Consent and Other Ancillary Matters as Requirements of a Customary Marriage*: LNM v MMM* (2020/11024) [2021] ZAGPJHC 563 (11 June 2021)

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Abstract

Consent may be seen as a fundamental human right. On the issue of marriage, people should only be married with their consent. A marriage without consent is a forced marriage. Section 3(1)(*a*)(ii) of the *Recognition of Customary Marriages Act* 120 of 1998 not only requires consent, but also requires specific consent for a marriage to take place under customary law. The Act is clear that consent to being married under customary law is one of the requirements for validity. If specific consent is lacking, there cannot be a valid customary marriage. This case note focusses on the decision in *LNM v MMM* where specific consent was one of the issues. It discusses whether consent of the guardian is still a requirement for customary marriages under the Act. It also discusses the required specific consent in detail and then considers the form that specific consent should take, noting that specific consent should not be inferred from the act of negotiating and delivering *ilobolo* as African people do for a civil marriage. In *LNM v MMM* the court also held that the handing over of the bride is "not imperative". By this, the court meant that the handing over of the bride was an unnecessary custom. This is not in accordance with the cases referred to in the judgment. This case note will respond to this. Should a customary marriage without specific consent to marry under customary law be annulled?

Keywords

Marriage; consent; handing over.

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1 Introduction

The requirements for valid customary marriages appear in section 3(1)(*a*) and (*b*) of the *Recognition of Customary Marriages Act*[1] (hereafter the *Recognition Act*). Accordingly, both parties must be above the age of 18;[2] they must both consent to be married to each other under customary law[3] and the marriage must be negotiated and entered into or celebrated in accordance with customary law.[4] The bulk if not all of the researchers in the field have focussed on the requirement that the marriage must be negotiated and entered into or celebrated in terms of customary law.[5] The other requirements, particularly, the requirement that the parties must consent to be married in terms of customary law, have enjoyed very little or piecemeal attention.

In *LNM v MMM*[6] the Gauteng Local Division, Johannesburg had to decide on the validity of an unregistered customary marriage. The applicant (the wife) argued that a valid customary marriage had been entered into between herself and the respondent (the husband) as they had complied with all the legislative requirements for a valid customary marriage. However, the respondent argued that although they had complied with these requirements they had not intended these to constitute their actual marriage. His argument was that at all relevant times the parties had agreed that they would enter into a civil marriage subject to an antenuptial contract and that their compliance with the requirements of a customary marriage was only for cultural reasons and never intended to be the final stage of the marriage.[7] After compliance with the cultural requirements the parties had attended to the execution of an antenuptial contract to regulate their matrimonial property regime with a view to the impending civil marriage.[8] The court pointed out that reference to an antenuptial contract was a misnomer because, at the time of executing the antenuptial contract, the parties had already complied with the requirements for a valid customary marriage. As a result, their customary marriage was in community of property.[9]

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1 Heaton and Kruger *South African Family Law* 33.

2 Section 3(1)(*a*)(i) of the *Recognition of Customary Marriages Act* 120 of 1998 (the *Recognition Act*).

3 Section 3(1)(*a*)(ii) of the *Recognition Act*.

4 Section 3(1)(*b*) of the *Recognition Act*.

5 Bakker 2018 *PELJ* 1; Sibisi 2020 *De Jure* 90.

6 *LNM v MMM* (2020/11024) [2021] ZAGPJHC 563 (11 June 2021*)* (*LNM v MMM).*

7 *LNM v MMM* para 16.

8 *LNM v MMM* para 16.

9 *LNM v MMM* para 35.

