Is it the end of the road for the integration of the bride as requirement for a customary marriage?

M.B.M v J.P.M (63162/2020)[2022]

1 Introduction

Disputing the validity of a customary marriage is a commonly litigated matter in customary law. The dispute can be motivated by various factors, which include trying to deprive one spouse and their family of the patrimonial consequence of a marriage (Osman and Baase "The recognition of same-sex customary marriages under South African customary law" 2022 *SAJHR* 2). The requirements for validity of a customary marriage in terms of section 3(1)(a) of the Recognition of Customary Marriages Act 120 of 1998 (Recognition Act) are that both parties must consent to the marriage and be 18 years of age. Section 3(1)(b) further provides that the marriage must be negotiated and celebrated in terms of customary law. It has been accepted that this entails that *lobolo* and integration of the bride are part of the conclusion of a customary marriage (Maithufi "The requirements for validity and proprietary consequences of monogamous and polygynous customary marriages in South Africa: Some observations" 2015 *De Jure* 262). Section 3(1)(b) is, however, causing interpretive challenges in courts. It should be noted that some rituals can be waived by the two families or parties concluding a customary marriage (Bakker "Integration of the bride as a requirement for validity of a customary marriage: *Mkabe v Minister of Home Affairs* [2016] ZAGPPHC 4601" 2018 *PELJ* 6). The Constitutional Court has also confirmed that customary law is flexible and adaptable, and must be developed to be in line with the spirit, purport and objects of the Bill of Rights (*Shilubana and Others v Nwamitwa* 2008 9 BCLR 914 (CC) para 43; *Bhe v Magistrate, Khayelitsha; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa* 2005 1 SA 580 (CC) para 41). The problem, however, is that courts merely accept that parties can waive integration of the bride without looking at the cultural group concerned and, more specifically, without asking whether that group allows for waiver of integration entirely.

Socio-economic changes may determine for example whether a ritual may be waived or not (Diala "The concept of living customary law: A critique" 2017 *Journal of Legal Pluralism and Unofficial Law* 155). Moreover, courts treat cohabitation by the two parties as a requirement that replaces the integration of the bride. The question is whether cohabitation should be treated as sufficient in addition to delivery of

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lobolo to determine that a customary marriage was concluded. Does the fact that customary law must be developed in line with the Bill of Rights entail that it should be developed even when there is no ground to justify such development?

This issue goes to the autonomy of communities and the manner in which the courts' development of customary law places limitations on the self-determination of said communities. The gap between living and codified customary law is widened as the realities of the community differ from the courts' interpretation of certain requirements. This note will investigate these issues. The point of departure is that cohabitation after delivery of *lobolo* does not mean that a customary marriage was concluded – there must be evidence of waiver of integration by the traditional groups concerned or an important ritual must be observed as part of integration. The courts cannot solely rely on the family function of the two parties because parties cannot simply have the power to waive integration, which might be an important requirement for/of their traditional group(s). It should be noted that the conclusion of marriage is both a cultural/religious and legal act, and its legal interpretation may delineate how culture comes to be through the recognition of customs. The situation above represents a move away from certain practices or customs altogether, therefore, invalidating it.

This note argues that courts are using customary law to countervail the problematic consequences of intimate relationships not being afforded legal protection (Osman "Precedent, waiver and the constitutional analysis of handing over the bride [discussion of *Sengadi v Tsambo* 2018 JDR 2151 (GJ)]" 2020 *Stellenbosch Law Review* 80). Customary law is recognised by the Constitution and must be applied when it is consistent with the Constitution, however, the court should not interfere with rules of customary law when constitutionality is not at issue.

2 Facts

In the case of *M.B.M v J.P.M* (63162/2020)[2022]), the court was approached to determine whether a customary marriage was concluded between the plaintiff and the defendant (para 8). The plaintiff argued that a customary marriage was concluded while the defendant disputed its conclusion because the plaintiff was not integrated into his family, nor was any ritual or celebration of a marriage observed (para 2). The plaintiff alleged that on 04 July 2009, she concluded a customary marriage with the defendant in accordance with section 3 of the Recognition Act. The plaintiff and defendant had been together since 2007, and three children were born of their intimate relationship. An emissary was sent to the plaintiff's family after the birth of the first child in 2009 to negotiate *lobolo*, part of the emissaries were two witnesses, being the mother and uncle of the plaintiff. An amount of R12 000 was agreed as *lobolo* and R 6000 was paid. The two families agreed that gifts would be exchanged as part of the marriage conclusion (para 8). The defendant explained the significance of each would-be gift – the knife, for

example, which was to be used to cut the cow as part of the integration and rituals observed. Further, the axe was to chop woods which would be used to make a fire (para 35). Both families need to eat from the same cow as part of the process of uniting the family in marriage (para 40). There was no agreement to waive these rituals (para 41). Rather, the plaintiff's mother allowed her daughter to go reside with the defendant's family. The ceremony, however, was important as it would have allowed for the two families to communicate with the ancestors and get their blessing to conclude the marriage (para 17).

