

**LOBOLO, CONSENT AS REQUIREMENTS
FOR THE VALIDITY OF A CUSTOMARY
MARRIAGE AND THE PROPRIETARY
CONSEQUENCES OF A CUSTOMARY
MARRIAGE:**

***N v D* (2011/3726) [2016] ZAGPJHC 163**

1 Introduction

Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 (hereinafter “Recognition Act”) provides that a customary marriage must be negotiated and celebrated in terms of customary law. In *Moropane v Southon* ([2014] ZASCA 76), the SCA concluded that “a fact-intensive inquiry” is necessary to determine the meaning of “negotiated and celebrated in terms of customary marriage” (par 35–37). Although negotiations under customary law can often include complex dynamics, delivery of *lobolo* (*bride price*) and transfer of the bride were deemed essential for the conclusion of a customary marriage. The SCA argued that section 3(1)(b) of the Recognition Act is clear and unambiguous. Prior to the Act, the requirements for conclusion of a customary marriage were explicit: delivery of *lobolo*, transfer of the bride, consent of the bride’s father or guardian, consent of the groom’s father or guardian (Himonga and Moore *Reform of Customary Marriage, Divorce and Succession in South Africa* (2015) 54; see also *South African Law Reform Commission Report* 90 ch 4 (hereinafter “SALRC”); Mofokeng *Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Marriages* (2009) 43–61, 69–73). Section 3(1)(a–b) does not make it clear, *lobolo* for example, is still a requirement for the validity of a customary marriage. According to Bennett, the omission of *lobolo* in section 3 indicates that *lobolo* “is now a contractual accessory to marriage” (Bennett *Customary Law in South Africa* (2004) 141).

Mofokeng argues that an analysis of every ethnic group will result in the conclusion that *lobolo* is a requirement for the conclusion of a customary marriage (Mofokeng “The *Lobolo* Requirement as the Silent Prerequisite for the Validity of a Customary Marriage in terms of the Recognition of Customary Marriages Act” 2005 *THRHR* 277 278–279; Van Schalkwyk *General Principle of Family Law* (2011) 300; Kovacs, Ndashe and Williams “Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa” 2013 *Acta Juridica* 273 283; Himonga and Moore *Reform of Customary Marriage* 63). In *Mxiki v Mbata* in re: *Mbata v Department of Home Affairs* ((A844/2012) [2014] ZAGPPHC 825), the court *a quo* regarded a marriage to have been concluded based on an undertaking to pay *lobolo*. On appeal, the Court argued that delivery of

lobolo is not a requirement for the conclusion of a customary marriage. However, delivery thereof is intrinsically linked with its existence (par 8). The Court concluded that there could never be a customary marriage without official transfer of the bride. The order of the court *a quo*'s decision was set aside (par 12; see also *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP)). In *Maloba v Dube* ((08/3077) [2008] ZAGPHC 434), the Court noted that *lobolo* does not have to be fixed, but what is important, is an agreement that *lobolo* would be paid. Once there is an agreement between the parties regarding *lobolo*, a marriage can be regarded as concluded on the date of the agreement. It is evident from the above cases that delivery of *lobolo* and transfer of the bride are still treated as requirements for the validity of a customary marriage.

However, traditional groups differ in terms of their views regarding the role of *lobolo* as essential to the validity of a customary marriage. For example, Tswana and Sotho societies regard *lobolo* as an essential requirement for a customary marriage, while the Nguni regards the transfer of the bride as an essential element (SALRC par 4.3.3.2). Thus, whether or not the delivery of *lobolo* on its own resulted in the conclusion of a customary marriage will depend on the practices of the traditional group in question. *Lobolo* is one of the most durable customary law norms, to such an extent that in African communities, it is also delivered in anticipation of a civil marriage (Maithufi "The Requirements for Validity and Proprietary Consequences of Monogamous and Polygynous Customary Marriages in South Africa: Some Observations" 2015 *De Jure* 266). If a party delivers *lobolo* in anticipation of a civil marriage but does not conclude a civil marriage, the question is whether the delivery of *lobolo* and the accompanying celebration result in the inference that a customary marriage was concluded. In *Cheche v Nondabula* (1962 NAC 23 (S)), the Court noted that delivery of *lobolo* is not a requirement for the conclusion of a civil marriage. However, proof of delivery thereof will be treated as ancillary to the marriage contract.

