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Multiple marriages, burial rights and the role of *lobolo* at the dissolution of the marriage

Summary

This paper highlights three aspects which have an impact on both customary and common law that came to the fore in the *Thembisile* case. An evaluation of the way in which the court dealt with the different aspects is made. Regarding multiple marriages, where a civil marriage is also involved, it is suggested that the courts should be hesitant to simply declare either the civil or the customary marriage a nullity and should consider the different options available first. Where a funeral is marred by feuds about burial rights, it is suggested that a flexible approach should be followed. Strict adherence to common law principles could lead to unreasonable and inequitable results, especially in traditional communities. Lastly, there seems to be conflict between the official customary law and the living law regarding the return of the *lobolo* at the dissolution of a customary marriage. Empirical research should be undertaken to determine whether *lobolo* is in fact still returned.

Veelvuldige huwelike, die reg om te begrawe en die rol van *lobolo* by die ontbinding van die gebruiklike huwelik

Hierdie artikel beklemtoon drie aspekte van belang vir beide die inheemse- en die gemenereg wat in die *Thembisile*-saak ter sprake gekom het. 'n Evaluering van die wyse waarop die hof die verskillende aangeleenthede hanteer het, word gedoen. Met betrekking tot veelvuldige huwelike, waar 'n siviele huwelik ook betrokke is, word daar aan die hand gedoen dat die howe huiwerig behoort te wees om summier of die siviele of die gebruiklike huwelik nietig te verklaar alvorens die verskillende opsies oorweeg is. Waar 'n begrafnis ontsier word deur twis oor wie die reg het om te begrawe, word aan die hand gedoen dat 'n soepel benadering gevolg moet word. Streng navolging van gemeenregtelike beginsels kan tot onredelike en onregverdige gevolge lei, veral in tradisionele gemeenskappe. Laastens, bleik dit asof daar konflik tussen die amptelike inheemse reg en die "living law" is met betrekking tot die teruggawe van *lobolo* by die ontbinding van die gebruiklike huwelik. Empiriese navorsing behoort gedoen te word om vas te stel of *lobolo* steeds feitelik teruggegee word.

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1. Background

In the recent case of *Thembisile v Thembisile* [1] a number of very important aspects impacting both customary and common law, came to the fore. The applicants (the deceased's first wife with whom he entered into a customary marriage in 1979 and the eldest son — still a minor — born from this relationship) sought a declaratory order that they were entitled to bury the deceased. They intended burying him at the deceased's ancestral home at a locality of their choice. The application was opposed by the deceased's second wife (the first respondent) who had entered into what purported to be a civil marriage with the deceased in 1996. This marriage, which was duly documented by a marriage certificate, was allegedly followed by a customary marriage in 1999. When the deceased died in 2001, the first respondent arranged for his body to be transferred to a funeral parlour (the second respondent) to prepare him for burial. The first respondent alleged that the customary marriage between the deceased and first applicant had been dissolved prior to the second civil marriage. This was denied by the first applicant. Both parties therefore laid claim to the right to bury the deceased, which prompted the urgent application by the applicant. The court held that the first respondent failed to prove the dissolution of the prior customary marriage of the first applicant and granted the relief sought by her. The court further declared the first respondent's civil marriage a nullity[2] and declared that even if she and the deceased had entered into a subsequent customary marriage, it was common cause that the applicant's rights as first wife and first-born male heir (to bury the deceased) were stronger than any claims she might have.[3]

The following aspects will be discussed:

Firstly, the problems relating to multiple marriages where a civil marriage is also involved; secondly, the place of burial of a deceased where there is a dispute among the family members, with specific reference to the impact of customary law; and, lastly, the role played by *lobolo* at the dissolution of a customary marriage.

2. Multiple marriages, where a civil marriage is also involved

Before 2 December 1988 spouses in a customary marriage could enter into a marriage by civil rites with each other or with another person. This had the effect of automatically dissolving the prior customary marriage.[4] In *Nkambula v Linda* [5] the court held that where a husband in a customary marriage subsequently entered into a civil marriage with another woman, this amounted to a desertion

1 2002 2 SA 209 TPD.
2 Par 32.
3 Par 33.
4 *Malaza v Mndaweni* 1975 BAC (C) 45; Sinclair 1996:219; Maithufi 2000:511; Dhlamini 1989:409.
5 1951 1 SA 377 A.

of his customary wife, who could leave him without rendering her guardian liable to return any *lobolo*.

