

DUTY TO SUPPORT AND THE DEPENDANT'S CLAIM: THE STRUGGLE OF WOMEN MARRIED IN TERMS OF CUSTOMARY AND MUSLIM LAW

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1 Introduction

Although the economic empowerment and independence of widows are generally dependent on the enforcement of their inheritance rights (and concomitant protection of property rights), a dependant's successful claim for loss of support in the case of a wrongful death of a husband also contributes significantly to the widow's ability to provide for herself and her children.¹

In South Africa, under the Roman-Dutch common law, the duty to support has traditionally only been acknowledged in certain circumstances: if imbedded in a valid marriage or resulting from blood relationship.² Until 2000, valid marriages only included civil marriages entered into in terms of the Marriage Act.³ Potentially polygynous marriages were deemed to be against public policy and consequently not recognised.⁴ The plight of widows from customary and Muslim marriages was obvious: since the marriage was not recognised as valid, the duty to support was not recognised either. These women, already vulnerable after the death of a spouse, were — irrespective of the duration of the marriage or the number of children born therefrom — without remedy. Widows from civil marriages were, however, able to successfully claim maintenance in similar circumstances.

Strangely enough, despite the blanket non-recognition of customary marriages until 2000,⁵ customary widows were accommodated by way of legislative intervention as early as 1963 in relation to wrongful death

¹ Although this contribution is written from the widow's perspective, it is recognised that the death of a wife may also result in the surviving spouse (widower) facing similar problems in practice, depending on the specific circumstances.

² This also includes adoption. See in this regard Neethling & Potgieter "Uitbreiding van die Toepassingsgebied van die Aksie van die Afhanklike" 2001 *THRHR* 483 487-488.

³ 125 of 1961.

⁴ See Maithufi & Moloi "The Current Legal Status of Customary Marriages in South Africa" 2002 *TSAR* 599-611 600-602 for a discussion of the reasons for non-recognition.

⁵ Even before the commencement of the Recognition of Customary Marriages Act 120 of 1998 on 15 November 2000, customary marriages were, however, also recognised for purposes of the following legislation: s 21 of the Insolvency Act 24 of 1936; s 1(1) of the Law of Evidence Amendment Act 45 of 1988; s 27 of the Child Care Act 74 of 1983; s 5(6) of the Maintenance Act 23 of 1963 and s 1 (the definition of "married") of the Income Tax Act 58 of 1962.

claims. Section 31 of the Black Laws Amendment Act 76 of 1963 specifically provides for the institution of a claim for maintenance if all of the requirements have been met. In practice, many of these requirements are extremely problematic. *Road Accident Fund v Mongalo*,⁶ a 2003 decision, has confirmed that this Act, a remnant from a period when legal measures were racially based, still provides the relevant mechanism to effect claims for customary widows.

The plight of widows in Muslim marriages underwent a lengthy piecemeal development in case law in which certain aspects of these relationships were recognised over a period of time. In 1997 the contractual basis of a *de facto* monogamous Muslim marriage was recognised and enforced.⁷ The duty to support and consequential claim for maintenance in the case of accidental death of a spouse was, however, only recognised in 1999. In *Amod v Multilateral Vehicle Accident Fund*,⁸ the Supreme Court of Appeal confirmed that the widow's right had to be protected if there was a legal duty to support — irrespective of the question whether the marriage was valid or not. By “properly applying” the common law principles, the Supreme Court of Appeal in the *Amod* case (merely) extended the common law to include the claim for maintenance for Muslim widows who were partners in a *de facto* monogamous marriage.

Consequently the legal position regarding the claim of a dependant in a customary and Muslim marriage can be summarised as follows: customary wives, whose marriages have been recognised as valid marriages since 15 November 2000, are still being sidelined by the common law, including *de facto* monogamous marriages. These widows have to make use of a racially based legislative measure with major repercussions if not fully adhered to. Muslim widows, whose marriages have as yet not been formally recognised (although development in this regard is currently underway), have, however, been incorporated into the common law — but only in relation to monogamous marriages. The publication of the Muslim Marriages Bill specifically calls for the recognition of monogamous and polygynous family structures.

It is the aim of this contribution to give an overview of the two distinctive approaches concerning customary and Muslim widows respectively in light of the new constitutional dispensation. The dependant's claim for support will first be placed in context by emphasising the aims and requirements for this remedy after which a brief historical background with regard to customary and Muslim widows will follow. Thereafter the current mechanisms to realise these claims will be set out and analysed. Questions whether the available mechanisms function optimally, especially in view of the polygynous

⁶ 2003 1 ALL SA 72 (SCA).

⁷ *Ryland v Edros* 1997 2 SA 690 (CPD).

⁸ 1999 4 SA 119 (SCA).

nature of these marriages, will be posed particularly. Possible options regarding the way forward will thereafter conclude the discussion.

2 The dependant's claim for loss of support in context

2 1 Rationale and aims of action

It is not the aim of this contribution to explore the historical foundations of this action in detail. Suffice it to say that it has developed from Germanic roots and has been incorporated into and thereafter adapted to form part of the Roman-Dutch common law.⁹ In fact, this action is a very good example of law in motion, of law not being static and being able to amend and adapt to changing times.¹⁰

In order to employ the remedy, the underlying rationale thereof becomes relevant, namely whether there is a legal duty to support the particular type of dependant who claims compensation for loss of support.¹¹ When considering this, factors like equity and decency must also be taken into account. During the pre-constitutional era, the duty to support requirement was generally linked to a valid marriage requirement — in accordance with the *boni mores* at that point in time.

The general aim of the claim for maintenance in the negligent causation of death of the breadwinner is to place the widow in the same financial position that she would have been, had her husband not been killed.¹² In this sense, the remedy has a purely delictual point of departure: damages in the case of wrongful conduct.¹³

2 2 Requirements for institution of remedy

The remedy will be available if the following requirements are met:¹⁴

- the claimant must establish that the deceased had a duty to support the dependant;
- the duty had to be legally enforceable; and
- the dependant's right to such support had to be worthy of protection.

