Ilobolo for the Oldies? A Critical Discussion of

Peter v Master of the High Court: Bisho [2022] ZAECBHC 22[*]

1 Introduction

After reading the decision in *Peter v Master of the High Court: Bisho* ([2022] ZAECBHC 22), the words of Matlapeng AJ in *Motsoatsoa v Roro* ([2011] 2 All SA 324 (GSJ) par 8) come to mind:

> "It is trite that [a] customary marriage is an age-old institution deeply respected and embedded in the social-cultural fabric of all indigenous people of South Africa. However, over a long period of time during the apartheid era, [a] customary marriage became an object of serious distortions. Regrettably we have now reached a stage where there is a serious and all pervasive confusion regarding the true nature of [a] customary marriage"

At the time of delivering the judgment in *Motsoatsoa v Roro* (*supra*), Matlapeng AJ was addressing perversion coming from litigants in an adversarial system. In this system, each party must make their case before the court. In *Motsoatsoa v Roro* (*supra*), the court intervened to address the perversion of the law relating to customary marriages and corrected the record. Slightly more than a decade later, this perversion emanated from the court in *Peter v Master of the High Court: Bisho* (*supra*). In this decision, the court downplayed the significance of several issues in customary marriages. These include the requirements of a valid customary marriage, the significance of *ilobolo* in the conclusion of a customary marriage by an elderly couple and the role of the family in the conclusion of customary marriages. According to the court, since one of the functions of *ilobolo* was the transfer of a woman's reproductive capacity, the corollary was that *ilobolo* was not necessary for a customary marriage whereby procreation was no longer possible as a result of age (par 34–35). The court went on to insinuate that *ilobolo* was one of the practices that may be waived in a customary marriage (par 37).

This case note is a critical discussion of the decision in *Peter v Master of the High Court: Bisho* (*supra*). At the outset, it must be indicated that this note does not intend to second guess the correctness of the court's decision

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but rather to engage in a discussion of some of the thought-provoking aspects of the judgment. The facts and the decision in *Peter v Master of the High Court: Bisho* (*supra*) are set out first. This is followed by a critical discussion of the issues provoked by the judgment, such as *ilobolo* as a general requirement of a valid customary marriage, the significance of *ilobolo* in a marriage involving the elderly, whether *ilobolo* may be waived and the importance of the family in the conclusion of customary marriages. Thereafter, a brief conclusion is drawn.

2 The facts in *Peter v Master of the High Court: Bisho*

The main issue in this case was the question of who was entitled to receive a letter of executorship. However, this question was linked to the validity of the customary marriage between the deceased and the second respondent. The deceased and the second respondent were an elderly couple. (The deceased had been married twice before the customary marriage in question, and both his wives had predeceased him (par 2)). It was common cause that the deceased had died intestate, and according to section 19(a) of the Administration of Estates Act (66 of 1965), the surviving spouse was the preferred executrix (par 15). The first applicant was the eldest daughter of the deceased (par 2). The first respondent was the Master of the High Court in Bisho. The second respondent was the alleged wife of the deceased in terms of a customary marriage (par 1).

Following the deceased's death, the second respondent instructed her attorney to report the deceased estate to the Master for a letter of executorship to be issued to her. The estate was duly reported, but a letter of executorship could not be issued to the second respondent because she did not have proof of her alleged customary marriage as it was not registered (par 3). Unaware that the estate had already been reported, the first applicant (together with some of her siblings) instructed an attorney to report the estate so that a letter of executorship could be issued to her. Upon reporting the estate, the attorney was informed by the Master that the estate had already been reported by the second respondent's attorney. However, a letter of executorship had not been issued because the latter did not have a certificate of registration of her customary marriage (par 3). The second respondent explained that they were unable to register their customary marriage due to the deceased's illness, and after his passing, she could not register the marriage because of the lockdown necessitated by the COVID-19 pandemic (par 10).

