

## **Short notes on**

### **DOES LOBOLO CONSTITUTE A CUSTOMARY MARRIAGE?**

#### ***Introduction***

There has recently been uncertainty and confusion in light of the Supreme Court of Appeal case of *Tsambo v Sengadi* [2020] ZASCA 46 ("*Tsambo case*"). Two of these uncertainties include the questions of whether or not lobolo constitutes marriage and whether a valid customary marriage is complied with in terms of section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) where the handing over of the bride to the groom's family in terms of custom has not been done.

#### ***Requirements for validity of Customary marriages***

In terms of Section 3(1) of the Act, in order for a Customary marriage to be valid, it has to be entered into by a man and woman over the age of 18 years who have the intention of getting married under Customary Law, and the marriage must be negotiated and entered into or celebrated in accordance with Customary Law. However, it is pertinent to mention that section 3(1)(b) does not stipulate the requirements or customs that must be complied explicitly to validate a Customary marriage. The reason for this, may be attributed to customs which differs from culture to culture or the dynamic Customary Law, which is consistently evolving to meet the changing needs of the people who live by its norms.

#### ***Does Lobola constitute Lobolo?***

Firstly, the Act defines lobolo as "*property in cash or in-kind 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.*" There is no doubt that lobolo is one of the essential requirements in terms of section 3(1)(b) of the Act; however, lobolo itself is no marriage."

According to *Mbungela & another v Mkabi & others (820/2018) [2019] ZASCA 134 (30 September 2019)*, the Court held the view a valid Customary marriage could be concluded without the full payment of lobola in light of the evolution of Customary Law if other requirements of a Customary marriage were met, such as the payment of a portion of the lobolo and the exchange of gifts by the two families in the instant matter.

### ***Is the bridal transfer an absolute requirement?***

This question was dealt with in the recent Judgment in *LS v RL [2018] ZAGPJHC 613; [2019] 1 All SA 569 (GJ); 2019 (4) SA 50 (GJ)*. The High Court “*held that the bridal transfer custom is unlawful as it unfairly and unjustly discriminates against the gender of the applicant as a woman and denies her the constitutional right of dignity and equality because only women, after consenting to enter into a customary law marriage are subject to this unequal treatment by the custom of handing over.*”

This Judgment further supports the view that African Customary Law has evolved and always flexible. Therefore, meaning that the bridal transfer custom does not invalidate a Customary marriage.

### ***Uncertainty as to whether a Customary marriage was concluded***

Many couples, after their separation, face the uncertainty of whether they are married or not. The Act lays a duty on the spouses to ensure they register their Customary marriage to do away with the uncertainties. However, failure to register the marriage does not necessarily mean it is invalid.

For separated couples who are uncertain and confused about whether they are married or not, they will have to approach the High Court to apply for a declaratory order to confirm that they are or not married under customary law.

### ***Conclusion***

For those couples intending or are in the process of concluding a Customary marriage, it would be wise to register and understand the patrimonial consequences of such a marriage. For those separated couples who are still not sure whether they concluded a Customary marriage, it would be prudent to approach the High Court for some legal certainty. Failure to do so will legally affect subsequent marriages with different partners or a partner having a claim to the other partner's assets.

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