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The essence vindicated? Courts and customary marriages in South Africa

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Summary

This article describes different approaches in which courts have determined the validity of customary marriages under the Recognition of Customary Marriages Act in order to address the historical injustices of vulnerable parties in a customary marriage. These approaches are drawn from selected cases decided after the Act came into effect and consist of two scenarios, namely, 'judicial notice' and 'proof' of customary law. These approaches produce considerably distinct results. On the one hand, where courts adopt the approach of 'judicial notice' and apply official customary law, the inevitable result has been the invalidation of marriages. On the other hand, if the approach has emphasised the recognition of the essence of customary law, courts have validated these marriages and protected vulnerable parties. These results may support (at least partly) the theory by various scholars that the Constitution envisaged that courts will be applying living customary law in order to fulfil their constitutional obligations.

Key words: *customary marriages; validity; judicial notice; proof of customary law; living customary law*

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1 Introduction

Since the coming into effect of the Recognition of Customary Marriages Act (RCMA),[1] case law show that customary rules and practices that regulate the validity of a customary marriage have undergone significant change.[2] The motivating factor has been the Constitution of the Republic of South Africa, 1996 (Constitution).[3] For example, courts have accepted the rule laid down in *Mabena v Letsoalo*,[4] namely, that a woman could now negotiate and receive *lobolo*.[5] In accepting this change, Judge Dlodlo in *Fanti v Boto* cited with approval *Mabena v Letsoalo* and observed that '[i]f courts do not observe the role played … by women in society, then that would include failure … on their part to participate in the development of customary law'.[6]

In addition, courts have accepted the requirement that, under Tsonga customary law, a husband who wants to marry a subsequent wife must inform his first wife.[7] This, again, was based on the fact that 'any notion of the first wife's equality with her husband would be completely undermined if a husband were able to introduce a new marriage partner to their domestic life without her consent'.[8] More recently, in *Nhlapo v Mahlangu*[9] the court accepted evidence by expert witnesses that according to Ndebele culture, 'when a man wants to enter into a second customary marriage he must have the first wife's approval'.[10] In recognising this rule, the court made

1 The Recognition of Customary Marriages Act, 1998 (RCMA), which regulates all customary marriages in South Africa, came into effect on 15 November 2000.

2 See, eg, the cases of *Mabuza v Mbatha* 2003 (4) SA 218 (C) and *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).

3 In particular, sec 39(2) of the Constitution provides that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. In addition, sec 211(3) provides that '[c]ourts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.

4 In *Mabena v Letsoalo* 1998 (2) SA 1068 (T), decided prior to the RCMA, the High Court gave effect to the living custom that allows the mother of the bride to perform the task of negotiating and receiving *lobolo*. Traditionally, this requirement was met if the agreement was between the bride's and groom's male guardians.

5 *Fanti v Boto* 2008 (5) SA 405 (C) para 21.

6 *Fanti v Boto* (n 5 above) para 21

7 According to expert witnesses' evidence, the requirement was to 'inform' the wife and her 'consent' was not needed. *Mayelane v Ngwenyama* (n 2 above) para 61.

8 *Mayelane v Ngwenyama* (n 2 above) para 72. In addition, the Constitutional Court in para 74 observed, 'given that marriage is a highly personal contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent'.

9 [2015] ZAGPPHC 142 para 34. Briefly, the challenge to the validity of the marriage was brought by the first wife who alleged that, according to Ndebele custom, her consent as the first wife was a requirement for subsequent marriages by her husband.

10 *Nhlapo v Mahlangu* (n 9 above) para 33.

reference to the *dictum* in *Mayelane v Ngwenyama* and was of the opinion that 'consent of the first wife was a necessary dignity and equality component of a further customary marriage in terms of section 3(1)(b) of the Recognition Act'.[11]

Against this brief background, the article explores whether courts apply living or official customary law when establishing the validity of customary marriages. The aim is to assess how courts address the injustices of the past that led to the non-legal protection of vulnerable parties, particularly women, in customary marriages. The article is divided into five main sections. The second section briefly outlines the legal framework regarding the requirements for a valid customary marriage under the RCMA. This part also discusses the distinction between living and official customary law. The third part is a discussion of the two main approaches adopted by courts in determining the validity of a customary marriage, namely, the 'judicial notice approach' and 'proof of customary law approach'. The fourth section is a critical analysis of the cases discussed and addresses the question whether courts protect vulnerable parties in a customary marriage. The last section is a conclusion in which, borrowing from Ozoemena's words, it is argued that 'the value of the Recognition Act as a tool to remedy the injustices of the past in relation to customary marriages'[12] can be achieved when courts apply living customary law. Such an approach may partly also support the theory by various scholars that the Constitution envisaged that courts would be applying living customary law in order to fulfil their constitutional obligations.[13]

11 *Nhlapo v Mahlangu (*n 9 above) paras 30 & 33 as cited in *Mayelane v Ngwenyama* (n 2 above) para 30.

12 R Ozoemena 'Legislation as a critical tool in addressing social change in South Africa: Lessons from *Mayelane v Ngwenyama*' (2015) 18 *Potchefstroom Electronic Law Journal* 969 987.

13 TW Bennett 'Reintroducing African customary law to the South African legal system' (2009) 57 *American Journal of Comparative Law* 1 11. Further, Bennett 8 observed that the '[c]onstitutional protection was reserved for the living law, which was deemed a genuine feature of African culture'. See also W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *South African Journal on Human Rights* 241 247. Lehnert (247) observes that 'the courts' obligation to apply customary law must refer to the living law because the distorted official customary law cannot be regarded as an expression of the culture of black South Africans'. See C Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: Problem solved or just beginning?' (2000) 117 *South African Law Journal* 306 331 where similar observations were made. In addition, Himonga & Bosch 328 observed that '[i]n the South African situation, the recognition of a right to culture also implies the recognition of theoretical frameworks of law that lie outside the legal positivists approaches to law. Denying that law can exist outside the state-generated law is tantamount to denying that there is a right to culture.' Reference can also be made to C Himonga & A Pope '*Mayelane v Ngwenyama and Minister for Home Affairs*: A reflection on wider implications' (2013) *Acta Juridica* 318 321.

