceased married on the day of the *lobolo* negotiations, claiming that she was not "handed over" to the deceased's family. He maintained the celebrations were simply to celebrate the successful conclusion of the *lobolo* negotiations.[14]

Even though the court *a quo* ruling was largely set aside on appeal,[15] it is prudent to consider the judgement due to the confusion created by it and the fact that it set the tone of the decision of the SCA in *Mbungela v Mkabi.*[16]

*Sengadi v Tsambo* is an urgent application for a declaratory order confirming that the applicant (Ms Sengadi) was the customary wife of the deceased based on the facts above. Further to the relief an interdict preventing the respondent from burying the deceased, an order entitling the applicant to bury the deceased and a spoliation order against the respondent to restore the matrimonial home and other effects of the applicant was claimed.

The court had to decide whether the customary marriage had been concluded in accordance with section 3(1) of the Act and if the applicant had been "handed over", and if not, whether this was an essential requirement for a valid customary marriage.

When it came to the question whether or not "handing over" was required to conclude a valid customary marriage Mokgoathleng J stated that:

> [t]he applicant's submission that the custom of handing over of the bride is an indispensable sacrosanct *essentialia* for the lawful validation of a customary

11 *Tsambo v Sengadi* para 5.
12 *Tsambo v Sengadi* para 8.
13 *Sengadi v Tsambo* para 17.
14 *Tsambo v Sengadi* paras 9-10.
15 The decision of the court *a quo* that the integration of the bride was not a requirement for a valid customary marriage (para 42) was set aside to the extent that the SCA in *Tsambo v Sengadi* still regards integration as a requirement for a valid marriage (para 26).
16 *Mbungela v Mkabi* 2020 1 SA 41 (SCA) (*Mbungela v Mkabi*).

> law marriage and that without the handing over of the bride… [n]o valid customary law marriage comes into existence is not correct because the validity of the customary marriage comes into being after the requirements of section 3(1) of the Recognition Act 120 of 1998 have been complied with.[17]

What Mokgoathleng J was attempting to convey with the preceding remark is unclear. As noted above, section 3(1) is divided into two parts: 3(1)*(a)* and 3(1)*(b)*. The formalistic requirements for a valid customary marriage are contained in Section 3(1)*(a)*: the parties must be 18 years of age or have the necessary consent, and they must agree to enter into a customary marriage. Section 3(1)*(b)* incorporates the essential living customary law requirements into the Act.[18] These requirements are the participation of the families of the bride and bridegroom, the *lobolo* negotiations and the integration of the bride into the bridegroom's family.[19] In other words, in terms of section 3(1), "handing over" in the wide sense (integration) is an essential requirement, and Mokgoathleng J's statement read literally leads to an absurdity. If the parties comply with section 3(1), it implies they have followed the requirement of "handing over" in the wide sense (integration) as a requirement under section 3(1)*(b)*, because the living customary law requirements are incorporated into the Act under this section and integration is a requirement of the living customary law.

The assertion makes sense, however, if "handing over" is understood to mean "physical handing over", or "handing over" in the narrow sense. If this interpretation is correct, the judge means the physical act of transferring the bride to the bridegroom's family when he uses the term "handing over". If this was indeed what Mokgoathleng J intended, then his assertion is correct. The bride's physical transfer is just one of many rituals that can be performed as part of the bride's integration into the bridegroom's family.[20]

The statement of Mokgoathleng J could also be seen to imply that the formal requirements in section 3(1)*(a)* are the only requirements, and that 3(1)*(b)* just requires the parties to engage in some type of customary law negotiation or celebration.[21] Is Mokgoathleng J of the opinion that only the formal requirements for a valid customary marriage must be met? If this is correct, it means that if the formal conditions are met, a customary marriage can be valid without the *lobolo* negotiations or any or all of the living customary law requirements. This interpretation is diametrically opposed to the courts' current approach. The Constitutional Court (hereafter the CC) determined that section 3(1)(b) of the Act incorporates the living customary

17 *Sengadi v Tsambo* para 18.
18 *Gumede v President of the RSA* para 29; Bakker 2013 *Obiter* 582-583.
19 Bakker 2018 *PELJ* 2-3.
20 Bakker 2018 *PELJ* 10-11.
21 This concept was indeed advanced by the SCA in *Tsambo v Sengadi,* discussed below.

law requirements.[22] These must be met to conclude a valid customary marriage.[23]

The most plausible explanation is that the court erred in equating "handing over" in the wide sense (integration) with the actual physical transfer of the bride to the bridegroom's family ("handing over" in the narrow sense).

