# Left in Limbo: The Status of the Handing Over of the Bride in Customary Marriages Post *Sengadi v Tsambo*

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## Abstract

Courts are regularly tasked with determining the validity of a customary marriage using the requirements stipulated in the *Recognition of Customary Marriages Act.* This entails an assessment of whether certain fundamental rituals and practices occurred. One such ritual that appears frequently in recent jurisprudence is the handing over of the bride to the bridegroom's family, although courts have differed on whether this is a necessary requirement for a valid customary marriage. In the case of *Sengadi v Tsambo,* the High Court conceptualised the handing over ritual as an extraneous requirement additional to the *Recognition of Customary Marriages Act* that could be imposed on an otherwise valid marriage, and ruled it unconstitutional to this extent. This article argues that the High Court's declaration of unconstitutionality, while peculiar for positioning the practice of handing over as extraneous to the statutory provisions, was within its powers, effective without further confirmation, and binding on lower courts within its jurisdiction. Upon appeal, rather than clarifying the matter, the Supreme Court of Appeal did not substantively deal with the High Court's peculiar conception of handing over and ruled that the High Court should not have pronounced on its constitutionality. In doing so, we argue that the Supreme Court of Appeal may have tacitly overturned the High Court's declaration of constitutional invalidity.

## Keywords

Customary marriage; handing over; HHP; constitutionality.

## 1 Introduction

It is well-known in South African law that customary law is a valid legal system. What is less canvassed is the precise mechanics of the recognition and application of customary law in our constitutional system. This article examines the effect of a high court's declaration of constitutional invalidity of a customary law rule and whether such a declaration requires confirmation by the Constitutional Court to be effective.

This question is examined through the prism of the 2018 case of *Sengadi* (HC)[1] which captured media headlines[2] and involved a dispute as to the existence of a customary marriage. Much has been written about the case,[3] but what has not been discussed in great detail is the High Court's declaration that the practice of handing over the bride as a requirement for a customary marriage is unconstitutional. This is a groundbreaking finding, given the centrality of handing over the bride in the conclusion of a valid customary marriage. This article examines the constitutional status of the practice of handing over in the wake of the High Court decision in *Sengadi* and the subsequent decision of the Supreme Court of Appeal (SCA) in *Tsambo v Sengadi.*[4] This addresses the broader question of the binding

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1 *Sengadi v Tsambo; In Re: Tsambo* 2019 1 All SA 569 (GJ) (hereafter referred to as *Sengadi* (HC)).

2 Nkosi 2020 https://www.iol.co.za/the-star/news/hhps-father-takes-lerato-sengadi-to-appeals-court-over-customary-marriage-ruling-42022925; Moyse 2020 https://www.ofm.co.za/article/centralsa/286042/hhp-court-battle-refocuses-spotlight-on-customary-marriage; Mahlahla 2020 https://www.sabcnews.com/sabcnews/sca-confirms-lerato-sengadi-as-hhps-customary-wife/.

3 Osman 2020 *Stell LR* 80-90; Radebe 2022 *De Jure* 77-86; Bakker 2022 *PELJ* 1-21; Manthwa 2023 *THRHR* 186.

4 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) (hereafter referred to as *Sengadi* (SCA)).

nature of a high court's declaration of constitutional invalidity in respect of a customary law rule. This is a novel examination given that this is the first time a high court has declared a customary law rule unconstitutional.

To contextualise the discussion, the article first examines the practice of handing over to explain its status as a requirement for the conclusion of a customary marriage. Thereafter, it examines the judgments by the High Court and SCA on the issue of the constitutionality of the practice of handing over. Finally, the article explores the constitutional status of the practice of handing over the bride in current South African law and addresses the broader question of the binding nature of a high court's order of constitutional invalidity in respect of a customary law rule.

## 2 Handing over of the bride as a requirement for a customary marriage: meaning and application

The *Recognition of Customary Marriages Act*,[5] (hereafter "*Recognition Act*") which came into force in the year 2000, recognises customary marriages as valid marriages having full force and effect in South Africa.[6] The Act sets out three requirements for the conclusion of a customary marriage: the parties must be over 18, they must consent to marry in accordance with customary law, and the marriage must be negotiated and entered into or celebrated in accordance with customary law.[7] The *Recognition Act*, in turn, 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",[8] and the definition is generally understood to refer to living customary law.[9] Consequently, the requirement that the marriage must be negotiated and entered into or celebrated in accordance with customary law has been interpreted to mean that the parties must comply with the provisions of living customary law.[10]

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5 *Recognition of Customary Marriages Act* 120 of 1998 (hereafter referrred to as the *Recognition Act*).

6 Section 2 of the *Recognition Act*.

7 Section 3(1) of the *Recognition Act*. For a discussion of the requirements of a customary marriage, see Nkuna-Mavutane and Jamneck 2023 *PELJ* 1-30; Bapela and Monyamane 2021 *Obiter* 186-193; Bakker 2016a *THRHR* 231; Bakker 2016b *THRHR* 357; Bakker 2022 *PELJ* 1.

8 Section 1 (definitions) of the *Recognition Act.*

9 Rautenbach 2003 *Stell LR* 107 fn 8; Mwambene 2017 *AHRLJ* 39.

10 *MM v MN* 2013 4 SA 415 (CC) para 29; *Mbungela v Mkabi* 2020 1 SA 41 (SCA) (hereafter referred to as *Mbungela v Mkabi*) para 17; Himonga and Nhlapo *African*

The indeterminacy of the third requirement has unsurprisingly given rise to a plethora of case law, as the validity of a customary marriage is constantly disputed because the requirements of the marriage have ostensibly not been satisfied.[11] From the jurisprudence, two essential requirements have emerged, namely the negotiation of *lobolo* between the families and the integration of the bride into the bridegroom's family - which is often used interchangeably in the literature with the notion of handing over of the bride.[12] It is important to note that the integration of the bride has been required in terms of the third requirement in the *Recognition Act*, which is that the marriage be negotiated and entered into or celebrated in accordance with customary law. It is not an additional requirement, extraneous to the *Recognition Act* that is imposed upon parties – a point we return to later in the article.

Manthwa[13] explains that integration:

> emerged in agrarian settings where families lived close together for defence and agricultural purposes. Since wealth, rights, and obligations were communal in nature, integration was observed by the family and was accompanied by traditional ceremonies that marked the link between the material and spiritual worlds. This is the context of the practice. The courts often do not focus on the agrarian social settings of this custom within the legal pluralism debate.

