



# Tutorial Letter 201/2/2017

## Advanced indigenous law LCP4804

### Semester 2

Department of Public, Constitutional and  
International law

**IMPORTANT INFORMATION**

This tutorial letter contains important information  
about your module.

BARCODE



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### **Dear Students**

Read this tutorial letter carefully. It contains commentary on Assignment 01, Assignment 02 and Assignment 03 for the second semester of 2017. It further contains information on the forthcoming October/November 2017 examinations. We hope that the feedback on Assignments will provide an insight into what is expected of you in the examinations. We trust that you found the assignments exciting, and that you are coping well with the workload.

### **The Study guide**

From your assignments you will have noticed that your Study Guide did not play a major role in your questions and answers. The reason for this is that the Study Guide is under review. It was compiled long before the developments that gave rise to most of the prescribed cases and statutes that are topical in customary law. A lot has changed since then. Its importance has therefore since waned over time. Yet it is still a good guide to show you how to understand the module in general, and in particular, study unit 2, (marriage) study unit 3, particularly contracts where (ukufakwa and other indigenous institutions) can be found and lastly study unit 5 for the troubled (primogeniture) principle. In order to understand the important issues discussed in the assignments and examination the Study Guide is the starting point. However, cases and statutes are more important in answering questions.

<b>1. FEEDBACK ON ASSIGNMENT 01</b>
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Assignment 01 was relatively simple and should not have given you too much trouble. This was a compulsory assignment, consisting of MULTIPLE choice questions. You had to mark either (1) (2) (3) or (4) for each of the questions on the Unisa Mark-reading sheet. You did not have to give reasons for your answers.

**The feedback on** Assignment 01 follows:

<b>QUESTION</b>	<b>CORRECT ANSWER</b>
<b>1</b>	<b>2</b>
<b>2</b>	<b>3</b>
<b>3</b>	<b>1</b>
<b>4</b>	<b>4</b>
<b>5</b>	<b>2</b>
<b>6</b>	<b>4</b>
<b>7</b>	<b>3</b>
<b>8</b>	<b>4</b>
<b>9</b>	<b>2</b>
<b>10</b>	<b>3</b>

You must make sure that you study the cases listed in these questions so that you can discuss them in the examination. Experience has shown that some students get the answers right but fail the examination requiring them to discuss the same cases. It does not help to pass an assignment if you fail the examination. Those who never deserved to pass the assignment will be exposed one day. And that will come!

## 2. FEEDBACK ON ASSIGNMENT 01

### Question 1

Answering this question requires commitment to the values of customary law, the Constitution and applicable legislation. That is to say, in answering the question you must bear in mind that **customary law** is an independent source of law (as stated in *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC)); that the **Constitution** is the supreme law (as stated in section 2 of the Constitution) and that the **Act** (TLGFA 41 of 2003) is the specifically applicable legislation (see section 211(3) of the Constitution. **See Textbook 241-246.**

(i) If section 11 of the Traditional Leadership and Governance Framework Act, 41 of 2003 is applied (see the role of the royal family). This section requires the royal family (of which both X and N are members) to identify the candidate for appointment. In considering their candidates' suitability for the position section 9 of the Constitution requires them to treat them with equality. Therefore, the reason why the royal family is not supporting N cannot be because she is a woman. At the same time the only way in which N can be appointed is by being identified by the royal family as required by the Act. Accordingly, X has more chances of success.

(ii) If section 211(3) of the South African Constitution, 1996 is applied (which system of law must be applied). This section enjoins the courts to apply customary law when it is the legal system indicated by the occasion, as is the case at present. Customary law identifies a particular clan/lineage for traditional leadership. Hence after B's death, the royal family must look for a successor from within the family. Like all law customary law's application is subject to the Constitution and specifically applicable legislation. Therefore, the appointment process must comply, not only with customary law, but also with the Constitution and legislation. Therefore, N cannot be overlooked simply because she is a woman (i.t.o the **Constitution**). If she loses it will be because she was not identified for the position by the royal family, using its own criteria for the position as required by the **Act** (the specifically applicable legislation is). Accordingly, X, as the identified candidate, has more chances of success (i.t.o. **customary law**, the **Constitution** and the **Act**).

(iii) If customary law is applied in terms of the principle developed in *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) (the application of customary

law freely from common law lens). According to this case customary law as recognised by the Constitution no longer has to be viewed with the lens of the common law. So, customary law must be viewed from the perspective of its own value system, which requires the maintenance of the lineage of the previous traditional leader in the appointment process. Hence the Act places the responsibility to identify the successor on the shoulders of the royal family. As the royal family has acted, X will most likely succeed.

(iv) If past practice has not changed because the amaQwathi Traditional Authority has not acted to change that practice (*Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC)). (the right to make, amend and repeal customary law i.t.o. section 211(2) of the Constitution). Prior to the present constitutional era, customary law preferred senior male descendants of the previous traditional leader. According to *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) past practice prevails until amended by the traditional authority or a new practice has emerged in social practice, or the court aligns customary law with the Constitution. Under the Constitution the traditional authority can no longer prefer X simply because he is a senior male. X and N must compete on an equal basis. Whoever is identified by the royal family on the basis of meeting the customary criteria for a suitable traditional leader will be appointed. Applying such criteria N was not so identified as required by the Act. X will most likely get the position.

