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# Recognising form through function in the context of integrating the bride requirement in customary marriages in South Africa

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**Summary:** *In previous scholarship we argued how the state and courts have tended to favour a formal or definitional approach to customary marriages in South Africa, leaving vulnerable parties, particularly women, not adequately protected. In this article we focus on a new approach emerging from the courts, particularly relating to the integration of the bride as a requirement for the validity of a customary marriage. While we affirm the courts' emerging approach regarding integration, we take issue with the language used by the courts, particularly that relating to the word 'waiver'. In considering the recent South African Supreme Court of Appeal decisions on integration, and the High Court decisions that have followed, we believe the courts are in fact not waiving the requirement, but recognising that the requirement of integration may be met in another way. In considering these cases, although the court does not explicitly rely on Ramose's 'social acceptance' thesis as to the validity of law, we believe that adopting this approach will do much*

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*to assuage concerns about courts ignoring custom. More importantly, Ramose's 'social acceptance' theory gives credit to living customary law as a legal system which, as widely observed, promotes the very values on which the Constitution is founded. We also believe that Ramose's approach is a much more balanced approach in this context than a typically Western approach that promotes certainty over the protection of vulnerable parties, and represents the very evolving nature of living customary marriage laws and practices.*

**Key words:** *customary marriage; integration of the bride; waiver; flexibility; evolution; Ramose; language; acceptance theory*

## 1 Introduction

In this article we focus on a new approach emerging from the courts, particularly relating to the integration of the bride as a requirement for the validity of a customary marriage.[1] Integration of the bride is commonly held by most ethnic groups in South Africa as an essential requirement for a valid customary marriage to come into being.[2] It serves an important purpose in a customary marriage, that is, that of integrating the wife into her new family, having particular regard to the cultural importance of bringing together two families (as opposed to two individuals).[3] Despite this, the Supreme Court of Appeal (SCA) has recently found in two cases, *Mbungela & Another*

1 See, eg, the cases of *Mbungela & Another v Mkabi & Others* 2020 (1) SA 41 (SCA); *Tsambo v Sengadi* [2020] ZASCA 46; *Peter & Others v Master of the High Court: Bisho & Another* (547/2020) [2022] ZAECBHC 22; and *Muvhali v Lukhele* (21/34140) [2022] ZAGPJHC 402 (18 July 2022). Our previous scholarship discussed the converse of this approach; see L Mwambene & H Kruuse 'Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa' (2013) *Acta Juridica* 292.

2 NJJ Olivier and others *Indigenous law* (1995) 20; C Rautenbach (ed) *Introduction to legal pluralism in South Africa* (2018) 86; C Himonga and others *African customary law in Southern Africa: Post-apartheid and living law perspectives* (2014) 98; C Mangema 'Introducing the bride – When is a customary marriage deemed to have been concluded by families' (2020) *De Rebus* 12. See also para 22 in *Mlamla v Robushe* [2019] ZAECM 64 in which the Court, citing *Moropane v Southon* [2014] ZASCA 76, observed that many decided cases across the country have emphasised the importance of the handing over of the bride as a marriage requirement in many different traditional communities in South Africa.

3 Eg, see *Fanti v Boto* 2008 (5) SA 405 (C) paras 23-24; T Nhlapo 'Customary marriage: Missteps threaten the constitutional ideal of common citizenship' (2021) 47 *Journal of Southern African Studies* 273 285. In particular, see *Mabena v Letsoalo* 1998 (2) SA 1068 (T) 1072C-D where the Court recognised that customary marriage is not only a matter between the bride and groom but it is also 'a group concern, legalising a relationship between two groups of relatives'. See also *Mlamla v Rubushe & Others* (6254/2018) [2019] ZAECMHC 64 para 9. More recently, Cakata & Ramose have analysed African language to emphasise the importance of the family relationship formed by marriage. See Z Cakata & MB Ramose 'When *ukucelwa ukuzalwa* becomes bride price: Spiritual meaning lost in translation' (2021) *African Identities* 7.

*v Mkabi & Others*[4] and *Tsambo v Sengadi*[5] that the requirement is not mandatory and can be waived by the parties/families.[6] These cases have been criticised by a number of academics who consider the Court to have variously (i) ignored their own precedent;[7] (ii) ignored actual custom;[8] and (iii) 'constitutionalised' the issue.[9] These criticisms seem to suggest that there cannot be a valid customary marriage if integration of a woman in the 'prescribed customary form' has not been met.[10]

However, in as much as we sympathise with the criticisms regarding the lack of regard for the 'prescribed customary form', we suggest that the Court's approach affirms the flexibility of customary rules generally[11] even though the Court's reliance or use of the term 'waiver' is regrettable.[12] We believe the courts are in fact not waiving the requirement, but recognising that the ritual can be met in another way.[13] In fact, although the courts do not explicitly rely

4 *Mbungela* (n 1).
5 *Tsambo* (n 1).
6 See, eg, para 26 of *Mbungela* (n 1); *Tsambo* (n 1) para 17. It should also be observed that before the *Mbungela* and *Tsambo* cases, the Court in *Mabuza*, as far back as 2003, held that the practice of *ukumekeza* (formal integration) no doubt has evolved and could thus be waived. ee *Mabuza v Mbata* 2003 (4) SA 218 (C) para 25.
7 *Motsoatsoa v Roro* [2010] ZAGPJHC 122 para 40; *Moropane* (n 2) 76 para 9. See TA Manthwa 'A re-interpretation of the families' participation in customary law of marriage' (2019) 82 *Journal of Contemporary Roman-Dutch Law* 41 and MP Bapela & PL Moyamane 'The "revolving door" of requirements for validity of customary marriages in action: *Mbungela v Mkabi* [2019] ZASCA 134' (2019) *Obiter* 190. See also S Sibisi 'The Supreme Court of Appeal and the handing over of the bride in customary marriages' (2021) 54 *De Jure* 370 371.
8 Manthwa (n 7); Bapela & Moyamane (n 7).
9 As above. However, as pointed out by TW Bennett *Customary law in South Africa* (2004) 215-216, courts grappled with this issue in the 1940s and 1950s, far earlier than the introduction of the Constitution. Thus, it is difficult to accept that courts have 'constitutionalised' the issue. See eg *Mbalela v Thinane* 1950 NAC 7 (C); *Ngcangayi v Jwili* 1944 NAC (C&O) 15; *Mothombeni v Matlou* 1945 NAC (N&T) 123; *Ntabenkomo v Jente* 1946 NAC (C&O) 59; and *Sefolokele v Thekiso* 1951 NAC 25 (C).
10 However, historically, as Bennett (n 9) points out (216), courts found marriages to exist in many situations where the ritual was not strictly observed.
11 Thus, Bennett (n 9) 194 observes that 'strict adherence to the ritual formulae was never absolutely essential'. See also S Nkosi 'Customary marriage as dealt with in *Mxiki v Mabata in re: Mabata v Department of Home Affairs & Others* (GP) (unreported case no A844/2012, 23-10-2014) (Matojane J)' (2015) *De Rebus* 67. Thus, in *Mbungela* (n 1) para 18, the SCA pointed out that '[t]he courts must strive to recognise and give effect to the principle of living, actually observed customary law', as this constitutes a development in accordance with the 'spirit, purport and objects' of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.
12 According to the Merriam-Webster dictionary, waiver is 'the act of intentionally relinquishing or abandoning a known right, claim, or privilege'. See https://www.merriam-webster.com/dictionary/waiver (accessed 23 August 2021). This may be why, for example, some commentators such as S Sibisi 'Is the requirement of integration of the bride optional in customary marriages?' (2020) 53 *De Jure* 90, and Manthwa (n 7) believe that the court changed the custom.
13 See *Mbungela* (n 1) para 26. Thus, in *Mlamla* (n 2) the Court citing *Moropane* (n 2) para 23 observed that 'the essential requirements cannot be waived, but

on Ramose's 'social acceptance' thesis as to the validity of law, we believe that adopting his approach will do much to assuage concerns about courts ignoring custom, and also not protecting vulnerable parties. We also believe that Ramose's approach is a much more balanced approach in this context than a typically Western approach that appears to promote certainty over the protection of vulnerable parties.[14]

This article is divided into four main parts, including this introduction. The second part is a discussion of Ramose's 'social acceptance' thesis as a theoretical framework. We do this to show the potential value of his 'social acceptance' theory in resolving disputes concerning rituals and customs under customary law. More importantly, we want to highlight that Ramose's 'social acceptance' theory gives credit to living customary law as a legal system that is evolving in nature and promotes the constitutional values. The third part discusses the courts' jurisprudence on the integration of a bride where the flexibility of customary law is highlighted. In this part we attempt to demonstrate how the 'social acceptance' theory has the potential to clarify issues, namely, through (i) the use of language; (ii) by identifying changed social practices; as well as (iii) by attempting to address the concerns of scholars as set out above.[15] The last part presents the conclusion and our recommendations.