The integration of the bride, predicated upon the bride residing with her parents, is aimed at ensuring the bride's acceptance or integration into the

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*Customary Law* 174. Bakker, however, notes that this was not the original intention of the section. The South African Law Reform Commission intended that the requirements for a customary marriage be the same as those for a civil marriage. The inclusion of the clause that the marriage be concluded in accordance with customary law "was to establish an open list of circumstances that would demonstrate the parties' wish to enter a customary marriage rather than a civil marriage, not to add a set of living customary law requirements". Parties would not have to comply with all the living customary law requirements, and the performance of some rituals would indicate an intention to conclude a customary marriage in terms of the *Recognition Act* as opposed to a civil marriage. Bakker 2023 *Acta Juridica* 156-157.

11 *Moropane v Southon* (755/2012) [2014] ZASCA 76 (29 May 2014); *Fanti v Botho* 2008 5 SA 405 (C); *Mabuza v Mbatha* 2003 4 SA 218 (C) (hereafter referred to as *Mabuza v Mbatha*); *Mabena v Letsoalo* 1998 2 SA 1068 (T); *Mbungela v Mkabi*; *FM v NR* (CA04/2020; 6254/2018) [2020] ZAECMHC 22 (17 June 2020); *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ).

12 *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ); *Mmutle v Thinda* 2008 JDR 0904 (T). See Himonga and Nhlapo *African Customary Law* 178-181 and the cases discussed therein.

13 Manthwa 2023 *THRHR* 188.

husband's family.[14] It entails assimilating the bride into the bridegroom's family through several rituals.[15] In some cultures, such rituals may include the slaughter of a sheep and the use of its bile to anoint the bride,[16] as well as the education and counseling of the spouses by their elders concerning their rights and obligations in their marriage.[17] It communicates the reciprocal acceptance of and by the *makoti* (bride) and her husband's family. It introduces the *makoti* to the ancestors as a new member of the husband's family through certain ceremonies or rituals.[18]

One ritual that forms part of the integration process is handing over or transferring the bride to the bridegroom's family. Handing over as a ritual can appear in different forms and hues across various communities. Nkosi notes that, for some communities, handing over must be virilocal (at the groom's home) and take place on the wedding day.[19] In contrast, for other communities, this may take place uxorilocally (at the bride's home), accompanied by the slaughtering of a beast by the bride's father or guardian.[20] As noted previously, integration and handing over have, in the past, been used interchangeably in the literature. The distinction has been muddied by the courts, who often use the term "handing over" to describe both the process of integration and the transfer of the bride. Bakker has subsequently distinguished between the courts' use of the term "handing over" in the wide sense, essentially synonymous with the integration process, and "handing over" in the narrow sense, which denotes the transfer of the bride.[21] He states:[22]

> In the wide sense, "handing over" refers to the integration process comprising 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).

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14 Nkuna-Mavutane and Jamneck 2023 *PELJ* 6-7.
15 Bakker describes it as "a series of rituals that symbolise the bride's final acceptance into the bridegroom's family"; Bakker 2022 *PELJ* 3.
16 Bakker 2022 *PELJ* 17.
17 *Mabena v Letsoalo* 1998 2 SA 1068 (T) 1074H para 19.
18 Osman 2020 *Stell LR* 88; Manthwa 2023 *THRHR* 188; Nkuna-Mavutane and Jamneck 2023 *PELJ* 6 and 7.
19 Nkosi 2015 *De Rebus* 67.
20 Nkosi 2015 *De Rebus* 67.
21 Bakker 2022 *PELJ* 3.
22 Bakker 2022 *PELJ* 3.

Bakker argues that handing over in the broad and narrow senses must be kept conceptually distinct. He argues that the integration of the bride (i.e., handing over in the wide sense) is an essential requirement of a valid customary marriage that cannot be waived, while handing over of the bride in a narrow sense is merely one of the rituals which may comprise integration and which may be waived or amended by the parties.[23] He critiques those judgments that have treated the handing over of the bride as synonymous with integration on the basis that this elevates the handing over as a ritual to an indispensable requirement for a valid customary law marriage.[24] It may furthermore lend to the mistaken perception of a customary law marriage being akin to a transaction of sale – with the bride being a commodity paid for with *lobolo* and then handed over to the bridegroom's family.[25]

In contradistinction, courts have also been critiqued for conflating the integration process with other customs accompanying customary marriages. In *Mabuza v Mbatha*, the court accepted that under siSwati law, a valid customary marriage is dependent on three requirements: the payment of *lobolo*, *ukumekeza* – described as synonymous with integration – and the handing over of the bride to the bridegroom's family.[26] Sibisi notes that *ukumekeza* describes the custom whereby the bride, accompanied by maidens, sings around the husband's family's kraal.[27] *Mabuza*'s conceptualisation of the requirements of a valid customary marriage elevates handing over to its own requirement and conflates integration with *ukumekeza*. Sibisi critiques this conflation as a mischaracterisation of the requirements of a valid customary marriage under siSwati law.[28] According to Sibisi, *ukumekeza* and handing over together form part of the integration

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23 Bakker 2022 *PELJ* 11.

24 Bakker 2022 *PELJ* 10-11.

25 Bakker argues that the term "handing over" still carries with it connotations of a transactional nature, implying that a customary wife is a kind of commodity. Bakker argues instead that the term "handing over" should fall into disuse in place of the term integration. This could perhaps introduce some certainty into the fold as handing over is currently used in a narrow and wide sense, with the two being confused. Integration (handing over in the wide sense) would then be one of the essential requirements of a customary marriage made up of a constellation of rituals that are subject to waiver or amendment. See Bakker 2022 *PELJ* 3, 6. Also see Manthwa 2023 *THRHR* 188 who argues against integration being equated to a business transaction in which a wife is delivered like a commodity in a sale of goods.

26 *Mabuza v Mbatha* para 9.

27 Sibisi 2020 *De Jure* 95 fn 33.

28 Sibisi 2020 *De Jure* 96 notes that the requirements for a valid customary marriage under siSwati law are *lobolo* and integration of the bride.

process.[29] Sibisi accepts that *ukumekeza* can be waived but maintains that virilocal (at the groom's home) handing over must occur.[30] The SCA in *Mbungela v Mkabi*,[31] however, has held that a customary marriage could come into existence without the ceremony of handing over of the bride.

A discussion as to whether the integration of the bride or its rituals can be waived is beyond the scope of this article. Still, it is worth noting that Osman posits that, instead of drawing definite conclusions regarding the rules of customary law, authors must track their development through living customary law.[32] Rather than strict compliance with any one requirement, Osman describes a family-specific approach reflected in case law.[33] As such, in theory, any requirement for a valid marriage has the potential to evolve or to fall away in the future – not because customary law is uncertain but because its fluid nature requires that scholars observe what practices exist and how they change instead of creating absolute "rules" from the outside. Indeed, when a valid marriage comes into existence, it is often based on what a specific family has decided.[34]

The discussion above illustrates that the requirement of integration of the bride has not been well-described in the current jurisprudence. The apparent conflation of particular rituals with the broader practice of integration has led to confusion and ambiguity regarding the scope of court orders, such as whether parties can waive the integration process or only a particular ritual, such as handing over.

