



WHAT HAPPENS TO *ILOBOLO* UPON THE DISSOLUTION OF A CUSTOMARY MARRIAGE?

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Customary marriages are currently regulated by the Recognition of Customary Marriages Act 120 of 1998 (“RCMA”). At its core, the Act seeks to remedy the historical injustices suffered by spouses who elected to enter marriage according to custom or tradition. This was embodied in the words of Moseneke DCJ in *Gumede v President of the Republic of South Africa and Others*¹ where he stated as follows:

“[The Act] represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary ‘unions’.”

As progressive as the RCMA is, it has not been without shortcomings. Courts have lamented in the past that, although

the intention of passing the RCMA was a noble effort to place customary marriages on equilibrium with civil marriages, many challenges persist. Consider in this regard *K v P* (GSJ).²

This article focuses on one problem area presented by the RCMA – that of the retention and/or the refund of *ilobolo* on the dissolution of a customary marriage. It is first appropriate to explore the function of *ilobolo* before a discussion of the retention and or refund of *ilobolo* on the dissolution of a customary marriage.

WHAT IS THE FUNCTION OF *ILOBOLO*?

Ilobolo, also known as bride wealth or dowry, is often shrouded in mystery for those unfamiliar with the custom. It involves the exchange of symbolic gifts from the groom’s family to the bride’s and holds deep cultural and legal significance. In this tradition, the family of the groom pays the family of the bride before a marriage takes place. In earlier times cattle were often used as payment. Today cash is accepted. However, *ilobolo* is not regarded as a purchase. The payment is thought of as a symbol of the union between the families of the bride and the groom.



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Although the custom of lobola is practised in the Nguni culture, the RCMA does not specifically make the tendering of *ilobolo* a requirement for the conclusion of a valid customary marriage. Courts have interpreted s 3(1)(b) of the RCMA as a tacit requirement that *ilobolo* must be given in order for the customary marriage to be valid. This means that, at the very least, there should be negotiations and agreement concerning payment, in part or in full, of *ilobolo*.³ In *Maloba v Dube and Others*⁴ Mokgoatlheng J held that “[t]he agreement to marry in customary law is predicated upon lobolo in its various manifestations. The agreement to pay lobolo underpins the customary marriage”.

Notwithstanding the RCMA’s silence on *ilobolo* as a requirement for a valid customary marriage, there is clear understanding of the importance of *ilobolo* from those who practise customary law and the courts. This importance has recently been underscored in *Southon v Moropane*⁵ Saldulker J held that “[t]he traditional principle that there can be no [valid] customary marriage without lobolo being delivered or at least negotiated, still prevails”.

It can thus be argued that, despite the RCMA’s silence on the matter, the core element that distinguishes a customary marriage from civil marriage is the payment or delivery of *ilobolo*. It is further submitted that the bedrock of a customary marriage is the payment of *ilobolo*. It has been argued that *ilobolo* provides stability to the customary marriage. In the words of RM Dlamini⁶ the prospect of forfeiture of *ilobolo* was thought to deter a man from divorcing his wife frivolously, and conversely, the possible return of *ilobolo* by the wife’s father should she misbehave motivated her to behave with due decorum and not to wreck the marriage by her misconduct.

Recently, diverging views have emerged regarding the relevance of *ilobolo* in “modern times”. At the centre of these views is the misconception that *ilobolo* is a “purchase and sale agreement”. It may be argued that the ugly practice of commodification may have crept into the space; however, *ilobolo* was never intended to commodify women nor was it ever intended to resemble a purchase and sale agreement. A customary marriage is not a marriage between two people, it is a marriage between two families.⁷ *Ilobolo* was paid or delivered to signify the union of these two families.

Adherents of customary law and practices are themselves not united as to the function and significance of *ilobolo*, let alone the retention and/or refund of it on divorce. Some have said that the function and significance of *ilobolo* properly analysed have to do with the transfer of the reproductive capacity of the woman from her family into that of her husband.⁸ As advanced above some hold a view that *ilobolo* is a token of appreciation that the groom’s family extend to the bride’s family for rearing the bride and that it is only once *ilobolo* or part of it has been tendered and received that the bride is welcomed by the ancestors of the groom into the family. In capturing these divergent views on the function and significance of *ilobolo*, RM Dlamini argues that *ilobolo* in its proper customary sense has a multiplicity of legal functions.⁹ It is submitted that the argument around the function and significance of *ilobolo* is neither here nor there. The indisputable fact is that the bedrock on which a customary marriage rests is *ilobolo*.

