

The Indomitable *Ukuthwala* Custom

The Cape Colonial government and, later, the government of the Union of South Africa, denied recognition of the customary marriages of the African people, *inter alia* for the following reasons:

- (a) It has the *ukulobolo* practice as the “rock” on which the marriage is founded, which they misunderstood as a sale of the woman (in this regard see Koyana *Customary Law in a Changing Society* (1980) *passim*).
- (b) It has the element of polygamy, which is in direct conflict with the understanding of marriage as the union of one man and one woman (see Brouwer *De Jure Connubiorum* 2.28.5; also *Sishuba v Sishuba* 1940 NAC (C&O)123)
- (c) It has the element of *ukuthwala* as one of the methods of the formation of a customary marriage, yet this (in their understanding of customary law) amounts to the crime of abduction.

From enquiries that we made and on the basis of our own observations we are rest assured that the *thwala* custom is still widely practiced in Nguni communities. Anthropologists and spokespersons confirmed that the practice does not occur amongst other groups.

Bekker (*Customary Law in Southern Africa* (1989) 97) explains that an engagement is sealed by the deposit with the girl’s father of a few head of cattle which are held as an earnest of the suitor’s good faith to proceed in due course with the proposed marriage. The writer proceeds and says that engagements are not always initiated with orthodoxy.

“Sometimes a more romantic procedure called *thwala* is resorted to, [w]hen there is some obstacle to a marriage, not necessarily imposed by the girl’s guardian . . . Even to force his own father’s hand . . .” (Bekker 98).

The procedure for *ukuthwala* is as follows: The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day, towards sunset or at early dusk, and they will “forcibly” take her to the young man’s home. Sometimes the girl is caught unawares, but in many instances she is “caught” according to plan and agreement. In either case, she will put up a show of resistance to suggest to onlookers that it is all against her will when, in fact, it is hardly ever so. Bekker explains:

“The girl to appear unwilling and to preserve her maidenly dignity, will usually put up a strenuous but pretended resistance for, more often than not, she is a willing party.” (*Ibid*).

Indeed, so acceptable is the *thwala* custom to the people, so pretended is the resistance put up by the girl known to be, and so good is the reason for the *thwala*, *viz* the formation of a marriage, that no onlooker ever interferes and tries to stop the *thwala* because of the crocodile tears that the woman sheds in the process.

Which does not mean that *thwala* was tantamount to a forced marriage. As explained by Bennett (*Customary Law in South Africa* (2004) 201):

“Given their strong commitment to spousal consent, the colonial authorities were bound to take up the cause of unwilling brides. Hence, in the Transkeian Territories, forced marriages were prohibited and the guardians responsible for them were subject to criminal penalties. In Natal, and later KwaZulu, an ‘official witness’ had to attend a customary wedding, where he was obliged to ask the wife whether she was marrying of her own free will. If a guardian coerced his ward into marriage, he was guilty of an offence. In other parts of South Africa, where there was no specific legislation banning forced marriages, the courts, as a matter of policy, deemed them null and void.”

Lately the necessity for the consent of the bride has been put beyond any doubt. In terms of section 3(1)(a) of the Recognition of Customary marriages Act 120 of 1998 the consent of both prospective spouses of a customary marriage is necessary for the validity of the marriage.

Yet the woman is in many instances a willing party to the *thwala* so that she can get her own “empire” as a married woman. This is shown by an interesting account given by Reverend Damane during a sermon he gave at a funeral in Mount Frere as recently as July 2002. His younger brother, Dikeni Damane, a gentleman who never went to school and wanted to *thwala* a girl Nokoji, who like him, lived within the confines of the customary law jurisdiction, had asked his brother, the very reverend gentleman, to help him to *thwala* her in the year 1992. Very reluctantly because of his position in the eyes of the community as minister, he agreed and took off his collar, put on some old clothes and went along with his brother to effect the *thwala* so that he could get a wife who would look after the needy home. They started the arduous task of “forcing” her along to their home. He soon noticed that his brother was drunk, so that he battled on largely alone, pulling and pushing the girl who was sometimes crying. At a point about 200 metres away from the home the drunken brother collapsed and sat down, and the minister said that he would also let the girl go as it was not for his sake that the *thwala* was being done. The crying girl screamed on, “Don’t stop, don’t stop, we are almost there, carry on, carry on” – and the minister regained his confidence. He completed the *thwala* single-handedly, with the girl crying but cooperating in an admirable manner with the *thwala* process which had indeed begun to be more by consent than by force. The reverend gentleman was commenting on the need for people not to underestimate the impact of African beliefs and African ways of doing things even in this modern day and age. He also told how well that *thwala* wife was doing at her married home regardless of the fact that his poor brother had only managed to pay four head of cattle as *lobolo* out of the required ten, ten years after the marriage had taken place.