## 3 *Sengadi* (HC)

The facts of *Sengadi* (HC) are as follows: Lerato Sengadi ("the applicant") and hip hop artist Jabulani "HHP" Tsambo ("the deceased") cohabited for

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29 Sibisi 2020 *De Jure* 96.

30 Sibisi 2020 *De Jure* 97.

31 *Mbungela v Mkabi* para 30.

32 Osman 2020 *Stell LR* 86.

33 Osman 2020 *Stell LR* 85; *Mathaba v Minister of Home Affairs* 2013 JOL 30820 (GNP); *Mabuza v Mbatha*; *Maluleke v Minister of Home Affairs* 2008 JDR 0426 (W).

34 Osman 2020 *Stell LR* 85. This argument is supported by the recent case of *Peter v Master of the High Court: Bisho* (547/2020) [2022] ZAECBHC 22 (2 August 2022) in which the court found that there was a tacit waiver of *lobolo* (para 37). The court reasoned that "the function of *lobolo* would have served little purpose and the couple would have been expected, instead, to have used any available resources to make their lives more comfortable in anticipation of old age; it is common cause that they did so, carrying out extensive renovations and refurbishments at the homestead" (para 36).

three years before the commencement of marriage negotiations.[35] The *lobolo* was initially set at R45,000, with an immediate payment of R30,000 to the applicant's mother.[36] The remaining amount was to be paid in two installments at agreed future dates.[37] During the *lobolo* negotiations, the deceased and the applicant participated in celebratory customs, with the deceased wearing formal wedding attire and the applicant in her wedding dress.[38] The applicant claimed that after the conclusion of the *lobolo* negotiations, a customary law marriage celebration took place where she was introduced as the customary wife and daughter-in-law. Video recordings, photographic evidence, and affidavits from the applicant's family members supported her claims.[39] Following the celebrations, the applicant and the deceased lived together without objection from the deceased's family.[40] However, the deceased had substance abuse issues, and the applicant organised a family meeting and joined a medical aid scheme to help the deceased with rehabilitation.[41] Due to the deceased's infidelity and substance abuse problems, the applicant left the common home, expressing her willingness to return only if the deceased sought help for his addiction.[42] Upon the deceased's death, the applicant attempted to return home but was informed by the deceased's father ("the respondent") that she was not recognised as a customary law wife and was not entitled to make funeral arrangements.[43] The respondent disputed the existence of a customary marriage, citing the outstanding *lobolo* amounts as evidence and that the handing over of the bride (*go gorosiwa*) had not occurred.[44]

The respondent claimed that several formalities had not been observed and various agreements and negotiations not completed, of which handing over was considered the most crucial for the existence of a customary marriage.[45] Further, the slaughter of a lamb or goat that traditionally accompanies the transfer of the bride and the cleansing of the couple with the bile therefrom had not occurred.[46] As a result of the failure to observe

35 *Sengadi* (HC) para 4.
36 *Sengadi* (HC) para 5.
37 *Sengadi* (HC) para 5.
38 *Sengadi* (HC) para 6.
39 *Sengadi* (HC) para 8.
40 *Sengadi* (HC) para 9.
41 *Sengadi* (HC) para 10.
42 *Sengadi* (HC) para 11.
43 *Sengadi* (HC) para 11.
44 *Sengadi* (HC) paras 14-15.
45 *Sengadi* (HC) para 14.
46 *Sengadi* (HC) para 16.

the correct rituals, the respondent contended that the applicant could not be accepted as a *makoti* (bride) by the deceased's family.[47] The court rejected the respondent's argument that the handing over of the bride constitutes an "indispensable sacrosanct *essentiallia*" for the lawful validation of a customary marriage as validity is determined as a result of compliance with section 3(1) of the *Recognition Act.*[48] The court found this argument to rest on the assumption that handing over as a custom has remained unchanged over time and that "customary [law] is rigid, static, immutable and ossified".[49] The court reasoned that the custom of handing over has evolved in response to changing socio-economic and cultural norms to allow the waiver of, or the symbolic handing over of the bride to the husband's family.[50]

In the evaluation of the evidence, the court found the submission that no customary marriage can come into existence without the handing over of the bride to be incorrect because a customary marriage is concluded after the requirements in the *Recognition Act* are satisfied.[51] Nonetheless, the court found that "there was a tacit waiver because a symbolic handing over of the applicant to the Tsambo family occurred".[52] It is not entirely clear what the court meant by this, as a waiver would surely negate the existence of the handing over, symbolic or otherwise. The court likely meant that there had been a tacit waiver of the physical act of handing over. The tacit waiver of the physical act could be imputed from conduct that constituted a symbolic handing over of the bride.[53] In this case, the conduct was the deceased's aunts and the respondent congratulating and welcoming the applicant into the family[54] and the couple's continued cohabitation after the conclusion of their customary marriage.[55]

As the court found that the practice of handing over of the bride had been tacitly waived, we may have expected the court to conclude that a customary marriage had come into existence and that to be the end of the matter. The court, however, continued to consider the constitutionality of the

47 *Sengadi* (HC) para 16.
48 *Sengadi* (HC) para 18.
49 *Sengadi* (HC) para 20.
50 *Sengadi* (HC) paras 20-21.
51 *Sengadi* (HC) para 18.
52 *Sengadi* (HC) para 19.
53 Osman 2020 *Stell LR* 86.
54 *Sengadi* (HC) para 19.
55 *Sengadi* (HC) para 19.

custom of handing over the bride to the bridegroom's family, though the parties did not canvas this issue before the court.[56]

The court noted earlier that pre-constitutional customary law marriages were a function of patriarchal supremacy.[57] The court's discussion of the constitutionality of the custom of handing over picked up on this point and noted that the codified rules of customary marriage allowed for the dominance of males within the familial household and its property management, which resulted in the marginalisation of women and children.[58] Today, however, customary law must be "consistent with the spirit, purport, and objects of the *Constitution*, and values of freedom, equality, and dignity in an open, transparent and democratic South Africa".[59] Furthermore, the *Constitution* obliges courts to apply customary law and develop it according to the *Constitution*.[60] Regarding handing over, the court notes that custom has "not been given the space to adapt and keep pace with the changing socio-economic conditions and constitutional values".[61] However, the court does not explicitly explain why this is the case.