Then Mokgoathleng J continues:

> In this particular case there was a *tacit waiver* of this custom [handing over] because a *symbolic handing over* of the applicant to the Tsambo family occurred after the conclusion of the customary law marriage.[24]

The waiver of "handing over" leads to "symbolic handing over", according to the court. This demonstrates that the court did, in fact, equate the bride's physical transfer with the essential requirement of "handing over" (integration). The distinction between "physical handing over" and "symbolic handing over" has been a source of confusion for courts in the past, since they misinterpreted integration as a physical act of delivering the bride to the bridegroom's family. Where the actual physical handing over did not occur, they had to devise another way to recognise the marriage - symbolic or constructive handing over.[25]

The differentiation between physical and symbolic handing over is an old perspective the author believed had been buried in the past.[26] From this perspective a customary marriage is equivalent to a transaction of sale. The man or his guardian pays *lobolo* for the woman, who is then physically delivered to his family in a manner similar to how goods are delivered in a sale transaction. Goods can be supplied symbolically in a sale transaction, which means that the seller does not have to hand over the actual goods to the buyer, as normal. The goods are simply pointed out to the purchaser by the seller.[27] As a result, the author strongly suggests that we change the term "handing over" to "integration" of the bride into the bridegroom's family to avoid the sale analogy, which should not be used in marriage. When the courts employed this analogy in the past, this produced a lot of difficulty when it came to defining the difference between symbolic and actual handing over, as well as the requirements for each.[28]

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22 *Gumede v President of the RSA* para 29.

23 Bakker 2013 *Obiter* 582-583.

24 *Sengadi v Tsambo* para 19. My emphasis.

25 *Dlomo v Mahodi* 1946 NAC (C&O) 61 62; *Ngcongolo v Parkies* 1953 NAC 103 (S) 105; Bapela and Monyamane 2021 *Obiter* 189.

26 "Constructive delivery" appeared again in *Mbungela v Mkabi* as an *obiter* remark (para 52).

27 So called *tradition brevi manu* (delivery with the long hand). See Horn, Knobel and Wiese *Introduction to the Law of Property* 164.

28 Bekker *Seymour's Customary Law* 215.

According to the court:

> the practices, customs, rules, usages and conduct in African communities has [sic] evolved, is [sic] dynamic, pragmatic and constantly adapting to the interactive social and economic imperatives which infuse living customary law with flexibility in content and application of the custom of handing over ...[29]

The court then quotes extensively from Nkosi[30] where the author makes the error of using *Mabuza v Mbatha*[31] as authority that "handing over" (presumably in the wide sense) can be waived and claiming that *ukumekeza* is the siSwati equivalent of "handing over", which it is not. *Ukumekeza* is just one of the rituals that take place during the integration process ("handing over" in the wide sense).[32] The court determined that "handing over" (in the wide sense or integration) did occur in this case, and that only the *ukumekeza* ritual was waived; in fact, the bride was physically handed over, and the judgement is thus not authority to waive the essential living customary law requirement of integration.[33] This is another reason why we should move away from using the term "handing over" when referring to the process of integration. Integration is a series of rituals that make the bride a member of the bridegroom's family, rather than a single act of physically transferring the bride.[34] The court in *Sengadi v Tsambo* places extreme emphasis on the wrong interpretation of *Mabuza v Mbata* to demonstrate that "handing over" is no longer a requirement.[35]

The court found that handing over is not "an essential pre-requisite for the lawful validation and lawful existence of a customary marriage … when section 3(1) of the Recognition Act has been complied with".[36]

According to how the judgement is interpreted by the SCA, the court concluded that the essential requirement of integration ("handing over" in the wide sense) can be waived by the parties involved. Contrarily, the facts show that one integration ritual ("handing over" in the narrow sense) can be replaced by another if it signifies the bride's integration into the bridegroom's family. Rather than physically transferring the bride to the bridegroom's family home, integration was done by dressing her in a wedding dress, welcoming her into the family, and introducing her as the deceased's wife.[37]

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29 *Sengadi v Tsambo* para 21.
30 Nkosi 2015 *De Rebus* 67
31 *Mabuza v Mbatha* 2003 4 SA 218 (C) (*Mabuza v Mbatha*).
32 Bakker 2018 *PELJ* 9.
33 Bakker 2018 *PELJ* 7-11.
34 Bakker 2018 *PELJ* 7.
35 *Sengadi v Tsambo* para 24. See Bakker 2018 *PELJ* for an in-depth discussion on *Mabuza v Mbatha*.
36 *Sengadi v Tsambo* para 36.
37 This is how the SCA in *Tsambo v Sengadi* read the case. See below.

