THE INCLUSION OF THE DIVERSITY OF INDIGENOUS PEOPLE'S LAWS AND COURTS IN A JUDICIAL SYSTEM AND JURISPRUDENCE OF A COUNTRY: IS SOUTH AFRICA A SELF-DOUBTING AND RELUCTANT LEADER OF NATIONS?

ABSTRACT

The courts and the administration of justice in countries have generally favored settlers or colonialists, and looked down on the indigenous peoples, their legal system and laws. This presentation seeks to address the inclusion of indigenous people, their laws and courts, in the national judicial system and jurisprudence. The presentation will focus on the case of indigenous people of South Africa, their laws and their courts. It will trace the exclusion of indigenous people, their laws and courts in the administration of justice during apartheid. The presentation will trace the path of development of both the African law and African courts, discussing the structure of the judicial system and the courts with specific focus on African law. It will discuss the structure of the judicial system and the how it is presented in the new constitutional and democratic dispensation. The non-recognition and establishment of parallel courts up to the ultimate application of African law in line with the Constitution of the Republic of South Africa is discussed. African courts are now recognized as part of the judicial system. Despite some criticisms highlighted on the new Traditional Courts Act, and the delays on the Regulations under that Act, the paper points that South Africa, as the capital of human rights in the world, is a self-doubting and reluctant leader of other countries.

JURISPRUDENCE DEFICIENT OF AFRICAN LAW

European settlers generally had a condescending attitude towards indigenous people in Africa, including their laws and courts or judicial systems.[1] This disposition in South Africa is traceable even through apartheid case law. The jurisprudence was deficient in

[1] The Supreme Court of the then Republic of Transvaal refused to recognize marriages concluded in accordance with African law, on the basis that they were regarded as inconsistent with 'civilised' conscience. In *R v Mboko* 1910 TPD 445 at 447 the reason was because the marriage was potentially a polygynous one, and in *Kaba v Ntela* 1910 TPD 964 at 969 because it amounted to the sale of a woman.

humaneness, or as we call it in South Africa, *Ubuntu.* Case law or prior binding decisions is one of the sources of law in South Africa. This paper will make reference to four reported cases to illustrate the poverty of jurisprudence which has no regard to indigenous people. These cases will help illuminate the extent to which indigenous people were humiliated, not heard and their values disrespected, as part of the development of apartheid jurisprudence. *S v Xhego* 1964 (1) P.H.[2] was a judgment by the then Judge President of the Province of Natal, that is, the most senior and authoritative judicial officer of that province at the time, Van der Riet J.P. In the case the accused alleged to a magistrate that they were induced by police duress to make a statement. The Judge President wrote:

"Had the evidence been given by Europeans it might well have prevailed against the single evidence of warrant officer de Beer, for there were many other policemen, one of even higher rank, who were allegedly involved in evidence of assault and of this torture, who gave no evidence in contradiction. But the native, in giving evidence, is so prone to exaggeration that it is often impossible to distinguish the truth from fiction."

The case demonstrated how something as elementary as assessment of credibility of evidence is influenced by the social engineering of the decision-maker. The judgment spoke for itself on how prejudice often presented itself on indigenous people, even amongst those who are trusted by their nations with the noble profession of judgeship. This case also demonstrated why indigenous people must also serve as judicial officers in their country of origin. The Judiciary must reflect at least the racial and gender composition of a country. From the Judge President, a gear up is the then Chief Justice of the Republic of South Africa, Rumpff CJ, sitting at the then Appellate Division, the highest court of the land at the time, in *S v Augustine* 1980 (1) SA 503 (AD) at 505H-506A. The then Chief Justice did not hesitate to provide this authority:

"Coloureds and Black men will sometimes stab people without any reason other than an apparent lust for stabbing." (My English translation from the original Afrikaans text).

On 9 November 1960 Mrs Nkabinde was denied her claim for loss of support against her husband's insurance company simply because she was married in accordance with

[2] Prentice Hall, Weekly Legal Service 1964 (1), Section H, page 196, Criminal Law, 4 April 1964.