The court reiterates that dignity, equality, and freedom are the most salient rights in an open, transparent, and democratic South Africa.[62] These rights entail the right-bearer's freedom of choice.[63] Drawing on this freedom of choice, the court held that handing over as an essential prerequisite for a customary marriage robs women of their choice as, despite having complied with section 3(1) of the *Recognition Act*, a woman's husband or her husband's family can demand she be handed over and, subsequently, can assert that the lack of handing over invalidates an otherwise valid marriage.[64] In this case, a woman's freedom of opinion, autonomy, and control over her marital life is undermined.[65] It must be emphasised that the court declared handing over in this context, as an essential prerequisite with the power to override other requirements in section 3(1) of the *Recognition*

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56 In *Sengadi* (SCA) para 33, the Supreme Court of Appeal noted that "[d]uring the exchange with the bench, both counsel assured this Court that the constitutionality issue was not canvassed during argument before the high court. They bemoaned the fact that the declaration was made without the benefit of full argument".

57 *Sengadi* (HC) para 25.

58 *Sengadi* (HC) para 27.

59 *Sengadi* (HC) para 24.

60 *Sengadi* (HC) para 27.

61 *Sengadi* (HC) para 33.

62 *Sengadi* (HC) para 32.

63 *Sengadi* (HC) para 33.

64 *Sengadi* (HC) para 33.

65 *Sengadi* (HC) para 33.

*Act*, unlawful and inconsistent with the *Constitution*.[66] The court found that handing over was "self-evidently discriminatory" on the grounds of gender,[67] as only women are subject to the custom, and declared the practice of handing over unconstitutional.[68]

Unfortunately, the court's constitutional analysis is conducted in a single paragraph that does not investigate the cultural meaning and significance of the custom to the applicant and women more generally.[69] The thin and limited constitutional analysis furthermore overlooks that while the bride is handed over, the groom may be involved in rituals as well, such as being smeared with bile as part of the cleansing ceremony. There is also no substantive argument for distinguishing between handing over and *lobolo*, which is paid to the women's family only but is considered to have an essential social function, such as strengthening marital relationships.[70] Women may also invoke the lack of handing over to invalidate a customary marriage – this is not solely a male prerogative. However, the court's lack of engagement with the practice itself may be understood and justified because it did not declare the general practice of handing over of the bride unconstitutional. Instead, handing over is unconstitutional when it is used as an essential and extraneous requirement that can invalidate an otherwise valid marriage that has complied with section 3(1) of the *Recognition Act.* The court states:[71]

> It is declared that the customary law custom of handing over the bride to the bridegroom's family as an essential pre-requisite for the lawful validation and the lawful existence of a customary law marriage declared to be not a lawful requirement for the existence of a customary law marriage when section 3(1) of the Recognition Act have been complied with.

It follows that the court focused its constitutional analysis on handing over in this particular context. The court envisages the custom of handing over of the bride as an additional requirement to those set out in section 3(1) of the *Recognition Act*. This is contrary to how it is usually understood –

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66 *Sengadi* (HC) paras 36-38.
67 *Sengadi* (HC) para 37.
68 *Sengadi* (HC) para 38.
69 We previously discussed the meaning of the custom of handing over. It should be noted that Himonga and Moore in their study on customary marriage, divorce and succession found no human-rights-based objections regarding integrating the wife into her husband's family, Himonga and Moore *Reform of Customary Marriage* 93. See also Manthwa 2023 *PELJ* 11.
70 *Mbungela v Mkabi* para 20. Also see Bakker 2022 *PELJ* 8 who discusses the gendered nature of *lobolo* negotiations.
71 *Sengadi* (HC) para 36.

discussed earlier – as being incorporated into section 3(1)(b) of the *Recognition Act* as part of the requirements of living customary law.

## 4 *Sengadi* (SCA)

The High Court judgment was appealed to the Supreme Court of Appeal in *Sengadi* (SCA), wherein the SCA was tasked with determining the validity of the marriage concluded between the applicant and the deceased.[72] An ancillary issue was whether handing over had occurred in satisfaction of the requirement that the marriage be negotiated and entered into or celebrated in accordance with customary law in terms of section 3(1)(b) of the *Recognition Act*.[73]

The SCA considered the impact of the practice of handing over of the bride on the determination of the existence of a customary marriage.[74] In this regard, the court relied on the High Court judgment of *Mabuza v Mbatha,* wherein the court found that the *ukumekeza* custom in siSwati law had evolved to the point where it could be waived by agreement between the parties.[75] The SCA noted that it had in its previous judgment of *Mbungela v Mkabi* approved the dictum in *Mabuza v Mbatha* and found that bridal transfer, or handing over, could be and was, indeed, waived.[76] *Mbungela v Mkabi* was decided by the SCA in 2019 between the two *Sengadi* cases; the High Court's decision was handed down in 2018, while the SCA heard the appeal in 2020.

The SCA in *Mbungela* was referred to the *Sengadi* (HC) judgment as support for the argument that bridal transfer as an essential prerequisite for a valid customary marriage was "rigid, formalistic and inconsistent"[77] with the *Constitution*. The SCA in *Mbungela* did not explicitly pronounce on the merits of the decision in *Sengadi* (HC) but stated that a waiver of bridal transfer does not offend the Bill of Rights.[78] The court held that treating wedding ceremonies and transferring the bride as non-essential requirements for the creation of a customary marriage "is not constitutionally

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72 *Sengadi* (SCA) para 1.
73 *Sengadi* (SCA) para 1.
74 *Sengadi* (SCA) para 13.
75 *Sengadi* (SCA) para 16.
76 *Mbungela v Mkabi* para 26. The court in *Mbungela* affirmed the decision in *Mabuza v Mbatha,* although it referred to *ukumekeza* as bridal transfer rather than integration (para 21).
77 *Sengadi* (SCA) para 20.
78 *Mbungela v Mkabi* para 26.

reprehensible"[79] and that a customary marriage had come into existence as the essential requirements of the marriage were satisfied and the parties did not hinge the validity of the marriage on the transfer of the bride.[80] It should be noted that the court in *Sengadi* (HC) did not pronounce on the constitutionality of the waiver of handing over of the bride, but the constitutionality of the practice being required as an additional requirement to that set out in the *Recognition Act*.

