Problems With Waiving the Handing-Over of the Bride in Customary Marriages

Siyabonga Sibisi
LLB LLM
Senior Lecturer, School of Law, University of the Witwatersrand, Johannesburg, South Africa
Attorney of the High Court of South Africa
https://orcid.org/0000-0002-2372-5173

SUMMARY

In the recent line of decisions on the validity of customary marriages where the bride had not been physically handed over to the groom's family, courts have repeatedly found that these marriages are valid and that the physical handing-over of the bride had been waived in favour of a symbolic handing-over. The reasoning behind these decisions is that customary law is a flexible legal system that does not always demand all the requirements of a marriage to be complied with. It is observed, in these decisions, that waiver of the handing-over is not based on any agreement to waive the requirement, but rather it is inferred by the court – largely based on the parties' partial compliance with the requirements, coupled with cohabitation. Not surprisingly, these decisions have received criticism for a number of reasons. The inference of waiver may cause problems with determining the date of the marriage and the requirements for customary marriages, as well as difficulties regarding the choice of matrimonial property system. It may also be discriminatory insofar as cohabitation plays a central role. This article seeks to lead a discussion on these potential problems. Case law is used to demonstrate some of these problems.

Keywords: waiver, handing over, matrimonial property, cohabitation

1 INTRODUCTION

In the recent line of decisions on the validity of customary marriages where the bride had not been physically handed over to the groom's family, courts have repeatedly found that the marriage in question is valid, and that the physical handing-over of the bride had been implied where the parties are already cohabiting, or had been waived in favour of a symbolic handover.[1] Researchers have criticised these decisions for ignoring the precedent set by previous decisions where courts have found that, in terms of living customary law, the physical handing-over of the bride is the most important step in a customary marriage as it leads to the integration of the bride into

[1] For example, *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) (also reported [2020] 1 All SA 42 (SCA)) and *Mankayi v Minister of Home Affairs* [2022] ZAKZPHC 43 par 33.

her new family.[2] The decisions have also been criticised for distorting the living customary law that is actually observed, and for imposing rules and concepts that are foreign to it.[3] In this article, the overreliance on cohabitation of the parties is criticised with reference to case law.[4]

What must be emphasised about a waiver of the handing-over of the bride is that, to date, there has been no decided court case where the parties explicitly agreed to waive the physical handing-over of the bride. Instead, courts have inferred a waiver based on the conduct of the parties – usually their conduct in cohabiting following *ilobolo*[5] negotiations and at least partial delivery thereof. This inference is made by the courts at a time when the relationship between the parties has come to an end,[6] and when the parties have to bear consequences they never envisaged or contemplated at the time they decided to cohabit.

While there is significant literature on the handing-over of the bride and the waiver thereof, nothing has been written on the problematic potential consequences that the inference of waiver of the handing-over of the bride may have on the parties. This article is an exposition of some of these problematic consequences. An overview of the potential problems is set out first. This is followed by a brief discussion of the general requirements of a customary marriage. The handing-over of the bride is contextualised. Thereafter, the identified potential problems are fully discussed.

2 AN OVERVIEW OF THE POTENTIAL PROBLEMS

Before engaging in any significant discussion, it is convenient to set out the identified problems. The first is that, in arriving at a decision that the physical handing-over of the bride has been waived by the parties, some courts have misdirected themselves in their interpretation of the requirements of customary marriages in terms of section 3(1)(*b*) of the Recognition of Customary Marriages Act[7] (RCMA). Secondly, as a result of the misdirection, courts then conclude that the mere delivery of *ilobolo,* followed by cohabitation, concludes a customary marriage. This ignores the plethora

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2 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* 80 83; Manthwa "The Relevance of Handing Over the Bride in Contemporary South Africa: *Miya v Mnqayane* (3342/2018) [2020] ZAFSHC 17 (3 February 2020)" 2021 *THRHR* 403 409–410; Bapela and Monyamane "The 'Revolving Door' of Requirements for Validity of Customary Marriages in Action: *Mbungela v Mkabi* [2019] ZASCA 134" 2021 *Obiter* 186 189.

3 Bapela and Monyamane 2021 *Obiter* 189.

4 In *Mankayi v Minister of Home Affairs* (*supra* par 33), the court held that since the family of the applicant might have known and accepted that she was staying with the deceased as husband and wife, a customary marriage had been concluded.

5 *Ilobolo* refers to consideration given by the groom or his family to the family of the bride in view of marriage between the bride and groom. It may be given in the form of money or cattle. The Recognition of Customary Marriages Act 120 of 1998 spells it as *"lobolo*". In this article, the word *ilobolo* is used. The prefix "i" simply means "the".

6 The parties may end their relationship by agreement, or through the death of one of them. In the latter case, the family of the deceased usually disputes the marriage.