The above facts prompted the applicants to approach the court for an order directing the Master to issue a letter of executorship to the first applicant. The second respondent opposed the application on the ground that she was the deceased's surviving spouse and ought to be appointed as the executrix (par 5). The court correctly pointed out that the heart of this dispute was whether there had been a valid customary marriage between the deceased and the second respondent (par 1). The outcome of this question will determine who should receive the letter of executorship.

According to the second respondent, she and the deceased had grown up together and, thereafter, went their separate ways until they met again in 2013 after many years apart (par 5). They then entered into a relationship, and she would visit the deceased at his homestead and spend a few days there (par 5). They did not cohabit because this was contrary to the second respondent's religious beliefs (par 5). They discussed the subject of marriage extensively and eventually agreed to be married in December 2016 by customary rites. Due to the deceased's homestead being dilapidated, the parties arranged to be married at the house of a certain Mr Kututu Joseph, whom the deceased considered a brother as they belonged to the same Mkhuma clan (par 6 and 11).

On the day of the customary marriage, the second respondent further averred that they proceeded to Mr Kututu Joseph's house, where the second respondent was welcomed as the wife-to-be of the deceased (par 6). Customary law ceremonies were performed, and the second respondent was given a bridal name, Nokhuselo, by the sister of the deceased (par 6). The second respondent alleged that both their families witnessed the ceremony. Thereafter, they began living together as husband and wife at the deceased's homestead, which they renovated and refurbished in 2017 (par 6). The second respondent was by the deceased's side when he got ill. Only some of his children visited him, but the first applicant never visited (par 7).

When the deceased passed away, the first applicant assisted her with the funeral arrangements. She was acknowledged as the surviving spouse of the deceased and sat in the place reserved for widows during the church funeral service. Her marriage to the deceased was also acknowledged in the funeral programme and the obituary (par 9). After the burial, the second respondent grieved and wore black for a period of six months. After the mourning period, a cleansing ceremony was held at the deceased's homestead, and none of the applicants attended it (par 8).

A number of the second respondent's averments were confirmed by several people (par 12 to 14). The first applicant argued that the deceased and the second respondent were in a romantic relationship. As such, no marriage existed between them (par 2). She denied that they ever lived together as husband and wife (par 2). She contended that no delegation was sent by the deceased's family to the second respondent's family, no *ilobolo* was negotiated and there was no handing over of the bride to the family of the deceased (par 17).

3 Decision

The court considered section 3(1) of the Recognition of Customary Marriages Act (120 of 1998) (RCMA). According to this provision, a valid customary marriage must comply with these requirements, namely (a) the spouses must both be 18 or above (s 3(1)(*a*)(i) of the RCMA); (b) they must both consent to be married to each other under customary law (s 3(1)(*a*)(ii) of the RCMA, and (c) the marriage must be negotiated and entered into or celebrated in accordance with customary law (s 3(1)(*b*) of the RCMA). The court held that both parties had consented to the marriage (par 17). As it

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was clear that the parties were above the age of 18, the court pointed out that the focus of its enquiry is s 3(1)*(b*) of the RCMA, which requires that the marriage must be negotiated and entered into or celebrated in accordance with customary law.

The court mentioned that in terms of s 3(1)(*b*) of the RCMA, the legislature did not prescribe any specific requirements because "customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms …" (par 19, citing *Mbungela v Mkabi* [2020] 1 All SA 42 (SCA) 17). Although the court acknowledged that flexibility gives rise to uncertainty, it pointed out that courts have adopted "a pragmatic approach, rooted in the practices and lived experiences of the communities concerned" (par 20).