African law.[3] Judge Caney relied on an earlier decision of a higher court. On 26 February 1960, in *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo*, 1960 (2) SA 467 (AD), the highest court of the land at the time, held that the wife, married in accordance with African law, was not entitled to damages for loss of support, as she was not recognized as a wife in accordance with Roman-Dutch law. Mrs Fondo, just like Mrs Nkabinde, had been widowed after her husband was killed by negligent driving, and she had lodged a claim against the insurance company. *Mcitiki and Another v Maweni (1913) CPD 684* is a case that led to the development of a separate noble principle of the law in South Africa, to wit, an anti-dissipation interdict. However the case left the true issues which was the genesis for the two families taking each other to court unanswered. The true question on that marriage concluded in terms of African law was: "Is bogadi/lobola/ilobolo[4] to be returned to the groom's family when a marriage concluded in terms of African law disintegrates and the wife returns home?" To date, 111 years later, that question has not yet been answered in the jurisprudence in South Africa. It is waiting for the voice from the African law courts to help develop the jurisprudence.

African law had to be proved in South Africa.[5] Instead of giving recognition to African Law Courts of the Indigenous people of South Africa, apartheid European-settler-led South

[3]This is what Caney J said in *Nkabinde v SA Motor & General Insurance Co Ltd* [1961] 1 All SA 434 (D):
"The plaintiff, a native woman, to whom I shall refer at the present stage of the action as the respondent, has sued to recover for herself and her minor children damages for the alleged negligent killing by a motor car insured with the defendant under the provisions of Act 29 of 1942, of the man, also a native, with whom she lived as his "wife" in a registered customary union which is a marriage according to native law and custom. Recognising that, despite sec. 10 bis of Act 38 of 1927, as enacted by sec. 4 of Act 21 of 1943, the fact of her being the "widow" of her late "husband" by native law and custom in itself gives her no cause of action for damages for loss of support due to the alleged negligent killing (see *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo*, 1960 (2) SA 467 (AD).

[4] Bogadi is the name used by the Sotho-speaking nations whilst ilobolo/lobola is the name used by the Nguni-speaking nations of South Africa. Sotho includes the languages Setswana, Sepedi and Sesotho whilst Nguni includes isiZulu, sisXhosa, isiSwati and isiNdebele. The name refers to value given by the groom's family to the bride in appreciation of the new relationship and marriage, and as recognition of the depreciation occasioned by the daughter leaving her family, relatives, kin and sometimes even clan or nation, to go and use her industry, pain, suffering and sacrifices to establish and build another, including through pro-creation and estate building, all valued and credited to that other.

[5] In *Sigcau v Sigcau* 1944 AD 67 at 69 it was said:
"Pondo law and custom is a body of unwritten law save for certain decisions of the Native Appeal Court and statements as to Native Law and Custom made by native assessors which are recorded in the reports of the Native Appeal Court, and save for certain passages in books dealing with native custom. But even such records as there are

Africa established native commissioner's courts.[6] The Appellate Division of the Judiciary of that South Africa justified this development.[7] It is important to observe that all of the "experts" that the court said would preside over these matters, were Europeans who did not practice and had no training of and on African law. The then Appellate Division held that a court could find that the applicable law was clear to it and that there was no room for dispute.[8] It should come as no surprise that generally in its current state, the 'official' version of African law as found in textbooks and old case law often does not reflect the 'living' law as practiced by indigenous people of South Africa. Later, magistrates' courts could apply African law in cases where both parties were Black, on the proviso that the provisions of that African law were not repugnant to the principles of Roman-Dutch influenced public policy and natural justice.[9] Appeals from the commissioner's courts lay with the Native Appeal Court subsequently called the Bantu Appeal Court.[10]

JURISPRUDENCE ENRICHED BY AFRICAN LAW

On the eve of the democratic breakthrough, apartheid South Africa produced what is now the general structural approach to African law, regulated by section 1 of the Law of

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little more than records of traditions, records of what someone at some time said the custom was. In the reported cases the recorded opinions of assessors naturally harden into law, and certain books are to some extent accepted as accurately stating what native custom is. But apart from making what use is possible of these scanty records, the only way in which the Court can determine a disputed point, which has to be decided according to native custom, is to hear evidence as to that custom from those best qualified to give it and to decide the dispute in accordance with such evidence as appears in the circumstances to be most probably correct."

[6] Section 10 of the BAA.