2 Requirements for a valid customary marriage under the Recognition of Customary Marriages Act

The RCMA regulates all customary marriages in South Africa.[14] According to section 2, it recognises two types of marriages, namely, marriages concluded before and after the coming into effect of the RCMA.[15] Marriages concluded before the RCMA are recognised provided they are in existence and valid at the time when the Act came into force.[16] With the exception of KwaZulu-Natal, the requirements for a valid marriage concluded before the RCMA are, therefore, provided under traditional living customary laws as observed by indigenous communities.[17] These requirements, as outlined by several scholars,[18] include the age of puberty or undergoing initiation ceremonies; consent of spouses; consent of parents or guardians, especially the bride's male guardian or father; prohibited degrees of relationships, whereby most communities prohibited marriages between members of the same clan; formal delivery or handing over of the woman from her family to the family of the husband; the agreement that *lobolo* will be delivered; and non-existence of a civil marriage.

For customary marriages concluded in KwaZulu-Natal, the requirements, as stipulated under section 38(1) of the KwaZulu Act on the Code of Zulu Law and Natal Code of Zulu Law, are consent of the father of the prospective wife (if a minor), which consent may not be withheld without good reason; consent of the father of the prospective husband (if a minor); and a public declaration by the intended wife to an official witness at the celebration of the marriage

14 According to the Preamble, the RCMA is an 'Act to make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith'.

15 Sec 2(1) of the RCMA provides that '[a] marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage'. Sec 2(2) of the RCMA provides that '[a] customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage'. Sec 2(3) provides that '[i]f a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages'. Sec 2(4) provides that '[i]f a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages'.

16 See also IP Maithufi '*MM v MN*' (2012) 2 *De Jure* 405.

17 See TW Bennett *Customary law in South Africa* (2004) 194.

18 Eg, Bennett (n 17 above) 195 and C Rautenbach et al *Introduction to legal pluralism* (2010) 50.

that the union was with her free will and consent.[19] After the RCMA came into effect, section 3(1) requires that both parties must be over the age of 18;[20] both parties must give consent to be married under customary law;[21] and, more relevant to this discussion, 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'.[22]

From the preceding paragraphs, whether a customary marriage was concluded before or after the RCMA, one of the crucial requirements for its validity is meeting the *customary law* requirements. But what is customary law in the context of customary marriage requirements? According to the RCMA, customary law is defined 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'.[23] Literature informs us that there are mainly two forms of customary law: living and official law.[24] These forms have been confirmed in, for instance, *Bhe v Magistrate Khayelitsha,*[25] in which case the Constitutional Court stated: 'the official rules of customary law are sometimes contrasted with what is referred to as living customary law, which is an acknowledgment of the rules that are adapted to fit in with changed circumstances.'[26] Again, in *Mabena v Letsoalo*, the High Court held that there are two forms of customary law, 'an official version as documented by writers, and living law, denoting law actually observed by African communities'.[27] In addition, legislation dealing with customary law also recognises the coexistence of official and living customary law. For example, both the RCMA and Reform of Customary Law of Succession and Regulation of Related Matters Act of 2009 (Customary Succession Act) define 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'.[28]

19 Sec 38(1) of the KwaZulu Act on the Code of Zulu Law 16 of 1985 and Natal Code of Zulu Law published in Proclamation R151 of 1987, GG 10966.

20 Sec 3(1)(a)(i) RCMA.

21 Sec 3(1)(a)(ii) RCMA.

22 Sec 3(1)(b) RCMA.

23 Sec 1 RCMA.

24 Authors, eg, C Himonga et al (eds) *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 27 have observed a third form of customary law which is state generated by courts and legislation. On the general discussion on dichotomy between official and living customary law, see generally Himonga & Bosch (n 13 above) 319-331.

25 2005 (1) SA 580 (CC).

26 *Bhe* (n 25 above) para 87.

27 *Mabena v Letsoalo* (n 4 above) para 1074.

28 See secs 1 of both the RCMA and the Customary Succession Act. It should, however, be observed that, even though both legislations use the exact same wording in defining customary law, there is a minor difference between the two. The RCMA use the word 'peoples' and the Customary Succession Act use 'people'. The difference, however, does not affect the fact that both legislations envisage the living customary law as observed by the indigenous communities. See also

In addition, when determining the applicable customary law in the context of customary marriage requirements, it is important to restate that these laws are diverse due to the different ethnic groups that exist in South Africa.[29] This diversity, compounded by the different forms and sources of customary law,[30] gives rise to the need to ascertain the applicable customary laws in a given case, which remains a challenge.[31] Furthermore, our courts have observed that 'customary law is a dynamic system of law that, along with society, changes with time'.[32] This position has led courts to emphasise the importance of proving the custom in the context of customary marriages. In *Moropane v Southon*,[33] for example, the court observed:[34]

> African law and its customs are not static but dynamic. They develop and change along with the society in which they are practiced. This capacity to change requires the court to investigate the customs, cultures, rituals and usages of a particular ethnic group to determine whether their marriage was negotiated and concluded in terms of their customary law at a particular time of their evolution.

Again, in *Mayelane*, the Constitutional Court observed:[35]

> First, a court is obliged to satisfy itself, as a matter of law, on the content of customary law, and its task in this regard may be an onerous where the customary law rule at stake is a matter of controversy with the constitutional recognition of customary law, this has become the responsibility of the courts. It is incumbent on our courts to take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule.

