

BREACH OF PROMISE TO MARRY UNDER CUSTOMARY LAW*

1 Introduction

In terms of section 211(3) of the Constitution, courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law (Constitution of the Republic of South Africa, 1996). This is a significant shift from the past when customary law was subjugated in favour of the common law. Past courts had discretion to apply customary law or not (Bekker and Van der Merwe “Proof and Ascertainment of Customary Law” 2011 26 *SAPL* 115 116). In terms of section 11(1) of the Black Administration Act (38 of 1927), the commissioners’ courts were authorised to apply customary law “provided that such customary law shall not be opposed to the principles of public policy and natural justice”. This provision was known as the repugnancy clause. The repugnancy clause provided some qualified relief to litigants who lived under customary law. The practical effect was that common-law courts could have regard to and apply customary law.

There was further qualified relief through section 1(1) of the Law of Evidence Amendment Act (45 of 1998). In terms of this provision, “any court could take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty”. This was the case provided that the custom was in accordance with public policy or natural justice. Section 1(2) of this Act also allowed a party to adduce evidence as proof of customary law. What is noteworthy about section 1(1) is that it equated customary law with foreign law. Courts are not bound by foreign law. It can thus be argued that the provision eased the evidentiary burden on litigants and relieved the courts of the burden of establishing a customary rule or practice as a question of fact by enabling courts to take judicial notice of customary law provided that it was readily ascertainable and in accordance with public policy.

Now, the Constitution places customary law on an equal footing with the common law. The application of customary law is now mandatory provided that it is applicable and in line with the values enshrined in the Constitution (Bekker and Van der Merwe 2011 *SAPL* 119). In practice, this means that courts are required to ascertain the content of the customary law applicable and then apply it. Perceivably, as a result of years of subjugation, customary law was deprived of the opportunity to progress along with the *mores* of society and as such, very large sections remained outdated or dormant (Ntlama “The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa’s New Constitutional

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Dispensation” 2012 15 *PER* 24 34 asserts that the benefit of recognition is that customary law can now be developed alongside the common law). Some subjects, such as the customary-law promise to marry, seem to have escaped the attention of writers as very few, if any, have written about them.

A discussion on the customary-law breach of promise to marry is important for a number of reasons. First, the Constitution places customary law on the same footing as common law, and the common law provides remedies for breach of promise to marry. While it is important to heed the caution of the Constitutional Court in *MM v MN* (2013 (4) SA 415 (CC) 423) that “customary law must be understood in its own terms, and not through the lens of the common law,” the developed state of the common law is exemplary. Further, it is submitted that the development of the common law on breach of promise to marry, which is discussed below, has been carried out in terms of section 39 of the Constitution. This is a common standard that this note will rely on towards the end. Therefore, the common law is an important point of reference.

Secondly, a large section of indigenous South Africans live under customary law. The courts should apply customary law when resolving disputes. If the content of the customary-law promise to marry is unclear, outdated, does not provide sufficient remedies or does not uphold principles such as equality, justice and fairness, courts must develop it. Thirdly, the elevation of the status of customary law means nothing if litigants who live under customary law find themselves struggling for remedies under common law just because little attention has been paid to a certain subject under their system of law. Finally, the presence of a remedy under common law should not be seen as a bar to the application of customary law.

In light of the fact that years of subjugation have stagnated customary law, section 39(2) of the Constitution imposes a duty on the courts to develop customary law by bringing it into line with the spirit, purport and object of the Bill of Rights. Such development takes place through the cases that come to the courts. It must be stated that there is no reported case on the customary-law breach of promise to marry. Two reasons may account for this silence: first, the previously institutionalised stagnation of customary law in general, and secondly, as is shown below, a promise to marry was rarely breached under customary law. It is also possible that when a case did eventually get to court, it was resolved through common-law principles. Whatever the reason for the silence, this subject remains topical because there can be no marriage without an underlying promise or agreement to marry.