## 2 Theoretical framework

One of the vexed questions in jurisprudence is what counts as law. While this may be seen as an overly broad question regarding the issue of the integration of the bride in customary marriages, we see this as directly relevant and useful.[16] Tamanaha points out that this

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the accompanying rituals and ceremonies may be waived or abbreviated. See also Nkosi (n 11) 67 who observes that there are many decisions that are a study in judicial flexibility, and gives examples of *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC) paras 49-55; see also *Mabena* (n 3) 1074-1075 and *Mabuza* (n 6) 226.

14 While marriage, as an institution, raises the issues of power imbalances and inequality, no matter what the culture or religion, we note that customary marriages are particularly affected. Moore & Himonga notes that '[w]hile almost one in every two men and women in a civil marriage is employed, only two in every five men and women in a customary marriage are employed. Only one-quarter of women in customary marriages are employed, compared to 37,5% of women in civil marriages.' See E Moore & C Himonga 'Customary marriage: Is the law working? Study shows confusion among couples' *GroundUp* 1 March 2016, https://www.groundup.org.za/article/customary-marriage-law-working/ (accessed 13 August 2021.

15 As pointed out in the introduction, commentators point out that courts have (i) ignored their own precedents; (ii) ignored actual custom; and (iii) 'constitutionalised' the issue.

16 We do this given Diala's criticism, correct in our view, that 'as a concept, living customary law has not benefited from a detailed legal theoretical explanation'.

question is answered by legal theorists in three ways, depending on three broad intuitions that legal theorists have about the law. These intuitions fit into the general categories of legal positivism, natural law and historical-sociological jurisprudence.[17] While these categories are familiar to most commentators, it is useful to repeat them briefly here.

Legal positivism sees law as composed of rules, which are easily recognisable by simple evaluation standards such as legislation and case law.[18] According to this approach, law has its own independent self-contained character that is separate and distinct from both morality and history. In this way, the law's origin and sanction essentially lie in 'the will of the state',[19] which may take on many variations.[20] Notwithstanding these variations, theorists according to this approach agree that the one defining feature of legal positivism is an institutional normative system.[21] In contrast with this focus on form, natural law theorists insist that law must conform with objectively true universal moral principles.[22] While variations exist, natural law theorists generally maintain that law is the right reason reflected in a just social order.[23] Without these essential characteristics, the enforcement of norms is not law, but raw power or tyranny.[24] Finally, there are theorists who adopt an historical-sociological approach to law. These theorists deny that systematic institutional enforcement is a necessary feature of law (as the positivists would have it)[25] or that there is some universal understanding of law (as the

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See AC Diala 'The concept of living customary law: A critique' (2017) 49 *Journal of Legal Pluralism and Unofficial Law* 143 144ff.

17 BZ Tamanaha *A realistic theory of law* (2017) 39. See, in general, HJ Berman 'Toward an integrative jurisprudence: Politics, morality, history' (1988) 76 *California Law Review* 779.

18 Diala (n 16) 150.

19 HJ Burman *The nature and function of law* (1958) 21. See also Tamanaha (n 17) 39.

20 Eg, the law is the command of a sovereign (Austin); the law is the combination of primary and secondary rules (Hart); the law is a hierarchy of norms (Kelsen) and so forth. For more on these theories, see J Austin *Austin: The province of jurisprudence determined* (1995); HLA Hart *The concept of law* (1961); and H Kelsen *Pure theory of law* (1934) respectively.

21 J Raz *The authority of law* (1979) 105. See also Tamanaha (n 17) 40.

22 Tamanaha (n 17) 42.

23 As above.

24 As above. While perhaps stated too broadly, Burman suggests that '[i]ndeed, it is a tenet of natural-law theory that governmental acts or commands that grossly contravene fundamental principles of justice do not deserve to be called law at all'. See Burman (n 19) 780.

25 See, eg, Malinowski (quoted in Tamanaha (n 17) 41) who sets out that 'law can exist without 'a definite machinery of enactment, administration and enforcement of law'. In fact, Malinowski states that law can exist as binding obligations on fundamental matters. See also Berman, that it is 'not merely the will or reason of the lawmaker. Law spreads upward from the bottom and not only downward from the top.' See HJ Berman *Law and revolution: The formation of the Western legal tradition* (1983) 40.

natural law theorists would have it). Instead, they see law as a matter of customs, usages and ordered social relations.[26] This is so since they argue that what the law 'is' politically and 'ought to be' morally is to be found in 'the culture, national character, and the historical ideals and traditions of the people or society whose law it is'.[27]

It is trite that legal theorists exploring customary law, for the most part, are adherents to the historical-sociological school of thought, given its proposition that law consists of concrete usages and social practices.[28] The challenge with this view, as Tamanaha and others point out, is that it can be over-inclusive and too expansive.[29] Everything then counts as law and there is little distinction between general rules of social life and law *per se*. In this context, Cohen famously challenged Erlich's identification of law (an early prominent legal sociologist)[30] by suggesting that his terminology would make 'religion, ethical custom, morality, decorum, tact, fashion, and etiquette' all 'law'.[31] This challenge resonates in the context of recognising customary law in South Africa and, in particular, the integration of the bride requirement in customary marriages, as Bennett asks: 'How was the essential, legal, to be distinguished from the optional, and therefore customary?'[32]

In considering this theoretical framework, and its insights for our purposes, we recognise that some commentators have latched on to the 'too expansive' criticism. For example, they have done so by criticising the courts for being over-inclusive in their inclination to treat the 'mere act of cohabitation' as meeting the requirements of customary marriage.[33] Commentators have also criticised the notion of using the social practice of 'a white wedding' or attendance at a funeral as evidence of law.[34] Certainly, we appreciate the cohabitation

26 Tamanaha (n 17) 40.
27 Burman (n 19) 780-781.
28 Tamanaha (n 17) 40. See also C Himonga 'The future of living customary law in African legal systems in the twenty-first century and beyond with special reference to South Africa' in J Fenrich, P Galizi & TE Higgins (eds) *The future of African customary law* (2001) 35.
29 Tamanaha (n 17) 40. Eg, Merry asks '[w]here do we stop speaking of law and find ourselves simply describing social life?' See SE Merry 'Legal pluralism' (1988) 22 *Law and Society Review* 869. Himonga & Bosch ask how living customary law can be 'distinguished from customs and practices?' See C Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: Problems solved or just beginning' (2000) 117 *South African Law Journal* 306.
30 See, in general, E Ehrlich *Fundamental principles of the sociology of law* (1936).
31 F Cohen *The legal conscience* (1960) 187.
32 Bennett (n 9) 214.
33 Sibisi (n 7) 385; F Osman 'Precedent, waiver and the constitutional analysis of the handing over the bride' (2020) 31 *Stellenbosch Law Review* 85.
34 Bapela & Moyamane (n 7) 191. Contrary to this criticism, Erlank suggests that white weddings have actually been used 'to continue with older marriage-related patterns of reciprocity'. See N Erlank 'The white wedding: Affect and

criticism as a fundamental problem since it dilutes the objective of the requirements of a customary marriage – being the bringing together of two families.[35]

However, one such historical-sociological theorist, Ramose, seems to provide a way of differentiating between an act of a social habit, to one that counts as customary law in a way that can meet some of the criticisms set out above.[36] He suggests that we should recognise that law is flexible, unformalised, reasonable and linked to morality.[37] On this basis, he believes that 'law consists of rules of behaviour contained in the flow of life'.[38] The idea that life is a constant flow and flux means that it cannot be decided in advance that certain legal rules have an irreversible claim to exist permanently.[39] Arguably, this is captured by the Recognition of Customary Marriages Act (RCMA) which leaves the content of these legal rules to a question of evidence.[40] In the context of this discussion, this evidence is then precisely the sort of rules that a community has come to accept as regulative of their behaviour and practices, leading to them being counted as 'law'. Put differently, Ramose's theory suggests that the fact that parties may cohabit is neither here nor there, unless the community has accepted that such cohabitation regulates their compliance with the customary requirement in question.[41] All this, therefore, leads to the question of whether the relevant community has accepted that certain acts achieve the objective set out by the customary marriage requirement.[42] Bilchitz and others state that Ramose's comments implicitly suggest that acts have authority for members of a given community to 'the extent that they accept

economy in South Africa in the early twentieth century' (2014) 57 *African Studies Review* 29 41-42.

35 See, eg, the Court's comments in *DRM v DMK (*2017/2016) [2018] ZALMPPHC 62 (7 November 2018) para 31. See also Mangema (n 2); and Sibisi (n 7) 385 who observes that in *Sengadi v Tsambo,* for example, the Court misdirected itself in placing much emphasis on the parties' cohabitation.

36 See, in general, MG Ramose *African philosophy through ubuntu* (1999) ch 6; MG Ramose 'An African perspective of justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy*, https://them.polylog.org/3/frm-en.htm (accessed 19 August 2021); and MB Ramose 'Reconciliation and reconfiliation in South Africa' (2012) 5 *Journal on African Philosophy* 21.

37 Ramose (2001) (n 36) para 6.

38 As above. See also Ramose (1999) (n 36) 84-85 where he quotes De Tejada and concludes: 'Ubuntu or Bantu law is without exception … a combination of rules of behaviour which are contained in the flow of life.'

