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Kronieke / Chronicles

Non-recognition?: Lobolo as a requirement for a valid customary marriage*

1. Introduction

In traditional African societies marriage is one of the factors taken into account when determining the rights, duties and obligations of an individual in society, in other words to determine the status of the individual in that particular societal grouping.[1] It is common cause that there is a perceived inequity between men and women in African society. This becomes apparent when taking into account the massive research that has been done on this specific issue, especially matters relating to polygamy and the requirement of *lobolo* [2] as a prerequisite for a valid customary marriage.[3]

The rectification of the inequities of the past, as well as those perpetrated by a system of patriarchy, have been high on the political agenda for the longest time, and the government's efforts culminated in the promulgation of the interim[4] and the final Constitutions, stating as one of its founding values non-sexism and equality.[5]

Various academics and human rights advocates have over the years argued against and for the abolishment of *lobolo* as a prerequisite for a valid customary marriage. Their reasons for attacking the payment of *lobolo* have been, amongst others, that the payment or arrangement of *lobolo* is demeaning and it is said to be a tool through which the active subordination of women is further entrenched in our society.[6] Others have argued that *lobolo* is an essential and necessary part of customary life in that the bride's family is compensated for the loss of the earning capacity of their daughter and the transfer of the reproductive capacity of a woman to the family of her husband.[7]

* We are indebted to Professor Willemien du Plessis for her constructive comments and suggestions which enabled us to finalise this chronicle.

1 Bennett 1995:174-182; see also Olivier 1995:3. Other factors taken into account are tribal membership, gender, status, age and legitimacy. See also Dlamini 1999:14.

2 Bridewealth, *lobolo* or *bogadi*.

3 Murray and Kaganas 1994:17-20; Bekker 1989:150-151; Olivier 1995:32-33; Dlamini 1999:32; just to name a few.

4 Constitution of the Republic of South Africa 200/1993 (hereinafter 'the interim Constitution').

5 Section 1 of the Constitution of the Republic of South Africa 108/1996 (hereinafter 'the Constitution').

6 Bennett 1995:118.

7 It is accepted today that the payment of *lobolo* is not a sale transaction. Olivier 1995:33; Bekker 1989:151.

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The complexity of the matter is further outlined by the conflicting views and interpretation of, *inter alia*, the provisions of the Constitution and the rules of customary law. This conflict was pre-empted by the Constitutional Court in the certification of the final Constitution,[8] where *lobolo* was specifically mentioned as a principle of patriarchy which could be 'outlawed by the Bill of Rights, thereby undermining the core of indigenous law'.[9] The conflict is more than adequately illuminated by the recent *Mthembu v Letsela* decisions[10] and the resulting torrent of publications.

The recently promulgated *Recognition of Customary Marriages Act* [11] (hereinafter 'the Recognition Act'),[12] ensured the recognition of potentially polygamous customary marriages,[13] and reinforced the premise advocated by the Constitution, namely that all South Africans irrespective of race, colour or creed are equal before the law and have equal benefit from the law.[14]

Taking into account this history, it is not surprising that the National Legislature's focus on equality, as a result of the constitutional mandate placed on it,[15] has sprouted Act 4 of 2000, the *Promotion of Equality and Prevention of Unfair Discrimination Act*.[16] This fledgling Act, in some ways unique, has more than its share of difficulties to face.[17] The Act launches a wholesale attack on customary practices, as is evident from section 8(c)-(d) of the Act.

> (N)o person may unfairly discriminate against any person on the ground of gender, including -
>
> (c) the system of preventing women from inheriting family property;
>
> (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl-child.

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8 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 CC; *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 CC:[198]-[190] *per* Sachs J.

9 *Du Plessis and Others v De Klerk and Another* :[200].

10 *Mthembu v Letsela and Another* 1997 2 SA 936 T (hereinafter 'the first *Mthembu*-decision'); *Mthembu v Letsela and Another* 1998 2 SA 675 T (hereinafter 'the second *Mthembu*-decision'); *Mthembu v Letsela and Another* 2000 3 SA 867 SCA (hereinafter 'the third *Mthembu*-decision').

