

NOTES / AANTEKENINGE

A PERSPECTIVE ON THE DICHOTOMY OF ACQUISITION OF PARENTAL RESPONSIBILITIES AND RIGHTS BY FATHERS IN TERMS OF THE CHILDREN'S ACT AND CUSTOMARY LAW

1 Introduction

South Africa's legal system is pluralist in nature. It is embedded in two components, namely, customary law and the common law, which converge to form one national legal system through legislation and case law. However, the distinct development of these two components of the legal system has a significant impact on how their respective frameworks are perceived and subsequently applied in given cases. Traditional African family systems were regulated under the "banner" of customary law, but the validity of the system was ultimately decided in terms of the common law, subject to the repugnancy clause. The repugnancy clause was introduced during the colonial era and was used as a measure discarding certain indigenous African values as contrary to public policy and natural justice (see Juma "From 'Repugnancy to Bill of Rights': African Customary Law and Human Rights in Lesotho and South Africa" 2007 21 *Speculum Juris* 88). Hence, the common law was generally preferred to customary law. This state of affairs influenced the manner in which the two components of the legal system developed, entrenched an outlook of a subservient position towards African customary law particularly in relation to parental responsibilities and rights as asserted below. This position, in turn, rattles the traditional family value system of the indigenous African people.

This state of affairs persists regardless of the fact that in the new constitutional dispensation, customary law has been afforded legitimate recognition. Section 211 (3) of the Constitution provides that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. Furthermore, section 39(3) recognises the rights and freedoms "that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights".

The official recognition of customary law necessitated that the application of the customary law and the common law within the same legal system be harmonised. Issues pertinent to the harmonisation of the common law and customary law were discussed in the South African Law Commission Report of 1999 (South African Law Commission Report "Harmonisation of the

Common Law and the Indigenous Law: Report on Conflicts of Laws” Project 90 of 1999). One of the issues raised in the report was how to determine when the customary law is applicable (Himonga and Bosch “The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning? 2000 117 *South African LJ* 314). It was found that generally, the judiciary exercises its own discretion to decide when to apply the customary law (South African Law Commission Report of 1999). A constant challenge that the judiciary faces is to ascertain the customary law position in a given case. This exercise generally requires probing of both the “official” and “living” versions of the customary law. Needless to say, an investigation of this nature is complex. Normally the traditional customary law position, that is, the living customary law of the pre-colonial is considered in light of its significance in the contemporary society. The diverse plethora of customs and cultures has further compounded the process of ascertaining a customary law position of the various indigenous African groups. Finally, it is essential that the judiciary consider the manner in which a group interprets and applies a particular custom. Due to the said complexities that prevail when attempting to ascertain the African customary law position, the attitude, then is generally to adopt the apparent African customary law position.

In light of the said entrenched tensions between customary law and common law in terms of application, this note seeks to explore the dichotomy of the acquisition of parental responsibilities and rights as portrayed in legislation and in terms of customary law. Specific reference will be made to the legal position of unmarried fathers in this regard.

This note investigates how parental responsibilities and rights are acquired as provided for in legislation. It further examines whether, in terms of customary law, unmarried fathers can acquire parental responsibilities and rights as stipulated in the legislation.

2 The position of unmarried fathers in terms of the Children’s Act

Section 18 of the Children’s Act lays down the components of parental responsibilities and rights. Section 20 recognises parental responsibilities and rights of married fathers. This section states that a married father who is also the biological father of a child has full parental responsibilities and rights in respect of the said child if he is married to the child’s mother; or if the biological father was married to the child’s mother at the time of the child’s conception, birth, or any time between the child’s conception and birth.

Section 21 makes provision for parental responsibilities and rights of unmarried fathers. This section somehow captures the customary law position. Section 21(1) provides that an unmarried father acquires parental responsibilities and rights in respect of the child (a) if at the time of the child’s birth, he is living in a permanent life-partnership with the mother; or (b) if he, regardless of whether he has lived or is living with the mother (i) consents or applies in terms of section 26 of this Act to be identified as the child’s father; or *he pays damages in terms of customary law* (author’s emphasis). Further conditions for acquisition of parental responsibilities and

rights of unmarried fathers include (ii) contributing or attempting in good faith to contribute to the child's upbringing for a reasonable period, and (iii) contributes or has attempted in good faith to contribute towards expenses of maintenance of the child for a reasonable period.

Section 21 presents a number of shortcomings. In terms of customary law, none of the provisions of section 21 follow unless the latter part of section 21(1)(b)(i), that is, payment of damages, being complied with. This means that in terms of customary law, there is no room for an unmarried father to agree to be identified as the child's father and contribute to the child's upbringing and maintenance unless the said father has paid damages. Evidently, as discussed below, the subject of damages, together with the significance of *ilobolo* in the acquisition of parental responsibilities and rights, are complex.