The argument that there was no customary marriage in the absence of consent to be married under customary law not only compelled the court to address the matter, albeit unsatisfactorily as will be shown below; the argument also enjoys statutory support in section 3(1)(*a*)(ii) of the *Recognition Act,* which requires specific consent to be married under customary law. This case note will focus on the requirement for consent to be married under customary law, as raised in the judgment. Particularly, what form should this specific consent take? A discussion of consent also presents an opportunity to discuss the question of the guardian's consent in customary marriages. Here the question is whether a customary marriage, other than one entered into by a minor, can be concluded without the consent of the guardian. One of the arguments that will be raised is that specific consent to be married under customary law should not be inferred from merely negotiating and delivering *ilobolo* because African people deliver *ilobolo* even in cases where a civil marriage is intended.[10] The court also remarked that the handing over of the bride was not imperative. The court seems to have relied on the decisions of the Supreme Court of Appeal (hereafter the SCA) in *Mbungela v Mkabi*[11] and *Tsambo v Sengadi*[12] in making this remark. This note, however, will argue that this is not a correct reading of these decisions. It will finally consider the question of whether a court may annul a customary marriage where there is no specific consent to be married in terms of customary law. It will thereafter draw a conclusion.

2 Facts

The relationship between the parties was as in a fairytale, as they literally spoke of a "whirlwind" romance. The couple met on the 16th of April 2019 and two weeks thereafter the respondent introduced the applicant to his family. A day later the respondent's family handed a letter to the applicant for her to deliver to her family. The letter was a request for the applicant's hand in marriage.[13] *Ilobolo* negotiations between the two families took place on the 25th of May 2019 and were finalised on the same day. The result of the negotiations was a payment of R50 000 and an exchange of gifts between the two families. The agreement was also reduced to writing and signed by both the families.[14]

On the 14th of June 2019 the applicant's family slaughtered a goat, welcoming the respondent as their son-in-law. Bile was smeared on both of them, symbolising a binding customary marriage. On the 15th of June 2019

10 Knoetze 2000 *TSAR* 532-536.
11 *Mbungela v Mkabi* (820/2018) [2019] ZASCA 134 (30 September 2019) (*Mbungela v Mkabi*).
12 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) (*Tsambo v Sengadi*).
13 *LNM v MMM* para 6.
14 *LNM v MMM* para 7.

public celebrations at the bride's family homestead took place and the event was graced by invited guests. The invitation was titled "A Traditional Wedding Celebration".[15] On the 28th of June 2019 the applicant was handed over to the respondent's family in Limpopo. On the same day a sheep was slaughtered to introduce her to the ancestors. The following day formal celebrations ensued.[16] Thereafter, the parties lived together as husband and wife in Johannesburg.[17] Between September and October of 2019 the parties executed and registered an antenuptial contract.[18] Marital difficulties started in March 2020.[19] At the time that this case was heard in court there were other cases pending before other courts between the same parties. The other cases were about domestic violence, eviction and criminal matters.[20]

It was not in dispute that at the time of the customary marriage the applicant had many debts that she had incurred before her relationship with the respondent.[21] It was also common cause that the respondent was eager to protect the financial interests of his children from previous relationships in the event of his untimely death. He also wanted to protect the applicant's proprietary interests against any claims by his ex-wives.[22] To this end, the respondent argued that the parties had agreed that they would not conclude a customary marriage because of its proprietary consequences; instead, they would conclude a civil marriage subject to an antenuptial contract. He also argued that all the events were "pre-celebrations and observances of cultural practices in anticipation of a civil marriage to be concluded in November 2020."[23] In other words, he argued that they had not consented to be married under customary law.

The applicant disputed that they intended to conclude a civil marriage subject to an antenuptial contract. She averred that they had intended to conclude a customary marriage in community of property, and that any talk of changing their matrimonial property regime took place only after their customary marriage.[24]

The issue before the South Gauteng High Court was whether there was a valid customary marriage in terms of section 3(1) of the *Recognition Act*. In the event of there being a valid marriage, the court was called to determine

15 *LNM v MMM* para 8.
16 *LNM v MMM* para 9.
17 *LNM v MMM* para 10.
18 *LNM v MMM* para 1.
19 *LNM v MMM* para 12.
20 *LNM v MMM* paras 13, 14.
21 *LNM v MMM* para 15.
22 *LNM v MMM* para 11.
23 *LNM v MMM* para 16.
24 *LNM v MMM* para 19.