(v) If contemporary practice had taken over from past practice; and the royal family and the amaQwathi Traditional Authority were consequently not bound by custom to favour any of the candidates (*Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC)). The tradition of preferring males in the past will not favour X today, as males and females are equal. Under the new social practice both candidates will compete on an equal basis. Because no-one has advantage, the traditional authority will accept whoever is identified, by the royal family, male or female, as the suitable candidate. X, as the identified candidate, will most likely get the position.

(vi) If in (iv) above the characteristics of living customary law (described in *Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC) were relied upon by the court to justify its deviation from past practice in order to assist N to overcome her civic disabilities. At para 34-35 the court held:

The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs. Our history, however, is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilised and “stone-walled”<sup>3</sup>

through codification, which distorted its mutable nature and subverted its operation. The Constitution is designed to reverse this trend and to facilitate the preservation and evolution of customary law as a legal system that conforms with its provisions.

Indeed, the legislature has recognised the dynamic nature of customary law and the need to let it evolve in keeping with the changing lives of the people. Hence it has restored the power to identify royal candidates to the royal family who can treat it as a living and active body of law. In their exercise of this power the royal family looked at its members, unhindered by the legal disabilities of the past, and after disabusing themselves of the patriarchal prejudices of yester-year, identified the candidate with the requisite qualifications as required by the Act. As the identified candidate X will most likely get the position.

Therefore, the candidate must satisfy the customary requirements for identification for the position; that selection must be consistent with constitutional requirements as well as applicable legislation. That is why X won the contest. In other words, a candidate for traditional leadership can only succeed if his/her community sees potential for the position as the community knows it. You must remember that succession to traditional leadership is a local government issue. It is not enough for the candidate to be favoured by lineage. It must also be identified by the royal family, which is a council of the closest relatives of the previous traditional leader. This identification must be endorsed by the traditional authority, so that the Premier can accept it. In this way the Premier has the assurance that the candidate has local support which is vital for governance purposes. On the other hand, no such support is necessary in the case of succession to an ordinary family position. Hence lineage is sufficient.

## Question 2

Before his death Z married his wife R by customary rites. After Z's death R went to register their customary marriage at the Home Affairs Department, only to be told, to her consternation, that P had already been to that office to register hers with the deceased (Z). R knew that P did what she did in order to claim Z's estate. **Textbook pages 98-104, 116-121.**

(i) comment on whether Z could possibly have had two valid customary marriages, referring to any law/legislation recognising it. Yes. See section 2(3) and (4) of the Recognition of Customary Marriages Act, 120 of 1998 which refers to 'more than one spouse', Thus the Act recognises that the concept of customary marriage is compatible with multiple customary marriages of one

man with two or more wives. Customary marriage does not belong to the family of civil marriages of the Western tradition, which recognise a marriage of one man and one wife.

(ii) what would your comment be if R says Z never told her about his customary marriage with P and that R and Z subscribed to Tsonga customary law which does not recognise Z's further customary marriage, contracted without her consent as Z's senior wife. This is what *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC) is all about. According to this judgment, without R's consent, a Xitsonga further customary marriage is invalid. However, the courts are not unanimous on this matter as it was held in *Ngwenyama v Mayelane* 2012(10) BCLR 1071(SCA) that a Xitsonga further customary marriage that complies with the Act is valid despite the lack of the first wife's consent, (since the Act protects all women, not just one woman).

(iii) what would be the position if K, being Z's father, says he does not recognise both R and P as his son's (Z's) widows as he never negotiated their customary marriages. (See *Mthembu v Letsela and Another* 1998 (2) SA675 (T), *Mabena v Letsoalo* 1998 (2) SA 1068 (T) and *Bhe v Magistrate Khayelisha and Others* 2005 (1) BCLR (1) (CC) for fathers who claimed their son's estates for themselves).

Except for the *Mthembu* case where the deceased's father succeeded because it was decided under section 23 of the old Black Administration Act (BAA), which favoured senior males (Remember that the BAA applied before the advent of the Constitution).

On the other hand, the *Mabena* and the *Bhe* fathers failed because they were decided under the 1996 Constitution which focuses on the value of equality. To succeed in their claims against K the daughters-in-law, R and P, must still prove the validity of their customary marriages in terms of section 3(1) of the Recognition of Customary Marriages Act, 120 of 1998. Such marriages never depended on K's participation.

In terms of *Mabena* the father of the deceased tried to impune his deceased son's marriage with the daughter-in-law on the basis that he did not negotiate the customary marriage as required by law. The court rejected this ground and upheld the marriage as valid, holding that he did not even have to negotiate the customary marriage of his adult and independent son. In other words, as developed under section 39(2) of the Constitution, the involvement of a father of an adult and independent son is no longer a requirement.

In terms of *Bhe* a woman who had children by the deceased did not have to prove her customary marriage but successfully claimed the estate for her two minor children fathered by the deceased. Again, illegitimacy was no longer a bar to the children's claims.

(iv) Would R's and P's situation be any different if K's problem with their customary marriages was that they were invalid for non-observance of the necessary *imvume/ukumekeza* traditions. In terms of *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) (*imvume*) and *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) (*ukumekeza*) the observance of these customs is no longer essential in the urban and different environments in which today's conditions obtain. Transformation means that once the requirements of section 3(1) of the Act are observed the customary marriage will be valid. Thus the enjoyment of the relevant traditions has been reduced to the level of nice festivities to grace the wedding, but no longer essential requirements for a valid customary marriage. You must note that proof of these festivities may still help the court in a difficult case where evidence is needed to define the occasion as a customary marriage. In such a case it would be difficult for a party who admit *imvume/ukumekeza* were held, to then dispute that the occasion was a customary marriage wedding.