On the question of the lack of involvement of the deceased's blood family in the alleged marriage, the court first acknowledged the fact that a customary marriage is not just a marriage between the bride and the groom, but it also involves their respective families (par 21; referring to *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1072C). However, relying on the authority in *Mabena v Letsoalo* (*supra*), the court held that in light of the social realities where men lived on their own and could fend for themselves, there was no reason "an independent, adult man" could not negotiate his own *ilobolo* or required the consent of his parents to marry (*Mabena v Letsoalo supra* 1073C). The court further held that "the agreement to marry in customary law is predicated upon *lobolo* in its various manifestations; the agreement to pay it underpins the customary marriage" (par 23).

The lack of involvement of the deceased's blood family in the marriage did not perturb the court. It found that the presence of people of the same Mkhuma clan as the deceased at the wedding was the same as having close family members (par 30). The court also ruled that there was no reason the practice of the handing over of the bride could be said not to have evolved to accommodate a situation where the groom's family was represented by members of the same clan as him (par 32). To arrive at this decision, the court relied on the fact that both the parties were in their 60s and that there were no remaining elders in the deceased's family – the only surviving elder was mentally ill (par 39). The relationship between the deceased and his children did not allow them to participate in the marriage preparations (par 41). If not the members of the Mkhuma clan, who would have represented the deceased?

Finally, the court acknowledged that the second respondent made no mention of *ilobolo* being negotiated and delivered (par 33). It first considered the definition of *ilobolo* in section 1 of the RCMA, which provides that it is "the property in cash or in kind … which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage". Although the court acknowledged that there was no consensus on the functions of *ilobolo*, but accepted that, among other things, it transfers a woman's reproductive capacity (par 35). Since the parties were in their 60s at the time of the marriage, there was no reproductive capacity to transfer (par 36). In the court's words:

> "the function of *lobolo* would have served little purpose and the couple would have been expected, instead, to have used any available resources to make their lives more comfortable in anticipation of old age." (par 36)

Therefore, the court held that *ilobolo* could be waived and then went on to state that, in this particular case, there had been a tacit waiver of *ilobolo* (par 37). In light of the reasoning above, the court found that there was a valid customary marriage between the deceased and the second respondent.

4 Discussion

As pointed out in the introductory paragraphs, the decision above raises a number of questions. In general, it raises a question on *ilobolo* as a general requirement of a customary marriage, and in particular, it draws attention to its significance in marriages involving elderly women who can no longer procreate. While the waiver of certain customs is a known practice under customary law, there are those customs that are so sacred that they cannot be waived (Sibisi "Is the Requirement of Integration of the Bride Optional in Customary Marriages" 2020 *De Jure* 90 97). Without these customs, the marriage would be considered invalid. Is *ilobolo* one of the customs that may be waived?

The importance of the family in the conclusion of customary marriage also became one of the central issues in the judgment. As a result, the distinction between a family and a clan is also discussed together with the question of whether a clan may substitute a family. It is not the aim of this case note to second guess the correctness of the court's decision in finding that the customary marriage in question was valid, and as such, this aspect of the judgment will not be interrogated.

4 1 Ilobolo as a general requirement of a customary marriage

The question of *ilobolo* as a general requirement of customary marriages must be considered with due regard to the distinction between the official customary law and the living customary law. Official customary law refers to the written version of customary law. This includes the various codes (for example, the Codes of Zulu Law), statutes, case law, regulations in terms of statutes, proclamations, journal articles, and textbooks (*Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) par 86 and Diala "The Concept of Living Customary Law: A Critique" 2017 *The Journal of Legal Pluralism and Unofficial Law* 143). Living customary law refers to the lived experiences of those who live according to customary law (*Alexkor v Richtersveld Community* 2005 (5) SA 460 (CC) par 50 and Diala 2017 *The Journal of Legal Pluralism and Unofficial Law* 148). While it is possible for written law to reflect accurately on a rule of living customary law, it is impossible to account for all the different rules that exist as a result of differences in the ways of life between different ethnic groups. Obviously, the official version of customary law is ascertained through reference to the relevant source from the list above.