7 120 of 1998.

of decided cases that have stated authoritatively that *ilobolo* alone does not conclude a customary marriage.[8]

The third problem is that there is no clear event or principle used to determine the date of the marriage. As is explained below, the date of the marriage is important for a number of reasons. Fourthly, the parties do not get a proper opportunity to decide on the matrimonial property system they want to govern their marriage; it is only at the end of the relationship that such parties learn that they are married, and that their marriage is in community of property, or out of community of property in case of some new polygynous customary marriages where the parties do not comply with section 7(6) of the RCMA. Finally, basing the inference of waiver on the act of cohabitation is problematic, as it excludes people who decide not to cohabit for cultural and religious grounds. This is a form of indirect discrimination on the grounds of culture and religion.

3 THE REQUIREMENTS OF A CUSTOMARY MARRIAGE AND THE HANDING-OVER OF THE BRIDE

Since this article is not about the requirements of customary marriages or the handing-over of the bride *per se*, the cursory discussions in this part of the article are intended only to set the tone by placing the theme of this article in context.

3 1 The requirements of a customary marriage

The requirements for a customary marriage appear in section 3 of the RCMA. First, both the parties must be above the age of 18;[9] secondly, they must consent to be married to each other under customary law;[10] and thirdly, the marriage must be negotiated and entered into or celebrated in accordance with customary law.[11] The first two requirements are purely formalistic, whereas the third one is a formalistic requirement that makes way for living customary law. The first requirement is straightforward. If any of the parties is below the age of 18, the consent of the parents or guardian is required.[12] However, the second and third requirements are not as straightforward, and they have been the subject of ongoing academic literature. The second requirement requires specific consent to be married under customary law. Unless there is express consent, it is not always easy to establish if specific consent to be married under customary law has been

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8 These decisions include *Mabena v Letsoalo* 1998 (2) SA 1068 (T) and *Road Accident Fund v Mongalo* 2003 (3) SA 119 (SCA) and *Nkabinde v Road Accident Fund* 2003 (3) SA 119 (SCA). Two things must be clarified. The first is that in all three decisions, there was cohabitation, to which the courts did not attach much significance. The second is that the *Mongalo* and *Nkabinde* cases are two distinct cases dealing with the same matter. The courts expedited matters by joining these cases. This should explain the same citation.

9 S 3(1)(*a*)(i) of the RCMA.

10 S 3(1)(*a*)(ii) of the RCMA.

11 S 3(1)(*b*) of the RCMA.

12 S 3(3)(*a*) of the RCMA.

given. Although this consent can be inferred from the conduct of the parties,[13] it cannot be lightly inferred from certain conduct such as the simple act of delivering *ilobolo*. This is because African people also deliver *ilobolo* when a civil marriage is intended.[14] It has been submitted that whenever there is a dispute about whether there was specific consent to be married under customary law, courts ought to make a proper finding of facts as to whether a customary marriage was intended.[15]

As stated above, the third requirement ushers in living customary law. It has drawn attention to the requirements of customary marriages. It has been pointed out that, by not prescribing any specific rituals and practices, the legislature has left this requirement open-ended to accommodate the various cultural groups in South Africa.[16] It is also accepted that this requirement accommodates *ilobolo* negotiations,[17] the consent of the first wife in cases of Tsonga polygynous customary marriages,[18] and the integration of the bride into the groom's family, as well as many other dispensable and non-dispensable practices.[19]

3 2 Integration of the bride

A customary marriage is not a once-off event, but a culmination of events. In addition to *ilobolo* agreement, the bride must be integrated into the groom's family. In turn, the integration comprises various events and practices. Some of these practices are optional and may be waived, whereas others cannot be waived.[20] In a Zulu customary marriage, for instance, after *ilobolo* agreement, the bride may deliver gifts called *umbondo* or *ingqibamasondo* (to obliterate cattle tracks).[21] This is her way of showing gratitude to her in-laws for considering her as their bride.

Thereafter, the groom may send gifts to his bride's family. This is called *ukwembesa* (to cover or dress somebody) or *izibizo* (demands/gifts).[22] In

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13 Horn and Van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *JJS* 54 59.

14 Nkosi "A Note on *Mandela v Executors, Estate Nelson Mandela* 2018 (4) SA 86 (SCA) and the Conundrum Around the Customary Marriage Between Nelson and Winnie Mandela" 2019 *SAPL* 1 9.

15 Sibisi "Consent and Other Ancillary Matters as Requirements for a Valid Customary Marriage: *LNM v MMM* (2020/11024) [2021] ZAGPJHC 563 (11 June 2021)" 2023 *PELJ* 1 12.

16 Nkosi and Van Niekerk "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* 345.

17 Himonga, Nhlapo, Maithufi, Weeks, Mofokeng and Ndima *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 103.

18 Bakker "The Validity of a Customary Marriage Under the Recognition of Customary Marriages Act 120 of 1998 With Reference to Section 3(1)(b) and 7(6) – Part 2" 2016 *THRHR* 357.