the matrimonial property regime regulating it. The court also had to determine the validity of the antenuptial contract registered during October of 2019.[25]

3 Decision

On the question of the validity of the marriage, the court acknowledged the respondent's argument that there had been no consent to enter into a customary marriage. The requirement for consent entails not only consent to marriage, but specific consent to a customary marriage.[26] Relying on the decision of the Constitutional Court in *MM v MN*,[27] the court cautioned that consent to enter into a customary marriage must be understood in the framework of customary law and not that of the common law.[28] It cautioned against an assumption that the notion of consent would have a universal meaning across all sources of law.[29]

Without deciding whether the respondent had consented to be married under customary law, the court pointed out that customary law is generous and flexible and "places a high premium on the right to dignity and the community beyond narrow individualistic interests."[30] The court also noted that all the rituals had been performed, including the handing over of the bride. The parties had also cohabited before the marriage and after all the customary rituals had been performed. Further, although it was not an issue, the court remarked that the handing over of the bride was not imperative.[31] Therefore a valid customary marriage had been concluded on the 29th June 2019.[32]

Additionally, the court held that due to section 7(2) of the *Recognition Act* the applicable matrimonial property regime was community of property, because the antenuptial contract had been executed and registered only after the conclusion of the customary marriage. Section 87(1) of the *Deeds Registries Act*[33] (hereafter the *DRA*) provides that an antenuptial contract must be executed and attested to by a notary and registered within three

25 *LNM v MMM* para 1.
26 *LNM v MMM* para 26.
27 *MM v MN* 2013 4 SA 415 (CC) (*MM v MN*).
28 *LNM v MMM* paras 27-28.
29 *LNM v MMM* para 28. In *MM v MN* para 49 the Constitutional Court stated "courts must understand concepts such as 'consent' to further customary marriages within the framework of customary law, and must be careful not to impose common-law or other understandings of that concept. Courts must also not assume that such a notion as 'consent' will have a universal meaning across all sources of law."
30 *LNM v MMM* para 29.
31 *LNM v MMM* para 30
32 *LNM v MMM* para 30.
33 *Deeds Registries Act* 47 of 1937 (the *DRA*).

months of its execution.[34] It can be entered into only prior to the marriage.[35] Therefore, the antenuptial contract was null and void.[36]

4 Discussion

As alluded to above, this decision raises some interesting questions. This present discussion will focus on the issue of specific consent to be married in terms of customary law as a requirement for a valid customary marriage. It will also engage critically with the court's obiter remark that the handing over of the bride in customary marriages is not imperative. Argument will be advanced that a party to a customary marriage without specific consent to be married under customary law should be able to bring court proceedings for the annulment of the customary marriage.

4.1 Whose consent is required for the marriage?

Before the *Recognition Act*, consent of the guardians of the intending bride and groom was an essential requirement even if the parties were majors.[37] The bride was expected to abide by her parent or guardian's choice of a husband for her, unless she had a generous father who considered her views.[38] The first notable enactment that required the consent of the bride as well was section 59 of the *Natal Code of Zulu Law,* 1932.[39] It must be added that the consent of the guardian was also required if either of the parties to the marriage was a minor.[40] Section 3(1)(*b*)(ii) of the *Recognition Act* states that both the parties to the customary marriage must consent to be married to each other under customary law.

Section 3(3)(*a*) of the *Recognition Act* requires the consent of the parent or guardian if one or both of the parties is below the age of 18. It must be noted that refusal by the guardian or the failure or inability to obtain the guardian's consent is not an absolute bar to the customary marriage. In this situation, section 3(3)(*b*) of the *Recognition Act* read with section 25 of the *Marriage*

34 *LNM v MMM* para 38.

35 *LNM v MMM* para 39.

