

## THE INFUSION OF AFRICAN JURISPRUDENCE ON LEGAL DEFENCES INTO JUDICIAL DELIBERATIONS

***Bulelwa Ndamase v Development Bank of  
Southern Africa Limited D 8073/2020 [2022]  
(ZAKZDHC) (30 May 2022)***

### 1 Introduction

It is often said that customary law is unwritten, as its knowledge system is not recorded in statutes and codifications (Okupa “African Customary Law: The New Compass” in Hinz and Patemann (eds) *The Shade of New Leaves: Governance in Traditional Authority – A Southern African Perspective* (2006) 375). Tracing its earliest origins can prove difficult, largely because African communities have historically lived independently of one another, observing norms and practices that differ from one community to another (Rautenbach *Introduction to Legal Pluralism in South Africa* 5ed (2018) 9). In previous eras, Africans lived according to values such as a sense of communal belonging, collective ownership of assets and the communal life that characterised the African tradition. All these elements developed into an African normative system that catered for justice and human rights (Juma “From ‘Repugnancy to Bill of Rights’: African Customary Law and Human Rights in Lesotho and South Africa” 2007 *Speculum Juris* 88). The fortunes of customary law, however, changed after contact with colonialism. Section 11(1) of the Black Administration Act (BAA) 38 of 1927, for example, afforded courts the discretion to apply customary law in all disputes concerning African people as disputants, provided that customary law was not against public policy and natural justice. This repugnancy proviso therefore limited the application of customary law. Section 11(1) of the BAA was repealed in 1988 by the Law of Evidence Amendment Act 45 of 1988, which was framed in similar terms to the BAA, and in terms of which courts could take judicial notice of customary law if it could be readily ascertainable. As a result, courts could merely strike down any African practice or norm that they deemed to be inconsistent with principles of public policy and natural justice (Rautenbach *Introduction to Legal Pluralism* 38). The interim Constitution contained a specific provision speaking to the cardinal African concept of *ubuntu*. However, this concept did not find space in the 1996 Constitution.

Yet, *ubuntu* had already informed the basis for the abolition of the death penalty in one of South Africa’s most seminal judgments in a first case that came before a full panel of the Constitutional Court (*S v Makwanyane* 1995 (3) SA 391 (CC)). The Constitutional Court stressed the importance of

infusing African jurisprudence or indigenous knowledge systems into judicial pronouncements. This had become apparent in the wake of the ill-treatment of customary law as a subordinate legal system *vis-à-vis* common law. Other courts have subsequently made commitments that customary law and its value systems would be afforded space as an independent legal system away from the prowling eye of the common law (*Alexkor v Richtersveld Community* (2004 3 All SA 244 (LCC) par 51). Also, in *Gumede v President of the Republic of South Africa* (2009 (3) SA 152 (CC) par 22), the Constitutional Court confirmed that customary law “lives side by side with the common law and legislation”. Notwithstanding these assertions, courts have not given effect or found an avenue to allow customary law to be integrated in decision-making. It must be stated that customary law differs from indigenous law as customary law emerges from the latter. Customary law is people’s adaptation of indigenous law to socio-economic changes. This gives effect to the value of indigenisation that scholars have written about and has also become a value that institutions of higher learning have embraced to form part of their curriculum design and transformation. A long journey still lies ahead for the process of indigenisation, especially in Western-style courts, but there are tools and a rich body of literature with which to work. The role of developing indigenous languages has also become important and requires attention.

The objective of this contribution is to evaluate these developments, considering the judgment of the High Court in *Bulelwa Ndamase v Development Bank of Southern Africa Limited* (*supra*), in which Mathenjwa J recognised *ukuthwasa* as a defence against the applicant, thus allowing a stay of warrant of execution in respect of movables and immovable property. *Ukuthwasa* means to “come out” or to be reborn (par 2). It is a calling by ancestors for a person to become a healer after a period of spiritual training during which a person can be away from their family and work (Bongar and Beutler *Comprehensive Textbook of Psychotherapy: Theory and Practice* (1995) 161). It is a welcome development to see a court infuse indigenous values into a judgment pertaining to civil action. This contribution argues that institutions of higher learning have a role to play in ensuring the infusion of customary law into their curriculum. The contribution provides examples of other significant African practices that can play a legitimate role in South African law if afforded space. It also looks at the significant role of indigenous language development in South Africa and its role in achieving indigenisation.

