Briefing Paper

# Harmonising customary law and women's rights: Decisions of South Africa's Constitutional Court

EQUALITY & JUSTICE ALLIANCE

This briefing paper[1] analyses seminal decisions of the South African Constitutional Court addressing conflicts between customary law and women's constitutional equality rights. The first part of the paper discusses the meaning and the position of customary law in the South African legal system. The paper then explores the implications of legal dualism[2] before considering key decisions of the Constitutional Court (and decisions of lower courts on key issues which the Constitutional Court has not yet addressed) under five themes: marriage and divorce; inheritance; access to land; traditional leadership; and domestic violence.

## 1. Customary law

Sometimes called indigenous law, customary law means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. The term is now understood to encompass at least two versions: "official" and "living". The former is rigid and dislocated from its social context as a result of state interference in the form of legislation and interpretation through western-style court systems. The latter, also known as "living law", is considered to be an authentic set of norms governing the actual day-to-day relations of a community and adapted to changed social and economic circumstances.[3]

Since the recognition of customary law by the South African Constitution, it has been made quite clear by the Constitutional Court on several occasions that the version of customary law referred to in the Constitution is the "living" version, difficult though it may be to ascertain.

### Constitutional recognition of customary law

Following a colonial and apartheid history of neglect and distortion in equal measure, customary law eventually found its place in the legal system of the new democratic order of South Africa when it was recognised by the Constitution[4] in Section 211(3), as follows:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

### Customary law as "living law"

From its earliest pronouncements on customary law, the Constitutional Court declared a victory for "living law" over its discredited counterpart, the "official" version. In perhaps its first pronouncement on customary law, the court, in the *Certification Case*,[5] interpreted the draft text of the new South African Constitution as mandating "…. the survival of an *evolving* customary law"[6] (emphasis added). This approach was amplified and clarified in a series of further decisions. In *Alexkor v Richtersveld Community*[7] the court set out the main principles of dealing with customary law,

1 This briefing paper was authored by Prof. Thandabantu Nhlapo, Emeritus Professor of Private Law and Former Deputy Vice-Chancellor, University of Cape Town, South Africa. The paper is based on previous published works by Prof. Nhlapo, including T. Nhlapo, *Customary law in post-apartheid South Africa: constitutional confrontations in culture, gender and "living law"*, South African Journal on Human Rights, 33:1, 1-24, 2017 and T. Nhlapo, *Customary Marriages* in B. Stark and J. Heaton (eds) *Routledge Handbook of International Family law*, pp. 45-59, 2019.

2 The phrase is used consciously to denote the clash of cultures between traditional world views on the one hand and imported western values, on the other, and the legal systems that underpin the two. In reality, the situation that pertains in South Africa is pluralism – a wider phenomenon than dualism. See J. Bekker, C. Rautenbach and N. Goolam (eds) *Legal Pluralism in South Africa*, LexisNexis Butterworths (Durban), Introduction, pp. 5-14, 2006.

3 Summary quoted from T. Nhlapo, *Customary law in post-apartheid South Africa: constitutional confrontations in culture, gender and "living law"*, South African Journal on Human Rights, 33: pp.11-24, 2017.

4 The Constitution of the Republic of South Africa, Act 108 of 1996.

5 *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

6 Ibid., at para. 197.

7 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) 460 (CC).

observing that "…while in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law",[8] and cautioning against too much reliance on academic textbooks in ascertaining the rules of this system of law. Acutely aware of the challenge of defining its content, the Court in *Bhe v Magistrate, Khayelitsha*[9] articulated the practical problem succinctly:

"The difficulty lies not so much in the acceptance of the notion of 'living' customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights."[10]

Finally, in *Shilubana and others v Nwamitwa,*[11] Justice Van der Westhuizen set out a useful set of guidelines for courts dealing with customary law, in these important words:

"Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question… The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. *Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society"*[12] (emphasis added).

The short discussion above makes clear that, as soon as "living" customary law was declared to be the version that enjoyed constitutional recognition, the judiciary would of necessity have a central role in the definition and development of South Africa's "living" customary law.

## 2. Judicial decisions on customary law and women's rights

The matters that have come before the Constitutional Court closely match core concerns of customary law, namely, family and kinship and economic survival. Together, these two (linked) themes account for almost all of the issues that have generated litigation. To say that they are linked is simply to recognise the vast areas of overlap between them, erasing the classical common law divide between public law and private law and locating the family at the centre of social, religious, economic and political life.