36 *LNM v MMM* para 58. The correct procedure was that of a postnuptial contract as provided for in s 89 of the *DRA*, read with s 21 of the *Matrimonial Property Act* 88 of 1984 (the *MPA*). S 21 of the *MPA* deals will changing the matrimonial property system. Accordingly, the spouses must make a joint application for leave to change their matrimonial property system. The spouses must show that there are sound reasons for the proposed change, they have given sufficient notice of the proposed change to all their creditors and that no other person will be prejudiced as a result of the change.

37 Human "Customary Marriages" 207; Himonga *et al African Customary Law* 99.

38 Simons 1958 *Acta Juridica* 327.

39 *Natal Code of Zulu Law Proclamation* 168 of 1932.

40 Section 38 of both the *Natal Code of Zulu Law Proclamation* R195 of 1967 and the *KwaZulu Act on the Code of Zulu Law* 16 of 1985.

Act[41] applies. The presiding officer of the children's court may be approached for the consent. If the presiding officer refuses to give the consent, the High Court, as the upper guardian of all minors, may be approached for the required consent.[42] The High Court will generally grant consent if the marriage is in the best interest of the minor.[43] However, it will decline to give consent if it is of the opinion that the marriage is contrary to the best interest of the minor.[44] If a minor marries without the required consent, the marriage is not void. Instead, it is voidable at the option of the parent or the minor.[45]

4.2 Consent of the guardian in marriages between majors – section 3(1)(b) of the Recognition Act

This note has dealt with consent of the parent or guardian in cases of minority. What about consent where one or both of the parties is a major? As stated above, on the face of it the *Recognition Act* requires the consent of only the intending bride and groom. However, the *Recognition Act* also contains a catch-all provision in section 3(1)(*b*), that provides that a customary marriage must be negotiated and entered into or celebrated in terms of customary law.[46] Section 3(1)(*b*) has been interpreted in various ways.[47] Nkosi and van Niekerk submit that this provision was left open-ended in order to accommodate the various ethnic groups that the Act caters for.[48] This submission is hereby supported. It is impossible for the legislature to specifically cater for all ethnic groups adequately in a single statute. While some practices may be similar, there are also differences among the different communities.[49]

In *MM v MN* section 3(1)(*b*) was interpreted to include the consent of the first wife in Tsonga.[50] Bakker supports the idea that section 3(1)(*b*) caters for the consent of the first wife.[51] He adds that it also caters for the "cultural practices of the relevant communities".[52] The handing over of the bride is

41 *Marriage Act* 25 of 1961 (the *Marriage Act*).
42 Section 25 of the *Marriage Act*.
43 *Allcock v Allcock* 1969 1 SA 427 (N); *B v B* 1983 1 SA 496 (N).
44 *De Greeff v De Greeff* 1982 1 SA 882.
45 Section 3(5) of the *Recognition Act* read with s 24A of the *Marriage Act.* See also Heaton and Kruger *South African Family Law* 20.
46 Section 3(1)(b) of the *Recognition Act*.
47 *Modiko v Sethabela* (4856/2016) [2017] ZAFSHC 123 (4 August 2017).
48 Nkosi and Van Niekerk 2018 *THRHR* 345.
49 Raphalalani and Musehane 2013 *JLC* 19 point out the fact that *ilobolo* is common to various ethnic groups in South Africa, albeit in different names. Magwaza *Orality and Its Cultural Expression* 29 refers to *umemulo* ceremony. This ceremony is done before a daughter is married. Some families perform it for the first born daughter and others perform it for all their daughter. Other do not perform it at all.
50 Van Niekerk 2013 *SAPL* 482.
51 Bakker 2016 *THRHR* 357.
52 Bakker 2016 *THRHR* 357.