19 Sibisi "Is the Handing Over of the Bride Optional in Customary Marriages?" 2020 *De Jure* 90 93.

20 Sibisi 2020 *De Jure* 96.

21 Mathonsi and Gumede "Communicating Through Performance: *Izigiyo Zawomame* as Gendered Protest Texts" 2006 *SALALS* 483 484.

22 White "The Materiality of Marriage Payments" 2016 *ASA* 297 304.

many cases, *izibizo* will be the last of the pre-marital ceremonies. However, in other Zulu families, the bride's family may perform further ceremonies for their daughter – such as the coming-of-age ceremony called *umemulo*.[23] Some families may perform *umemulo* for each of their daughters, whereas others may perform it only for the eldest daughter, before any betrothal.[24] If it was not done before betrothal, it may have to be done just before the marriage. However, if it is performed just before marriage, it is called *umkhehlo* and the groom's family has a hand in the ceremony.[25] However, this ceremony is performed at the bride's residence.

During the *umemulo* or *umkhehlo* ceremony, a beast is slaughtered, and the parent(s) thank(s) their daughter for how she has carried herself. They thank her for the respect she has shown them. Though rare these days, they also thank her for not having children out of wedlock.[26]

The ceremonies above are flexible. The final stage of a Zulu customary marriage is when the bride is integrated into her new family. On the wedding day, the emissaries will fetch the bride from her home before dawn. Her family will hand her over to the emissaries who represent the groom's family. She is accompanied by some members of her family. Upon her arrival, the *ukuqhoyisa* (welcoming) beast is slaughtered. The hide of this beast symbolises *isidwaba*, a traditional garment for married women and those who are about to marry.[27] The bride must give her in-laws gifts, reciprocating *ukwembesa* or *izibizo*, as referred to above. Finally, the bride must be introduced to the ancestors through burning incense and being smeared with gall bladder. During these processes, the bride is counseled by senior women in her new family regarding what is expected of her. This may be followed by celebrations.

3 3 Waiver of the handing-over of the bride

As noted above, generally the integration of the bride commences with the bride being handed over by her family to the groom's family. It goes without saying that without the bride being handed over, she cannot be integrated. Arguably, without integration, the marriage loses any semblance of being a customary marriage. To ignore integration and the attendant ceremonies and rituals is to ignore the fact that a customary marriage is not just a union

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[23] Magwaza *Orality and Its Cultural Expression in Some Zulu Traditional Ceremonies* (unpublished MA dissertation, University of Natal) 1993 29.

[24] *Ibid*.

[25] Shange (*Indigenous Methods Used to Prevent Teenage Pregnancy: Perspectives of Traditional Healers and Traditional Leaders* (unpublished Master of Social Works dissertation, University of KwaZulu-Natal) 2012 58) points out that during this ceremony, the bride is gifted blankets and money by members of the community to assist her to shoulder the costs of gifting her in-laws on her wedding day.

[26] Magwaza *Orality and Its Cultural Expression* 30; Mntambo (*Umemulo and Zulu Girlhood: From Preservation to Variations of Ukuhlonipha Nokufihla (Respect and Secrecy)* (unpublished MA dissertation, Rhodes University) 2020 9) submits that nowadays, *umemulo* is usually performed when a daughter finishes university studies or when she turns 21.

[27] Nyawose *"Living in Two Worlds": Optimizing Our Indigenous Knowledge Systems to Address the Modern Pandemic, HIV and AIDS* (unpublished DTech thesis, Durban University of Technology) 2013 1.

between those who are living; it is also a union of ancestors.[28] There are beliefs that if the crucial aspects are not adhered to, the marriage will not be recognised as such by the ancestors and this could cause problems for the descendants of the couple.[29]

Arguably, in its current application, the waiver of the handing-over of the bride is a machination of the courts. This is to say that it emanates from court decisions and not from any rule or practice of living customary law. As pointed out above, in those decided cases finding that the handing-over of the bride had been waived, none was a case in which there had been an explicit agreement by the parties to waive the physical handing-over of the bride; instead, the waiver is inferred by the court from the conduct of the bride and groom in cohabiting, and not so much from the conduct of their families.

In summary, if a man and a woman agree to marry each other and then commence cohabitation after an agreement regarding *ilobolo* – without complying with further customary marriage requirements, courts are likely to find that a customary marriage has been concluded. In *Mbungela v Mkabi*,[30] the parties commenced cohabitation after *ilobolo*.[31] They did not comply with any further marriage requirements.[32] The court found that a customary marriage had been concluded.[33] Courts are also likely to arrive at the same decision even if the parties in question had cohabited before reaching an agreement to marry each other. This is what happened in *Tsambo v Sengadi*.[34] The problem with *Tsambo v Sengadi* is that the court-inferred waiver is based on the continuation of an existing cohabitation. The decisions mentioned hereunder have been followed in subsequent decisions. Nonetheless, they have drawn criticism for ignoring precedent,[35] failing to ascertain living customary law, and distorting living customary law under the guise of gender equality.[36] One such precedent that has never really been overturned is a decision of the SCA in *Southon v Moropane*,[37] where it was emphasised that the handing-over of the bride is the most

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28 Rudwick and Posel "Contemporary Functions of *Ilobolo* (Bridewealth) in Urban South African Zulu Society" 2014 *JCAS* 118 122.