11 *Recognition of Customary Marriages Act* 120/1998.

12 Act 120/1998 came into force on 15 November 2000.

13 Section 2(3) of Act 120/1998.

14 Section 6 of Act 120/1998.

15 Section 9(4) of Act 108/1996.

16 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

17 Section 8 sets out the grounds of unfair discrimination, and these include practices which in the past prohibited women to inherit property, or prevented women access to land, or practices which undermine equality between men and women. It is clear that most of the rules of African customary law dealing with women will come under scrutiny as a result of Act 4/2000.

Sub-section (d) might be construed to indicate that the negotiation of *lobolo* is outlawed, especially when one takes into account the criticism against this traditional practice, as cited above. In the light of this statement and the importance of equality[18] in a society divided, emphasis needs to be placed on the implications of the enforcement of, amongst others, the *Recognition Act*, especially with regard to the acceptance or abolishment of *lobolo* as a prerequisite for a valid customary marriage.

In this contribution we intend to discuss *lobolo*, in the milieu of the culture-equality debate, as a prerequisite for a valid customary marriage, specifically with reference to its nature and the impact of the *Recognition Act*.

2. Requirements for a valid customary marriage

Traditionally it was not uncommon to arrange customary marriages, sometimes even without the knowledge of the girl or the young man to be wed. As a matter of fact the two essential requirements for a valid customary marriage were (a) consensus between the two family groupings with respect to the two individuals to be wed and the *lobolo* to be paid, and (b) the transfer of the bride to her new family. Later the whole process became more individualised, even though the traditional requirements still needed to be adhered to, such as the consent of the guardian of the bride, the handing-over of the bride and the highly controversial *lobolo* agreement. The emphasis seems to have shifted from family involvement to serving the interests of individual prospective spouses. This trend can be more than adequately illustrated with reference to the requirements for a legally binding[19] customary marriage up until the *Recognition Act* as well as the requirements instituted by the said act, such as the requirement that the actual consent of the bridal couple is required as to the application of customary law.[20]

Notwithstanding all these developments bride-wealth or *lobolo* has always been a very important part of the marriage negotiations. The physical delivery of *lobolo* is not an essential requirement for validity, but the subsequent non-delivery can give rise to grounds for the annulment of the marriage.[21] Not only is the importance of *lobolo* illustrated by this fact, the marriage is also regarded as "incomplete", and the status of the children born out of such a marriage is ultimately affected by the non-compliance with the *lobolo* prerequisite, which serves to further enshrine the position of *lobolo* in customary law.[22]

18 Section 9 of Act 108/1996.

19 Olivier 1995:21. The non-consummation, for whatever reason, does not invalidate the customary union; however, the ability of the wife or wives to reproduce is an important factor in determining the maintenance of the continued marital relationship.

20 Section 3(1)(a)(ii) of Act 120/1998.

21 Olivier 1995:40.

22 Olivier 1995:32-34; see also Bennett 1995:220; Jansen and Ellis 1999:43.

The South African Law Commission considered this question and found that, despite its relevance in African society, the actual payment thereof is seldom considered as an essential for a valid customary marriage.[23]

Before the promulgation of the *Recognition Act*, the judiciary had a very important role in the preservation of *lobolo*. The following cases can be cited as examples of the continued recognition of *lobolo* as an essential requirement for a valid customary marriage. In late 1997 the second *Mthembu*-case was heard, and Mynhardt J found that the applicant and the deceased were not married in accordance with customary law, because the deceased died before the whole *lobolo* payment was made.[24] Despite the fact that the court found that the non-payment of *lobolo* rendered the marriage invalid, this case can still be cited to support the importance of *lobolo*. At the same time *Mabena v Letsoalo* [25] was heard, and Du Plessis J found that the bride's mother could negotiate the *lobolo* agreement in the absence of the bride's father. Even though the court did not expressly name the *lobolo* agreement as an essential, it can rightly be adduced that it was indeed considered to be a prerequisite for a valid customary union. In *Hlope v Mahlalela and Another*,[26] a father volunteered outstanding *lobolo* to his deceased wife's father to obtain guardianship over his children. This case serves as an illustration of an almost forgotten aspect of the nature of *lobolo*, namely the maintenance and custody character thereof.[27]