When considering the last-mentioned element, the legal convictions of the community are also relevant. In order to be successful with the claim, all

⁹ See for the historical development, Rautenbach & Du Plessis "The Extension of the Dependant's Action for Loss of Support and the Recognition of Muslim Marriages: the Saga Continues" 2000 *THRHR* 306-307; Davel *Skadevergoeding aan Afhanklikes* (1987) 46; Neethling, Potgieter & Visser *Law of Delict* (1999) 10 283 and *Victor v Constantia Insurance Co Ltd* 1985 1 SA 118 (C).

¹⁰ See in this regard par 5 *infra*.

¹¹ *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equity Intervening)* 1999 4 SA 119 (SCA) par [10].

¹² See also Clark & Kerr "Dependant's Claim for Loss of Support: Are Women Married by Islamic Rites Victims of Unfair Discrimination" 1999 *SALJ* 20-27 and the sources listed at 22-23.

¹³ *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equity Intervening)* *supra* par [6].

¹⁴ See *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equity Intervening)* *supra* par [10]; *Santam Bpk v Henery* 1999 3 SA 421 (SCA) 1326A-B.

of the requirements have to be met.¹⁵ A contractual basis alone will not constitute a duty to support.¹⁶

3 Development of the claim for support for specific widows

3 1 Customary wives

3 1 1 Nature and origin of duty to support

Customary marriages may be monogamous or polygynous. Irrespective of whether one or more than one wife is a partner in the marriage relationship, the duty to support is a well-established principle.¹⁷

Section 1 of the Recognition of Customary Marriages Act 120 of 1998 defines a customary marriage as “a marriage concluded in accordance with customary law”. “Customary law” is the “customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”.¹⁸ All marriages that were validly entered into under customary law prior to 15 November 2000, irrespective of when they were concluded, are recognised to be valid marriages for all purposes.¹⁹ The validity requirements for customary marriages concluded after the commencement of the Act are set out in section 3 thereof. Additional requirements are provided for in the case of polygynous marriages concluded after 15 November 2000.²⁰ Apart from the marriage relationship that gives rise to a duty to support, adoption in accordance with customary law²¹ also constitutes a valid duty to support:

“Adoption is recognised by customary law. The question is whether, although there was such a duty under customary law, it is a legal duty. This depends on whether such a duty is legally

¹⁵ The requirements in *Amod* were set out as follows: it had to be proven (a) that the deceased had a legally enforceable duty to support the dependant; (b) that it was arising from a solemn marriage in accordance with the tenets of recognised and accepted faith; and (c) that it was a duty which deserved recognition and protection for the purposes of the dependant's claim.

¹⁶ Confirmed in *Amod supra* and emphasised in *Metiso v Padongelukfonds* 2001 3 SA 1142 (T). The duty to support, which may be embodied in a contract, also needs to be linked with another relationship, be it that of a marriage relationship or that of a parent-child relationship. See for more detail in this regard Neethling “Aksie van Afhanklikes: Bemoeiing met 'n Kontraktuele Onderhoudspelig” 2002 *TSAR* 156-160. As early as 1961, the court found that a duty to support embodied in a contract alone would lead to an “unmanageable situation” *Nkabinde v SA Motor and General Insurance Co Ltd* 1961 1 SA 302 (N).

¹⁷ See for more detail concerning the nature and consequences of customary marriages, Bennett *Customary Law of South Africa* (2004) ch 8; Mqeke & Church *Law of Persons, Family in LAWSA XXXII: Indigenous Law* (2004) pars 106-107; Dlamini *Family Law* in Bekker, Labuschagne & Vorster (eds) *Introduction to Legal Pluralism in South Africa vol 1: Customary Law* (2002) ch 3.

¹⁸ S 1 of the Recognition of Customary Marriages Act 120 of 1998.

¹⁹ S 2(1) of the Recognition of Customary Marriages Act 120 of 1998. Polygynous marriages contracted before 15 November 2000 are recognised in s 2(3) of the Recognition Act.

²⁰ See s 7(6). This entails that the husband needs to make an application to the court to approve the written contract entered into by all interested parties with regard to the future proprietary consequences of the marriage. In such an application the court needs to (a) terminate the existing matrimonial property system applicable to the marriage and (b) effect the division of the matrimonial property see s 7(7)(a).

²¹ See in detail Nkala “Stepchildren and the Duty to Support on the Death of the Breadwinner in Customary Law and Common Law” Aug 2004 *De Rebus* 22-24.

enforceable. There is no reason why such a duty which accords with tribal customs would not be enforceable. The deceased's obligation to support is not contrary to public policy or opposed to the principles of natural justice."²²

In relation to adoption, the question is thus whether a valid adoption had occurred, which forms the legal source or origin for a legally enforceable duty to support.²³ In *Metiso v Padongelukfonds*,²⁴ the court held that a customary duty of support should be recognised in civil law. In that case the "best interest of the child" and the negative consequences of non-recognition of the adoption and the duty to support flowing therefrom, were also considered.²⁵

3 1 2 *Historical overview: before 1963*

3 1 2 1 *Position in KwaZulu Natal*

Customary law generally draws no clear distinctions between delicts on the one hand and crimes on the other.²⁶ The unlawful causation of death of another person traditionally did not give rise to delictual liability in customary law. Originally manslaughter and homicide were deemed to be in the exclusive jurisdiction of the tribal chief. Normally a part of the customary fine imposed by the chief would be allocated to the deceased's relatives. The dependants themselves did not, however, institute claims for damages.

This changed in 1901 with *Sipongomana v Nkuku*,²⁷ decided in KwaZulu-Natal. Here the court found that, if a valid customary marriage was concluded, a personal claim for maintenance of the wife and children could be instituted under customary law.²⁸

3 1 2 2 *The rest of the country*

In all of the other provinces a claim for maintenance, based on the duty to support, was only possible if instituted in accordance with the common law principles. That implied that all the common law (Roman-Dutch) requirements had to be met. The point of departure was that such a claim was only possible if the duty to support was acknowledged. Such a duty to support only resulted from a valid marriage of one man and one woman. Since customary marriages were potentially polygynous and accordingly against public policy and furthermore did not meet the

²² *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA) 776.

²³ See also *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).

²⁴ 2001 3 SA 1142 (T).