## 2 Facts of the case

The first respondent sought an order against the applicant for the immediate handing over of certain valuables in the possession of the applicant. The applicant did not oppose the application and an order was granted against her in her absence on 1 December 2020, but she did not comply with the court order (par 2). Subsequently, on 19 March 2021, the court issued an order calling upon the applicant to appear personally before it to show cause why an order should not be issued against her declaring her to be in contempt of court for failing to comply with the court order granted on 1 December 2020 (par 2). In explaining the delay in instituting in complying

with the court order the applicant said that as from September 2020, she had accepted her ancestral calling and as from October 2020, she had been attending the initiation practice training in line with the terms of her ancestral calling (par 3). During the process of the initiation, in terms of the rules of the initiation process, she was not allowed physically to interact and have contact with anyone except the other trainees and her spiritual diviner, known as *igqira lam* (par 3). In March 2021, she learnt for the first time through her spiritual diviner that there was a court order against her and other court orders that were calling her to appear in person before court. She could not appear in court because in terms of the initiation training rules, she was not allowed to interact physically and communicate with people outside the initiation training centre (par 3).

However, after she had progressed with her training, she was granted limited time by her spiritual diviner to contact her previous attorney telephonically. This is when she noted that there was an appeal against the judgment granted against her in her absence on 1 December 2020 (par 4). Her application for leave to appeal was dismissed by the court, and she appealed against the refusal of her leave to appeal to the Supreme Court of Appeal, which also dismissed her appeal. She later instituted an application for reconsideration of the court order, which application was also dismissed. After extensive consultation, she instituted proceedings in terms of Uniform Rule 42(1)(a) on the basis that the judgments were erroneously sought and erroneously granted against her (par 4).

### 3 Decision

The question that the High Court needed to determine was whether the applicant had made out a proper case compelling urgent circumstances to justify the court's intervention (par 7). Mathenjwa J concluded that recognition of traditional authority and traditional rituals entails that customary rules can be raised as a defence in litigation, provided they are not inconsistent with the Constitution and legislation (par 8). The matter was brought to court 18 months after the handing-down of the judgment that was the subject of application for variation. In advancing a case compelling urgency, the applicant first relied on the rules of the initiation practice that prevented her from timeously challenging the judgment issued by the High Court in December 2020 in her absence. The court indicated that the issue of whether the observance of traditional practice could be raised as a lawful ground for failing to challenge the judgment timeously could not be appropriately determined at this stage of the urgent application. Mathenjwa J posited that section 211 of the Constitution of the Republic of South Africa, 1996 recognises traditional authority and customary law. He refers to Jafta J in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* (2015 (3) BCLR 268 (CC) par 11), who held:

“Both the common law and customary law derive their legal force from the Constitution. This means that a customary law rule that is inconsistent with common law retains its validity if it is in line with the Constitution.” (par 7)

He accordingly argued that this entailed that customary rules concerning traditional authority and indigenous practice can be raised as a defence in

litigation (par 8). He then ordered that the applicant's non-compliance with rules pertaining to service and time period be condoned, and declared the application an urgent one. Moreover, a warrant of execution against movables issued on 8 October 2021 and 23 February 2022 was ordered to be stayed pending finalisation of the application (par 10).

