PROOF OF EXISTENCE OF A CUSTOMARY MARRIAGE

Fanti v Boto 2008 5 SA 405 (C)

In a traditional setting there was hardly ever any necessity to prove the existence of a customary marriage. I once asked a man how I would know that he is married. He said that I should ask his *induna* (headman). He was quite correct. Marriages took place in a community where everybody knew about everybody else and the family heads, ward headmen and senior traditional leaders kept a watchful eye.

All the necessary negotiations, rituals, transfer of *lobolo* cattle, the wedding ceremony and eventually the transfer of the bride to her husband's family were done in a tangible way for everybody to observe and even to participate in some events.

This, I have been told, is still done more or less along the same lines in rural areas. This is confirmed by De la Harpe, Leith and Derwent *Zulu* (1998) 122–139 in respect of the Zulu people.

However, except for those who live in rural areas, the scene has changed. Many people have over years drifted away from their ancestral homes and have adopted a western lifestyle. There is certainly not a great deal of research on the social nature of this "new" lifestyle, but the few that did research confirm that traditional customs are still adhered to, albeit in adapted form (see, among others, Vorster (compiler) *Urbanites' perceptions of Lobolo: Mamelodi and Atteridgeville* (2000) and Coertze *Etnografiese studies in Suidelike Afrika* (1972) 291–334).

The courts have all along been prepared to apply customary law as dictated by social change. Thus in *O'Callaghan NO v Chaplin* 1927 AD 310 327 Innes CJ declared:

> "It is the duty of a court . . . so to administer a living system of law as to ensure without the sacrifice of fundamental principles – that it shall adapt itself to the changing conditions of the time."

Even in the present constitutional dispensation in which the courts "must apply customary law when that law is applicable, subject to the Constitution and any

legislation that specifically deals with customary law" (s 211(3) of the Constitution of the Republic of South Africa, 1996) the courts have reiterated that changing social circumstances must be taken into account. Thus in *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) Van der Westhuizen J said that "a court must consider both the tradition and the present practice of the community".

It was in respect of a customary marriage in these circumstances that Dlodlo J had to decide whether the applicant in the above case had been married to the first respondent's daughter (Ms Lusiba).

The story is familiar. Similar ones regularly turn up nowadays, because more blacks are affluent or belong to the middle class and have more to gain or lose from being married or not. Succession, custody of children, maintenance and more hinge on the question whether claimants or respondents were married or single. Also claims such as the present one regarding the right of burial are frequently brought to court, often as a matter of urgency.

The applicant (Mr Fanti) averred that:

- the customary celebration and rituals had taken place at his place of birth at Bulhoek, Whittlesea, Edutshwa in the Eastern Cape during August 2005; and
- he had paid *lobolo* in the amount of R3 000.

That is for my purposes the essence of his evidence. On that score he said that he wanted to bury his wife, but Ms Boto, the deceased's mother, opposed this.

The first respondent (the deceased's mother) flatly denied that there had been a ceremony and that the R3 000 represented *lobolo*. She said that the amount had been a gesture to open negotiations about *lobolo*.

That is the crux of the evidence and as the saying goes, dead men (by implication also dead women) tell no tales. Ms Lusiba was deceased, but the first respondent had corroborative evidence. I cannot comment on the cogency of the evidence on either side.

My interest is in the manner in which Dlodlo J dealt with the legal aspects of the matter.

It is pleasing that the judge dealt with customary law and called the concomitant customs and rituals by name. I say so because in terms of section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 a requirement for a marriage to be valid is that it "must be negotiated and entered into or celebrated in accordance with customary law". This judgment will indeed be helpful for lawyers and others in cases where the existence of a marriage is disputed.

It is also appreciated that he accepted that it goes without saying that *lobolo* is one of the requirements for a customary marriage (para 20). It is of course a requirement, although as stated by the judge: "[E]ven if payment of *lobolo* is properly alleged and proved, that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements" (*ibid*).

The Recognition of Customary Marriages Act does not specifically require the provision of *lobolo* as a prerequisite for a customary marriage. However, several authors have examined the apparent uncertainty and have come to the conclusion that it is a prerequisite. For instance, in an article "The lobolo agreement as the silent prerequisite for the validity of customary marriage in terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 277–288, Mofokeng convincingly argues that the *lobolo* agreement is in fact a silent requirement for the validity in terms of section 3(1)(b) of the Act, which states that "the marriage

must be negotiated and entered into or celebrated in accordance with customary law". (See also the discussion of *lobolo* as an integral part of a customary marriage by Jansen "Family law" in Bekker *et al Introduction to legal pluralism in South Africa* (2006) 39–41).

I wish to highlight a few more points made by the judge. These are important, because they are matters about which lawyers squabble when the validity of a customary marriage is contested.

The judge stated:

> "I want to make it very clear that the mother of a girl whose father died or is for some other acceptable and understandable reason absent and/or unable to discharge duties normally meant for the 'kraalhead', is quite entitled to act as the head of the family. Such mother becomes the 'father' and legal guardian of the children of her family. I state categorically that such a mother would legitimately negotiate for and even receive *lobolo* paid in respect of her daughter" (para 21).

That is nothing new. It has been the case all along.

Under current social circumstances it is even more prevalent. In *Mabena v Letsoalo* 1998 2 SA 1068 (T), for example, it was pointed out that the traditional rule required the consent of the bride and bridegroom's guardians. The court, however, gave effect to current practice whereby the bridegroom could negotiate *lobolo* with his future mother-in-law.

