

**THE CENTRALITY OF CUSTOMARY LAW IN
THE JUDICIAL RESOLUTION OF DISPUTES
THAT EMANATE FROM IT**

***Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC**

1 Introduction

The recent judgment by the Mthatha High Court in *Dalisile v Mgoduka* ((5056/2018) [2018] ZAECMHC (*Dalisile*)) has elicited much jubilation over the permeation of customary-law principles into the judicial resolution of disputes that emanate from a customary-law context. The judgment comes at a time when common-law principles appear to have infiltrated the resolution of disputes that originate from customary law. This case paves the way and provides a foundation for the resolution of customary-law disputes within their own context. It reinforces arguments that have long been canvassed to constitutionalise customary law within its own framework (Ndima “The Anatomy of African Jurisprudence: A Basis for Understanding the African Socio-Legal and Political Cosmology” 2017 *Comparative and International Law Journal of Southern Africa* 84–108). It endorses the envisioned commitment to translate into reality the “healing of the divisions of the past” as envisaged in the preamble of the Constitution of the Republic of South Africa 1996 (Constitution). Section 211(3) of the Constitution is distinct and prescriptive on the obligations of the courts relating to the application of customary law. Section 211(3) is in the context of pursuing the advancement of a constitutionalised system of customary law that seeks to equate the applicable laws of the Republic.

This case has filled a *lacuna* in the application and interpretation of customary law, which has been clouded by the prism of common law. The gap was acknowledged by the court in *Alexkor Ltd v Richtersveld Community* (2003 (12) BCLR 1301 (CC) (*Alexkor*)), when the court pronounced:

“while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so, the courts must have regard to the spirit, purport and objects of the Bill of Rights”. (par 51)

In *Alexkor*, customary law was affirmed as an independent and legitimate source of law that is empowered to regulate its own affairs within the

framework of the Constitution. It does not have to be legitimised and validated by common-law principles in addition to the Constitution.

Resolving disputes arising from customary law has been a great cause for concern. The courts have delivered many disappointing judgments in the area of resolving customary-law disputes. These judgments appear to lean towards importing common-law principles into the resolution of disputes that arise from the system of customary law. This case note does not intend to discuss these judgments in any depth as they have been dealt with elsewhere (Ntlama “Equality Misplaced in the Development of Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 (CC)” 2009 *Stellenbosch Law Review* 333–356).

It is thus not the purpose of this case discussion to delve into the history of customary law. Its intended focus is limited to the significant stride made by the court in *Dalisile* in uprooting the dominance of the application of common-law principles in the resolution of disputes that arise from the system of customary law. The objective is to generate debate on the contribution that the judgment makes to the incorporation of Africanised principles into the broader constitutional framework of the jurisprudence of our courts. The note argues that it is the Constitution that is the dominant authority over all the legal systems that are applicable in the Republic, including customary law.

2 Background facts concerning *ilobola* as a component of customary marriage

The case emanates from a challenge in relation to burial rights over the unfinished payment of *ilobola*, which, as alleged, could have resulted in the conclusion of a valid customary marriage. The applicants sought an urgent interdict to bar the respondent (husband) from burying his deceased wife. The respondent contended that he had concluded a valid customary-law marriage with the deceased, who died tragically in a car accident on 10 September 2018 in Butterworth. The applicants painstakingly contested the claim of a valid customary marriage (par 1).

It is clear from evidence presented before the court that *ilobola* negotiations were entered into on 26 December 2014, when a set number of cows was agreed upon and a total amount of R22 000 was paid. At the end of the negotiations, the deliberations and resolutions were recorded and signed by the negotiating parties as follows:

“GUESTS FROM MGODUKA FAMILY, ONYATHI FLAGSTAFF 26 DECEMBER 2014. When asked they said they were carrying with them R20 000.00 which was counted and confirmed. Amaqwathi met and decided that the cow for the face of the girl is R6 000.00 and each cow will be R5 000.00. They asked that each cow should be R4 000.00 which was agreed to. They left four cows of R20 000.00, R6 000.00 of which was set aside for the face of the girl leaving R14 000.00 with each cow being R4 000.00. They paid three bottles of brandy which were named according to tradition. They also paid R2 000.00 and the total paid is R22 000.00”. (par 4–6).