29 See Ngema ("The Enforcement of the Payment of *Ilobolo* and Its Impact on Children's Rights in South Africa" 2013 *PELJ* 405 407), who states that there is a belief that ancestors would not permit a woman for whom *ilobolo* has not been delivered to have children. Nevertheless, if the growing number of children born out-of-wedlock is anything to go by, this belief is brought into question. However, it must be stated that ancestors operate differently.

30 *Supra*.

31 *Mbungela v Mkabi supra* par 4.

32 *Mbungela v Mkabi supra* par 7.

33 *Mbungela v Mkabi supra* par 30.

34 [2020] ZASCA 46.

35 Osman 2020 *Stell LR* 83; Manthwa 2021 *THRHR* 409–410 and Bapela and Monyamane 2021 *Obiter* 189.

36 Radebe "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: *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)" 2022 *De Jure* 77 81–83.

37 [2014] ZASCA 76.

crucial requirement of a customary marriage; without it, there can never be a valid customary marriage.[38]

Among the various ceremonies above, *ilobolo* and the integration of the bride are the most crucial. This is a common feature in African marriages. Without these two ceremonies, there can never be a valid Zulu customary marriage. It is not clear whether *izibizo* and *ukwembesa* are crucial aspects of a Zulu customary marriage. However, these gifting ceremonies are prevalent in Zulu communities. It is harder to picture a Zulu marriage without these in contemporary Zulu practices. However, all the other ceremonies, including *ingqibamasondo*, *umemulo* and *umkhehlo*, are optional.

As noted above, the integration of the bride is the final stage of customary marriage and it comprises various events, some of which may be waived.[39] At the conclusion of this stage, the bride is confirmed as a member of the groom's family. The first step towards integration is the handing-over of the bride by her family to the family of the groom. The family of the groom receives their bride. A beast is slaughtered to welcome her into the family. She then hands gifts to selected members of the groom's family.

3 4 Living-customary-law examples of waiver of handing-over

The idea that the handing-over of the bride could be waived is not altogether foreign to customary law. For obvious reasons, the handing-over of the bride could be waived in cases of *ukuthwala* (to carry away) and *ukungena* (sororate marriage). In *ukuthwala*, a suitor or lover carries the woman off to his family.[40] His family must then inform the family of the bride that they have carried the bride away. Without getting into burdensome details regarding *ukuthwala*, it suffices to point out that it is one of the ways of initiating marriage talks.[41] It was also a way to pressurise a reluctant guardian to consent to the marriage.[42] Since the woman was already with the lover's family, there was no need for her to be handed over should the negotiations succeed. It was a matter of integrating the bride into her new family in marriage.[43]

In *ukungena*, a male relative is assigned to "look after" a widow.[44] The male relative is also assigned to look after the children of the deceased. Whatever seed he raises is that of the deceased.[45] Because the widow is

[38] Some scholars may criticise the reliance on precedent in customary law because it stultifies the development of customary law.

[39] Sibisi 2020 *De Jure* 96.

[40] Simons "Customary Unions in a Changing Society" 1958 *Acta Juridica* 320 330.

[41] Matshidze, Lee and Decide "Human Rights Violations: Probing the Cultural Practice of *Ukuthwala* in KwaZulu-Natal Province, South Africa" 2017 *Gender & Behaviour* 9007.

[42] Simons 1958 *Acta Juridica* 330. The author also points out that a young couple could opt for *ukuthwala* in order to avoid an arranged marriage with someone they did not love. *Ukuthwala* could also be resorted to in order to avoid an expensive wedding.

[43] Simons 1958 *Acta Juridica* 330.

[44] Braatvedt "The Zulu Customs *Ukuvusa* and *Ukungena*" 1940 *THRHR* 111 112; Zungu and Siwela "Isiko Lokuzila: Umnyombo Wengcindezelo Ovezwa Emanovelini *Ifa Ngukufa* Nethi *Ifa Lenkululeko*" 2017 *SAJAL* 75 83.

[45] Braatvedt 1940 *THRHR* 112.

already married to the family, and thus integrated into the family, there is no need for her to be handed over and re-integrated. It is a matter of informing the deceased, who is now an ancestor, that his brother or cousin is looking after his wife. Culturally, any children that may be born of *ukungena* marriage are those of the deceased. Nonetheless, *ukungena* does raise some important contemporary issues, such as the right of the sororate wife and children to inherit intestate from the sororate husband and any parental responsibilities and rights in relation to sororate children. However, these issues are beyond the scope of this article.