[7] In *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) at 394-395:

"Before considering the language of sub-sec. (1) it may be noted that the native commissioner's courts are expressed to be courts of law (sec.10 (2)); in the absence of any further provision the law that they would have to apply would be the general law of the land. Native customs would then be provable and would have effect according to the principles generally applicable to customs (see *van Breda v Jacobs* (1921, A.D. 330). But one of the advantages of setting up native commissioner's courts is that cases involving native customs may be tried by experts who do not require the existence of a custom to be proved in each case; where the judicial officer has not the requisite knowledge, evidence of the custom must be given (see *Msonti v Dingindawo* (1927, A.D. 531)."

In *Yako*, the Appellate Division held that neither common nor customary law was *prima facie* applicable. Courts had to consider all the circumstances of a case, and, without any preconceived view about the applicability of one or other legal system, select the appropriate law on the basis of its inquiry.

[8] *R v Dumezweni* 1961 (2) SA 751 (A) at 757.

[9] Section 54A(1) of the Magistrates' Court Act 32 of 1944 (inserted by the Special Courts for Blacks Abolition Act 34 of 1986).

[10] Section 13 of the BAA.

Evidence Amendment Act 45 of 1988.[11] The Constitution of the Republic of South Africa[12], produced by a mass democratic movement African-majority-led government, now provides in one section for the right to language and culture[13] and in another to cultural, religious and linguistic communities.[14] Legislation may be passed to recognize 'systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.[15] Section 211 of the Constitution recognizes traditional leaders, traditional authorities and traditional courts.[16] The application of African Law is a constitutionally entrenched right in our democracy.

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[11] It provides:
"(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant of such principles.
(2) The provisions of subsection (1) shall not preclude any part from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.
(3) In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.
(4) For the purposes of this section 'indigenous law' means the law or custom as
applied by the Black tribes in the Republic."

[12] Act 108 of 1996.
[13] Section 30 provides:
"Language and Culture
30. Everyone has the right to use language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provisions of the Bill of Rights."
[14] Section 31 provides:
"Cultural, religious and linguistic communities
31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
(a) to enjoy their culture, practice their religion and use their language and
(b) to form, join and maintain cultural, religious and linguistic association and other organs of civil society.
(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."
[15] Section 15(3)(a)(ii) of the Constitution provides:
"Freedom of religion, belief and opinion
15. (3)(a) This section does not prevent legislation recognizing-
(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion."
[16] Section 211 provides:
"Recognition
211. (1) The institution, status and role f traditional leadership, according to customary law, are recognized, subject to the Constitution.

In *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2006 (1) SA 580 (CC) 2005 (1) BCLR 1 (CC) (15 October 2004) the Constitutional Court clarified the position of customary law within the constitutional framework of South

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deal with customary law."

Africa.[17] African Law is now an integral part of our law.[18] The nature of this law was considered in para 51 to 54 in *Alexkor*.[19] The stage is now set for African law to unleash

[17] From paragraph 40 to 46 the court said:
"The approach to customary law

[40] The system that flows from the above legislative framework purports to give effect to customary law. It is a parallel system, different in concept and in effect, to that which flows from the Intestate Succession Act, which is designed to apply to all intestate estates other than those governed by section 23 of the Act.

[41] It is important to appreciate the distinction between the legal framework based on section 23 of the Act and the place occupied by customary law in our constitutional system. Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30[38] and 31[39] of the Constitution entrench respect for cultural diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3)[40] states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211[41] protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

[42] It is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.

[43] This status of customary law has been acknowledged and endorsed by this Court. In *Alexkor Ltd and Another v Richtersveld Community and Others*, the following was stated:

"While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution." (footnotes omitted) [42]

This approach avoids the mistakes which were committed in the past and which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of the common law or other systems of law.[43] That approach also led in part to the fossilisation and codification of customary law which in turn led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where, in the words of Mokgoro J, "[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community".[44]

[44] It should however not be inferred from the above that customary law can never change and that it cannot be amended or adjusted by legislation. In the first place, customary law is subject to the Constitution.[45] Adjustments and development to bring its provisions in line with the Constitution or to accord with the "spirit, purport and objects of the Bill of Rights" are mandated.[46] Secondly, the legislative authority of the Republic vests in Parliament.[47] Thirdly, the Constitution envisages a role for national legislation in the operation, implementation and/or changes effected to customary law.[48]

[45] The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu.[49] These valuable aspects of customary law more than justify its protection by the Constitution.