The above discussion show that the Constitution envisaged that courts will be applying living customary law.

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definitions by different customary law scholars, eg Rautenbach et al (n 18 above) 29 define living law 'as original customs and usages that are in constant development'. Himonga et al (n 24 above) 27 refer to Hamnett's description of customary law 'as a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority'. Bennett (n 17 above) 1 indicates that 'customary law is derived from social practices that the community concerned accepts as obligatory'.

29 *Mayelane v Ngwenyama* (n 2 above) para 51. See also Himonga & Pope (n 13 above) 322.

30 The different sources of customary law may include customs and usages of the communities, case law and legislation.

31 See also recently observed by Ozoemena (n 12 above) 977 and Lehnert (n 13 above) 246.

32 See, eg, *Bhe* (n 25 above) para 87; *Alexkor v Richtersveld Community* 2004 (5) SA 460 (CC) para 52.

33 (755/12) [2014] ZASCA 76.

34 *Moropane v Southon* (n 33 above) para 36.

35 *Mayelane v Ngwenyama* (n 2 above) para 48.

3 Approaches of courts in determining the validity of a customary marriage

3.1 Judicial notice approach

The starting point for a discussion on whether courts apply official or living customary law in determining the validity of a customary marriage is section 1(1) of the Law of Evidence Amendment Act (LEAA).[36] The LEAA provides that 'any court may take judicial notice … of indigenous law in so far as such law can be ascertained readily and with sufficient certainty …'[37] Several authors agree that this provision envisaged that courts will be applying 'official customary law' since it is more certain than living customary law.[38] For example, Kruuse and Sloth-Nielsen have pointed out that 'the application of section 1 of the Law of Evidence Amendment Act is possible only where the customary law is reasonable and certain'.[39] In addition, courts have observed that 'ascertaining customary law from textbooks and case law does not present problems'.[40] Indeed, Ngcobo J in his dissenting judgment in *Bhe* affirmed that[41]

> there are at least three ways in which indigenous law may be established. In the first place, a court may take judicial notice of it. This can only happen where it can readily be ascertained with sufficient certainty. Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 says so.

However, in ascertaining the applicable customary laws, section 39(2) of the Constitution, which obligates courts to recognise and apply customary law subject to the Constitution and the Bill of Rights, becomes relevant.[42] As Bennett rightly pointed out, acceptance of customary law by courts 'involved complex issues of proof, compliance with the Constitution, and the endorsement of culture and tradition'.[43] In the context of customary marriage laws, the

36 Law of Evidence Amendment Act 45 of 1988, as amended by the Justice Laws Rationalisation Act 18 of 1996.

37 Sec 1(1) LEAA. See also Himonga & Bosch (n 13 above) 308.

38 See, eg, Himonga & Pope (n 13 above) 323; H Kruuse & J Sloth-Nielsen 'Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*' (2014) 17 *Potchefstroom Electronic Law Journal* 1710 1718.

39 Kruuse & Sloth-Nielsen (n 38 above) 1718. See also Himonga & Bosch (n 13 above) 336 who observed that this provision does not help with proof of customary law.

40 *Motsoatsoa v Roro* [2011] 2 All SA 324 para 15.

41 *Bhe* (n 25 above) para 150.

42 The importance of these provisions in the context of customary law has been widely observed. See eg Ozoemena (n 12 above) 981; Himonga & Pope (n 13 above) 323; and C Rautenbach & W du Plessis 'African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (*in*)*novatio* or *confusio*?' (2012) 57 *McGill Law Journal* 749.

43 Bennett (n 13 above) 1.

Constitutional Court in *Mayelane v Ngwenyama* reaffirmed this fact as follows:[44]

> When section 3(1)(b) thus speaks of customary law marriages, it necessarily speaks of marriages in accordance with human dignity and fundamental equality rights upon which our Constitution is based. It is no answer to state that the definition of customary law and customary marriages in the RCMA does not expressly state this. Those definitions must be read together with the Constitution and this Court's jurisprudence.

An examination of the cases in which the validity of a customary marriage was challenged due to non-compliance with the formal integration of a customary rule seems to suggest that courts comply with section 1(1) of the LEAA, but disregards the Constitution. A prime example is *Fanti v Boto.*[45] The issue in this case was the validity of a customary marriage where there was non-fulfilment of the requirement of formal delivery of the bride to the bridegroom's family. What was at stake was the husband's right to bury his deceased wife.[46] The brief facts were that the first respondent's daughter passed away in Hermanus on 7 November 2007. Funeral arrangements were made to bury the deceased in Hermanus, where she was staying with the first respondent (her mother) at the time of her death.[47] A day before the funeral date, the applicant sought an urgent application for an order declaring that he was entitled to the custody and control of his wife's body, and to determine when and where his deceased wife was to be buried.[48]

The applicant's founding affidavit deposed that he was married to the deceased according to Xhosa customary marriage laws in 2005. He further averred that in the conclusion of this marriage, he met the Xhosa customary marriage laws, including payment of *lobolo* in the amount of R3 000, and two bottles of brandy were delivered to the first respondent.[49] The first respondent denied the fact that a valid marriage had taken place. She asserted that the initial payment was not *lobolo* but *imvula mlomo* (the mouth-opener), the acceptance by the bride's family, which only signifies willingness to enter into the marriage negotiation.[50] The court analysed the wording of the RCMA and held that no valid marriage existed between the deceased and the applicant.[51] The result was that the mother of the deceased was

44 *Mayelane v Ngwenyama* (n 2 above) para 76. In addition, the Constitutional Court approved the authority laid down in *Gumede* as follows: 'This Recognition of Customary Marriages Act not only makes provision for regulation of customary marriages, but most importantly, it seeks to jettison gendered inequality within the marriage and the marital power of the husband by providing for the equal status and capacity of spouses' (para 77).