39 As above. Ramose's description is similar to the Court's views in *Pilane & Another v Pilane & Another* 2013 (4) BCLR 431 (CC) particularly para 34 that '[t]he 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'.

40 As one of the requirements for the validity of a customary marriage, sec 3(1)(b) of the RCMA provides that 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'.

41 Ramose (2001) (n 36) para 6.

42 See also Nkosi (n 11).

them as binding and regulative of behaviour'.[43] On this basis, then, Ramose's theory requires a court to ask whether the act in question has been 'socially accepted'.[44] This is similar to Bennett's question, as set out above, regarding how the essential can be distinguished from the optional.[45] At the end of the day, this would mean that the court would have to be convinced that members of a community accept particular acts as accomplishing objectives, and that it does not merely amount to a social habit.

In order to understand this, Bakker's insights are useful here in relation to the nature of these acts. He posits that part of the problem with the customary marriage judgments on the integration of the bride is that the acceptance (or not) of a *ritual* is conflated with a *requirement*.[46] The product of such conflation then is that the community's acceptance of a change of ritual is mistakenly seen as a change or waiver of the requirement itself. There is an unfortunate use of the words 'waiver' and 'requirement' in the judgments.[47] As set out below, relinquishing or abandoning (implied by the word 'waiver') is not an accurate characterisation of the issue since it is not the requirement that is abandoned, but the change of particular actions that evidence the requirement.

Our question then is whether the community accepts that it has waived the *requirement* of integration of the bride, or whether the community has accepted that individuals can *find other means or acts of reaching the objective/function of the requirement*. In many of the cases that will be discussed later, there is a clear indication that the requirement remains very important in customary marriages, but that the rituals/associated acts have evolved in different ways to cater for different situations.[48] In *Tsambo*, for example, the requirement was not waived. The integration requirement was met. As the Court correctly observes, 'the wife was given matching attire and both families were present to witness a coming together at the place of

43 D Bilchitz, T Metz & O Oyowe *Jurisprudence in an African context* (2017) 34-35.
44 As above.
45 Bennett (n 9) 214.
46 In this regard Bakker notes that '[i]t is not the essential requirements that can be waived but rather the rituals associated with the essential requirements'. See P Bakker 'Integration of the bride as a requirement for a valid customary marriage: *Mkabe v Minister of Home Affairs* [2016] ZAGPPHC 460' (2018) 21 *Potchefstroom Electronic Law Journal* 10. See also Sibisi (n 12) 97.
47 *Mbungela* (n 1) paras 15 & 26; *Tsambo* (n 1) paras 18, 29 & 31. See also *Mabuza* (n 6) paras 25-26.
48 Eg, in *Mbungela* (n 1) and *Tsambo* (n 1), it seems that *lobolo* and formal delivery/integration of a woman into her husband's family took place at the same time. More importantly, and dispensing with the form, formal delivery happened at the bride's family homestead, and not the groom's family. See generally discussion by Sibisi (n 12).

the *lobola* negotiations, after they had been concluded'.[49] Nkosi bears such interpretation out when he suggests that 'adherence to [the handing over of the bride] ritual has never been monolithic'.[50] Again, in *Mbungela* the integration requirement was met in the following ways:[51]

> The first appellant, in his own words, described the successful *lobola* negotiations, the payment of a significant portion of the amount agreed upon and a live cow and the exchange of gifts by both families as a combination of the two families. It is, therefore, not surprising and of great significance that the couple's families subsequently sent representative delegations to each other's burial ceremonies, as in-laws. Furthermore, it is striking that family members who contested the validity of the customary marriage in question, referred to the couple as 'husband and wife' during unguarded moments as they testified. These were patent Freudian slips that truthfully indicated that they accepted that the couple was indeed married. And it is not insignificant too that the deceased recorded the deceased as her husband in a valuable document which informed the world of her important next of kin.

An analogy dealing with how one meets a requirement is to be found in positive (legislated) law.[52] While we recognise the danger of comparing customary law with legislated positive law, the original requirement emanated from a custom in canon law as is described below. Poignantly, Ramose and his co-author, Cakata, point out the following, which is useful in our context: 'Indigenous peoples … have actually always been open to learning, appreciating and taking the cultures of others whenever they see fit. This is expressed in the isiNguni saying *intonga entle igawulwa ezizweni* (a beautiful rod is cut from other nations).'

Thus, in terms of section 29(2) of the Marriage Act,[53] a civil marriage '*shall* take place in a church or other building used for religious service, or in a public office or private dwelling house, with open doors'. In the case of *Ex Parte Dow* the problem was that the entire marriage ceremony, in breach of section 29(2), had taken

49 *Tsambo* (n 1) paras 5-6.
50 Nkosi (n 11) 67. Nkosi goes on to explain the different ways in which this ritual has been accepted as accomplished, for instance, through physical (virilocal) handing over, symbolic, or uxorilocal. In this latter version, Nkosi advises that it may involve the slaughtering of a beast by the father or guardian of the bride, to signify the acceptance of the groom by the family, or as an indication that she is free to join the husband and his people.
51 Mbungela (n 1) para 23.
52 The authors go on to say: 'The problem with Western knowledge is that it imposes itself instead of allowing people to find what could be useful to them from its culture.' See Z Cakata & MB Ramose 'When *ukucelwa ukuzalwa* becomes bride price: Spiritual meaning lost in translation' (2021) *African Identities* 5.
53 Act 25 of 1961.

place in the front garden of a private dwelling place in the open (that is, not under a roof or with open doors).[54] The Court looked at the objects sought to be achieved by the section 29(2) requirement throughout history. The Court found that the requirement was put in place to ensure publicity.[55] Given that many of the issues that required roofs and doors no longer were in play (that of escaping banns and clandestine marriages),[56] the Court found that the publicity was still achieved by holding a marriage ceremony in a garden, albeit as part of a private dwelling home.[57] Thus, while the requirement was still in place, there was a change in the way in which the parties complied with this requirement.

Literature on the integration of the bride requirement demonstrates that some commentators have tended to adopt an 'either/or' characterisation of the issue. We find this ironic, given that the adoption of this binary falls into the very trap of Western ideas around certainty and a family form that relies on individual consent rather than the union of families.[58] For example, Sibisi suggests that commentators usually fall into two schools of thought regarding the integration of the bride requirement.[59] He suggests that the first school argues that integration of the bride is a dispensable or variable requirement that parties may waive if they so choose.[60] The second school argues the opposite – that integration of the bride is an indispensable requirement.[61] This characterisation, we argue, is misguided, and it would be better to consider the issue through the lens of social acceptance of the change and variability of the ritual *underlying* the existing requirement.[62] This is because – despite the SCA's language in the cases of *Tsambo* and *Mbungela* of 'waiver'– there is ample evidence from courts' jurisprudence and empirical studies[63]

54 1987 (3) SA 829 (DCLD).
55 See Broome J's comments at 832F-H in *Ex Parte Dow* (n 54)*:* 'In my view the object of these provisions was essentially to ensure that marriages took place in public, that the public were to be informed of intended marriage so that any objections could be raised, and that a register to which the public had access be kept. The constant reference to open doors is an indication that the public were to be permitted access to every marriage ceremony, the mischief being clandestine marriages.'
56 Cretney & Masson (quoting Poynter) suggest that the theory was that banns were primarily 'addressed to parents and guardians, to excite their vigilance, and afford them fit opportunities of protecting those lawful rights which may be avoided by clandestinity'. See SM Cretney & JM Masson *Principles of family law* (1990) 15-16.
57 *Ex Parte Dow* (n 54) 833G-H.
58 Sibisi (n 12); Nhlapo (n 3) 281.
59 Sibisi (n 12) 90-91.
60 As above.
61 As above. See also *Fanti v Boto* (n 3).
62 See our argument below. See also Bakker (n 46) and Nhlapo (n 3) in general.
63 See, in general, C Himonga & E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015). For references to earlier studies, see J Comaroff

to suggest that most clans and communities continue to believe that the integration of the bride is an important requirement.[64]

However, and in line with the courts' general recognition that integration requires some type of 'constructive delivery',[65] there are particular circumstances where there may be an abbreviation or simplification of the rituals associated with the requirement. We have noted a number of circumstances where this could be said to be the case: first, in urban middle-class settings,[66] and where the future wife is an older woman (often a spinster or a widow)[67] or where both parties are elderly.[68] In these cases there seems to be an understanding in the community that the 'usual' rituals[69] are not necessary, and that simplified or symbolic integration will achieve the objective of the requirement. We believe that this approach is implicitly endorsed by Ramose and that the 'strict compliance with form' approach ironically uses Western law's need for certainty as the appropriate measure, and treats customary law as something other than what it is. Ramose alludes to this when he suggests that when legal language ruptures the (customary) ideas of 'be-ing' into (the Western) 'be!', it becomes a violent act.[70]

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& S Roberts *Rules and processes: The cultural logic of dispute in an African context* (1981).