The court subsequently declared the "handing over" of the bride to be unconstitutional. The court concluded that "handing over" discriminated against women by infringing on the rights of equality and dignity.[38] The practice maintained the patriarchal nature of pre-constitutional customary law, which considered women as perpetual minors.[39] "Handing over" should therefore not be regarded as a requirement for a valid customary marriage. The court ruled that the applicant had been married to the deceased, but that the burial could be arranged by the deceased's brother based on the principle of ubuntu.[40]

The court *a quo* did not consider the practical implications of declaring the integration process unconstitutional. If integration is not permitted because it is unconstitutional, the parties are effectively married when the *lobolo* negotiations are concluded. Because the full payment of *lobolo* is not required for a valid customary marriage, the marriage would start as soon as the *lobolo* negotiations were finalised. This is a significant departure from living customary law, which recognises the woman as "ring fenced" only when the *lobolo* negotiations are finalised.[41] No other suitor may approach the family for *lobolo* negotiations because of this practice. The situation will remain the same until the woman marries and undergoes the integration rituals, or her family withdraws from the *lobolo* arrangement, which could result in delictual liability.[42] If the ruling were to be upheld, a woman and her family would be unable to withdraw after *lobolo* negotiations and would be forced to divorce. The author is sceptical that living customary law has progressed to the point where the marriage processes have been replaced by a single event, *lobolo* negotiations. Such an approach would impose on living customary law the common law view that marriage is not a process but rather a singular event.

A similar argument to the one stated by the court might be made to claim that *lobolo* is unconstitutional because it discriminates against women. Apart from stating that she is interested in marrying a specific man during the negotiations, a woman has little power over the *lobolo* process. Her parent or guardian will continue to negotiate *lobolo* and make the final decision on the marriage. If, after integration, *lobolo* negotiations are declared unconstitutional based on a similar rationale advanced by the court, nothing of the living customary law of marriage will remain.[43]

38 *Sengadi v Tsambo* para 35.
39 *Sengadi v Tsambo* para 35.
40 *Sengadi v Tsambo* paras 39-42.
41 Olivier *Privaatreg* 20.
42 Olivier *Privaatreg* 32-37.
43 Bakker 2018 *PELJ* 6.

The SCA overturned the court's finding on the unconstitutionality of integration in *Tsambo v Sengadi.* However, in both *Mbungela v Mkabi* and *Tsambo v Sengadi* the SCA declined to give an opinion on the constitutionality of integration.

## 3 Muddle in the middle

Before hearing the appeal against *Sengadi v Tsambo* the SCA decided on *Mbungela v Mkabi*. The SCA was influenced by the decision in *Sengadi v Tsambo,* which was later overturned by the same court in *Tsambo v Sengadi.*

In *Mbungela v Mkabi* in the court *a quo* the plaintiff sought a declaratory order that a valid customary marriage existed between him and the deceased.[44] The matter was opposed by the deceased's daughter (and executrix of his estate) and the brother of the deceased (the elder of the family), the appellants in the SCA case. Although *lobolo* had been agreed upon and delivered in part, the deceased had not been "handed over". The court *a quo* confirmed that full payment of *lobolo* was not required and on the wrong application of *Mabuza v Mbatha* confirmed that "handing over" could be waived or its absence condoned, and that the deceased and the plaintiff had concluded a valid customary marriage.[45] The justification for the waiver was that customary law is adaptable and flexible to the point where "handing over" can be waived or condoned.