The meaning of "negotiated and celebrated" in terms of customary marriage is not the only requirement that has attracted the attention of the Courts. Section 3(1)(a) provides that a customary marriage should be consented to by both parties. It appears that the consent of the families is not required in terms of the Recognition Act. This, however, does not reflect the position of living customary law (Maithufi 2015 *De Jure* 265). Families still play a crucial role in the conclusion of a customary marriage, a role that may affect the validity of a customary marriage. As a result, it is argued that the consent of the parties to a customary marriage should reflect consent in living customary law. A number of questions may arise in relation to the consent requirement. For example, should the proprietary consequences of a marriage be taken into account when determining whether or not a party consented to a customary marriage? Furthermore, can consent of the parties be construed as including the consent of the families to conclude a customary marriage? This note will attempt to answer these questions in light of *N v D* (*supra*).

2 Facts of the case

The plaintiff instituted an action against the defendant seeking a decree of divorce and ancillary relief. The defendant had proposed marriage to the plaintiff, which she accepted. The *lobolo* negotiations were scheduled to take place on 16 March 2003. A wedding venue, where a function was to be held, was booked for November 2003. According to the plaintiff, this function involved only the blessing of the rings, but according to the defendant, the function was to perform a civil marriage (par 8). The events surrounding the *lobolo* negotiations are largely common cause. The parties had agreed on the amount of *lobolo*. Each family sent a delegation of three members to the house of the plaintiff's mother on 16 March 2003. The practices surrounding *lobolo* negotiations were followed. The plaintiff and defendant were not permitted to be present when negotiations took place between the delegates who had been mandated. Eventually, the delegates reached an agreement. There was a ceremonial placing of blankets and a scarf on certain of the women. The *lobolo* was paid in full and there was a celebration (par 9). The issues, which came before the Court, were whether or not the defendant had consented to be married and whether or not the ceremony complied with the requirements to conclude a customary marriage (par 1). The plaintiff's evidence was that once *lobolo* negotiations had been concluded, a customary marriage occurred. The plaintiff claimed that the defendant knew that a reference to *lobolo* negotiations was a reference to a marriage and that the defendant had agreed to the marriage and participated in the ceremony (par 10). On the other hand, the defendant's evidence was that *lobolo* negotiations form only part of the process of marriage. The marriage process would therefore only be completed according to the customary law once the ceremonial handing over and induction of the bride into the groom's family had taken place (par 11). The defendant argued that they had intended to conclude a civil marriage and the *lobolo*, which was delivered, was not for the purpose of concluding a customary marriage, but rather in anticipation of a civil marriage.

3 Discussion

The Court found it unnecessary to determine the role of *lobolo* in the validity of a customary marriage, since the defendant did not intend to conclude a customary marriage, but intended to conclude a civil marriage (par 44). The parties agreed that if the Court found that the defendant did not consent to a customary marriage, then the claim should be dismissed. In order to determine whether or not the defendant consented to a customary marriage, the Court relied on his intention. The Court pointed out that the first step was to determine whether or not the defendant knew that *lobolo* negotiations would result in a marriage, because "if he did not it would be a probability in his favour" (par 21.2). In addition, the Court had to determine whether or not the defendant authorised the delegation representing him at the *lobolo* negotiations to conclude a marriage. If he did not, his conduct prior to the marriage was consonant with an intention not to participate in a ceremony resulting in marriage and not to consent to the marriage (par 22). If this inquiry was answered in the affirmative, however, the Court could conclude

that the intention of the defendant was not to conclude a customary marriage, but rather a civil marriage (par 23).