(v) what would be the position if Q appeared claiming to be the only descendant of Z by an earlier relationship. Q does this by discrediting R's customary marriage because her *lobolo* was never paid in full; and P's one because she was never delivered to the groom's family.

Neither full *lobolo* nor delivery are listed in section 3(1) of the Act as requirements for a valid customary marriage. As long as the customary marriage has been negotiated and entered into or celebrated under customary law, the marriage is valid. (see (iv) above for the value of the evidence of these customary traditions in proving a difficult case) As stated above, once one admits that the occasion was *lobolo*/delivery, then it becomes impossible to deny that the occasion was not a customary marriage. To aggravate Q's woes, the *Bhe* judgment adopts the Intestate Succession Act and lists all the deceased's descendants and spouses for the purposes of receiving equal child portions from the estate. This situation has been endorsed by the legislature through the Reform of the Customary Law of Succession and the Regulation of Related Matters Act, 11 of 2009. Q must just acquaint himself/herself with the reality that he will share child portions with the rest of the other recipients.

### 3. FORMAT OF THE OCT/NOV 2017 EXAMINATION

The 2017 Oct/Nov examination will be a **Two-hour** examination paper. The paper consists of a total of 100 marks.

#### NOTE: PREPARING FOR THE EXAMINATION

**Study all the prescribed tutorial matter and do not “spot”. Therefore you must study all sections of the work. Note the following:**

#### In order to pass the Examinations:

- 1 Study the Recognition of Customary Marriages SAct, 120 of 1998; Traditional Leadership and Governance Framework Act, 41 of 2003; and the Reform of customary Law of Succession and Regulation of Related Matters Act 11 of 2009. What is important is to be able to demonstrate the transformation these Acts brought about in the sphere of customary law.
- 2 Find the cases/sources from which all the extracts/quotes in Assignment 1 come from, not just those that were chosen as the right answers for the assignment.
- 3 Study Tutorial Letter 201 of 2017 and Revise your assignments, especially the solutions to Assignment 02 (above) and Assignment 03 (below).
- 4 Use Assignments 02 and 03 as models for answering the examination questions
- 5 When preparing for the examination please make sure that you take particular note of the feedback to Assignments 02 and 03.

Assignment 03 is a self-evaluation assignment. It is a preparatory exercise for the examination

**When you join the legal profession, you will have to evaluate your own arguments and submissions and you should, therefore, acquire this skill as soon as possible.**

1. The questions in the assignment cover all the study units in the study guide. Since the questions are similar to the kinds of questions you may expect in the examination, you should view this assignment as a **valuable revision exercise in your examination preparation.**
2. After you have answered the assignment questions, **please evaluate your own answers by using the commentary that follows below**

3. In this commentary, we give you the answers to the questions. The purpose of this is to show you how to approach and answer a question. The knowledge obtained in this way can thus then be applied when answering the questions in the examination.

**NOTE: Please do not submit this assignment to us for marking. We repeat: this assignment is a self-evaluation assignment and should not be handed in for marking. If you have any difficulties with any of the questions in the assignment, and our commentary does not assist you, please contact us.**

### **SELF-EVALUATION QUESTIONS**

**Answer the following questions as seriously as possible. The exam will consist of longer and shorter questions which total up to 100 marks. Your mark will be converted to a mark out of 80 because your two assignments amount to a mark out of 20.**

**Each of the following sections are important for your preparation for the examination.**

#### **Assignment 03**

##### **Section A The requirements for a valid customary marriage:**

Apply the provisions of the Recognition of Customary Marriages Act 120 of 1998 regarding the requirements for a valid customary marriage to test the validity of the following judgments.

(Remember to start case discussion properly by giving the **names of the parties**; the **legal question** that was answered by the court, the **reasons for judgment** (*ratio decidendi*) given by the court and the **decision** of the court).

##### **(a) The names of the parties**

*Mthembu v Letsela and Another* 1997 (2) SA 936 (T)

*Mthembu v Letsela and Another* 1998 (2) SA 675 (T)

*Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA)

#### **Introduction**

**Textbook pages 173-174.**

In November 1996, Le Roux J heard an application by the applicant, Mildred Hleziphi Mthembu, who approached the court for relief in a matter of succession to the estate of her deceased

husband, one Tebalo Watson Letsela, to whom she claimed to have been married by customary law.

### **The legal question that was answered by the court**

The applicant sought the following relief:

1. An order declaring
  - 1.1. that the rule of African customary law which generally excludes African women from intestate succession ("the customary law rule") is inconsistent with the Constitution and consequently invalid;
  - 1.2. that s 23 of the Black Administration Act 38 of 1927 ("the Act") and s 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks made under s 23(10) of the Act [and published] by Government Notice R200 of 6 February 1987 ("the regulations") are invalid insofar as they demand the application of the customary law rule;
  - 1.3. that the administration and distribution of the estate of her late husband, Tebalo Watson Letsela ("the deceased") is governed by the common law of intestate succession; and
  - 1.4. that Tembi Mtembu is the deceased's only intestate heir.

### ***Mthembu v Letsela and Another 1997 (2) SA 936 (T)***

Before his death Letsela (the deceased) was employed in Boksburg and owned a house at 822 Ditopi Street, Vosloorus, in which he had lived with the applicant (the widow) since 1990, together with their daughter, Tembi, who was born on 7 April 1988. In the same house also lived Letsela's parents, his sister and her daughter.