Customary law has been defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of the culture of those peoples” (s 1 of the Recognition of Customary Marriages Act 120 of 1998 (Recognition Act)). It comprises two categories. The first is formal or official customary law, which consists of cases decided by the then-commissioners’ courts, statutes such as the Black Administration Act, and, largely, academic writings (*Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1074I). This category of customary law is readily available in print and is usually the starting point when courts ascertain the content of a custom. However, whether formal customary law

correctly reflects the customary law is debatable because most of it was not written by people who lived under customary law. A counter-argument is that one need not be a subject of customary law in order to write accurately about it. Another argument is that, by its nature, customary law is constantly changing, and therefore reducing it to writing makes it static. This latter argument can be countered by the fact that customary law does not change overnight; although, of course, older literature may fail to take account of the changes in customary law. Notwithstanding these arguments, formal customary law remains useful as a starting point.

The second category of customary law is living customary law. This is the law actually observed by indigenous communities and which reflects changing practices (*Mabena v Letsoalo supra* 1074I, where the court noted that living customary law was in a state of continuous development). Living customary law easily adapts to changes in practice as it is not written down. Once living law is reduced to writing, it becomes official customary law. Whether the official version reflects the living law will depend on the speed of change in societal practices; although difficult to keep track of, it should be acknowledged that they do not change overnight.

The purpose of this note is to look at breach of promise to marry, or breach of an engagement, under customary law. The note commences with a brief discussion of the common law and its development on the subject of promise to marry. This is followed by an enquiry into whether, under customary law, there is such a thing as a promise to marry, as we have come to know it, and if so, what the consequences of such a breach are. After this, the question discussed is who could claim following a breach of promise to marry. This is important because, under customary law, unmarried women were under the guardianship of their fathers or the eldest male in the family. Consequently, a father or eldest male in the family enjoyed the exclusive right to claim damages in a semi-personal capacity for a wrong committed against his daughter (*Mabena v Letsoalo supra* 1074I). After the expositions outlined above, this note then considers whether the customary law on a promise to marry is in need of development to bring it into line with the Constitution and how that development should take place.

2 The common-law action for breach of promise to marry

In recent years, the common-law notion of a breach of promise to marry has been a bone of contention in South African law. The common law, as it stood in the nineteenth century, afforded the wronged party, often a woman, specific performance (Geduld and Dircksen “The Right to Say ‘I Don’t’: The Reception of the Action for Breach of Promise” 2013 *De Jure* 957 963). By the twentieth century, it was no longer possible to claim specific performance. Instead, the wronged party had two potential remedies. The first was under the law of contract (*Sepheri v Scanlan* 2008 (1) SA 322 (C) 331). The wronged party had to prove (a) the promise to marry, and (b) the breach thereof (*Sepheri v Scanlan supra*). The wronged party could claim for actual and prospective loss suffered as a result of the breach (*Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) 561). Under actual loss, she could claim,

among others, the wasted costs of planning the wedding and any other losses she had suffered as a result of the breach. Under prospective losses, she could claim for the loss of benefits she would have enjoyed had the marriage materialised (Skelton and Carnelley *Family Law in South Africa* (2010) 27). The latter entitled the wronged party to claim up to half the estate of the guilty party if there was something to support a claim that the promised marriage would have been in community of property (*Guggenheim v Rosenbaum* 1961 (4) SA 21 (W)). The extent of a claim was influenced by factors such as the expected length of the marriage, the age of the plaintiff and the possibility of remarriage).

The second potential remedy was under the law of delict. Under this head, the wronged party could claim for injured feelings if the manner in which the breach occurred was wrongful in the delictual sense (*Van Jaarsveld v Bridges supra* 561). Whether there was just cause for the breach was irrelevant. What mattered was the manner in which the breach occurred. However, the fact that the wronged party felt jilted and hurt by the breach was not enough. She could only succeed with a claim if the manner in which the breach occurred was objectively wrongful (*Bull v Taylor* 1965 (4) SA 29 (A)).