The plaintiff argued that the defendant's compliance with the ceremony provided by custom and the presence of the representatives of the defendant at the ceremony constituted consent to that marriage, regardless of whether or not the defendant had in fact expressly consented to a marriage and mandated his representatives to agree to such (par 15). During the ceremony, consent was neither sought from the defendant personally nor was it obtained. His consent would have been given through the delegates who represented him in the *lobolo* negotiations. During the celebrations, which took place after the payment of *lobolo* and the announcement that the *lobolo* negotiations had been concluded, thanks were given in a speech. The Court concluded that a customary marriage could not exist because the defendant did not consent to be married in such a way. However, it is submitted that consent to a customary marriage should not have been construed from an individual perspective. It was common cause that delegates were sent to the bride's family. Before Courts can consider whether or not the defendant intended to conclude a civil marriage, it must also investigate the role of the family and whether the delegates concluded a customary marriage, or merely delivered *lobolo* in anticipation of a civil marriage.

In customary law, the consent of parents to a marriage is a requirement even when the child is over the age of 18 (Maithufi 2015 *De Jure* 265; Himonga and Moore *Reform of Customary Marriage* 55; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism in South Africa* 4ed (2014) 97). The role of the parents in concluding a customary marriage was acknowledged in *Mmutle v Thinda* ((20949/2007) [2008] ZAGPHC 352), where the Court accepted that a customary marriage can still be concluded, even if consent came from the families of the spouses. The Court further drew a list of requirements that included consent of the families. The Court did not provide for the consent of the prospective spouses as a separate requirement but the consent of the families presupposes an agreement between the bride and the bridegroom to be married (par 12). In *Motsoatsoa v Roro* (2011 2 All SA 324 (GSJ)) the Court pointed out that a customary marriage is a process that involves the two families. The involvement of the two families also presupposes that the bride and bridegroom have already consented to the marriage (par 17). In *Fanti v Boto* (2008 (95) SA 405 (C)) the Court pointed out that even if delivery of *lobolo* is paid, there will not be a customary marriage unless delivery of *lobolo* was preceded by an agreement between the two families (par 29). It is clear from the above cases (*Mmutle*, *Motsoatsoa* and *Fanti*) that the consent of the families is still a requirement for the validity of a customary marriage despite the silence of the Recognition Act on the issue.

A customary marriage is a process, and after the prospective spouses consent to a marriage, the two families will be involved in the negotiations and will have to consent to certain processes, such as determining the amount of *lobolo*, transfer of the bride or exchange of gifts (Himonga and Moore *Reform of Customary Marriage* 79–81). Himonga and Moore indicate that the requirements for the conclusion of a customary marriage should

clearly reflect the role of the two families since they agree with regard to the important elements of the marriage (Himonga and Moore *Reform of Customary Marriage* 71). Although section 3(1)(a) does not explicitly define the role of the families in consenting to a marriage, the role of the families can be viewed in terms of section 3(1)(b), which states that a customary marriage must be entered into and negotiated in terms of customary law (Himonga and Moore *Reform of Customary Marriage* 71 and 82–83; Maithufi 2015 *De Jure* 265).

Himonga and Moore point out that consent in terms of section 3(1)(b) is a “dual consent”, because it includes the decision of both parties to marry, but also to marry in customary law, which consequently includes the consent of the families to be involved in the marriage negotiations (Himonga and Moore *Reform of Customary Marriage* 79). In light of this, it can be argued that *in casu* when the defendant consented to deliver *lobolo*, this consent also included the consent of his family. Therefore, decisions taken in the *lobolo* negotiations should be seen as reflecting his consent. If the families concluded a customary marriage or believed that they concluded a customary marriage, this should lead to the conclusion that a customary marriage was concluded, despite the fact that the intention of the defendant was to conclude a civil marriage. The decision as to whether or not a customary marriage was concluded should be based on the negotiations between the families, and not only on the intention of the defendant (Lewis “Judicial Translation and Contextualisation of Values: Rethinking the Development of Customary Law in *Mayelane*” 2015 *PELJ* 1126 1141).