The appellants argued on appeal that the "handing over" of the bride was an essential requirement for a valid customary marriage, and that therefore no marriage existed between the deceased and the first respondent. In response to the appellant's assertion that "bridal transfer" was an absolute requirement for a valid customary marriage, the appellate court set the tone by noting that "handing over" was found to be unconstitutional in *Sengadi v Tsambo*, but stated that it was not required to decide on the constitutionality of the requirement and refrained from commenting on the ruling's merits.[46] The court then declared that it had been clearly established in *Mabuza v Mbatha* that "bridal transfer"[47] could be waived. Hence, the parties had not been required to comply with integration.[48] It is clear that the appellate decision decided at this point that "bridal transfer" was not a requirement.

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44 *Mkabe v Minister of Home Affairs* (2014/84704) 2016 ZAGPPHC 460 (9 June 2016). Note that the plaintiff's surname is spelled differently in the court *a quo* and in the SCA case. For the sake of uniformity Mkabi, the spelling of the SCA, will be used.

45 For a discussion of why the decision was wrong see Bakker 2018 *PELJ* 1.

46 *Mbungela v Mkabi* para 19.

47 Interesting to note is that the SCA refers to "handing over" and "bridal transfer" interchangeably. It is an indication that the courts fixate on the physical transfer of the bride and not the actual requirement of integration, that is "handing over" in the wide sense.

48 *Mbungela v Mkabi* para 21.

As a result, the court based its decision on the erroneous reading of *Mabuza v Mbatha*, as explained above. The ruling that integration is not a requirement is therefore wrong in law and cannot be followed.

The court cited a passage from Bennett[49] that is frequently cited in cases involving the question of whether "handing over" can be waived.[50] The passage indicates that marriage ceremonies are abbreviated when required by the parties. It does not, however, apply to the essential living customary law requirements of a customary marriage. This is evident from the court's quotation of the following passage:

> Western and Christian innovations have been combined with traditional rituals … [h]ence a ring may be used in place of the traditional gall bladder or slaughtered beast, and, for many, *a church ceremony is now the main event.*[51]

The passage alludes to traditional rituals rather than the essential requirements of living customary law. A living customary law requirement consists of a series of rituals intended to notify the community that all of the requirements have been met and the parties have married. Rituals can be waived and amended but the actual requirement must be complied with.[52] As a result, instead of anointing the bride with bile at the bridegroom's family home, it is possible to meet the integration requirement by marrying in a church. The crucial part is that the families agree, either explicitly or implicitly, that the church wedding will be the ritual by which the bride will be integrated into the bridegroom's family. It is possible that the bile ritual was replaced by a church wedding under that community's living customary law, in which case no agreement would be required, but the party asserting the relevant change in living customary law would have to prove it.[53]

It is evident that the court did not differentiate between rituals and living customary law requirements when it stated that:

> the value of the custom of bridal transfer [cannot] be denied … [b]ut it must also be recognised that an inflexible rule that there is no valid customary marriage if just this *one ritual* has not been observed, even if the *other requirements* of s 3(1) of the Act, especially spousal consent, have been met … could yield untenable results.[54]

From this it is evident that the court regarded the "bridal transfer" as the requirement of integration. In other words, not merely the physical transfer of the bride, which could be seen as one of the rituals of integration, but rather the process of accepting the bride into the bridegroom's family. The

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49 Bennett *Customary Law* 215.

50 *Mbungela v Mkabi* para 24; *Mabuza v Mbatha* para 26; Bakker 2018 *PELJ* 6.

51 Bennett *Customary Law* 215 as quoted by *Mbungela v Mkabi* para 24 with the court's emphasis in italics.

52 Bakker 2018 *PELJ* 10.

53 Bakker 2018 *PELJ* 11-12; Rautenbach 2017 *PELJ* 18-20.

54 *Mbungela v Mkabi* para 27.

court equated the "ritual" to "other requirements of s 3(1)" such as "spousal consent". "Handing over" in the narrow sense is equated by the court with "handing over" in the wide sense.