Furthermore, neither section 20 nor section 21 mentions *ilobolo*. As it will be discussed below, *ilobolo* is primary in matters of acquisition of parental responsibilities and rights in customary law. The concern with the provisions of section 21 is conceptualising the customary law position of acquiring parental responsibilities and rights amidst the other qualifiers within the same provision and the exclusion of *ilobolo* within its parameters. This is particularly problematic because the sequence of the requirements of both sections 20 and 21, when viewed collectively, are in conflict with the basic normative values of customary law.

3 The position of unmarried fathers in terms of customary law

It may be argued that the term "marriage" as contained in section 20 of the Children's Act encompasses every valid marriage, regardless of whether such a marriage is regulated under the civil law or customary law regime. However, a collective analysis of both sections 20 and 21 creates reluctance if it is indeed the aim of section 20 to encompass marriages concluded in terms of customary law.

The provisions of section 21 of the Children's Act are somehow simplistic and obscure. Firstly, the individualistic approach of viewing the unmarried father in isolation of his family unit already stifles the customary law value system on the aspects involved in the acquisition of parental responsibilities and rights. In terms of customary law, an unmarried father cannot be referred to in isolation of his family head. Premising fatherhood from an individualistic point of view creates an impression that unmarried fathers can acquire parental responsibilities and rights outside the parameters of a family group. It is important to note that in terms of customary law, acquisition of parental responsibilities and rights is a process, which is holistic in nature in that it is not merely concerned with facilitating issues of maintenance, contact or access in respect of the child, as premised in the Children's Act. The primary aim is to establish the child's sense of belonging to a family. Hence, when a child is born to unmarried parents is said to belong to *the mother's family* (author's emphasis); where *ilobolo* has been transferred, the child belongs to the *father's family* (author's emphasis). In terms of customary law, children were born to a family, which obviously

includes parents, as opposed to only parents *per se*. Thus the focus of families was that of ascertaining where the child belongs (Bennett *Customary Law in South Africa* (2007) 307; see also Mkhize “African Traditions and the Social, Economic and Moral Dimensions of Fatherhood” in Richter and Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 187).

In conceptualising parental responsibilities and rights, particularly in relation to the customary law position, section 21 does not highlight this fact as a point of departure. This state of affairs then renders section 21 obscure when applied for the purposes of ascertaining the customary law position.

Secondly, highlighting the defect that arises as a result of excluding *ilobolo* is important. It may be argued that it is not expected that section 20 should refer to *ilobolo* within its ambit because such reference is not even made in the Recognition of Customary Marriages Act (120 of 1998). The Recognition of Customary Marriages Act does not refer to a customary marriage as an *ilobolo* marriage. The Act does not explicitly list *ilobolo* as a requirement for the conclusion of a valid customary marriage. Instead, it provides that for a customary marriage to be valid, it must, among other requirements, be negotiated and entered into or celebrated in accordance with customary law (s 3 (1) of the Recognition of Customary Marriages Act). It is generally accepted that the concepts “negotiated”; “entered into”; and “celebrated in accordance with customary law” encompass matters pertaining to *ilobolo* (*Maluleke v Minister of Home Affairs* (02/24921) [2008] ZAGPHC par 8). It has also been generally accepted that *ilobolo* forms part of the processes involved in concluding a valid customary marriage.

However, the assertion of the North Gauteng High Court Division recently in the *Ngema v Dabengwa* (case number: 2011/3726 (not yet reported), hereinafter “the *Dabengwa* case”) that the transfer of *ilobolo* does not constitute a customary marriage has created a dichotomy in this analysis. If the decision in the *Dabengwa* case prevails, then indeed section 20 of the Children’s Act should not make any reference to *ilobolo* within its ambit, as *ilobolo* and marriage, as asserted in the *Dabengwa* case, do not correlate.

It is however, argued that section 21 of the Children’s Act, which makes provision for the acquisition of parental responsibilities and rights of unmarried fathers, should include *ilobolo* within its ambit. A clause on *ilobolo* is imperative because, in terms of customary law, *ilobolo* is a primary determining factor of where a child belongs (Bennett *Customary Law in South Africa* 307; see also Hartman *Aspects of Tsonga Law* (1991) 88–90). As stated earlier, when *ilobolo* has not been transferred, the child belongs to the mother’s family; and when it has been, the child belongs to the father’s family.