In *Sengadi* (SCA), the SCA stressed customary law's flexibility and evolving nature. Evidence from, *inter alia, Mabuza,* and *Mbungela* showed that "strict compliance with rituals has, in the past, been waived".[81] The SCA reasoned that:

> the failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary.[82]

Handing over was thus understood not as an essential and inalienable requirement for a valid customary marriage but as one of several rituals that can be waived or varied. The SCA noted that, although handing over and the slaughter of a sheep did not occur, the applicant was welcomed by the deceased's aunts, who provided the applicant with attire they referred to as her wedding dress.[83] The "clearest indication" of the applicant's acceptance by the deceased's family was her formal introduction and congratulations as the deceased's wife.[84] The existence of a valid marriage was also evidenced by the period of cohabitation between the applicant and the deceased.[85] The SCA subsequently found a valid marriage between the deceased and the applicant, and the appeal failed.[86]

The SCA, further, held despite finding that the appeal must fail, that it was obliged to pronounce on the High Court's declaration of constitutional invalidity regarding the practice of handing over of the bride.[87] The court

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79 *Mbungela v Mkabi* para 29
80 *Mbungela v Mkabi* para 30.
81 *Sengadi* (SCA) para 18.
82 *Sengadi* (SCA) para 18.
83 *Sengadi* (SCA) para 25.
84 *Sengadi* (SCA) para 26.
85 *Sengadi* (SCA) para 27.
86 *Sengadi* (SCA) para 30.
87 *Sengadi* (SCA) para 31. The court stated that "[d]espite the finding that the appeal against the order of the high court ought to fail, there is an aspect that this Court is constrained to pronounce itself on. Having correctly found on the facts of this case that the physical handing over of the bride was waived in favour of a symbolic

held that handing over of the bride was raised to establish the validity of a customary law marriage.[88] The constitutionality of the custom of handing over was not in question in the High Court; the High Court raised it on its own accord.[89] The court, relying upon jurisprudence from the Constitutional Court, stated that a court may raise the constitutionality of a law of its own accord where (a) the constitutionality arises on the facts and (b) the determination of constitutionality is required for the outcome of the case or is in the interests of justice to do so.[90]

In addressing the question of whether the High Court was justified in considering the constitutionality of the practice of handing over on its own accord, the SCA noted that the applicant never pleaded that the requirement of the handing over of the bride was unconstitutional.[91] The question of whether handing over of the bride had occurred was only relevant to determine the existence of the customary marriage.[92] The manner in which the case was pleaded meant that the constitutionality of the custom of the handing over of the bride did not arise.[93] As mentioned previously, counsel did not canvass the constitutionality of the practice in the High Court and "bemoaned the fact that the declaration was made without the benefit of full argument".[94] The SCA concluded that the requirements laid down by the Constitutional Court[95] for raising the constitutionality of a law on its own accord (discussed above) had not been satisfied and concluded that there was thus no basis for the High Court to declare handing over unconstitutional.[96] This is the final statement on the matter, and the court dismissed the appeal. The court does not explicitly state whether it views

handing over, the high court, in the process of giving reasons for its order, proceeded to declare that the custom of the handing over of the bride was unconstitutional".

88 *Sengadi* (SCA) para 33.

89 *Sengadi* (SCA) para 33. The court noted that "[d]uring the exchange with the bench, both counsel assured this Court that the constitutionality issue was not canvassed during argument before the high court. They bemoaned the fact that the declaration was made without the benefit of full argument".

90 *Sengadi* (SCA) para 32, referring to *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 4 SA 222 (CC).

91 *Sengadi* (SCA) para 33.

92 *Sengadi* (SCA) para 33.

93 *Sengadi* (SCA) para 33.

94 *Sengadi* (SCA) para 33.

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

96 *Sengadi* (SCA) para 33.

the High Court declaration in respect of the constitutionality of the practice as being overturned.

## 5 Is the practice of handing over of the bride unconstitutional?

The court in *Sengadi* (HC) found that a customary marriage had been concluded and declared the practice of handing over of the bride unconstitutional.[97] On appeal, the Supreme Court of Appeal applied the requirement of handing over and held that there was no basis for the High Court's declaration of unconstitutionality but did not expressly state that the order of unconstitutionality was overturned. This results in several complexities, such as the effectivity and binding nature of the High Court's declaration order, which are discussed below.

### *5.1 Effectiveness of a High Court's order of unconstitutionality*

The first pressing question is whether the High Court order of unconstitutionality is required to be confirmed by the Constitutional Court to be effective.

It is trite law in South Africa that customary law is recognised as a valid legal system subject to the *Constitution*. Section 211(3) of the *Constitution* mandates courts to apply customary law where it is applicable, subject to the *Constitution* and any legislation dealing with customary law.[98] This means that customary law must be checked against the *Constitution*, and where it conflicts with it, it must be brought into line or struck down.[99] This extends to official customary law (written versions of customary law found in sources such as legislation or case law) and living customary law

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97 The SCA understood the High Court's ruling as having declared handing over unconstitutional. Additionally, Bakker describes the court in *Sengadi* as having declared handing over unconstitutional such that handing over is no longer a requirement for a valid customary marriage. The SCA in *Mbungela v Mkabi* referred to the judgment in *Sengadi* as having declared handing over unconstitutional; *Tsambo v Sengadi* para 31; Bakker 2022 *PELJ* 8; *Mbungela v Mkabi* para 19. The SCA referred to the judgment as "*LS v RL* [2018] ZAGPJHC 613; [2019] 1 All SA 569 (GJ); 2019 (4) SA 50 (GJ)".

98 Section 211(3) of the *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the *Constitution*).

99 For a discussion of how courts may develop customary law, see Lehnert 2005 *SAJHR* 248-253.

(uncodified principles),[100] and the courts have given effect to this obligation. For example, in *Bhe v Khayelitsha Magistrate*, the Constitutional Court was asked to confirm a high court's declaration that specific provisions of the *Black Administration Act*[101] were invalid.[102] The Constitutional Court confirmed the unconstitutionality of the provisions and went further to declare the customary law principle of male primogeniture unconstitutional.[103] Similarly in *Gumede*[104] and *Ramuhovhi*,[105] where the court declared specific provisions of the *Recognition Act* that regulate the propriety consequences of a customary marriage unconstitutional, the matters were referred to the Constitutional Court for confirmation.[106] It is thus trite law that when a high court declares a statutory provision invalid for contravening the *Constitution*, the court must refer the declaration of constitutional invalidity to the Constitutional Court for confirmation.[107]

The judgment in *Sengadi* (HC) is a novel case as it is the first time a high court has declared a customary law practice (such as handing over) unconstitutional. It raises the broader question of whether the High Court's order of unconstitutionality regarding a customary law practice is not final until the Constitutional Court confirms it. Manthwa states that the High Court's order of unconstitutionality is not final until confirmed by the Constitutional Court and refers to section 167(5) of the *Constitution* in support of this statement.[108] We, however, disagree with this for the reasons set out below.