The court then stated:

> To my mind, there can be no greater expression of the couple's consummation of their marriage than their undisputed church wedding.[55]

The meaning of the statement by the court is unclear. The court appears to imply that customary law has progressed to the point where the "bridal transfer" ceremony has been supplanted by a church wedding. However, no argument was offered in this regard. Nothing prevents the parties from replacing the ritual of "bridal transfer" with a church wedding. This does not imply that the requirement of integration has been waived but rather that one of the rituals contributing toward integration has been amended by the parties. If this had indeed been the case the parties would have had to provide proof that this was their intention.[56]

The purpose of "handing over", according to the court, was to present the bride to her new family and to mark the beginning of the marriage.[57] This is the function of integration or "handing over" in the wide sense. The court on the other hand, overlooked the spiritual dimension of integration. The purpose of integration is further to introduce the new bride to the ancestors of the bridegroom's family.[58] The court was accurate in stating that a formal ceremony is not required for "handing over".[59] The nature of integration will be determined by what the families consider to be a sufficient process for integrating the bride into the bridegroom's family, which may include a church wedding if the families believe this is sufficient to integrate the bride into the bridegroom's family.[60]

At this point, it is important to point out a problem that our courts have when it comes to issues involving customary law: cherry-picking authorities to support the court's position. Although it is true that the courts rely largely on the sources supplied to them by legal counsel, this practice should be approached with caution.

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55 *Mbungela v Mkabi* para 24.

56 Bakker 2018 *PELJ* 11-12.

57 *Mbungela v Mkabi* para 25.

58 Mantwha 2021 *TSAR* 207.

59 Bekker *Seymour's Customary Law* 108.

60 For a different opinion see Bapela and Monyamane 2021 *Obiter* 191. The authors are of the opinion that a church wedding or "white wedding", as it is known in the indigenous communities, can never be equated with a traditional wedding, or be regarded as a replacement for the handing over of the bride.

The court cited Bekker[61] as authority for the position that "handing over need not be a formal ceremony" implying that "handing over" can be abandoned,[62] but the previous sentence in this source proclaims that "[t]here is no customary marriage until the girl has been handed over to the bridegroom … [t]his concise statement cannot be enlarged upon in any way; it states literally the correct position." If the court wants to accept Bekker's argument that "handing over" does not have to be a formal process, it must also recognise that "handing over" (in the wide sense) is an essential requirement for a valid customary marriage.

The court also quoted Bennett,[63] who maintains that "the bridal transfer, ceremony should be treated as an optional element of customary law …".[64] Bennett's position is similar to that of the South African Law Reform Commission (hereafter the SALRC) which proposes that only the requirements in section 3(1)*(a)* should be considered as requirements for a valid customary marriage, and that section 3(1)*(b)* should merely be factors to consider in distinguishing the customary marriage from other marriages.[65]

However, what the court failed to mention was that the book was published in 2004 and that, three years later, in 2007, the court in *Fanti v Boto* declared section 3(1)*(b)* of the Act to incorporate the living customary law requirements as validity requirements into the Act.[66] The CC in *Gumede* in 2008 confirmed that these requirements are incorporated into the Act by section 3(1)*(b)*,[67] and the SCA in *Moropane v Southon* in 2014 reaffirmed this.[68] As a result, the legal landscape has been altered since the source was written. Although Bennett and the SALRC's argument would have been ideal, the courts have chosen a different route. Section 3(1)*(b)* elevates the living customary law requirements for a valid customary marriage to essential requirements for a valid customary marriage, according to the courts.

The statement of the court that "Bennettt argues …, that the bridal transfer ceremony should be treated as an optional element of a customary marriage"[69] is in fact immaterial to the judgement because the court is bound by the SCA's own decision that "handing over" (in the wide sense) is not an optional element but rather a requirement for a valid customary marriage.

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61 Bekker *Seymour's Customary Law* 108.
62 *Mbungela v Mkabi* para 25.
63 Bennett *Customary Law* 216.
64 *Mbungela v Mkabi* para 29.
65 Discussed in detail in Bakker 2013 *Obiter* 586-588.
66 *Fanti v Boto* 2008 5 SA 405 (C) para 19. Also see *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ) paras 18-20.
67 *Gumede v President of the RSA* para 29.
68 *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014) paras 39-40; Bakker 2013 *Obiter* 582-583.
69 *Mbungela v Mkabi* para 29.

