

AN APPRAISAL OF THE ROLE OF RITUALS AND THEIR WAIVER IN THE CONCLUSION OF A CUSTOMARY MARRIAGE

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SUMMARY

The validity of customary marriages remains a topical issue in South Africa and the most litigated aspect of customary law. The problem is that courts often do not pay attention to the role that rituals play in the validity of a customary marriage. Courts do not always investigate the relevant living law to determine if indeed the traditional group involved allows for waiver of a ritual in conclusion of a customary marriage. Living law refers to the day-to-day norms of communities that base their lives on customary law. Living law is affected by different factors such as acculturation and urbanisation.¹ The focus of this article is on some of the different traditional groups in South Africa and looks at case law in South Africa in terms of how traditional groups deal with the role of rituals in determining the conclusion of a customary marriage. The article argues that what is happening is problematic because customary law is not given the recognition it is afforded by the Constitution. The article argues that understanding rituals can play an important role in helping courts to determine whether a customary marriage has been concluded in a particular case. Rituals are also observed to integrate a bride into the groom's family; however, there are rituals that may be waived without affecting the validity of a customary marriage. Integration of the bride is a broader term requiring scrutiny because this process includes different and varying rituals that are observed in the conclusion of a customary marriage. In customary law, rituals are significant because they are associated with legitimising certain occurrences, such as the change of a surname and the coronation of a king. This article argues that courts should appreciate the significance of rituals in the conclusion of a customary marriage. In addition, courts should understand which rituals are so important that they cannot be waived.

¹ Manthwa "The Interplay Between Proving Living Customary Law and Upholding the Constitution" 2019 *Stell LR* 465.

1 INTRODUCTION

The observance of rituals is significant in customary law as it can be equated to a traditional and religious process, aimed at legitimising changes and developments in a community.² Traditionally, the observance of a ritual is accompanied by the slaughtering of an animal, which invites spiritual benignity by the spilling of blood.³ Changes or developments that often require the performance of a ritual include the birth of a child, changing a surname and the return of a long-lost daughter.⁴ For the purposes of this article, only rituals performed in the conclusion of a customary marriage and their significance are analysed, although other rituals are also mentioned to provide context. The rituals involved in a customary marriage, and analysed here, have legal implications as they may determine whether a customary marriage is regarded as binding.⁵

The living-law requirement for the conclusion of a customary marriage often includes that *lobolo* be delivered and that the bride be integrated into the groom's family.⁶ Although a requirement for the conclusion of a customary marriage might be shared by different traditional groups, such a requirement might not have the same significance for every group. An example is evident in *MM v MN*,⁷ where the court concluded that consent of the first wife is a requirement for the validity of a subsequent polygynous customary marriage. The court reached this conclusion in developing customary law of the Tsonga group. However, the court acknowledged that consent of the first wife might not have the same significance in other traditional groups.

The objective of this article is to determine the significance of rituals performed in the conclusion of a customary marriage and whether all rituals could be waived, as courts often do not pay attention to the role that rituals play in determining the validity of a customary marriage. It is argued that rituals can play an important role in assisting the court to determine whether a customary marriage has been concluded in a particular case. In the main, courts are inconsistent when determining whether a customary marriage is valid. This has serious implications for vulnerable partners, especially women, as they can leave an intimate relationship without legal recourse if a declaration of invalidity is made by a court. This article provides a general discussion of the significance of rituals in African culture, including a discussion of the right to culture. This is followed by a discussion of case law relating to rituals and the integration of the bride in the conclusion of a customary marriage. Emphasis is placed on some traditional groups such as

² Ndima *Re-Imagining and Re-Interpreting African Jurisprudence Under the South African Constitution* (LLD thesis, UNISA) 2013 77.

³ Soga *Intlalo kaXhosa* (1937) 129–130.

⁴ Ndima *Re-Imagining and Re-Interpreting African Jurisprudence* 150.

⁵ Van Niekerk and Nkosi "The Unpredictable Judicial Interpretation of Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998: *Eunice Xoliswa Ngema v Sifiso Raymond Debengwa* (2011/3726) [2016] ZAGPJHC 163 (15 June 2016)" 2018 *THRHR* 350.

⁶ *Motsoatsoa v Roro* [2011] 2 All SA 324 (GSJ).

⁷ *MM v MN* 2013 (4) SA 415 (CC).

the Nguni and Tswana traditional groups. The article names some of the rituals and explains whether or not they can be waived.