The deceased died on 13 August 1993 and the first respondent, Henry K Letsela, (father of the deceased) was appointed by the second respondent (the Magistrate, Boksburg) to administer and wind up the estate. He claims that the house in Ditopi Street devolves upon him according to the rules of customary law. The rules are recognized by s 23 of the Black Administration Act 38 of 1927 and the regulations made under the authority of the Act, especially reg 2 of 6 February 1987 promulgated in *Government Gazette* 10601 as Government Notice (5) R200. This regulation provides for customary law to apply to the devolution of the estate of a black

person who dies intestate. The most important customary law rule is the one of male primogeniture in the customary law of succession in terms of which only first-born or precedent males may inherit in cases of intestacy, to the exclusion of females and junior males.

First respondent claimed that he has no responsibilities toward applicant, either to house her or to maintain her and her daughter; denied the existence of a customary marriage between the applicant and his son and rejected any suggestion that the applicant and her daughter were part of his family. In her reply, the applicant produced witnesses and documents to prove the existence of a valid customary marriage between herself and the deceased, including the information that *lobolo* was formally fixed at R2,000 and that by the time of his death, her deceased husband had paid R900 towards this sum.

The first respondent relied mainly on the argument that there was no valid customary marriage between his son and the applicant and that consequently she neither has any rights as a wife in this matter nor does he owe her and her daughter any obligations.

### **The decision and reasons for judgment**

The court found that the customary law rule excluding women from inheritance is *prima facie* discriminatory on the grounds of sex or gender but not unfairly so because of the concomitant duty of support. Mindful that the constitutional issue (unfairly discriminatory on the grounds of sex or gender) might assume a different complexion if the facts revealed that there had been no customary marriage between applicant and deceased, Le Roux J realized that the concomitant duty of support would cease to be a consideration and the investigation into the constitutionality of the rule would have to take different factors into account. The court accordingly referred the matter for the hearing of oral evidence on: (a) whether there was a valid customary marriage between the applicant and the deceased; or (b) whether a putative marriage under customary law existed between them.

**Mthembu v. Letsela and Another 1998 (2) SA675 (T)****The legal question that was answered by the court:**

Whether a customary marriage existed between Mthembu (applicant) and Letsela (deceased) and whether Tembi (daughter) was a legitimate child

The hearing of oral evidence took place in August 1997 in a case presided over by Mynhardt J. Neither the applicant nor the first respondent adduced any evidence and the application was accordingly determined on the basis that no customary marriage existed between Mthembu and the deceased and that Tembi was therefore illegitimate.

On the question of the court 'developing' customary law in line with the spirit, purport and objects of the Bill of Rights, applicant's counsel made a strong case for customary law to be coaxed towards equality, which is a value fundamental to the Constitution.

Arguing that the issue of discrimination on the grounds of sex or gender is 'academic' in this case because the real reason for Tembi's disqualification from inheritance is her illegitimacy, the Court refused to 'develop' customary law in the direction suggested.

**The reasons for judgment**

"In the present case I therefore decline the invitation to develop the customary law of succession which excludes women from participating in intestacy and which also excludes children who are not the oldest male child. In any event, because the development of that rule, as proposed by Mr Trengrove, would affect not only the customary law of succession but also the customary family law rules, I think that such development should rather be undertaken by Parliament.

**The decision of the court**

The Court dismisses the application with costs, and grants leave to appeal.

***Mthembu v Letsela and Another 2000 (3) SA 867 (SCA)*****The legal question that was answered by the court:**

An appeal against the decision of Mynhart J who dismissed the application to declare that a customary marriage existed between applicant and the deceased and declared that Tembi was a legitimate child

Justices of Appeal Smalberger, Marais, Zulman and Mpati, and Acting Justice of Appeal Mthiyane heard the appeal on 4 May 2000 in the Supreme Court of Appeal. Counsel for the appellant raised the same four grounds of attack against the customary law rule of male primogeniture which had been dismissed by Mynhardt J in the court *a quo*. He stated, however, that he would not advance oral argument in respect of the first two grounds and would instead concentrate on the last two grounds which were based on the proposition that:

1. Tembi would have succeeded by intestate succession at customary law to her deceased father's estate but for the fact that she is female, and that
2. the customary law rule of primogeniture is offensive to public policy or natural justice (within the meaning of s 1(1) of the Law Evidence Amendment Act, 1988).

### **The reasons for judgment**

The Court dismissed both arguments and went on to consider the invitation to develop customary law according to the 'spirit, purport and objects' of the Bill of Rights. On this point, counsel for the appellant had argued that the customary law rule was based on 'inequity, arbitrariness, intolerance and inequality,' all of which are repugnant to the new constitutional order. The Court was urged to develop the rule so that it sheds its discriminatory elements and allows male and females, legitimate and illegitimate, descendants to inherit.

The court was not convinced, arguing that Tembi was excluded by illegitimacy not gender and that it was undesirable to pronounce on such an important constitutional question in a case in which the issue was academic.

### **The decision of the court**

The appeal was dismissed on all four grounds.

### **Own comment on customary values and the Constitution**

The place of this case in history is assured for the simple reason that it fielded the first salvo in what was to become a sustained battle against the primogeniture rule which was to culminate in the case of *Bhe*. Several points about the *Mthembu* cases are worth noting.

- i. Some of the earliest criticisms of the outcome in *Mthembu* were based on concerns that the court did not give enough weight to the distinction between official customary law, on the one hand, and day-to-day community practice, on the other. At the time, under attack was the conclusion of Le Roux J that the concomitant duty of support attaching to the heir's right to take all the property to the exclusion of girls and women had the effect of 'saving' the customary law rule from constitutional attack. This was because the duty of support rendered the discrimination not to be unfair.