The seminal cases on customary law and women's rights can be grouped under the following five headings:

**A. MARRIAGE AND DIVORCE**

**B. INHERITANCE AND SUCCESSION**

**C. ACCESS TO LAND**

**D. TRADITIONAL LEADERSHIP**

**E. DOMESTIC VIOLENCE**

The analyses below trace decisions of the Constitutional Court and lower courts under each of these headings.

### A. MARRIAGE AND DIVORCE

Since 2000, customary marriage has been governed by the *Recognition of Customary Marriages Act* 120 of 1998 (the RCMA) whose provisions have, however, mandated recourse to customary law in certain cases. The courts have thus had to draw from both the legislation and customary law in equal measure. The main reason for this (though there are others) is RCMA s.3(1)(b), which provides that in addition to the parties to a marriage being over 18 years of age and freely consenting to marry, the marriage itself must be "negotiated and entered into or celebrated in accordance with customary law". This clearly imports customary law into the very definition of marriage, in addition to any legislative provisions that must be complied with. Many of the cases discussed below display this interplay between customary law and statute.

8 Ibid., at para. 51.
9 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC).
10 Ibid., at para. 109.
11 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).
12 Ibid., at para. 55.

## 1. Formation and dissolution

The most contentious issue in relation to customary marriages is the question of the essential requirements for the validity of a customary marriage. The position is important and urgent enough to be discussed here even though the matter has not yet come before the Constitutional Court for consideration.

For some time now, there have been growing levels of disquiet about the state of customary marriage in South Africa, particularly the lack of clarity regarding requirements for validity. A series of court decisions have scrutinised various aspects of marriage law since the coming into force of the RCMA in 2000. Many of these cases have had to do with gender issues, particularly the rights of women during marriage and at its termination, as well as those of children, especially in the context of succession to the estates of their deceased parents.

A noticeable trend in these judgments has been the wide variety of interpretations of the RCMA in respect of what constitutes the essential requirements for the validity of customary marriages. In particular, it has been necessary in many cases to interpret the provision of the RCMA which requires that, to be valid, a customary marriage concluded after the introduction of the RCMA must be "negotiated and entered into or celebrated in accordance with customary law". Particularly alarming has been the frequency with which parties to legal proceedings have sought to deny the existence of a marriage, requiring the courts to determine the validity or otherwise of these relationships, usually by assessing the legal effect of the practices, rituals and ceremonies that were undertaken.

Even more disturbing are the reasons why parties seek to deny the existence of a marriage, most often due to a reluctance to share the marital assets upon divorce and, in the case of inheritance and succession, "property-grabbing" by the family of the deceased husband which is rendered easier by denying the status of daughter-in-law to the surviving widow. In all these cases, the victims are women and children. They are not assisted by current judicial trends, which appear to be failing to contain the widespread tendency to use the most trivial deviation from tradition (authentic or invented) to deny the existence of a customary marriage.[13]

## 2. Property consequences

The legal consequences of a customary marriage, always elaborate, have been rendered even more complex by the enactment of the RCMA. Section 7(1) states that the proprietary consequences of a customary marriage concluded before the date of commencement of the RCMA continue to be governed by customary law – a statement that has had to be revised drastically since the cases of *Gumede v President of the Republic of South Africa and Others*[14] in 2009 and *Ramuhovhi and Another v President of the Republic of South Africa and Others*[15] in 2016.

Before these decisions, customary law proprietary consequences applied to all pre-RCMA marriages, regardless of whether they were monogamous or polygamous.[16] Now, RCMA s.7(2) provides that a monogamous customary marriage concluded after the date of commencement of the RCMA is a marriage in community of property, unless this regime has been specifically excluded by the spouses in an antenuptial contract. Pre-RCMA wives are thus excluded from the benefits of the community of property regime which applies to post-RCMA wives in *de facto* monogamous relationships.

The decision in *Gumede* altered the rule in RCMA s.7(1) by extending community of property to pre-RCMA marriages that were monogamous. The Constitutional Court concluded that depriving women in pre-RCMA monogamous marriages of the benefits of s.7(2) simply because of the date of their marriage amounted to unfair discrimination on grounds of gender. RCMA s.7(1) was therefore unconstitutional and invalid in respect of monogamous customary marriages contracted before the coming into effect of the Act. The court struck down the words "entered into after the commencement of this Act" in s.7(2) as unconstitutional. The result was to make RCMA s.7(2) applicable to all customary marriages that were *de facto* monogamous, regardless of the date on which they were concluded. This still left out polygamous customary marriages entered into before the RCMA, which continued to be governed by customary law as provided by RCMA s.7(1).