2 THE SIGNIFICANCE OF RITUALS FOR SOUTH AFRICAN TRADITIONAL GROUPS

Traditional groups have various rituals they observe and regard as important – to the extent that their non-observance would result in the invalidity of a customary marriage. Rituals in customary law are significant because they are associated with legitimising certain occurrences such as the integration of the bride into the groom's family, the change of a surname and the coronation of a king. Another example is the ritual observed to introduce a child to the ancestors as a new member of the family. A new member must be formally introduced through the observance of a ritual. The newborn child of a married couple would not be recognised as having been accepted into the family by the ancestors unless the rituals have been observed.⁸ The non-observance of rituals carries the risk that the ancestors may unleash their wrath on the child. Similarly, a bride may not be recognised as such without the performance of a certain ritual regarded as essential for the conclusion of a customary marriage. Such rituals may include dowing with milk, depending on the traditional group involved.⁹

The Xhosa traditional group observes *utsiki* after the arrival of the bride at the groom's family to integrate her as their *umakoti* (daughter-in-law).¹⁰ *Utsiki* involves slaughtering an animal. The bride must eat goat meat and drink sour milk from a goat. A bride does not automatically acquire the status of *umakoti* or become a full member of the groom's family when *lobolo* has been delivered, or when she has entered the groom's home.¹¹ A Kenyan expression articulates the importance of rituals in the context of integration of the bride as follows:

"A sheep is killed, the fat of which is fried and the oil is used to anoint the bride in a ceremony of adoption into the new clan. After she has been admitted as a full member of the husband's family, she is free to mingle with its members and take an active part in the general work of the homestead."¹²

Ndima posits that the importance of a ritual can be seen in the restoration of equilibrium in society, and gives the example of attaining a university qualification:

"University graduates need the ritual of a graduation ceremony which confers on them the degrees that they have already passed during assessments. In this way society gets thereby informed and assured that the students do not only claim to be graduates but have been recognised as such by those

⁸ Mtuze *The Essence of Xhosa Spirituality – and the Nuisance of Cultural Imperialism: Hidden Presences in the Spirituality of the amaXhosa of the Eastern Cape and the Impact of Christianity on Them* (2002) 26.

⁹ See Bakker "Integration of the Bride as a Requirement for a Valid Customary Marriage: *Mkabe v Minister of Home Affairs* [2016] ZAGPPHC" 2018 PELJ 6.

¹⁰ Ndima *Re-Imagining and Re-Interpreting African Jurisprudence under the South Africa Constitution* 78.

¹¹ Tamsanqa *Ithemba Iiyaphilisa* (1979) 125.

¹² Kenyatta *Facing Mount Kenya* (1938) 173.

qualified to do so at a graduation ceremony arranged for that purpose. Hence their certificates proclaim that they were conferred at the congregation of the university.”¹³

Rituals are generally significant in terms of customary law owing to the legitimate purpose they serve. Integration of the bride, like the delivery of *lobolo*, emerged in agrarian settings where families lived close together for defence and agricultural purposes. Since wealth, rights and obligations were communal in nature, integration was observed by the family and was accompanied by traditional ceremonies that marked the link between the material and spiritual worlds. This is the context of the practice. In the legal pluralism debate, the courts often do not focus on the agrarian social settings of this custom. Part of the reason that families observe the practice is the need to introduce the bride to the ancestors as a new member of the groom’s family by observing a ritual. The bride’s change of status from her family to the groom’s family must be marked by a ceremony and communication with the ancestors because the ancestors must bless her integration into the groom’s family and accept her as one of their own.¹⁴ This might involve slaughtering an innocent animal to invite divine beneficence through the spilling of blood. Integration signifies to the community, the collective families of the bride and groom, and the living, that the bride is recognised as a legitimate member of the groom’s family.¹⁵ In the case of a ritual to conclude a marriage, the ritual is significant because it gives the woman the added responsibility of protecting the family and her husband’s reputation, and of maintaining her dignity once her status has changed.¹⁶ In *Fanti v Boto*,¹⁷ the court observed the following:

“All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly transferred or handed over to her husband or his family. Once that is done severance of ties between her and her family happens. Her acceptance by the groom’s husband and her incorporation into his family is ordinarily accompanied by well known extensive ritual and ceremonies involving both families.”¹⁸

Customary law can adapt and change, and as a result a ritual might be waived, but it must not be presumed that this has happened. Rituals embody the transfer of teachings about culture and respect for the individual and community.

2.1 The right to culture

The Constitution of the Republic of South Africa, 1996 (the Constitution) protects the rights of everyone to observe their culture, and this extends to rituals performed in conclusion of a customary marriage. It is important to note that customary law is subject to the Constitution, which requires that

¹³ Ndimba *Re-Imagining and Re-Interpreting African jurisprudence under the South Africa Constitution* 78.

¹⁴ Bennett *A Source Book of African Customary Law for Southern Africa* (1991) 192.