The SCA can depart from its own ruling only if it can be demonstrated that the decision was wrong in law,[70] which the court did not do in this case.[71]

The court based its order on Bennett's opinion that the handing over of the bride

> is not [sic] an important but not necessarily a key … determinant of a valid customary marriage … [t]hus it cannot be placed above the couple's clear volition and intent … [if they] did not specify that the marriage would be validated only upon bridal transfer.[72]

There is one too many "not" in "is *not* an important but *not* necessarily a key … determinant".[73] The court meant to say that "handing over" is important but not required for a customary marriage to be valid. The court then concluded that the parties' intention, not "bridal transfer", was the most important factor to consider.[74] The court evidently followed Bennett's opinion, ignorant of the fact that the SCA and CC had taken a different approach, requiring "bridal transfer" or "handing over" if it is still required in the relevant living customary law. This conclusion that "handing over" (in the wide sense) can be waived in its entirety is patently wrong in law and the SCA is not bound by it.[75]

The single aspect which may be of value is that the court, without explicitly identifying it as such, revived the presumption of a valid customary marriage where the parties cohabited after the *lobolo* agreement had been finalised without any objection from the woman's guardian.[76] The SCA picked up on the cursory reference to the presumption in *Tsambo v Sengadi* and it will be addressed in more detail under the next heading.[77]

## 4 The last word

In *Tsambo v* Sengadi, the SCA identified the central issue in the case as

> whether a customary marriage came into existence between the deceased … and the respondent … Ancillary to that issue is whether, pursuant to the conclusion of the lobola negotiations, handing over of the bride ensued in

70 *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue* 1997 3 SA 654 (SCA) 666F-H. Should integration no longer be a requirement in living customary law, it would not be a requirement under s 3(1)*(b)* of the Act, but no proof has been advanced in any case that integration is no longer part of living customary law.

71 Manthwa 2021 *TSAR* 202-203.

72 *Mbungela v Mkabi* para 30.

73 My emphasis.

74 See Bakker 2013 *Obiter* 586-588.

75 Bapela and Monyamane 2021 *Obiter* 193.

76 *Mbungela v Mkabi* para 28.

77 *Tsambo v Sengadi* para 27.

> satisfaction of the requirement … in terms of section 3(1)(b) of the Recognition of Customary Marriages Act.[78]

The issue is therefore simply to determine based on the facts of the case whether a valid customary marriage was concluded.[79]

The SCA adopted the correct approach in stating that strict observance of all rituals is not required for a valid customary marriage, especially if the parties satisfy section 3(1)*(a)* of the Act.[80] The court cited *Ngwenyama v Mayelane*[81] as authority, which ruled that section 3(1)*(b)* is met "when the customary law celebrations are generally in accordance with the customs applicable."[82] The SCA emphasised the word "generally" to imply that strict compliance to all rituals is not required; it is sufficient to comply with the rituals in general.

It is reassuring to see that the SCA accurately referenced *Mabuza v Mbatha*, not just the inaccurate headnote, but the actual decision, in which the court stated that the *ukumekeza* ritual can be waived by agreement between the parties.[83] Ironically, the SCA then upheld the decision in *Mbungela v Mkabi,*[84] which was founded on an incorrect interpretation of *Mabuza v Mbatha*.[85]

The court emphasised that customary law is constantly evolving and follows Bennet that customary law is flexible and pragmatic and therefore it is not required to follow all rituals to the letter. A marriage ceremony can be abbreviated, simplified, or even replaced by an exotic custom such as a church wedding.[86]

Taking the authorities to heart, the SCA concluded that failing to follow all rituals that have been historically maintained cannot invalidate a customary marriage that has been negotiated, concluded, and celebrated according to customary law.[87]

When considering the facts to determine whether a customary marriage has been validly concluded, the court notes that some rituals that are traditionally part of the "handing over" of the bride, such as the slaughter of

78 *Tsambo v Sengadi* para 1.
79 *Tsambo v Sengadi* para 13.
80 *Tsambo v Sengadi* paras 15-18.
81 *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA).
82 *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) para 23.
83 *Mabuza v Mbatha* para 25; *Tsambo v Sengadi* para 16.
84 *Mbungela v Mkabi* 2020 1 SA 41 (SCA).
85 *Mbungela v Mkabi* para 27.
86 Bennett *Customary Law* 194, cited in *Mbungela v Mkabi* para 24 and *Tsambo v Sengadi* para 17.
87 *Tsambo v Sengadi* para 18.

a sheep and the use of the sheep's bile, was not observed by the parties.[88] However the court goes on to say:

> It is quite striking that the deceased's aunts are the ones who provided the respondent with an attire matching that of the deceased and who actually dressed her up in it. That they described it as her wedding dress is quite telling. These are customary practices that are undoubtedly compatible with an *acceptance of the respondent by the deceased's family*.[89]

The respondent was then introduced as the deceased's wife and welcomed into the family. The appellant (the father of the deceased) even embraced and congratulated the respondent on her marriage to the deceased. The purpose of the "handing over" of the bride, according to the SCA, is "to mark the beginning of a couple's customary marriage and introduce the bride to the bridegroom's family." The SCA concluded that declaring the acceptance of the respondent into the family satisfied the "handing over" of the bride requirement (clearly used in the wide sense).[90]

The SCA stated that it was fortified in its decision by the facts that the parties cohabited after the ceremony and that the deceased added the respondent as spouse to his medical aid.[91] The court further relied on the fact that the respondent's mother did not take any delictual customary action against the deceased while knowing that they were cohabiting,[92] as in the above-mentioned comment in *Mbungela v Mkabi*.[93] The court found that the respondent had been "handed over" and that she and the deceased had had a valid customary marriage. The High Court's finding that "handing over" was not a requirement was overturned. According to the SCA, the High Court "correctly found on the facts … that the physical handing over of the bride was waived in favour of a symbolic handing over."[94] As a result, the court found that the parties had indeed integrated the bride. They clearly deviated from the customary practice of completing integration at the family home of the bridegroom, but integration did occur.

88 *Tsambo v Sengadi* para 24.
89 *Tsambo v Sengadi* para 25. My emphasis.
90 *Tsambo v Sengadi* para 26.
91 *Tsambo v Sengadi* para 27.
92 *Tsambo v Sengadi* para 27.
93 *Mbungela v Mkabi* para 28.
94 *Tsambo v Sengadi* para 31. It is difficult to decipher the decision of the court *a quo*, in the sense that the final order under the heading "the order" (*Sengadi v Tsambo* para 42) was that the requirement of integration can be waived, although the court had earlier stated that physical handing over had been replaced by symbolic handing over (*Sengadi v Tsambo* para 19). In this sense the SCA rejected the decision of the court *a quo* because it did not find that integration can be waived, although it did support the factual decision of the court *a quo* that physical handing over can be replaced by symbolic handing over.

The SCA resurrected a long-forgotten presumption that had previously been used in Native Appeal Court proceedings.[95] Parties who cohabited with the approval of the woman's guardian were assumed to be married. If the parties had lived together without being married, the guardian would have claimed delictual damages for seduction or demanded marriage negotiations.[96] This is a welcome addition to the field of customary law litigation. When a woman in a customary marriage wishes to divorce, her husband will usually deny the marriage even exists. This instantly puts the woman at a disadvantage in terms of evidence, since she will have to prove the existence of her customary marriage before being entitled to a divorce and the remedies that come with it. The man is typically financially stronger, and the added litigation burdens the woman. The burden of proof is now moved to the marriage denier, who is usually the man, when the presumption is applied. The marriage denier will have to prove that they are not married if he denies the existence of the marriage after cohabiting with the woman. This approach is welcomed.

Although a court may raise the unconstitutionality of a law on its own under certain circumstances,[97] the SCA found that the issue of the constitutionality of the "handing over" of the bride should not have been considered by the court *a quo*.[98] The court had no jurisdiction to evaluate the constitutionality of "handing over". The SCA was also told by council that the constitutionality of "handing over" was never an issue before the court, and that the court *a quo* made the decision without providing an opportunity to present arguments.[99]

Courts can raise the constitutionality of an issue where it is not part of the pleadings before the court only if the question of constitutionality arises from the facts and it is necessary for the outcome of the case to determine the constitutionality of the applicable Act. When the determination is not necessary for the outcome of the case the court can only make such a pronouncement if it would be in the interest of justice.[100] Whatever the basis for evaluating the constitutionality of legislation, the parties must always be given adequate opportunity to argue on the issue of constitutionality, particularly where it affects living customary law. When a litigant petitions the court for the enforcement of a customary law rule, it is usually not the litigant's intention to change the existing customs.

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95 *Tsambo v Sengadi* para 27; *Kgapula v Maphai* 1940 NAC (N&T) 108; Olivier *Privaatreg* 57; Bennett *Customary Law* 219.

