



The Zimbabwe Electronic Law Journal

Commentary on Contemporary Legal Issues

2017 Part 1

The Editorial Board of this new electronic journal comprises:

Dr T. Mutangi, Professor L. Madhuku and Dr. I. Maja (co-Chief editors) and Professors J. Stewart and G. Feltoe.

The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

We would like to take this opportunity to invite persons to submit for consideration for publication in this journal articles, case notes and book reviews.

Articles must be original articles that have not been published previously, although the Editors may consider republication of an article that has been published elsewhere if the written authorization of the other publisher is provided. If the article has been or will be submitted for publication elsewhere, this must be clearly stated. Although we would like to receive articles on issues relating to Zimbabwe, we would also encourage authors to send to us other articles for possible publication.

Case note on Hosho v Hasisi HH-491-15

By Slyvia Chirawu-Mugomba¹

Introduction

The payment of the bride price (known as *roora/lobola*) in Zimbabwe has been one of the most contentious issues recently, especially since the Supreme Court declared in the case of *Katekwe v Muchabaiwa*² that *lobola* is not a legal requirement. This is against the backdrop of the dual legal system in Zimbabwe that recognises the application of both customary and general law side by side.

The facts

At the centre of the dispute lay a house located in Norton. The plaintiff N purchased the property from one Z. N sought the eviction of one L from the premises on the basis that the property was registered in his name and he had title deeds. L opposed the application on the basis that she was entitled to the house by virtue of being a surviving spouse of one R. The property had been sold to Z by one C³ who was a step son to L and a son to R. In turn, Z had sold the same property to N.

L stated that she was in an unregistered customary law union with R but did not have any children with him. The house was acquired in 1997 during her marriage to R though it was registered in the name of R only. Documents had been stolen from her by R's sisters and used for purposes of entering into the agreement of sale with Z. L further stated that she was in an unregistered customary law union with R but that all the witnesses who were present at the lobola payment ceremony were deceased. She produced the deceased's medical aid card but it is not clear from the facts whether or not it showed any evidence of a marriage. She also produced a loan application form filed during the life time of the deceased which reflected the name 'Lilian' as the spouse, which was her first name. The death certificate also showed the deceased as being married.

L had not received the deceased's pension which has instead gone to his sister. The deceased's family did not recognise her as a spouse. The Magistrate court had not recognised her or confirmed her as the surviving spouse because she was not made aware of the registration of the estate of the late R.

The decision and legal issues arising

The case turned on the issue of whether or not there was in existence a customary law union between L and R. If there was, L would be entitled to the property on the basis of her being a surviving spouse who was present at the house at the time of death. The court held that L had

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² S-87-84

³ C had been appointed as executor of his late father's estate at an edict meeting held on 20 May 2004. He had been issued with letters of administration and the property had been subsequently issued to him and the property had been subsequently transferred to him by the local authority. He then sold the house to Z who in turn sold it to N.

been unable to prove that an unregistered customary law union was in existence between her and R. It is however the court's observations on the issue of *lobola* that are important.

As rightly observed by the court, Zimbabwean law has moved further in recognising the right of a woman married under a customary law union but such union not having been solemnised⁴ to inherit from her late husband's estate. The absence of a marriage certificate does not bar such a woman from inheriting. The law is therefore in keeping with the tenets of the Constitution and the international human rights framework.

In the event of a woman proving that she was married under customary law and in the event of a dispute, she is then entitled to inherit depending on other factors such as where she was living at the time of death, the number of wives; and whether or not there are any children.⁵ One critical factor though is proving the existence of the customary law union, a fact which has proved to be in some instances an uphill task. It is more often than not, left to the relatives of a deceased's man to 'support' the assertion that one was married to the deceased under customary law.

The Honourable Justice Tsanga observed that:

"For a marriage to qualify as a customary marriage, certain cultural practices which involve the payment of *roora/lobola* are attendant upon its formation. Payment consists of a lump sum payment of money (called *rutsambo* among the shona) as well as cattle though increasingly the money equivalent is paid in today's society. Its payment is part of the culture for the majority of the citizens who adhere to customary ways of marrying. Constitutionally, in terms of s 63, every person has a right to participate in the cultural life of their choice although such freedom cannot be exercised in a manner which violates fundamental human rights and freedoms that are guaranteed in the constitution."⁶

Despite concerns about payment of *lobola*, it remains the only way of establishing that a customary law union has come into being. There are inherent contradictions between the payment of *lobola* and certain rights such as rights to equality. Nonetheless, if it has not been paid, there is no customary law union to talk about.

"Still despite these observations, suffice it to say that where it has not been paid there is strictly speaking, no customary marriage to talk about. There are considerable limits to the extent to which in practice law can effectively run ahead of people's thinking in society. The continued payment of *roora/lobola* for women in Zimbabwe, regardless of legislative inroads, bears testimony to this. Its continued existence is about a way of life and a distinct sense of "African" identity – it is an unspoken resistance to what is often perceived as cultural imperialism from the rapid westernisation of African societies. What is therefore

⁴ Section 3(1)(a) of the Customary Marriages Act [*Chapter 5:07*] states that no marriage contracted in terms of customary law shall be valid unless it is solemnised. However, section 3(5) of the act states that a marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage.

⁵ See generally section 68F of the Administration of Estates Act [*Chapter 6:01*] on the actual permutation

⁶ On page 4 of the cyclostyled judgement

fundamental where an unregistered customary marriage is averred, is proof of the existence of a recognisable customary union.”⁷

The fact that L failed to prove the existence of a customary law union meant that she did not have any defence against the claim by N. The court went on to state that:

“Payment of *roora /lobola* remains the most cogent and valued proof and indicator of a customary union/marriage particularly when it has not been formally registered. It is this that the defendant has failed to prove given the basis of her claim to being a surviving spouse by virtue of such.”⁸

Despite international instruments placing the duty upon states to ensure that every marriage is recorded in writing and registered in accordance with national laws⁹, the case under discussion shows that it is easier said than done. The time has come perhaps, for Zimbabwe to come up with home grown solutions to address the non-registration of marriages. South Africa has in place the Recognition of Customary Marriages Act 120 of 1998 which Zimbabwe could learn from but not follow wholesale as conditions in the two countries are different and the act has been problematic in some instances. However, the need is shown for Zimbabwe to develop home grown solutions to respond to its own unique situation.

⁷ On page 5.

⁸ *Ibid*

⁹ Article 6(d) of the Protocol to the African Charter on the rights of women in Africa