This criticism is justified but the point usually overlooked is the impact of the approach of the court. In deciding to assess an African customary practice on its own merits without assuming its inferiority to some other "mainstream" notions of propriety, the court sent a strong signal about the future of customary law in a constitutional dispensation.

- ii. The failure to recognise the existence of a marriage between Hleziphi Mthembu and the deceased was another lost opportunity – this time to force the issue of the existence of a marriage so as to ensure the centrality of the real constitutional issue, sex and gender, as opposed to illegitimacy. The point could have been canvassed more forcefully, with a fair chance of success.

One must always be mindful of that important truism in customary law: 'African customary marriage is a process, not an event'. According to many systems of customary law a relationship between a man and a woman 'ripens' towards marriage on the occurrence of a number of events, formal and informal, intended or inadvertent, and the reaction of the couple's families to those events. Among the events and occurrences are: discussions about *lobolo*, delivery of marriage goods, cohabitation, pregnancy or the birth of a child.

All these fundamentals exist in the case of the applicant and the deceased. The crisp legal question then becomes: "what is the applicable legal system and, according to that legal system, do these fundamentals constitute a valid customary marriage?" The judgement in the first Mthembu hearing reveals that the applicant is Zulu and the deceased was of South Sotho stock. It would have been worth exploring the rules in these two systems to see whether a valid customary marriage comes into existence, in either system, in the circumstances set out above, despite the protestations of the first

respondent. As things have turned out, a feeling persists that a potentially fruitful avenue in inquiry has been blocked by (or surrendered to) the first respondent, who had the clearest material motive for denying the existence of the marriage.

(b) *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported), The court held:

Once it is clear that the negotiations have taken place, the next inquiry, applying the Act is whether there are any factors that show that the marriage was “entered into” or “celebrated”.

The validity of a customary marriage was impuned on the basis that the traditional *imvume* ritual, the Zulu variation of *ukumekeza* (Swazi), for integrating the bride into the groom’s family, had not been observed before the death of the husband. Tshiqi J examined the requirements for a valid customary marriage as laid down in section 3 of the Recognition of Customary Marriages Act.

On the basis of these requirements the judge concluded that customary marriage has evolved over the years, and that this evolution has been accepted by the South African courts. The judge then rejected the pre-transformation “official” version of customary law which held that the non-observance of the *imvume* ritual was fatal to the validity of a customary marriage. The judge accordingly approved the validity of the customary marriage, confirming the bride’s averment that the *imvume* practice was not an essential requirement for the validity of her customary marriage.

The case of *Motsoatsoa v Roro* All SA 324 (GSJ) is important for emphasising the value of integration of the bride to mark the transfer from one family to another. The case is important for understanding the meaning of 'entered into' or celebrated in section 3(1)(b) of the Act. What was in issue here was lack of handing over of the bride. The question was: can the woman hand herself over? *Fanti v Boto and Others* 2008 (5) SA 405 (C) also does the same thing but focuses on the importance of involvement of the two families in the formation of the customary marriage. The question was: can the husband decide, without the involvement of his in-laws, that their daughter is now his wife?

©*Ngwenyama v Mayelane* 2012(10) BCLR 1071 (SCA) and *Mayelane v Ngwenyama and Another* 2013 (8) BCLR 918 (CC)

**The legal question that was answered by the court:**

- i. whether Section 7(6) of the RCMA did indeed introduce a new requirement of validity by requiring the husband to seek his first wife's consent;
- ii. if not, whether such consent was required in Xitsonga customary law; and
- iii. whether, if such consent had not been furnished, the court ought to develop the customary law to insert this requirement.

The issue was the interpretation of section 7(6) of the RCMA: whether, in requiring a husband who wants to marry another wife to make certain proprietary arrangements it introduces (by the back door, as it were) another requirement for the validity of a customary marriage.

Ms Mayelane and Ms Ngwenyama both claimed to be married by Xitsonga customary law to one Mr Moyana, now deceased. After Mr Moyana's death Ms Mayelane, the first wife, challenged the validity of Ms Ngwenyama's marriage on the ground that the RCMA required a husband to obtain the consent of his first wife to contract a valid further customary marriage, and that Mr Moyana had not obtained such consent.

The High Court found the Mr Moyana's further marriage to Ngwenyama to be invalid for not complying with section 7(6) of the Recognition Act. It left the matter of the requirement of the first wife's consent undecided. Ngwenyama appealed to the SCA.

***Ngwenyama v Mayelane 2012 (10) BCLR 1071 (SCA)***

The court heard an appeal from the decision of the high court that declared Ngwenyama's marriage to her deceased husband invalid because the latter did not apply to court to get its approval for the contract regulating the matrimonial property of the spouses before marrying her as the second wife in terms of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998.

The SCA looked at the question before court as to whether a further marriage such as Ngwenyama's that was negotiated, entered into or celebrated without a prior court approval of a section 7(6) contract was valid or not.

The SCA' approach was to examine the provisions of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 to establish whether their non-observance could have had a bearing on the validity of a customary marriage at all. This was in view of the fact that

ordinarily the validity of the customary marriage is regulated by section 3 of the Act; and section 7(6) regulates regimes of matrimonial property only.