Flowing from this agreement, it was also agreed that the respondent’s family would return and pay two further cows when they would be advised of

the number of cows to be paid in order to conclude a valid customary marriage. In January 2015, the deceased was received and welcomed into the respondent's family and was given her marital name "Avuyile" and the goat called "tsik" was slaughtered to introduce her to the ancestors (par 19). This was also done in preparation of the final *ilobola* payment so that their marriage could be concluded.

There is a dispute of facts as to whether the payment of two cows was made, notwithstanding evidence that R10 000 was withdrawn from the respondent's bank and his allegation that an amount of R8 000 was paid over for the two cows that were outstanding. The respondent alleged that on 2 April 2018 the money was paid, but the record could not be traced because the emissary (his uncle) who had the record, had since passed on. The applicants, on the other hand, denied that the money was paid or that the respondent's family visited their family. It was also not in dispute that it was only after the payment of the two cows that the respondent was to be advised of the number of cows to be paid as *ilobola* (par 19).

It is also reported that the deceased advised her family that the respondent's family abducted her. The latter welcomed the deceased into their homestead as a wife without informing the applicant's family. This was viewed by the latter as disrespectful and, in response to their concern, the respondent's family made an informal apology. The deceased also left her marital home for her own home in May 2015, already pregnant with the respondent's child, and further left for Cape Town where she gave birth to their child. After the birth of the child, the families again met and performed a ritual to welcome the child into the respondent's family. It was at this ritual that the applicant's uncle made a pronouncement in public that the respondent was not recognised as a son-in-law or his family as "*abakhozi*" (in-laws) because the marriage had not been validly concluded.

With these facts presented, the legal question arising in this case was whether a valid customary marriage was concluded between the parties (par 14).

3 The rejection of common-law principles in the interpretation of customary-law disputes

The decision in *Dalisile* was inevitable. Since the entrenchment of customary law as a constitutionalised system of law in the 1996 Constitution, it has been imbued with its own independence in the regulation and resolution of customary affairs. The role of the pre-1994 constitutional law system, which subordinated and dominated customary law through the application of common-law principles, was rejected by South Africa's new constitutional sphere. Under the 1996 Constitution, the established principles of the common law could no longer assert their authority and venture into the arena of customary law to form and develop the content of the latter system. The application of common-law principles to customary disputes was misplaced from the outset in South Africa's history.

The fundamental change brought about by the 1996 Constitution accords customary law equal status with the common law; this enables the

development of customary law using constitutionalised principles within the framework of the latter system itself. It paves the way for the infusion of the local content in the production of legal knowledge. This change has the potential to shape the functioning of the courts to affirm a constitutional framework that may contribute to the reconstruction of South Africa's jurisprudence.

As part of such reconstruction, the court in *Dalisile* rejected reasoning that applied common-law principles to the determination of burial rights as expressed in *Mankahla v Matiwane* (1989 (2) SA 920 (CkGD) 924 A–F (*Mankahla*)). In the latter case, the court formulated the burial principles as follows:

- (a) If someone is appointed in a will by the deceased, then that person is entitled and obliged to attend to his burial and that person is entitled to give effect to his wishes.
- (b) The deceased person can appoint somebody to attend to his burial in his will or in any other document or verbally formally or informally, and in all these instances effect should be given thereto in so far as it is otherwise legally possible and permissible.
- (c) A deceased can in the third instance, die intestate, but can appoint someone to attend to his burial in a document or verbally.
- (d) In the absence of a testamentary direction the duty of and the corresponding right to see to the burial of the deceased is that of the heirs. The heirs appointed as heirs in the will of a deceased.
- (e) The afore-mentioned principle that heirs (appointed as heirs), in the absence of any provision in the will as to burial of the deceased, are entitled and obliged to attend to the burial of the deceased applies in my view similarly and equally to intestate heirs of a deceased. That would mean that, in the absence of any indication by a deceased as to his burial arrangements, the intestate heirs would be in the same position as testate heirs. [The judge] can see no reason why the position should be different in the case of intestate heirs.
- (f) It follows that persons obliged and entitled to see to the burial arrangements are also entitled to arrange where and when the deceased is to be buried." (par 32)

The court in *Dalisile* vehemently opposed reliance on these factors as it constitutes a disregard of the system of customary law in the resolution of disputes that emanate from it. The court first points out the fact that the case itself (*Mankahla*), which predates 1994, was a non-starter. These factors were the common feature of the jurisprudence at the time. However, the use of common law predated customary law itself. The court goes further and affirms that even if there were cases decided after *Mankahla* and/or after the commencement of the new constitutional dispensation, they would have been decided on a wrong premise without determining the applicability of customary law. The court substantiated its reasoning and held that