Section 167(5) of the *Constitution* provides that:

> The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act, or conduct of the President is constitutional and

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100 See *Bhe v Magistrate, Khayelitsha* 2005 1 SA 850 (CC) (hereafter referred to as *Bhe*) paras 81-87. For a critical discussion of the distinction between official and living customary law, see Diala 2017 *J Legal Plur* 143-165; Diala 2021 *IJLPF* 7-9.

101 *Black Administration Act* 38 of 1927.

102 *Bhe* para 9.

103 *Bhe* para 136.

104 *Gumede (Born Shange) v President of the Republic of South Africa* (4225/2006) [2008] ZAKZHC 41 (13 June 2008) (hereafter referred to as *Gumede*) para 17.

105 *Ramuhovhi v President of the Republic of South Africa* (412/2015) [2016] ZALMPTHC 18 (1 August 2016) para 76.

106 *Gumede* para 17, item 8. The order was confirmed in *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) para 59; *Ramuhovhi* para 76, item 5. The order was confirmed in *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) para 71.

107 Section 167(5) of the *Constitution*.

108 Manthwa 2023 *THRHR* 187.

> must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status before that order has any force.

Manthwa's interpretation appears to be that the Constitutional Court must confirm any order of invalidity before it has any force and effect. But we submit this is wrong. The requirement for confirmation in section 167(5) of the *Constitution* relates to where a court declares unconstitutional "an Act of Parliament, a provincial Act, or conduct of the President" as stated in the section – it does not encompass all declarations of unconstitutionality. An interpretation that any and all orders of unconstitutionality (beyond that contemplated in the section) must be confirmed by the Constitutional Court is inconsistent with the current interpretation and implementation of the *Constitution*.

Regarding confirmation of an order of constitutional invalidity, section 172(2) of the *Constitution* further provides:

> (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
>
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

Section 172(2)(a) of the *Constitution* is interpreted to refer to declarations of constitutional invalidity of Acts of Parliament, provincial Acts or any conduct of the President. The Constitutional Court in *Minister of Health and Another v New Clicks (Pty) Ltd*[109] found that:[110]

> [D]eclarations of constitutional invalidity, other than those referred to in section 172(2)(a), made by courts other than this court, in the absence of any appeal against those orders, have effect without the need to be confirmed by this court.

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109 *Minister of Health v New Clicks (Pty) Ltd*; *In re: Application for Declaratory Relief* 2006 8 BCLR 872 (CC).

110 *Minister of Health v New Clicks (Pty) Ltd*; *In re: Application for Declaratory Relief* 2006 8 BCLR 872 (CC) para 19. In the same paragraph, the Court added that the remedial orders in s 172 apply to all orders of constitutional invalidity, including delegated legislation.

Our interpretation is further supported by the fact that declarations of unconstitutionality in respect of regulations enacted in terms of a statute do not have to be confirmed by the Constitutional Court to be effective.[111] For example, in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs,* the Cape Provincial Division of the High Court declared a statutory provision and certain regulations unconstitutional.[112] The Constitutional Court referred to section 172(2) of the *Constitution* and provided explicit confirmation that not all orders of unconstitutionality need to be confirmed by the Constitutional Court. The Constitutional Court expressly stated:[113]

> [T]he order made by the High Court declaring section 25(9)(b) of the Act to be to be inconsistent with the Constitution and therefore invalid has no effect until it is confirmed by this Court. On the other hand, the order of the Court declaring the fee regulations to be invalid does not need confirmation by this Court to be effective.

Similarly, declarations of unconstitutionality in respect of the common law do not have to be referred to the Constitutional Court for confirmation. The Constitutional Court has explicitly stated that "the Constitution makes no provision for an obligatory referral in such cases" regarding orders of unconstitutionality concerning the common law.[114] Accordingly, when the High Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[115] declared the common law offence of sodomy and the statutory provisions criminalising the conduct unconstitutional, it was only the declarations of unconstitutionality in respect of the acts of Parliament that were referred to the Constitutional Court for confirmation.[116] The

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111 See *Mulowayi v Minister of Home Affairs* 2019 4 BCLR 496 (CC) para 27 and *Minister of Home Affairs v Liebenberg* 2002 1 SA 33 (CC) para 13.

112 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 1 SA 997 (C) 1057-1060.

113 *Dawood and v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) 11.

114 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 3.

115 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 102 (W).

116 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 102 (W) 131. Heher J ordered only those orders that declare constitutionally invalid any "provisions of Acts of Parliament" be referred to the Constitutional Court for confirmation. Ackerman J, writing for the majority of the Constitutional Court, stated that Heher's referral was correct as s 172(2)(a) of the *Constitution* does not require confirmation by the Constitutional Court of orders of constitutional invalidity of common law offences. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 2.

Constitutional Court held that the declaration of invalidity with respect to the common law would become final when the period for instituting appeal proceedings against the order lapsed.[117] In confirmation proceedings, the Constitutional Court confirmed the unconstitutionality of the common law offence of sodomy because the common law provision was inextricably linked to the statutory provision[118] – with the reasoning here being critical. The declaration of unconstitutionality with respect to a common law rule is referred to by the Constitutional Court only when the common law rule is intertwined with a statutory provision. Otherwise, the constitutional invalidity concerning a common law rule does not have to be confirmed by the Constitutional Court to be effective.[119]

In light of this, we argue that where a high court declares a customary practice unconstitutional, confirmation by the Constitutional Court would only be necessary where the customary law rule is inextricably linked to a statutory provision that has been declared unconstitutional. For example, the *Reform of Customary Law of Succession Act*[120] codifies the practice of woman-to-woman marriages and provides that the term "spouse" includes a woman in such a marriage.[121] If the court declared the practice of woman-to-woman marriages and the statutory provisions unconstitutional, then – given that the statutory provision is intertwined with the customary law

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117 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 3.

118 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 79. The Court stated that, to the extent it had to consider the confirmation orders, it would be impossible to separate the offense of sodomy and the impugned provisions that contain this offense. Finding the common law offense of sodomy to be constitutionally invalid was, according to the Court, an "indispensable and unavoidable" step in finding that the inclusion of the offense in the impugned provisions was constitutionally invalid. While these two issues could not be separated, the fact that they had been dealt with together by the High Court and could thus be dealt with together by the Constitutional Court was "fortuitous" and need not necessarily be the case.

119 See *Malachi v Cape Dance Academy International (Pty) Ltd* 2010 11 BCLR 1116 (CC) para 3: "The Constitution does not make provision for the confirmation of an order of constitutional invalidity of the common law." In this matter, the High Court declared ss 30(1) and 30(3) of the *Magistrates Court Act* 32 of 1944, as well as the common law principle of arrest *tanquam suspectus de fuga* as expressed in the impugned provisions, constitutionally invalid. The High Court referred its declarations to the Constitutional Court for confirmation, however, ultimately the applicant brought an application for confirmation relating only to the impugned provisions.

