

The *lobolo* agreement as the “silent” prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act*

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OPSOMMING

Die *lobolo*-vereiste as “stilswyende” vereiste vir die geldigheid van ’n gebruiklike huwelik ingevolge die Wet op Erkennung van Gebruiklike Huwelike

Dit is tans onduidelik of die betaling en lewering van *lobolo* ’n vereiste vir die geldigheid van ’n gebruiklike huwelik is. Anders as in die oorspronklike inheemse reg waar die huwelik en die verskaffing van *lobolo* onlosmaaklik was van mekaar, word die verskaffing van *lobolo* nie direk as ’n geldigheidsvereiste gestel deur die Wet op Erkennung van Gebruiklike Huwelike nie. Hierdie artikel betoog dat die *lobolo*-ooreenkoms wel as ’n stilswyende geldigheidsvereiste deur artikel 3(1)(b) van die Wet gestel word.

1 INTRODUCTION

It is currently not clear whether the payment and delivery of *lobolo* is a legal prerequisite for the formation of a customary marriage. Unlike in original customary law where the marriage was inseparable from the payment and delivery of *lobolo*, the rendering of *lobolo* is not directly specified as a requirement for the validity of a customary marriage in the Recognition of Customary Marriages Act¹ which came into effect on 15 November 2000. Section 3 provides for the requirements for the validity of a customary marriage and section 3(1)(b) provides that “the marriage must be negotiated and entered into or celebrated in accordance with customary law”. It is submitted that when determining what is “in accordance with customary law”, one must conclude that the *lobolo* agreement is in fact a silent requirement for the validity of a customary marriage in terms of section 3(1)(b). This section insists only on a very general requirement. It is submitted that the words “negotiated and entered into or celebrated” in accordance with customary law are indicative of the fact that this requirement

* Revised version of a paper presented at the annual Conference of the Congress of the Society of University Teachers of Law, University of Namibia, Windhoek, 30 June – 3 July 2003.

1 Act 120 of 1998 (“the Act”).

extends far beyond the wedding ceremony, and therefore require a thorough and careful examination of the custom and law as it is understood by the people who live in accordance with it.

One of the main features of a customary marriage is that it usually involves the payment of *lobolo*. This, *inter alia*, is one of the most crucial features that distinguish civil law marriages from African customary law marriages. This article attempts to define the custom of *lobolo* from a traditional perspective and attempts to correct legal misinterpretations surrounding it. Further, following the introduction of the Act, it is not clear whether payment of *lobolo* is a legal requirement for the validity of a customary marriage. Although the South African law does not expressly make the payment of *lobolo* a legal requirement for the validity of a customary marriage, it is submitted that the Act, which applies nationally, tacitly requires that the *lobolo* be given in order for the customary marriage to be valid, or at the very least, that there must be negotiations and agreement concerning payment and delivery of *lobolo* or an agreement not to pay any *lobolo* at all.² That is, the family group must reach a specific agreement on the amount of *lobolo*, or alternatively agree that no *lobolo* will be paid. Furthermore, this article discusses and evaluates the purpose, role and significance of the *lobolo* custom in African customary law in support of the conclusion that an agreement concerning payment and delivery of *lobolo*, is a silent prerequisite for the validity of a customary marriage according to section 3(1)(b) of the Act.

2 THE MEANING OF LOBOLO

The definition of *lobolo* is necessary to illustrate that the *lobolo* custom is not an agreement of purchase and sale. The understanding of the meaning of *lobolo* within the context in which it is practised, negotiated and delivered, explains its necessity as a prerequisite for a customary marriage within the meaning of section 3(1)(b) of the Act. *Lobolo* may be defined as

“an agreement between the family group of the prospective husband and the family group of the prospective wife that on or before the marriage ceremony, there would be the transfer of property from the family group of the husband, to the family group of the wife in respect of the marriage”.³

From this definition, the following conclusions are inevitable: First, *lobolo* is given in property as opposed to mere payment of money. Second, *lobolo* is delivered in respect of the marriage, and not as payment for the wife. Third, the prospective husband is, in most cases, not the person who gives *lobolo*. *Lobolo* is

2 S 3(1)(b) insists only on the very general requirement for the validity of a customary marriage that the marriage “must be negotiated and entered into or celebrated in accordance with customary law”.