#### 4 Discussion

The decision by the High Court to infuse African values into its judgment is a good one. The court recognised that it has an obligation in terms of section 211 of the Constitution to apply and recognise traditional authority and customary law (par 7). Courts have on several occasions missed such an opportunity to infuse customary law into their pronouncements, thereby continuing the common-law paradigm. For example, in *Bhe v Khayelitsha Magistrate; Shibi v Sithole*; (2005 (1) SA 580 (CC)), the Constitutional Court imported section 1 of the Intestate Succession Act (81 of 1987) after declaring primogeniture unconstitutional because women were not allowed to inherit property in terms of customary law. The judgment was criticised as it looked to the common law for solutions (Ntlama "The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation" 2012 15(1) *PELJ* 344). In another example, *MM v MN* (2013 SA 415 CC), the Constitutional Court listened to evidence from community members and traditional leaders affected by the living law. The outcome, however, did not reflect an African solution. The requirements for an African marriage are that *lobolo* must be delivered and that the bride must be integrated into the groom's family. The majority judgment waded into dangerous waters by creating a third requirement for the conclusion of an African marriage that was not previously there, by making consent of the first wife compulsory. Ndima points out that the problem with this construction is that the court enabled an environment where two rules would exist – namely, official law as pronounced by the courts, and the actual lived practices of the community (Ndima "Re-Imagining and Re-Interpreting African Jurisprudence Under the South Africa Constitution" (LLD thesis, Unisa) 2013 185). Kamga argues that *ubuntu* was given effect to in cases such as *MM v MN* (*supra*) and *Bhe v Magistrate Khayelitsha* (*supra*) (Kamga "Cultural Values as a Source of Law: Emerging Trends of Ubuntu Jurisprudence in South Africa" 2018 *AHRLJ* 637).

This is because customary law echoes *ubuntu*, and customary jurisprudence was given effect to in terms of section 211 of the Constitution, which provides that customary law is recognised provided it is consistent with the Bill of Rights. There is, however, nothing that expresses *ubuntu* in the mentioned Constitutional Court judgments: in *MM v MN* (*supra*), the Constitutional Court declared a second marriage unconstitutional because the first wife did not consent to the marriage. It is submitted that leaving the second wife unprotected is not in accordance with *ubuntu*. If *ubuntu* had been applied, then this would have led the court to focus on the legitimate purpose served by a second marriage, and on finding ways to protect also the second wife. Similarly, in *Bhe v Khayelitsha Magistrate* (*supra*), the court would not have declared primogeniture unconstitutional because this is an

important African practice that serves a legitimate purpose (Centre for Child Law *Amicus Curiae* 2007 12 BCLR 1312 (CC)). This approach highlighted the dominance of Western values over African values. There are cases such as *M v S* (Centre for Child Law *Amicus Curiae* 2007 (12) BCLR 1312 (CC)), where it could be argued that the outcome was informed by *ubuntu*. This is largely because one of the judges, Conradie J, referred to the importance of restorative justice rather than the Western criminal justice. There is also the case of *Joseph v City of Johannesburg* (2010 4 SA 55 (CC)), where the court referred to the “Batho Pele” principle. Skweyiya J stated that “Batho Pele gives practical expression to the constitutional value of *ubuntu*”. Ntlama argues that while decisions such as *Bhe v Khayelitsha Magistrate*; *Shibi v Sithole* (*supra*), can be celebrated because they achieved a measure of gender equality, this is nonetheless compromised by the heavy reliance on Western conceptions of gender equality and the failure to afford customary law an opportunity to achieve the same end. She refers to *Dalindyebo v State* (2016 (1) SACR 329 (SCA)), where an opportunity to develop the African philosophy of *ubuntu* was wasted in the interpretation of the criminality of a king/queen 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 African criminal law into the determination of the guilt of the king (Ntlama “The Centrality of Customary Law in the Judicial Resolution of Dispute That Emanates From It: *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC” 2019 *Obiter* 209).