The agreement between the two emissaries negotiating the *lobolo* was completed in writing and exchange of gifts were to be delivered at a later stage as the plaintiff's mother needed to renovate her home first. She would advise the defendant's family when the renovations were done so that they could finalise the marriage negotiations. Both families agreed that integration of the bride and accompanying rituals including slaughtering of a cow would take place later.

The plaintiff admitted in court that there was no integration of the bride, but the two parties could cohabitate after delivery of *lobolo* (para 31). The plaintiff indicated that the defendant was regarded as a son in law by her mother and allowed to visit her home as a son in law (as visiting her home as a boyfriend was not permitted). It was argued that the non-exchange of gifts and the fact that the rituals mentioned above weren't observed does not necessarily mean that a customary marriage was not concluded, that is, if *lobolo* was delivered in full.

3 The judgment

The court held that a customary marriage was concluded notwithstanding that integration of the bride was entirely waived (para 99). The court relied on the fact that both parties cohabited together for a period of 10 years and *lobolo* was delivered. The Judge held that the fact that both the plaintiff and the defendant had lived together in cohabitation after delivery of *lobolo* was significant and an indication of commitment to a marriage (para 88 and 89). The court similarly adopted a family function approach in determining the validity of a customary marriage (Osman "The consequences of the statutory regulation of customary law: An examination of the South African customary law of succession and marriage" 2019 *Potchefstroom Electronic Law Journal* 12; Rautenbach "Some comments on the status of customary law in relation to the Bill of Rights" 2003 *Stellenbosch Law Review* 107). The plaintiff and the defendant had immovable property registered in both their names and these reflected that they were married in community of property. The defendant had further submitted in the Notice of Birth form that he was married to the plaintiff in terms of customary law (para 57 and 77). The court considered that the two parties were professionals and understood the significance of providing correct information when completing the Notice of Birth. The court held that it was bound by the

SCA judgment in *Mbungela v Mkabi* 2020 1 SA 41 (SCA) where it was held:

> "That the couple continued to cohabit after that celebration and that the respondent registered the deceased as a beneficiary and spouse on her medical aid scheme are features that cannot be dismissed as insignificant, as they are consonant with the existence of a marriage. I am fortified in this view by Professor Bennet's argument with regards to the handing over requirement. He argued that the parties' intention could be inferred from cohabitation. According to him, where the parties were cohabiting, the gravamen of the enquiry was the attitude of the woman's guardian. If the guardian did not object to the relationship, a marriage would be presumed, irrespective of where the matrimonial home happened to be or how the 'spouses' came to be living there. Professor Bennett placed reliance on a case in which the Court had remarked that "long cohabitation raises a strong suspicion of marriage, especially when the woman's father has taken no steps indicating that he does not so regard it (para 27 and 31)".

The court further held that the fact that plaintiff and defendant cohabited together before observance of any ritual and integration of the bride contradict the defendant's conviction that he deeply believed in the culture that integration of the bride is important, and a marriage cannot be concluded without it (para 87 and 93). The defendant had argued that he respects and fears his ancestors and would not act in a way that would result in them unleashing their wrath on him. The court held that both parties considered the rituals needed to conclude a customary marriage and the role of integration but decided to waive them. This is supported by the fact that the defendant's uncles did not object to the plaintiff cohabiting with the defendant notwithstanding their take on culture and respect for ancestors (para 90-93). The court held that if the parties regarded the rituals and integration of the bride as significant and mandatory, they would have observed them. However, they showed flexibility by not observing them which highlights the flexibility of customary law.