This position stood until the decision in *Ramuhovhi*, which declared RCMA s.7(1) unconstitutional in its entirety, not just in relation to monogamous marriages. The result was that s.7(1) also ceased to apply to polygamous customary marriages. The case had been brought by the biological children of the deceased who, during his lifetime, had been married polygamously to their mothers in accordance with customary law.

13 See the summary below for some of the lower court decisions.
14 2009 (3) SA 152 (CC).
15 [2017] ZACC 41.
16 Polygamy is the practice of having more than one spouse.

The court found that:

"The provisions of Section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 discriminate unjustifiably against women in polygamous customary marriages on the basis of gender, race and ethnic or social origin, and are thus inconsistent with the Constitution, and must be declared invalid."

This decision was confirmed by the Constitutional Court, which means that there is now no difference in the proprietary regimes of all customary marriages concluded before the RCMA. The decision further erodes the relevance of pre-RCMA customary law of matrimonial property, especially in respect of polygamous marriages.

### 3. Equality of spouses

Section 6 of the RCMA explicitly ensures the equality of the spouses within marriage. Headed "Equal status and capacity of spouses", s.6 states:

"A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

The Constitutional Court in *Gumede* breathed new life into this provision when Deputy Chief Justice Moseneke made it the centerpiece of the Court's argument against those provisions of the RCMA which discriminated between wives married before the date of commencement of the legislation, and those whose marriages came after that date. Referring to the RCMA in general, Moseneke DCJ stated as follows:

"The legislation makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses."[17]

He went on to quote RCMA s.6, referring to it as "a useful starting point… [for the purposes of equality analysis in this case] …".[18] A progressive statutory reform thus found direct endorsement by the highest court in the land.

### 4. Polygyny[19]

The recognition formula adopted by the RCMA makes it clear that a polygynous customary marriage is a legal marriage in South Africa. Many commentators and customary law watchers expected the issue of polygyny to be the first to make it to the Constitutional Court in the democratic dispensation. To others, it came as no surprise that inheritance was the first. Even now, there is a muted debate about whether polygyny will ever be challenged in court.

There has been no such legal challenge and on those occasions when the matter of polygyny has arisen, the courts have simply interpreted the provisions of the RCMA as they exist. The decision in *Mayelane v Ngwenyama*[20] is a case in point. The court was considering a wife's claim that her husband's second marriage was invalid on the ground that he had failed to comply with the requirements of s.7(6) of the RCMA.

Section 7(6) is an attempt to deal with the property of a polygynous (or soon to be polygynous) household and it sets out procedures for the husband to follow, the most important of which is to apply to a court for approval of a written contract regulating the future matrimonial property regime of his marriages before the subsequent marriage is concluded. The husband in this case had not followed the procedure set out in s.7(6) and had proceeded to marry a second wife without the required written contract which, by definition, would have involved negotiations with his current wife.

When the matter was first heard, the High Court agreed with the wife and declared the attempted second marriage invalid due to failure by the husband to comply with the requirements of s7(6). However, the Supreme Court of Appeal overruled the High Court decision, holding that s.7(6) was not meant as an additional requirement for validity and its contravention could not invalidate a marriage.

The position as it stands is thus that a husband's failure to comply with RCMA s.7(6) does not invalidate the subsequent marriage. But the case continues to be relevant to the issue of marriage essentials, in that the Constitutional Court invalidated the marriage in question, though on a different ground: namely, that the husband should have obtained the consent of his wife in order to marry a second wife. Although this was in the context of Xitsonga customary law, the court's grounding of the consent requirement on the constitutional rights of equality and dignity hints at the possibility of this requirement being mandatory in all future polygamous marriages.

17 Ibid., para. 24.
18 Ibid., para. 25.
19 Polygyny refers to one man with multiple wives. Polyandry refers to one woman with multiple husbands.
20 2013 (4) SA 415 (CC).