4 POTENTIAL PROBLEMS WITH INFERRING WAIVER OF HANDOVER

The thesis of this article concerns the problems that may arise when the court infers a waiver of the handing-over of the bride based on cohabitation. As noted above, the word from recent court decisions is that the physical handing-over of the bride may be waived, a symbolic handing-over taking its place. Courts infer this waiver of the handing-over of the bride from the conduct of the parties and their families. This conduct includes cohabitation of the bride and groom,[46] failure by the families to admonish the parties for their cohabitation,[47] attending each other's funerals,[48] and other conduct such as referring to the bride as "*makoti*".[49] The word "*makoti*" is a generic word that could mean engaged or married.[50] The common thread is that, if the parties agree on *ilobolo* and thereafter the bride and groom cohabit, regardless of whether the parties had already cohabited before *ilobolo*, courts are more inclined to find that a customary marriage has been concluded. This part of the article therefore discusses the problems that may arise from an inference of waiver.

4 1 A misdirection on the part of the courts

When a court infers that the handing-over of the bride has been waived, it misdirects itself on at least two grounds. First, it paints the requirements of customary marriages of the different ethnic groups with the same brush without ascertaining the facts. In *Mankayi v Minister of Home Affairs*[51] (one of the decisions that has since endorsed *Tsambo v Sengadi* and *Mbungela v Mkabi*), the court recognised that different communities might differ on how they enter into a customary marriage. The court went on to acknowledge that some people may say that they are not married when, in fact, what they mean is that their marriage has not been celebrated.[52] It is argued that this is an example of a court imposing marriage on people who do not regard

46 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ) par 8.
47 *Sengadi v Tsambo supra* par 17.
48 *Mbungela v Mkabi supra* par 26.
49 *Tsambo v Sengadi supra* par 5.
50 Dladla, Hiner, Qwana and Lurie "Speaking to Rural Women: The Sexual Partnerships of Rural South African Women Whose Partners Are Migrants" 2001 *Society in Transition* 79 80.
51 *Supra*.
52 *Mankayi v Minister of Home Affairs supra* par 29.

themselves as married. The correct position is that people who adhere to customary law will not regard themselves as married if they have not complied with what they consider to be crucial aspects of a customary marriage. It is therefore undesirable to impose marriage on such people when they do not regard themselves as married.

Secondly, the court also misdirects itself in interpreting the wording of section 3(1)(*b*) of the RCMA. The relevant portion of this provision is that a customary marriage must be "negotiated and entered into or celebrated" in accordance with customary law. Courts are prepared to find that a customary marriage exists even if it has only been negotiated. In *FM v NR*,[53] the court stated the following:

> "Where the parties have consented to the customary marriage and agreement has been reached at the negotiation stage by the two families for the beginning of such marriage, the handing over of the bride becomes superfluous. The bride is not like goods that need to be delivered to the marital home. The reading of section 3(1)(b) suggests that it is sufficient if the marriage is 'negotiated and entered into or celebrated' in accordance with customary law."[54]

Clearly, the court ignored the wording of section 3(1)(*b*), which in addition to negotiation, requires that the marriage must be entered into or celebrated. It is submitted that the court did not consider that the use of the word "and" means that, in addition to being negotiated, the marriage must be entered into or celebrated in accordance with customary law. In other words, the requirements that the marriage must be "negotiated" and "entered into" are cumulative; whereas the word "or" between "entered into" and "celebrated" suggests that the parties have a choice whether or not to have a celebration – that is, in the absence of a celebration, the marriage must still be "entered into". It is trite that a customary marriage does not have to be celebrated. The celebration may be summarised.

4 2 *Ilobolo* concludes a customary marriage

By inferring a waiver of the handing-over of the bride and, incidentally, integration of the bride, the court is essentially saying that *ilobolo* alone concludes a customary marriage. In *Mankayi v Minister of Home Affairs*,[55] the court held that "once there has been an agreement on *lobolo* and the bride allowed to join her husband or his family a customary marriage has been formed."[56] In other words, there was no need for the bride to be formally handed over and integrated into her new family. Despite acknowledging that the mere delivery of *ilobolo* does not, on its own, conclude a customary marriage,[57] the court nevertheless found the marriage valid, although only *ilobolo* was delivered. It is argued that the decision may be interpreted as endorsing the conclusion that the mere act of delivering *ilobolo* concludes a customary marriage. This is problematic because earlier

53 [2020] ZAECMHC 22.

54 *FM v NR supra* par 35.

55 *Supra.*

56 *Mankayi v Minister of Home Affairs supra* par 30.

57 *Mankayi v Minister of Home Affairs supra* par 32.

decisions held that *ilobolo* alone does not conclude a customary marriage; in addition to *ilobolo*, the bride must be integrated.[58] These decisions have never proved to be contrary to what is observed.