3 Note that s 1(1) of the Natal Code of Zulu Law (Notice R151 of 1987) adopts a similar definition. According to this section *lobolo* means “cattle or other property which in consideration of an intended customary or civil marriage the intended husband, his parent or guardian or other person agrees to deliver to the parent or guardian of the intended wife”. S 1 of the Act provides a similar definition: “Lobolo means the property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage.”

delivered to the prospective wife's family group on the man's behalf by his family group in respect of his marriage to his first wife.⁴ Fourth, the prospective wife is not the recipient of *lobolo*, but her family group is.

Today *lobolo* is likely to be "paid" in either money or property, or both.⁵ It is certainly not feasible to deliver certain types of *lobolo* in "cash", especially where specific property is needed for the performance of mandatory wedding rituals before or during the celebration of the marriage.⁶ There is no direct translation of *lobolo* into English or any other non-African language.⁷ The views espoused by those who did not understand the custom was that *lobolo* represented the purchase of the wife, and consequently the best English term for *lobolo* would inevitably be the "brideprice" or "bridewealth".⁸ Whatever *lobolo* may be called in other languages, the above definition does not reflect any form of a commercial transaction between any of the parties involved in the *lobolo* agreement.

3 THE CUSTOMARY SIGNIFICANCE OF LOBOLO

An understanding of the customary significance of *lobolo* is necessary, especially because traditionally, *lobolo* is not only a practice that precedes the customary marriage, wedding and other related ceremonies, but it is itself regarded as a "marriage". Dlamini observes that "blacks in general are unable to regard a relationship as a marriage even if there can be compliance with all legal requirements if *lobolo* has not been delivered or an agreement for its delivery concluded".⁹

A man who failed to deliver at least part of the *lobolo* could not be regarded as a "husband" in African societies. Therefore, it seems that traditionally, there could be no conclusion of a valid marriage without the delivery of *lobolo*.¹⁰ It is generally agreed that modern Southern African communities still put a considerable degree of importance on the *lobolo* custom as an ingredient of a valid customary marriage.¹¹

4 This creates a quasi-contractual alliance between the two families. The alliance need not be expressly agreed upon – it is created by virtue of the marriage.

5 In some communities *lobolo* could also consist of other livestock or even other goods or implements. In modern times the amount of the *lobolo* is often calculated in terms of money, but the amount stipulated is usually the value of an agreed number of cattle.

6 Eg, the Basotho communities must perform *ho hlabisa bohadi*. This is a mandatory feast provided by the wife's family group, to mark the receipt of half of *lobolo* due to them, or more than 10 *lobolo* cattle (whichever is the greater) and to fulfil the marriage contract.

7 *Lobolo* is also known in other African languages as *bohadi*, *bogadi*, *bohali*, *munywalo*, *ikhazi*, *rovoro*, etc.

8 See Bennett *A sourcebook of African customary law for Southern Africa* (1991) 196.

9 See Dlamini "The modern legal significance of *ilobolo* in Zulu society" 1984 *De Jure* 148 149.

10 According to Bekker *Seymour's customary law in Southern Africa* (1991) 107 "[t]he rendering of *lobolo* . . . is the major essential of the customary marriage. Such phrases as 'there can be no customary marriage if there are no cattle with the girl's guardian' are essentially correct statements of law". See also *Lutoli v Dyubele* 1940 NAC (C&O) 78 80; and *Matholo v Moquena* 1941 NAC (C&O) 17.

11 Bennett *Human rights and African customary law* (1995) 118 noted that "[t]o the African way of thinking, the most important ingredient of a valid marriage is bridewealth, the time-honoured practice that gives the union its distinctively African character". Further, according

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The modern continuation of the practice of the *lobolo* custom is likely to be persuasive to the courts when interpreting section 3(1)(b) of the Act. The courts should be wary of complacently relying on the official customary law codes. Thus, the courts should undertake a careful examination of the customary law as it is understood by the people who live in accordance with it, in order to apply what is genuinely the law of that community. According to Bennett:¹²

“Customary law is mainly about the family. We should therefore be justified in expecting it to reflect, in some measure at least, any changes that may have occurred in the African family structure and function. Yet in South Africa customary law is disturbingly out of harmony with social reality. This is because the state’s attitude to intervention in African family affairs was (and still is) quite different to what it was in the case of European families.”