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Challenges exist when it comes to ascertaining living customary law. Strictly speaking, living customary law can truly be ascertained through reference to the lived experiences of those who are subject to the rule sought to be ascertained. Fortunately, ancillary rules have been developed to deal with the ascertainment of living customary law (see Osman "Ascertainment of Customary Law: Case Note on *MM v MN*" 2016 *SAPL* 240). However, it is interesting to note that in *MM v MN* (2013 (4) SA 415 (CC)), the Constitutional Court was not unanimous on how it should go about ascertaining living customary law. The majority of the court preferred calling for further evidence (*MM v MN supra* 433C). In a minority judgment, Zondo J (as he then was) did not see a need for further evidence. In his view, the matter could be decided based on the record as there was no dispute regarding the content of the rule before court – the appellant had pleaded the rule, and the respondent did not dispute it in pleadings (*MM v MN supra* 433F–H; for a discussion of this aspect of the judgment in *MM v MN*, see Sibisi "Breach of Promise To Marry Under Customary Law" 2019 *Obiter* 340 346–347).

A painstaking discussion of the rules relating to the ascertainment of living customary law is beyond the scope of this case note. It suffices to point out that sometimes, the written version, such as case law, may be consulted to ascertain living customary law. Himonga refers to this as the official living customary law (Himonga "The Dissolution of a Customary Marriage by Divorce" in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* (2014) 233).

Back to the question of *ilobolo* as a general requirement of a customary marriage. The official customary law is the RCMA and there is a plethora of case law on the subject. Section 3(1) of the RCMA does not explicitly list *ilobolo* as a requirement for a customary marriage. However, this is not the end of the road; as seen 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. It is accepted that this provision makes way for living customary law. Under living customary law, *ilobolo* is a requirement of customary marriage, and therefore, section 3(1)(*b*) implicitly requires *ilobolo* (Himonga in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* 255). Another indication that *ilobolo* is a requirement of a customary marriage appears in section 4(4)(*a*) of the RCMA. According to this section, proof of *ilobolo* may be used to register a customary marriage. In practice, it is impossible to register a customary marriage without *ilobolo*. A party may otherwise have to litigate for an order directing the Department of Home Affairs to register the marriage, and even then, there will be difficulty in proving the existence of a customary marriage without *ilobolo* (Sibisi "Registration of Customary Marriages in South Africa: A Case for Mandatory Registration" 2023 *Obiter* 515 523).

Other than the case under the present discussion, there is one other case where the court did find in favour of a valid marriage in the absence of *ilobolo.* In *Lijane v Kekana* ([2023] ZAGPJHC), the question before the South Gauteng High Court was whether a valid customary marriage had been concluded between an African man and a coloured woman. In this case, there was no *ilobolo per se*; instead, the applicant had simply offered

the bride's family an amount of R10 000 as compensation for the marriage (par 13). The court construed the applicant's offer as *ilobolo*, which, according to the court, was accepted as a contribution to the costs of the wedding (par 13). This analogy by the court is problematic because it implies that any gift may be construed as *ilobolo*. It is submitted that this downplays or compromises the importance of *ilobolo*. The parties must convene and specifically agree on the question of *ilobolo*.

It is appreciated that one of the parties in *Lijane v Kekana* (*supra*) was coloured and may not have lived according to customary law. However, a person who wishes to conclude a customary marriage should comply with the requirements of such marriage irrespective of their race. It is not customary law that must change to accommodate such a person. The same is the case with civil marriages. A person who wishes to conclude a civil marriage must comply with the requirements of a civil marriage. It is also doubtful that customary law is flexible enough to permit the conversion of a compensation or contribution to *ilobolo* without the parties having agreed to this, let alone having envisaged the same at the relevant time.