The consent requirement in the Recognition Act is contrary to consent in living customary law on the ground. However, the Act does not bar Courts from using the requirements of customary law as observed by communities on the ground. *In casu*, the Court should have been guided by the consent requirement on the ground and determined whether the families had consented to a customary marriage, which would have presupposed the consent of the bride and the bridegroom. Only if the Court found that the intention of the family was also to deliver *lobolo* in anticipation of a civil marriage could it conclude that the parties did not consent to conclude a customary marriage. The delegates of the defendant had pointed out that they were there to ask for the bride’s hand, and the plaintiff’s family presumed that this referred to a marriage (par 18).

The Court also argued that the “asking for the bride’s hand is ambiguous”, as this could have meant that the delegates were there to conclude a customary marriage or a marriage at a later stage (par 18). If the Court found the meaning of asking the bride’s hand to be ambiguous, it should have then asked for clarity before ruling on something that it was not sure about. It could have determined whether the asking of “the bride’s hand” meant the conclusion of a customary marriage or delivery of *lobolo* in anticipation of a civil marriage. The reference to the bride’s hand could have meant that they were concluding a customary marriage. The defendant’s delegation was not called upon to provide the context of what they meant by stating that they were there to ask for “the bride’s hand”. Courts should clearly investigate these issues before dismissing such claims. If courts are not sure about the true meaning of something that is said during the

negotiations of a customary marriage, it should conduct a fact-finding inquiry (see *Moropane* above). One of the ways of doing this could be to call elders in the traditional group to which the litigants belong and determine the true meaning of asking for the bride's hand. Unfortunately, the Court, in this case, seemed to be more concerned about the consequences of declaring that a customary marriage was concluded.

The Court appeared to be influenced by the proprietary consequences that would follow the finding that a customary marriage was concluded. The defendant stated that he wanted to conclude an ante-nuptial contract (hereinafter "ANC") to regulate the proprietary relationship between the plaintiff and the defendant before concluding a marriage with the plaintiff (par 7). If the Court found that a marriage existed, this would have meant that the parties were married in community of property, as an ANC was not concluded. As a result, to impose the consequences of the community of property would have been contrary to the expressed wishes of the defendant to conclude an ANC. The Court held that "once the property regime was determined it would be impossible for the defendant to agree to a different regime", and he would be bound by a matrimonial property regime that he did not intend before the marriage. It is improbable that the defendant would agree to a regime he clearly did not want before entering into his marriage (par 38). This is discussed in more detail below.

3 1 *Proprietary consequences of a customary marriage*

The proprietary consequences of a customary marriage are closely related to the validity of a customary marriage. The proprietary consequences of a customary marriage are automatically in community of property if a marriage is concluded without an ANC (s 7(2) of the Recognition Act; Maithufi 2015 *De Jure* 267). When a party delivers *lobolo*, he probably has not considered the proprietary consequences of his customary marriage (s 7 of the Recognition Act). Maithufi points out that for a customary marriage to automatically be in community of property may be contrary to the intention of the parties. He asks whether the intention of the parties should not matter, especially considering the fact that the parties may not be aware of the meaning of being married in community of property (Maithufi 2015 *De Jure* 268). Parties may decide not to register an ante-nuptial contract for various reasons. One of these reasons could be that a customary marriage is a process and a party may have decided to conclude an ANC at a later stage when it is clear that the parties will conclude a customary marriage. This may be after delivery of *lobolo* or transfer of the bride. It might be premature for parties to register their ANC before marriage. If a customary marriage is not concluded, it may mean that the parties have incurred financial costs of concluding an ANC for a marriage that will not be concluded.