It is clear from the cases mentioned that *lobolo* is deemed to be a prerequisite for a valid customary marriage, as far as the judiciary is concerned, whether for the purposes of validation or maintenance and custody. The legislature itself is quite outspoken with regard to the importance of *lobolo*, especially when section 1(1) of the *Law of Evidence Amendment Act* [28] is taken into account. This section states that a court may take judicial notice of customary law but may not "declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant" to the principles of public policy and natural justice.[29] This section is still operational and has to be adhered to by the courts.

The *Recognition Act* lists as prerequisites for a valid customary marriage the following: (1) both the prospective spouses must be at least 18 years old,[30] (2) they must both consent that the potential marriage will be solemnised in

23 Republic of South Africa:56-61. Despite this finding the court in the second *Mthembu*-case found, on the insistence of counsel, that it was common cause that no marriage existed between the deceased and the applicant, based on the fact that the deceased had not paid the entire *lobolo* amount before his untimely demise.

24 *Mthembu v Letsela* 686 E-F.

25 *Mabena v Letsoalo* 1998 2 SA 1068 T.

26 *Hlope v Mahlalela and Another* 1998 1 SA 449 T.

27 Jansen and Ellis 1999:47.

28 *Law of Evidence Amendment Act* 45/1988.

29 This section's origins can be traced back to section 11(1) of the *Black Administration Act* 38/ 1927.

30 Section 3(1)(a)(i) of Act 120/1998.

terms of customary law,[31] and (3) the marriage must be "negotiated and entered into or celebrated in accordance with customary law."[32] Instead of taking the cue from the Law Commission the legislator remained silent on the aspect of the payment of *lobolo*. Samuel[33] interprets this silence to imply that:

> (i)n the Act, bridewealth is not a requirement for a valid marriage and the non-payment will have no effect on the rights of the spouses towards one another and their children.[34]

3. *Lobolo*: the 'non'-requirement?

Taking all this into account the question still remains: to what extent does the *Recognition Act* recognise the *lobolo* agreement as an essential for a valid customary union?

At first glance it seems that *lobolo* was not retained as a prerequisite for validity, as Samuel[35] intimated, but despite the fact that no specific mention is made of *lobolo*, it is referred to both directly and indirectly in the Act: indirectly to the extent that section 3(1)(b) requires that the marriage be negotiated and entered into in accordance with customary law, and directly to the extent that the registration officer must register "any *lobolo*"[36] received. The Act even defines, in section 1 thereof, "*lobolo*" as:

> property in cash or in kind, [...] which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family *in consideration of a customary marriage* [37] (our emphasis).

The true intention of the legislator has to be determined in order to conclude as to the retainment of *lobolo* as a prerequisite or as to its abolishment. The discussions before the promulgation of the Act leaned towards the abolishment of *lobolo*, on the grounds that custom, as it is exercised today, does not place such a high value on the payment of *lobolo* as had been the position previously. This sentiment was accurately resounded by Du Plessis J in *Mabena v Letsoalo* in which he stated that:

> [...] customary law exists not only in the 'official version' as documented by writers, there also is the 'living law', denoting 'law actually observed by African communities'.[38]

31 Section 3(1)(a)(ii) of Act 120/1998.
32 Section 3(1)(b) of Act 120/1998.
33 Samuel 1999:23-31.
34 Dlamini 1999:32 states that Act 120/1998 does not recognise *lobolo* as an essential for a valid customary union.
35 Samuel 1999:23-31.
36 Section 4(4)(a) of Act 120/1998.
37 Section 1of Act 120/1998.
38 *Mabena v Letsoalo*:1074.