one such practice. This being the case, can section 3(1)(*b*) be interpreted in such a manner that it accommodates the consent of the parent in cases where one or both the parties are majors? It is important to reiterate the purpose of section 3(1)(*b*), which is to accommodate the various cultural practices that are part of the conclusion of a customary marriage. Studies show that in practice the vast majority of African women will not marry without *ilobolo*.[53] In their view no self-respecting woman will marry without her parent's or guardian's consent. The belief is that the parent is most likely to give his consent to the marriage if *ilobolo* has been given.[54] In *Machika v Mthethwa*[55] the court held that section 3(1)(*b*) entails, *inter alia*, the consent of the parent or guardian of the bride.[56] Writing some time before the *Recognition Act*, Simons pointed out that consent could be inferred from the parent's or guardian's participation in the *ilobolo* negotiations and eventually acceptance of delivery thereof. In this way consent may be inferred from the parent's or guardian's conduct.[57]

Now that it has been established, with case authority that the consent of the parent is a requirement for a customary marriage, it is necessary to determine the effect of the absence of such consent. In other words, is a customary marriage valid without the consent of a parent, particularly the consent of the bride's parent or guardian? A parent or guardian may refuse to consent due to a number of reasons. He or she may also refuse to consent to the marriage for selfish reasons. Be that as it may, can such consent be circumvented without risking invalidity? This question must be answered with reference to the collective nature of culture. African communities defer to the authority of a family group and not an individual.[58] It is arguable that in some instances, the family as a group has more authority than the parent or guardian as a single individual.[59] Therefore, the family may negotiate *ilobolo* in the absence or refusal of the parent or guardian. It is submitted that this will depend on a number of factors including the reasons for the parent's absence or refusal and the willingness of the family to proceed with negotiations against the parent's or guardian's will. The family may also refuse to give consent to the marriage if they disapprove of the marriage.

On the face of it, the idea that a woman living under customary law still requires her parent or guardian's consent for marriage does not align well

53 Rudwick and Posel 2015 *Social Dynamics* 289.
54 Rudwick and Posel 2015 *Social Dynamics* 289.
55 *Machika v Mthethwa* (55482/2011) [2013] ZAGPPHC 308 (24 October 2013) (*Machika v Mthethwa*).
56 *Machika v Mthethwa* para 54.
57 Simons 1958 *Acta Juridica* 327.
58 Rudwick and Posel 2014 *JCAS* 118.
59 Bonthuys and Sibanda 2003 *SALJ* 784.

with the current dispensation that is premised on equality between men and women.[60] Section 6 of the *Recognition Act* also guarantees the equal status and capacity of the spouses. However, the requirement of the consent of the parent or guardian does not detract from a woman's equality and her capacity to act. It is submitted that this requirement should be seen in its living law context.

4.3 Consent to be married in terms of customary law

A distinction can be drawn between consent to marry in general and the more specific consent to be married under customary law. As stated above, section 3(1)(*a*)(ii) requires specific consent to be married under customary law. Such consent must come from both parties to the intended marriage. Strictly speaking, in the absence of the specific consent there can never be such a marriage. Having an opportunity to consent may be seen as a basic human right.[61] Anything less than this is a violation of the rights to human dignity and freedom. In essence, the resultant marriage could then be regarded as a forced marriage.

In the *LNM v MMM* case the respondent argued that the specific consent was lacking as the parties had agreed to conclude a civil marriage subject to an antenuptial contract and that their customary marriage was merely in compliance with the cultural aspects.[62] The court responded to this argument as follow:

> The argument advanced by the respondent engages the question of whether, despite his denial, an intention to conclude a customary marriage can be imputed to him. It is a factual question and a question of law.[63]

The court then referred to the decision in *MM v MN*, albeit in the context of a polygamous marriage, where the Constitutional Court cautioned that consent to a subsequent customary marriage must be understood in the framework of customary law. In *MM v MN* the Constitutional Court had also cautioned against imposing the common law understanding of consent and that courts should not assume that consent will have a universal meaning across all sources of law.[64]

In addition, the court reiterated its view of the “open, generous, flexible communal spirit of customary law";[65] and it went on to state that when these characteristics are correctly embodied, they place "a high premium on the right to dignity and the community beyond narrow individualistic interest."[66]

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60 Section 9 of the *Constitution of the Republic of South Africa*, 1996.
61 Singh 1999 *De Jure* 314.
62 *LNM v MMM* para 16.
63 *LNM v MMM* para 27.
64 *LNM v MMM* para 28.
65 *LNM v MMM* para 29.
66 *LNM v MMM* para 29.