64 Eg, see Himonga & Moore (n 63) 92-93 and Bakker (n 46).

65 *Mlamla* (n 2). Here the judge stated at para 17, in reference to the integration of the bride requirement: 'I also agree with the concept of constructive delivery to the extent that it suggests, at the very least, some authorised members of the bride's family delivering or handing her over to the groom's family without a big formal occasion.'

66 See, eg, the comment by Laing J in *Peter* (n 1) paras 19-20*:* 'It is useful … to reiterate the organic nature of customary law, which is characterised by its continuous and natural development *within a constantly changing socio-economic environment* … Overall, it appears from the case law that the courts have adopted a pragmatic approach, rooted in the practices and lived experiences of the community concerned' (our emphasis).

67 See, eg, *Miya v Mnqayane & Another* (3342/2018)[2020] ZAFSHC 17 paras 13-14 where the Court explored and ultimately accepted the reasons for a truncated handing-over ceremony.'

68 Eg, in *Peter* (n 1) the Court states (para 36) that the spouses were 68 and 61 years old when their customary marriage took place. Later, the Court notes (para 46) that '[i]t would have been reasonable for the couple to have abbreviated the process where both were advanced in years and where it was the deceased's third marriage'.

69 See Nhlapo (n 3) 275.

70 Ramose goes on to say: 'The violent separation of be-ing, becoming and the invention of opposition between be-ing and becoming through the insertion of be! is ontologically and epistemologically questionable.' See Ramose (1999) (n 36) 80. Elsewhere, Ramose has eschewed the idea of a being as 'finite' – he talks about being as 'one continuous wholeness'. See Ramose (2001) (n 36) para 6. In the context of customary marriages, see Nhlapo (n 3) 275, who makes this exact point: '[T]he construction of official customary law under colonialism and apartheid and warns that *the search for common-law style certainty runs the risk of destroying the essence of customary law*, in the process denying legal validity to marriages that are perfectly sound socially' (our emphasis). See also Nhlapo (n 3) 281.

# 3 Court jurisprudence on formal delivery and integration of a bride requirement

## 3.1 Categories of court approaches

For the purposes of this discussion, the courts' jurisprudence on the formal delivery and integration of a woman may be divided into three main categories. The first category is where courts use the fact that customary law is recognised subject to the Constitution as a justification for disregarding the formal integration of a woman requirement. *Mabudza v Mbatha*[71] is an example of how the Court used the Constitution to endorse the waiver of the formal integration requirement in the name of developing customary law.[72] Further, in *LS v RL*,[73] while finding that there was compliance with the integration requirement, the Court ultimately held that the requirement was unconstitutional for its alleged discrimination against women.[74] The second category, represented by *Fanti v Boto*[75] and *Motsoatsoa v Roro*,[76] focuses on the Court's *dictum* that formal delivery is a requirement that cannot be waived. On the face of it, this approach seems to suggest that there be strict adherence to the form traditionally accepted of the integration requirement in customary marriages.[77]

The above first and second categories represent missed opportunities in different ways to consider (i) what language is used to describe and understand customary marriage; and (ii) what the Constitution really requires in terms of equality. More importantly, these approaches fail to consider the flexibility of customary marriage rules which, as practised, change to meet the community's social context, among other issues.[78] In this context, Ramose's observations

71 *Mabuza* (n 6). See also *LS v RL* 2019 (4) SA 50 (GJ).
72 In *Mabuza* (n 6), where the Court observed that 'if one accepts that African customary law is recognised in terms of the Constitution, and relevant legislation passed thereunder, such as the Recognition of Customary Marriages Act, No 120 of 1998 … there is no reason, in my view, why the courts should be slow at developing customary law ... the proper approach is to accept that the Constitution is the supreme law of the Republic. Thus any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny.'
73 *LS v RL* (n 71).
74 In *LS v RL* (n 71) para 34 the Court held that the handing over of a woman 'as a prerequisite in validating the existence of a customary law marriage is inconsistent with the constitutionally guaranteed values of equality, dignity and non-discrimination'.
75 *Fanti* (n 3).
76 *Motsoatsoa* (n 7).
77 See also *Motsoatsoa* (n 7). See also Nkosi (n 11) who observes that 'adherence to [the handing over of the bride] ritual has never been monolithic'.
78 Eg, most communities have accepted the changed realities in which the customary marriage requirement of *lobolo* is now practised, ie, money is delivered

cannot be overemphasised, namely, that the language of form and rules – that conform to tick-box requirements – cannot truly capture the essence of customary marriage. Moreover, as customary law is dynamic, living and linked to morality, it really is concerned with what the community accepts within the framework of an egalitarian Constitution.[79] In this regard, we further argue that courts using the Constitution to do away with the practice seem to disregard the constitutional mandate of developing customary law[80] or, at a minimum, show courts falling into the trap of common law ideas of certainty.

The third category, which is our focus in this article, affirms the flexibility of customary rules as represented by the case of *Mbungela.*[81] In this category of cases, instead of disregarding the requirement, courts seem to recognise other activities/acts undertaken to reach the objective of the formal delivery and integration requirements.[82] In so doing, courts are ultimately focusing on the functionality of the marriage, that is, mutual respect, taking care of each other, to name a few. The function of a marriage, for example, is well represented in the case of *Peter* where, as will be discussed later, the wife assisted the deceased with the renovation of the house, took care of the deceased's illness, and mourned him as the widow.[83] In what subsequently follows, we look at the cases in this category and attempt to show how Ramose's theory is at work.

### 3.2 *Mbungela & Another v Mkabi*

Similar to the context in *Fanti v Boto*,[84] the issue before the Court in *Mbungela v Mkabi* was whether the first respondent, Mr Mkabi, and the late Ms Ntombi Eunice Mbungela (the deceased) had complied with section 3(1)(b) of the RCMA and concluded a valid customary marriage. The main issue before the Court was that the deceased's

instead of live cows (*Tsambo* (n 1)). It should be recalled that traditionally, *lobolo* was delivered in the form of live cows (Bennett (n 9)).

79 See eg *Shilubana* (n 13).

80 In this regard, see generally discussion by J Sloth-Nielsen & L Mwambene 'Walking the walk and talking the talk: How can the development of African customary law be understood?' (2012) *Law in Context* 27 where the authors highlight the confusion emanating from court when their use of 'develop' actually means 'change'.

81 *Mbungela* (n 1), *Peter* (n 1) and *Muvhali v Lukhele* (21/34140) [2022] ZAGPJHC 402 (18 July 2022).

82 See also *Tsambo* (n 1).

83 *Peter* (n 1) paras 12 & 14.

84 In both *Fanti* (n 3) and *Mbungela* (n 1) the families of the respective deceased wives are challenging the validity of the marriage on the basis that the customary marriage did not take place due to non-fulfilment of the customary marriage requirement of handing over of the bride to her groom's family. However, it is observed that the outcomes of these two cases are different.

family, the appellants, contended that Mr Mkabi and the deceased had not concluded a customary marriage as the deceased was not handed over to the Mkabi family and *lobola* was not paid in full. As a result, the family argued that not all the requirements of section 3(1)(b) of the Act were met.[85]

The brief facts surrounding this case are that Mr Mkabi, a Swati, and the deceased, a Shangaan, who were respectively 59 and 53 years old, started dating in 2007. They each owned immovable property. They regularly visited each other at their respective properties in Kanyamazane, Nelspruit, and in Pienaar. Mr Mkabi, however, spent significant amounts of time at the deceased's home and had his washing done there on a permanent basis.[86] On 2 April 2010 Mr Mkabi sent emissaries from his family to the deceased's home in Bushbuckridge to start the marriage/*lobola* negotiations. The proceedings were successful and the two families concluded an agreement in terms of which Mr Mkabi would pay *lobola* in the sum of R12 000 and a live cow. He immediately paid R9 000 which was accompanied by an exchange of gifts.[87] According to the deceased's family member, the exchange of gifts 'symbolised the combination of a relationship between the bride and the groom and the[ir] families'.[88] It is common cause that Mr Mkabi subsequently delivered the cow to the deceased's family.[89] After the *lobola* negotiations, the deceased remained at her family home for a few days and returned to Mr Mkabi in the following week.[90] Unfortunately, the deceased and Mr Mkabi did not register their customary marriage due to no fault of their own. In 2013 they approached the relevant traditional council in order to obtain an official letter confirming their union as they considered themselves married. The traditional council secretary, however, was absent from the office on that day.[91]

Before determining the issue, the Court highlighted several factors that pointed to a possible conflict of laws in so far as the handing over of the bride requirement was concerned. The Court noted that Mr Mkabi was a Swati man who was not familiar with the customs of the deceased (who was a Shangaan). During the *lobola* negotiations, the deceased's family made no mention of a handing over or a bridal

85 *Mbungela* (n 1) para 3.
86 *Mbungela* (n 1) para 4.
87 The various gifts for the deceased's family included a man's suit, shirt, tie, socks and a pair of shoes for her guardian, a woman's suit for her mother, a blanket, a headscarf, two snuff boxes, brandy, whisky, a case of beers and a case of soft drinks. The deceased's family also gave gifts to the Mkabi emissaries (para 5).
88 *Mbungela* (n 1) para 5.
89 As above.
90 *Mbungela* (n 1) para 6.
91 *Mbungela* (n 1) para 6.

transfer requirement. According to Mr Mkabi, the handing over of the bride was not an absolute requirement to complete a customary marriage in Swati custom.[92] In addition, the Court highlighted several incidents that point to the fact that both the family of the deceased and Mr Mkabi were involved in the processes that led to the marriage and during the marriage.