Striking at the heart of the institution of polygamy, this decision caused ripples in customary law circles. It has become a rich source of debate – about the ascertainment of living customary law by the courts, about the application of the decision to other traditional communities in South Africa and about the intentions of the legislature in enacting s.7(6) of the RCMA.

## B. INHERITANCE AND SUCCESSION

The most ground-breaking intervention by the Court in customary law in South Africa has been the decision in the case of *Bhe and other v Magistrate Khayelitsha*[21] *and Others 2005 (1) SA 580 (CC),* where the rule of male primogeniture, long associated with the customary law of inheritance, was declared unconstitutional and invalid. The Constitutional Court was sitting to confirm two High Court decisions (reported together as *Bhe*) which struck down as unconstitutional certain sections of the Black Administration Act 38 of 1927 and also the customary law principle of male primogeniture, which prescribed that only first-born males could inherit from a deceased. In both cases the applicants were women who had been denied the right to inherit the estates of their deceased fathers.

The Constitutional Court confirmed the orders of the two High Courts and went on to consider the rule of male primogeniture in customary law. Langa DCJ, delivering the majority judgement of the Court, reviewed the historical purpose and function of the rule, its transformation into "official" customary law and the changed economic and social context in which it was expected to function. He concluded:

> "the official system of customary law of succession is incompatible with the Bill of Rights. It cannot in its present form, survive constitutional scrutiny."[22]

The rule was accordingly struck down as unconstitutional, together with certain sections of the Black Administration Act 1927 and the Intestate Succession Act 81 of 1987. The Court ordered that the "corrected" version of the latter would now cover, through its regulations, estates that had in the past devolved according to customary law, until corrective legislation was passed.[23]

## C. ACCESS TO LAND

The issue of land in South Africa remains highly contested. A colonial history of conquest and dispossession, followed by the segregationist policies of apartheid, left black people virtually landless. The 13% of the country's land mass allocated to blacks was (and still is) largely in the poor rural areas that were once earmarked as reserves or "homelands", which are currently home to some 18% of the South African population. Needless to say, the majority of these are women.

In urban areas, too, women bore the brunt of landlessness, mainly from the spatial policies of apartheid and their aggressive implementation through legislation such as the Group Areas Act.[24]

In an effort to correct the situation and provide justice for those dispossessed by these processes and laws, the South African Constitution provided for restitution and redress in a series of provisions set out in Section 25.[25] Judicial intervention in this area has largely taken the form of securing the rights of communities (as opposed to individual women) to land from which they had been forcibly removed, or dispossessed in any other way. The courts have been able to do this through post-apartheid legislation enacted under the auspices of Section 25 of the Constitution.

No case focused specifically on the land rights of women has as yet come before the Constitutional Court. The cases that have been considered by the Court to date have concerned the land rights of communities, where the outcome benefitted women as members of those communities. But the shape of things to come is evident. In the case of *Mthizana-Base v Maxhwele,*[26] the Eastern Cape High Court protected the land rights of a woman-headed household in the rural areas by stopping the predatory encroachments over the land by her chief.

21 *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC).
22 Ibid., at para. 97.
23 See *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009, which came into operation on 20 September 2010.
24 The Group Areas Act was the title of three acts of the South African Parliament enacted under the apartheid government. The acts established residential and business sections in urban areas for each race and members of other races were barred from living, operating businesses, or owning land in them in a system of urban apartheid.
25 Section 25(1)-(9) sets out mechanisms for land reform, restitution, redistribution and for the protection of security of tenure. The section also places a duty on government to legislate appropriately on these matters.
26 Case Number 3351/18.

## D. TRADITIONAL LEADERSHIP

### 1. Succession to chieftainship

In the field of what we may loosely describe as public law, judicial intervention in favour of women's rights came in the decision in *Shilubana and Others v Nwamitwa*.[27] The case concerned succession to the chieftainship of the Valoyi traditional community in the province of Limpopo, where the royal family had unanimously resolved to confer the chieftainship on Ms Shilubana, the daughter of Fofoza, a chief who had died without male issue in 1968 and therefore had been succeeded by his younger brother, Shilubana's uncle.

In trying to bring their governance arrangements in line with the Constitution, the royal family – with the active participation of Fofoza's younger brother Richard, who was now the chief – sought to install as chief the daughter who had been passed over on the death of her father because she was a woman. The actions of the royal family were opposed by the respondent, who claimed to be the rightful heir to the chieftainship as Richard's eldest son. He instituted proceedings in the High Court to be declared the heir who was entitled to succeed Richard upon his death. His application succeeded in the High Court and, again, on appeal in the Supreme Court of Appeal (SCA).