45 *Fanti v Boto* (n 5 above).

46 *Fanti v Boto* para 1.

47 As above.

48 *Fanti v Boto* (n 5 above) para 2.

49 *Fanti v Boto* para 5.

50 *Fanti v Boto* para 8.

51 *Fanti v Boto* para 19.

declared the person entitled to undertake funeral arrangements and to bury the deceased daughter.[52]

For purposes of the article, however, what is relevant is that in holding that no marriage existed, the judge cited with approval the essential requirements of a customary marriage as consent of the bride, consent of the bride's father or guardian, payment of *lobolo*, and the handing over of the bride, as laid down in *Mabuza v Mbatha* and other case law.[53] The judge also made reference to scholarly writings on these requirements.[54]

Commenting on the importance of the requirement of the handing over of the bride in validating a customary marriage, the court observed:[55]

> One does not merely inform the head of the family of the bride. The customary marriage must take place in his presence and/or the presence of those representing his family and who have been duly authorised to do so … The importance of these rituals and ceremonies is that they indicate in a rather concretely visible way that a customary marriage is being contracted and that *lobolo* has been paid and/or the arrangement regarding the payment of *lobolo* have been made and that such arrangements are acceptable to the two families, particularly the bride's family.

Similarly, in *Motsoatsoa v Roro*,[56] 'the contention was that one of the crucial prerequisites of a valid customary marriage, namely, the handing over of the bride to the bridegroom's family, is amiss'.[57] What was at stake was the right to inherit the deceased's house.[58] The facts of the case are briefly that the applicant and the deceased were lovers and lived together in the same house from 2005 until his death in 2009. Before his death, the deceased introduced the applicant to his parents and informed them of his intention to marry her.[59] Thereafter the deceased, through his parents, negotiated and agreed on *lobolo* with the applicant's parents.[60] After his death, the applicant approached the Department of Home Affairs, the third respondent, with a request to have the customary marriage between herself and

52 *Fanti v Boto* para 29.

53 *Fanti v Boto* paras 19 & 20. The court made reference to *Mabuza v Mbatha* (n 2 above) and other authorities, including *Gidya v Yingwana* 1944 NAC (N&T) 4; *R v Mane* 1947 2 PH H 328 (GW); *Ziwande v Sibeko* 1948 NAC (C) 21; *Ngcongolo v Parkies* 1953 NAC (S) 103.

54 *Fanti v Boto* (n 5 above) paras 20, 22 & 23. Reference was made to the writings of JC Bekker & NJJ Olivier *Indigenous law* (1995) as well as JC Bekker *Customary law in Southern Africa* (1989).

55 *Fanti v Boto* (n 5 above) paras 21, 22 & 23. The court further commented that 'all authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly transferred or handed over to her husband or his family'.

56 *Motsoatsoa v Roro* (n 40 above).

57 *Motsoatsoa v Roro* para 7.

58 *Motsoatsoa v Roro* para 2.

59 As above.

60 *Motsoatsoa v Roro* para 3.

the deceased registered posthumously.[61] She did not succeed. The applicant then approached the Court on two grounds: that it be declared that a customary marriage had existed between herself and the deceased; and that the Department of Home Affairs be directed to register the customary marriage between the applicant and the deceased in terms of section 4(7) of the RCMA.[62]

The court, relying on the official customary laws and the academic views of Maithufi and Bekker, *Fanti v Boto*, and Bennett,[63] ruled that no valid marriage existed due to non-compliance with the requirement of the formal delivery of a customary marriage.[64] Judge Matlapeng, concluding that no valid marriage existed, observed:[65]

> One of the crucial elements of a customary marriage is the handing over of the bride by her family to her new family, namely, that of the groom … Until the bride has been formally and officially handed over to the groom's people there can be no valid customary marriage.

A more recent example where the challenge to the validity of a customary marriage was based on the requirement of the handing over of the bride to the bridegroom's family is *Mxiki v Mbata & Another.*[66] What was at stake in this matter was the right to inherit from the deceased estate.[67] The case was an appeal from the court *a quo* in which the trial judge had directed and ordered, first, that the Department of Home Affairs register a customary marriage between the deceased and the appellant concluded on 3 November 2007 and, second, issue the appellant a customary marriage certificate.[68] The appellant alleged that she had entered a customary marriage with the deceased in 2007 and that they were staying together until his death in February 2009. She further alleged that a minor child had been born out of this relationship and that they were also the registered owners of two immovable properties.[69] In support of these allegations, the appellant annexed to her founding affidavit a copy of an acknowledgment of receipt of partial delivery of the *lobolo*.[70] The deceased's father disagreed with the appellant and stated that the November 2007 events did not constitute a customary marriage agreement, as 'the appellant was never handed over to the deceased's family as required by customary law'.[71] In agreeing with the

61 *Motsoatsoa v Roro* para 4.
62 *Motsoatsoa v Roro* para 1.
63 *Motsoatsoa v Roro* para 20.
64 *Motsoatsoa v Roro* para 22.
65 *Motsoatsoa v Roro* paras 19 & 20.
66 [2014] ZAGPPHC 825.
67 *Mxiki v Mbata* (n 66 above) para 2.
68 *Mxiki v Mbata* para 1.
69 *Mxiki v Mbata* para 2.
70 *Mxiki v Mbata* para 3.
71 *Mxiki v Mbata* para 4.

deceased's father and holding that no valid marriage had taken place, the judge stated:[72]

> The Act requires that *the marriage must be negotiated and entered into or celebrated in accordance with customary law.* The customary law of marriage is, in my view, correctly stated by Matlapeng AJ in *Motsoatso v Roro & Another* 2011 (2) ALL SA 324 at para 17 as follows: 'As described by the authors Maithufi IP and Bekker JC "Recognition of Customary Marriages Act 1998 and its impact on family law in South Africa" *CILSA* 182 (2002) a customary marriage in true African tradition is not an event but a process that comprises a chain of events. Furthermore it is not about the bride and groom. It involves the two families. The basic formalities which lead to a customary marriage are: Emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage (this of course presupposes that the two parties ie the man and the woman have agreed to marry each other); a meeting of the parties' relatives will be convened where *lobolo* is negotiated and the negotiated *lobolo* or part thereof is handed over to the woman's family and the two families will agree on the formalities and date on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration (wedding).