²⁵ See the criticism of Bonthuys "The South African Bill of Rights and the Development of Family Law" 2002 *SALJ* 760 of the decision that the courts did not develop the customary rule which did not require the mother's consent before adoption could take place.

²⁶ Cf Olivier *Law of Delict* 2004 in *LAWSA XXXII: Indigenous Law* pars 212-217.

²⁷ 1901 NHC 26.

²⁸ See in this regard Olivier *LAWSA XXXII* par 216; Rautenbach & Du Plessis 2000 *THRHR* 302-304 306-308.

requirements of the Marriage Act,²⁹ these marriages were thus not recognised as valid unions.³⁰

A duty to support would only be enforceable if the defendant accepted and recognised it. A black defendant recognised and acknowledged both the customary marriage and the concomitant duty to support.³¹ In all instances where the defendants were non-blacks, the problems identified *supra* would resurface, thus prohibiting a widow to claim for support.³²

Numerous attempts in case law to eradicate the prohibition and to enable widows to institute claims, irrespective of the racial and cultural background of the defendant, were all unsuccessful in attempting to shift the common law boundaries.³³ These decisions, without exception, confirmed that

- customary marriages were not recognised;
- the duty to support — although recognised by black parties — could not be enforced against non-black parties;
- it was irrelevant whether the marriage partners had a mutual duty to support each other and in fact supported each other;
- the Roman-Dutch law was the only set of requirements to be considered; and
- a contract stipulating mutual support duties for black customary partners still did not provide a basis for a general recognition of the duty to support — only a valid marriage or recognised family relationship would suffice.

3 1 3 Position after 1963

The problems facing women married in accordance with customary law attempting to institute a dependant's claim were eventually acknowledged by the legislature in 1963 with the promulgation of section 31 of the Black Laws Amendment Act 76 of 1963. This section is still the relevant mechanism to realise these claims³⁴ and is discussed in more detail in par 4 1 *infra*.

Black South Africans could, however, also enter into common law marriages governed by the Marriage Act and the Black Administration Act 38 of 1927.³⁵ In cases of negligent deaths of husbands in these

²⁹ Marriage Act 125 of 1961 and its predecessors.

³⁰ Cf also Rautenbach & Du Plessis 2000 *THRHR* 302; Bennett *Customary Law in South Africa* 188-192; *Santam v Fondo* 1960 2 SA 467 (A).

³¹ Olivier *LAWSA XXXII* par 216.

³² Eg *Mokwena v Laub* 1943 WLD 63.

³³ *Zulu v Minister of Justice* 1956 2 SA 128 (W); *Santam v Fondo* 1960 2 SA 467 (A); *Nkabinde v SA Motor & General Insurance* 1961 1 SA 302 (D).

³⁴ *Road Accident Fund v Mongalo* 2003 1 ALL SA 72 (SCA) confirmed that s 4 of the Recognition of Customary Marriages Act 120 of 1998 has not replaced s 31 of the Black Laws Amendment Act. S 4 of the Recognition Act provides for the registration of customary marriages. Such registration is, however, not a validity requirement and does not impact negatively on the marriage relationship if it had not been complied with.

³⁵ S 22 laid down very specific provisions regarding black persons who entered into civil marriages. These requirements were amended in 1988 under the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 and finally repealed by the Recognition of Customary Marriages Act 120 of 1998. Ss 3(2) and 19(1) of the Recognition of Customary marriages Act 120 of 1998 now regulate this issue.

instances widows had no problems instituting claims based on an acknowledged duty to support — irrespective of the racial and cultural background of the defendant.

3 2 Development of the claim for support for Muslim wives

3 2 1 *Nature of marriage*

One of the basic Islamic legal concepts evolves around the concept of duty and embodies and promotes the notions of sharing and caring.³⁶

An Islamic marriage is both a contract and a religious institution with a religious purpose.³⁷ Since the family forms the nucleus of the community, marriage is generally encouraged in the Muslim community.³⁸ Muslim marriages may generally only be concluded by persons belonging to the Islamic faith (or by Muslim males and non-Muslim females). The content and responsibilities of the marriage are interpreted in terms of the *Shari-ah*.³⁹

One of the unavoidable consequences of a Muslim marriage is that the husband has to support the wife, irrespective of whether the wife has her own income. If that is indeed the case, the husband still has to see to her general well-being. The duty to support also extends to the children born from the marriage.⁴⁰ A woman married under Islamic law is therefore entitled to reasonable maintenance during the marriage as well as during the *iddah* period upon divorce.⁴¹

Polygynous marriages may also be entered into in accordance with Muslim law. Depending on the financial means and the ability of the husband to provide for the wives fairly, a maximum of four wives may be married.⁴²

In the *Amod* case,⁴³ the court confirmed that the Muslim marriage was:

“contracted according to the tenets of a major religion; and that it involved ‘a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable’”.

As Rautenbach & Du Plessis⁴⁴ correctly point out, the obligation to

³⁶ Gokul, Bernhard, Du Plessis, Gollam & Heyns *General Foundations* in Rautenbach & Goolam *Introduction to Legal Pluralism in South Africa: Religious and Legal Systems* (2002) 19.

³⁷ Rautenbach & Du Plessis 2000 *THRHR* 308; Hodkinson *Muslim Family Law* (1984) 89; Pearl *A Textbook on Muslim Personal Law* (1987) 58; Coulson *A History of Islamic Law* (1991) 189-190; Schacht *An Introduction to Islamic Law* (1991) 22.

³⁸ The essence of marriage is like the relationship between the human body and the garment it wears Gokul, Goldstein, Goolam, Badat & Moosa *Law of Marriage* in Rautenbach & Goolam *Religious and Legal Systems* 61. This is in accordance with ch 30 verse 21 and ch 2 verse 187 of the *Holy Qur'an*.

³⁹ See Rautenbach & Du Plessis 2000 *THRHR* 308 for an exposition on the differences between marriage as a civil contract and marriage as a religious institution.

⁴⁰ Gokul et al *Law of Marriage* 64-65.

⁴¹ Clark & Kerr 1999 *SALJ* 22-23.

⁴² Gokul et al *Law of Marriage* 74.

⁴³ *Supra* par [20].

⁴⁴ 2000 *THRHR* 309.

support is not only based on the contractual nature of the marriage, but is intrinsically linked with its religious foundation.