In view of the large number of female-headed households in urban and rural areas this is a common practice. In a study of an East London township in the 1970s, Pauw *The second generation* (1987) 141–163 found that 42 per cent of the households had female heads. They are either never-married, widows or separated from their husbands but, whatever their status, they fulfil the role formerly reserved for the male family head, including negotiations about the marriages of their children, often in consultation with male family members with whom their husbands would have consulted if they had been alive or available.

Another important point made by the judge is that "[t]he fact of the matter is that the customary marriage is and remains an agreement between two families (the two family groups)" (para 24). I have been consulted in cases where the man or woman said that he or she had entered into an agreement and paid (some) *lobolo*, without involvement of both families. In one case the bridegroom's family was not even aware of the alleged payment.

Lastly, and that is extremely important, the judge said:

> "All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formally transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom's family and her incorporation into his family is ordinarily accompanied by a well-known extensive ritual and ceremonies involving both families" (para 22).

It is for two reasons not always possible to apply this rule in practice. Many couples nowadays get married after they have been living together for some time. In other cases the husband's family does not occupy a distinct family home to which she may be taken. Be that as it may, I am of the opinion that there should at least be some ceremony and ritual or nominal incorporation of the bride, which is done in practice. Bekker *Seymour's Customary law in Southern Africa* (1989) 109 states this requirement as follows:

> "There is no union until the girl has been handed over. This concise statement cannot be enlarged upon in anyway; it states literally the correct position. It might

> be stated that physical consummation is not necessary, so long as the bride has been sent to the kraal where the bridegroom lives, as his wife, even if the bridegroom is away at the time."

In *Maluleke v The Minister of Home Affairs and Radebe* 2008 ZAGPHC 129 the court confirmed that the *de facto* integration of the bride in the bridegroom's family and their acceptance of her are more crucial than an actual "handing over". In this case the court held:

> "It is therefore accepted that at the time of the deceased's death his family regarded the second defendant as his wife. Clearly too, the deceased and the second defendant agreed that they were husband and wife. This agreement together with the acceptance of the second defendant as his wife and the family of the deceased satisfied the requirement of the Act that the customary marriage be 'entered into'. Although the parties also intended to celebrate the marriage by holding an *imvume*, the fact that the celebration of their marriage in the form of *imvume* did not occur does not, in my judgement, detract from that conclusion."

The present judgment was unfortunately not as thorough as it might have been. The marriage in question should actually have been considered in view of the requirements of the Recognition of Customary Marriages Act. The Act was not mentioned at all.

The judge found, on analysis of the evidence, that the applicant was not married to the first respondent's daughter, because he failed to prove that

- the girl had been formally transferred or handed over to her husband or his family;
- the customary rituals and celebrations involving the two families had been in conformity with the requirements of a customary marriages; and
- *lobolo* had been paid or that acceptable arrangements had been made for its payment.

He applied the rules of customary law in a manner that could serve as a precedent in similar circumstances. As intimated above, claims and denials have become the order of the day.

However, precedents alone are not sufficient. The Recognition of Customary Marriages Act should be amended

- to make payment of *lobolo* a requirement for the validity of a customary marriage; and
- to refine the system of registration, and make it a requirement for concluding a customary marriage.

In terms of section 4(1) of the Recognition of Customary Marriages Act spouses in a customary marriage have a duty to ensure that their marriage is registered. Note that it is not phrased in the usual terminology of "must" or "shall". However, in terms of section 4(3)(a) marriages entered into before the commencement of the Act (on 15 November 2000), *must* be registered within 12 months after the commencement of the Act and marriages entered into after the commencement of the Act within three months or in both cases within such longer period as the minister may prescribe. The minister extended the periods by 12 months. In terms of section 4(3) and (b) of the Recognition of Customary Marriages Act the Minister of Home Affairs prescribed a further period of registration for both customary marriages entered into before and after the commencement of the Act to 1 November 2009 (GN 1390 and 1391 of 24 December 2008). Customary marriages not registered by that date could be proved only by way of

an application to the High Court. Proof of marriage is required, among others, by the Master of the High Court whenever the estate of a person who was married by customary law is reported. From that date the next-of-kin or heirs of a person whose marriage was not registered will have no option but to apply for confirmation of the marriage by the High Court.

For the sake of a complete picture of the registration I must add that the certificate of registration constitutes *prima facie* proof of the existence of the customary marriage (s 4(8)) but failure to register a customary marriage does not affect the validity of the marriage (s 4(a)). This, I submit, indicates that a person who disputes the existence or validity of a customary marriage must prove the allegation. However, in view of the duty to register, officials such as the Master of the High Court cannot in the absence of registration assume the existence or validity of such a marriage, even if not in dispute.

In practice serious legal problems arise in respect of the requirement that in terms of section 8(1) of the Recognition of Customary Marriages Act "a customary marriage may only be dissolved by a decree of divorce". The following situations occur:

- A customary marriage was not registered as a result of effluxion of time within which to register.
- The Department of Home Affairs refused to register the marriage, although there was a *de facto* marriage with consequences for the partners and children.
- The defendant disputes the existence of a marriage, albeit registered, because the certificate is only *prima facie* proof of the marriage (s 4(8) of the Act).

The courts may in terms of section 4(7) of the Act order the registration or the cancellation or rectification of any registration. It is submitted that such an application may be brought simultaneously with an application for a decree of divorce. If a defendant should deny the existence of a customary marriage the plaintiff may refute the denial and produce appropriate evidence.

It is grossly unfair to leave customary marriages in limbo where anybody may try to allege that a marriage has been concluded or not, depending on what benefit may be gained this way or the other.

JC BEKKER
University of Pretoria