Further, the court was of the following opinion:[73]

> A customary marriage is a union of two family groups a bride cannot hand herself over to her in-laws. Her family has to hand the bride over to her husband's family at his family's residence where the elders will counsel the bride and the bridegroom in the presence of their respective families. Accordingly, the court was of the view, it is the handing over of the bride, even if the *lobolo* has not been paid in full, that constitute a valid customary marriage not the payment of *lobolo* as the court *a quo* found.

Consequently, similar to *Fanti v Boto* and *Motsoatsoa v Roro*, the court concluded that 'there can be no valid customary marriage until the bride has been formally and officially handed over to her husband's family'.[74] In holding that no valid marriage exists, the court relied on the official customary law provided in *Motsoatsoa v Roro* and Bennett's writings.[75]

Furthermore, in *Ndlovu v Mokoena,*[76] the question before the court was whether the *lobolo* transaction concluded the marriage between the deceased and Ndlovu. The brief facts were that Ndlovu made an application claiming that she was the only customary wife of the deceased and requested an order declaring the (alleged) customary marriage between Mokoena and the deceased null and void. The deceased had passed away in 2008.[77] As an educator in the service of the Ministry of Education, pension benefits were payable to the wife of the deceased. If the first alleged customary marriage had been validly concluded, the pension was to be divided in half between the

72 *Mxiki v Mbata* para 9.
73 *Mxiki v Mbata* para 10.
74 As above.
75 *Mxiki v Mbata* (n 66 above) paras 9, 10 & 11.
76 (2973/09) [2009] ZAGPPHC 29.
77 *Ndlovu v Mokoena* (n 76 above) para 2.

two wives.[78] Before the court there were two customary marriage certificates issued by the Department of Home Affairs. The first was that of Mokoena and the deceased, dated 25 May 1991. The second was that of Ndlovu and the deceased, dated 20 May 1998. The same marriage officer issued both certificates after the death of the deceased. The marriage officer who issued the marriage certificates told the court that he, *inter alia*, had reference to a one-page *lobolo* negotiation document before he issued the marriage certificate.[79]

The question that was before the court was whether the *lobolo* transaction concluded the marriage between the deceased and Ndlovu. The court referred with approval to the authority laid down in the cases of *Fanti v Boto* and *Mabena v Letsoalo*, where it was held that the *lobolo* transaction is but one of the two requirements for the conclusion of a customary marriage. The other requirement is the delivery of the woman to the family of the man. Judge Van Rooyen consequently held:[80]

> I have come to the conclusion that there are sufficient reasons for me to intervene: there is no evidence that there was a delivery of Velaphi or that they lived together and the court documents amount to supporting evidence that a marriage had not been concluded. I, accordingly, find that although there was no evidence of fraud, the marriage officer did not apply his mind properly to all the facts which were before this Court and that the certificate must be set aside.

3.2 Proof of customary law

The second approach in determining the validity of a customary marriage is to call witnesses to prove the existence of a particular custom. This is in line with section 1(2) of LEAA. Section 1(2) of LEAA provides that '[t]he provisions of subsection (1) shall not preclude any part from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned'.

This provision, it is argued, envisages that courts will source living customary rules from the experts of the community concerned. There are several cases in which courts have adopted this approach and called witnesses. In *Mabuza v Mbatha,*[81] for example, the issue before the court was the requirements for a valid siSwati customary marriage.[82] The brief facts were that the plaintiff and the defendant entered into a relationship in 1989. The plaintiff fell pregnant in September 1989. In or about November 1989 the defendant's family approached the plaintiff's family to start negotiations for the *lobolo* payments, and the penalty payment related to the fact that the plaintiff had fallen pregnant out of wedlock. An agreement was

78 *Ndlovu v Mokoena* paras 1 & 2.
79 *Ndlovu v Mokoena* para 7.
80 *Ndlovu v Mokoena* para 12.
81 *Mabuza v Mbatha* (n 2 above).
82 *Mabuza v Mbatha* para 3.

reached with regard to the payment of *lobolo*, which the defendant paid in full. The plaintiff and defendant lived together as husband and wife since about 1992 when the plaintiff moved into the house with the defendant. [83]

In 2000, and after the parties had relocated to the Western Cape, the relationship between them terminated and the plaintiff instituted a divorce action against the defendant.[84] The defendant opposed the divorce action on the ground that no marriage existed between the parties because under isiSwazi law, marriage required the payment of *lobolo* and the formal handing over of the bride.[85] The plaintiff herself and an expert witness supplied evidence to the fact that a valid marriage existed. The plaintiff's evidence was that there were three requirements to a siSwati marriage: *lobolo*; *ukumekeza* (formal integration); and formal delivery of the woman to her husband's family. She told the court that all the requirements had been met except for the *ukumekeza* custom. The expert witness's evidence was that if the *lobolo* requirement and formal delivery took place, the formal integration could be waived.[86] In addition, the expert witness concluded 'that it was inconceivable that *ukumekeza* was so vital such that it could not be dispensed with by agreement between the parties'.[87]

The evidence of the defendant and his expert witness was that *ukumekeza* was still a vital requirement. In particular, the expert witness stated:[88]

> *Ukumekeza* is vital because it makes a woman a wife. If a bride did not go through *ukumekeza*, she would be no more than a girlfriend even if *ilobolo* [were] paid for her. *Ilobolo* does not change the status of a woman to that of a wife. It is only the *ukumekeza* custom, according to Swati people, which makes a woman a wife.