It then concluded, "all the markers and essential rituals necessary to form a customary marriage were performed in this case",[67] including the handing over of the bride, which in the court's view was not imperative.[68] It is argued that this conclusion does not address the respondent's argument. While the characteristics referred to are indeed a correct reflection of the nature of customary law, it is submitted that in some instances, especially since the introduction of the Bill of Rights, communal interests yield to individual interest. As pointed out above, the right to dignity tips the decision in favour of allowing an individual to consent not only to being married, but also to consent to the system that will regulate the marriage. To hold otherwise is tantamount to promoting a forced marriage, something which section 3(1)(*a*)(ii) clearly seeks to prevent. A forced marriage must be distinguished from an arranged marriage, since an arranged marriage, if done with the consent of the parties, is legal.[69] It is submitted that the correct approach was for the court to properly establish proper the facts pertaining to whether or not the respondent had consented to be married under customary law rather than simply relying on mere compliance with the cultural aspects.

It is submitted that had the court considered the totality of the facts, vital information would have had bearing. It was common cause that the applicant had many debts. The respondent had sought to protect the interest of his children from previous relationships in the event of his death.[70] It is submitted that marrying a person who is heavily indebted in community of property has serious financial implications. Because of this, there is some credence in the respondent's argument that they had always agreed to be married out of community of property. The facts also show that the parties had executed an antenuptial contract to regulate their marital property regime in preparation for the civil marriage.

It is submitted that the court focussed too much on the fact that the parties had complied with the cultural aspect at the expense of historical reality. Africans comply with the cultural formalities even when a civil marriage is intended. Because customary marriages were treated as subservient to civil marriages in the past, African people are inclined to resort to dual marriages.[71] They regard the customary marriage as compliance with culture, whereas the civil marriage defines their marital status for everyday purposes. An example in point is the marriage between the late former president of South Africa and his wife, Nelson and Winnie Mandela.[72] Dual marriages were eventually permitted in the *Marriage and Matrimonial*

67 *LNM v MMM* para 30.
68 *LNM v MMM* para 30.
69 Horn 2002 *JJS* 172.
70 *LNM v MMM* para 15.
71 Osman 2019 *PELJ* 3-5.
72 Nkosi 2019 *SAPL* 1.

Property Law Amendment Act.[73] It is submitted that, despite the full recognition of customary marriages, African people have retained the practice of dual marriages. Osman refers to a dual marriage as a marriage celebrated in accordance with customary law but registered as a civil marriage.[74] Therefore, the respondent's arguments were not detached from reality.

Be that as it may, all the constituents for a customary marriage were present. The respondent's decision to commence with the cultural aspects without considering the legal implications worked against him. Lack of legal knowledge was also a contributing factor. This appears in paragraph 16 of the judgment where the respondent

> … claims that when he and the applicant discussed their marriage, they agreed that they would not marry in terms of customary law because of its proprietary consequences.

However, there is no basis for his argument, as the default position is the same in both civil and customary marriages. Another example of lack of knowledge is that the parties learned only at a later stage that their customary marriage was a valid marriage in community of property. The applicant argued that it was only at this stage that they agreed to change the marital regime.[75] The fact that the parties agreed to change their marital regime as soon as they became aware that they had been married in community of property lends credence to the argument that the parties had intended their civil marriage to be out of community of property.