¹⁵ Ndimba *Re-Imagining and Re-Interpreting African Jurisprudence* 77.

¹⁶ *Ibid.*

¹⁷ *Fanti v Boto* 2008 (5) SA 405 (C).

¹⁸ *Fanti v Boto supra* par 22.

rituals and practices must be consistent with the Constitution as supreme law of the land. However, the right to observe certain rituals is part of the right to culture as recognised by sections 15, 30 and 31 of the Constitution. The law must allow people to observe the culture of their choice and the court must consider the legitimate purpose served by rituals in the conclusion of a customary marriage. Section 31(1) of the Constitution, for example, states that

“persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community – to enjoy their culture, practise their religion and use their language.”

The section can be interpreted broadly as it does not mention any specific culture but refers to all cultures. The right to culture gets further impetus in section 185 of the Constitution, which provides for the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The right to culture embodies the need and right to belong to a community and to be part of a collective. It emphasises the sense of belonging to a community as part of a person’s culture. Culture is not static; it can change from time to time as a particular society changes. The change in culture is brought about by the people who live in a community at a particular time.¹⁹ The community also shapes the rituals observed as part of its culture. Cultural rights are by their nature group-oriented, as individuals share their culture with other groups and communities.²⁰ The court must weigh up competing interests, such as the rights of indigenous people to live by their customary laws and observe rituals, versus rights protected by the Constitution, including an individual’s right to equality and dignity.²¹ Decisions must be made on a balance of probabilities, which must always reflect the living law of communities.²²

The right to culture is also recognised in international instruments such as the Universal Declaration of Human Rights.²³ Article 27(1) of the Declaration provides that “everyone has the right freely to participate in the cultural life of the community”. Similarly, the International Covenant on Civil and Political Rights (ICCPR)²⁴ protects people’s right “to enjoy their own culture, to profess and practise their own religion, or to use their own language”.²⁵ South Africa is a signatory to the above treaties and is bound to observe their provisions.

South Africa has varying traditional groups that observe rituals for different purposes. The right to culture is pivotal also to the recognition of the right to dignity and respect, which lies at the centre of human rights protection. The right to culture, however, must be observed in ways that are consistent with

¹⁹ Matsumoto *Culture and Psychology: People Around the World* 2ed (2000) 24.

²⁰ Devenish *A Commentary on the South Africa Bill of Rights* (1998) 422.

²¹ Lewis “Judicial ‘Translation’ and Contextualization of Values: Rethinking the Development of Customary Law in *Mayelane*” 2015 *PELJ* 1126.

²² *ND v MM* (2020) ZAGPJHC 113 par 27; see also Marwick *The Swazi: An Ethnographic Account of the Natives of Swaziland Protectorate* (1996) 123–124.

²³ UNGA *Universal Declaration of Human Rights* 217 A (III) (1948).

²⁴ UNGA *International Covenant on Civil and Political Rights* 999 UNTS 171 (1966). Adopted: 19/12/1966; EIF 23/03/1976.

²⁵ Art 15(1) of the ICCPR.

the Constitution's Bill of Rights. Any ritual or cultural practice inconsistent with the Constitution will thus be declared unconstitutional.

Maluleke posits that practices that traditionally served a legitimate purpose may today fall short of consistency requirements of the Constitution owing to their infringement of rights such as the right to equality.²⁶ He gives examples, such as virginity testing, male circumcision and *ukuthwala*, which have elements of human rights violation.²⁷ *Ukuthwala* is a cultural practice that involves the abduction of a woman by a man for the purpose of persuading her family to enter into negotiations to conclude a customary marriage between the woman and the man.

It cannot be denied that many customary law practices and rituals are currently observed in ways that violate human rights. The ignominy flowing from this is the stigma that customary law in general does not care about the protection of human rights. However, it can be argued that customary law does respect and protect human rights as it does not allow rape, the killing of children or the abuse of women and children in the name of culture.²⁸

Customary law has its own normative framework that is found in the concept of *ubuntu* and captures the notion of human rights.²⁹ *Ubuntu* embodies African values and, if properly understood, the concept has the same connotations as human rights.³⁰

The legitimate purpose served by rituals should not be lost, as they support the social, political and legal organisation of society, and the protection of vulnerable members' interests.³¹

The problem facing the observance of rituals today is distortion, as has been the case with *ukuthwala* and *ukuthwasa ebudodeni* or *intonjane* (initiation to manhood or womanhood). Some of these practices have led to the raping and killing of thousands of young children and should be abandoned altogether.³² However, these practices should not be declared unconstitutional if observed without infringement of human rights. Rituals should be practised safely in a way that protects the rights to life, human dignity and bodily integrity of young children and women.