4 Criticism of judgment

The decision by the court to recognise a customary marriage as valid where integration was entirely waived, is problematic. This is because the court relies on cohabitation as though it is a requirement for conclusion of a customary marriage after delivery of *lobolo*. The court followed the precedence of the SCA judgment in *Mbungela v Mkabi* ([2016] ZAGPPHC 4601), where it was held that integration of the bride cannot be treated as so important that a customary marriage cannot be regarded to be completed without it (para 26). The court pointed out that there are sometimes gaps and questions arise whether the original custom as practiced by people who subscribe to it should be followed and/or whether such original custom has evolved and needs to be considered and applied based on the modern way of life (para 1). The question to be asked is whether cohabitation after delivery of *lobolo*

constitute conclusion of a customary marriage. The plaintiff relied on *Mbungela v Mkabi* in arguing that cohabitation gives effect to conclusion of a customary marriage even if the bride is not integrated into the groom's family. This is considered together with the length of the cohabitation and purchasing properties as well as raising children together as a couple (para 56). Similarly, does the fact that the two families treated the plaintiff and defendant as daughter and son in law make up for complete waiver of integration? The court once more cited with approval *Mbungela v Mkabi* where it was further held that:

> "It is important to bear in mind that the ritual of handing over of a bride is simply a means of introducing a bride to her new family and signify the start of the marital consortium. Here, the deceased and Mr Mkabi had an intimate relationship and cohabited for three years before Mr Mkabi started the marriage process. After the lobola negotiations, the deceased immediately resumed her life with Mr Mkabi without censure from her family. According to J C Bekker, the handing over need not be a formal ceremony; for example, upon delivery of lobola or a fine for seduction only, the subsequent thwala i.e. the abduction of the maiden to the groom's home without her guardian's consent, consummates the customary marriage, if her guardian then allows her to remain with her suitor on the understanding that further lobola will be paid due course. And proof of cohabitation alone may raise a presumption that a marriage exists, especially where the bride's family has raised no objection nor showed disapproval, by, for example, demanding a fine from the groom's family (para 25-26)".

The court cannot find to be giving effect and applying customary law by recognising cohabitation after delivery of *lobolo* as giving effect to a customary marriage when, in truth, cohabitation is not a requirement. Section 3(1)(b), by stating a customary marriage must be negotiated and celebrated in accordance with customary law, entails that a fact intensive inquiry must be done to establish how a particular traditional group observes customary law (*Moropane v Southon* (755/2012) [2014] 2016 ZASCA (29 March 2014, para 40). It cannot be said that the court applied customary law when it did not do so. It contradicts the Constitution by forcing recognition of a customary marriage when living customary law does not recognise cohabitation as significant in concluding a customary marriage. The Judge held that customary law is flexible and adaptable and used, as example, the fact that historically *lobolo* was delivered in the form of livestock but is today delivered through money or cash payout (para 86). However, the delivering of *lobolo* through monies was not done for the sake of it. Rather, it was brought about by the fact that livestock are expensive, and, in some cases, there is difficulty when it comes to travelling and delivering *lobolo* in different provinces. Phooko J thus uses this example without considering the context and asking whether similar reasons that affected change of delivery of *lobolo* existed in *casu* as well.

The court must recognise that cultural practices reflect the values and beliefs held by members of a community for periods often spanning generations. Every social grouping in the world has specific traditional

cultural practices and beliefs, some of which are beneficial to all members, while others have become harmful to a specific group, such as women. A customary practice will therefore become law through being recognised by the community as a source of obligation, thus demonstrating a consistent, longstanding and reasonable practice over time. Therefore, the court cannot merely accept any assumed practice by litigants to be binding as the actual law of the community (Manthwa "Towards a new form of customary marriage and ignorance of precedence: *Mbungela v Mkabi* 2020 1 SA 41 (SCA)" 2021 *TSAR* 203).

In *Van Breda* 1921 AD 330, the court pointed out that a practice must be certain, be long established and uniformly observed to acquire the character of law. However, the Constitutional Court has since departed from this determination of whether a customary practice has acquired the character of law. In *Shilubana v Nwamitwa* (2009 2 SA 66 (CC)), the Constitutional Court pointed out that custom at common law is "an immemorial practice that could be regarded as filling in normative gaps [...] In that sense, custom no longer serves as an original source of law capable of independent development but survives merely as a useful accessory" (para 54). The court in *casu* accepted a practice as law even though the alleged practice was not certain nor uniformly observed.