Scholars have debated the role of customary law in the post-constitutional era and how it should be integrated into judicial pronouncements in the wake of judgments such as *Alexkor v Richtersveld Community*, where a pronouncement was made that the time has passed where the African values would be viewed through the lens of the common law (par 51). Amalgamation has been proposed, but there is no clarity on the form amalgamation could take. Should it, for example, retain the choice-of-law departure point that currently exists with the common law and customary law, but make these options generally applicable to everyone? (Weeks “Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: *Ramuhovhi*, the Proprietary Consequences of Marriage and Land as Property” 2021 11(1) *Constitutional Court Review* 182). Alternatively, should choice of law be retained, but common law draw from customary law to make the common law more infused with customary law or more African? Weeks states that it might be a better option to do away with the choice of laws altogether and have a situation where both the common law and customary law can be merged so that South Africa would have only one single and unified system of law made up of the two jurisprudences, and courts would be guided and apply this in their dispute resolution (Weeks 2021 *CCR* 36–41). It could be argued that amalgamation is problematic because it continues to reaffirm the common-law paradigm, and litigants would not have an option of having customary law as the only system applicable to their dispute. It further denies South Africa a decolonised option because judicial pronouncements on customary law would reflect the common law as part of the solution.

This cannot be advisable at a time when indigenisation should be a solution. Indigenisation is about re-affirming African culture and identity. This

view does not ignore the existence of other jurisprudences, but it is argued that a departure is needed from the common law, and customary law should be afforded space to resolve disputes independently, without the prowling eye of the common law. One could argue that there is hardly anything indigenous about Africans anymore. From fashion to food, education, and thinking, Africans have adapted to modernity, thereby questioning mainstream understandings of the meaning of customary law. It is therefore important not to ignore how Africans adapt their daily lives to socio-economic changes. Customary law is a result of people adapting indigenous law to socio-economic changes such as urbanisation (Diala "The Concept of Living Customary Law: A Critique" 2017 *International Journal of Law, Policy and the Family* 158). Thus, customary law differs from indigenous law because it emerges from indigenous law. English common law is essentially a system of customary law. Customary law is whatever people do at any given moment (Hund "Customary Law Is What People Say It Is": HLA Hart's Contribution to Legal Anthropology" 1998 *Archives for Philosophy of Law and Social Practice* 420).

However, there are still millions of people who live their daily lives based on indigenous values, and these values must be part of the mainstream legal system. Amalgamation is a reversal of the commitment to walk away from viewing customary law through the lens of the common law. There is also the option of harmonisation, in terms of which an attempt is made to remove the discord between the common law and customary law and to reconcile the contradictory principles of the two to enable the two to coexist (Allot "Towards the Unification of Laws in Africa" 1965 *International and Comparative Law Quarterly* 366). The struggle for recognition of customary law has never been about harmonisation but is about recognising that customary law has a rich body of literature that has served the majority of people in South Africa. Judges must be innovative and come up with ways to infuse customary law into dispute resolution. Nhlapo argues that the disputes of indigenous people of South Africa should strongly be influenced by the integration of the culture of its people, and thus a departure should be taken from the history of re-imagining the African legal system through Western glasses, which makes transformation necessary (Nhlapo "Human Rights: The African Perspective" 1995 (6)1 *ALR* 38). Section 211 of the Constitution provides that customary law is applicable to the extent of its consistency with the Bill of Rights; this has been understood to entail that African values or practices not consistent with the Bill of Rights should be abandoned in favour of the latter. However, there is an element of creativity and innovation required of a judge when faced with a conflict between the two systems (Pieterse "It's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-Racialism" 2001 17 *SAJHR* 392). This is what Mathenjwa J achieved in *Bulelwa*: the infusion of African values by recognising *ukuthwasa* as a defence in a civil case.

#### 4.1 *The contribution of indigenous practices*

There are other important practices that are in line with *ubuntu* that highlight the power of customary law to exist independently but also to contribute to the socio-economic challenges of South Africa. For example, there is the