4.4 The form of consent required

What form should specific consent to be married under customary law take? In *Moropane v Southon*[76] the SCA illustrated this as follows:

> In early 2002, the appellant proposed marriage to the respondent, who accepted. Although the parties are agreed on the intended marriage, they differ as to its nature. Were they going to be married according to customary law or civil rites? The respondent maintains that it was to be by customary law whilst the appellant stands firm that it was to be by civil rites. The

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73 *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988. S 10(1) of the incumbent *Recognition Act* retains dual marriages by making it possible for parties to a customary marriage to convert their customary marriage to a civil marriage. However, it would appear that in terms of s 10(4) of the *Recognition Act*, parties to a civil marriage are not legally competent to convert a civil marriage to a customary marriage.

74 Osman 2019 *PELJ* 9.

75 *LNM v MMM* para 19.

76 *Moropane v Southon* (755/2012) [2014] ZASCA 76 (29 May 2014) (*Moropane v Southon*).

> determination of this dispute is pivotal to the question whether a customary marriage or civil marriage came above.[77]

Consent may take the form of words or conduct. Horn and van Rensburg submit that it is unclear whether the legislature intended consent to be explicit or implicit.[78] If parties agree in words that they will be married under customary law, the matter will be clear and straightforward. Difficulties do arise if consent is inferred from the conduct of the parties, as in the case under present discussion.

The negotiation and delivery of *ilobolo*, though important, do not on their own denote consent to a customary marriage. This is because in practice, as pointed out above, Africans deliver *ilobolo* even where only a civil marriage is intended by the parties. The common practice is to deliver *ilobolo* before a civil marriage, regardless of the fact that *ilobolo* is not a requirement for a civil marriage.[79]

The point of departure is that if there is a dispute about the intended type of marriage, the court ought to make a finding whether a civil or customary marriage was intended based on the evidence available before it. The subsequent registration of a customary marriage could be a strong pointer to the intended marriage. However, this is not very helpful in the light of the existence of many unregistered customary marriages which are intended by the parties to be the final stage. Further, non-registration does not invalidate a customary marriage.[80] Another pointer is if the parties only conclude a customary marriage (registered or unregistered) and then commence to cohabit like husband and wife without entertaining the idea of a civil marriage for a considerable period. One can easily conclude that they intended the customary marriage to regulate their marital relationship. The case under present discussion can be distinguished from those since the idea of a civil marriage out of community of property had always been entertained and envisaged by the parties. The existence of a customary marriage in community of property is inconsistent with this fact.

4.5 The handing over of the bride not imperative

In the case under discussion all the rituals had been complied with, including the handing over of the bride. Nonetheless, the court pointed out that this was not imperative.[81] As pointed out above, the court relied on *Mbungela v Mkabi* and *Tsambo v Sengadi* to reach this decision. In *Mbungela v Mkabi* the SCA held that the handing over was a flexible practice and that it had

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77 *Moropane v Southon* para 5.
78 Horn and Van Rensburg 2002 *JJS* 59.
79 Knoetze 2000 *TSAR* 536; West and Bekker 2012 *Obiter* 357; Nkosi 2019 *SAPL* 9.
80 Section 4(9) of the *Recognition Act.*
81 *LNM v MMM* para 30.

been waived by the parties concerned. The SCA went on to find that the parties and the families had waived it when the parties began cohabiting as husband and wife.[82] In *Tsambo v Sengadi* the SCA held that parties could waive the physical handing over in favour of a symbolic one.[83] It must be pointed out that both these decisions have been heavily criticised.[84] Although these decisions held that the handing over could be waived by the parties concerned, this should not be read as implying that the handing over is not imperative. A case could arise where the parties and their families clearly intended that the customary marriage will be concluded only on the handing over of the bride, leaving little room for any inference that the parties had waived the handing over. It is submitted that the decisions above are authority only for the assertion that parties may choose to waive the handing over if they so wish. To this end, the caution expressed by the court in *ND v MM*[85] resonates:

> Waiver in our law is not assumed, and clear proof must be provided. The conduct, from which the waiver is inferred, must be unequivocal, consistent with no other hypothesis (such as mere non-compliance with an obligation).[86]

Simons points out that historically the handing over of the bride could be waived, for instance, in cases of *ukuthwala* where the bride had already been physically carried off.[87] Simons also points out the difficulty that arises in cases of cohabitation. He notes that in the past authorities who were not well versed with customary marriages were prepared to find that a marriage existed if there was cohabitation, regardless of the fact that none had existed in the first place.[88] Customary law was distorted in this way.