The same view was expressed in *Mabena v Letsoalo*¹³ where the court distinguished a “living” system of customary law from an official system of customary law. Thus the court found that the groom could negotiate *lobolo* with his prospective wife’s mother (as opposed to the father).

4 THE LAW CONCERNING *LOBOLO* IN SOUTH AFRICA

4.1 The law before 1927

Although *lobolo* was previously prohibited by various colonial legal systems that existed before 1910,¹⁴ legislation now expressly provides that *lobolo* may not be deemed contrary to public policy by any court,¹⁵ and hence *lobolo* transactions are recognised as legally valid, provided they comply with the general principles of the law of contract.¹⁶ The *lobolo* agreement, as explained above, involves an agreement between the family groups concerned for the transfer of property from the family group of the husband, to the family group of the wife in respect of the marriage.

In the past, the *lobolo* transaction was often regarded as inconsistent with civilised principles. Some people viewed the *lobolo* custom as immoral and akin to the purchase and sale of a woman for marriage. This view, which was based on a misunderstanding of customary law, caused certain colonial governments to refuse to recognise *lobolo* agreements.¹⁷ As early as 1895 the Superintendent of

to Bekker (fn 10) 151 “[*lobolo* is the rock on which customary marriage is founded; there is considerable justification for the view that a *lobolo* contract has a greater binding force than a marriage at common law”.

¹² See Bennett *Sourcebook* 145.

¹³ 1998 2 SA 1068 (T) 1074–1075. The court observed: “There is no reason to hold that an independent, adult man is not entitled to negotiate for the payment of *lobolo* in respect of his chosen bride, nor is there any reason to hold that such a man needs the consent of his parents to marry. That this is how the customary law has developed is evident from what Seymour and Olivier write . . . It is accordingly held that the fact that the appellant did not consent to the marriage under discussion has no effect on the validity of the marriage. By the same token his lack of involvement in the *lobolo* negotiations is of no consequence.”

¹⁴ Transvaal Law 3 of 1876.

¹⁵ S 11(1) and (2) of the Black Administration Act 38 of 1927, deleted by s 2 of Act 34 of 1986, reproduced in s 1 of the Law of Evidence Amendment Act 45 of 1988.

¹⁶ See generally ss 58–68 of the Natal Code of Zulu Law, 1987 that regulates the payment of *lobolo*. See also s 4(4)(a) of the Recognition of Customary Marriages Act.

¹⁷ In the Transvaal, eg, Law 3 of 1876 declared that “in furtherance of morality the purchase of women or polygamy among Natives is not recognised in the Republic by the law of the land”.

Natives issued a circular to the effect that “the purchase of women for money or cattle was contraband dealing upon which the Native Courts could not adjudicate”.¹⁸

4 2 The law after 1927

The *lobolo* agreements are now sanctioned by laws dealing with aspects of customary law such as the Law of Evidence Amendment Act,¹⁹ the Recognition of Customary Marriages Act²⁰ and the Natal Code of Zulu Law.²¹ These laws allow the practice and recognise it as a valid contract, provided that the original contract is based purely on customary law that is not perceived to be unconstitutional²² or contrary to public policy.²³ Thus, apart from the isolated abuses of the custom which may be found in some parts of Africa, in South Africa blacks generally do not regard a woman as a chattel or property which is capable of ownership. In any event, the *lobolo* agreement and its legal consequences differ completely from the common law contract of purchase and sale. The wife is never sold merely as a chattel, and the husband cannot resell her as such or destroy her as if she was his personal property.²⁴

In 1927 section 11 of the Black Administration Act²⁵ provided for the legal recognition of *lobolo* transactions. This section was repealed, but the identical provision was re-enacted in 1988 by section 1(1) of the Law of Evidence Amendment Act²⁶ which provides as follows:

“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: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.”