*letsema* customary practice in terms of which communities can come together to plough their cropping fields so that it can later form part of the economic activities to sustain the communities. This is a customary-law contract. However, the underlying aims and consequences of the contract differ from those of a common-law contract (Mahoney “Contract and Neighbourly Exchange Among the Birwa of Botswana” 1977 *Journal of African Law* 58). Another example is a *mafisa* contract, which is a livestock loan or farming-out contract: a community member who owns a large herd of livestock lends a portion of it to another community member who can benefit through milking and other benefits (Himonga and Nhlapho (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 194–195). The practice carries the risk that the livestock may suffer from disease, and of the loss of livestock, but indigenous communities use the practice for the upliftment of each other (Bekker “Law of Contract” in Joubert (ed) *LAWSA XXXII Indigenous Law* 2ed (2009) 241). A mere promise is enforceable in indigenous law and damages can be claimed when a promise is broken (Schapera “Contracts in Tswana Case Law” 1965 *Journal of African Law* 142). Bekker states that indigenous contracts are real contracts, and there are no fundamental differences between indigenous and Western contracts of purchasing (Bekker *Seymour’s Customary Law in Southern Africa* 5ed (1989) 332), exchange or loan agreements. Indigenous courts, when settling social problems in the community, endeavour to reconcile disputing parties within the community’s basis of social harmony. Individuals are persuaded to accept the community’s *boni mores* – the standards of social behaviour and conformity (with the emphasis on diverse extra-legal traits such as friendliness and generosity) (Whelpton “Die Inheemse Kontrakereg van die Bakwena ba Mogopa van Hebron in die Odi I Distrik van 250 Bophuthatswana” (Unpublished LLD thesis, Pretoria: University of South Africa) 1991 72).

The jurisprudence on *ubuntu* and other practices such as *letsema* must be allowed to form part of the mainstream law and can contribute to overcoming socio-economic challenges such as poverty and unemployment. It is argued that the LLB curriculum in institutions of higher learning must improve the pace of curriculum decolonisation and should infuse African knowledge systems into the LLB curriculum. More importantly, it is argued that these concepts can assist in fighting poverty and in reforming other aspects of law and social justice. Mbembe argues that the LLB curriculum is problematic because it is heavily loaded with Eurocentric epistemology; it mirrors that of the commonwealth tertiary institutions, except that in some quarters, efforts may have been made to integrate the concept of *ubuntu* (Mbembe “Decolonising the University: New Directions” 2016 *AHHE* 32).

Most institutions of higher learning in South Africa have an obligation to implement curriculum transformation to decolonise the curriculum, which has continued to reflect Western epistemologies and pedagogies (Mendy and Madiupe “Curriculum Transformation: A Case in South Africa” 2020 38(2) *Perspectives in Education* 2). Institutions of higher learning have provided glossaries of the 11 official languages: the University of South Africa (Unisa) is an example – it identifies the role played by multilingualism as a significant enabler of transformation. Unisa had removed Afrikaans as a medium of instruction and only recognised English. However, the Constitutional Court

upheld the Supreme Court of Appeal's finding that the new policy, excluding Afrikaans, was not consistent with the right to education in terms of section 29(2) of the Constitution (see *Chairperson of the Council of UNISA v AfriForum* 2022 (2) SA 1 (CC); see also *AfriForum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC). See also *Daniels v Scribante* 2017 (4) SA 341 (CC) par 154). Afrikaans was removed as a medium of instruction at Unisa following the institution's policy objective of making tuition available in all South African official languages to enable an effective multilingualism. When this proved not immediately feasible, the institution opted to remove Afrikaans and had tuition temporarily offered only in English. There is thus a need for the phasing in of all indigenous languages as having English as the only medium language in South Africa is unconstitutional in terms of section 29(2) of the Constitution, which provides:

"Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable."

Other institutions, such as Stellenbosch University, have begun to offer their curriculum in Xhosa. However, transformation is not merely about offering the same curriculum in a language other than English and Afrikaans. It is about what is taught and how it is taught. The journey for curriculum transformation is generally slow in institutions of higher learning. Himonga argues that a decolonisation of the law project is needed to heal the country of the heavy reliance on Western-centred knowledge (Himonga "The Constitutional Court of Justice Moseneke and the Decolonisation of Law in South Africa: Revisiting the Relationship Between Indigenous Law and Common Law" 2017 *AJ* 117). It has the potential to free the country and legal education system from the Eurocentric epistemological concept of law that is deeply rooted in colonialism, which has dominated the legal culture.