120 *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

121 Section 2 of the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

practice – the declaration in respect of the statute and customary law practice should be referred to the Constitutional Court for confirmation.

It leads to the obvious question of whether handing over is inextricably linked to the *Recognition Act*, such that the High Court's declaration of invalidity must be referred to the Constitutional Court for confirmation. We think not. As discussed previously, the High Court declared the custom of handing over unconstitutional on the basis that it functioned as a requirement extraneous to section 3(1) of the *Recognition Act* that could be imposed on spouses by third parties, like the husband's family, to invalidate the customary marriage. Moreover, the High Court did not view its order as being linked to the statutory provisions because it made no order as to their constitutionality. The practice, in fact, was declared unconstitutional because it was viewed as being additional to the statutory requirements.[122] The High Court declaration of unconstitutionality thus arguably does not require confirmation by the Constitutional Court.

### *5.2 Question of precedent value*

Given that the High Court was competent to pronounce on the constitutionality of handing over and that the order does not need to be confirmed by the Constitutional Court, does the pronouncement bind future cases as a precedent?

The first aspect to consider is whether the declaration of unconstitutionality is part of the ratio decidendi of the judgment or obiter. Bakker submits that the declaration is obiter and not binding on other courts,[123] but this is unclear. In the court's first dealing with the submission that the custom of handing over is essential for the conclusion of a customary marriage, the court rejects the submission and states that a marriage is concluded after the requirements set out in section 3(1) of the *Recognition Act* are satisfied.[124] It is apparent from the outset that the court views handing over as an additional requirement to that set out in the Act, which is the basis of the court's declaration of unconstitutionality. The court goes on to find that "[i]n this particular case" there was a waiver of the custom, with the implication that had there been no waiver on the facts, it would have been irrelevant because, as stated upfront handing over is not required for the

122 *Sengadi* (HC) paras 33 and 36.
123 Bakker 2022 *PELJ* 2.
124 *Sengadi* (HC) paras 18 and 20.

conclusion of a marriage once the requirements in the *Recognition Act* have been satisfied. Indeed, the court order[125] provides solely that handing over as an additional requirement for the statutory requirements for marriage is unlawful and unconstitutional and makes no reference to a waiver of the custom. The declaration is thus arguably the ratio and not obiter in the judgment.

If the declaration is part of the ratio as argued above, then the order would bind other courts according to the rules of precedent, namely that a court is bound by a superior or larger court in its own jurisdiction.[126] In this case, the High Court of a single judge would bind other courts of such size[127] in the area of jurisdiction (being Gauteng). Larger courts[128] in the jurisdiction may respect the judgment but are not bound by it, nor is a superior court or those courts located outside the jurisdiction.[129] Accordingly, the decision may bind the courts of a single judge in the Gauteng area.

A final point to consider is whether judgments on customary law practices constitute binding precedents. While judgments on statutes dealing with customary law such as *Gumede* and *Ramuhovhi* serve as precedent, it is

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125 *Sengadi* (HC) paras 36-38: "It is declared that the customary law custom of handing over the bride to the bridegroom's family as an essential pre-requisite for the lawful validation and the lawful existence of a customary law marriage declared to be not a lawful requirement for the existence of a customary law marriage when section 3 (1) of the Recognition Act have been complied with. The customary law custom of handing over the bride is self-evidently discriminatory on the ground of gender and equality as between the prospective wife and the prospective husband. Because only women, after consenting to enter into a customary law marriage are subject to this unequal treatment by the custom of handing over which overrides the statutory requirements of section 3(1) of the Recognition Act as the essential requirements for a valid customary marriage. In my view the customary law custom of the handing over has to be developed to the extent that the requirement of the handing over of the of the bride as an essentialia for the lawful existence of a customary law marriage and that the failure to comply with such custom despite having complied with the section 3(1) statutory requirements of the Recognition Act invalidates the validity and existence of the customary law the spouses consented to and had celebrated. In my considered view the requirement of handing over the bride to bridegroom's family does not pass Constitutional muster as it is not in accordance with the Bill of Rights and it does not promote the spirit, purport and objects of the equality and dignity clauses in the Constitution because this handing over custom as a determinative prerequisite for the existence of a customary law marriage unfairly and unjustly discriminates against the gender of the applicant as a woman and denies her constitutional right of equality and dignity."

126 Kahn 1967 *SALJ* 309.

127 With size being determined by the number of judges on the court.

128 Where there is more than one judge sitting on the case.

129 For a discussion of the doctrine of precedent, also see Devenish 2007 *Obiter* 1-22.

less clear whether judgments in respect of customary law practices which may be particular to specific communities serve as binding precedent. For example, subsequent to the case of *MM v MN*,[130] Himonga and Pope examined the scope of the court's judgment that a first wife's consent is required for a subsequent polygynous marriage.[131] They argued that living customary law is not based on precedent and that "a finding about the customary law of one group is generally not applicable to other groups in the same way that the doctrine of precedent applies in common law circumstances".[132] In this regard, Osman highlights the difficulty with treating customary law as monolithic, arguing that "judgments on customary law, particularly those that pronounce on the requirements of a customary marriage, should not be applied as precedent in subsequent cases".[133] The contention is that this will potentially lead to the ossification and distortion of the law.[134] Indeed, "the courts may become reluctant to deviate from judgments thought of as precedent" as "flexible, developing notions of customary law are likely to be overlooked in favour of certain and easily ascertainable law".[135] Osman sees precedent as another source of law to be considered by courts rather than a binding rule to be applied.[136]

On the other hand, scholars such as Rautenbach[137] and Bakker[138] favour judgments on customary law as being viewed as authoritative and binding. Rautenbach argues that precedent is "a binding source of law, including customary law, which must be followed until such time that it is either absorbed into legislation or amended by a subsequent decision in terms of the principle of stare decisis".[139] In support of this, she argues that the ever-growing jurisprudence on customary law matters could perhaps indicate that litigants view case law as an authoritative and binding source of customary law.[140] Using case law as precedent further facilitates ascertaining the law and certainty.[141] Similarly, Bakker argues that previous judgments on an issue bind courts, and where a party alleges a change or

130 *MM v MN* 2013 4 SA 415 (CC)
131 Himonga and Pope 2013 *Acta Juridica* 322-323.
132 Himonga and Pope 2013 *Acta Juridica* 322.
133 Osman 2020 *Stell LR* 84.
134 Osman 2020 *Stell LR* 90.
135 Osman 2020 *Stell LR* 84.
136 Osman 2020 *Stell LR* 84.
137 Rautenbach 2019 *PELJ* 1-20.
138 Bakker 2018 *PELJ 1* -15.
139 Rautenbach 2019 *PELJ* 16.
140 Rautenbach 2019 *PELJ* 13.
141 Rautenbach 2019 *PELJ* 1-20.

development in the law, this must be proved by evidence,[142] failing which the previous judgment binds the court.