Although *lobolo* was an essential requirement for the formation of a customary union in traditional society, and is still extensively practised, it is no longer an express essential prerequisite for the formation of a valid customary union under the Recognition of Customary Marriages Act. *Lobolo* seems to be understood by lawyers and courts to be a separate and ancillary contract to the customary marriage, bearing no legal significance to the validity of a customary marriage.²⁷

18 A similar attitude existed in the East African case of *Rex v Amkeyo* 7 EALR 14 in which in 1917 Sir Robert Hamilton CJ used the expression “a so-called marriage by the native custom of wife-purchase”, and based his judgment on the view that this custom did not “approximate in any way to the legal idea of marriage”.

19 Act 45 of 1988.

20 See in particular ss 1, 8(3)(b) and 4(4)(a).

21 Particularly ss 58–66.

22 The courts must apply customary law when it is applicable, subject to the Constitution. See s 211(3) of the Constitution of the Republic of South Africa Act 108 of 1996.

23 See s 1 of the Law of Evidence Amendment Act.

24 S 107 of the Natal Code of Zulu Law, which provides expressly that African women are not to be treated as chattels.

25 Act 38 of 1927.

26 This reform involved the repeal of s 54A(1) of the Magistrates’ Courts Act 32 of 1944.

27 *Mabena v Letsoalo* 1998 2 SA 1068 (T). See also *Mthembu v Letsela* 2000 3 SA 867 (SCA) 878. Mpati AJA distinguished *lobolo* as a separate agreement from a customary marriage: “In my view, counsel’s interpretation of this passage is incorrect. The learned writer speaks of the crucial element ‘in the marriage’ which transfers the child into the

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It is submitted that this is an incorrect interpretation of the current law dealing with the *lobolo* agreements concerning customary marriages. Of course, that view would be correct concerning civil marriages between African people. The correct approach was summarized by Ngwenya J in *Bhe v Magistrate, Khayelitsha*²⁸ in the following terms:

“[T]here is one misconception on the part of the third applicant which requires correction. She averred that had it not been the inability of the deceased to pay *lobolo* for her, they would have been married before he died. It has never been a prerequisite under African customary law to pay *lobolo* before marriage is consummated. There must be agreement, however, as regards *lobolo*. It may be deferred as long as circumstances do not permit payment. It is not uncommon that *lobolo* be paid upon the couple’s eldest daughter being *lobolo*’ed. Payment of *lobolo* alone, however, does not mean that the parties are married.”

Section 3(1)(b) of the Recognition of Customary Marriages Act provides that “the marriage must be negotiated and entered into or celebrated in *accordance with customary law*”.²⁹ This section is in fact one of the prerequisites of a customary marriage, but does not indicate how the marriage should be “negotiated” or “celebrated in accordance with *customary law*”. Customary law is defined in the Act as “the customs and usages traditionally observed among indigenous African peoples of South Africa and which form part of the culture of those peoples”.³⁰

It is submitted that the definition of customary law, read with section 3(1)(b), makes *lobolo* negotiations a requirement for the validity of a marriage. Below, some of the “customs and usages traditionally observed” by African communities concerning marriage and *lobolo* are discussed. It is apparent that if these customs are required when the marriage is negotiated and entered into, or celebrated in accordance with the traditional customs and usages of Africans, then *lobolo* must in fact be delivered to the wife’s family group either before, during or after the customary marriage was concluded. Therefore, negotiation of marriage means negotiation of *lobolo* because in traditional societies, *lobolo* and marriage were inseparable.

5 THE PURPOSE OF THE *LOBOLO* AGREEMENT IN A CUSTOMARY MARRIAGE

Various explanations have been given concerning the purpose of *lobolo*. Nevertheless, whatever explanation is given, it must be remembered that a customary marriage creates an alliance not only between husband and wife, but also between their respective family and kinship groups. The custom of *lobolo* provides the bedrock on which this collective aspect of African marriages is based. This aspect in turn gives rise to reciprocal rights and duties amongst the family groups concerned, and the purpose of the *lobolo* agreement may then be explained in terms of these rights and duties. There are various rights and duties that arise solely because there has been a marriage concluded between two parties, and

father’s family as being payment of bridewealth or part of it. There must thus be a marriage (customary union) and not merely payment of bridewealth or part of it for the child to be ‘transferred’ into its father’s family . . . It follows that, although part of the bridewealth was paid, without a customary union between her parents, Tembi was not legitimised.”