"it has always been wrong to decide a case without consideration on the facts of the case whether customary law is applicable or not ... [and] could amount to the impermissible disregard of the Constitution and therefore a promotion of common law at the expense of customary law, even if that is done unwittingly." (*Dalisile* par 34–35)

The court further drew a distinction between the "indiscriminate conflation of burial rights with rights of inheritance" and held that they

“do not always go together, certainly not under customary law and African traditional belief systems which sometimes include issues of African traditional religious practice. It is this dominance that must be guarded against as not doing so will be at the risk of not complying with the clear provisions of the Constitution on customary law.” (par 36)

It is evident that the court in *Dalisile* eased the pain of the non-infusion of customary-law principles into South Africa’s jurisprudence. Sachs J has long articulated this pain in *S v Makwanyane* (1995 (6) BCLR 665 (CC) (*Makwanyane*)) when he held:

“it is a distressing fact that our law reports and legal textbooks contain few references to African sources as part of the general law of the country. That is no reason for this court to continue to ignore the legal institutions and values of a very large part of the population, moreover, of that section that suffered the most violations of fundamental rights under previous legal regimes, and that perhaps has the most to hope for from the new constitutional order.” (par 371)

Mokgoro J in the same judgment argued that the

“point of departure in the resolution of customary-law disputes should be the latter system itself and not the importation of the Western conceptions of the prescripts in the broadening of the framework of the law.” (par 308)

Although it is still too early to determine with precision the effect the judgment will have, the court asserted the equality of constitutional status in the development of the principles of all legal systems. The assertion by the court on its power to develop the content of customary law within its own context is commendable. The court reinforced the language of rights that affirms the constitutional identity of the subscribers to the system of customary law. The rejection of the continued manifestation of South Africa’s history, especially by the courts, in the making of judicial pronouncements that have a negative effect on the evolution of customary-law principles in the post-apartheid era is indicative of the needed strides for the development of the system within the envisaged constitutional framework. Customary law is subject to the Constitution and its principles should not be shaped by common-law principles. The court exerted its own judicial authority as envisaged in section 165 of the Constitution. The latter section provides:

- “(1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
- (6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.”

Section 165 is directly linked to section 172, which entrenches the powers of the courts in constitutional matters and reads as follows:

- “(1) When deciding a constitutional matter within its power, a court:
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including:
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
- (2)
- (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. [Par (a) substituted by s. 7 of the Constitution Seventeenth Amendment Act of 2012.]
 - (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
 - (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
 - (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.”

The two sections serve as an affirmation of the execution of judicial authority that should not be clouded by common-law principles in the resolution of customary-law disputes. They endorse the personal and institutional independence that characterise the role of the judiciary in the application of the law without fear or favour. This means that judges, as individuals have to apply the law impartially without undue influence and as an institution, to uphold the ability of the judiciary in the administration of justice (Siyu and Mubangizi “The Independence of South African Judges: A Constitutional and Legislative Perspective” 2015 *PELJ* 817–846).

With the judgment in *casu*, the legitimacy of customary law with its characteristic lived and official versions is no longer clouded by a shadow of doubt over its constitutional status. Customary law is contextualised as a source of law that should not merely be tolerated while using the Constitution to give content to customary law’s own values and principles. It is clear that customary-law principles have crept into the judicial space in the development of the values of the new dispensation. This was unavoidable because the courts are required by section 39(2) to promote the bill of rights when interpreting and developing customary law. It is in this vein that section 211(3) of the Constitution further requires the courts to apply customary law, subject to the Constitution, because customary law is protected in its own right (*Bhe v Khayelitsha Magistrate* 2005 (1) BCLR (CC) 15 par 41 (*Bhe*)). This sets the tone for a constitutionalised jurisprudence that should give effect to the legitimacy of customary law. The result of *Dalisile* is the

affirmation of the supremacy of the Constitution, as envisaged in section 2, in the application and interpretation of customary law.