Better regulation of rituals is likely to be embraced by communities. Education programmes and reporting of crimes against children can assist in addressing the distortion of rituals. As Diala argues, many people have grown up with distorted *ukuthwasa ebudodeni* versions of customary law and believe that they are observing legitimate practices, while in reality indigenous law and rituals were distorted as a result of collaboration among

²⁶ Maluleke "Culture, Tradition, Custom, Law and Gender Equality" 2012 *PELJ* 10.

²⁷ Maluleke 2012 *PELJ* 13.

²⁸ Mahao "O se re ho morwa 'morwa towel' African Jurisprudence Exhumed" 2010 *CILSA* 326.

²⁹ *Ibid.*

³⁰ Dlamini "The Clash Between Customary Law and Universal Human Rights" 2002 *SJ* 26.

³¹ Ndima *Re-Imagining and Re-Interpreting African Jurisprudence* 56.

³² Nduna, Siswana, Ewing and Vilancuos "Changes in Gender Norms Are Making Initiation Safer for South African Boys" (2015) *The Conversation* <https://theconversation.com/> (accessed 2022-09-13).

colonial officials and African leaders.³³ An example of a distorted practice or ritual is found in the facts of *S v Jezile*, in which a child was raped, and where *ukuthwala* was used as a ground of justification.³⁴ However, it cannot merely be concluded that the observance of rituals is a problem. The voices of people who live their daily lives based on these practices and observe these rituals need to be heard.

The law should not speak on behalf of people as if they cannot speak for themselves. This is problematic – a violation of the right to self-determination in terms of section 235 of the Constitution.³⁵ Cultural self-determination is a community's collective right. It is associated with ethnic, linguistic, religious and cultural communities living in a defined territory and sharing a culture, customs and heritage.³⁶ This right requires that courts and other state institutions recognise that indigenous people have the right to decide which laws they want applied to them. Courts must not consider issues not brought before them, as happened in *Sengadi v Tsambo*,³⁷ where the court declared integration of the bride unconstitutional, although the parties had not raised this issue. Twala J argued that customary law must be developed to be consistent with the Constitution.³⁸ However, the problem is that a court might see an opportunity to develop customary law judicially, even when the parties have not raised constitutionality as an issue, and more importantly, when there are no grounds to declare the said rituals inconsistent with the Constitution. It is argued that courts often take this opportunity to develop customary law because they want to make customary law progressive and protect vulnerable partners. This does not mean that courts can impose recognition on the framework of customary marriages when requirements for a customary marriage have not been met.

If a party brings a matter to court, this does not mean that they want a ritual or practice declared unconstitutional. The problem could be that they want the ritual or practice changed to reflect the needs of a modern society or to promote gender equality. The court must explore doing this without deciding on the constitutionality of the practice.³⁹

Similarly, any ritual observed in the conclusion of a customary marriage may be declared unconstitutional. However, it cannot merely be assumed that rights are inconsistent with the Constitution. Rights must be tested against the Constitution and competing interests must be weighed. The right

³³ Diala and Kangwa "Rethinking the Interface Between Customary Law and Constitutionalism in Sub-Saharan Africa" 2019 *De Jure* 194–197.

³⁴ 2016 (2) SA 62 (WCC).

³⁵ Van der Vyver "The Right to Self-Determination of Cultural, Religious and Linguistic Communities in South Africa" 2011 *PELJ* 18.

³⁶ Mailula "Abdication of Judicial Responsibility, Cultural Self-Determination and the Development of Customary Law: Lessons from *Shilubana*" 2008 *SAPL* 232.

³⁷ *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).

³⁸ *Sengadi v Tsambo supra* par 35–40; see also Radebe "Tsambo v Sengadi (244/19) [2020] ZASCA 46 (30 April 2020); *Sengadi v Tsambo*; In Re: Tsambo (40344/2018) [2018] ZAGPJHC 666; [2019] 1 All SA 569 (GJ) (8 November 2018) Assessing the Insurmountable Challenge in Proving the Existence of a Customary Marriage in Terms of Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 and the Misplacing of Gender Inequality" 2022 *De Jure* 81.

³⁹ *Sengadi v Tsambo supra* par 40–44.

to culture is not absolute and will in some cases be tested, for example against the right to equality, and may be limited by a law of general application in terms of section 36 of the Constitution.⁴⁰ Section 211 of the Constitution recognises customary law to the extent that it is consistent with the Constitution.