3 2 2 *Historical overview*

Development in this regard has occurred piecemeal by way of case law.⁴⁵ The same arguments that were raised against the recognition of the dependant's claim in the case of customary marriages were employed with regard to Muslim marriages:

- the marriage did not enjoy the status of a marriage in civil law; and
- any legal duty which the deceased had to support the appellant was a contractual consequence of the union and not an *ex lege* consequence of the marriage *per se*.

The point of departure was that these marriages, being potentially polygynous, were *contra bonos mores*.⁴⁶ The duty to support was thus inextricably linked to the existence of a valid marriage, which criterion was laid down by the common law in (at that stage) an intolerant *boni mores* environment.

First movements in the direction of a more tolerant *boni mores* environment took place in 1997 with the *Ryland v Edros*⁴⁷ decision. The failure to accept the existing marriage contract, which arose from a valid monogamous marriage relationship concluded in terms of the Muslim rites and religion, because it was not in line with one specific group's concept of what constitutes a marriage, was found to be unacceptable in the new constitutional dispensation:

"it is inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it".⁴⁸

The effect of this case was, however, limited since it only provided for the recognition of the duty to support claim and only in relation to *de facto* monogamous marriages.

⁴⁵ See in general, Mahomed "Another Landmark Decision in *Amod v Multilateral Motor Vehicle Accident Fund* [1999] 4 ALL SA 421 (A)" Jan 2000 *De Rebus* 8; Maenetje "Motor Vehicle Accidents and the Multilateral Motor Vehicle Accident Fund Act 93 of 1989" 2000 *Juta's Business Law* vol 8 74-81; Jacobs "Enforcement of Contractual Obligations Flowing from a Potentially Polygamous Muslim Marriage which was in Fact Monogamous" *Ryland v Edros* 1997 (2) SA 690 (C)" 1998 *Codicillus* vol 34 68-70; O'Sullivan "Upholding the Property Rights of Women Married According to Muslim Rites" Community Law Centre Sept 2004 *ESR Review* 10-13; Clark & Kerr 1999 *SALJ* 20-27; Freedman "Islamic Marriages, the Duty to Support and the Application of the Bill of Rights" 1998 *THRHR* 532-538; Goldblatt "*Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA)" 2000 *SAJHR* 138-144; Maithufi "Recognition and Protection of Duty to Support between Partners to an Islamic Marriage" 2000 *De Jure* 383; Neethling & Potgieter 2001 *THRHR* 484-488; Bonthuys "The South African Bill of Rights and the Development of Family Law" 2002 *SALJ* 748-782; Rautenbach "Islamic Marriages in South Africa: Quo Vadimus?" 2003 *Koers* 121-152.

⁴⁶ *Ismail v Ismail* 1983 1 SA 1006 (A).

⁴⁷ 1997 2 SA 690 (C) especially 707E-H.

⁴⁸ *Ryland v Edros supra* 707H.

Despite these legal developments, the full consequences of a Muslim marriage had not yet been acknowledged or legally recognised at that stage. However, the shift towards a more tolerant *boni mores* environment had certainly gained momentum. In 1999, *Santam Bpk v Henery*,⁴⁹ as eluded to by Mahomed CJ in *Amod v Multilateral Vehicle Accident Fund*⁵⁰ divorced the “duty to support requirement” from the “valid marriage requirement”:

“In my view, the correct approach is not to ask whether the customary marriage was lawful at common law or not to enquire whether or not the deceased was under a legal duty to support the appellant during the subsistence of the marriage. . .”

According to the *Amod* decision the legal questions were thus: was there a duty to support and did it deserve recognition and protection by law?⁵¹ Mahomed CJ found both in the affirmative.

3 2 3 A change in the boni mores

What has thus happened, since *Ismail v Ismail*⁵² decided in 1983, for the courts to “re-discover” that the existing common law remedy also incorporates claims from Muslim widows? The pre-constitutional paradigm linked the duty to support requirement inextricably with the valid marriage requirement which was “recognised by one faith or philosophy to the exclusion of others”.⁵³ Even before the formal adoption of the interim Constitution in 1993 a “new ethos of tolerance, pluralism and religious freedom” had consolidated itself in the community. This new ethos is light years removed from the intolerant approach regarding marriages which did not accord with the assumptions of the culturally and politically dominant establishment of that time.

The change in the *boni mores* subsequently also manifested itself in a corresponding change in the application of the law:

“the common law is not to be trapped within the limitations of its past”.⁵⁴

Although references were made to the evolving *boni mores*, constitutional values and underlying norms were not explored fully by the court in the *Amod* case. The non-recognition of Muslim marriages and the reflection thereof on equality, human dignity and the right to religious freedom were categorically ignored.⁵⁵

With regard to the question which mechanism should be used to change the application of the law, Mahomed CJ⁵⁶ stated that:

⁴⁹ 1999 3 SA 421 (SCA).

⁵⁰ *Supra* par [19].

⁵¹ *Supra* 1330E.

⁵² 1983 1 SA 1006 (A).

⁵³ *Amod v Multilateral Vehicle Accident Fund supra* 1328B.

⁵⁴ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) par [86].

⁵⁵ See for more detail Bonthuys 2002 *SALJ* 761-763 777-779; Rautenbach & Du Plessis 2000 *THRHR* 309.

⁵⁶ *Amod v Multilateral Vehicle Accident Fund supra* 1331G-1332D.

“I have no doubt that it would be perfectly proper for the Legislature to enact such legislation if it considered it necessary, but it does not follow that the Courts should not interpret and develop the common law to accommodate this need if it was consistent with the relevant common-law principles which regulate the objectives and the proper ambit of the dependant's claim in Roman-Dutch law. . .the legal certainty of the claim can be assessed purely on the proper application of common-law principles of application to the dependant's action without any reference to any religious doctrine or policy”.⁵⁷

4 Mechanism for the realisation of claim

4 1 Customary marriages: section 31 of Black Laws Amendment Act 76 of 1963

Section 31 is hereby reproduced in full, after which an analysis of the section follows:

“(1) A partner to a customary union as defined in section thirty-five of the Black Administration Act, 1927 (Act 38 of 1927), shall, subject to the provisions of this section, be entitled to claim damages for loss of support from any person who unlawfully causes the death of the other partner to such union or is legally liable in respect thereof, provided such partner or such other partner is not at the time of such death a party to a subsisting marriage.