The court acknowledged that this customary requirement existed, but held that the omission was not fatal and the marriage was recognised as valid.[89] In upholding the marriage as valid, Judge Hlope said that *'*[i]n my judgment there is no doubt that *ukumekeza*, like so many other customs, has somehow *evolved* so much so that it is probably practised differently than it was centuries ago …'[90] More importantly, the court declared that '[i]f one accepts that African customary law is recognized in terms of the Constitution … there is no reason … why the courts should be slow at *developing* African customary law'.[91]

83 *Mabuza v Mbatha* para 7.
84 *Mabuza v Mbatha* para 1.
85 *Mabuza v Mbatha* para 2.
86 *Mabuza v Mbatha* para 14.
87 *Mabuza v Mbatha* para 15.
88 *Mabuza v Mbatha* para 21.
89 *Mabuza v Mbatha* para 27.
90 *Mabuza v Mbatha* paras 25-27 (my emphasis).
91 *Mabuza v Mbatha* para 30 (my emphasis).

Another example where proof of a particular customary rule by witnesses led to the validity of a marriage is the case of *Nthejane v Road Accident Fund.*[92] In this case, the plaintiff, acting on behalf of her minor son, sued the defendant for certain damages arising out of the death of her husband, the biological father of her son.[93] The brief facts of this case were that the parties agreed to enter into *lobolo* negotiations. These negotiations took place, and it was agreed that the deceased's family would give ten cows as *lobolo*. The parties also agreed that delivery of the *lobolo* was to take place at a later stage.[94] The defendant, however, challenged the validity of a customary union due to non-fulfilment of the *lobolo* requirement.[95] The issue for the court to decide was whether or not the plaintiff was married to the deceased in terms of a customary law. The plaintiff and her grandfather gave evidence that the requirements of *lobolo* and formal delivery of the woman had been met. The defence did not challenge this. In holding that the marriage was valid, the court simply observed 'that the *lobolo* agreement was acceptable to both families and that, therefore, the arrangement was in accordance with their customary practices'.[96]

In addition to these cases, in *Mayelane v Ngwenyama*[97] the appellant challenged the validity of the marriage between her deceased husband and the respondent due to the fact that she, as the first wife to the deceased, had not been consulted before the marriage was concluded. The brief facts of the case are as follows: On 1 January 1984, the first respondent, Ms Mdjadi Florah Mayelane, was married to the deceased, Hlengani Dyson Moyana, according to customary law and tradition at Nkovani Village, Limpopo. Three children were born out of the union. The marriage was not registered. The deceased died on 28 February 2009 and the marriage was still subsisting. When the first respondent sought to register the customary union at the Department of Home Affairs after the death of the deceased, she was advised that the appellant, Ms Mphephu Maria Ngwenyama, had also sought to register a customary marriage allegedly contracted between her and the deceased on 26 January 2008.[98]

The first respondent challenged that the purported marriage between the deceased and the appellant was *ab initio* null and void because of the fact that she had not been consulted before it was concluded. The Constitutional Court complied with both sections 1(1) and (2) of the LEAA and called nine witnesses.[99] In taking into

92 (2011) ZAFSHC 196.
93 *Nthejane v Road Accident Fund* (n 92 above) para 1.
94 *Nthejane v Road Accident Fund* para 9.
95 *Nthejane v Road Accident Fund* para 8.
96 *Nthejane v Road Accident Fund* paras 9 & 11.
97 *Mayelane v Ngwenyama* (n 2 above).
98 *Mayelane v Ngwenyama* para 4.
99 The composition of these witnesses was as follows: three in subsisting polygynous marriages; one advisor to the traditional leaders; one commissioner in the

account their evidence, the court found that the living law of Xitsonga required that the first wife be informed of her husband's impending subsequent marriages. Consequently, the Court invalidated the subsequent marriage on the basis that consent from the first wife had not been obtained.[100] The Court arrived at this decision by, *inter alia*, applying the constitutional principles of equality and dignity as they relate to the first wife and the husband.[101] As rightly pointed out by Kruuse and Sloth-Nielsen, the view of the Constitutional Court was that 'informing' and 'consent' were traditionally-accepted legal norms upon which a valid marriage could exist.[102] In this case, however, a different conclusion was reached despite the fact that courts adopted the same approach as in *Mabuza* and *Nthenjane*. [103]

The last example is *Moropane v Southon*.[104] The issue before the court was whether the parties were married according to customary law or civil law. This case was an appeal from the High Court in which the trial judge had held that there was a valid customary marriage between the appellant and the respondent. The brief facts of this case were that Moropane (the appellant) and Southon (the respondent) met and fell in love in 1995. At the time, Moropane was still married to his former wife whom he divorced in 2000.[105] In 2002, Moropane proposed marriage to Southon. According to Southon and her witnesses, she concluded a customary marriage because the *lobolo* and formal delivery of the bride to her husband's family, among other requirements, had been met.[106] Moropane disputed the fact that a valid customary union had come into existence. According to him, the so-called *lobolo* paid by his emissary was, just as in *Fanti v Boto*, for *pula molom/go kokota* (literally translated as 'opening the mouth to start the marriage negotiations'). Moropane also admitted that Southon, accompanied by her aunt, had come to his home, but maintained that she was delivered not as a *makoti*.[107]

Two expert witnesses were led to assist the court in determining whether the marriage between the parties met Pedi customary marriage requirements.[108] Both experts agreed that the customary marriage requirements for a valid customary marriage amongst the Bapedi people included negotiations; agreement; the payment of *lobolo*; and formal delivery of the woman, among others. More importantly, both experts agreed that the handing over of the *makoti*

Commission on Traditional Leadership Disputes and Claims; two traditional leaders; and two academic experts.