So how, then, is the order in *Sengadi* (HC) to be treated? The High Court in *Sengadi* (HC) did not make a declaration regarding the rituals of the community. Instead, its order was that the imposition of handing over as an additional requirement to that set out in section 3 of the *Recognition Act* was unconstitutional. The order does not pertain to the content of customary law and the practices of the community but rather the legal framework and the constitutionality of imposition of additional requirements to that set out in the statute. Thus, Osman's concerns in respect of treating customary law as precedent are not present here – there is no risk of ossification and distortion of customary law. The order should thus be treated as precedent as it pertains to the interpretation and operation of the statute and not the customary law practice itself.

### *5.3 Has the SCA overturned the finding of unconstitutionality?*

Given that a declaration of unconstitutionality was within the High Court's powers and may bind other courts in the jurisdiction, it is essential to determine whether the Supreme Court of Appeal in *Sengadi* (SCA) overturned the High Court order. As the SCA dismissed the appeal against the High Court judgment, it may appear that it did not, but the matter is more complex. In *Sengadi* (SCA), the SCA first spent a considerable part of the judgment delving into whether the handing over of the bride had been waived. This is a back-to-front approach as the court considered the constitutionality issue at the end of the judgment, which should have been dealt with first. If the SCA had upheld the finding of unconstitutionality, then the deliberation regarding the waiving of the practice would have been unnecessary.

The court examined whether handing over has occurred or may be waived in the context of whether the requirements of section 3 of the *Recognition Act* have been satisfied. This accords with existing jurisprudence on the issue of handing over but is at odds with how it was positioned in the High Court judgment as an additional requirement to that set out in section 3 of the *Recognition Act*. The SCA did not address this difference in how the High Court positioned the requirement, which is unfortunate as it is central to the finding of unconstitutionality. However, it also means that the SCA

142 Bakker 2018 *PELJ* 6 and 12.

uses the custom of handing over in a different context, making it hard to reconcile the various approaches to handing over in the two judgments. Nonetheless, Bakker argues that:[143]

> The decision of the court a quo [*Sengadi* (HC)] 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).

Bakker appears to mean that as the SCA applied integration as a requirement for a customary marriage, it has set aside the High Court ruling that handing over is unconstitutional.

The difficulty with this reasoning is that the SCA regards handing over as a requirement in terms of section 3 of the *Recognition Act* – which was not objected to by the High Court. The SCA judgment does not address the High Court's reasoning with the result that the decisions may be read together: the custom of handing over is required but may be waived in terms of section 3 of the *Recognition Act* (as per *Sengadi* (SCA)) but cannot be imposed as an additional requirement to section 3 of the Act (as per *Sengadi* (HC)).

This leads to the relatively sparse manner in which the SCA considers the constitutionality issue. *Sengadi* (SCA) "addressed" constitutionality at the very end of the judgment in paragraphs 32 and 33 only to say that the High Court had no basis for granting the order of unconstitutionality but does not go on to explicitly state that given the lack of basis for the order, the declaration of unconstitutionality is set aside. But surely, the SCA's finding that there is no basis for the constitutionality declaration means that the declaration is set aside. Since the Court made a pronouncement on the improper basis on which the inquiry in *Sengadi* (HC) was made, it only makes sense that the finding of this inquiry no longer stands. The necessary implication is that the SCA's reasoning tacitly overturned the finding of unconstitutionality, even though it is not explicitly stated in the dismissal of the appeal.[144]

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143 Bakker 2022 *PELJ* 4 fn 15.

144 Bakker also states that the SCA overturned the finding of unconstitutionality, but without expanding on why this is so; Bakker 2022 *PELJ* 9.

## 6 Conclusion

The High Court in *Sengadi* (HC) found the custom of handing over of the bride to be unconstitutional to the extent that it is applied as an additional requirement to section 3(1) of the *Recognition Act*. The judgment is peculiar because it positions the custom of handing over as an additional requirement that may be invoked after the parties have complied with the provisions in the *Recognition Act* – contrary to how it is usually invoked as part of the requirement of the Act. Nonetheless, it is argued that the High Court's declaration was well within its powers and need not be confirmed by the Constitutional Court to be effective. Furthermore, judgments on customary law matters – specifically those that rule on customary practices – should not ordinarily be treated as binding precedents for the risk of ossifying and distorting customary law, but the judgment in *Sengadi* (HC) does not pronounce on the content of customary law and does not carry such risks. Instead, the judgment pertains to whether additional requirements to that set out in the *Recognition Act* can be imposed on parties for the conclusion of a customary marriage. This goes to the legal framework and interpretation, and accordingly, it is argued that it should be binding on subsequent courts following the normal rules of precedent.

Unsurprisingly, the matter went on appeal to the Supreme Court of Appeal, where the SCA considered the requirement of handing over of the bride as part of the requirements of the *Recognition Act* and not as the extraneous requirement articulated by the High Court. This is unfortunate as the courts are talking at cross purposes. The High Court's declaration of unconstitutionality is in the context of the custom of handing over being imposed after the requirements of the *Recognition Act* have been satisfied. This context cannot simply be ignored, and in doing so, the SCA does not deal adequately with the High Court's reasoning and clarify whether the High Court was mistaken in its approach. The High Court's declaration of unconstitutionality is dealt with in a cursory manner by the SCA. After a brief discussion, the court concluded that there was no basis for the declaration and left the matter at that. While an extensive discussion of the matter may not have been necessary, the court should have categorically stated that the declaration of unconstitutionality was set aside – which would have provided certainty and clarity to a matter shrouded in ambiguity. The *Sengadi* saga represents the all-too-common dispute in our law reports in which parties dispute the existence of a customary marriage, and it is hoped

that the Supreme Court will pronounce definitively on the High Court's declaration of unconstitutionality in the near future.[145]

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## List of Abbreviations

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| AHRLJ | African Human Rights Law Journal |
| IJLPF | International Journal of Law, Policy and the Family |
| J Legal Plur | Journal of Legal Pluralism and Unofficial Law |
| PELJ | Potchefstroom Electronic Law Journal |
| SAJHR | South African Journal on Human Rights |
| SALJ | South African Law Journal |
| SCA | Supreme Court of Appeal |
| Stell LR | Stellenbosch Law Review |
| THRHR | Tydskrif vir Hedendaagse Romeins-Hollandse Reg |