### **The reasons for judgment**

The SCA, per Ndita AJA, concluded that section 7(6) of the Recognition Act was only concerned with matters of matrimonial property, and had nothing to do with the validity of the customary marriage which was regulated by section 3 of the Act. The SCA held accordingly that the non-observance of the section 7(6) did not affect the validity of the customary marriage. At most, such non-observance left the customary marriage out of community of property. According to the SCA the purpose of the Recognition Act is to protect all women, not just a particular woman. The SCA did not find it necessary to determine whether the consent of Mayelane, as the deceased's first wife was required for the validity of Ngwenyama's marriage to the same husband.

### **The decision of the court**

The court upheld the appeal.

### **Own comment on customary values and the Constitution**

The SCA's determination that the non-observance of the provisions of section 7(6) of the Recognition Act does not affect the validity of the customary marriage is to be commended as such matters are clearly dealt with by the provisions of section 3. Consequently it held that the marriage of Ngwenyama to her deceased husband was valid despite the non-observance of the provisions of section 7(6) Recognition Act. It emphasised that the purpose of the Recognition Act is to protect all wives, not just the first wife. As there was no suggestion that section 3 Recognition Act which deals with issues of validity was not complied with, there was no basis for invalidating the marriage.

However, the SCA's refusal to inquire into the impact of the lack of the first wife's consent to her husband's further marriage to another woman is to be lamented because the high court had already found that lack of such consent was problematic. The SCA therefore erred in holding that because the validity of Ngwenyama's marriage was not invalidated by the deceased's failure to comply with the section 7(6) provisions, it was therefore not necessary to investigate the role of the first wife's consent.

***Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC)****The legal question that was answered by the court:**

Mayelane appealed to the Constitutional Court against the decision of the SCA.

**The reasons for judgment**

The Constitutional Court found it necessary to investigate whether the relevant Xitsonga custom allowed the deceased to marry Ngwenyama as a second wife without first obtaining the consent of his first wife, Mayelane. The court's approach was to collect affidavits from the community about the need for the husband to obtain his first wife's consent to her husband's further marriage to another woman. The court's majority held that the Recognition Act did not contain a requirement for the first wife's consent and that Xitsonga customary law did not have a uniform rule in this regard. The court decided in these circumstances to develop Xitsonga customary law to include the rule that the first wife's consent to her husband's further marriage to another woman is a requirement for the validity of a further marriage. The consequence was that non-compliance with the rule would result in the attempted subsequent marriage being invalid. Unfortunately the court, in the absence of a uniform customary law rule on consent, chose the one requiring consent, not the other. Having done that the Constitutional Court developed the version of Xitsonga customary law it favoured and gave it the stamp of the Constitution.

**The decision of the court**

Accordingly, the Constitutional Court, per Fronemann J, upheld the appeal, concluding that Ngwenyama's marriage to her deceased husband was invalid since it was irregularly entered into without the necessary consent of the first wife.

**Own comment on customary values and the Constitution**

The minority judgments of Zondo J and Jafta J are instructive in assessing the performance of the Constitutional Court's majority decision in this matter. Both justices take issue with Foremann J's approach in taking a lot pains collecting evidence to prove what was already clearly established on record. According to Jafta J Mayelane's evidence that her deceased husband never sought and obtained consent to marry Ngwenyama was never refuted by the latter. Foremann J should therefore have accepted this fact as established, instead of calling for further evidence. Lacking consent, which is necessary according to the particular community's

tradition in terms of the unrefuted evidence, means that the subsequent marriage was not negotiated and entered into or celebrated in the manner required by custom.

## **Section B The development of the Customary law of Succession**

### **Apply the provisions of the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 to test the validity of the following judgments**

(Remember to start case discussions properly by giving the **names of the parties**; the **legal question** that was answered by the court, the **reasons for judgment** (*ratio decidendi*) given by the court and the **decision** of the court).

- (a) *Mthembu v Letsela and Another* 1997 (2) SA 936 (T), *Mthembu v Letsela and Another* 1998 (2) SA 675 (T) and *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA). See section A above.
- (b) *Bhe* cases (*Bhe v The Magistrate Khayelitsha* 1998 (3) 2004 (1) BCLR 27 (C), *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC), See section C below.
- (c) *Nwamitwa v Philia and Others* 2005 (3) SA 536 (T); *Shilubana cases (Shilubana and Others v Nwamitwa* 2007 (2) SA 432 (SCA) and *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC).

### **The legal question that was answered by the court**

Philia Shilubana, of the Valoyi traditional community, in the Limpopo Province of South Africa, was not appointed as a traditional leader (hosi) of her people when her father died in 1968. As a woman she could not be appointed due to the laws of unfair discrimination at the time. Instead her father's brother, Richard Nwamitwa, was appointed as the traditional leader (hosi). When the latter died in 2001, the Valoyi Traditional Authority took a resolution to appoint Philia Shilubana as the traditional leader (hosi) relying on the constitutional provision for gender equality which motivated the community to adapt its rules. This resolution amended the past practice of the community which indicated the eldest son of the previous hosi as the successor to his father as the new traditional leader (hosi). Sidwell Nwamitwa, Richard Nwamitwa's son, sought to dispute Philia Shilubana's appointment, relying on past practice based on his purported right as the eldest son of the previous hosi.

**The decision of the court**

The matter was decided in favour of Sidwell Nwamitwa in both the High Court and the SCA, in terms of the community's past practice.

***Shilubana v Nwamitwa 2008 (9) BCLR 914 (CC)*****The legal question that was answered by the court**

The case was eventually taken on appeal to the Constitutional Court.

**The decision of the court and reasons for judgment**

In a unanimous judgment, the Court decided that Ms Shilubana was legally appointed as the legitimate traditional leader (hosi) of the Valoyi people. The Court emphasised the fact that customary law is a living system of law. As such it was not bound by historical precedent. Its flexibility allowed it to evolve as its community changed. Once it was clear that the contemporary practices of the community have replaced its past practices, the latter no longer applied.