100 *Mayelane v Ngwenyama* (n 2 above) para 87. Apart from non-fulfilment of this requirement, *lobolo* and other customary requirements were also not met.

101 *Mayelane v Ngwenyama* (n 2 above) para 83.

102 Kruuse & Sloth-Nielsen (n 38 above) 1721.

103 *Mayelane v Ngwenyama* (n 2 above) para 4.

104 *Moropane v Southon* (n 33 above) 76.

105 *Moropane v Southon* para 4.

106 *Moropane v Southon* paras 7-14.

107 *Moropane v Southon* paras14-15.

108 *Moropane v Southon* para 39.

to her in-laws was the most crucial part of the customary marriage.[109] The court found that the essential requirements for a valid customary marriage according to the Bapedi people had been met and, therefore, upheld the decision of the court *a quo* that a valid customary marriage existed.[110]

4 Critical analysis: Are courts applying living or official customary law?

In determining the validity of customary marriages, three main observations are made. First, courts seem to apply a new form of customary law, which is not based on official or living customary law. Second, courts are seen to strictly adhere to official customary law as found in the books and case law. Lastly, courts accommodate and recognise particular living customary rules as practised on the ground. The impact of these approaches on the validity of customary marriages and the protection of women found in these marriages is discussed below.

4.1 New form of customary law

An examination of the cases discussed reveals that, in some instances, courts do not apply 'living' customary law or 'official' customary law when determining the validity of customary marriages.[111] The preference has been to apply a new form of customary law that is either justified on the 'development of customary law', or on the 'equality of spouses in a customary marriage' envisaged by section 6 of the RCMA, read with section 9 of the Constitution.[112] This position has led Kruuse and Sloth-Nielsen to observe that 'courts have had to enter the law-making arena … where current environment … provides inadequate direction'.[113]

For example, in *Mabuza v Mbatha*, two expert witnesses gave contradictory views on whether the requirement of the formal integration of the woman may be waived or not. Judge Hlope concluded that a valid customary marriage existed based on the fact that 'if one accepts that African customary law is recognised in terms

109 *Moropane v Southon* para 40.

110 *Moropane v Southon* paras 55-57.

111 See also similar observations by Bennett (n 13 above) 11 and Himonga & Pope (n 13 above) 329.

112 Sec 6 of the RCMA provides: 'A wife in a customary marriage has, on the basis of the equality with her husband and subject to the matrimonial property system governing the marriage, full status to acquire and dispose of property …'

113 Kruuse and Sloth-Nielsen (n 38 above) 1731. See also Bennett (n 13 above) 2 who observed, in 2009, that once living law becomes a primary source of law, 'the courts start playing the role of law-makers'.

of the Constitution … there is no reason, in my view, why courts should be slow at developing African customary law'.[114] Similarly, in *Mayelane v Ngwenyama*, where evidence tendered by witnesses made it clear to the court that the requirement was to 'inform' the first wife, in the following terms:[115]

> (a) although not the general practice any longer, VaTsonga men have a choice whether to enter into further customary marriages; (b) when VaTsonga men decide to do so they must inform their first wife of their intention; (c) it is expected of the first wife to agree and assist in the ensuing process leading to a further marriage; (d) if she does so, harmony is promoted between all concerned; (e) if she refuses consent, attempts are made to persuade her otherwise; (f) if that is unsuccessful, the respective families are called to play a role in resolving the problem; (g) this resolution process may result in divorce; and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but children of the second union will not be prejudiced by this as they will still be regarded as legitimate children.

The Constitutional Court, however, developed Xitsonga customary marriage rule of inform to make consent a requirement for a subsequent marriage.[116]

4.2 Living customary law

The Constitutional Court in *Alexkor v Richtersveld Community* observed that '[i]t is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules'.[117] In the context of this discussion, where courts apply living customary law, courts have accepted that it complies with constitutional requirements and therefore the general outcome has been validation of that the marriage. This outcome resonates with the observations made by Lehnert and Bennett in 2005 and 2009, respectively, that courts assumed that living customary law was more likely to comply with constitutional values, particularly the right to equality and dignity.[118] For example, courts seem to accept validity of a particular living

114 *Mabuza v Mbata* (n 2 above) para 30.

115 *Mayelane v Ngwenyama* (n 2 above) paras 61 & 122. See also evidence of Headman Maluleke in an additional affidavit where it is stated: 'The prospective bridegroom should inform his existing wife about his intentions to marry another wife. He informs her so that she should not be surprised in seeing another wife. It is not a requirement to even advise as to the identity of the prospective subsequent wife. Whether she gives her consent or not, the prospective bridegroom will proceed with his plan to marry another wife.'

116 *Mayelane v Ngwenyama* (n 2 above) para 75. See also discussion by Ozoemena (n 12 above) 979.

117 *Alexkor v Richtersveld Community* (n 32 above) para 52. See also Himonga & Pope (n 13 above) 321 and Bennett (n 13 above) 11 who, however, observed that the first acceptance of living customary law was in *Ex Parte Chairperson of the Constitution Assembly: In re Certification of the Constitution of the RSA, 1996*, 1996 (4) SA 744 para 197 where the Constitutional Court held that the Constitution guarantees 'the survival of an evolving customary law'.