Legal provision was made in order to offer some kind of protection to the other spouse in the prior customary marriage who generally became known as the "discarded spouse".[6] Section 22(1) of the *Black Administration Act* [7] provided:

> No male Black shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared upon oath, before the magistrate or commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of any such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or House under Black custom; and such other information relating to any such union as the said official shall require.

The effect of the above declaration was merely to facilitate proof of any allocation of property, the husband was not bound to allot anything to his customary wife/wives or houses.[8]

Failure by the husband to make the declaration did not affect the validity of the civil marriage.[9] According to subsection 22(5) it was an offence to contract a civil marriage without making the necessary declaration or to make a false declaration.

Due to the extremely precarious position of the discarded customary wives,[10] section 22 was amended by the *Marriage and Matrimonial Property Law Amendment Act* [11] which came into effect on 2 December 1988. Subsection 22(1) and (2) reads as follows:

> (1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.

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6 Maithufi 1992:628.

7 38/1927.

8 Olivier *et al* 1995:91. The customary wife had no right to the estate of her husband except that which had been declared in terms of section 22(1) (Maithufi 1992:628). Subsection 22(7) further provided, and still provides that:

> No marriage contracted after the commencement of this Act [on 1 January 1929] but before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 [on 2 December 1988] during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.

9 Bennet 1985:141; Bennet 1991:439-440; Maithufi 1992:628.

10 See Bonthuys and Pieterse 2000:618.

11 3/1988.

> (2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union.

A marriage officer was not permitted to solemnise a civil marriage of a black man unless he had first taken a declaration from him that he was not a partner in a customary marriage with any woman other than the one he intended marrying. A black man who wilfully made a false declaration was guilty of an offence.[12] The intention of the legislature in enacting this legislation was to provide greater protection to the female spouse of the customary marriage.[13]

Theoretically, this meant that the previous problems arising from dual or multiple marriages — involving also a civil marriage — were something of the past.[14] In practice this was not the case. It should be noted that section 22(1)-(5) of the *Black Administration Act* was repealed by the *Recognition of Customary Marriages Act* [15] and replaced by similar provisions in sections 3(2), 10(1), 10(4) and 11 of the Act.

Contrary to the position before 2 December 1988, a customary marriage entered into after this date is not dissolved or superseded by a subsequent civil marriage.[16] It is, however, still not clear what the effect of a contravention of the rules prescribed by section 22(1) to 22(5) will have on the subsequent civil marriage.[17] Although these subsections have been repealed, they continue to apply to civil marriages entered into prior to the commencement of the *Recognition of Customary Marriages Act* — the *Thembisile* case is an example. In this case the court referred to the amended Section 22(1) and (2) and declared the subsequent civil marriage a nullity because the second wife (first respondent) could not prove that the prior customary marriage had been dissolved.[18]

The way in which the court emphasised the value, status and full recognition of a customary marriage can be applauded.[19]

The question may, however, be asked whether it is fair to the woman and children involved in the civil marriage if the marriage is simply declared a nullity. The court did not refer to[20] the conflicting views on the effects of a contravention of the relevant legislation. How can the interests of all the parties involved best be served? The following views have already been expressed:

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12 Subsection 22(5).
13 Maithufi 1992:629. See also subsection 22(7) in footnote 8 above.
14 Olivier *et al* 1995:92.
15 Act 120/1998, which came into effect on 15 November 2000.
16 Maithufi 2000:511.
17 Bonthuys and Pieterse 2000:620.
18 Par 30-32.
19 Par 22-26.
20 It was probably also not placed before the court.

2.1 The civil marriage is void

According to Sinclair it is clear from the *Marriage and Matrimonial Property Law Amendment Act* that a contravention of section 22(1) and (2) will render a subsequent civil marriage null and void.[21] Unlike its predecessor, the amended section 22(2) refers expressly to competence, that is capacity. Although this is also the opinion of Dlamini, even he concedes that it is not clear whether the civil marriage so concluded is void or not and states that it may not necessarily be void.[22]

The implications of an omission by the marriage officer who did not obtain the declaration, are also not clear. It is submitted that this will not affect the validity of the marriage.[23]