The legal position outlined above has changed. Davis J expressed doubts whether basing the claim for breach of promise on the law of contract was in line with the *mores* of society in the twenty-first century (*Sepheri v Scanlan supra* 330). However, he left it for a higher court or the legislature to clarify the legal position (*Sepheri v Scanlan supra* 331). These doubts found expression in the Supreme Court of Appeal (SCA) when Harms DP reiterated:

“I do believe that the time has arrived to recognise that the historic approach to engagements is outdated and does not recognise the *mores* of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise.” (*Van Jaarsveld v Bridges supra* 560–561)

Despite feeling so strongly about reconsideration of the law, the SCA did not seize the opportunity to pronounce on whether a claim relating to a breach of promise based on the law of contract still formed part of our law or needed redress. In the court’s view, the case could be decided without altering the legal position. The matter could be decided with reference to two factual issues: the first was whether the breach was contumacious in the delictual sense, and the second, was whether the plaintiff had suffered any actual loss as a result of the breach (*Van Jaarsveld v Bridges supra* 561). This portion of the judgment has been criticised for rejecting the law of contract as the basis of the claim, while using law-of-contract concepts to decide the matter (Bonthuys “Developing the Common Law of Breach of Promise and Universal Partnerships: Rights to Property Sharing for All Cohabitants?” 2015 132 *SALJ* 76 85). Nonetheless, the court upheld the delictual head of the claim. It also upheld the contractual claim for actual loss. It is worth emphasising that the court did not pronounce on whether the claim for prospective loss still formed part of South African law.

The question about prospective loss resurfaced in the Western Cape High Court in *Cloete v Maritz* (2013 (5) SA 448 (WCC)). In this case, Henney J agreed with the argument by counsel for the plaintiff that the doubts

expressed in *Sepheri* and *Bridges* were obiter and not binding on the court. However, in deciding the matter, the court had regard to section 39 of the Constitution. It noted the need to sever the claim for prospective loss as it was no longer in line with public policy (*Cloete v Maritz supra* 459G; Geduld and Dircksen 2013 *De Jure* 966).

A similar matter was heard before the Gauteng High Court in the unreported case of *Nhlapo v Zimu* (NGP (unreported) 2017-9-1 case no 2016/8478). In this case, the court supported the view that the doubts expressed in *Sepheri* and *Bridges* were obiter. The court also found that it was not bound by the decision in *Cloete*, being a decision of another division. Nonetheless, the court considered the decision in *Cloete* to be of strong persuasive value. The court held that public policy considerations based on the Constitution no longer allow a claim for breach of promise to marry based purely on contractual damages (*Nhlapo v Zimu supra* par 25–26).

Although some academics are of the view that the claim for prospective loss no longer forms part of our law (Geduld and Dircksen 2013 *De Jure* 966–967), this is not entirely correct, especially taking into account the doctrine of judicial precedent. Strictly speaking, a higher court, being the SCA, has not pronounced on the matter. The SCA twice had the opportunity to settle the matter, but did not. This means that, until the SCA pronounces on the matter, another division of the High Court would be justified in upholding a claim for prospective loss based on the law of contract. Taking into account the sharp criticisms of the judgments above levelled by Bonthuys, this appears even more likely to be the true position. As has been noted above, Bonthuys points out that the courts' insistence that breach-of-promise claims should not be treated like commercial contracts is contradicted by the application of contractual principles to curtail the claim (Bonthuys 2015 *SALJ* 78). She also argues that the effect of the above judgments was to limit litigation under contractual principles while widening the gate for universal partnerships (Bonthuys 2015 *SALJ* 88).

Nonetheless, for the sake of progress in the present discussion, there is no harm in accepting that, in terms of current law, a wronged party can only claim for actual loss arising from the breach of an engagement and for damages in delict for hurt feelings; this is to say, that a wronged party can no longer claim for prospective loss under the law of contract.