In *Maluleke v Minister of Home Affairs* (02/24921 [2008] ZAGPHC 129 (9 April 2008)), the court argued that *ukumemeza* is observed differently today but what becomes important are the factors that cause this to happen (see Bekker and Van der Merwe "Proof and ascertainment of customary law" 2011 *SAPL* 126). Observance of integration of the bride, like culture, is not monolithic, and although individuals have their own autonomy in terms of how they act, to rely on customary law they must act in accordance with it (Currie "Minority rights: Education, culture, and language" in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman (eds) *Constitutional Law of South Africa* (1996) 35.19).

An individual will observe a cultural practice based on the significance of that ritual to the conclusion of a customary marriage, and they may not waive or deviate from its observance when it is regarded as significant for the conclusion of a customary marriage (Osman and Baase 2022 *SAJHR* 3). The problem is that courts tend to ignore living customary law and rely on the alleged flexibility and adaptation of customary law. Parties cannot be given the power to determine what is customary law and which rituals they can choose to comply with. Change is caused by contextual factors, and these factors must be considered, specifically, whether these factors existed in a particular case so as to justify a departure from age old practices. Diala and Kangwa points out that historically, in Sub-Saharan Africa, customary law was adapted to the demands of the society as well as because of socio-economic changes (Diala and Kangwa "Rethinking the interface between customary law and Constitutionalism" 2019 *De Jure* 191). Acculturations shaped customary law in South Africa. With the arrival of the Dutch when South Africa was

conquered by the Netherlands from 1652-1795, the first significant change to culture took place. Roman Dutch law was implemented as the law of South Africa. The Dutch colonisers used Christianity as an important weapon to colonise South Africa (Nunn "Religious conversion in colonial Africa" 2010 *American Economic Review* 147).

In cases where a man was married to more than one wife, he was convinced by colonial priests to abandon the other wives and practise monogamy (Ndima "The African Law of the 21st Century in South Africa" 2003 *CILSA* 329). The continuance of the Christian attitude to polygyny was reflected in different historical periods in South Africa. This could, for example, be observed in the case of *Seedat' Executive's v Master (Natal)* 1917 AD 302, where the court refused to recognise a Muslim union as valid, citing Christian morality as the reason. The court argued that it is frowned upon by the majority of civilised peoples and on grounds of morality and religion, the courts of a country are not justified in recognising a polygynous union as a valid marriage (*Ismail v Ismail*, 1983 1 SA 1006 (W) para 1025-1026).

Civil marriages between Europeans were automatically in community of property. This resulted in customary practices such as primogeniture being distorted to highlight patriarchal elements rather than the legitimate purpose it served. Similarly, other customary law practices such as payment of *lobolo* were misinterpreted to mean the buying of a wife as if she was a commodity (Manthwa "The compatibility of judicial approaches to the integration of the bride with community practices: Guidelines for law reform" 2023 THRHR 188). Customary law does not merely adapt in a vacuum, the adaptation is brought about by a circumstance such as acculturation or globalisation. African societies have changed over time. It has gone through a multitude of iterations and ordering. Mbaye argues that Precolonial African rules developed to meet the demands of ancient and primitive societies who had inhabited a space. Consequently, a need arose to be adaptable. These adaptations also became acceptable in South Africa because they were eventually accepted as obligatory by the communities to preserve their interests (Mbaye *The Legal Systems of the World: Their Comparison and Unification*: International Encyclopedia of Comparative Law, January 1, (1975) 140).

Parties in a court must argue on the factors that necessitated the need to be flexible. Customary law should not be developed in a vacuum. Any submission that customary law is adaptable or has adapted must be supported by evidence from the living law that the parties' community practice.

It is argued that parties can only waive rituals that are allowed to be waived by their traditional groups. If parties are allowed to determine what customary law is every time they go to court, then customary law would be anything the parties purport it to be. This raises the question of who is responsible for developing customary law in a community? The

Constitutional Court in *Shilubana v Nwamitwa* held that customary law must be based on the living law of the communities (para 53).

In court, parties may be motivated by selfish interests such as trying to deny the other party from the patrimonial consequence of a customary marriage. One cannot ignore the role of socio-economic factors in impacting how people observe customary law. However, it should take more than mere reliance on the assertion of a litigant who may be motivated by selfish interests (Kruuse and Sloth-Nielson "Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*" 2014 *PELJ* 1720-1725).