A void marriage is one which has simply never come into existence; it does not have the legal consequences of a valid marriage and does not affect the status of the parties. Children born of the marriage are illegitimate and the spouses will not inherit intestate from each other.[24] For the second Mrs Thembisile and her children the declaration that her marriage was a nullity had serious and far-reaching consequences. Over and above the fact that she was not allowed to bury her "husband" with whom she had *de facto* been living for five years (as husband and wife in what she thought was a valid civil marriage), she was probably also faced with the following consequences: The deceased apparently died without a valid will.[25] Section 2 of *Government Notice R200* of 1987 provides that if a black person dies leaving no valid will and is survived by any partner with whom he had entered into a customary marriage, customary law of succession rules apply. His estate will therefore devolve on his oldest male descendent (*in casu* the second applicant). In terms of customary law he will also have no concomitant duty to support either the second Mrs Thembisile or her children.[26] It will inevitably also jeopardise her claim to the pension benefits from the Rustenburg Platinum Mine, unless the existence of the subsequent customary marriage which was allegedly entered into by her and the deceased (in October 1999) could be proved.[27]

21 Sinclair 1996:222 and further.
22 1999:30 and in Bekker *et al* 2002:47. He declared the view that it is voidable and not void as untenable.
23 Sinclair 1996:223-224; Dlamini 1989:412.
24 Cronje and Heaton 1999:49.
25 Par 11.
26 *Mthembu v Letsela* 2000 3 SA 867 SCA.
27 The existence of the customary marriage is disputed by the applicants and doubted by the court. See par 33.
28 1994:92-93.
29 1992:631-632.

2.2 The civil marriage is voidable

Olivier[28] and Maithufi[29] base their arguments that the civil marriage is voidable and not void on two considerations:

Firstly, non-compliance with section 22(1) and (2) is coupled with a criminal sanction.[30] When a penalty is added to a contravention of a statutory provision, the question arises whether the legislator intended the penalty to suffice or in addition to render the act void. The purpose of the legislative measure, namely the mischief that the legislator intended to combat, should provide the answer to this question. The purpose of the amended section 22(1)-(5) was to protect the female spouse of a customary marriage.[31] The legislator's intention was to visit non-compliance of the act with a penalty and not to declare the subsequent marriage void *ab initio*. Olivier declares that if that were not the case, "the innocent wife and children would suffer a calamity which was not of their own making".[32] This is exactly what happened to the second Mrs Thembisile and her children.

A voidable marriage is a valid marriage for all purposes[33] although grounds are present either before, or at the time of contracting the marriage, on the basis of which the court can be approached to dissolve the marriage.[34] A voidable marriage is valid unless and until a decree of nullity is obtained. A voidable marriage also affects the status of the parties because they are legally married and the children born during the course of the marriage are legitimate.[35] Only specified persons will have *locus standi* to bring an action for the annulment of the marriage successfully.[36] It is submitted that not only the spouses of the marriage, but also the spouse of the prior customary marriage will have a sufficient interest in the marriage to approach the court for a decree of annulment.

According to this view the subsequent civil marriage in *Thembisile* is voidable on the ground that one of the spouses was at the time of contracting such a marriage a partner to a customary marriage.[37] The effect of a decree of annulment is that the consequences of the voidable marriage are extinguished as from the solemnisation thereof. Contrary to where a void marriage is declared void, the action for annulment of a voidable marriage is competent only

30 Subsection 22(5):

> A Black man who wilfully makes a false declaration to a marriage officer with regard to the existence or not of a customary union between him and any woman, shall be guilty of an offence and liable on conviction to the penalties which may by law be imposed for perjury.

31 Olivier *et al* 1995:92; Maithufi 1992:631.
32 Olivier *et al* 1995:93.
33 Sinclair 1996:401.
34 Cronje and Heaton 1999:50.
35 Sinclair 1996:403; Cronje and Heaton 1999:50.
36 Sinclair 1996:401.
37 Maithufi 1992:632.
38 Labuschagne 1989:376.
39 Sinclair 1996:401.

during the lifetime of both spouses. If one of them dies, the marriage is dissolved by death.[38] If one of the spouses dies intestate before the marriage is annulled, the other spouse can inherit from the deceased's estate in accordance with the rules governing succession *ab intestato*.[39]