2.2 Judicial pronouncements

The requirements of a customary marriage in terms of the Recognition of Customary Marriages Act⁴¹ (the RCMA) are that both parties must be at least 18 years of age and must consent to the marriage.⁴² The RCMA further provides that the marriage must be negotiated and entered into according to customary law.⁴³ This has been interpreted to include that *lobolo* and the integration of the bride are requirements for a customary marriage. The court should desist from discounting the importance of certain rituals when approached to determine the validity of a customary marriage when a certain ritual has not been performed. Courts must take steps to be informed of the importance of that ritual. Case law in some matters recognises that integration of the bride is a requirement for the conclusion of a customary marriage. However, courts generally focus on the integration of the bride without looking at the significance and roles of rituals. For example, in *Mthethwa v Road Accident Fund*,⁴⁴ and *Mxiki v Mbata in re: Mbatha v Department of Home Affairs*,⁴⁵ the court concluded that a customary marriage could not be concluded without integration of the bride. It reached this conclusion without considering the traditional groups involved. In cases such as *C v P*,⁴⁶ and *Mkabe v Minister of Home Affairs*,⁴⁷ however, the court recognised the validity of a customary marriage, notwithstanding that the bride had not been integrated. In *Mkabe v Minister of Home Affairs*, the court concluded that integration of the bride could not be considered an essential requirement to the extent that a marriage would not be valid if the custom had not been observed.⁴⁸ The court concluded that constructive integration of the bride should be recognised and the marriage should be valid; thus, integration does not have to be physical.⁴⁹

It is submitted that the court cannot merely conclude that constructive integration of the bride is acceptable if the court does not understand the role and significance of rituals in concluding a customary marriage. In cases such as *Nthejane v Road Accident Fund*,⁵⁰ and *Matlala v Dlamini*,⁵¹ the court

⁴⁰ Grant "Human Rights, Cultural Diversity and Customary Law in South Africa" 2006 *Journal of African Law* 7.

⁴¹ 120 of 1998.

⁴² See s 3 of the RCMA.

⁴³ S 3(1)(b) of the RCMA.

⁴⁴ [2010] ZAGPJHC 138.

⁴⁵ [2016] ZAGPPHC 893.

⁴⁶ [2017] ZAFSHC 57.

⁴⁷ [2016] ZAGPPHC 460.

⁴⁸ *Mkabe v Minister of Home Affairs supra* par 35.

⁴⁹ *Mkabe v Minister of Home Affairs supra* par 38 and 40.

⁵⁰ [2011] ZAFSHC 196.

⁵¹ [2010] ZAGPPHC 277.

was prepared to recognise a valid customary marriage based solely on the delivery or partial delivery of *lobolo*. Integration was thus not seen as necessary. In *Mmutle v Thinda*,⁵² the court concluded that integration of the bride was a ceremonial gesture that could be waived. The court held that integration should not be regarded as significant to the extent that its non-observance should affect validity of a customary marriage.⁵³ However, the court did not consider which rituals should be observed as part of integration and whether these had been observed.

In *Motsoatsoa v Roro*,⁵⁴ the court held that integration is important because it taught both men and women about their duties and responsibilities as husbands and wives, and their responsibilities to their new families.⁵⁵ This is a step that cannot be waived in Tswana law. In fact, most traditional groups in South Africa would not allow this ritual to be waived. However, if there is evidence from the traditional group concerned that a certain ritual is no longer important for concluding a customary marriage, then that ritual might be waived. In all these cases and many others, the court did not further interrogate the integration of the bride or the role of rituals.⁵⁶ This could have been done by looking at rituals and determining which ones were so significant that they affected the validity of a customary marriage if not observed.

It is argued that integration is a broader term that requires scrutiny because different rituals for different traditional groups are observed as part of integration when concluding a customary marriage. A broader view focuses on the legitimate purpose served by a particular ritual. It is argued that courts adopt a narrow view of integration of the bride. As a result, they merely argue that integration is flexible, and that any ritual observed during integration can be waived. A ritual can be waived if the traditional group concerned allows the waiver of the ritual in question. Evidence must be sought from the community concerned before the court can recognise waiver. It could be argued that courts are motivated by a flexible approach that focuses on recognition by a family, but the identification of the involved traditional group is an important step. Courts should scrutinise the role of all rituals and treat these rituals with the respect they deserve according to the Constitution.

3 RCMA AND RITUALS

As stated above, section 3(1)(b) of the RCMA provides that a customary marriage “must be negotiated and entered into or celebrated in accordance with customary law”.⁵⁷ Maithufi posits that section 3(1)(b) determines that a marriage must be concluded based on the system of customary law of the

⁵² [2008] ZAGPPHC 352.

⁵³ *Mmutle v Thinda supra* par 51.

⁵⁴ *Supra*.

⁵⁵ *Motsoatsoa v Roro supra* par 19.

⁵⁶ Manthwa “Handing Over the Bride as a Requirement for Validity of a Customary Marriage – *C v P* (1009/2016) [2017] ZAFSHC 57 (6 April 2017)” 2019 *THRHR* 656.