(2) No such claim for damages shall be enforceable by any person who claims to be a partner to a customary union with such deceased partner, unless

- (a) such person produces a certificate issued by a Commissioner stating the name of the partner, or in the case of a union with more than one woman, the names of the partners, with whom the deceased partner had entered into a customary union which was still in existence at the time of death of the deceased partner; and
- (b) such person's name appears on such certificate.

(2A) A certificate referred to in subsection (2) shall be accepted as conclusive proof of the existence of a customary union of the deceased partner and the partner or, in the case of a union with more than one woman, the partners whose name or names appear on such certificate.

(3) Where it appears from the certificate referred to in subsection (2) that the deceased partner was survived by more than one partner to a customary union, all such surviving partners who desire to claim damages for loss of support, shall be joined as plaintiffs in one action.

(4) (a) Where any action is instituted under this section against any person by a partner to a customary union and it appears from the certificate referred to in subsection (2) that the deceased partner was survived by a partner to a customary union who has not been joined as a plaintiff, such person may serve a notice on such partner who has not been joined as a plaintiff to intervene in the action as a co-plaintiff within a period of not less than fourteen days nor more than one month specified in such notice, and thereupon the action shall be stayed for the period so specified.

(b) If any partner to a customary union upon whom a notice has been served in terms of paragraph (a), fails to intervene in the action within the period specified in such notice or within such extended period as the court on good cause shown may allow, such partner shall be deemed to have abandoned her claim.

(5) If a deceased partner to a customary union is survived by more than one partner to such a union, the aggregate of the amounts of the damages to be awarded to such partners in terms of this section shall under no circumstances exceed the amount which would have been awarded had the deceased partner been survived by only one partner to a customary union.

(6) A partner to a customary union whose name has been omitted from a certificate issued

⁵⁷ See especially Bonthuys' criticism on the court's finding that the issue does not involve "any difficult policy and political choices" 2002 *SALJ* 776. Her valid criticism is that these are indeed issues that the court should have explored, despite commending the final conclusion reached by the court in this decision.

by a Commissioner in terms of subsection (2) shall not by reason of such omission have any claim against the Government of the Republic or the Commissioner if such omission was made bona fide.

(7) Nothing in this section contained shall be construed as affecting in any manner the procedure prescribed in any other law to be followed in the institution of a claim for damages for loss of support.”

4 1 1 Analysis of section 31

4 1 1 1 The objectives of section 31

As set out above, the main aim of the action to claim maintenance is to place the widow in the same financial position that she would have been, had her husband not been killed. Section 31’s main objective thus is to enable the widow to institute such a claim. Generally the objectives of section 31 are fourfold:⁵⁸

- To provide a legal mechanism to institute a claim for damages since widows from customary marriages were only able to institute such claims if the defendant accepted and acknowledged the duty to support. In practice this meant that the claim could only be instituted successfully against black defendants.
- To limit the amount of damages.⁵⁹ Irrespective of the number of wives or children involved, the underlying idea was to place widows of customary marriages on par with widows from common law marriages. Since common law marriages are limited to one man and one woman, there is no possibility of more than one wife claiming for damages. That entailed that the claim for damages had to be limited: the amount claimed cannot be more because there was more than one wife involved.
- To limit time and costs involved.⁶⁰ Being potentially polygynous, more than one plaintiff may be involved in the proceedings. Section 31, however, provides that only one action be instituted. The joining of claimants therefore prevents duplication of actions and costs and aims to be more expedient.
- To indemnify the State and functionaries from claims that might arise from the *bona fide* omission of plaintiffs’ names from certificates.⁶¹

It is ironic that polygyny, the root of the “problem” concerning recognition of customary marriages and consequential duty to support, has effectively been sidelined in section 31. Although it acknowledges the *idea* of polygyny it *negates its effect in practice*. Put differently, the consequences of polygyny have not been incorporated to the benefit of

⁵⁸ Taken from Labuschagne & Van den Heever *Law of Delict* in Bekker, Labuschagne & Vorster (eds) *Introduction to Legal Pluralism in South Africa: Customary Law* (2002) 102. See also Olivier *LAWSA XXXII* par 219.

⁵⁹ S 31(5).

⁶⁰ S 31(1)-(4) and (7).

⁶¹ S 31(6).

the claimant(s) — they have, however, been incorporated to the benefit of the defendant.

The above objectives do not take into account that section 31 was drafted before the commencement of a Bill of Rights which has since then led to the promulgation of legislation specifically legalising polygyny. A mechanism like this should therefore have as one of its aims to give effect also to the *full consequences* of polygyny.

4 1 1 2 The formulation of section 31

*Road Accident Fund v Mongalo*⁶² has confirmed that section 4 of the Recognition of Customary Marriages Act 120 of 1998 has not substituted section 31 as the mechanism to institute the dependant's claim. The certificate to which section 31 refers is not a referral to the certificate that now proves the existence of a valid customary marriage. The Black Administration Act provides that a certificate issued by a Commissioner shall be accepted as conclusive proof of the existence of a customary marriage. Not only is the concept of section 31 a remnant from the pre-constitutional era, so too is the specific text and formulation. The provision still contains references to a "customary union", thereby reflecting the pre-2000 legal position when customary marriages were still considered unions and not marriages. Further references are to the Black Administration Act — section 31 has no references to the Recognition of Customary Marriages Act as such. Perhaps the time has come to rethink not only the specific formulation of the text, but the use in principle of this provision in a post-constitutional era.

4 1 1 3 The certificate requirement

The function of the certificate is generally fourfold:

- it has evidential value;
- it determines *locus standi*;
- it enables the defendant to raise certain defences; and
- it enables the court to determine the amount of maintenance.⁶³

Since claims may only be instituted if the claimant is in possession of a certificate, case law had to deal with different aspects flowing from the certificate requirement. The registration of a customary marriage has not been and still is not a validity requirement.⁶⁴ Thus, even though legislation makes reference to the *issue* of these certificates, there is no legally enforceable duty to have a marriage registered, thereby automatically providing for the said certificate to be issued.