DISSOLUTION OF A CUSTOMARY MARRIAGE

Section 8 of the RCMA deals with the dissolution of a customary marriage. In terms of this section, a customary marriage is dissolved in the same way the Divorce Act dissolves a civil marriage. This section poses a significant challenge in two ways. Firstly, the section is contrary to what the Act broadly seeks to achieve. At its core, the Act seeks to protect the rights of parties to enter marriages in terms of custom. If one has the right to enter a marriage in terms custom then the corollary must exist. It is submitted that the contents of section 8 of the RCMA deny a party the sacrosanct right to resile from a marriage according to custom. Secondly, section 8 creates an anomaly in that it treats a customary marriage and a civil marriage in the same way. It is submitted that the very nature of a customary marriage is distinct from a civil marriage. It has already been advanced that a customary marriage, unlike a civil marriage is not individualistic; it is a marriage of two families and thus cannot be treated like a civil marriage. The latter was confirmed in *Gumede* where it was held:

“In our pre-colonial past, [customary] marriage was always a bond between families and not individual spouses. Whilst the two parties to the marriage were not unimportant, their marriage relationship had a collective or communal substance. Procreation and survival were important goals of this type of marriage and indispensable for the well-being of a larger group.”¹⁰

Prior to the enacting RCMA, two broad grounds existed for the dissolution of a marriage. The first was death of a husband. If the husband died and provided that the family did not practise the custom of *ukugenwa* (a process whereby the brother of the

deceased husband enters in place of the husband), then the marriage would be dissolved. The second instance was if, during the lifetime of the husband, owing to ill-treatment or any other valid reason, a woman would return to her father's household thereby forcing her husband to *phuthuma* (fetch) her with a fine, failing which, it was accepted that the husband did not want to continue with the marriage.¹¹ It was at the *phuthuma* that the wife could air out her grievances and the husband could be fined. This provided a dispute resolution mechanism. Although flexible, the two grounds provided practical rules that were adhered to for the dissolution of a marriage. It is submitted that section 8 takes away these practical rules, further perpetuating the argument that section 8 denies parties a right to elect how to resile from the marriage.

Bekker argues that there are limited instances where *ilobolo* could be refunded. Those instances were recorded as:

- infidelity on part of the bride;
- where a wife deserted her husband and refused to return when fetched;
- where a wife was guilty of conduct giving rise to him rejecting her; or
- where her father repaid the *ilobolo* in an apparent act of dissolving the marriage.

The above list is not exhaustive. Where a husband rejected his wife without cause *ilobolo* could be retained.¹² In the same way that the RCMA is silent on the payment of *ilobolo*, so too the RCMA is silent on the retention and repayment of *ilobolo*. This is notwithstanding a plethora of authorities on the matter which are unanimous that *ilobolo* could be retained and refunded depending on the circumstances leading to the divorce.¹³

Courts are no strangers to these disputes. In *Nkambule v Linda*¹⁴ the court held that a woman in a customary marriage was justified to leave a man who had contracted a civil marriage and, in so doing, did not render her guardian liable for a refund of *ilobolo*. Bertelsmann J in *Thembisile and Another v Thembisile and Another*¹⁵ acknowledged the importance of this question when he held:

"It appears to be well established, however, that in customary law the central issue in divorce proceedings is refund of bridewealth, an obligation taken so literally that the husband could demand return of the same cattle he had originally given. If they had died in the interim, the defendant could settle the claim with a cash equivalent".

In South Africa the crude divorce rate in 2022 was 33 divorces per 100 000 estimated resident population, which equated to 22 230 divorces being finalised that year. Assuming that in a large portion of those divorces *ilobolo* was paid, it is foreseeable that disputes will arise as to the refunding of *ilobolo*. These disputes may prove costly and will force courts to come up with dynamic ways to resolve the conflict. It is hoped that customary law will find creative and innovative ways to deal with this challenge. After all, "customary law is a flexible, living system of law, which develops over time to meet the changing needs of the community".¹⁶

CONCLUSION

Notwithstanding the muteness of the RCMA on issues pertaining to the tender and retention of *ilobolo* one cannot dispute the significance of *ilobolo*. Further, a claim for the refund of *ilobolo* constitutes a valid claim that could be enforceable against a customary law wife and her guardian. **A**

Notes

- 1 *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) at para 16.
- 2 *K v P* (GSJ) (unreported case no 09/41473, 15-10-2010) (Moshidi J) at para 11.
- 3 See L Mofokeng 'The *lobolo* agreement as the "silent" prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act' (2005) 68 *THRHR* 277 at 278.
- 4 *Maloba v Dube and Others* (GSJ) (unreported case no 08/3077, 23-6-2008) at para 26.
- 5 *Southon v Moropane* (GSJ) (unreported case no 14295/10, 18-7-2012) at para 81.
- 6 RM Dlamini 'The transformation of a customary marriage in Zulu Law' 1983 *CILSA* 383 at 390.
- 7 See *Mabena v Letsolo* 1998 (2) SA 1068 (T) at 1072C – D.
- 8 NJJ Olivier; JC Bekker; NJJ Olivier (Jnr) and WH Olivier *Indigenous Law* (Durban: LexisNexis 1995) at 32.
- 9 RM Dlamini 'The transformation of a customary marriage in Zulu Law' 1983 *CILSA* 383 at 386.
- 10 *Gumede* at para 18.
- 11 Herbst and Du Plessis at 11.
- 12 Bekker at 151.
- 13 See *Sila v Masuku* 1937 NAC (N & T) 121; *Matlala v Tompa* 1951 NAC (N-E) 404.
- 14 *Nkambule v Linda* 1951 (1) SA 377 (A) at 384D.
- 15 *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T) at para 28.
- 16 See *Shilubana and Others v Nwamitwa and Others* [2008] ZACC 9; 2008 (9) BCLR 914 (CC) at para 35.