Jansen[39] elaborated on this statement when she noted that:

> [...] [l]egislation has the most chance of success when it has the consensus of the people behind it, when it confirms attitudes and patterns which the people, by their behaviour, have demonstrated that they hold and value.

Irrespective of all the preparatory statements, especially taking into account the dynamic nature of customs and society, it is not clear from the Act whether the recommendation of the South African Law Commission was indeed heeded. It is our submission though that, in the face of arguments to the contrary, *lobolo*, as an essential requirement for a valid customary marriage, was indeed retained by the *Recognition Act*. Our argument is based on the interpretation of the sections cited below:

Section 4(4)(a) of the Act reads as follows:

> (4)(a) A registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, *any lobolo agreed to* and any other particulars prescribed. (Our emphasis)

The Afrikaans text reads:

> (4)(a) 'n Registrasiebeampte moet, indien hy of sy oortuig is dat die gades a geldige gebruiklike huwelik gesluit het, die huwelik registreer deur die identiteit van die gades, die datum van die huwelik, *enige lobolo waarop daar ooreengekom is* en enige ander voorgeskrewe besonderhede aan te teken. (Our emphasis)

Taking into account the actual wording of the text it is clear that some sort of *lobolo* agreement was indeed envisaged by the legislator. Admittedly the section quoted does not make it clear if "any" can be construed to mean "the registration of *lobolo* if or in the event that it had been agreed upon", or "the registration of *lobolo* as per the agreement between the parties involved as a fulfilment of the *essentialia* of a customary union".

Another consideration to be taken into account is the meaning of "in accordance with customary law". Longman's *Dictionary of Contemporary English* on page 6 defines "in accordance with" as "in a way that fulfills or agrees with". In other words, a marriage "in accordance with customary law", can be re-stated as a marriage that must be practised in a way that agrees with customary law. The question is not answered by merely referring to the dictionary meaning of a particular phrase, but the reference can clarify the issue, especially when taking cognisance of the fact that at the time of the promulgation of the *Recognition Act*, the payment of *lobolo* was recognised as an essential for a valid customary union by customary law.[40] This is clear from the case law referred to in the discussion above, therefore the payment of *lobolo* "agrees with" the application of customary law, which renders it applicable and thus necessary.

39 Jansen and Ellis 1999:45.
40 Mqeke 1999:60.

4. Conclusion

On closer inspection of the above-mentioned sections it becomes quite clear that the legislator's silence on the issue does not necessarily justify the conclusion that *lobolo* was indeed abolished as an essential for a valid customary marriage, particularly when taking into account recent case law on the issue. The section 3-prerequisite, namely that the prospective spouses must consent to the application of customary law, and that the marriage "must" be negotiated in terms of customary law, read with the registration provision, makes it all too clear that *lobolo* was indeed retained as a prerequisite.

It is clear that explicit abolishment, if it was indeed so intended, of the prerequisite of the payment of *lobolo* is imperative. Legal certainty necessitates clear and unambiguous language. The *status quo* is clearly unacceptable, in that *lobolo* is hoped to have been abolished by this Act by academia and practitioners alike, but one cannot list the prerequisite that the marriage must be entered into and celebrated in accordance with customary law, and expect that *lobolo* is abolished merely because it is not specifically mentioned in the Act.

It is our submission that customary unions, in order to be regarded as valid, need to adhere to the prerequisites stated in the Act and those practised throughout South Africa. This would entail that where applicable, a *lobolo* agreement has to be entered into, in order to ensure the validity of the marriage.