3 Promise to marry under customary law

As has been pointed out above, the Constitution binds the courts to apply customary law, provided that it is applicable. The first step towards complying with the Constitution in this regard is to ascertain the content of the customary practice. In this note, the concern is whether customary law recognises the concept of a promise to marry, and any consequences for breach of such a promise. A distinction must be drawn between ascertaining customary law as a research exercise, such as the present one, and ascertaining customary law in judicial proceedings. The former entails a perusal of existing literature, whereas the latter is a bone of contention in

light of the Constitutional Court decision in *MM v MN (supra)*, which is discussed below.

In what follows, the content of customary law on breach of promise to marry will be ascertained. This is done through the use of available literature. The immediate challenge is that most customary law academics have focussed on trending topics such as the validity of customary-law marriages and *ilobolo* (in addition to the problems identified by Bekker and Van der Merwe 2011 *SAPL* 120 that there is no agreement that the written sources, such as textbooks and journals, are an authentic representation of customary law). Very little attention has been given to what customary law has to say on breach of promise to marry or engagement. This is a *lacuna* because a marriage cannot be separated from an engagement as every marriage, whether under customary law, common law or religious rights, is preceded by an engagement – that is, an agreement to marry on a certain date or within a reasonable time.

While academics have not paid much attention to the subject, one academic, Dlamini, considers the subject in his doctoral thesis (Dlamini *A Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society* (doctoral thesis, University of Zululand) 1983). In answering the question whether engagements existed under customary law, he considered the common-law definition of an engagement. He defined an engagement as “an agreement between two persons of the opposite sex wherein they promise to marry each other either on a fixed day or within a reasonable future time. This agreement is a contract that is enforceable in a court of law” (Dlamini *A Juridical Analysis* 325). It is submitted that this gender-specific definition is a reflection of the common law at the time of writing the doctoral thesis. Changes in societal values and the constitutional right to equality demand that the definition should be gender neutral. On the other hand, it remains to be seen whether customary law, which is known to frown upon same-sex unions, will ever voluntarily adopt a gender-neutral stance or whether one will be imposed through constitutional interventions.

After defining an engagement in terms of the common law, Dlamini considers whether under customary law, particularly Zulu law and seSotho law, a similar agreement existed. He found that an agreement of this nature did exist. It is submitted that he is correct in this regard because in every system, a marriage cannot exist in the absence of a preceding promise to marry. Dlamini also pointed out that marriage under customary law, specifically Zulu law, goes through various stages namely, *ukuqoma*, *ukucela*, *ukukhonga*, the *ilobolo* negotiations and finally, the celebration of the marriage (Dlamini *A Juridical Analysis* 325). Since there are various stages, it is important to consider at which stage an engagement is concluded, which entails going through each of these stages. These are briefly discussed under a separate heading below.

It therefore appears that the concept of an engagement exists under customary law. This conclusion is not affected by the fact that the stage at which an engagement is concluded has been left open. The next question to consider is whether customary law recognises a breach of an engagement or promise to marry. The work of Dlamini is once again useful. He submits that under early customary law, a breach of promise to marry was not

actionable (Dlamini *A Juridical Analysis* 328). This was largely because a promise of this nature was hardly ever broken (Dlamini *A Juridical Analysis* 328–331 submits that the practice was to proceed with an unhappy marriage, and thereafter take a further wife of choice). Equally interesting is that, as with breach of promise, divorce was foreign to customary law (Bekker “Grounds of Divorce in African Customary Marriages in Natal” 1976 9 *CILSA* 346). In the unfortunate event that a breach did occur, the issue turned on the appropriate remedy (Dlamini *A Juridical Analysis* 328). It is unclear what the appropriate remedy was; some argued for forfeiture of cattle given for *ilobolo* while others argued for another form of remedy (Dlamini *A Juridical Analysis* 333–336). In Natal and KwaZulu, the practice was against forfeiture of *ilobolo* cattle until the occurrence of the marriage. Forfeiture was dependent on fault and could only occur after the marriage (Dlamini *A Juridical Analysis* 328–329). Even in cases where some form of forfeiture did occur, it was not complete forfeiture. Needless to say, once the marriage occurred, the matter fell outside the scope of promise to marry.