This occurrence is reminiscent of what the Native Appeal Court (as it then was) said seventy years ago in *Mkupeni v Nomungunya* (1936 NAC (C&O) 77 Tabankulu (Pondo):

“It is true that in a real case of *thwala*, the girl does make a show of resistance, as to appear to go willingly would be regarded as a disgrace, but in such cases it is shown always that the resistance is not serious.”

There is much evidence that the genuine formation of a marriage is the essence of the *thwala*. As a result, in some instances the suitor is not even present when the *thwala* takes place in the hands of those who act on his behalf. Thus in *Mkokobane v Mngqumazi* (1947 NAC (C&O) 41), a case from Bizana in Pondoland, the bridegroom went to work in Natal and left instructions with his brother to negotiate a marriage between him and defendant's sister, Nomagqiza. One Nyobela then went along and *thwalaed* Nomagqiza and placed her at the homestead of the brothers. The brother at home paid *lobolo* for the brother at work and Nomagqiza remained there despite the absence of her husband, patiently awaiting his return from work in Natal!

In other instances a *thwala* is actually arranged with the girl's guardian himself. And so in *Dyongo v Nani 2* (NAC 102 (1911)), a case from Idu-tywa, (Gcaleka) the girl's brother himself suggested that the girl be *thwalaed* as a preliminary to the marriage proposed by the suitor. When the brother went to enquire about her a sheep was slaughtered for him and this established beyond doubt that consensus had been reached about the marriage.

Likewise in *Zamana v Bilitane 2* (NAC 114 (1911)) a case from Port St Johns (Pondo) the parents encouraged the *thwala* as a preliminary to the marriage. Here it appears, the girl was initially not enthusiastic about the marriage.

On the same day as the *thwala* or early the following day, those who have effected a *thwala* are required to make a report at the girl's home, to tell the people not to be worried because the girl is safe with them. They then indicate what earnest cattle they propose to pay and how soon that can be done. A friendly relationship is thus established between the two families, and the status of the girl is immediately elevated to that of a young wife, sooner or later some cattle will be paid to the girl's father as *lobolo* and sooner or later she will be released to go to her father's home to make preparations for being taken to the husband's home "in grand style" accompanied by a *duli* party (a large group of relatives and friends) thereby cementing the relationship between the two families.

It is therefore understandable that where a *thwala* takes place but there is no offer of marriage, a fine of one beast, known as the *thwala* or the *bopha* beast, is imposed by customary law. The reason for this payment is that for both the girl's guardian and his daughter the *thwala* in that case is an outright insult which leaves them being a laughing stock in the eyes of the community. In *Sakanka v Totsholo* (1945 NAC C&O 11), a case from Ngqeleni in Western Pondoland, the assessors set out this legal position and the court acted in accordance therewith (See also *Robo v Siqwayi 2* NAC 123, *Hantsa v Dide 3* NAC 1).

It is contrary to customary law for a young man to have intercourse with a girl that he has *thwalaed*. She is immediately placed in the midst and care of the womenfolk and is treated with utmost kindness and respect. That indeed is one of the inducements for her to wish to go ahead with the marriage and be part of this caring family. The man who seduces a *thwalaed* girl is required to pay a seduction beast in addition to the number of *lobolo* cattle agreed upon, and in addition to the *thwala* or *bopha*

beast where no marriage has been proposed. In *Molisana v Legela* (1911 2 NAC 189), a case from Mount Fletcher, a Transkeian district whereat Sotho custom is upheld by the Sotho speaking section of the people, a horse was awarded for the *thwala* and a further beast was allowed for the seduction (see also *Nyila v Mnyama* 4 NAC 2 (1922) from Butterworth in Fingoland. See *Magqabi v Makolwana* 1933 NAC (C&O) 3 from Nqamakwe in Fingoland, where the daughter said she had met and had gone with him to his home where they had slept and had intercourse. It was rightly held that there was no *thwala* and one beast for the seduction without pregnancy was allowed).

Obviously, therefore, if a marriage results from the *thwala*, no *thwala* or *bopha* beast is payable. In a case that came from Mzimkhulu (*Mthiywa v Bhakile* 1940 NAC (C&O) 21), action had already been commenced whereby plaintiff claimed a *thwala* beast. The case was already at the headman's court when marriage was proposed and accepted, followed by a payment of *lobolo*. The court held the claim for the *thwala* beast thereupon fell away.