In the light of what has been said above, clearly, *ilobolo* is the cornerstone of a customary marriage (Manthwa and Ntsoane "The Space for Lobolo in the Post-Constitutional South African Era: Revisiting the Debate" 2022 *THRHR* 509 511 and Dlamini *A Juridical Analysis And Critical Evaluation Of Ilobolo In A Changing Zulu Society* (Unpublished LLD thesis, University of Zululand) 1983 151). This, in turn, brings into question the legislature's decision not to explicitly list *ilobolo* as a requirement for a customary marriage. This decision has its roots in the South African Law Reform Commission (SALRC) (as it is now called) recommendation (SALRC *Project 90: The Harmonisation of the Common Law and Indigenous Law – Report on Customary Marriages* (1998) 61). The SALRC observed that among Africans, *ilobolo* was considered inseparable from a customary marriage (SALRC *Project 90: The Harmonisation of the Common Law and Indigenous Law* 56). It also observed that other ethnic groups seldom focused on the delivery of *ilobolo*; an agreement would suffice (see Montle and Moleke "Exploring the Commercialisation of *lobola* in South Africa" 2021 *PJAEE* 587 592). The BaSotho and Tswana groups regard the delivery of *ilobolo* or *bogadi* as the crux of a customary marriage, whereas in other groups, such as AmaZulu, *ilobolo* alone does not conclude a customary marriage (SALRC *Project 90: The Harmonisation of the Common Law and Indigenous Law* 56–57). As a result of the aforementioned, the SALRC recommended that the delivery of *ilobolo* should be optional and that it should not be an essential requirement of a customary marriage (SALRC *Project 90: The Harmonisation of the Common Law and Indigenous Law* 61).

It is debatable if the legislature really heeded the recommendation of the SALRC. Some may view the omission to explicitly deal with *ilobolo* as heeding the above recommendation, while others may say otherwise, especially when considering the difficulty in registering or proving a customary marriage in the absence of *ilobolo*. Further, as pointed out 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.

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It has been accepted that the word "negotiated" refers to *ilobolo* negotiation (Manthwa and Ntsoane 2022 *THRHR* 514 and Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 103). The word "must" indicates that the provision is peremptory and suggests that the legislature intended *ilobolo* to be an essential requirement of a customary marriage. If this were not the case, it would be difficult to assign meaning to the word "negotiated" as used by the legislature. Mofokeng arrives at a similar conclusion but for a different reason. He submits that the words "in accordance with customary law" in the same provision mean that *ilobolo* is a silent requirement of a customary marriage (Mofokeng "The Lobolo Agreement as the Silent Pre-Requisite for the Validity of a Customary Marriage in terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 277 277–278).

4 2 The significance of ilobolo in a marriage involving elderly women

This case note takes the view that *ilobolo* is essential to a customary marriage (Manthwa and Ntsoane 2022 *THRHR* 510). What, then, is the significance of *ilobolo* in a marriage involving elderly women? This question cannot be answered without reference to the general significance of *ilobolo*. It has three broad functions, namely, legal functions, social functions, and economic functions (Sibisi "The juristic nature of *ilobolo* agreements in modern South Africa" 2021 *Obiter* 57 60-62). The legal functions emanate from the role of *ilobolo* as an essential requirement for the validity and registration of the marriage as per section 4(4)(*a*) of the RCMA (Sibisi 2021 *Obiter* 60–61). The social functions encompass the significance of *ilobolo* under living customary law (Sibisi 2021 *Obiter* 61–62). Finally, the economic functions come from the modern role of *ilobolo* in financing the bride's gifts for the in-laws and assisting with the wedding costs (Sibisi 2021 *Obiter* 62–64).

The case note is more concerned with the social significance of *ilobolo*, which is to show love and respect for the bride, her family, and culture (Montle and Moleke 2021 *PJAEE* 589; Dlamini "The Modern Legal Significance of *Ilobolo* in Zulu Society" 1984 *De Jure* 148 151). Ngema submits that *ilobolo* is an indication that the husband values the bride and that he will treat her well (Ngema "Considering the Abolition of *Ilobolo: Quo Vadis* South Africa" 2013 *PELJ* 30 37). However, Dlamini dismisses this submission. He points to a number of civil marriages without *ilobolo* where husbands still treat their wives well (Dlamini 1984 *De Jure* 151).