⁶² 2003 1 ALL SA 72 (SCA).

⁶³ See also Labuschagne & Van den Heever *Law of Delict in Introduction to Legal Pluralism in South Africa: Customary Law* (2002) 103.

⁶⁴ S 4 of the Recognition of Customary Marriages Act 120 of 1998 provides for the registration of marriages, but it is not obligatory.

Pre-2000 case law has also confirmed that no substitute for the certificate would be acceptable, not even an affidavit providing that the couple had been married and that a duty to support had existed.⁶⁵

Exactly when the certificate has to be submitted, has still not been resolved in case law. Since one of the aims of the certificate is to form the basis of *locus standi* for the plaintiff(s) and is *prima facie* proof of the marriage, it would make sense to submit the certificate before trial in order for the defendant to get the opportunity to prepare to contest the certificate, if necessary.

Although the certificate is “conclusive proof” of the existence of a customary marriage, case law has now made it clear that fraudulently acquired certificates would not be acceptable. *Nkabinde v Road Accident Fund*⁶⁶ found that the validity of a certificate may be disputed: a statutory provision that a document constituted conclusive proof of a state of affairs would not immunise the document from attack on the basis that it was fraudulently acquired. Due to the fact that the *quantum* of damages is restricted,⁶⁷ the effect of a fraudulently acquired certificate could be that the lawful partners in a customary marriage would have to share the damages with a person who is not really a partner. Again, the obligation to register marriages may go a long way in eliminating fraudulent claims in this regard.

4 1 1 4 Limiting of claims and damages

As mentioned before, one of the aims of section 31 is to limit the proceedings so that one action only is instituted. In this regard two distinctive sets of questions may be posed:

- what would the case be had the name of one of the plaintiffs been on the certificate, but the defendant omitted to join her in the action? and
- what would the case be if the name of one of the plaintiffs had been omitted from the certificate — despite the existence of a valid customary marriage? Essentially the question is: would it be possible to institute a *further* claim against the specific defendant?

With regard to the first scenario where the name was on the certificate, but the defendant refrained from joining her in the action, section 31(5) would prevent a further action due to the fact that the amount of damages is limited to what the amount would be had only one wife been involved. A further claim would thus not have any practical or financial implications for either the plaintiff or the defendant. In these circumstances the widows would probably have to come to some kind of agreement between themselves as to how the amount of damages is to be divided.

⁶⁵ Olivier *LAWSA XXXII* par 218.

⁶⁶ 2003 1 ALL SA 72 (SCA).

⁶⁷ See par 4 1 1 1 *supra* and par 4 1 1 4 *infra*.

In the second scenario where a name was omitted, the defendant is not to be blamed — he or she had no knowledge of the existence of the further wife. If the name was omitted *mala fides* by a State official, then a claim for damages could be instituted by the widow since government is only indemnified against *bona fide* mistakes.⁶⁸ Since the amount of damages is limited anyway to the amount that would have been claimed if there were only one plaintiff, no more compensation would be claimable in principle. Thus, irrespective of whether her name had been omitted *bona* or *mala fide*, there is no further possibility to institute a claim against that particular defendant. Depending on the circumstances, a claim for damages against the State is, however, possible.

4 1 1 5 Calculation of damages

The calculation of damages is intricate.⁶⁹ The underlying idea is to place the claimant in the same financial position she would have been had the husband not been killed. In determining damages, various factors are considered, *inter alia* the age and general health of the deceased, his estimated life span and income and the possibility for the claimant to remarry. This last factor has also undergone some development under common law.⁷⁰

With regard to customary wives, the calculation is even more complicated, since courts tend to take into account both customary and common law factors. The fact that the widow may be supported by the extended family under customary law is also taken into account, thereby diminishing the actual amount of damages granted.⁷¹

Polygynous families pose certain unique complexities: the ranking and position of wives vary, their needs and the number and needs of their respective children differ. Section 31 gives no indication as to how the actual calculation is to take place or how the needs of different wives are to be balanced.

4 1 1 6 Beneficiaries

Section 31 is only limited to persons married in accordance with customary law. Until 1988 it was quite possible that persons could be

⁶⁸ S 31(6).

⁶⁹ Clark & Kerr 1999 *SALJ* 22-24.

⁷⁰ It is generally held that a widow loses her claim for loss of support as soon as she remarries — *Glas v Santam Insurance Ltd* 1992 1 SA 901 (W). The reason for that is that she is then maintained by the new husband. Evidence that the new husband is financially worse off than the deceased, is irrelevant. The correctness of this approach was investigated in *Ongevallekommisaris v Santam Bpk* 1999 1 SA 251 (A). If the action for loss of support is heard before she remarries, the chances of her remarrying are factored into the calculation of the amount claimed. In this case it was found that, had the widow remarried, evidence that her second husband was less able to support her should be allowed in order to compensate her adequately. The motivation for this change was that the aim of the action was to place her in the *same financial position* she had been before the death of her husband. Even after re-marriage, if her position is not equated to that before the death of her first husband, the “negative impact” of the second marriage had to be considered.

⁷¹ Olivier *LAWSA XXXII* par 215.

partners in both customary and civil marriages.⁷² Section 31-relief was not available if either partner to the customary marriage was also a party to a civil marriage. Due to the non-recognition of customary marriages before 2000, the civil marriage merely “dissolved” the customary marriage. In the case of death of the (former) husband, the “widow” lost her section 31-claim. In these circumstances only the civil law widow would be able to claim support in terms of the common law.

4 2 Mechanism for realisation of claims: Muslim wives

In accordance with the *Amod*⁷³ case it is now clear that the common law remedy is also the relevant mechanism to realise Muslim widows’ claims, but only in relation to monogamous marriages. Arguments that Muslim couples still have the opportunity to solemnise marriages in terms of the Marriage Act⁷⁴ and are thus not discriminated against on the basis of religion, leave out of the equation that the Marriage Act of 1961 still only provides for monogamous marriages. Solemnisation under civil law therefore poses no real solution, instead, it emphasises the underlying problem and its pre-occupation with monogamous marriages.

The extension of the common law remedy to include these claims is not based on the existence of a contract *alone* that provides for a duty to support.⁷⁵ The contract has to be linked with another relationship, be it that of husband or wife or that of parent and child, for example.