Furthermore, *ilobolo* serves as a conduit through which the reproductive capacity of a woman is transferred to the man’s family (Ngema “The Enforcement of the Payment of *Lobolo* and its Impact on Children’s Rights in South Africa” 2013 *Potchefstroom Electronic LJ* 407). It is thus asserted that although in the *Dabengwa* case the High Court held that *ilobolo* is not synonymous to marriage, the court’s approach, in this case, cannot nullify the purpose of *ilobolo*, which is to establish where the child belongs, and to

transfer the reproductive capacity of a woman to the family to which she will be married.

Section 21 lists “payment of damages in terms of customary law” as one of the conditions through which an unmarried father can acquire parental responsibilities and rights. The superficial reference to “damages” in section 21 is a cause for debate in that different customs are applicable to different communities. The umbrella provision that states that “damages paid in terms of customary law”, on the face of it, may seem general enough to be inclusive of all customs, when in fact it opens a floodgate for misusing this provision. Similar to the latter position, the Recognition of Customary Marriages Act has created a platform of disputing the significance of *ilobolo* to a customary marriage. This was done through the omission of *ilobolo* in its provisions. Section 21 mentions “payment of damages in terms of customary law” loosely without entrenching the context within which damages were paid under customary law.

Acquisition of parental responsibilities and rights through payment of damages is very opportunistic. The acquisition of parental responsibilities and rights through the transfer of damages is not a norm in customary law. The norm was for *ilobolo* to be transferred. Although the unmarried father can subsequently acquire parental responsibilities and rights, the purpose instituting an action for damages against the unmarried father is not to reward him with attaining fatherhood. Instead, it is to reprimand him for bringing shame of impregnating a woman out of wedlock (Nhlapho and Himonga (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 204). Furthermore, the transfer of damages cannot be for the purpose of acquisition of parental responsibilities and rights in that the woman’s family undertakes the initial step towards a claim for damages. The woman’s family has to report the unsolicited seduction, which subsequently resulted in pregnancy, to the man’s family (Nhlapho and Himonga *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 204). Irrespective of whether a woman was a virgin or not, sexual intercourse with an unmarried woman qualifies a claim for damages. In this respect, see *Ndawokwelo v Meleni Tongo* (1941 NAC (C&O) 41). This process of reporting is referred to as *ukubika*. Where the unmarried father accepts the responsibility for the seduction and the pregnancy, he ought to acknowledge this fact openly. Such an acknowledgement is done at the *ukubika* meeting (Nhlapho and Himonga *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 204). The process of *ukubika* is followed by the transfer of *inhlawulo* (generally referred to as damages) by the man’s family. The nature of damages varies. These are categorised in terms of, firstly, damages for seduction, excluding pregnancy. These damages constitute the *ngquthu* beast (Nhlapho and Himonga *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 204). Secondly, damages for impregnation, which take the form of the *mvimba* beast.

In terms of other African cultures in general, however, the proceedings followed by the *ukubika* meeting and subsequently the transfer of damages, do not bestow parental responsibilities and rights to the unmarried father and his family. Other cultures require a further consideration, which is *isondlo*. It

is only after the *isondlo* cattle have been transferred that the father and his family would acquire parental rights (Bennett *Customary Law in South Africa* 310). *Isondlo* also serves as a form of compensation to the mother's family for taking care of the child while he or she was still in their custody (Bennett *Customary Law in South Africa* 310; see also *Hlengwa v Maphumulo* 1972 BAC 58 (NE)).

As asserted above, the manner in which the provisions of the Children's Act are presented misrepresents the customary law position. The requirement for payment of damages is brought forth as an optional requirement that must be met in order for an unmarried father to acquire parental responsibilities and rights. In terms of customary law, payment of such damages is not conditional, but an obligation where a woman is impregnated out of wedlock.

4 Conclusion

The Children's Act expounds both the civil law and customary law provisions, that is, both components are embodied within the same legislation. However, the customary law position, for the purposes of acquisition of parental responsibilities and rights of unmarried fathers, is not explicit. This creates difficulty in sifting the customary law position from the other provisions when interpreting the legislation. Furthermore, this state of affairs creates an unwarranted platform for customary law to be subdued instead of being developed within the legal system. Customary law becomes subdued because if the customary law position is not apparent and precise, it becomes insignificant in the interpretation of the provisions of that legislation. Eventually, this results in the enforcement of a distorted customary law position, or the non-enforcement thereof.

Both the civil law and customary law prescribe different processes for the acquisition of parental responsibilities and rights of unmarried fathers. The legal prescripts of these two components must be accurately conceived and applied in given cases. Thus, an accurate interpretation of their respective provisions is essential. Furthermore, the context within which the different components of South African law operate should also be considered, particularly as it plays an essential role in interpreting the provisions of customary law.

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