In essence, *Dalisile* presents an opportune moment to align African law with a transformed jurisprudence of our courts. It also clarifies the myths and misconceptions that are perpetuated, mostly by academics, that the system of customary law is confusing. For example, Lehnert (“The Role of the Courts in the Conflict between Customary Law and Human Rights” 2005 *SAJHR* 241–277) argues and creates a misconception that customary law disputes do not emanate from a system that carry an equal “rights status”. Customary law is a human-rights system in itself and disputes that emanate from it should be dealt with within the context of the fundamental rights that arise from it. Why would customary law confuse the people who are living the system? Its unwritten nature does not make it unknown and redundant to the people who practise it. Discarding common-law principles is the foundation needed for a clear resolution of customary-law disputes within their own context. It is common-law principles that have long caused confusion about the legitimacy of customary-law principles in the resolution of its own disputes.

Dalisile is a fair reflection of South Africa’s pluralistic character, to which the country committed itself in the Constitution’s Preamble. The common-law approach to the resolution of customary-law disputes has been based on narrow sociological and ideological approaches. The author must pause to mention, as pointed out in *Alexkor* (par 56), that the two systems (customary law and common law) developed in different situations, under different cultures and in response to different conditions. Hinz correctly captures this distinction as he points out:

“[A]frican customary law shows differences to Western law because both forms of law are based on different concepts of justice and maintain procedural rules geared towards achieving their concepts of justice. In view of this, and since there was no administration of justice in Africa comparable to the administration of common law that would produce reliable precedents, the call for codification appeared to be the easiest way to ‘uplift’ African customary law to the standard of real law. That African customary law would lose their flexibility to be applied by the communities in the interest of restoration of peace and harmony among themselves was of no concern to the proponents of codification.” (Hinz “The Ascertainment of Customary Law: What is Ascertainment of Customary Law, What is it For and What is the Work Ahead?” 3 in Hinz and Gairiselo *Customary Law Ascertained: The Customary Law of the Nama, Ovaherero, Ovambanderu, and San Communities of Namibia* (2016))

Mnyongani similarly expressed that

“[t]here is very little in common between customary law and the dominant Western-inspired legal system. Philosophically, the two systems are grounded on completely different *jural* postulates. Procedurally and substantively, the systems are worlds apart. What is fair in one system may therefore not necessarily be fair in another. Access to justice is more than physical access and includes being heard effectively. To be heard effectively will require fluency in the legal language and its processes.” (Mnyongani “Duties of a Lawyer in a Multi-Cultural Society” 2012 *Stellenbosch Law Review* 352–369 353)

There was evidently a need for produced jurisprudence to ensure the preservation of the quality of legal knowledge in every segment of society's legal and value systems. In this way, as reinforced in *Makwanyane*, it entails a

“radical departure from what it used to be in the past where, due to parliamentary sovereignty, the courts could not go beyond the unambiguous language of the text irrespective of how unjust the legislative provision”.(par 301)

This past has continued to manifest itself in the production of jurisprudence shaped by common law, even in the new dawn of democracy – as evidenced by, for example, the *Shilubana v Nwamitwa* (2008 (9) BCLR 914 (CC)) and *Bhe* judgments. These two cases, though highly acclaimed for achievement and progressive realisation of the right to gender equality, were tainted by heavy reliance on Western conceptions of the latter principles instead of on the framework of the law under which they emanated – namely, customary law. The same applied in the *Dalindyebo v State* (2016 (1) SACR 329 (SCA) 1) judgment. In this case, an opportunity was wasted for the development of the African philosophy of *ubuntu* in the interpretation of the criminality of King Dalindyebo within the framework of customary law. The court could have developed the concept of the “King can do no wrong” and enabled the infusion of constitutional criminal-law principles into the determination of the guilt of the King in customary law. In this way, the approach could have seen constitutional principles giving content to the development of African principles of jurisprudence as required by section 39(2) of the Constitution. The three cases, by importing common-law principles for the interpretation of customary-law disputes, reinforced the state of degeneration of the latter system by neglecting to develop it alongside the common law.