Although *ilobolo* alone does not cement her status within the new family until the marriage is finalised, it nevertheless establishes it. In many traditional families, there is a difference between a bride whose *ilobolo* has been delivered, a woman who simply cohabits without any *ilobolo,* and the bride who enters into a civil marriage without *ilobolo*. The payment or delivery of *ilobolo* leads to the acceptance of a woman as a bride. (Ngema 2013 *PELJ* 37).

The most crucial function of *ilobolo*, which is directly in line with the case under the present discussion, is the transfer of the bride's reproductive capacity (Montle and Moleke 2021 *PJAEE* 588). As noted above, the court held that since the bride was an elderly woman with no reproductive capacity, *ilobolo* became redundant. The correct proposition is that *ilobolo* facilitates the transfer of the bride to her new family. Her offspring belong wherever she belongs. If she is unmarried, the offspring belong to her maiden family. The offspring will still belong to her maiden family, where only *ilobolo* has been delivered, without ancillary ceremonies that complete a customary marriage (Dlamini *A Juridical Analysis* 353).

Should the relationship between the bride and groom become sour before the finalisation of the marriage, the groom will have to conduct certain ceremonies in order to fully integrate his children into his family (see Moore and Homonga "Living Customary Law and Families in South Africa" in Hall, Richter, Mokomane and Lake *Children, Families and the State: Collaboration and Contestation* (2018) 62). The only children that do not have to be specially integrated are those that are born after a complete customary marriage. The logic behind this is that once a customary marriage is completed, the bride fully belongs to the groom's family, and whatever offspring she begets belongs to her new family. This will be the case even if the other progenitor is not her husband. Therefore, *ilobolo* facilitates the transfer of the bride, and not just her reproductive capacity.

If the bride does not beget any children, she is still a member of her husband's family. She may demonstrate her reproductive capacity in many ways besides bearing children. She may raise children in need within the family. These may be the children of her husband. Sometimes, the family assigns children to her through customs. The Zulu custom in this respect is called *ukufakwa esiwini* (Matiwane "Prince Simakade KaZwelithini Takes Claim to the Throne to the High Court" (16 September 2022) https://www.timeslive.co.za/news/south-africa/2022-09-16-prince-simakade-kazwelithini-takes-claim-to-the-throne-to-the-high-court/ (accessed 2024-03-13)). Children assigned through this custom will be that of the wife for all intent and purposes. As a result of these, as far as the question of *ilobolo* is concerned, subject to what is said below, there is no distinction between the young and old (Matiwane https://www.timeslive.co.za/news/south-africa/2022-09-16-prince-simakade-kazwelithini-takes-claim-to-the-throne-to-the-high-court/). Therefore, the assertions made in the judgment in this regard do not find any support in customary law.

4 3 The waiver of ilobolo

The idea that a practice may be waived is not completely inimical to customary law. However, not all practices may be waived. A customary marriage is not a once-off event but a culmination of a series of events (Osman "The Million Rand Question: Does a Civil Marriage Automatically

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Dissolve the Parties' Customary Marriage?" 2019 *PELJ* 1 8). Among these events, some may be waived and others not (Sibisi 2020 *De Jure* 97). In some South African ethnic groups, it is mandatory to perform the coming-of-age ceremony (*Umemulo* in Zulu) for the eldest daughter. If not performed at the time she came of age, it must be performed just before marriage. However, this coming-of-age ceremony is not necessary if the bride is not the eldest daughter.