The negotiations for a customary marriage may be intense and parties may be focused only on the negotiations, unwittingly ignoring the consequences of their marriage (Maithufi 2015 *De Jure* 268). Maithufi indicates that he has been approached by parties who tried to dispute the validity of their marriage based on the fact that they agreed to the marriage, but not its financial consequences. He asks whether consent to a customary marriage should also include separate consent to the proprietary

consequences of a marriage. Parties have the option of changing their matrimonial property regime after marriage in terms of section 21 of the Matrimonial Property Act 88 of 1984 (see s 7(5) of the Recognition Act), and the Court may grant leave for the change. However, the procedure has financial implications for the parties, who may find the implications to be a barrier, especially after spending heavily on the delivery of *lobolo* and the accompanying celebrations.

Maithufi concludes that parties should not be deemed to be married in community of property merely because they did not conclude an ANC. If parties can establish that they did not have the intention to marry in community of property, they should be allowed to have a matrimonial property regime of their choice (Maithufi 2015 *De Jure* 270). Horn and Van Rensburg argue that the whole of section 7 of the Recognition Act presents a problem for spouses in customary marriages (Horn and Van Rensburg "Non-recognition? *Lobolo* as a Requirement for a Valid Customary Marriage: Chronicle" 2002 *Journal for Juridical Science* 54 64). An ANC is likely to cost thousands of rands, in addition to the costs of the marriage celebration and buying of gifts for the other family. The truth is that a large number of customary marriages are concluded in rural areas, where most of the parties to the arrangement are illiterate. As a result, spouses are in no position to comprehend the consequences of non-compliance with provisions that are meant to regulate their intimate relationships (Mqoke "The Rainbow Jurisprudence and the Institution of Marriage with emphasis on the Recognition Customary Marriages Act" 1999 *Obiter* 52 66).

It is submitted that *in casu*, the Court should not have considered the proprietary consequences of the marriage when it made its decision. The fact that declaring a customary marriage to have been concluded will result in consequences not contemplated by the defendant should not influence the court's decision that a marriage was concluded. The proprietary consequences of a customary marriage may be closely related to the validity of a customary marriage however, the proprietary consequences of a marriage are not a requirement for the validity of a customary marriage and should only be considered when it is clear that a customary marriage was concluded. The proprietary consequences of a marriage may be contracted before a marriage but their operation is suspended until a marriage contract has been concluded or upon dissolution of a marriage. Consent to a customary marriage and the proprietary consequences of a marriage are separate contracts and should be kept as such.

Courts should find other means to free parties from proprietary consequences that they did not contemplate. The solution could be to give spouses an opportunity, in customary law, to regulate the financial consequence of their marriage before community of property automatically applies. For example, the parties could be allowed a period of three months after the conclusion of their marriage to regulate the matrimonial property, failing which, community of property will automatically apply to their marriage. However, there is a need for educational programmes that will teach people about the consequences of not providing for a particular regime (Mqoke 1999 *Obiter* 66).

4 Conclusion

Courts have in certain cases viewed the delivery of *lobolo* as sufficient to conclude a customary marriage, while in other cases the matter has rested on the transfer of the bride. This highlights the fact that there is no hierarchy of requirements with regard to the delivery of *lobolo* and transfer of the bride. Courts should, therefore, be open-minded and where other evidence exists that points to the conclusion of a customary marriage, such evidence should be taken as *prima facie* proof that a customary marriage was concluded. *In casu*, expert evidence was called and an expert for the plaintiff attested that *lobolo* is a requirement for the validity of a customary marriage, while expert evidence on the part of the defendant argued that the transfer of the bride is essential. However, it was not clear to which traditional groups the litigants belonged. As a result, the requirements could not be accepted without investigating the custom of that particular group. Similarly, a customary marriage in customary law is a marriage between the two families. Therefore, the courts cannot determine the requirements of a marriage, such as consent, without determining the role of the family in consenting to a marriage. This requirement is important despite the silence of the Recognition Act. Even if the intention of the groom was to deliver *lobolo* in anticipation of a civil marriage, it is important to determine whether his intentions were the same as that of his family or the delegates' that delivered *lobolo*. Finally, courts should not declare that a customary marriage was not concluded because such a conclusion would result in a property regime not contemplated by the parties.

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