96 Olivier *Privaatreg* 32-37.

97 *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Develepment* 2009 4 SA 222 (CC).

98 *Tsambo v Sengadi* para 33.

99 *Tsambo v Sengadi* para 33.

100 *Tsambo v Sengadi* para 32.

The constitutionality of integration, like so many other elements of customary law, such as polygyny and *lobolo*, is an open question. When determining whether a custom is unconstitutional, it is recommended that the wider meaning and function of the custom in the community be examined to see if the perceived harsh repercussions can be mitigated when considering the overall function of the custom. It is also crucial to pay attention to the perspectives of communities that live by customary law, or risk producing only paper law.

## 5 Conclusion

The notion that "handing over" (in the wide sense, or integration) is not essential for a valid customary marriage was established in the minds of the general public after the erroneous judgement of the court in *Sengadi v Tsambo* was widely publicised. Even though the SCA reversed the incorrect judgement, the perception lingers that the court changed living customary law to exclude "handing over". Family participation, a *lobolo* agreement, and the bride's integration into the husband's family are the living customary law requirements for a valid customary marriage under section 3(1)*(b)* of the Act.[101] These requirements are necessary for a valid customary marriage and cannot be waived by the parties to the marriage, either tacitly or expressly. The essential requirements for a valid customary marriage consist of different rituals that establish that the parties have complied with the essential requirements. Such rituals have traditionally been performed in public. The community will not be aware that the parties are married unless the rituals are performed. No traditional marriage is ever concluded in secrecy.[102]

The slaughter of a sheep and the use of the bile to anoint the bride are examples of rituals to demonstrate integration into the bridegroom's family, as the respondent in *Sengadi v Tsambo* contended should happen before the bride is integrated. To match the social reality of the family, these rituals can be waived, abbreviated, or modified. The rituals prove that the parties have met the essential elements of a valid customary marriage, as stipulated in section 3(1)*(b)* of the Act.

The facts of *Tsambo v Sengadi* and *Mbungela v Mkabi* are examples of how parties changed the marriage rituals to abbreviate their marriage process. The traditional extended marriage process includes the *lobolo* negotiations, whereafter the bride will then be integrated at the bridegroom's family home, on the same day or on a later date. In *Tsambo v Sengadi* the bridegroom's family abbreviated the process by integrating the bride at her family home

101 *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ) para 17; *Moropane v Southon* (755/12) [2014] ZASCA 76 (29 May 2014) para 40; Bakker 2018 *PELJ* 2-3.

102 Olivier *Privaatreg* 60-62.

on the same day as the *lobolo* negotiations by dressing her in her wedding dress, welcoming her into the family and introducing her to all present as the wife of the deceased. This took place at the bride's family home and was permitted by her family, indicating that everyone agreed on the abbreviated wedding. In *Mbungela v Mkabi* the bride was apparently integrated by the church wedding, although this was not proven. Even though the rituals were abbreviated, all of the essential requirements were present. The families cooperated, *lobolo* was agreed upon and the bride was integrated into the bridegroom's family.

In *Tsambo v Sengadi*, the SCA simply confirmed the traditional position that parties are free to choose which rituals they would follow, but they must observe the essential requirements of living customary law. Because the judgement in *Mbungela v Mkabi* was founded on an incorrect interpretation of *Mabuza v Mbatha*, *Tsambo v Sengadi* should be applied instead.

The SCA judgements are significant because they re-established an old but forgotten presumption that couples are presumed to be married if they live together after the *lobolo* negotiations have been completed and the woman's family has not objected to their cohabitation. The burden of proof will be shifted to the marriage denier, who is usually the husband, to prove that the marriage did not exist after the *lobolo* negotiations were completed.

When referring to the process of assimilating the bride into the bridegroom's family, the term "integration" should be used instead of "handing over" to avoid any confusion between customary rituals and essential living customary law requirements. The term "handing over" will then simply relate to the physical transfer of the bride, which is just one of the rituals that will assist the bride to assimilate into the bridegroom's family.

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**List of Abbreviations**

| | |
|---|---|
| CC | Constitutional Court |
| PELJ | Potchefstroom Electronic Law Journal |
| SALRC | South African Law Reform Commission |
| SCA | Supreme Court of Appeal |
| TSAR | Tydskrif vir die Suid-Afrikaanse Reg / Journal for South African Law |