First, the Court found that Mr Mkabi and the deceased had a white wedding at the deceased's church and they continued living as a married couple.[93] Second, according to the deceased's diary, she had listed her emergency contact persons as Ms Mkhonza and Mr Mkabi, whom she respectively described as her daughter and husband.[94] Third, when Mr Mkabi's mother died in 2012, the deceased's family attended her funeral at his ancestral home in Umkomaas. Likewise, when the deceased's mother passed away in October 2013, members of his family attended the funeral. These attendances were an acknowledgment by the two families of their relationship as in-laws and a corresponding show of respect in accordance with African culture.[95] Finally, the Court found two slips of the tongue during cross-examination. First, the deceased's brother (as first appellant) told the Court – when asked whether he prevented Mr Mkabi from attending the deceased's funeral – that 'I did not stop him all, what I did was to report to him that *his wife* has passed away'.[96] Similarly, the daughter of the deceased (as second appellant) referred to Mr Mkabi as *'my mom's husband'*.[97]

In arriving at the decision, the Court made several observations that, we believe, manifests Ramose's social acceptance theory in its acceptance of the flexibility of customary law but, more importantly, that the law is what is accepted by the community in its contemporary setting. In this regard, the Court notes:[98]

> [C]ustomary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistently with the Constitution, so as to meet the changing needs of the people who live by its norms. The system, therefore, requires its content to be determined with reference to *both the history and the present practice*

92 In addition, according to Mr Mkabi, payment of *lobola* may suffice in Swati culture, depending on the negotiations. Related to this issue, Mr Mkabi further averred in court that he had not been informed that the marriage would be complete only when the entire *lobola* amount was paid. Furthermore, there was no demand for the balance of R3 000 which he intended to pay in due course despite his understanding that *lobola* is never paid in full; *Mbungela* (n 1) para 7.
93 *Mbungela* (n 1) para 7.
94 As above.
95 *Mbungela* (n 1) para 8.
96 *Mbungela* (n 1) para 14 (our emphasis).
97 *Mbungela* (n 1) para 13 (our emphasis).
98 *Mbungela* (n 1) para 17 (our emphasis).

> *of the community concerned*. As this Court has pointed out, although the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society. Thus, the legislature left it open for the various communities to give content to s 3(1)(b) in accordance with their lived experiences.

In addition, and also directly speaking to the flexibility characteristic nature of customary law, the Court pointed out that

> *the Constitutional Court has cautioned courts to be cognisant of the fact that customary law regulates the lives of people and that the need for flexibility and the imperative to facilitate its development must therefore be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights*. The courts must strive to recognise and give effect to the principle of living, *actually observed customary law*, as this constitutes a development in accordance with the 'spirit, purport and objects' of the Constitution within the community, to the extent consistent with adequately upholding the protection of rights.[99]

In applying these observations, the Court held that *in casu* there was a valid marriage. In addition to the partial payment of *lobola* and the exchange of gifts, the Court found that several incidents pointed to the integration of the bride, the most important of which was the coming together of both families at a white wedding. However, this was not seen in isolation: The delegations at family burial ceremonies, the recording of the married status in an important document, and the cross-examination slips of the tongue by the appellants in unguarded moments were enough to convince the Court that a customary marriage existed.[100]

More importantly, and directly speaking to the changed form of the practice and Ramose's social acceptance theory, the Court cited Bennett's examples of traditional wedding ceremonies that were simplified or abridged without affecting the validity of a marriage. The Court pointed out:[101]

> Western and Christian innovations have been combined with the traditional rituals … [h]ence a wedding ring may be used in place of the traditional gall bladder or slaughtered beast, and, for many, a church ceremony is now the main event. This seems to be precisely what happened here. To my mind, there can be no greater expression of the couple's consummation of their marriage than their undisputed church wedding.

99 *Mbungela* (n 1) para 18 (our emphasis).
100 *Mbungela* (n 1) para 23.
101 *Mbungela* (n 1) para 24.

Furthermore, and confirming our observation that the Court in fact recognised the importance of handing over of the bride requirement (in spite of its unfortunate use of the word 'waiver'), the Court held that the two families had indeed come together: There was overwhelming evidence that the families, including the deceased's 'guardian', considered the couple husband and wife for all intents and purposes. This, we find, speaks to Ramose's social acceptance theory, essentially boiling down to recognising 'the living law *truly observed by the parties and the actual demands of contemporary society*'.[102] Second, the Court implied that it was the *requirement* and not a specific and inflexible ritual or act that has value in customary law:[103]

> The importance of the observance of the traditional customs and usages that constitute and define the provenance of African culture cannot be understated, nor can the value of custom of bridal transfer be denied. However, it must be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual was not observed, even if other requirements of section 3(1)(b) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results.

In summary, the Court concluded that both families of the deceased and Mr Mkabi, who come from different ethnic groups, were involved in and acknowledged the formalisation of their marital partnership.[104]

### 3.3 *Moropane v Southon*

In similar fashion to *Mbungela,* the Court in *Moropane v Southon*[105] concluded that a valid marriage existed.[106] The appellant's case was that there was no evidence that the parties had ever agreed to conclude a customary marriage, suggesting that the requirement in section 3(1)(b) of the Act had not been met.[107] In order to understand the Court's finding, we narrate the brief facts of the case as follows: The parties met and fell in love during 1995. At that time the appellant, Mr Moropane, was still married to his former wife whom he divorced in October 2000, after which the respondent, Ms Southon, moved in with the appellant and they both lived together at the appellant's house in Morningside Manor, Johannesburg.[108]

102 *Mbungela* (n 1) para 26 (our emphasis).
103 *Mbungela* (n 1) para 27.
104 *Mbungela* (n 1) para 30.
105 *Moropane* (n 2).
106 *Moropane* (n 2) para 3 as read with para 55.
107 Sec 3(1)(b) RCMA.
108 *Moropane* (n 2) para 4.

On 17 April 2002 a delegation, led by the appellant's brother, Mr Strike Moropane, was sent to the respondent's parental home in Seshego, Polokwane. The negotiations were carried out between the two families which culminated in an agreed amount of R6 000 being paid by the appellant's delegation to her family.[109] After the negotiations had been completed, the Moropanes gave the Mamabolos two blankets, one for the respondent and the other one for her mother, as well as knives and cutlery.[110] In addition, a sheep was slaughtered to signify the new union between the two families brought about by the customary marriage between the appellant and the respondent.[111] This was followed by festivities during which the two families and the people who had gathered at the Mamabolos' residence sang, danced, ululated and partook in food and drinks in celebration of the customary union. The respondent was draped with the blanket that the Moropanes, her in-laws, had bought for her.[112]

In relation to the integration requirement, the Court noted that on the day of the marriage negotiations, a closed meeting was held between the two families and the appellant's delegation requested the respondent's family to permit the newly-wed bride (the *makoti*) to be delivered to their home. Later on the respondent was driven to the appellant's home in Atteridgeville, Pretoria, where she was welcomed by the appellant's sister.[113] Essentially, the respondent asserted that this context (that is, the closed meeting and being driven to the appellant's home) was what constituted the negotiations and formal delivery.[114]

On the other hand, the appellant contended that the meeting and the drive were no more than preliminary or exploratory discussions and not to conclude a customary marriage.[115] Further, the respondent contended that, after the negotiations on 17 April 2002, the parties continued to live together in the same house as husband and wife in a customary marriage until she left in November 2009. In contesting this, the appellant asserted that such context was a mere cohabitation.[116] The third bone of contention between the parties involved identifying the type of marriage. The respondent maintained that the marriage was customary in nature, while the

109 *Moropane* (n 2) para 6.
110 *Moropane* (n 2) para 7.
111 *Moropane* (n 2) para 8.
112 *Moropane* (n 2) para 9.
113 *Moropane* (n 2) paras 10 & 11.
114 *Moropane* (n 2) para 2.
115 *Moropane* (n 2) para 17.
116 *Moropane* (n 2) para 3.

appellant contended that it was always meant to be a marriage by civil rites.[117] The determination of this issue, therefore, was crucial to the question of whether a customary marriage or a civil marriage came about.

Against this brief background, and in holding that a valid customary marriage existed, the Court considered a number of important events that took place between 2002 and November 2009 while the parties lived together in Johannesburg.[118] These include the following:[119]

> [T]he appellant bought the respondent an 18 carat yellow ring which he arranged with a jeweller to redesign as a wedding ring; he organised a lavish 50th birthday for her which was captured on a DVD; he admitted that at this birthday he freely referred to her as his customary law wife at this party; the appellant further referred to her mother as his mother-in-law and Gilbert, as his brother-in-law; when he applied for her to be a member of the prestigious Johannesburg Country Club, he described her as his customary law wife and also when he applied for a protection order.