South Africa is a pluralistic legal system that changes along with the changing values of the society. But some things take longer to change. A survey of key decisions indicates that no litigant in a case concerning customary marriage has ever alleged that there has been a change in practice from a formal handing-over to a symbolic one. In fact, in the trailblazer case for the symbolic handing-over – *Sengadi v Tsambo*[59] – the applicant did not allege a change in practice. Her case was that a customary marriage had been entered into between her and the deceased on the same day as *ilobolo* negotiations. Thereafter, the parties resumed cohabitation.[60] The bride was never properly handed over.[61] Instead of deciding the matter based on its facts, the court held that the handing-over of the bride had not been given an opportunity to adapt to the "socio-economic conditions and constitutional values".[62] It also held that a customary-law wife had "no freedom of opinion, autonomy or control" over her marital affairs if her husband's family insist that she be handed over by her family even though she and her husband had complied with section 3(1) of the RCMA.[63] This was an incorrect assertion by the court: one of the requirements of section 3(1) is that the marriage be negotiated and entered into or celebrated in accordance with customary law. Whether the marriage had been entered into in accordance with customary law was not decided. Instead, the court assumed that the custom of handing over the bride had evolved, without ascertaining this for a fact. It then inferred a symbolic handing-over.[64]

Equally interesting is that other legal commentators have argued that *ilobolo* is not a legal requirement for a customary marriage to be valid.[65] Does this mean that a valid customary marriage will be concluded if people who are above the age of 18 simply consent to each other that they will conclude a customary marriage and thereafter cohabit without any *ilobolo* negotiations or any handing-over? It is submitted that this is incorrect. *Ilobolo* is a legal requirement of a customary marriage under living customary law. It distinguishes a customary marriage from other marital unions.[66] It is the

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58 *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP); Van Niekerk 2014 *SAPL* 504; *Ngema v Debengwa* [2016] ZAGPJHC 163 par 24 (also referred to as *N v D*); Manthwa "*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" 2017 *Obiter* 438 439 and Mwambene "The Essence Vindicated? Courts and Customary Marriages in South Africa" 2017 *AHRLJ* 35 45.

59 *Supra* n45.

60 *Sengadi v Tsambo supra* par 9.

61 *Sengadi v Tsambo supra* par 16.

62 *Sengadi v Tsambo supra* par 33.

63 *Ibid*.

64 *Sengadi v Tsambo supra* par 19.

65 Race and Gender Research Unit *The Recognition of Customary Marriages in South Africa: Law, Policy and Practice* 2012 University of Cape Town http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/CLS_RCMA_Factsheet_2012_Eng.pdf (accessed 2022-06-22) 2.

66 South African Law Commission *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages Project 90* (1998) 49.

bedrock upon which customary marriages rest.[67] It may not be an express requirement, but it is very much alive in the RCMA.[68]

4 3 Uncertainty regarding the date of marriage

When a court infers a waiver of the handing-over of the bride, it creates uncertainty regarding the date of marriage. Three scenarios illustrate this issue. The first is one where a bride and groom, after *ilobolo* agreement, cohabit without a formal handing-over and integration. The second scenario envisages a bride and groom who do not cohabit after negotiations. The third scenario concerns a bride and groom who cohabit after negotiations and, after a passage of time, finally perform the formal handing-over and integration of the bride. In the first scenario, like *Tsambo v Sengadi* and *Mbungela v Mkabi*, courts are likely to find that the date of cohabitation is the date of the marriage. In the second scenario, no customary marriage will exist. In *Khambule v Mazibuko*,[69] *ilobolo* agreement was concluded and partial delivery was effected. However, the bride was not handed over and she did not cohabit.[70] The court found that a customary marriage had not been concluded.[71] The third scenario presents a problem. Will the courts use the date of *ilobolo* negotiations, the date of cohabitation, or the date of the official handing-over and integration?

The date of marriage is important for a number of reasons. It is important for a home affairs official who registers a marriage.[72] It is also important when a marriage is dissolved, either through death or divorce. According to the Intestate Succession Act,[73] a spouse may inherit from the deceased if the latter dies without a will.[74] The date of marriage will assist in determining if a person was a spouse at the time of death. For example, if it is accepted that the date of *ilobolo* agreement is the date of the marriage, a person will be a spouse if the deceased dies after the *ilobolo* agreement. The date of marriage is also important in divorce proceedings. For instance, a court is required to consider the duration of the marriage in order to make an order regarding spousal maintenance[75] and forfeiture of patrimonial benefits.[76] Decisions on these issues are partially dependent on the duration of the marriage.

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67 Mofokeng "The *Lobolo* Agreement as the 'Silent' Prerequisite for the Validity of a Customary Marriage in Terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 277 282.

68 S 4(4)(*a*) of the RCMA requires a registering officer to record details of any *ilobolo* agreed to. Although the key word is "any", it is doubtful that any customary marriage has ever been registered in the absence of an agreement regarding *ilobolo*. Arguably, a person may have to litigate to achieve this.

69 [2022] ZAFSHC 152.

70 *Khambule v Mazibuko supra* par 3.

71 *Khambule v Mazibuko supra* par 26–28.

72 S 4(4)(*a*) of the RCMA requires a registering officer to record the date of the marriage.

73 81 of 1987.