28 2004 2 SA 544 (C).

29 My emphasis.

30 S 1.

their respective families are automatically obliged to do something, or to refrain from doing something, as the case may be.

Transactions which the husband's and wife's family groups are deemed to have entered into, are listed below. These transactions arise due to the mere conclusion of a customary marriage. The implication is that the marriage is followed by the "alliance" between the two groups. The alliance implies rights and duties, performance of each being due at a specific agreed time. These rights and duties are implied terms flowing directly or indirectly from the conclusion of the marriage and payment of *lobolo* or the agreement not to pay it.

Paragraphs 5 1 to 5 5 below deal with the nature of negotiations; and the rights and duties imposed on the family groups of the husband and wife (or the prospective husband if the wedding is pending) by the *lobolo* and marriage agreements. The discussion of these practices and duties, which form part of marriage negotiations, shows that the marriage negotiations as expressed in the current law require the negotiation of *lobolo*.

5 1 The *lobolo* recipient's duty as a mediator

It has been noted that traditionally the *lobolo* agreement was the cornerstone of the marriage agreement. The *lobolo* agreement implied that the husband, the wife and their respective family groups would fulfil their respective duties underlying the marriage. Failure on the part of any of these parties to fulfil their duties would terminate the *lobolo* agreement and therefore the marriage itself.

It follows, therefore, that traditionally the dissolution of a customary union was dependent on the termination of the *lobolo* agreement. The *lobolo* was, and still is, usually disposed of by the principle that the party who was responsible for the breakdown of the marriage, by breaching the warranty implied on the *lobolo* contract, has to either forfeit or return the *lobolo* delivered in consideration of that marriage. Thus if the husband is at fault, he has to forfeit the *lobolo* delivered on his behalf, and if the wife is at fault, *lobolo* received for her marriage must be returned to the husband's family group, less certain deductions.³¹ If both parties were at fault, the *lobolo* was usually divided between the husband and the wife's guardian. If the parties are not *ad idem* as to how the *lobolo* should be disposed of, they may approach the court for judicial intervention.³² The relevance of *lobolo* on dissolution of a customary marriage is particularly

31 Where the wife was at fault, in terms of Zulu law the following deductions are made from the *lobolo* returnable to the husband family group: (a) One beast for each child born in the course of the union, including illegitimate children (unless repudiated by the husband) and miscarriages. (b) Also two head of cattle are deducted in Kwazulu-Natal in respect of a marriage lasting for a long period, for the services of the wife. In Kwazulu-Natal, the dissolution of a customary union must be accompanied by the return of at least one beast by the wife's guardian or his successor. See ss 51 and 52 of the Natal Code of Zulu Law. See also s 8(4)(e) of the Recognition of Customary Marriages Act that provides that "a court granting a decree for the dissolution of a customary marriage may, when making an order for the payment of maintenance, [shall] take into account any provision or arrangements made in accordance with customary law".

32 See s 8(4)(b) of the Recognition of Customary Marriages Act. The section provides that "a court granting a decree for the dissolution of a customary marriage . . . must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order . . . and must make any equitable order that it deems just".

important because it is at this stage that the recipient of the *lobolo* is required, as matter of law and custom, to attempt to reconcile the parties.

While section 8(4) of the Recognition of Customary Marriages Act provides that on dissolution of a customary marriage the divorce court has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act³³ and section 24(1) of the Matrimonial Property Act,³⁴ it goes on to say that nothing in that section

“may be construed as limiting the role, recognised in customary law, of any person, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court”.