More importantly, two expert witnesses, Mr Sekhukhune for the appellant and Prof Mokgatswane for the respondent, were called to testify on Pedi customary marriages in an attempt to assist the Court to determine whether the marriage between the parties was 'negotiated and entered into or celebrated in accordance with customary law' of the Bapedi people.[120] In that regard, the Court observed:[121]

> Except for minor and inconsequential differences on cultural rituals, both experts were agreed that the current customary requirements for a valid customary marriage amongst the Bapedi people include amongst others, negotiations between the families in respect of lobola; a token for opening the negotiations (*go kokota or pula molomo*); followed by asking for the bride (*go kopa sego sa metsi*); an agreement on the number of beast payable as lobola (in modern times this is replaced by money); payment of the agreed lobola; the exchange of gifts between the families; the slaughtering of beasts; a feast and counselling (*go laiwa*) of the makoti followed by the formal handing over of the makoti to her in-laws by her elders.

In considering these rituals, the Court – recognising the potential that these rituals can change and indeed that living customary law

117 *Moropane* (n 2) para 5.
118 *Moropane* (n 2) para 17.
119 As above.
120 As above.
121 As above.

is dynamic – confirms our belief that Ramose's social acceptance theory works in practice. The Court noted:[122]

> African law and its customs are not static but dynamic. They develop and change along with the society in which they are practised. This capacity to change requires the court to investigate the customs, cultures, rituals and usages of a particular ethnic group to determine whether their marriage was negotiated and concluded in terms of their *customary law at the particular time of their evolution*. This is so particularly as the Act defines 'customary law' as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those people.

Ultimately, the Court was satisfied that the essential requirements for a valid customary marriage according to the customary law of the Bapedi people had been met.[123]

### 3.4 *Tsambo v Sengadi*

In similar fashion to *Mbungela* and *Moropane*, the SCA in *Tsambo v Sengadi*[124] also took a flexible approach regarding the formal transfer of the bride requirement and held that the marriage was valid.[125] The two important issues were (i) whether a customary law marriage between the deceased, Tsambo and Mrs Sengadi, came into existence on 28 February 2016;[126] (ii) whether 'pursuant to the conclusion of the *lobolo* negotiations, a *handing over of the bride* ensued in satisfaction of the requirement that the marriage be negotiated and entered into or celebrated in accordance with customary law in terms of section 3(1)(b) of the RCMA 120 of 1998'.[127]

In order to understand the SCA's finding that there was a valid customary marriage, we highlight the brief facts of this case as follows: The respondent (being the alleged wife) averred that the deceased proposed marriage to her on 6 November 2015 while they were in Amsterdam, which she immediately accepted. On 20 January 2016 the appellant (the deceased's father) dispatched a letter to the respondent's mother, requesting that the families of the respondent and the deceased meet 'to discuss the union' of the deceased and the respondent. On 28 February 2016 the two families met at the

122 *Moropane* (n 2) para 36 (our emphasis).
123 *Moropane* (n 2) para 55.
124 *Tsambo* (n 1).
125 *Tsambo* (n 1) para 2. This case was an appeal, directed at the decision of the High Court that found that a valid customary marriage had been concluded between the deceased and the respondent. The court a quo judgment is cited as *Tsambo v Sengadi* 2019 (4) SA 50 (GJ).
126 *Tsambo* (n 1) para 1.
127 As above (our emphasis).

respondent's family home.[128] Upon the successful conclusion of the *lobola* negotiations, the deceased and the respondent were immediately dressed in matching wedding attire, and the celebration by the two families, ululating, and uttering the words 'finally, finally' ensued.[129] It is also important to highlight that the deceased's aunts introduced the respondent to all persons present as the deceased's wife and welcomed her to the Tsambo family.[130] The deceased and the respondent lived in the same house as husband and wife until 2018 when she moved out due to his infidelity.[131] In the same year the deceased committed suicide. The respondent immediately returned to the matrimonial home in order to mourn the passing of her husband. However, she was informed by the appellant that he did not acknowledge her as the deceased's wife and barred her from making funeral arrangements for him.[132]

The appellant's actions led to the respondent launching an urgent application, seeking recognition of her customary marriage to the deceased.[133] In opposing the application, the appellant averred that the respondent had no right to the relief sought, as no customary law marriage had been concluded between her and the deceased. More relevant to the theme of this article, the appellant averred that the handing over of the bride, which he considered as the most crucial part of a customary marriage, did not take place.[134] In addition, he described the meeting that took place between the two families to have been confined to *lobola* negotiations and the celebration of the successful conclusion of the lobola negotiations.[135]

Before looking at the SCA decision, it is important that we pause to highlight that Ramose's social acceptance theory was at play in the High Court decision, when it 'found that there was a tacit waiver of the custom of the handing over of the bride because a *symbolic handing over* of the respondent to the deceased's family had occurred after the conclusion of the customary marriage'.[136] Of course, in as much as the Court's use of the word 'waiver' is regrettable, we find that the Court's approach, that of recognising that the symbolic handing over had taken place, speaks to the Court's focus on the dynamic and flexible nature of the application of living customary rules, and – in line with Ramose's theory – confirmation of a changed

128 *Tsambo* (n 1) paras 3 & 4.
129 *Tsambo* (n 1) para 6.
130 *Tsambo* (n 1) para 5.
131 *Tsambo* (n 1) para 7.
132 As above.
133 *Tsambo* (n 1) para 8.
134 *Tsambo* (n 1) para 10.
135 *Tsambo* (n 1) para 9.
136 *Tsambo* (n 1) para 11 (our emphasis).

practice that everyone in the family and those present accepted at the time.

Reverting to the SCA decision's regarding the validity of the customary marriage, we submit that the Court's citation of certain authorities underlines the applicability of Ramose's theory in this case.[137] This is so for various reasons: First, the Court highlighted that 'when dealing with customary law, it should always be borne in mind that it is a dynamic system of law', endorsing the authorities as laid down in the *Mabuza v Mbatha'*.[138] Second, and in endorsing the flexibility nature of customary rules, the Court observed that 'the appellant's contentions pertaining to the rituals observed during the handing over of the bride ceremony fail to take into account that customary law is by its nature, a constantly evolving system'.[139] Third, and more importantly, the Court cited with approval Bennett's observations regarding the importance of flexibility in the application of customary rules in the following words:[140]

> In contrast, customary law was always flexible and pragmatic. Strict adherence to *ritual formulae* was never absolutely essential in close-knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified; similarly, the wedding might be abbreviated by reason of poverty or the need to expedite matters. Aside from this, the indigenous rituals might be supplanted by exotic ones: a wedding ring may now be used in place of the traditional gall bladder of a slaughtered beast and for many a church ceremony has become indispensable [Moreover], the Court observed that given its obligation imposed on the courts to give effect to the principle of living customary law, 'failure to strictly comply with all rituals and ceremonies that were historically observed cannot invalidate a marriage that has otherwise been negotiated, concluded or celebrated in accordance with customary law'.

Furthermore, in concluding that the requirement of the handing over of the bride had been met – albeit in a different form – the Court made several observations that directly support Ramose's social acceptance theory and, arguably, also confirms the dynamic nature of living customary practices as follows:[141]

> While rituals associated with the handing over of the bride, like the slaughtering of the sheep and the consumption of its bile were indeed not observed, there are some features that bear consideration. First, the court noted that it was striking that the deceased's aunts were the

137 *Tsambo* (n 1) para 14.
138 *Tsambo* (n 1) para 16.
139 *Tsambo* (n 1) para 17.
140 *Tsambo* (n 1) para 18 (our emphasis).
141 *Tsambo* (n 1) paras 25 & 26 (our emphasis).

> ones who provided the respondent with an attire matching that of the deceased and who actually dressed her up in it, describing such attire as her wedding dress. In the court's reasoning, it found that this was a customary practice that is compatible with an acceptance of the respondent by the deceased's family. Second, the clearest indication of her acceptance as the deceased's wife is evidenced by the actual utterances that were made: the respondent was formally introduced as the deceased's wife and welcomed to the Tsambo family. Third, the appellant embraced her and congratulated her on her marriage to the deceased.

In view of the above, the Court, therefore concluded and agreed with the respondent's version that a handing over, in the form of *a declared acceptance of her as a makoti* (daughter-in-law) satisfied the requirement of the handing over of the bride.

### 3.5 *Peter & Others v Master of the High Court: Bhisho & Another*

In *Peter*[142] the daughter of the deceased (a Mr Blayi) wanted the Court to issue her with letters of executorship in respect of her father's estate. The issue in the case dealt with whether there was a valid marriage between the deceased (Mr Blayi) and the second respondent (Ms Thobeka Joe) who wanted to be appointed as executor instead of the daughter.[143] The brief facts to the case were as follows: Consequent to the passing of Mr Blayi on 23 June 2019, the applicants (being the five children of the deceased) instructed their attorneys to report the death to the Master of the High Court and for letters of executorship to be issued accordingly. However, the Master informed the applicants that the death had already been reported by Ms Joe's attorneys on 12 August 2019 in her capacity as the alleged customary wife of the deceased. The Master had advised Ms Joe's attorneys that no letters of executorship could be issued until the marriage had been registered with the Department of Home Affairs (DHA). The applicants' attorneys invited the second respondent's attorneys to submit proof that a customary marriage had been concluded but received no response.[144]

The first applicant thus brought the application, challenging the validity of the second respondent's marriage to her deceased father, Mr Blayi. In the first applicant's submissions, she conceded that her father had been in a relationship with Ms Joe at the time of his death, but emphatically denied that they had been married.