Because of this, the Constitutional Court deviated from prior decisions that had served as a test for determining the content of customary law even though they indicated long-standing and historical practices. Instead the Court redefined customary law as a system that reflected the current practices of the particular community. Living customary law came to be defined with reference to the constantly evolving practices that indicate the current system of norms by which that community has chosen to live.

The Constitutional Court held that the customary law regarding the appointment of a traditional leader (hosi) had legitimately evolved to allow for the appointment of a woman as a traditional leader (hosi) and that this development was consistent with the Constitution. After finding that Philia Shilubana had been validly appointed the Constitutional Court upheld the appeal, thus confirming her appointment as a traditional leader (hosi) of her Valoyi community.

Bear in mind that this was after this particular community (Valoyi community) had decided to adapt its laws consistently with the Constitution. Other communities will be judged according to their own contemporary practices.

## **Own comment on customary law values and the Constitution**

The Constitutional Court very well endorsed the community's right to develop their law, thus protecting their right to develop their culture. In doing so the court unfortunately destroyed the rule regulating the customary law of succession from one generation to another. The Constitutional Court ignored that according to customary law, lineage is important and that the position of successor must be held by someone capable of producing a future Nwamitwa heir. In appointing Philia, the court should not have left future succession hanging. It should have made it clear that it was doing so because of her status as a princess, and add that in order to uphold lineage of the Nwamitwa royal line, after her death the position would revert to a qualifying Nwamitwa prince/princess. Therefore, the court did a good thing (promoting gender equality) and (not so good as it failed to promote culture).

## **Section C The development of living customary law under the Constitution**

### **Apply the evolving principles in post-apartheid customary law**

(Remember to start case discussion properly by giving the **names of the parties**; the **legal question** that was answered by the court, the **reasons for judgment** (*ratio decidendi*) given by the court and the **decision** of the court).

*Mabuza v Mbatha* 2003 (7) BCLR 43 (C) *Mabena v Letsoalo* 1998 (2) SA 1068 (T)

These two cases are about how the courts have negotiated the transition from the old order to the present. *Mabuza* demonstrates the transition from a society that defined customary marriage with reference with reference to the elaborate *ukumekeza* tradition that was best suited to the previous rural set-up, and that it is no longer necessary in the current urban conditions. *Mabena* is about how independent and adult youths have been empowered to negotiate their own customary marriages; and that the involvement of their fathers is no longer essential for this purpose. As the law lived by communities in actual current social practice, living law endorsed after the court looked at the current situation in the country. These cases can also illustrate the extent of transformation in the law of marriage as well, especially the issue of validity. See also *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) where the court held that even though the integration of the bride might not have been observed, but the spouses themselves showed by the way they related to each other that they accepted that they were husband and wife. Therefore, in a

difficult case, where, after the negotiations have been completed, the requirements of "entered into or celebrated" cannot be proved, the behaviour of the spouses towards each other becomes important.

*Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) is proof that customary law and common law are equal components of South African law and the time when customary law was viewed with reference to common law was over. The current status of customary law is that of an original and independent system that has its own values and norms.

*Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) is authority for ascertaining the applicable customary law. You find it by looking at the community's past practice, which is their customary law. Past practice continues to apply until it is clear that such practice has changed. In the latter event one must look at the current social practice to find the applicable customary law. It is also important to note that section 211(2) of the Constitution empowers communities to make and amend their laws. In *Shilubana* this was done by an amendment in which the community aligned their law with Constitution, making females equal to males for the purposes of appointment to traditional leadership positions.

*Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC)) is authority for jettisoning the discredited apartheid rule entrenched in section 23 of the Black Administration Act (BAA), which preferred males to females in matters of succession. As a result, section 23 of the BAA, the principle of male primogeniture; the distinction between legitimate and illegitimate children were all declared unconstitutional and removed from customary law. The court went on to incorporate the provisions of the Intestate Succession Act, 81 of 1987, dealing with child portions. After making the necessary adjustments, all the children of the deceased, legitimate and illegitimate, together with all his widows/widowers must get child portions. **Textbook pages 173-182**

**Understanding customary law in its post-transformation state and contrast it with its pre-transformation state.**

**The following quotation shows you how to describe post-apartheid customary law:**

*Pilane and Another v Pilane and Others* 2013 (4) BCLR 431 (CC) paras 34-35

it is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms. The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs,

On this basis the court held that the traditional authority cannot deny constitutional rights/freedoms to members of the community who wish to enjoy/ exercise them

**You must compare the above with the following quotation from pre-recognition customary law:**

Section 1(1) of the Law of Evidence Amendment Act, 45 of 1988

any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice.

**What is the difference?** – the first quotation emphasises a customary law that is recognised and protected by the Constitution – that is **living, active and dynamic**, and part of the **lives of the people; and** - the second quotation merely refers to *taking of judicial notice*, not **recognition**; it puts customary law at the level of *foreign law*, as opposed to a **vital component of our constitutional system**; it requires customary law to be *proved* before being used (ie *ascertained readily and with sufficient certainty*), as opposed to being applies as in section 211(3) of the Constitution. Lastly, and most importantly, pre-recognition customary law was used, not as of right, but subject to a condition, namely: *Provided that indigenous law shall not be opposed to the principles of public policy or natural justice*. In other words, there was a suspicion that indigenous law might be contrary to good morals if used unchecked. When you notice that the italicised phrases were never used in describing the common law you will realise that these two components of South African law were never treated with equality in the past.