Thus the traditional role of the recipient of *lobolo* as the mediator and protector of the woman for whose marriage he received *lobolo*, is recognised in the Act. For this role to become active, obviously, *lobolo* must have been delivered to that person. Even before the introduction of the Recognition of Customary Marriages Act, and as early as 1883, the general tendency of the lawmakers was to recognise that the primary function of the *lobolo* recipient was to protect the woman whose *lobolo* he received. In 1883 the Cape Commission defined *lobolo* as

“a contract between the father and the intending husband of his daughter, by which the father promises his consent to the marriage of his daughter, and to protect her, in case of necessity, either during or after such marriage”.³⁵

Thus, for instance, a person who received *lobolo* does not only act as mediator in cases involving disputes between the parties, but is also expected to assist in stabilising the marriage by protecting the wife if she is mistreated, deserted or neglected. This illustrates the fact that, in terms of custom, women in fact need the delivery of *lobolo* for their own customary law protection, more than men do. *Lobolo* not only guarantees their protection under customary law, but is also “a public measure of their worth”.³⁶ The words “measure of their worth” have no connotations concerning financial security, but rather social security and the dedication of the prospective husband to conclude a marriage, and to provide for the wife during the marriage.

5.2 The *ukwenzelela* custom

As illustrated above, African customary marriage is in a wider sense a matter that concerns the respective family groups of the husband and wife. Thus, when a man takes his first wife, it is common that his father delivers the greater part of the *lobolo* for the marriage. It is also common for some of the male relatives of his family group, to either voluntarily offer, or be requested to contribute a beast or so towards the *lobolo*. Sometimes a friend will make a contribution of a beast or two, and there is a presumption that cattle so advanced by a relative or friend are intended as a “loan” and not as a gift. This practice is known as *ukwenzelela*. The contribution is not mandatory, but it is likely to take place where a man does not have enough *lobolo* cattle.³⁷

³³ Act 70 of 1979.

³⁴ Act 88 of 1984.

³⁵ Cape of Good Hope Commission on Native Laws and Customs: *Report on proceedings, with appendices of the Government Commission on Native Laws and Customs* (1883) para 70. See also Bennett *Sourcebook* 197.

³⁶ Bennett *Sourcebook* 198.

³⁷ See generally Koyana *Customary law in a changing society* (1980) 72.

If there is no express agreement as to how and when such contributions are to be repaid, they are repayable by the husband from the *lobolo* received for the first married daughter of his marriage. If there is no female issue, the debt is extinguished. This was the true position in traditional law but the courts have held that a contributor may obtain a refund at any time and that it is only when there is an express agreement that he would be paid from the *lobolo* of a daughter, or at some other specified time, that the contributor is obliged to await such event.³⁸ In certain cases the *ukwenzelela* contributions are handed to the father of the prospective husband instead of the prospective husband himself. In such case it is the father of the husband who receives the refund from the first married daughter of the marriage or customary union and then settles with the contributors.

5.3 The *ukwethula* custom

Like the *ukwenzelela*, the *ukwethula* custom is also associated with *lobolo*. *Ukwethula* is defined as

“the customs whereby an obligation is imposed upon a junior house to refund *lobolo* which may have been taken from a senior house to establish such junior house. The *lobolo* of the eldest daughter of such junior house is usually indicated as the source from which the liability is to be met but the custom is not recognised as extending to the handing over of the *ethula* girl herself as a pledge of payment”.³⁹

Ukwethula is therefore an inter-house loan that may take two forms. First, in a polygamous marriage, the husband may “borrow” property from an existing senior house in order to marry another wife and establish a junior house for that wife. Second, the family head may use another “house’s” property⁴⁰ for the marriage of his son belonging to another house in the family. If this happens, the family head is entitled to a full refund of the disbursements from the *lobolo* of the first daughter born of that son’s marriage, and such property would then revert back to the house from which it was borrowed. Thus, where house property is used for this purpose, whether from the house to which the son belongs or from another house in the kraal, the son is liable to make a refund in due course without stipulation or agreement. This obligation is quasi-contractual, and it arises automatically immediately upon the conclusion of the union. Unless there is an express stipulation or agreement to the contrary, the refund is normally

38 See *Mpikwa v Magyekana* 1949 NAC 104. Thus the parties may agree as to when the loan will be repayable, but in the absence of such agreement a demand before the marriage of the first daughter of the debtor would be premature in true traditional law. When the cattle received from the first married daughter of the debtor’s marriage are not sufficient to meet the demands to be made upon it, it is not unusual for the parties concerned to agree to wait until the cattle have increased sufficiently to meet all demands. When the contributions are made for the *lobolo* to be paid by the chief for his great wife (usually the first wife), no refund is expected because customary law holds that the chief is marrying the mother of the tribe who will bear the successor to the throne.