With the above said, may *ilobolo* be waived? It is important to consider living law as *ilobolo*, which is the bedrock of customary marriages. It is a strict requirement of a customary marriage (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 86). This is because it distinguishes between marriage and cohabitation on the one hand and civil marriage and a customary marriage on the other hand (Van Niekerk "Some Thoughts on Bridewealth in South Africa and Dowry in Roman Law" 2017 *SUBB Jurisprudentia* 131 134). However, the latter assertion must be treated with caution. This is because Africans have cemented the practice of delivering *ilobolo* even where a civil marriage is intended (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). Nevertheless, it is a strong indicator that the parties intended a customary marriage. In addition to this, it cements the relations between the respective families and the respective ancestors (Sibisi 2021 *Obiter* 62).

In light of the above discussion, it is impossible to think of a customary marriage without *ilobolo*. Without it, the marriage may never be said to be customary. As such, *ilobolo* cannot be waived. The only flexibility where the parties are old is the amount of *ilobolo* in that a token amount may replace the often-exorbitant prices to accommodate the parties' diminished financial standing. However, Osman asserts that the negotiation of *ilobolo* may evolve in the future to a custom that may be waived (Osman 2020 *Stell LR* 86). It is argued that only time will prove whether *ilobolo* will evolve into a custom that may be waived in a customary marriage. Until such evolution takes place, *ilobolo* cannot be waived. For the sake of completeness, it is important to point out that the reason for a possible reduction in the amount of *ilobolo* has to do with the reduced costs of the marriage. An elderly couple usually have a low-profile wedding. Therefore, in the case under the present discussion, the court misdirected itself in finding that *ilobolo* could be waived.

4 4 The importance of the family in customary marriages

The last issue that requires special attention in light of the facts of the case of *Peter v Master of the High Court: Bisho* (*supra*) is the importance of the family in a customary marriage. In this case, the groom's side is comprised of people from the same clan as him. May a clan replace the family? A clan comprises interrelated families that are distantly related. What makes families a clan is a very distant common ancestor. Some families within the clan are so distant that marriages between them are permitted. Clan names

(*izithakazelo* in Zulu) provide very good assistance in determining who forms part of a particular clan. A family is a close-knit unit that comprises a person's immediate ancestors and descendants. There is a limit to the number of generations that may comprise a family. It all depends on how long the family remains. Some families may remain together for many generations, whereas others may become fragmented within a few years of the departure of the common ancestor. After the fragmentation, the many branches of the once close family form part of a larger and already existing clan (see discussions in Radcliffe-Brown and Forde *African Systems of Kinship and Marriage* (1950) 5–6).

A clan only becomes relevant if a matter in question pertains to the clan. In this case, the chief of that clan will lead the process. If the matter concerns a family, the family must take charge. A customary marriage is a family affair, not a clan affair (Hadfield "Understanding African Marriage and Family Relations from South Africa to the United States" 2017 *Journal of West African History* 102 103). The leader of the family plays a significant role. The fact that in the case of *Peter v Master of the High Court: Bisho* (*supra*), the deceased was the eldest, and the other elder was mentally ill is insignificant. The family does not just become leaderless, and a clan cannot replace a family.

5 Conclusion

This case note has discussed some thought-provoking issues raised in the judgment. It focused on *ilobolo* as a requirement of a customary marriage. In particular, it discussed *ilobolo* as a requirement in a marriage between the elderly. It showed that even in such a case, *ilobolo* must still be delivered. Although *ilobolo* does transfer the reproductive capacity of a woman, this should be interpreted in context. It actually facilitates the transfer of the woman in the sense that wherever she belongs, her offspring will follow her. Therefore, it is not entirely correct to assert that *ilobolo* transfers the reproductive capacity. *Ilobolo* is an important element in customary marriages, and it cannot be waived.

In addition, the importance of the family in customary marriages should be considered. A family is distinguishable from a clan. In the case of *Peter v Master of the High Court: Bisho* (*supra*), the deceased was represented by members of his wider clan and not his family. The court accepted the substitution of the family by the clan. A customary marriage is an affair between the two families. It is the family that plays a central role, not the clan. Therefore, the court misdirected itself in finding that the clan could represent the deceased in the absence of his family.

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