The common law remedy has common law limitations. The major short-coming in this regard, as already alluded to above, is the fact that it is only available to *monogamous* partnerships. When the Draft Muslim Marriages Bill, which affords recognition to monogamous and polygynous Muslim marriages, commences, widows from polygynous marriages will still be left out in the cold in the case of a wrongful death of a husband. Despite recognition of polygynous marriages in theory, full consequences from these marriages are thus not provided for by the present-day common law.

5 Possible way forward

As early as 1911 the then Appeal Court⁷⁶ found that the dependant’s

⁷² It was not uncommon for a man to have a civil law wife in urban areas and a customary wife in rural areas – see Bennett *Customary Law in South Africa* 239. This dual marriage system was abolished by the Marriage and Matrimonial Property Amendment Act 3 of 1988. The Amendment Act did not apply in the former four national states – Transkei, Ciskei, Bophuthatswana and Venda – which meant that the dual system was perpetuated there for a while longer. In the rest of South Africa after 1988 the husband would have had to declare that he was not a partner in a customary marriage before he concluded a civil marriage – s 22(1) of the Black Administration Act 38 of 1927. This entailed that men had to dissolve customary marriages before entering into civil marriages.

⁷³ *Supra* par [24].

⁷⁴ S 29A of the Marriage Act – see also Hahlo *Husband and Wife* 31-32.

⁷⁵ *Amod* case *supra* par [26]. Arguments were raised that if the duty to support could be contracted, it would unacceptably widen the scope of the dependant’s claim in common law.

⁷⁶ *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657.

claim for support was a flexible remedy which needed to be adapted to modern conditions and that, in determining the process of adaptation, regard must be had to the rationale of the remedy, which was to afford relief to dependants whom the deceased had a legal duty to support — even if the duty arose from natural law.⁷⁷ Since both decency and *boni mores* have in the past been considered in the development of the common law, this remedy has in fact been adapted by allowing for claims in the following instances:

- by a husband for loss of support after the death of his wife;⁷⁸
- by a husband for loss of support arising from injury caused to his wife;⁷⁹ and
- by a divorcee who had received maintenance from her former husband prior to his death.⁸⁰

Apart from the very distinctive historical evolution of this particular remedy, which intrinsically involved internal development, the Constitution also provides for the development of common law in certain circumstances. Adapting or developing the common law in this regard is thus a real and definite possibility. The other option is to promulgate legislation.

5 1 Development of the common law

Section 35(3) of the interim Constitution and section 39(2)⁸¹ of the final Constitution enjoins courts to develop the common law. The *Metiso* case has already indicated that some courts are willing to rethink the common law *foundations* of the remedy with the result that common law concepts and customary law concepts — especially in view of the best interest of the child — can be *interwoven*, all finally falling under the common law umbrella. With regard to Muslim widows, the *Amod* case has indeed redefined the remedy in that common law has been “re-stated” to include *de facto* monogamous Muslim marriages. As pointed out by Goldblatt,⁸² even Roman-Dutch sources had indicated that the remedy is available to dependants like “wife, children and the like” and to those whom the deceased was “accustomed to support”.⁸³ The point of

⁷⁷ See also Maenetje 2000 *Juta's Business Law* vol 8 part 2 74-81 80.

⁷⁸ *Union Government (Minister of Railways and Harbours) v Warneke supra*.

⁷⁹ *Abbott v Bergman* 1922 AD 35.

⁸⁰ *Santam Bpk v Henery* 1999 3 SA 421 (SCA).

⁸¹ “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” Read with ss 8(2) and (3)(a) of the Constitution: “when applying a provision of the Bill of Rights to a natural or juristic person in terms of section (a), a court

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right. . .”.

⁸² 2000 *SAJHR* 142.

⁸³ *Santam Bpk v Henery supra* par [7].

departure should thus rather be to determine the duty to support in accordance with the particular family structure.

With regard to the development of common law, two possibilities may be explored:

- The first is to extend the common law claim to include *de facto* monogamous customary marriages. The same arguments for the extension of common law to include Muslim marriages can be used to include customary marriages. This option has the result that *de facto* monogamous customary and Muslim marriages are dealt with by the common law. Common law remedies will thus apply to all monogamous marriages — civil, customary and Muslim-oriented. *De facto* polygynous customary marriages will in these circumstances thus still be dealt with by section 31 of the Black Laws Amendment Act. If section 31 thus remains in place, the practical and theoretical shortcomings and problems, discussed above, will have to be dealt with as well. This could, *inter alia*, entail amending the Recognition of Customary Marriages Act 120 of 1998 by making registration of customary marriages obligatory. A *lacuna* will then still remain with regard to *de facto* polygynous Muslim marriages.
- The other possibility is to re-conceptualise what is understood under “marriage” and thereby developing family common law. “Marriage” as such is not defined in the 1961 Marriage Act. Before the commencement of the Constitution, the traditional approach, as embodied in the definition of Hahlo,⁸⁴ was still adhered to by the courts. The commencement of the Constitution, however, also heralded a more tolerant *boni mores* environment. Apart from these very distinctive developments, the promulgation and commencement of the Recognition of Customary Marriages Act in 2000 and the publication of the SA Law Commission’s Report on Islamic Marriages and Related Matters in July 2003 and the drafting of the Muslim Marriages Bill amended the family law playing field further.

Since 15 November 2000 polygynous marriages are a practical and legal reality for persons who live in accordance with customary law. The Recognition Act recognises customary marriages “for all purposes”.⁸⁵ Arguably this should also relate to duty to support-actions. With regard to Muslim marriages, clause 2 provides that the Muslim Marriages Bill applies to all existing marriages entered into in terms of Muslim law — monogamous as well as polygynous. As soon as the Bill passes through parliament and commences, polygynous marriages will also be a reality — in its full sense — for the Muslim community.⁸⁶ If the concept of polygyny

⁸⁴ *The South African Law of Husband and Wife* (1985) 29.

⁸⁵ Despite this provision, customary marriages were not recognised for intestate succession purposes under the Intestate Law of Succession Act 81 of 1987 until the well-known case of *Bhe v Magistrate, Khayelitsha, Shibi v Sithole, SA Human Rights Commission v President of the RSA* 2005 1 SA 580 (CC).