Rautenbach asserts that decolonisation of law is vital for the survival of living customary law as an independent legal system that regulates the lives of millions of people. She further asserts that it is important because it provides the basis for an alternative legal epistemology that can realise the true transformative potential of law in regulating real lived inequalities of people (Rautenbach *Introduction to Legal Pluralism* 56). What curriculum decolonisation seeks to do is actively and consciously bring to the centre other marginalised knowledge systems to ensure that both form and substance of the curriculum transcends Western standardised normativity. This would allow judges who have not been fully initiated into how to infuse African knowledge systems into the law a legitimate platform to question the standards and methods of Westernised Art and Humanities, Pure and Life Sciences, Law, Education and Economics, and to reimagine what it could and should be. This would result in judicial outcomes that reflect an infusion of African ontologies and epistemologies. This is not merely about promoting a new hegemony but about enabling a pluralistic approach where other knowledge systems such as customary law can be used to solve disputes without the prowling eye of the common law. However, it must be acknowledged that just because people love a concept such as decolonisation does not make it easy to achieve. Diala argues that law teachers do not unmask colonialism in order to pursue a "successful



ideological struggle for African beliefs (religion), way of life (culture), and perception of the world (philosophy)" (Diala "Curriculum, Decolonisation and Revisionist Pedagogy of African Customary Law" 2019 *Potchefstroom Electronic Law Journal* 6). Colonialism has had an irreversible impact on Africans. This includes indoctrination through Christianity and ethnic conflicts (Diala 2019 *PELJ* 14). The way forward should include unmasking the impact of colonialism on the African people and their legal culture, and focusing on forging a new identity and self-contemplation.

There is thus a need to re-centre the significance of African knowledge systems. For example, South Africa currently experiences the problem of police brutality. This was widely experienced after the outbreak of Covid-19, where scores of people were brutalised and some regrettably killed. This culture must not be tolerated, according to the adage that says *ngwana phoso ya dirwa ga bolawe*, meaning that death or police brutality cannot be justified or used as a response to any unlawful act a person may have committed. It is argued that many indigenous value systems can be infused into the legal system, LLB curriculum and other socio-economic issues and educational challenges faced by South Africa as a developing country (Mendy and Madiopé 2020 *Perspectives in Education* 14). It would produce lawyers and judges with a different legal culture to the Western-orientated culture – ones who would be creative and innovative in their pronouncements.

Restorative justice is both backward-looking in that it includes dealing with the "aftermath of the offence", and forward-looking, in that it is a process that looks at implications for the future. This introduces a crime-prevention element to the process in that an effort is made to identify how future incidents may be avoided (Bailey "*Ngwana phosa dira ga a bolawe: The Value of Restorative Justice to the Reintegration of Offenders*" 2008 *South African Crime Quarterly (SACR)* 28). The White Paper on Corrections in South Africa (2005) provides a vision for viewing correction as a societal responsibility: correction is therefore not just the duty of a particular department. It is the responsibility of all social institutions and individuals (starting with the family and educational, religious, sport and cultural institutions), and a range of government departments. It is only at the final point, where society has failed an individual, that the criminal justice system and the Department of Correctional Services step in (Bailey 2008 *SACQ* 34).

## 5 Conclusion

Customary law, despite being the law of the majority of the South African population, continues to play a secondary role to the common law as courts are happy to continue the latter's paradigm. A commitment was made in judgments such as *Alexkor* to move on, yet in subsequent judgments, the paradigm continued. It is nevertheless refreshing that the High Court in *Bulelwa* has recognised the role played by customary law and recognised *ukuthwasa* as a defence in a civil claim. The judgment is commended, and it is hoped that more such infusion will happen. The goal should be indigenisation, where customary law is afforded the sole space to resolve a dispute. The common law should rather be afforded space where customary law falls short of resolving a dispute. This is in line with the choice of laws

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because the dispute in hand would determine whether to refer to the common law or customary law. The parties themselves should have the space to determine by which law they wish their dispute to be resolved. It is argued that customary law has a lot more to offer and this must be explored so that the jurisprudence can participate in finding solutions to the country's ills, such as poverty.

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