As Kruuse and Sloth-Nielson posits, courts must pay attention to the distinction between societal norms and behaviour that is regarded as obligatory to observe. It is argued that cohabitation can be seen as a societal norm that is facilitated by many reasons such as not being able to afford a marriage. Parties also cohabit when they do not pay *lobolo*. Nevertheless, it cannot be accepted that just because *lobolo* was paid, this gave effect to conclusion of a customary marriage. Kruuse and Sloth-Nielsen argue 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" (Kruuse and Sloth-Nielson 2014 *PELJ* 1721). Diala asserts that social practices can only be accepted as norms if people in a community feel a sense of obligation towards observing the practice (Diala 2018 *AHRLJ* 108). It can be argued that communities in general feel the obligation to integrate the bride because of ancestral acquiescence but may not feel the same with cohabitation.

An important factor that should also assist the court in every case is to determine which traditional group the parties come from and what the importance of certain rituals from that group's perspective are. Does the group allow for certain rituals to be waived? These are important guidelines that can assist the court; however, the court consistently overlooks these important matters. Of course, the court cannot assume the role of data-collector on a case-by-case basis. However, litigants must be able to provide evidence of the practice they allege to exist. However, there is a long established fundamental legal principle of law that "he who alleges must prove", requiring the party making a claim or assertion to provide sufficient evidence to convince the court or tribunal of its truth. Customary law should not be treated as a single system of law (Osman 2020 *Stell LR* 89). Customary law is not a unified and cohesive body of legal rules and principles applied within a specific jurisdiction, nor a multitude of disparate legal codes and conflicting traditions. It does however imply a singular source and consistent application of laws, creating stability and order by ensuring all individuals and entities are governed by the same set of rules (Himonga and Nhlapo *African Customary Law in South Africa: Post-apartheid and Living Law Perspectives* (2014) 23); see also Himonga and Pope "Mayelane v Ngwenyama and Minister for Home Affairs: A reflection on wider implications" 2013 *Acta Juridica* 322-323); Himonga and Bosch "The application of customary law

under the Constitution of South Africa: Problems solved or just beginning?" 2000 *SALJ* 319).

There are variations of practices from each community, however, the main features and significance of a practice may be maintained (Bekker, Rautenbach and Tshivhase "Nature and sphere of African customary law" in Rautenbach (ed) *Introduction to Legal Pluralism* (2018) 19–23). This is what makes customary law unique, the fact that integration of the bride may have the same significance, but rituals observed may differ.

Customary law is observed by millions of people as part of their right to culture which is protected in the Constitution (Osman and Baase 2023 *SAJHR* 22). The court has an obligation to protect customary law and its values from distortions and opportunists who go to court and allege that customary law has adapted and is flexible, or who argue that a practice was waived when the concerned communities regard it as unwaivable. The court, at the same time, face the dilemma of protecting the right of an individual to culture *vis-à-vis* those of the community. There are competing interests at play. Communitarianism forms a central point in African culture and euro-centric notions of individualism produce conceptual divides which find expression through the courts. Communitarianism has primarily been understood within the context of communities influenced and shaped by liberal thought and experience, resulting in an eschewed understanding of its significance. Communitarianism offers a valuable framework for cultivating authentic community life while also maintaining the potential for universal moral dialogue.

The court must consider all these competing factors and come to an informed decision in a particular case. Limitation may be fair if in a particular case it serves a legitimate societal purpose (Osman and Baase 2023 *SAJHR* 18). The purpose behind observing integration of the bride may require that it is not waived, notwithstanding that in some cases two parties can agree that they consider themselves married after delivery of *lobolo*, cohabitation and the fact that the two families regarded the spouses' families as in-laws. This must be weighed against the said traditional groups interests in not allowing waiver of integration of the bride. The concern currently is that courts make this conclusion lightly and create new requirements for a customary marriage in the process.

4 1 Development of customary law

Courts often argue that they develop customary law to be consistent with the Constitution in making their decisions (Manthwa and Ntsoane "The right to bury the deceased in terms of customary law: Whose right is it? *Sengadi v Tsambo* 2019 4 SA 50 (GJ)" 2020 *THRHR* 518). However, development of customary law by courts is a grey area and far from a reflection of living law (Sloth Nielson and Mwambene "Talking the talk and walking the walk: How can the development of African customary law be understood?" 2010 *Law in Context: A Socio-Legal J* 20). *MM v MN*

2013 4 SA 415 (CC) is a good example of where the court held that it was developing customary law in relation to consent in polygamous marriages to be consistent with the right to equality and dignity. The development of customary law to reflect living law was attempted, however, the court waded in dangerous waters by creating a new requirement that was not based on the living law (para 201). The case had to deal with the question of whether consent was accepted in the Tsonga traditional group as a norm and a requirement for a customary marriage. The court in the end created a common law requirement to determine the requirements for a customary marriage (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* 363). Lewis argues that development requires interrogation of the values that are embedded in the Constitution. These are predominantly the right to equality and dignity, which are foreign to the South African context but are applied in their mainstream setting despite not being suited to a group context (Lewis "Judicial 'translation' and contextualization of values: Rethinking the development of customary law in *Mayelane*" 2015 *PELJ* 1139).