⁵⁷ See heading 2.1 above.

parties.⁵⁸ It is argued that this provision must be interpreted to include important rituals in the conclusion of a customary marriage. Although section 3(1)(b) does not expressly provide that the integration of the bride is required, it is argued that integration is necessary to conclude a customary marriage in living law.⁵⁹ Court decisions must be consistent with what communities are doing.⁶⁰ Section 3(1)(b) enables courts to recognise cultural nuances and differences in practices, but it also requires that courts somehow determine and take into account the importance of a ritual for a particular traditional group.⁶¹

There is no standard approach to determining the validity of a customary marriage because customary law is not a single law system with consistent norms across the board.⁶² As stated above, the RCMA does not provide clarity on the requirements for or conclusion of a marriage. Consequently, it has been left in the hands of courts whose decisions are not consistent with the living law of communities. Section 3(1)(b) might give rise to unpredictability as it allows inconsistent interpretations by courts. Courts might interpret the same set of facts and reach different conclusions about the integration of the bride; some might conclude that integration and a ritual involved cannot be waived, while others might disagree.⁶³ Mwambene and Kruuse argue that courts indicate that a ritual can develop or change in one group but stay the same in another. The question is: which criteria does a court use to reach such a conclusion?⁶⁴

It is regrettable that courts do not consider the significance of rituals and gloss over the nuances when determining the validity of a customary marriage. Some rituals, such as *utsiki*, are so important that they cannot be waived. The validity of a customary marriage is affected if *utsiki* is waived. Courts must understand that practices differ from one community to the next. For example, a similar ritual in another traditional group may not have the same significance as *utsiki* in the Xhosa group.⁶⁵

It is argued that courts must not assume that practices are the same in all traditional groups because the problem of ossifying customary law arises, and courts rob themselves of an opportunity to tap into the rich history of

⁵⁸ Maithufi “The Requirements for Validity and Proprietary Consequences of Monogamous and Polygynous Customary Marriages in South Africa: Some Observations” 2015 *De Jure* 278.

⁵⁹ Himonga and Moore *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015) 92.

⁶⁰ Kruuse and Sloth-Nielsen “Sailing Between Scylla and Charybdis: *Mayelane v Ngwenyama*” 2014 *PELJ* 1722.

⁶¹ Manthwa “An Appraisal of the Hurdles With Ascertain the Applicable Customary Law When Determining Conclusion of a Customary Marriage – *ND v MM* (18404/ 2018) (2020) ZAGPJHC 113 (12 May 2020)” 2022 *Speculum Juris* 227.

⁶² Osman “Precedent, Waiver and the Constitutional Analysis of Handing Over of the Bride [Discussion of *Sengadi v Tsambo* 2018 JDR 2151 (GJ)]” 2020 *Stell LR* 84; Manthwa 2019 *THRHR* 652–662.

⁶³ Van Niekerk and Nkosi 2018 *THRHR* 348.

⁶⁴ Mwambene and Kruuse “Form Over Function? The Practical Application of the Recognition of Customary Marriages Act 1998 in South Africa” 2013 *AJ* 310; Mwambene and Sloth-Nielsen “Talking the Talk and Walking the Walk: How Can the Development of Customary Law Be Understood?” 2010 *Law in Context* 32.

⁶⁵ Osman 2020 *Stell LR* 85.

customary law and to understand the significant role of rituals.⁶⁶ Courts need to consider the important roles played by rituals to understand that mere integration of the bride is not the sole purpose of integration of the bride.

If there is an argument for recognising a marriage despite the waiver of integration, the court must ascertain whether the traditional group concerned allows the ritual to be waived. For example, in terms of the Swati traditions, *libovu* (smearing a bride with red ochre) cannot be waived during integration as it marks an important stage in the conclusion of a customary marriage.⁶⁷ Smearing *libovu* on the faces of the parties is an important stage in the conclusion of the marriage.⁶⁸ A bride-to-be is not regarded as a wife until she is smeared with *libovu*. In *ND v MM*,⁶⁹ the father of the plaintiff had testified that *libovu* is so significant that it could not be waived. The plaintiff, on the other hand, argued that she had been integrated into the groom's family through symbolic integration.⁷⁰ The court therefore emphasised the importance of hearing evidence from living law on rituals that play a significant role in the conclusion of a customary marriage. In such cases, someone from the community must testify on the position of living law so that the court does not make decisions without evidence.⁷¹

Rituals and their inclusion in customary law should be studied to assist courts in determining which rituals can be waived and which not. The Constitutional Court concluded in *MM v MN*⁷² that the living law of the communities had to be visited to determine how they observed a particular practice. Similarly, in *Moropane v Southon*,⁷³ the Supreme Court of Appeal concluded that a fact-intensive inquiry was needed to determine how a community observed certain rituals. The above discussion highlights that courts in some cases adopt a narrow view of integration of the bride and its accompanying ritual. Courts will consequently conclude that symbolic, constructive or ceremonial integration of the bride took place. It is, however, important for courts to be informed by what communities are doing.