The *Promotion Act* states as one of its founding provisions that the inequities, both social and economic, generated by, amongst others, patriarchy must be eradicated.[41] The argument of academics opposing the payment of *lobolo* is that it, no matter what basis it relies on for its existence, constitutes a mechanism through which women are continuously subordinated and serves as a vehicle for the perpetuation of patriarchy and continued inequality. The *Promotion Act* is very persistent in its attack on all oppressive norms and values,[42] but it allows for some leeway. Section 3, the interpretation-clause of the Act, states that "(a)ny person interpreting this Act *may* (not must) be mindful of — any relevant law or code of practice in terms of a law." (Our emphasis).[43] *Lobolo* is recognised as non-redundant in terms of section 1(1) of the *Law of Evidence Amendment Act* 45 of 1988, which is still operational, and *lobolo* is widely practised throughout South Africa (and recognised in terms of law). Does this constitute "code or practise in terms of law"? Does this mean that *lobolo* is rendered "untouchable", yet again,

41 Preamble of Act 4/2000.

42 The Preamble of the Act 4/2000 is indicative of the single-minded undertaking of the legislator especially with reference to the last paragraph of the Preamble: "This act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom."

43 Section 3(2) of Act 4/2000.

even in terms of the *Promotion Act* ? Or may the court take cognisance of section 1(1), and still find it redundant? These questions can only be answered if it is found that the payment of *lobolo* can be constructed as an infringement on the rights of women, especially their right to equality and human dignity.

On a superficial level, the practice might seem to boil down to the purchase of a wife, but it is Bennett's[44] submission that 'the practice of giving bridewealth does not directly involve less favourable treatment for wives than hushands', considering the fact that men have to pay *lobolo*, and not women.

The debate regarding the apparent conflict between culture and equality is ongoing. It is hoped that a suitable conclusion will be reached in the near future, but for the meantime practitioners are bound by text, statute and case law when determining such a legal question. This does not exclude legal development, as it is well known that the dynamic nature of custom in our changing and never static society necessitates development. (The words of Du Plessis J in the *Mabena*-case rings true.) It is therefore not inconceivable that the *lobolo*-prerequisite can be abolished in the near future, especially taking into account the *Promotion Act* and the emphasis it places on equality and the eradication of patriarchy, but it is clear that such a step can only be taken once sound empirical research has been done to determine the prominence of the custom in African society today or the true nature of *lobolo* is rediscovered.

The difficulty faced by our courts in dealing with the relationship between custom and equality was pre-empted by Sachs J in *Du Plessis and Others v De Klerk and Another* where he concluded that he has:

> difficulty in seeing how this Court (the Constitutional Court) could effectively examine the constitutional propriety of institutions like *lobola* or *bohadi* and each and everyone of their myriad inter-related rules and practices.[45]

A possible approach to solve the difficulty regarding the equality and culture question was proposed by the Judge. He is of the opinion that:

> (t)he indirect approach would permit courts closer to the ground to develop customary law in an incremental, sophisticated and case-by-case way so as to progressively, rapidly and coherently bring it into line with the principles of chapter 3.[46]

Clearly the *Promotion Act* advocates this approach with the insertion of section 3(3), which reads:

> (3) Any person applying or interpreting this Act must take into account the context of the dispute and the purpose of this Act.

44 Bennett 1995:118.
45 *Du Plessis and Others v De Klerk and Another* :[189].
46 *Du Plessis and Others v De Klerk and Another* :[189].

The question that needs to be answered is whether it is feasible to deal with the matter in a casuistic manner, particularly with matters that affect so many South Africans. On the other hand one must be mindful of the implications, especially implications pertaining to the Bill of Rights, of a once-off approach through which all practices which are perceived to bring about inequality are eradicated, particularly in the light of the recognition of culture[47] in the Bill of Rights.

The problems illuminated in the discussion are a mere indication of the potential complications faced by our legislators and courts. It is problems unique to a pluralistic system. These problems are also uniquely African, and very uniquely South African, for South Africa possesses one of the most progressive Constitutions amongst the so-called developed nations, but is still faced with the age-old concepts of primogeniture and patriarchy. It is clear that we face a new solution to a problem spawned before the dawn of time, a renaissance in the legal profession and interpretation of laws.

47 Sections 30 and 31 of Act 108/1996.

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