39 S 1 of the Natal Code of Zulu Law.

40 The family head allocates property to the houses in his home, and all property which has been so allocated, constitutes house property, whilst all property which has not been allocated to a particular house, constitutes home property. Certain kinds of property automatically accrue to a house, such as property acquired through the efforts and labour of the wife or any minor of a house, as well as property acquired from fines and *lobolo* received by him in respect of a daughter of a house. Such property belongs to the particular house to which that wife, minor or daughter belongs.

made from *lobolo* receivable in due course by the son when the daughters of the union marry. The debt is not extinguished if there is no female issue in his marriage. The son or his heir remains liable until the debt is discharged.

Where the *lobolo* for the son's wife has been paid by the family-head out of family property,⁴¹ there is no obligation on the son to pay back unless, at the time of the celebration of the union, the family-head clearly and publicly stipulates that he requires such refund in due course.

5 4 The *ukufakwa* custom

Ukufakwa is an agreement whereby the girl's relatives would also make contributions towards the expenses of her marriage or wedding outfit, or any other expenses for which her father is normally responsible, and whereby the contributor becomes a participant in her *lobolo* to the extent to which he has borne expenses, and is entitled to be refunded from it.⁴²

When a girl reached the age of puberty, certain customary ceremonies are carried out, and it is common for the girl's relatives to make contributions towards those ceremonies. The girl's relatives would also make contributions towards the expenses of her marriage or wedding outfit or any other expenses for which her father is normally responsible.⁴³ In such cases, the contributor is automatically "*fakwa*'ed", that is, put into her *lobolo*. *Fakwa* means to be put into. Thus the contributor is put into the *lobolo* of the girl, that is, the contributor becomes a participant in her *lobolo* to the extent to which he has borne expenses, and is entitled to be refunded from it.

The custom of *ukufakwa* and *ukwenzelela* are distinct, because *ukufakwa* applies where contributions are made in connection with the women's ceremonies relating to puberty or marriage, in which the contributor is *fakwa*'ed or put into the *lobolo* of the woman. *Ukwenzelela* applies to the affairs of men, and is the contribution of one man to another, usually a relation, who is about to take a wife, and requires cattle to pay for *lobolo*.

5 5 The *umabo* or *ho phahlela* custom

The isiZulu word *umabo* means a distribution or allocation, while the Sesotho word *ho phahlela* means "to pack for" one's daughter. This is the custom that takes place during the celebration of the marriage, in terms of which the bride's family group must give certain "gifts" to the new house which is about to be created by the marriage. The gifts may be anything, depending on the community involved. In most cases however, the gifts "packed for" the bride include

41 A family may have two distinct kinds of property: First, home property, otherwise known as his general estate, and house property. Family property may be best illustrated in a polygamous union. Property that accrue to the whole family, as opposed to a particular house in the family, is family property – eg land used for cultivation, livestock, vehicles, etc.

42 See generally Koyana 71.

43 *Ibid.* The author uses an example taken from *Mtakatya Nketheni v Bokolo Mlangeni* 4 NAC (1918–1922) 368 (Umtata): Thandwefika becomes indebted to Mzimasi for a goat or sum of R40 lent to enable him to cater at the *intonjane* ceremony of his daughter Ngqongqo. Thandwefika says: 'I shall refund you with a beast out of the *ikhazi* of my daughter Ngqongqo.' This is the *ukufakwa* custom. Mzimasi has now been 'put into' the *ikhazi* of Ngqongqo. He has been made a participant, an entitled party, therein. When that girl gets married a beast out of her *ikhazi* must go to Mzimasi."

clothes and other household necessities for the new marital home. In modern society the goods may range from furniture to cooking equipment. Again, the goods are purchased from the proceeds of the *lobolo* that a man delivered for his wife, and this time the *lobolo* is used for the benefit of the newly-weds themselves.