The reason for the distinction between pre-marital and post-marital forfeiture may not be self-evident. It is presumed that before marriage, the maiden retained her chastity whereas, after consummation of the marriage, she lost it. The forfeited cattle operated as damages for defloration and desertion. It must be emphasised that damages in the form of forfeiture do not relate to the breach of promise to marry, but are a stand-alone remedy for defloration. It should be evident that forfeiture of cattle is a complicated practice meriting a separate study beyond this note. Remedies for breach of promise are considered below.

It has been pointed out that a distinction must be drawn between ascertaining customary law as a research exercise, such as the present one, and ascertaining customary law in judicial proceedings. It has also been stated that ascertaining customary law in judicial proceedings is contentious. This part of the discussion turns now to ascertaining customary law in judicial proceedings. There have been doubts whether section 1(1) of the Law of Evidence Amendment Act is still applicable when ascertaining customary law (Bekker and Van der Merwe 2011 *SAPL* 115). This provision essentially allowed courts to take judicial notice of customary law provided that it could be ascertained with sufficient certainty and provided that it was not contrary to public policy and natural justice. Courts can take judicial notice when a fact is so well known and readily ascertainable that it is unnecessary to adduce evidence to prove it (Bekker and Van der Merwe 2011 *SAPL* 117). If the court cannot take judicial notice of customary law, evidence must be led to prove it (Bekker and Van der Merwe 2011 *SAPL* 118).

In *MM v MN* (2013 (4) SA 415 (CC)), there was a sharp contrast in views on how the court should go about ascertaining customary law. The core issue was whether, in Xitshonga customary law, the consent of a first wife was mandatory for the husband to enter into a subsequent customary marriage. The majority of the Constitutional Court preferred calling evidence. It held that it is the function of the court to decide on the content of customary law as a matter of law and not facts (*MM v MN supra* 433C). In a minority judgment, Zondo J held that it was unnecessary to call for further

evidence for two reasons. Firstly, the matter should have been decided based on the record before the court (*MM v MN supra* 440H). Secondly, there was no dispute regarding the content of the relevant rule of customary law because the appellant had pleaded it and the respondent did not dispute it (*MM v MN supra* 444F). A distinction should be drawn between not disputing a rule and an innocent failure to dispute a rule in the pleadings. The former can be construed as accepting the validity of the rule, whereas the latter failure to dispute the rule may be cured by amending the pleadings. In this case, it was the former. Zondo J also held that deciding on the content of customary law was a matter of fact, not law (*MM v MN supra* 450). In another minority judgment, Jafta J appears to second the view of Zondo J that the court should have accepted the content of the custom alleged by the appellant because it was not disputed (*MM v MN supra* 452).

This judgment is a reflection of the court's approach to taking judicial notice of customary law. The majority of the court preferred embarking on an exercise that necessitated the calling of evidence. In other words, the court was not prepared to take judicial notice of the custom solely on the ground that the respondent had not disputed the applicant's averment. On the other hand, the minority was in favour of taking judicial notice of the custom because, based on the pleadings, it was not disputed. Both the approach of the majority and that of the two minority judgments are subject to shortcomings. The approach of the majority can waste time as it involves the calling of evidence even in cases where it may be unnecessary. Equally, rigidly following the approach of the minority may result in the court accepting a practice as a rule of customary law simply because the respondent did not dispute it (Osman "Ascertainment of Customary Law: Case Note on *MM v MN*" 2016 31 *SAPL* 240 244).

It is submitted that the decision of the court may nonetheless be harmonised using a two-stage approach. The first stage applies if there is no dispute regarding a rule and the second stage applies if the rule is disputed. First, if there is no dispute regarding the rule, the court may take judicial notice of the rule provided that it can be "ascertained readily and with sufficient certainty" (*Mabena v Letsoalo supra* 1075A; *Hlophe v Mahlalela* 1998 (1) SA 449 (T) 457E–F). Once the court has taken judicial notice of a rule, it must apply it. If the application of the rule does not yield fair results, the court may take appropriate steps such as the development of the rule in accordance with section 39(2) of the Constitution. This should settle the matter. If, on the other hand, there is a dispute regarding the content of the rule, the court should go to the second stage. It should call for further evidence. From the evidence, the court must decide on the content of the rule as a matter of fact. It is submitted that this two-stage approach is a "one-size-fits-all" solution.