It seems that the term development of customary law by the court entails that if *lobolo* is paid, any form of family function that take place replaces integration of the bride as requirement. This cannot be seen as applying or developing customary law. In doing this, it is argued that courts are making up for the harsh consequences of parties ending up vulnerable if an intimate relationship is not recognised as a marriage. However, courts and parties should consider alternative avenues to protect parties such as universal partnerships (Manthwa "An appraisal of the hurdles with ascertaining 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* 229). A universal partnership generally exists when three of its essentials are present. The first is that both parties must contribute or bring something to the occasion (Hager "The dissolution of universal partnerships in South African law: Lessons to be learnt from Botswana, Zimbabwe and Namibia" 2020 *De Jure* 123). The partnership should further be carried with the objective of benefitting both parties and lastly, the purpose should be to make a profit (Gibson *et al, South African mercantile and company law* (2003) 241.

Ngcobo J in *Bhe v Magistrate Khayelitsha* recognised two instances where development of customary law may be justified: The first one is where it is done to reflect community practice in living law (para 216). In the second case development is done to reflect constitutionality. The court in this case pointed out that the Constitution affords everyone the right to protection of the law and to further apply, interpret and give effect to customary law. The Recognition Act requires that all requirements for a customary marriage must be complied with for a customary marriage to be valid (para 18). The court argued for development of customary law in light with Constitutional values (para

22). Although the court may have meant well with this statement; it is argued that protection of law envisioned in the Constitution entail that customary law must be given effect the way it is. Further, not every case presents an opportunity for development of customary law. The court cannot argue for development where a customary practice is not inconsistent with the Constitution. It is argued that the issue of development must only arise if a practice is argued to infringe a right in the Constitution. The second instance to develop customary law is when there is a need to give effect to the spirit, purport and objects of the Bill of Rights (ibid).

It is true that customary law is applicable subject to the Constitution and the Constitution places an obligation on courts to apply customary law unless it is inconsistent with the Constitution. This cannot be seen as applying and developing customary law in terms of the Constitution, if the result no longer accords with customary law (Ndima "*Re-imagining and re-interpreting African jurisprudence under the South African Constitution*" (LLD thesis Unisa 2013) 191).

A court should not argue that it afforded application to customary law if it did not appreciate and interrogate existing cultural nuances. Integration of the bride and whether rituals can be waived depend on the traditional group is concerned. For example, Nguni traditional groups such as the Xhosa require observance of a formal ritual. *Utsiki* is observed through an animal being slaughtered in preparation of the bride's integration into the groom's family. *Utsiki* involves the slaughtering of a goat as part of the integration of the bride into the groom's family. The bride is expected to eat the goat meat and drink the sour milk from the goat (Manthwa and Lekolwana "An appraisal of the role of rituals and their waiver in the conclusion of a customary marriage" 2024 Obiter 3). *Utsiki* is significant because the bride is introduced to the ancestors as a new member of the family. *Utsiki* cannot be waived because it is considered as a significant stage in the conclusion of a customary marriage.

5 Conclusion

While it is true that customary law can be flexible and adapt to socio-economic and other changes. However, courts should not assume this in cases where a litigant alleges that a requirement for a customary marriage was waived. Customary law does not adapt in a vacuum, the adaptation is brought about by a circumstance such as acculturation. It must be proved that there is a circumstance that justified the adaptation of a customary law practice. Equally important is that courts must be careful not to give individuals the power to determine what is customary law. Courts must also ensure that the alleged customary law reflects what the said traditional group is doing in practice. The issue of development of customary law must also be raised when it can be argued that a customary law practice infringes a right in the Constitution. Cohabitation although a common practice after delivery of ***lobolo*** is not a requirement

for the conclusion of a customary marriage and should not be treated as such.

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