6 CONCLUSION

South Africa is a multicultural country and it is not surprising that it has, or must have, a plurality of legal systems. To some extent, the Constitution of the Republic of South Africa recognises the application of personal and religious family law systems, and expressly obliges the courts to “apply customary law when that law is applicable”. Further, the Constitution recommends the enactment of legislation “recognising marriages concluded under any tradition, or a system of religious, personal or family law”.

The Recognition of Customary Marriages Act recognises marriages concluded under customary law. However, to allow the diversity of cultural practices the Act does not make any provision as to how a marriage should be celebrated and concluded under customary law. Under the circumstances, it was necessary to analyse the implications of the Act concerning the negotiation, celebration and conclusion of a marriage in terms of African custom. This article has discussed the relevance of *lobolo* concerning the negotiation and celebration of a customary marriage in terms of the Act. From this analysis it would be incorrect not to conclude that the *lobolo* agreement is still the cornerstone of any African customary marriage in terms of the Act, despite the fact that the Act does not expressly make it a requirement. Therefore, by requiring that the customary “marriage must be negotiated and entered into or celebrated in accordance with customary law”, the Act⁴⁴ tacitly requires the *lobolo* negotiations to have taken place in terms of African custom, failing which, the marriage would be invalid.

All the customs discussed above have the same effect in a customary marriage. They are all designed to assist, at least where possible, the parties to the intended marriage concerning costs of *lobolo* and wedding expenses. The obligations pertaining to this assistance are then shared by both or all family groups. For instance, in some circumstances the contributor expects to receive some return for the contribution made by him or her concerning the marriage in question, so as to extend the same assistance to others in the future.⁴⁵

Most importantly, however, all these customs illustrate the fact that a customary marriage is difficult, if not almost impossible, without the delivery of *lobolo*. Further, one of the main objectives of marriage, that is, the quasi-contractual alliance created by the marriage relationship between the two families, is unlikely to take place without the payment of *lobolo*. In fact, a customary marriage is itself non-existent without the delivery of *lobolo*. If we say there can be a customary marriage without the delivery of *lobolo*, does the distinction between a customary marriage and a marriage by civil law still exist? If the salient features

⁴⁴ See s 3(1)(b).

⁴⁵ In the case of *ukufakwa* from the *lobolo* of the woman in respect of whom he has been put in, and in the case of *ukwenzelela*, from the *lobolo* of the first girl to be married, born of the marriage in respect of which the contribution has been made.

of a customary law marriage, such as those resulting directly from *lobolo*, are removed, what remains is in fact a replica of a civil marriage, with the only difference being the recognition of polygamy. In any event, the marriage for which *lobolo* was not negotiated will not qualify as a marriage “entered into or celebrated in accordance with customary law” within the meaning of the Recognition of Customary Marriages Act.⁴⁶

Finally, it is recommended that the Act should be amended so as to include detailed provisions concerning the *lobolo* agreements pertaining to customary marriages. By so doing, the law will not only reflect the “living” version of customary law, but will also ensure clarity and certainty.

Often the formality of the law serves to hide underlying inequalities . . . If the interpretation of the effect of the decision in Jayiya . . . is applied it would mean that until the issue is again raised before the Supreme Court of Appeal persons such as the applicant will have to be told that the courts cannot help them in the form of ordering financial compensation if public state officials do not do their work properly and that, even if the courts do order compensation, there is nothing legally that the courts can do to help them if State functionaries neglect . . . to give effect to such an order. It would be of little comfort to persons such as the applicant who rely on a disability grant for a living to know that they have a right of appeal. Out of their own pocket they would not be able to fund the appeal. The rule of law would have failed them and its failure would have given succour to public functionaries who flouted their public responsibilities.

Froneman J in Kate v MEC for Department of Welfare, Eastern Cape [2005] 1 All SA 745 (SE) para 26.

46 S 3(1)(b).