Ms Shilubana sought leave to appeal to the Constitutional Court against the decision of the SCA. In response, the respondent argued that the royal family's actions had been "grossly irregular" because they (the royal family) lacked the power to redirect the succession. The Constitutional Court found for the appellant, holding essentially that a community had a right to develop its own laws in a manner consistent with the Constitution; that in ascertaining a rule of customary law, past practice was relevant but not decisive; and that the royal family's resolution legitimately constituted a change in the customary law of the Valoyi.

The decision caused ripples in legal and social circles both as an endorsement of "enacted" living customary law and, for traditionalists, as a harbinger of unprecedented uncertainty in the area of customary law succession to chieftainship.

### 2. Civic status generally

The issue of the civic status of women is multi-layered, but this paper focuses mostly on the rights of rural women (ie: those living under chiefs) and their visibility in public and community affairs. There is a great deal of ferment in this area, though as yet no specific constitutional cases. It is important to note the many attempts by the government to pass a very controversial Traditional Courts Bill[28] and the effective resistance mounted in response by rural women's organisations. The resistance revolved around the provisions of early versions of the Bill, which failed to protect women from patriarchal oppression in matters such as appearing in traditional courts in their own right, and, indeed, their eligibility for appointment as court functionaries and as members of traditional councils. Even though there is no Constitutional Court decision on these matters, it is important to highlight this subject, not least because the constitutionality of the Traditional Courts Bill that is currently making its way through Parliament (and is likely to be passed) is certain to be tested in court before long.

## E. DOMESTIC VIOLENCE

Domestic abuse of women in the home is a huge scourge in South Africa and, again, this subject is included despite no specific customary law jurisprudence on the matter. (There is, of course, no shortage of criminal cases where perpetrators are prosecuted under the Domestic Violence Act).

The case of *Jezile v S*[29] provides a notable example of a related problem, even though the case was not heard beyond the level of the High Court. An irregular mode of initiating a marriage, called *ukuthwala* and prevalent in the Eastern Cape and KwaZulu-Natal, has come before the courts in prosecutions based on statutory and common law offences. Literally meaning "to carry off", the custom has features of a mock abduction of a girl, ideally of marriageable age and with her consent, although abuses of the practice are rife. In the *Jezile* case, a man's conviction for human trafficking, assault and rape was upheld and a sentence of 22 years confirmed. He had abducted an under-age girl from her home and had claimed in his defence that he had married her under customary law. The court rejected his defence, calling it an abuse of the custom constituting a distortion of customary law.

27 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).
28 An early version of this legislation, tabled as far back as 2012, was withdrawn in 2014 due to resistance to its provisions and to parliament's weak consultation process. It has since been reinstated and is currently going through Parliament.
29 2016 (2) SA 62 (WCC).

## Summary

This briefing paper has discussed the broad outlines of the South African legal landscape, especially with regard to the social and legal dualism brought about by the recognition of African customary law as a full partner in the legal system, together with imported common law. Both customary law and common law must comply with the provisions of the Constitution. In the case of customary law, in particular, the recognition by the Constitution has been under the strict understanding that it is the "living law" version of customary law that is recognised, not the "official" version.

The courts did not take long in the constitutional era to grapple with issues of customary law, and the contestation between patriarchal traditions and the equality and non-discrimination clauses in the Constitution predictably raised its head quite early on. This judicial interaction has resulted in a two-tier menu of decisions: those from the Constitutional Court – the apex court – itself, and those from the courts below. This paper has concentrated on the decisions of the Constitutional Court, which are binding on everybody, but cases from the Supreme Court of Appeal and from the various divisions of the High Court have also been included, either because of the importance of the issues, or as an indication of future developments. For example, we have included High Court decisions reflecting the struggles of women faced with attempts to delegitimise their marriages as some of these cases are sure to reach the Constitutional Court in the fullness of time. In the instances highlighted, every time the court confirms a marriage in the face of some spurious objection on a matter of trivial detail, this constitutes a victory for a South African woman's constitutional right to equal protection of the law.

Below is a short summary of key cases on customary law and their impact on the rights of women in South Africa.