74 There are various provisions of this Act that provide for spousal inheritance. See generally s 1.

75 S 7(2) of the Divorce Act 70 of 1979.

76 S 9(1) of the Divorce Act.

In light of the decisions above, the effect of a finding that the handing-over of the bride is unnecessary is that the date of *ilobolo* agreement will be the date of the marriage. The problem arises when the parties fully comply with all the requirements, including the handing-over and integration of the bride. If all the requirements of a marriage are complied with on the same day, the issue is simple. The date on which all the requirements were complied with will be the date of the marriage. However, what will happen in cases such as the third scenario? What will be the date of the marriage if *ilobolo* agreement and the handing-over of the bride do not take place on the same day? Will it be the date of the agreement or the later date of the handing-over? What will the date of the marriage be should such parties finally decide to comply with the physical handing-over of the bride and incidentally integrate her into the groom's family? This physical handing-over could be years after *ilobolo* agreement and cohabitation. Is it the date of *ilobolo* agreement, the date of cohabitation, or the date of the handing-over and integration?

In *LNM v MMM*, *ilobolo* agreement took place on 24 May 2019,[77] and the parties cohabited after that. On 28 and 29 June 2019, the bride was handed over to the groom's family;[78] she was integrated by informing ancestors that she was now part of the family.[79] The court held that the date of the marriage was 29 June 2019, which was the date on which she was finally integrated.[80] In *Mbungela v Mkabi*, the date of the negotiations was held to be the date of the marriage. In *Tsambo v Sengadi*, the date of the negotiations and resumption of cohabitation (these happened on the same day in this case) was seen as the date of the marriage. From this, one can deduce that where the bride has been formally handed over, the date of the handing-over, and incidentally integration, will be the date of the marriage. If there was no handing-over, the date of the negotiations would be the date of the marriage, provided that the parties cohabited. The problem with this approach is that it is not an established rule under living customary law. This being the case, a bride who has not been formally handed over has to resort to the court. The number of cases of this nature supports this claim.[81] It is submitted that court decisions that are not founded on living customary law only assist litigants financially; beyond this, one doubts whether such litigants get any meaningful acceptance into the families into which the court says they are married. Furthermore, in the absence of a court order, there is no certainty regarding the event in which one may say that a customary marriage has been concluded.

4 4 Choice of matrimonial property system

The inference of waiver does not give parties an opportunity to choose a matrimonial property system. It is submitted that (because of different cultural practices) some people do not intend, by negotiating and delivering

77 *LNM v MMM* [2021] ZAGPJHC par 7.

78 *LNM v MMM supra* par 9.

79 *Ibid*.

80 *LNM v MMM supra* par 34.

81 This assertion is based on the author's reading of the Southern African Legal Information Institute www.saflii.org (accessed 2023-03-16).

ilobolo, to conclude a customary marriage. It is well known that African people do deliver *ilobolo* even where they intend to conclude a civil marriage.[82] Because of this well-known practice, one cannot loosely infer that the mere act of delivery of *ilobolo* is consistent with a customary marriage. Therefore, when a court infers waiver of the handing-over of the bride based on cohabitation before or after *ilobolo* agreement, the parties will automatically be married in community of property. (In terms of section 7(2) of the RCMA, a new monogamous customary marriage is by default in community of property.)

If the parties to this monogamous customary marriage are not happy with the default community of property, they may change it through a stringent process set out in section 21 of the Matrimonial Property Act (MPA).[83] This section provides for changing the matrimonial property system. The parties must first bring a joint application to change the matrimonial property system.[84] This requirement alone may prove difficult, especially when the relationship between the parties has become sour, which is usually the time when parties approach the court for orders declaring their marriages valid. Secondly, the parties must satisfy the court that there are sound reasons for the proposed change.[85] Thirdly, sufficient notice must have been given to all their creditors.[86] Finally, no other person must be prejudiced by the proposed change.[87] The court may order that the default matrimonial property system no longer applies and authorise the parties' entry into an antenuptial contract.[88] If the monogamous customary marriage was purportedly entered into before the commencement of the RCMA, the parties should move this application in terms of section 7(4)(*a*) of the RCMA.[89]

The position is a bit complicated in the case of a polygynous customary marriage. It suffices to say that the parties will not get the opportunity to conclude a court-approved contract as required by section 7(6) of the RCMA. This provision requires a husband who wishes to enter into a subsequent marriage with another woman to make a court application to approve a written contract regulating their future matrimonial property system. The existing and potential wife must be joined in this application. If this requirement of a court-approved contract is not complied with, the marriage between the husband and the second wife will be valid, but it will be out of community of property.[90] Unfortunately, there is nothing in the RCMA that suggests that the matrimonial property system in polygynous customary marriages may be changed. Section 7(5) of the RCMA specifically provides that section 21 of the MPA does not apply to these

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82 Knoetze "The Modern Significance of *Lobolo*" 2000 *JSAL* 532 536.