4 When is a promise to marry made under customary law?

It has been mentioned above that, under customary law, a marriage comes into being through various stages. The question of the stage at which an engagement is concluded was left open. The aim of the present section is to

look at each of the stages with a view to pronouncing on engagements. For convenience, this part of the article is confined to Zulu law and the concepts used are from Zulu tenets.

4 1 *Ukuqoma*

Ukuqoma is when a female accepts a male's declaration of love for her (Dlamini *A Juridical Analysis* 325). Often, when a male declares his love for a female under customary law, he utters words such as "I want to make you my wife". However, the female's acceptance does not conclude an engagement. Such words are merely laudatory to attract a female's attention. In the absence of any *ilobolo* payment, there can never be any inference of intention to marry on the part of the male.

4 2 *Ukucela*

Ukucela refers to the male's family visiting the female's family to ask for *ubuhlobo obuhle* (good relations). Basically, they ask for the two families to become one through marriage. This is in line with the known submission that, under customary law, a marriage is a union between two families (Dlamini *A Juridical Analysis* 326). Dlamini correctly points out that it may be argued that *ukucela* is not a contract between the parties but between the families (Dlamini "The Transformation of a Customary Marriage in Zulu Law" 1983 16 *CILSA* 383 384). (Since marriage is between the two families, death of a spouse does not terminate the marriage. In certain practices, once *ilobolo* has been paid, the family of the deceased might have to substitute the deceased with a living being to consummate the intended marriage. This is a species of *ukungena* or *ukuvusa* custom).

During *ukucela*, as a result of the advent of currency, a token amount of money is given to the female's family on demand by the latter. This may be seen as earnest cattle (Dlamini *A Juridical Analysis* 327). Whether this concludes an engagement or declares intention to marry is unclear. What is clear is that it makes the relationship between the couple known to their families. Dlamini submits that this is an engagement because the bride's father gives his consent to the marriage (Dlamini *A Juridical Analysis* 326). It is submitted that this argument may be outdated and that *ukucela* should not be seen as constituting an engagement only by reason of the father's consent. On the other hand, the father's consent may conclude an engagement, taking into account that, under customary law, everything pertaining to marriage is between the families of the intending parties. *Ukucela* usually coincides with the commencement of *ilobolo* negotiations.

4 3 *Ukukhonga*

Ukukhonga is the negotiation of the *ilobolo* amount. It usually coincides with *ukucela*. Here, the *ilobolo* amount is deliberated upon and an agreement is reached. Argument has been made that an agreement to pay *ilobolo* ought to be enforceable in a court of law. On the other hand, it has been argued that courts should be barred from adjudicating upon claims that arise out of

ilobolo (Hlophe “The KwaZulu Act on the Code of Zulu Law, 6 of 1981: A Guide to Intending Spouses and Some Comments on the Custom of Lobolo” 1984 17 *CILSA* 163 171). The latter argument was made at a time when customary law was subjugated; it was probably made to preserve the sanctity of the practice by preventing courts from infiltrating customary law with common-law principles.

ilobolo negotiations usually presuppose a marriage. However, this is not always the case as *ilobolo* may sometimes be paid to ‘legitimise’ children born outside of wedlock so that they belong to their paternal clan. Nonetheless, the norm is to pay *ilobolo* with a view to getting married. Therefore, if any of the above stages do not conclude an engagement, then finalisation of *ilobolo* negotiations with a view to marriage seals the agreement.