142 *Peter* (n 1).
143 *Peter* (n 1) para 1.
144 *Peter* (n 1) para 3.

According to the applicants, Mr Blayi had apparently resided with the first applicant's brother, cited as the fourth applicant in these proceedings. The daughter suggested that, while the second respondent would sometimes visit the deceased, spending a night or more at his home, she would return to her own home afterwards, and they never co-habited. None of the applicants was aware of any marriage between the two individuals in question.[145]

In opposing the application, Ms Joe averred that she indeed was the customary wife of the deceased. She stated that on 10 December 2016 she and the deceased arranged to become married at the house of a Mr Kututu, whom the deceased considered a brother. This was due to the fact that Mr Blayi's house was dilapidated. On the day in question, at Mr Kututu's home, Ms Joe was welcomed as the late Mr Blayi's wife-to-be. Customary rites were performed and Ms Joe was adorned as a bride and given a bridal name (Nokhuselo) by the sister of the deceased. The ceremony was witnessed by families on both sides of the union, but not by Mr Blayi's children (that is, the applicants). Subsequently, the couple lived together as man and wife at the deceased's homestead, which they renovated and refurbished during the course of 2017.[146]

The Court considered the following evidence in deciding the matter, consonant with Ramose's theory of 'acceptance': First, subsequent to the passing of the deceased, the respondent grieved and wore black for a period of six months before marking the end of the mourning period at a cultural ceremony (*ukukhulula izila*) held at the homestead and attended by family, neighbours and members of the church. None of the applicants was present on the occasion.[147] In addition, the daughter assisted Ms Joe with preparations for the funeral, at which the latter was recognised as the surviving spouse. To that effect, Ms Joe pointed out that (i) she had been seated in the place reserved for a widow at the church; (ii) her union with the late Mr Blayi was acknowledged in the funeral programme; and (iii) speakers acknowledged her as the spouse in their various eulogies.[148] The second respondent's version was confirmed by Mr Katutu who stated that he saw himself as the representative of Mr Blayi's family as he and the deceased grew up together and were both of the Mkhuma clan. They viewed each other as brothers. He confirmed that the marriage was held at his house.[149] In addition, Mr Petros

145 *Peter* (n 1) para 2.
146 *Peter* (n 1) para 6.
147 *Peter* (n 1) para 8.
148 *Peter* (n 1) para 9.
149 *Peter* (n 1) para 11.

Meti, the son of the daughter (as first applicant) and grandson of the late Mr Blayi, also confirmed to have met the second respondent at the deceased's homestead and observed that the couple lived together as man and wife. In addition, Mr Meti also pointed out that in 2018, he noticed the homestead of his grandfather was being renovated. In addition, he heard his grandfather (the deceased) acknowledge the second respondent as his wife when he spoke to the first applicant. In summary, Mr Meti's evidence was confirmatory to all that Ms Joe had told the Court, that is, that Ms Joe had nursed and taken care of the late Mr Blayi, she was present at his death, and that she mourned the passing of the late Mr Blayi.[150]

Before holding that a valid customary marriage had been concluded, the Court made similar observations as those made in the *Mbungela* and *Tsambo* cases, confirming our reliance on Ramose regarding the importance of 'acceptance' by the family and the community. In this context, the children were largely estranged from their father. In the circumstances then, the Court adopted a pragmatic approach in considering who was 'family'. In its approach, it found its approach needed to be 'rooted in the practices and lived experiences of the community concerned'.[151]

As a result, in deciding whether the question/requirement of the handing over of the second respondent had been met, the Court seemed to align with the social acceptance theory when it observed that 'the second respondent was accompanied by her brother at the time of the marriage ceremony. She was welcomed into the deceased's family by, *inter alia*, Mr Kututu and the late Mr Blayi's sister.'[152] In particular – and following the acceptance of the community idea – the Court observed that Mr Kututu's clan link with the deceased made him 'family' as envisaged by the requirement:[153]

> It is apparent that the concept of clanship is integral to the practices and lived experiences of the isiXhosa community. The presence of members of the same clan at the marriage ceremony, especially individuals with whom the deceased had grown up and treated as his brothers, would have been akin to the deceased's having had close members of his direct family in attendance to have facilitated the handing over of the bride. This would have been all the more necessary where there were few if any surviving elders in the late Mr Blayi's family and where relations with his children were complicated, at best.

150 *Peter* (n 1) para 12.
151 *Peter* (n 1) para 20.
152 *Peter* (n 1) para 27.
153 *Peter* (n 1) para 30.

Consequently, the Court observed:[154]

> In the present matter, there does not seem to be any reason why the customary practice of the handing over of the bride could not be said to have *evolved to accommodate a situation where the groom's family is represented by members of the same clan*. This is all the more so where the circumstances at the time did not allow for the presence of any elders, simply because there were none or where the surviving elder lacked the capacity to represent the family meaningfully, and where the late Mr Blayi no longer enjoyed a close relationship with all of his surviving children.

In emphasising the importance of observing the cultural requirement of the handing over of the bride, albeit in different form, the Court quoted the remarks of the SCA in *Mbungela*:[155]

> The importance of the observance of traditional customs and usages that constitute and define the provenance of African culture cannot be understated. Neither can the value of the custom of bridal transfer be denied. But it must also be recognised that an inflexible rule that there is no valid customary marriage if just this one ritual has not been observed, even if the other requirements of section 3(1) of the Act, especially spousal consent, have been met, in circumstances such as the present ones, could yield untenable results.

In addition, and reflecting on how the social acceptance theory was applicable in this case, the Court observed:[156]

> Whereas a compelling enough argument can be made to the effect that there was a handing over of the bride and that *lobolo* was waived, the ultimate question remains whether this was sufficient to indicate that the marriage was customary in nature. To answer that, it would be remiss of the court not to take into account the evidence in relation to how *the union was viewed by the community itself, whose practices and lived experiences inform the content of customary law*.

In conclusion, we see the *Peter* decision as not only emphasising the need to be flexible in the light of living customary law, but also emphasising the importance of considering evidence of *acceptance* in the parties' family and community – constituted in the light of widowhood, advanced age, and socio-economic realities. We consider the emphasis on 'acceptance' as a test for validity as a much more balanced approach than a typically Western approach that prioritises certainty over the protection of vulnerable parties. The Court in *Peter* was at pains to emphasise Bennett's points (also cited by the Court in *Tsambo*) that 'strict adherence to ritual formulae has

154 *Peter* (n 1) para 32 (our emphasis).
155 *Peter* (n 1) para 40, citing *Mbungela* (n 1) para 27.
156 *Peter* (n 1) para 42 (our emphasis).

never been absolutely essential' and that it was important to consider 'how the community viewed the union'.[157]

For our purposes, then, it shows how Ramose's social acceptance theory was at play when the Court observed that 'how the community itself viewed the union has to be taken into account … cannot be ignored'.[158]

### 3.6 *Muvhali v Lukhele & Others*

In *Muvhali v Lukhele*[159] the issue before the Court concerned a determination of the applicant's marital status following the death of a Mr Lubisi (the deceased).[160] The applicant approached the Court for an order declaring that the customary marriage entered into between her and the deceased on 22 December 2018 was a valid customary marriage as envisaged in section 3 of the RCMA; that she was the customary wife of the deceased; and that she be granted leave to posthumously register her customary marriage with the DHA.[161] The respondents, who were the deceased's family members, opposed the application, stating that no valid customary marriage had been concluded between the applicant and the deceased.