118 Lehnert (n 13 above) 247 and Bennett (n 13 above) 8-9. The rights to equality and dignity are provided for in secs 9 and 10 of the Constitution, respectively.

customary rule where expert witnesses are called to give evidence despite differences in their opinions. The courts simply believe the one and disregard the other opinions. For example, in *Moropane v Southon*, the court accepted evidence by expert witnesses on the Pedi marriage requirements and upheld the decision of the court *a quo* that a valid marriage existed despite the differences in the evidence given.[119] The differences in the evidence given by the expert witnesses related to whether money could be used as *lobolo*, and whether it was in accordance with Pedi culture to slaughter a sheep instead of a cow, among others.[120]

In some instances, courts seem to accept living customary law, even where parties before the courts give the only evidence on the applicable living customary law. The only qualification seems that the other party must not have opposed it. For example, in *Nthenjane*, the court accepted the evidence that *lobolo* and formal integration requirements had been met. In this case, evidence was given by the plaintiff and her grandfather and was not opposed by the defendant.[121]

Furthermore, and more important to the characteristics of customary law, in the application of living customary law, courts seem to pay regard to the fact that customary law is dynamic and changes with social circumstances.[122] This position is well summarised by the Constitutional Court in *Bhe*, as follows:[123]

> True customary law will be that which recognises and acknowledges the changes which continually take place. In this respect, I agree with Bennett's observation that '[a] critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency'.

4.3 Official customary law

Where courts apply official customary law, the inevitable result has been the invalidation of marriages. The discussion has also revealed that issues raised in challenging the validity of marriages are about legal recognition as a spouse to inherit from the deceased estate. For example, in the cases of *Motsoatsoa v Roro, Ndhlovu v Mokoena* and *Mxiki v Mbata*, what was at stake was the right to inherit the intestate estates of the deceased. The application of official customary law, without considering the issues at stake, therefore, leads to harsh consequences for vulnerable parties, particularly women and children.

119 *Moropane v Southon* (n 33 above) paras 39-40.
120 *Moropane v Southon* para 41.
121 *Nthejane v Road Accident Fund* (n 92 above).
122 See discussions by Ozoemena (n 12 above) 975 on the impact of law in addressing social change.
123 *Bhe* (n 25 above) para 86.

In acknowledging the adverse consequences due to the application of official customary law, the Constitutional Court in *Bhe* observed that[124]

> … magistrates and the courts responsible for the administration of intestate estates continue to adhere to the rules of official customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society. Examples of this are the manner in which the *Bhe* and *Shibi* cases were dealt with by the respective magistrates.

Therefore, as is evident from these cases, if the application of official customary law will 'lead to correctness of decision but consequently to an injustice, nullity must [therefore] give way to an intended validity'.[125] Moreover, in cases such as *Fanti v Boto* where other customary requirements have been met, particularly that of both spouses having given consent, courts seem to be unfair to insist that the non-fulfilment of *only* one requirement should lead to the invalidity of a marriage.

5 Conclusion

The discussion of cases reveals that there is a disparity in addressing the injustices of the past when official or living customary law is applied in the context of customary marriages. Vulnerable parties are protected where courts focus on the 'essence' of customary law and apply living customary law.[126] They are also protected where courts develop living customary laws in line with the Constitution and the Bill of Rights.[127] Indeed, the Constitutional Court observed in *Mayelane v Ngwenyama*:[128]

> This Court has accepted that the Constitution's recognition of customary law as a legal system … requires innovation in determining its *living* content as opposed to the potentially stultified version contained in … legislation and court precedent.

However, as Bennett rightly points out, the challenge with this preference for living customary law 'is how this living law is to be discovered and how it can be proved'.[129] Indeed, in *Mayelane* the Constitutional Court observed these challenges[130] and cited with approval the dictum in *Bhe* case that 'the difficulty lies not so much in the acceptance of the notion of "living" customary law but in

124 *Bhe* (n 25 above) para 87

125 Rautenbach & Du Plessis (n 42 above) 766.

126 See *Mabuza v Mbata* (n 2 above).

127 *Mayelane v Ngwenyama* (n 2 above) para 43.

128 *Mayelane v Ngwenyama* (n 2 above).

129 Bennett (n 13 above) 11. See also Kruuse & Sloth-Nielsen (n 38 above) 1717.

130 In *Mayelane v Ngwenyama* (n 2 above) para 25, the Constitutional Court also pointed out that '[p]aradoxically, the strength of customary law – its adaptive inherent flexibility – is also a potential difficulty when it comes to its application and enforcement in a court of law'.

determining its content and testing it … against the provisions of the Bill of Rights'.

Despite the challenges, there is no doubt that the RCMA is an attempt to address historical injustices to women. Therefore, it cannot have unintended consequences for the women it seeks to protect.[131] Moreover, courts have welcomed the RCMA as[132]

> a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in which marriages were entered into accordance with the law and culture of the indigenous African people of this country.

This was recently reiterated in *Maropane v Southon*, that '[t]he primary objective of the RCMA is to give customary marriages recognition which was not the case under the past odious apartheid regime'.[133]

In light of the above, courts must be sensitive to such issues and develop official customary rules or apply living customary law in line with the Constitution in order to protect the vulnerable parties. More importantly, the choice is not only between applying living or official customary law, but *how* courts develop these laws in line with the Constitution.[134] Indeed, in *Mabuza v Mbatha* '[t]he court held that the test for the validity of indigenous law is … consistency with the Constitution'.[135]

131 *Gumede v President of South Africa* [2008] ZACC 23 paras 161-162.
132 *Maropanee v Southon* (n 33 above) para 44. See also *Mayelane v Ngwenyama* (n 2 above) para 26.
133 As above.
134 Himonga & Bosch (n 13 above) 331 (my emphasis).
135 *Mabuza v Mbata* (n 2 above) para 32.