It can be argued that the lesson to be learned from the uncertainty about the effect of a contravention of section 22(1)-(5) is that the legislator should always ensure that it specifies in direct language the consequences of a failure to fulfill the requirements of what it enacts.[40] On the other hand, it can be argued that the legislator, by not specifying the consequences of non-compliance, left the door open for the court to reach an equitable and just decision. It should be borne in mind that the *Thembisile* case called for a speedy decision. In these circumstances it is therefore understandable that not many facts relating to the surrounding circumstances were placed before the court. It is submitted that one of the factors that can be identified in the case report and which could have been taken into account (before declaring the civil marriage a nullity) is the fact that although the deceased and the first applicant had entered into the customary marriage more than two decades prior to his death, there is very little evidence of a real marital relationship that existed between them (at least for the last five years of the deceased's life). He regularly sent her money, but only on one occasion personally handed it to her. She also remained in the kraal allocated to her by the deceased.[41]

Conversely, the first respondent (second wife) and the deceased actually lived together as husband and wife together with their own two children (and three of his children from the prior customary marriage) in what she believed to be a valid (and therefore monogamous) civil marriage.[42] It should also be noted that there is an increasing demand worldwide for the recognition of factual marriages, mainly to prevent one of the parties from being unfairly treated.[43]

2.3 The civil marriage is putative

It is submitted that if the requirement(s) for a putative marriage are present the subsequent civil marriage should be declared putative.

According to Cronje and Heaton:

40 Sinclair 1996:225.
41 Par 16 and 17.
42 Par 10.
43 Labuschagne 1989:388.
44 1999:55.
45 Sinclair 1996:405: "As always good faith is presumed."
46 See *Bam v Babha* 1947 4 SA 798 A; *Ngubane v Ngubane* 1983 2 SA 770 T and *Moola v Aulsebrook* 1983 1 SA 687 N.

> A putative marriage exists when one or both parties are unaware at the time of concluding the marriage of the defect which renders their marriage void and believe in good faith that they are lawfully married.[44]

The first requirement is therefore that at least one of the parties was *bona fide* unaware of the defect.[45] Whether the second requirement of due solemnisation forms part of modern law, is still not clear.[46] The majority of opinions seem to favour the view that defects in form do not preclude a marriage from being putative.[47]

Although a putative marriage is void *ab initio*, certain of the consequences of a valid marriage still apply to it. The court simply declares that the relationship is/was a putative marriage and then the law will attach certain consequences to it from the date of marriage until one spouse dies or both parties become aware of the fact that the marriage is void.[48]

The legal position of the children of a putative marriage is exactly the same as that of any other legitimate child.[49] Presently, it is generally accepted that the court order is merely declaratory.[50] In *MvM*[51] the court unconditionally declared the children to be legitimate and stated that the interests of others cannot change anything about this fact.[52]

The patrimonial consequences of the putative marriage will depend on whether both or only one party was *bona fide* and whether they had entered into an antenuptial contract or not. If both parties were *bona fide* and married without an antenuptial contract, community takes place. If only one of the parties was *bona fide* community will only take place if it is to the advantage of the innocent party. If both parties were *bona fide* and they entered into an antenuptial contract, the contract is binding on both. If only one party acted in good faith, only this party can enforce the obligations under the contract. The innocent "spouse" inherits from his or her partner should the latter die intestate before the marriage is annulled.[53]

It is submitted that in the *Thembisile* case the requirements for a putative marriage were met.[54] This option should therefore have been considered.

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47 Sinclair 1996:405-406; Cronje and Heaton 1999:55.
48 Cronje and Heaton 1999:55.
49 Sinclair 1996:407.
50 Cronje and Heaton 1999:56.
51 1962 2 SA 114 GW.
52 116 E.
53 Sinclair 1996:408-409.
54 There was no evidence to the effect that the first respondent did not *bona fide* believe that she was lawfully married. The marriage was also duly documented by a marriage certificate: Par 12.
55 Bonthuys and Pieterse 2000:624.
56 *Transkei Marriage Act* 21/1978 (TK): section 38. See also section 3. These sections were repealed by the *Recognition of Customary Marriages Act* 120/1998.