The values of customary law, which historically were distorted and disregarded in judicial law-making, have once again been injected into the mainstream of South Africa's jurisprudence (*Makwanyane* par 305). Mokgoro J broadened this role and emphasised that the evolution of customary-law principles should not be left to the judiciary alone but should be extended:

“The broad legal profession, academia and those sectors of organised civil society particularly concerned with public interest law, have an equally important responsibility and role to play by combining efforts and resources to place the required evidence in argument before the courts. It is not as if these resources are lacking; what has been absent has been the will, and the acknowledgment of the importance of the material concerned.” (par 305)

Mokgoro J's recommendation is indicative of the challenge faced by those courts that are not familiar with African customary-law issues. The interrelationship and interdependence of the various sectors of civil society is foundational to the recognition and understanding of the ethos, practices, worldviews and rules that emanate from customary law. The acceptance of customary law by such an intersection of civil society practitioners will then deal with the history and further produce knowledge, judicially and otherwise, that is not couched and moulded in common-law-inspired

principles of the pre-constitutional dispensation period (Mnyongani 2012 *Stellenbosch Law Review* 353).

However, these sectors should also be cautious of the dominance of the official version of customary law over the living one because of rigid principles that are likely to be in a precedent format. I concur with the caution by the court in *Alexkor* (par 54) against the reliance on academic writing or other witnesses, notwithstanding their significance in the determination of a particular custom. It reasoned that textbooks and old authorities tend to view indigenous law through a prism of legal conceptions that are foreign to it. Secondly, the courts may also be confronted with conflicting views on the provisions of indigenous law on a particular subject. It also restrained itself from deciding how such conflicts are to be resolved.

It is important, as a point of departure, to consider the living version of customary law, which entails the unwritten customary law that is not developed by statutes but reflects the living circumstances of people as opposed to the official version. Ngcobo J in the *Bhe* judgment gave content to this version and held that

“[i]t lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case [and] accommodating different systems of law in order to ensure [the] ...:

- (a) respect the right of communities to observe cultures and customs which they hold dear;
- (b) preservation of indigenous law subject to the Constitution; and
- (c) protection of vulnerable members of the family. Indigenous law is part of our law. It must therefore be respected and accorded a place in our legal system. It must not be allowed to stagnate as in the past or disappear”. (par 236)

In the determination of the validity of the customary marriage in *Dalisile*, the reliance on the official version of customary law caused uncertainty over the development of these principles within their own context as argued here. The officialised version of the requirements of a customary marriage are entrenched in section 3 of the Recognition of Customary Marriages Act 120 of 1998 (RCMA). The RCMA reads as follows:

- (1) for a customary marriage entered into after the commencement of this act to be valid;
 - (a) the prospective spouse must both be above the age of 18 years;
 - (i) must both be above the age of 18 years;
 - (ii) must both consent to be each other under Customary Law;
 - (b) *the marriage must be negotiated and entered into or celebrated in accordance with customary law.*” (author’s emphasis)

It is clear from this provision that *ilobola* is not directly included as a requirement of a valid customary marriage. I am of the firm view that the *ilobola* custom was not included as a requirement in the RCMA for strategic reasons; the fact that *the marriage has to be celebrated according to custom* endorses the living version of the practice. The latter is clothed with its formalities until a formal customary marriage is concluded.

It is submitted that the heavy reliance of the court on the official version of the requirements of a customary marriage trivialised the understanding of marriage in a customary-law setting. It created an uncertain result relating to the legitimacy of the practice of *ilobola*. It is not in dispute that *ilobola* is a foundation of customary marriage. It is a bedrock that recognises the establishment of a relationship between families and not individual couples in a marriage. Besides, *ilobola* does not have to be paid in full for the recognition of a legitimate customary marriage. The refusal by the court to grant the respondent the burial rights of his wife reinforced the concept of individualism, which appears to characterise societies today. These societies are competitive and driven by the attainment of freedom for the self and not by a value system that is designed to keep individuals within family relationships. Marriage in customary law is not an individualistic affair and goes further to include not only family but the community at large. The Constitution was founded on principles of equality, human dignity and freedom (section 1) and should be inclusive of those principles that emanate from customary law.

It is submitted that the court in *Dalisile* misdirected itself and misconstrued the custom of *ilobola* by not considering the living version of customary law as a source of law. It conflated the living and official versions of the system by over-relying on the latter. It is not in dispute that to fulfil the requirements of a valid marriage in all the Nguni groups, *ilobola* has to be negotiated, as well as minor logistical differences between the diverse groups. Thus, *ilobola* does not have to be paid in full for a woman to be a legitimate wife to her husband. The necessities about the formalities of the handing over of the girl (*umendiso/uikutyiswa amasi*) are practices that are associated with a customary marriage. The non-performance of these rituals does not invalidate the marriage.