4.4 Delivery of *ilobolo*

The actual delivery of *ilobolo* may be regarded as performance of an agreement. The mere fact that no delivery has taken place does not on its own negate the agreement or promise to marry. Marriages have been concluded in the absence of delivery (or of complete delivery) thereof. Our courts have held that such marriages are valid (*Hlophe v Mahlalela supra* 459).

5 Who can claim for breach of promise to marry?

It has been established that customary law does recognise engagements. Furthermore, although historically engagements were seldom breached, breaches were not unknown. However, the remedies for breach remain unclear. This leads to one of the contentious issues in gender studies – the question of who has *locus standi* with respect to an action for breach of promise under customary law. It is known that under customary law women previously had no *locus standi*; instead, a male head of the family could bring the action. This is contentious and cannot be sustained today. The Recognition Act has remedied this situation. In terms of section 6, a woman married in terms of customary law has full status and capacity to contract and litigate. Furthermore, section 9 of the Act provides that the age of majority shall be 18 years (s 9 makes reference to the Age of Majority Act 57 of 1972, which has been repealed by the Children’s Act 38 of 2005; it is therefore submitted that the reference in s 9 is to the Children’s Act).

The rationale for allowing the male head to bring the action was that he was the head of the household and any insult towards any member of his household was, so to speak, an affront to his dignity and family name. There was no distinction between the head of the household and its members. Furthermore, for reasons that are stated below, it cannot be said that the action was brought in the male head’s personal capacity. Dlamini states:

“Customary law on the other hand had not developed to the stage of recognising individual rights, and consequently separating the individual from his family and kinship group. It was the group, and not the girl herself, that

was injured if she was [for instance] seduced.” (Dlamini *A Juridical Analysis* 331)

It is submitted that customary law remains collectivistic and group-oriented (Maluleke “Culture, Tradition, Custom, Law and Gender Equality” 2012 15 *PER* 2 4). No man is an island. This is illustrated by the isiZulu saying “*umuntu ngumuntu ngabantu*”, which means a person is a person because of other people (Maluleke 2012 *PER* 5). Collective rights are still held in high esteem and centralised around the head of the family or group. This does not mean customary law in this regard is stagnant. It has progressed and now accepts that the head of a family or group may be female.

It is therefore arguable that the head of the family, regardless of gender, should still be able to sue for the insult, although, of course, this must take into account the manner in which the promise to marry was breached. The rationale for this is that under customary law, a person’s household is sacred. There is a duty on those who interact with the household to do so with due regard to the dignity and privacy of its members. It is submitted that this argument has the support of the Constitution wherein the right to culture is upheld (s 31).

It is also submitted that under customary law, and in light of the Constitution and evolution of time and practices, women, who are generally the wronged party in such matters, should enjoy an unqualified right to take up such matters. This right should be independent of the right of the head of the household as argued above. In other words, the action of the head of the household and that of the wronged party should be distinct from each other.

6 Development of customary law on breach of promise to marry

Courts must develop customary law insofar as it is inconsistent with the Constitution. Development of the law must be carried out in terms of section 39(2) of the Constitution, which, in essence, requires the court to bring the law into line with the “spirit, purport and object of the Bill of Rights”. It is submitted that the phrase “spirit, purport and object of the Bill of Rights” refers to the values on which our Constitution is founded. These values are enshrined in sections 1–7 of the Constitution (Khumalo *Re-opening the Debate on Developing the Crime of Public Violence in Light of Violent Protests and Strikes* (Master’s dissertation, University of KwaZulu-Natal) 2015 5). It is also submitted that in order to give meaning to the spirit, purport and object of the Bill of Rights, courts must interpret the law so that it promotes the rights of vulnerable groups such as women and children (Khumalo *Re-opening the Debate* 5).

In *Gumede v President of the Republic of South Africa* (2009 (3) SA 152 (CC)), a case that dealt with the proprietary consequences of customary law, the Constitutional Court held that development of customary law serves three important purposes: first, to ensure that customary law is brought into harmony with constitutional values and international human rights standards; secondly, to salvage customary law from past deprivation; and lastly, to

strengthen the pluralist nature of the South African legal system (*Gumede v President of the Republic of South Africa supra* 162E–163A–B; at 166, the court held that it was unnecessary to develop customary law in terms of section 39(2) because the legislature had already done so by passing the Recognition Act).