⁸⁶ If a man currently a partner in a Muslim marriage wants to marry a further wife, the requirements of cl 8(5) and (6) have to be met as well, apart from the general validity requirements set out in cl 5 of the Bill.

has been accepted and legally recognised in legislation, in accordance with the Constitution,⁸⁷ the *full consequences* would have to be recognised as well. Full consequences would also entail claims by widows from polygynous customary and Muslim marriages. Already the door has been opened to claims resulting from monogamous Muslim marriages; it has not necessarily been closed to polygynous Muslim marriages:

“I do not thereby wish to be understood as saying that, if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant’s action based on any duty which the deceased might have towards such dependants. I prefer to leave that issue entirely open. Arguments arising from the relationship between the values of equality and religious freedom — now articulated in the Constitution but consolidated in the immediate period preceding the interim Constitution — might influence the proper resolution of that issue.”⁸⁸

If the re-conceptualisation of marriage takes place in accordance with the Constitution, it could result in the common law remedy being employed for all duty to support cases.⁸⁹

5.2 Introduction of legislation

In the absence of development of common law to provide for one of the above possibilities, the drafting of legislation is suggested. Various options may be explored:

- formulating a legislative mechanism similar to section 31 for Muslim marriages and amending the existing section 31 to be more in line with the new constitutional dispensation.⁹⁰ This option provides for two separate legislative mechanisms: one for customary wives and one for Muslim widows; or
- formulating a legislative mechanism that provides for the dependant’s claim for widows of polygynous marriages. Thus, one mechanism for widows involved in polygynous marriages to address their specific, unique circumstances — irrespective of the particular cultural or religious background.

It is clear, however, that the passage of the Muslim Marriages Bill through parliament alone will not address the plight of widows from polygynous marriages with regard to the dependant’s claim. Specific legislative intervention or the development of common law, as eluded to above, is essential in this regard.

Due to the fact that the South African development of family law has been piecemeal and sometimes erratic with no specific synergy between

⁸⁷ S 15(3) of the final Constitution specifically provides for the promulgation of legislation dealing with religion based legal systems and marriage.

⁸⁸ *Amod* case *supra* par [24].

⁸⁹ This option would inevitably result in the repeal of s 31 as the mechanism to institute duty to support claims. This would be in line with the point of departure that the Recognition Act recognises customary marriages “for all purposes”.

⁹⁰ This option would obviously not be possible if the common law is developed to provide for one remedy for all applicants, irrespective of background or religion.

the various levels of courts and or objectives of development,⁹¹ it is perhaps more expedient to draft legislation to effect suggested changes.

6 Conclusion

The duty to support with regard to religion-based and cultural-based marriages has already been recognised in legislation in relation to customary marriages and in case law with regard to Muslim marriages. Moving from that point of departure and combining it with legislative recognition of polygynous marriages in the case of customary law and draft provisions in relation to Muslim marriages, the boundaries of traditional concepts of marriage and family have been challenged and extended accordingly. That challenge continues.

The focus needs to be on the particular family structure and on the concomitant duty to support in that regard. To cling to the pre-occupation with monogamous marriages not only negates the constitutional call to develop law in line with the underlying constitutional principles and ideals, it also ignores the very existence of thousands of families in South Africa. It is high time that these marriages enjoy full recognition, thereby endorsing all of its consequences — including dependants' claims based on the duty to support.

OPSOMMING

Tesame met die afdwinging van erfopvolgingsregte is die suksesvolle instel van die aksie van die afhanklike by die nalatige doodsveroorsaking van die broodwinner 'n belangrike manier waarop 'n weduwee ekonomiese afhanklikheid na die afsterwe van haar gade kan verkry. Weens die potensieel poligame aard van Swart gewoonteregtelike en Moslem-huwelike, is hierdie huwelike aanvanklik nie as wettige huwelike aanvaar nie. Gevolglik is die plig tot onderhoud tussen hierdie gades ook nie aanvaar nie, wat dit vir weduwees uit hierdie huwelike onmoontlik gemaak het om suksesvolle aksies van die afhanklike na afsterwe van hul gades in te stel. In hierdie artikel word die historiese aanloop van die meganismes wat mettertyd ontwikkel is, hetsy deur ingrype van die wetgewer of deur ontwikkeling in regspraak, uiteengesit en ontleed. Hoewel die posisie van weduwees van gewoonteregtelike huwelike deur artikel 31 van die Wysigingswet op Swart Wetgewing 76 van 1963 aangespreek is, is daar in hierdie remedie, wat uit die voor-grondwetlike bedeling dateer, heelwat tekortkominge. Wat die posisie van Moslem-weduwees betref, het 'n "herbevinding" van die gemenerereg na 'n jarelange stryd in regspraak daartoe gelei dat die gemeenregtelike aksie van die afhanklike uitgebrei is om 'n weduwee van 'n *de facto* monogame huwelik in te sluit ten spyte daarvan dat Moslem-huwelike nog nie as wettige huwelike beskou word nie. Daar word aangevoer dat die tyd ryp is om die instel van die aksie van die afhanklike by gewoonteregtelike en Moslem-huwelike in heroënskou te neem in die lig van die inwerkingtreding van die Wet op Erkenning van Gewoonteregtelike Huwelike 120 van 1998 enersyds en die oorwegings van die Muslim Marriages Bill van 2003 andersyds. Selfs al word laasgenoemde wetsontwerp aanvaar en in werking gestel, laat dit steeds 'n leemte vir weduwees in poligame huwelike waar die aksie van die afhanklike ter sprake kom. Daar word gevolglik aan die hand gedoen dat die ontwikkeling van die gemenerereg in die algemeen en die aanpassing van die definisie van "huwelik" in die besonder, aandag moet geniet. Die daarstel van wetgewing ten einde die leemte aan te vul word ook as 'n verdere opsie ontleed. As poligame huwelike in wetgewing aanvaar en gereguleer word, moet alle gevolge van poligamie geakkommodeer word ook ten opsigte van die aksie van die afhanklike.

⁹¹ See in this regard especially Bonthuys 2002 *SALJ* 777-782.