In *Dalisile*, the deceased had already been received and welcomed into the respondent's family through the slaughtering of the goat named "*tsiki*" and had been given the marital name "*Avuyile*" in January 2015. When the deceased's family became aware that the respondent's family had welcomed her into their homestead, they did not immediately renounce her. Instead, they allowed the deceased to continue to be recognised as a wife to the respondent without any objections. On the other hand, customary law has a remedy for the deceased family where they could have done what is called the practice of *ukutheleka*. The practice entails the retention of the wife for the payment of the outstanding *ilobola*. It was only after the deceased had gone home, already pregnant with the respondent's child, that she indicated that she also no longer wanted to be married to the respondent. There is no evidence in the judgment indicating that a delegation was sent to the respondent's family to advise of the *ukutheleka* custom. Instead, when the wife gave birth to the child, they went to the respondent's homestead to conduct an *imbeleko* ritual for the welcoming and introduction of the child to the ancestors. This would have been misplaced if the deceased's family did not recognise the validity of the customary marriage; they could not have performed this ritual because the child of an unmarried woman belongs to the maternal family.

The *ukutheleka* and *imbeleko* practices, which are a foundation of the identity of the woman and the child in customary marriages, were rejected under the name of developing customary law as required by section 39(2). The development that is envisaged in section 39(2) is one that should be couched in customary terms.

Dalisile raises the question whether all legal professionals, not only the judiciary, are well vested and equipped to use customary law as a transformative legal and legitimate source of law in the decolonisation of South Africa's jurisprudence. The recognition of customary law highlights South Africa's pluralistic character, which sees the co-existence of both the living and official versions in the resolution of constitutional and legal conundrums that emanate from the system. In essence, the historic survival of customary law, culminating in its constitutional recognition, is indicative of its relevance as a source of law to the many South Africans who subscribe to the system. The Constitution also envisages the affirmation of its practices, rules and principles in the resolution of its own disputes within its own context.

4 Conclusion

The court in *Alexkor* stated:

"In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution." (par 53)

It is deduced from *Alexkor*, as contended in this case discussion, that common-law principles cannot be used as a vehicle to wipe out the significance of customary law in the resolution of its own disputes in its own context. Application and interpretation of customary law is imperative for the determination of a particular practice such as *ilobola* in customary marriages. The equal status accorded by the Constitution to all legal systems is fundamental for the transformation of a jurisprudence that should be reflective of the various sectors of South Africa's populace.

Notwithstanding some jubilation at the recognition of the status of customary law in *Dalisile*, there is also a need to distinguish between the living and official versions of customary law. The official version is one that entrenches the common-law approach to the determination of a particular custom. The first point of call in the resolution of customary-law disputes should be the living version. Otherwise, focus on the official version will produce unwelcome results that do not speak the language of rights in communities. The official version, which is developed by statutes and academic writing and other sources of law, tends to dilute the significance of a particular custom, as evidenced by section 3 of the RCMA, which requires the celebration of a marriage according to the applicable custom. It is submitted that, ironically, this section officialises the requirement of *ilobola* for a marriage despite not directly including it as a ground, which creates

uncertainty as to the interpretation of the phrase ... “in accordance with the custom”. However, it is not denied that there is a standard in all the groups that *ilobola* is the foundation of a marriage, and therefore it will be understood to be required by custom as referred to in the ‘official’ RMCA version.

In all the Nguni groups, *ilobola* underpins a marriage. This requirement is at the core of determining the validity of a customary marriage. There are also different logistics that have to be followed after its payment but in the isiXhosa custom, which was misinterpreted in *Dalisile*, *ilobola* does not have to be paid in full. The *umendis* practice may even follow after the *umakoti* has been received and welcomed into the husband’s family by the slaughtering of the *utsiki* goat.

It is worth reiterating that *ilobola* is a common requirement for all customary marriages and in *Dalisile*, as per the isiXhosa custom, which was misinterpreted by the court, the respondent should have been given the burial rights of his deceased wife. The court has paved the way for the abolition of decades of subordination of customary law as a legitimate source of law in the resolution of relevant disputes. However, the envisioned transformation of the constitutionalised jurisprudence fell short of making a pronouncement for the incorporation of the Africanised principles in the broader constitutional framework of the jurisprudence of our courts.

Nomthandazo Ntlama
University of Fort Hare