## Constitutional Court: landmark decisions

- **Bhe and Others v Magistrate Khayelitsha and Others 2005 (1) SA 580 (CC)** – found the customary law rule of male primogeniture unconstitutional thus delivering a major victory for women in succession; all children, male or female, now have equal succession rights, as have women in polygamous marriages; all deceased estates (previously dealt with separately according to race) now fall under the Master of the High Court.
- **Gumede v President of the Republic of South Africa 2009 (3) SA 152 (CC)** – found RCMA s.7(1) unconstitutional where it relegated the property consequences for wives married monogamously before the date of commencement of the RCMA to customary law, while those married after the introduction of the RCMA enjoyed the benefits of community of property. This decision entitles both groups of women to community of property.
- **Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC)** – held that a traditional community had a right to change its customary law to align with the Constitution and could thus legitimately appoint a woman chief.
- **Mayelane v Ngwenyama 2013 (4) SA 415 (CC)** – developed the customary law of the Tsonga community to include the requirement that the first wife's consent must be sought by the husband if he wished to marry another wife.
- **Ramuhovhi and Another v President of the Republic of South Africa and Others [2017] ZACC 41** – held RCMA s.7(1) unconstitutional in its entirety, thus extending community of property to polygamously married women, in the same way that *Gumede* had extended the same to monogamously married women, regardless of the date of the marriage.

## Supreme Court of Appeal: landmark decisions

- **Mbungela and another v Mkabi and Others (820/2018) [2019] ZASCA 134 (30 September 2019)** – the most recent case addressing the issue of essential requirements for the validity of a customary marriage. The court ruled that "handing over of the bride" is not a key determinant of validity and can be waived without endangering the marriage.
- **Moropane v Southon (755/12) [2014] ZASCA 76 (29 May 2014)** – held a contested marriage to be proven on the basis of payment of *lobolo* in the face of attempts to impugn the marriage for non-performance on the basis of a slate of minor rituals.

## High Court: decisions and ongoing struggles

This part summarises a selection of decisions from the lower courts which have had a significant impact on customary law, especially in the area of marriage, where we see the courts limiting the capacity of men to deny perfectly sound customary marriages on the weakest of grounds.

- **Thembisile and Another v Thembisile and Another 2002(2) SA 209** – overturned the apartheid rule that when a man had contracted a customary marriage and a civil marriage with different women, the civil marriage "extinguished" the customary marriage, leading to the problem of "discarded wives".[30]
- **Jezile v S 2016 (2) SA 62 (WCC)** – the Western Cape High Court convicted the accused on charges of human trafficking, assault and rape for abducting an under-age girl, rejecting his defence that his actions were in pursuit of a customary marriage.
- **Mabuza v Mbatha 2003 (4) SA 218 (C)** – held a Swazi ritual long considered central to the formation of a marriage to be capable of being waived by the mutual consent of the two families.
- **Maluleke v Minister of Home Affairs and Another (02/24924) [2008] ZAGPHC 129 (9 April 2008)** – held that the actual performance of a ritual accepted by both families to be essential could be dispensed with by agreement.
- **Mabena v Letsoalo 1998 (2) SA 1068 (T)** – the court confirmed a mother's ability to negotiate and receive *lobolo* for her daughter unassisted by a man.
- **Mmutle v Thinda and Another (20949/2007) [2008] ZAGPHC 352 (23 July 2008)** – the court held cohabitation and part payment of *lobolo* was sufficient to confirm the marriage, in the face of objections that *lobolo* had not been paid in full, there had been no exchange of gifts, and no handing over of the bride.

## Conclusion

Since 1994, the courts in South Africa have not shied away from addressing contentious issues relating to customary law when the need has arisen. Led by the Constitutional Court in seeking out the "living" customary law of the parties, or "developing" customary law to align with the Constitution, the courts have bravely attempted to understand how South Africa's version of legal pluralism should work. As evidenced by the instability that has been brought into the area of the essential requirements for the validity of a customary marriage, however, there is still a long way to go. It is a cause for optimism for the future to note that the judiciary has been consistent in insisting on the superiority of the Constitution whenever the rights of women have been on the table.

30 The elevation of civil marriage in this way had the consequence that the wife and children of the customary marriage were discarded and were left with no claim on the husband or his estate. On discarded wives, see C. Himonga and T. Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives*, and cases cited therein, O.U.P. Southern Africa , Cape Town pp. 93-94, 2014.