4 DETERMINING THE CONTENT OF LIVING LAW

Determining the content of living law is the way forward to inform courts on the significance of rituals. Courts have often concluded that their biggest challenge is determining the true content of a norm before endorsing it in court. In *Bhe v Khayelitsha Magistrate; Shibi v Sithole (Bhe-Shibi)*,⁷⁴ the Constitutional Court held that it was not able to determine this because the task was insurmountable.⁷⁵ In *MM v MN*,⁷⁶ the Constitutional Court

⁶⁶ Niekerk "Reflections on the Interplay of African Customary Law and State Law in South Africa" 2012 *SUBB Jurisprudentia* 13.

⁶⁷ *ND v MM supra* par 19.

⁶⁸ *ND v MM supra* par 21.

⁶⁹ *Supra*.

⁷⁰ *ND v MM supra* par 13.

⁷¹ *President of the Republic of South Africa v Gumedde* 2009 (3) SA 152 (CC) par 29–30.

⁷² *Supra*.

⁷³ *Moropane v Southon* [2014] ZASCA 76.

⁷⁴ 2005 (1) SA 580 (CC).

⁷⁵ *Bhe-Shibi supra* par 59.

⁷⁶ *Supra*.

embraced the difficult challenge of determining the content of living law by listening to community members on whether consent of the first wife is needed as a requirement for conclusion of her husband's second marriage. More of this approach is needed to assist the court in determining the content of living law. The court *a quo* was criticised for treating consent as a requirement even though it was not clear that consent of the first wife was indeed a requirement.⁷⁷ Kruuse and Sloth-Nielsen, for example, are not convinced that consent in *MM v MN* was observed out of a sense of obligation.⁷⁸ They write that "if courts are not alive to the finer distinctions between behavioural norms, there is a concern that 'law' and 'customary law' will lose any distinctive meaning".⁷⁹ This is an important consideration because new practices may be alleged in court out of self-interest, and the court cannot run the risk of recognising every practice as law.⁸⁰ Similarly, with rituals, the court must determine whether a ritual is needed for the conclusion of a customary marriage.

The decision of the Constitutional Court in *MM v MN*⁸¹ to visit living law is still welcomed despite the mentioned difficulties, because the court faced the insurmountable task it had previously shied away from in *Bhe-Shibi*.⁸² The shortcomings are a lesson for the road ahead and can assist courts in dealing more effectively with conflicting evidence and other challenges. This is not made easier by the fact that courts are likely to hear conflicting evidence on the subject. For the survival of customary law, it is argued that the court must not merely conclude that integration of the bride can be waived – it must be convinced of the importance of a ritual before this conclusion can be reached. The court cannot argue for example that *ukumemeza* can be waived without evidence from living law. *Ukumemeza* is a ritual that is observed as part of integration of the bride. In *Mabuza v Mbatha*,⁸³ the court concluded that *ukumemeza* could be waived since customary law had developed to the extent that *ukumemeza* was today observed differently.

This was a problematic conclusion because the court merely assumed that *ukumemeza* was observed differently; it had heard no evidence to support this conclusion.⁸⁴ Some judges in South Africa appear to have very little knowledge of customary law. For example, Sibisi criticised Hlophe J in *Mabuza v Mbatha* for lacking an understanding of the distinction between *ukumemeza* and integration of the bride.⁸⁵ Sibisi argues that *ukumemeza* and integration of the bride are two separate events in the conclusion of a

⁷⁷ Manthwa "Proof of the Content of Customary Law in Light of *MM v MN*: A Constitutional Approach" 2017 *THRHR* 307.

⁷⁸ Kruuse and Sloth-Nielsen "Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*" 2014 *PELJ* 1720–1725.

⁷⁹ Kruuse and Sloth-Nielsen 2014 *PELJ* 1721.

⁸⁰ *Ibid.*

⁸¹ *Supra.*

⁸² *Supra.*

⁸³ 2003 (4) SA 218 (C).

⁸⁴ Manthwa "Towards a New Form of Customary Marriage and Ignorance of Precedence: *Mbungela v Mkabi* 2020 1 SA 41 (SCA)" 2021 *TSAR* 204.