As pointed out at the beginning of this paper, the colonial and subsequent European governments' misunderstanding of the real purpose and operation of the *ukuthwala* custom led them to err and regard it as the crime of abduction and, accordingly, to lay criminal charges against those unfortunate young men.

The common law crime of abduction has been described as the unlawful removal of a minor out of the control of his or her guardian with the intention of violating the guardian's *potestas* and of enabling somebody to marry her or have sexual intercourse with her (*S v Killian* 1977 2 SA 31 (C) See also *S v L* 1981 1 SA 499 (BSC) 502) where the abduction of a 15 year old girl was followed by intercourse: In this case the court noted that "convictions for abduction are becoming increasingly rare . . . due to more permissive standards in society"). It immediately becomes clear that the customary law practice of *thwala* is totally different from the common law abduction because:

- (a) *thwala* is lawful in the society that designed it;
- (b) there is no *thwala* of males yet abduction relates to males and females; and
- (c) whilst one of the purposes of abduction is to have intercourse, the contrary is the position with *thwala* – here the aim is to negotiate a marriage.

Olivier *et al* (*Indigenous Law* (1995) 123 par 119) also state categorically that *thwala* is not abduction.

All this notwithstanding, the courts have sometimes gone ahead and ruled that *thwala* is no defence to a charge of abduction (see *R v Sita* 1954 4 SA 20 (E). See also *R v Swartbooi* 1916 SA Law Reports (Juta) 170 (EDLD). The Natal Code of "Zulu" Law makes the abduction of "an unmarried girl" an offence, thereby converting the *ukuthwala* custom of customary law into the common law offence of abduction (see section 115(1)(f) of the Code published in Proclamation R151 of 1987). The abduction punished in common law relates to a girl under 21 years of age,

who is therefore under parental control or guardianship, not any unmarried girl. The courts have accordingly ruled quite rightly in the circumstances that the word as used in the code's section bears the same meaning as at common law (see *S v Katelane* 1973 2 SA 230 (N)). But these cases related to abduction without the girl's consent. *Thwala* as described above, is not *ipso facto* an offence.

African women who are businesswomen, professors, doctors, lawyers, secretaries, teachers need not be concerned. The *thwala* custom is about a large number of people who practice a rustic lifestyle. The rules of *thwala* and customary law in general do not have to be adapted or suspended for their sake. For an open-minded observer *thwala* is indeed a charming, romantic practice. It is a peculiar type of elopement. It may also suitably be called a "mock abduction".

On the other hand a western lifestyle and an urban milieu do not lend themselves to the practice of *thwala*. Imagine a girl practicing as an advocate, living in a posh suburb and associating with fellow lawyers. They obviously live outside the sphere of customary practices like *thwala*. Unmarried men in that social circle would realize that abducting their advocate girlfriend under the guise of *lobolo* would spell trouble. There is no way in which it could be a prelude to a marriage. The girls and their parents would surely lay charges of abduction.

Statistics show that rather than decreasing, the *ukuthwala* custom is gaining popularity from decade to decade amongst the adherents of customary law. Thus Bennett (*A Sourcebook of African Customary Law for Southern Africa* (1991) 190) states:

"The marriages by *ukuthwala* which have been increasing from the 1920's have increased even further during the past few decades . . . [u]kuthwala marriages increased from 14.6% of all marriages in the 1920's to 18.3% in the 1930's and reached 30.3% in the 1940's . . . It can be seen that these marriages have increased further and constitute 55.9% of all marriages since 1950."

This is food for thought for those who think that customary law and customary practices like *thwala* and *lobolo* can be wished away just because we are in the new millennium. The other mistake is the introduction of legislative measures by parliament and the handing down of judgments by the highest courts of the land which purport to develop customary law when in fact they are killing it "softly" or in a clever manner. (See *Bhe v Magistrate, Khayelitsha* (*Commission for Gender Equality as amicus curiae*); *Shibi v Sithole*, *SA Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC), which abolished the rule of primogeniture in the customary law of succession; further Pieterse "Killing it softly: Customary law in the new constitutional order" 2000 *De Jure* 35.) A ray of light appears in the judgment of Pakade J in *Feni v Mgudlwa* (Transkei High Court Case No. 24/2002 (unreported)) where unqualified support for the *ukuthwala* custom as a basis for the formation of a valid customary marriage is given. In *casu* the judge found that there was no real *uku-thwala*, but intimated that if there was he would have recognised an ensuing customary marriage. It is hoped that the courts will persist in upholding the rules of customary law if only for the sake of those people

whose lives are governed by it and who have no place to hide under the sun in this regard.

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