2.4 Legislative amendment

Bonthuys and Pieterse[55] recommended that the legislator should consider adopting a system similar to that which prevailed in the Transkei.[56] If a man purports to conclude a civil marriage during the existence of a customary marriage, the civil marriage should operate as a valid customary marriage and not be regarded as a civil marriage. According to this view, the patrimonial consequences can be regulated similarly to the regulation of consecutive customary marriages under section 7 of the *Recognition of Customary Marriages Act*.[57]

To visit the negative consequences of moving between the different legal systems upon women will not stop the practice.[58] In future our courts will also be called upon to determine the validity of a civil or customary marriage entered into in contravention of the provisions of the *Recognition of Customary Marriages Act*.[59] In a country where polygamy prevails, the courts and the legislator should consider the different views and not simply declare the second marriage (whether civil or customary)[60] a nullity,[61] otherwise "women will be punished for the transgressions of their husbands who may not be aware of the legal consequences of their actions, or who may disagree with the conceptual legal and theoretical separation between these types of marriage".[62]

3. Place of burial

As in most communities in the world, funerals are also significant events in South African communities. In all cultural groups death is treated with reverence and grace.[63] In a time when family members and friends should console one another, it has become not uncommon that funerals are marred by feuds about burial rights,[64] as in the *Thembisile* case.

57 120/1998.
58 Bonthuys and Pieterse 2000:624.
59 See also Maithufi 2000:512.
60 See Vorster 1998:44 for a discussion of the adverse consequences for customary wives.
61 *Contra* Mathufi 2000:512.
62 Bonthuys and Pieterse 2000:264.
63 Mokotong 2001:297.
64 These include the right and duty to bury the deceased, a corollary of which is the right to determine the place of burial and the right to determine the burial ceremony. See Boberg 1975:222.
65 Grotius Inleiding 2.14.5.
66 Voet 11.7.7.
67 For example *Human v Human* 1975 2 SA 250 OK. *Gabavana v Mbete* [2000] 3 All SA 561 Tk, *Mankahla v Matiwane* 1989 2 SA 920 Ck (in which a list of the rules was set out), *Tseola v Maqutu* 1976 2 SA 418 Tk. See also Mokotong 2001:300 for a reference to a number of unreported cases of the Bisho High Court.
68 *Sekeleni v Sekeleni* 1986 2 SA 176 Tk; Mokotong 2001:299.

According to Roman-Dutch authorities the basic principles are that directions in a will as to the disposal of the body must, if possible and lawful, be followed.[65] If the deceased did not appoint anyone to attend to his funeral rites, the duty devolves upon his heirs under his will or failing those, his intestate heirs, each in their order of succession.[66] These principles are acknowledged and adhered to by the courts, especially in the Eastern Cape.[67] The deceased may also die intestate, but name someone to attend to his burial in any document such as a letter or an affidavit.[68]

Even the deceased's verbal wishes will be given effect to if there is clear proof of such wishes, provided it is legally permissible and possible.[69] In *Tseola v Maqutu* [70] the court held that public policy and a sense of what is right dictated that the widow's wishes (where she is an heir) should prevail.[71] In a dispute amongst heirs of equal status, the view of the majority of heirs will be given effect to.[72]

All persons have the right to make written wills in accordance with common law. Testamentary succession according to a will is, however, unknown in customary law.[73] Black people therefore often die intestate and funerals arise from custom.[74] In traditional communities it is not customary to plan for one's own death and is sometimes even seen as a bad omen to do so.[75] Should the courts rigidly apply the basic principles (as set out above), it could lead to unreasonable and inequitable results. If a dispute arises and the court should follow the basic principles as set out above, the oldest son (or his eldest male descendant) will according to the prevailing principle of primogeniture, be the heir. He will accordingly have the burial rights. The wishes of the widow, not being an heir, will be subordinate. In the *Thembisile* case the court did take note of the first applicant's position and declared her right as first wife, and the right of her son as the first-born male heir, to bury the deceased as "stronger than any claims the first respondent might

69 *Mnyama v Gxalaba* 1990 1 SA 650 C; *Mabula v Thys* 1993 4 SA 701 SE; Cronje and Heaton 1999:31.
70 1076 2 SA 418 Tk.
71 See also *Saiid v Schatz* 1972 1 SA 491 Tk.
72 *Gonsalves v Gonsalves* 1985 3 SA 507 T.
73 Olivier *et al* 1995:147.
74 Mokotong 2001:297. The influence of religion in the sense of ancestor worship plays a significant role in this regard. See also Mqeke 1999:62.
75 Mokotong 2001:297.
76 Par 33.
77 In *Trollip v Du Plessis* 2002 2 SA 242 WLD at 245 H the court remarked: "Uit die gesag blyk dit dat daar 'n kloof is tussen die Oos-Kaapse benadering en die benadering in die Transvaal." See also *Golsalves v Gonsalves* 1985 3 SA 507 T and *Finlay v Kutuane* 1993 4 SA 675 W.
78 2002 2 SA 242 WLD.
79 1993 4 SA 675 W:680 B- 681 H. See also *Trollip v Du Plessis* 2002 2 SA 242 WLD:245 J.

have".[76] Fortunately her wish was not in conflict with that of the first-born male heir.