4.6 Annulment of a marriage

Whether a marriage can be annulled under customary law is unknown. Certainly, the common law requirements for an annulment do not blend in with customary law. For instance, the practice of marrying minor children is

82 *Mbungela v Mkabi* paras 25 and 26.
83 *Tsambo v Sengadi* para 31.
84 Bapela and Monyamane 2021 *Obiter* 186, 189-191.
85 *ND v MM* (18404/20180) [2020] ZAGPJHC 113 (12 May 2020) (*ND v MM*).
86 *ND v MM* para 30.
87 Simons 1958 *Acta Juridica* 330.
88 Simons 1958 *Acta Juridica* 331.

a reality.[89] Under the common law this could be a ground for annulment.[90] Further, the degrees of marriage prohibited in common law may differ from those under customary law. For this reason section 3(6) of the *Recognition Act* provides that the prohibited degrees of a customary marriage must be determined according to the customary law. It is submitted that the customary law of marriage should be developed in as far as it may not recognise action for annulment. The absence of consent to enter into a customary marriage should be a ground for an annulment.

Accordingly, a marriage that does not comply with the formal or material requirements is voidable and may be annulled.[91] The respondent had performed all the actions that are required for a valid customary marriage. However, in the light of his argument that the requirement of consent to marry under customary law was absent since they had always agreed that they would enter into a civil marriage, could he approach the court to annul the customary marriage? It is submitted that unless the court can impute consent, there is no reason that people in the same position as the respondent should not be able to approach the courts for an annulment.

5 Conclusion

Consent may be seen as a fundamental human right. People should be allowed to consent to marriage. This case note has discussed how the *Recognition Act* not only requires consent to marriage, but also requires specific consent to be married under customary law. It has also argued that a customary marriage entered into without the specific consent should be invalid. The case note has also discussed the consent of the parent or guardian in customary marriages. It has been argued that section 3(1)(*b*) also caters for the consent of the parent or guardian and that if the parent or guardian refuses to give consent, the family group has the authority to give consent by participating in the *ilobolo* negotiations. Particularly, this case note has shown how in *LNM v MMM*, despite acknowledging that a person must specifically consent to be married under customary law, the court concluded that the respondent had consented to be married under customary law without establishing a proper factual basis to impute specific consent. This approach has been criticised. The case note has also

89 See Stats SA 2019 http://www.statssa.gov.za/publications/P0307/P03072019.pdf 3-5. The statistics show that in 2019 3 brides and 68 bridegrooms in civil marriages were under the age of 18; while 512 brides and 9 bridegrooms were married in terms of customary law during the same year. In the same year the Sowetan reported on Siyacela Dlamuka and Thando Thabethe, who were married as teenagers. News of their marriage earned them a reality television show on MojaLove DSTV channel. See Kgobotlo 2019 https://www.sowetanlive.co.za/sundayworld/news/2019-08-18-sas-celeb-teenage-hubby-quits-school/.

90 Barratt *et al Law of Persons and the Family* 252.

91 Heaton and Kruger *South African Family Law* 33.

discussed the form that specific consent should take; it has shown that specific consent may take place by words or conduct. Further, it has shown *inter alia* that specific consent cannot be inferred from the act of negotiating and delivering *ilobolo,* as it is also delivered for a civil marriage. The case note also addressed the issue of the handing over of the bride. A party to a customary marriage entered into without specific consent should be allowed to bring action to annul the marriage.

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List of Abbreviations

DRA	Deeds Registries Act 47 of 1937
JCAS	Journal of Contemporary African Studies
JLC	Journal of Language and Culture
JJS	Journal of Juridical Science
MPA	Matrimonial Property Act 88 of 1984
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal

SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman Dutch Law)
TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)