⁸⁵ Sibisi "Is the Requirement of Integration of the Bride Optional in Customary Marriages?" 2020 *De Jure* 96.

customary marriage.⁸⁶ *Ukumemeza* is a ritual that is observed as part of integration of the bride, but does not refer to the entire practice of integration.⁸⁷ *Mabuza v Mbatha* might serve as authority that a ritual pertaining to the validity of a customary marriage might be waived, but integration should not be waived in its entirety.⁸⁸ Regrettably this precedent has served as a central reference for determining validity of a customary marriage. First, evidence is needed to determine if indeed the Nguni traditional group allows for the waiver of *ukumekeza*; this cannot be assumed because the practice might be so important that a customary marriage would not be recognised as valid without its observance. As stated earlier, a rich body of literature is available to assist courts in determining how indigenous communities have traditionally arranged their daily lives and how rituals are observed today.⁸⁹ The Constitutional Court in *Shilubana v Nwamitwa*⁹⁰ provided the following finding:

“[W]here there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.”⁹¹

Experience might play a role, but in the final analysis someone who is well acquainted with the living law must testify on the position in living law.⁹² If it is alleged in court that a practice exists, the allegor has the responsibility to prove that it truly exists. This can be done by calling witnesses. This is important as there are uncertainties about certain aspects that might contribute to the validity of a customary marriage, such as the stage of its conclusion.⁹³ Guidelines on the conclusion of a customary marriage are provided in legislation, but legislation has not addressed many of the challenges, such as the stage of conclusion of a customary marriage.⁹⁴ The key is that even if the bride was integrated, the validity of a customary marriage might still be affected if certain important rituals were waived during integration. The approach of the court when interpreting section 3(1)(b) of the RCMA, and ascertaining whether a customary marriage has been concluded, is to look at whether integration of the bride is still necessary. The court then concludes that integration is either needed or it is not

⁸⁶ *Ibid.*

⁸⁷ Bakker 2018 *PELJ* 6–12.

⁸⁸ Sibisi 2020 *De Jure* 100.

⁸⁹ Nhlapo “Homicide in Traditionally African Societies: Customary Law and the Question of Accountability” 2017 *AHRLJ* 1.

⁹⁰ *Shilubana v Nwamitwa* 2009 (1) SA 66 (CC).

⁹¹ *Shilubana v Nwamitwa supra* par 49.

⁹² *See President of the Republic of South Africa v Gumedede supra* par 29–30 and *MM v MN supra* par 48.

⁹³ Sibisi 2020 *De Jure* 90.

⁹⁴ Osman “The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage” 2019 *PELJ* 6.

needed, without focusing on the significance of rituals.⁹⁵ This approach by courts needs to change. Also, their interpretation of section 3(1)(b) of the RCMA needs to recognise that the section can be interpreted in a way that recognises the significance of rituals.

It is argued that one reason that courts recognise a customary marriage as valid despite non-compliance with primary rituals is the need to protect vulnerable partners from the harsh consequences of an intimate relationship that is not recognised as a marriage. There is a need to protect vulnerable partners from the harsh consequences of a marriage being declared invalid. However, courts need to explore other avenues to protect such parties. They do not have to undermine the significance of rituals in concluding a customary marriage.⁹⁶ Some rituals may no longer play a significant role owing to the changing nature of customary law. Customary law is affected by different factors, such as acculturation and urbanisation, that can result in people observing customary law differently. However, courts may not merely assume that customary law is observed differently, or that certain rituals are no longer required.

5 CONCLUSION

Rituals play a significant role in customary law; they give legitimacy to an occurrence such as the conclusion of a customary marriage or other events such as the integration of the bride. Courts must understand that integration of the bride is a broader term, and satisfying this requirement does not merely entail the recognition of symbolic integration. It is therefore important that courts not treat customary law as a single system of law, accepting that symbolic integration is sufficient for all traditional groups to conclude a customary marriage. Courts must look at every case on its own merits. They must establish the importance of a certain ritual and whether its waiver affects the validity of a customary marriage. Thus, the court cannot adopt an approach that treats rituals as having the same significance for all traditional groups. Avenues should be explored to protect the parties involved when it is found that a customary marriage has not been concluded because a significant ritual has not been observed. However, this does not mean that courts should recognise a marriage as valid when a significant ritual has been waived. Rituals must be observed in ways that reflect the legitimate purpose they serve. Courts must recognise the importance of tapping into the living law of communities, and should look at the rich history of literature available on customary law. Courts must further recognise that integration and rituals are needed in terms of section 3(1)(b) of the RCMA.

⁹⁵ *Mxiki v Mbatha in re: Mbatha v Department of Home Affairs* [2014] ZAGPPHC 825; *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP); *Mthethwa v Road Accident Fund supra*; *Mkabe v Minister of Home Affairs supra*.

⁹⁶ *Manthwa* 2022 *Speculum Juris* 230.