**Section D The indigenous normative values of customary law found in concepts such as ukufakwa, isondlo and others that indicate the centrality of ubuntu in African traditions, See Textbook pages 188-194; the study guide pages 81-84;**

1 Study the elements of concepts ukufakwa, isondlo and others to determine the operation of such features of *ubuntu* such as communal living, group solidarity, shared belonging, collective ownership, the ethos of co-operation and the ethic of reciprocity.

The features of *ubuntu* in the *ukufakwa* institution

*Ukufakwa* entails a situation where a relative of a woman's father, namely, brother, uncle, cousin, nephew, you name it, takes the responsibilities of the father and ensures that the customary traditions and ceremonies related to the initiation and/or marriage of the father's daughter are carried out as if the relative himself was the father. This entitles the relative to a *pro rata* portion of the value of the *lobolo* goods expected from the marriage goods deliverable when the daughter gets married, or received as fines imposed as a result of delicts committed on that daughter.

The relative thereby gets entitled to such portion as of right, directly from its source (that is, as the goods are identified for delivery as *lobolo* goods the relevant portion already at that stage, belongs to the relative. This is to say, that portion never starts belonging to the father from the beginning and the father does not have access to it. To the extent of this portion, the relative becomes the father of the daughter in his own right. He does not have to claim the portion from the property of the father since it already belongs to him.

That is why if such goods are never delivered for whatever reason the relative does not have a claim against the father. He was never going to receive the goods from the father anyway. In such a case the relative also suffers his share of the 'nothing received'. However, the relative remains entitled to the portion if the goods are eventually received from the marriage goods of any subsequent daughter even if he never contributed to the ceremonies of the latter.

**The attributes *ubuntu* as found in *ukufakwa* include the following:**

**Communal living** is revealed in that relatives are a family and members of one home. They share the joys of unity as well as the pains that go with it. Nobody's nakedness should be exposed. In the same vain no one should be enriched at the expense of another. This is our home, these are our children. We must bring them up together for our collective betterment.

**Shared sense of belonging** is also revealed. No one belongs alone, nor does anyone enjoy wealth alone or suffer poverty alone. *Umuntu ngumuntu ngabantu/motho ke motho ka batho* - a human being derives his/her humanity from other humans. Life is shared. No child must suffer because of the condition of their parents, but must experience the same upbringing as other children. To be meaningful your prosperity must positively influence the condition of your family. The latter must also use their abilities to assist you to assist them.

**Group solidarity:** Your brother's problem is your problem. His shame is your shame. If he fails and gets despised, you are also associated with that failure. If your brother's daughter gets disgraced at her marriage home for falling short of what was expected, her father and his relatives get disgraced more. If she is Ms Khumalo, all her relatives are Khumalo. Nobody can afford to let that name go down. An injury to one Khumalo is an injury to all Khumalos.

**Reciprocity.** The good that you do will be done to you (*izandla ziyahlambana* – the hands wash each other). There is no permanent loss. What is paid out will be paid back. One hand washes the other. Nobody should be reluctant to help others because the others will also be pleased to reciprocate in future. A good deed is an investment. When you assist the niece it looks like you are losing, but you receive the goods later the favour is returned. Ubuntu requires you to send your sister's children to university. It also requires those children to assist you in old age.

**Collective ownership of assets.** Brothers belong to a home which is the real owner of their productive activities. This is a Khumalo home to whose growth and development all the Khumalos can and must contribute. After all, one Khumalo's cattle, are the cattle of all the Khumalos. All Khumalos claim: 'these are our cattle' (*zinkomo zakuthi ezi*). The cattle are a collective Khumalo fund. What I pay out is paid out from the Khumalos' fund (albeit administered by me), and what I receive is received by me into the Khumalos' fund. Our individual and collective efforts are directed at upholding this name, which is who we all are. The daughter's ceremonies are still financed by the Khumalo home, regardless of the particular individual who is the father or his brother.

This list is not exhaustive. You may also add the attributes of generosity, respect, responsibility, accountability, trust, honesty etc. All these features and many more can be found in the attribute of good living found in the institution of *ukufakwa* institution which urges humans (particularly relatives), to extend a hand of brother/sisterhood through the sharing of joys and pains for their collective good. This is what *ubuntu* is all about – to live your life selflessly and for others, who also live theirs selflessly for you, and for the world. In *ubuntu* we see rules of good living.

## **The family head's liability**

Evaluate the concept of communal legal personality in terms of which the corporate family home as represented by the family head is liable for individual family members' delictual and contractual obligations and the impact of the notion of majority age as entrenched in the Children's Act 38 of 2005 on this liability since the indigenous principle of primogeniture and the constitutional right to equality co-exist in our law.

2. In answering this question, you must display knowledge of the position occupied by the family head in relation to the other members of the family and how this affects everyone's legal personality. This must be understood in the context of the notion of collective ownership of property, which circumscribes the family head's dealings with the family estate and its assets. This background must feature in the analysis in family relations governing liabilities against and claims for damages in the event of delicts committed and contracts breached by members of the family as well as similar wrongs committed against them. Higher marks will be earned if the application reflects an appreciation of the values that underpin this relationship such as communal living, a shared sense of belonging and fraternal solidarity. You must point out that the Children's Act 38 of 2005 makes everyone a major at 18 years. Whilst this is so, a lot of such teenagers still live with their parents and are subject to family orders and discipline.

See you there!!!