Ms Muvhali alleged that the deceased proposed that they get married by customary law in September 2016.[162] She accepted his proposal and they got engaged to be married. The engagement was made known to their respective families.[163] During the course of 2018 the deceased proposed to pay *lobola*. Arrangements were made for their families to meet. The families met at her parental home on 22 December 2018 in Maungani village in Limpopo, and commenced *lobola* negotiations.[164] After the successful *lobolo* negotiations, the two families agreed that the deceased would pay a total sum of R90 000 as *lobola*, R23 000 of which would be in cash. The deceased family undertook to pay the outstanding *lobola* as soon as they were ready. At the time of the passing of the deceased, this had not happened.[165] It is also important to highlight that after the *lobola* negotiations, the two families started celebrating their

157 *Peter* (n 1) para 46 (our emphasis).
158 *Peter* (n 1) para 42 (our emphasis).
159 *Muvhali* (n 1).
160 *Muvhali* (n 1) para 1.
161 *Muvhali* (n 1) para 10.
162 According to *Muvhali* (n 1) paras 11-12, the applicant and deceased had been in love since 2009, and had been living together in the same house since 2014.
163 *Muvhali* (n 1) para 14.
164 *Muvhali* (n 1) para 15.
165 *Muvhali* (n 1) para 18.

customary marriage on that same day, and the deceased's family referred to her as their *makoti* or bride.[166]

In challenging the validity of Ms Muvhali's marriage to the deceased, the respondents contended that, although the applicant and the deceased resided together, their joint home was not a marital home. Furthermore, even though they admitted that they referred to her as 'their *makoti*' (the traditional wife), the use of the term was in 'a manner of speaking'. They reasoned that they used the term since the couple were cohabiting and not because they were officially married.[167] In addition, the respondents stated that the objective of the meeting on 22 December 2018 was to negotiate the payment of *lobola* and not to *celebrate* a customary marriage. The meeting served as a formal introduction of the applicant to the delegates of the deceased. They claim that the deceased's representatives met Ms Muvhali's representatives for the first and only time. They claimed that the deceased's elders were not present at the time as it was merely *lobola* negotiations and not the celebration of a customary marriage.[168] Furthermore, in terms of the Swati customs and traditions, a cow should have been slaughtered by the husband's family as a sign that they accepted their new *makoti*. This custom is known as *imvume* – an acceptance custom. The family of the groom would then pour cow bile on the head of their *makoti*, known as the *ukubikwa* custom, which represents that the new wife is introduced to the ancestors of the groom's family.[169] In essence, the respondents challenged the validity of the marriage as the prescribed form of celebrating the marriage according to Swati culture was not followed.

In determining the matter, and holding that there was a valid marriage between the applicant and the deceased, as envisaged by section 3 of the RCMA,[170] the Court made the following observations: First, the Court berated the respondents regarding their assertion that the events of 22 December 2018 were confined to *lobola* negotiations. The Court found that this type of assertion was common in customary marriage disputes and stated that it was

> duty bound to decry the often unwarranted attempts by parties to tabularise and dissect constituent components of an otherwise rich and generous system of law to meet legal exigencies. The unfortunate

166 *Muvhali* (n 1) para 19.
167 *Muvhali* (n 1) para 31.
168 *Muvhali* (n 1) para 34.
169 *Muvhali* (n 1) para 35.
170 *Muvhali* (n 1) para 65.

> consequence is to denude customary law of its inherent feature and strength – namely the spirit of generosity and human dignity.[171]

Second, and in line with the social acceptance theory, the Court observed that it could, in fact, 'look at other features which constitute customary practices that are indicative of, or are compatible with an acceptance of the bride by the groom's family'.[172] The Court found that considering these features served a vital purpose, which was to 'bring an objective view of issues away from the subjective predilections of the protagonists'.[173]

Third, the Court noted that the deceased's family referred to her as their *makoti* after the 22 December meeting, and that one of respondents attended her uncle's funeral, which was an indication that he recognised the extended relationship. Futhermore, communications between the wife and some of the deceased's family by means of WhatsApp clearly indicated that the family recognised her as their daughter-in-law/the deceased's wife in both manner and tone. The Court found that the respondents' explanation of addressing the applicant as their *makoti* was specious when considered with other objective facts.[174]

Finally, and referring to *Mbungela*, the Court found that it was significant that a family member made reference to the couple as husband and wife, and that the one spouse had registered the other as 'husband' in an important document. The Court found that essentially the respondents considered her the deceased's wife, and it was only after the death of the deceased that they had a change of heart.[175] The Court also made reference to the deceased's conduct when he was alive, in that he introduced the applicant as 'his wife' in their new home. In addition, the deceased took out an FNB Law on Call Personal Plan and registered the applicant as 'a spouse'. More importantly, the Court observed that the applicant and the deceased were consistent about the relationship from the time they met, and that they had lived together throughout and bought a home together.[176]

171 *Muvhali* (n 1) para 52.
172 *Muvhali* (n 1) para 58.
173 As above.
174 *Muvhali* (n 1) para 60.
175 *Muvhali* (n 1) para 61.
176 *Muvhali* (n 1) para 62.

## 4 Conclusion and recommendations

The SCA in *Moropane* confirmed the legal standing of the handing over of the *makoti* to her in-laws as one of most crucial parts of a customary marriage in most clans.[177] Its importance as a symbolic customary practice is that the *makoti* is finally welcomed and integrated into the groom's family, which henceforth becomes her new family. For that reason, Bakker's sentiments are apt:[178]

> After the decision in *Moropane v Southon* the integration of the bride is a requirement for a valid customary marriage in the official customary law. A deviation can be allowed only if it can be proved that the living customary law of a certain tribe has evolved to such an extent that integration of the bride can no longer be regarded as an essential requirement for a valid customary marriage.

Nothing in the recent SCA cases discussed has changed this approach, despite commentary to the contrary.[179] Considering the first two categories of court cases mentioned above, namely, (i) constitutionalising, and (ii) adherence to strict form, it is clear that there is a challenge in the language that is used to differentiate requirements, customs, rituals and acts. Language difficulties are borne out of attempts to resolve dynamic and living rules within the formal and certain structure of litigation. The language at times struggles to accommodate the nuances implicit in customary law, particularly that many requirements are processual as opposed to once-off.[180] Nhlapo identifies this issue poignantly when he states that '[t]he current pressure on the courts to identify and then prescribe clear essentials for the validity of a customary marriage is misplaced. *This is because African marriage is essentially a process that "ripens" into unassailable status over time.*'[181]

Further, contractual terms such as 'waiver' lose the meaning of what the courts are actually trying to do. In these cases, the courts accept that integration has occurred despite the 'traditionally accepted' rituals in certain prescribed forms not taking place. In the cases discussed above, courts have found integration to take place in the following circumstances, almost invariably being in the light of – rather than exclusively – the fact that the parties cohabited:

177 *Moropane* (n 2) para 40.
178 Bakker (n 46) 12.
179 Sibisi (n 12); Manthwa (n 7); Bapela & Moyamane (n 7).
180 Ramose (n 36). See also Comaroff & Roberts (n 63) 134 where the authors describe a customary marriage as an institution that matures slowly 'progressively attaining incidents, as time passes'.
181 Nhlapo (n 3) 275 (our emphasis).

(1) There was evidence of the groom's father and aunts physically congratulating the bride after the ceremony, and also introducing her as the bride to other family members.[182]
(2) A combination of 'incidents' was enough to persuade a court that integration had taken place, the most important of which was the attendance of both families at a 'white wedding' (that is, a church wedding) after *lobolo* negotiations had taken place.[183]
(3) The general acknowledgment by one spouse of the other spouse as a customary spouse in the presence of both families, taken together with the redesign and wearing of a wedding ring by the female spouse.[184]

As seen in *Peter,* in the contemporary reality of advanced age and estranged children, the Court has acknowledged that a wider understanding of who constitutes the family can exist. We believe that High Court decisions we have discussed (after the SCA decisions of *Mbungela* and *Tsambo*) illustrate the courts' implicit acceptance and endorsement of Ramose's social acceptance theory, having been given the 'go-ahead' by the SCA. In the *Peter* case in particular, we find the Court's statement resonating with all aspects of our argument thus far:[185]

> It cannot be said that a neat and clearly demarcated set of facts, unequivocally demonstrating compliance with the basic requirements for a customary marriage, has emerged from the proceedings. Whereas a compelling enough argument can be made to the effect that there was a handing over of the bride and that *lobolo* was waived, the ultimate question remains whether this was sufficient to indicate that the marriage was customary in nature. To answer that, it would be remiss of the court not to take into account the evidence in relation to h*ow the union was viewed by the community itself, whose practices and lived experiences inform the content of customary law.*

It bears emphasising that we are not advocating the waiving or the ignoring or constitutionalising of the requirement (the latter idea being problematic in that the Constitution is always at play, but never operates in a vacuum). We believe that there should be social acceptance by the community in a way that is flexible and can be accomplished in contemporary settings. As such, Ramose's theory to obtain a clearer account of what could be achieved is recommended. In this way, we can pay attention to the function of the customary marriage requirements – which is the ultimate union of two families.

182 *LS v RL* (n 71); *Miya* (n 67).
183 *Mbungela* (n 1).
184 *Tsambo* (n 1)
185 *Peter* (n 1) para 42. This comment replicates Nhlapo's suggestion that 'the behaviour of the families in question and that of the community towards the couple is a reasonable indicator of the social status – and therefore the legal incidents – that the relationship has attained'. See Nhlapo (n 3) 275.

By following this approach, we also try to address Bennett and others' concern that the observance of traditional procedures and ceremonies is important because it helps to define the 'cultural provenance' of the union and gives it the character of a customary marriage.[186]

More importantly, our analysis of the Court's interpretation of the handing over of the bride requirement, in the different contexts and persons from different tribes, bears testimony to the fact that living customary law is dynamic, and each case should be considered on its own merits. The impact on future cases, therefore, is that even where persons seem to be from the same tribe, the court has to consider how in that particular case there is social acceptance, and how living customary law has evolved. This means essentially finding that the application of the doctrine of precedent may not align with the dynamic nature of living customary law.

186 Bennett (n 17) 217.