The first stage in the development exercise is to consider whether the existing customary-law rule requires development in accordance with the section 39(2) objectives. A rule will require development if it falls short of the spirit, purport and object of the Bill of Rights. If the development is necessary, the next stage is to consider how such development should take place (*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2003 (6) SA 505 (CC) par 28). It has long been acknowledged that customary law rules on the promise to marry require development in various respects (Dlamini *A Juridical Analysis* 334). These are discussed immediately below.

It has been submitted that customary law does recognise a practice similar to a promise to marry. However, the consequences for breach are not entirely known because such promises have seldom been breached. It is submitted that customary law requires development to the extent that the consequences for breach of promise are unclear. Such development should enable the wronged party to claim damages from the wrongdoer. However, it must be noted that forfeiture of cattle given for *ilobolo* is not an appropriate remedy because it will fail outright in cases where no *ilobolo* was handed over to the potential bride's family. In such cases, there will be nothing to forfeit, so leaving the victim without a remedy. The most appropriate remedy will be damages in the delictual sense. Damages may be deducted before the *ilobolo* cattle are returned, that is if *ilobolo* had been delivered. If *ilobolo* had not been delivered, the defendant should be ordered to pay something of adequate value. Regard must also be given to the caution by Dlamini:

“The recognition of an action for damages in customary law would not necessarily mean that the termination of an engagement would always be actionable. It would only be actionable provided the elements for liability existed. In determining those elements recourse could be had to South African law as persuasive authority. In this way South African law would be used to develop customary law.” (Dlamini *A Juridical Analysis* 334)

Victims of a breach of promise should also be able to claim for patrimonial loss for expenses incurred preparing for a customary marriage that never happens (Dlamini *A Juridical Analysis* 331).

Secondly, it was submitted that under customary law, women had no *locus standi*. In *Mabena v Letsoalo (supra* 10731), the court observed that a woman could not act as a guardian with respect to her daughter because she was herself under her husband's guardianship. As pointed out above, this has been changed by sections 6 and 9 of the Recognition Act. It is submitted that customary communities should strive to realise these provisions. Cases such as *Bhe v Magistrate, Khayelitsha* (2005 (1) SA 580 (CC)) are a clear indication that society is moving in a constitutional direction that seeks to uphold the Constitution's founding values such as gender equality. Customary law should follow this direction in areas where women do not enjoy *locus standi* in matters that directly affect them. This argument

is also supported by the rapid increase in the number of female-headed households (Bekker and Van der Merwe 2011 *SAPL* 121). In *Mabena v Letsoalo* (*supra* 1073), the court had to decide whether the mother of a bride, being the head of the household, could receive *ilobolo* for her daughter. The court noted that, previously, customary law would not have allowed this, but it held that it had to recognise that a woman could receive *ilobolo*. This constituted development of customary law in accordance with the spirit, purport and object of the Constitution (*Mabena v Letsoalo supra* 1075B).

7 Conclusion

Customary law is constantly being developed. While a number of areas have enjoyed academic attention, others have been neglected. In the latter category is the present subject: breach of promise to marry under customary law. It is clear that the customary-law action for breach of promise to marry does exist. What is unclear are the remedies for such breach as it seldom occurred. Furthermore, years of subjugation rendered customary law on the subject stagnant. The rules affecting breach of promise to marry in customary law therefore require development in terms of section 39(2) of the Constitution.

It is submitted that customary law should be developed insofar as the remedies for breach of promise are unclear. Such remedies should include equitable remedies such as forfeiture of *ilobolo* or payment of damages depending on the circumstances of each case. In addition, customary law should be developed in such a way that it upholds the claim of the head of the household for the insult against the household and the claim of the wronged party as separate claims. It is noted and commendable that customary law already embraces the notion that the head of the household may be female.

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