Contrary to a number of Eastern Cape decisions in which it was held that heirs had the final say, it appears that the approach followed in the Transvaal is that fairness in the particular circumstances of the case should be decisive.[77] The court in *Trollip v Du Plessis* [78] *inter alia* referred to *Finlay v Kutoane* [79] in which it was emphasised that a claim could not be evaluated according to the mathematical proportions of heirship as if there is a co-shareholding in the deceased's body.

The fact that the court in *Thembisile* described the rights of the two applicants[80] as "stronger than *any claims* [81] the respondent might have" is completely out of line with the other Transvaal decisions. It is submitted that reasonableness and fairness required that other factors should also have been taken into account: The fact that the first respondent (second wife) in all probability was present at the deathbed[82] and the applicant was not.[83] The first respondent therefore had the duty to make the arrangements with the funeral parlour (second respondent).[84] Her conduct in taking the necessary steps can be perceived as sound judgement on her behalf.[85] She incurred expenses in respect of the funeral which the first applicant did not. The order in favour of the applicant resulted in wasted expenses without anyone being held accountable for them.[86] As was explained above,[87] there is little evidence of a real marital relationship that existed between the first wife and the deceased at the time of his death. In *Trollip v Du Plessis* the court took these factors into account. It is respectfully submitted that the flexible approach in the *Trollip* case promotes reasonableness and fairness and should be followed rather than the approach in *Thembisile*.

4. The role of *lobolo* at the dissolution of a customary marriage

Referring to Bennett[88] the court in *Thembisile* declared:

80 Being the first wife and the first-born male heir.
81 My emphasis.
82 The deceased died at Rustenburg where they stayed.
83 These facts do not appear in the case report but could easily have been established during the application.
84 See *Trollip v Du Plessis* 2002 2 SA 242 WLD:246 B-D.
85 See also Boberg 1975:222. In *Finlay* it was emphasised that in instances like these time is crucial. "The body cannot be allowed to lie around because an 'entitled' party is not at hand to take charges; nor because an *audi alteram partem* of people with rights to bury has to take place" at 681 J-682 A.
86 *Trollip v Du Plessis* 2002 2 SA 242 WLD:246 D. *Contra* the case in Port Elizabeth referred to by Mokotong 2001:297 (reported in *Sunday World* 1999-08-5).
87 In 2.2 above.
88 1991:269-70.
89 Par 28.
90 Olivier *et al* 1995:59.

> 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 died in the interim, the defendant could settle the claim with a cash equivalent.'[89]

The court perceived this statement of customary law as correct and can therefore be regarded as "official" customary law. Olivier declares that it is essential that the *lobolo* cattle be returned in order to terminate the marriage. As long as the *lobolo* has not been returned, the marriage has not been finally dissolved and the parties could become reconciled.[90]

The question as to whether and how many cattle should be returned or forfeited, depends on the blameworthiness of the parties in regard to the breaking up of their marriage. Where the father of the woman has to return the *lobolo*, he can retain some in accordance with customary principles.[91] If the number of cattle which the father may retain is equal or more than the number given as *lobolo*, at least one beast has to be returned to signify the dissolution, "except where the husband was at fault".[92] Should the husband conclude a civil marriage, he forfeits all the cattle.[93]

Remarks made by black students as well as the following discussion by Dhlamini of the fact that the *Recognition of Customary Marriages Act* [94] does not require a return of the *lobolo* upon dissolution of the marriage, makes one wonder whether the "living" law is still in accordance with the principles as set out above.

91 Olivier *et al* 1995:72.
92 Olivier *et al* 1995:73. See also Bekker 1989:195-198.
93 Olivier *et al* 1995:70.
94 120/1998.
95 Bekker *et al* 2002:47.

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