83 Matrimonial Property Act 88 of 1984.

84 S 21(1) of the MPA.

85 S 21(1)(*a*) of the MPA.

86 S 21(1)(*b*) of the MPA.

87 S 21(1)(*c*) of the MPA.

88 *Ibid*.

89 The requirements under this provision are similar to s 21 of the MPA, save that the notice must be served to all creditors of the spouses who are owed amounts exceeding R500 or such amount that may be determined by the Minister of Justice in the *Gazette*. See generally s 7(4)(*a*).

90 See generally *MM v MN* 2013 (4) SA 415 (CC).

marriages. It is also doubtful whether the parties may approach the courts in terms of section 7(6) of the RCMA. This provision only applies before the subsequent marriage, but not after.

Perhaps the biggest impediment in section 21 of the MPA is that it requires litigation in a high court. This is problematic as many people are not in a position to afford litigation.

4 5 Cohabitation as the basis for implied waiver and potential discrimination

It has been pointed out that the basis on which courts rely to infer that parties have waived the handing-over of the bride is cohabitation, and that a study of *Mbungela v Mkabi*, *Tsambo v Sengadi* and like decisions[91] shows that courts are more inclined to find that a customary marriage has been concluded where the parties have cohabited. In so doing, courts attach more meaning than the parties may have anticipated their cohabitation would bear. In *Tsambo v Sengadi*, the court *a quo* attached too much credence to the cohabitation. It held that by allowing the cohabitation, the father of the deceased had waived the need for the handing-over of the bride and had opted for a symbolic delivery of the bride. This conclusion is problematic because the parties had cohabited before the *ilobolo* agreement; after this agreement, they simply resumed cohabitation.[92] In addition, the families were not involved in the decision to cohabit. In *Mbungela v Mkabi*, the court propelled the idea that negotiations followed by cohabitation conclude a customary marriage.[93]

In light of the above decisions, would courts find in favour of the existence of a customary marriage in the absence of cohabitation after negotiations? In some communities, after negotiations, the woman remains at her homestead. She awaits the day when she will be officially handed over to her new family and integrated. In the unfortunate event of death or the relationship becoming sour, will the court decide that a valid customary marriage has been concluded? It is submitted that this is highly unlikely. As noted above, in *Khambule v Mazibuko,*[94] the parties concluded the *ilobolo* agreement and partial delivery was effected. However, the bride was not handed over, and neither did she cohabit.[95] The court found that a customary marriage had not been concluded.[96]

It should be noted that some people decide not to cohabit on cultural and religious grounds. Consequently, a person who decides not to cohabit out of strict adherence to culture or religion risks courts not finding in their favour. It is submitted that, unless the courts provide another basis (other than cohabitation) for inferring a waiver of the handing-over, there is a risk that decisions that do not favour persons who decide not to cohabit on cultural or

91 Such as *FM v NR supra* and *Mankayi v Minister of Home Affairs supra*.
92 *Tsambo v Sengadi supra* par 26.
93 *Mbungela v Mkabi supra* par 27.
94 *Supra*.
95 *Khambule v Mazibuko supra* par 3.
96 *Khambule v Mazibuko supra* par 26–28.

religious grounds could be seen as indirect discrimination on cultural or religious grounds. This is clearly untenable and possibly unconstitutional.

Alternatively, the courts could just declare that the mere act of concluding an *ilobolo* agreement and at least partial delivery thereof concludes a customary marriage. However, this will be problematic because of its discord with lived realities, and others will also argue that the declaration is not supported by living customary law. A one-size-fits-all decision is undesirable in certain instances. Nonetheless, it is submitted that by failing to ascertain the contents of living customary law, courts are already making one-size-fits-all decisions.

5 CONCLUSION

In addition to *ilobolo*, it is essential that the bride be handed over to her new family where she will be integrated. Integration of the bride involves ancestors being informed that the bride is a new member of the family. Without the handing-over, there is no bride to integrate into the new family. Nonetheless, the courts have found that the handing-over of the bride is not mandatory. Without recourse to any empirical evidence, some court decisions simply infer that the parties had waived the handing-over of the bride. To reach this decision, the courts have often relied on cohabitation between the parties. The effect of these decisions is that without the handing-over, *ilobolo* alone concludes a customary marriage. This is, in turn, problematic in light of some arguments that *ilobolo* is not a requirement of a customary marriage.

This article has discussed the different cultural practices regarding marriage. It has shown that decisions such as *Mbungela v Mkabi* and *Tsambo v Sengadi* do not find support in living law. These decisions have the potential to distort customary law and create a number of problems. These problems include misdirection on the part of the court. They also include difficulty in determining the date of marriage. The article has also shown that an inference of waiver does not afford parties the opportunity to choose their own matrimonial property system; instead, they find that they are suddenly married in community of property. The decision in *LNM v MMM* bears testimony to this. Finally, it has been argued that implied waiver based on cohabitation may discriminate against those who decide not to cohabit on the grounds of culture or religion. A case in point in this regard is *Khambule v Mazibuko.*