[46] It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights."

[18] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

[19] [51] While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution

". . . does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights]."

It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.

[52] In 1988, the Law of Evidence Amendment Act provided for the first time that all the courts of the land were authorised to take judicial notice of indigenous law. Such law may be established by adducing evidence. It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. As this Court pointed out in the Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996:

"The [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how . . . customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation."

[53] In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.

[54] Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. In the course of establishing

its full potential for the benefit of our jurisprudence, courts and people. The recent decision of Acting Judge Pick, sitting in the Mpumalanga Division of the High Court, reported as *Zwane v Zwane and Others* (2362/2021) [2024] ZAMPMBHC 25 (11 March 2024) illustrate the point that South Africa is on a new trajectory. The opening paragraph reads as follows:

"This is the story of the untimely death of a very wealthy man. As a rich man, should, he had three wives. This Court was requested to declare that the deceased was customarily married to the Applicant, the First Respondent and the Third Respondent – and to nullify the deceased's civil marriage to the First Respondent."

At paragraph 24 the AJ said:

The spirit of customary law is not rigid. It was held in Mayelane [*Mayelane v Ngwenyama and Others* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013) :

'[61].… it must be emphasised that, in the end, it is the function of a Court to decide what the content of customary law is, as a matter of law, not fact. It does not depend on the rules of evidence a court must determine for itself how best to ascertain that content …

…

[79] …Under the Constitution the legal status of all persons is based on everyone being equal before the law and having the right to equal protection and benefit of the law ….'

The result was that the civil marriage between the wife married in accordance with Roman-Dutch law and the deceased was declared null and void and the civil marriage of the First Respondent to the deceased was held to be of equal in status to the customary marriages of the deceased to the other two wives married in accordance with African law.[20]

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indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides. It is not necessary for the purposes of this judgment to decide how such conflicts are to be resolved.

[20] The AJ wrote further:

"CONCLUSION

42 As held earlier, at the time of the deceased's death, the Applicant has been his female companion for at least 47 years and the Third Respondent for at least 33 years. The First Respondent, at the time, was civilly married to the deceased for 46 years. There is in my mind no reason why they should not all be afforded equal protection before the law. The community's interest would expect no less. It was held in Mayelane:[24]

'[62] Section (1) of the Constitution provides that everybody is equal before the law and has the right to equal protection and benefit of the law

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[64] This Court has repeatedly emphasised the importance of the right to equality as a cornerstone of our constitutional democracy. As noted in Hugo (President of the Republic of South Africa and Another v Hugo (1997) ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 41): "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.'

43 Customary law is unwritten[25] and its contents are to be determined by the customs of the people and their values, in such a manner that their constitutional rights are respected. Customary law is not governed by rigid rules, but is flexible.[26] As was held in Tsambo v Sengadi:[27]
'[17] …That customary law has always evolved is evident from the following observation made by Professor Bennet almost three decades ago and approved In many judgments:
"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….

[18] It is evident from the foregoing passage that strict compliance with the rituals has in the past been waved… Clearly, customs has never been static. They develop and change along with the society in which they are practiced…'

44 In Tsambo, referring to Mbungela,[28] it was held that the Court decided that the handing over of the bride was not a pre-requisite to a valid customary marriage. Referring to Mabuza[29], the Court remarked that "ukumekeza" has evolved to such a degree, that it was capable of being waved by agreement between the two families. In ND v MM[30] it was held that the non-observance of registering a customary marriage does not invalidate it, it only makes it harder to proof the marriage without a certificate in hand.

45 In ND v MM,[31] the Constitutional Court was further quoted as holding in Mabuza v Mbatha:[32]
'[17] … It is established that customary law is a dynamic, flexible system, which continuously evolves within the context of its values and norms, consistent with the Constitution, so as to meet the changing needs of the people who lives by its norms. The system therefore, requires its content to be determined with reference to both history and the present practice of the community concerned …..

"[18] The Constitutional Court has cautioned Courts to be cognizant 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 therefor be balanced against the value of legal certainty , respect for vested rights and the protection of constitutional rights. The Court must strive to recognize and give effect to the principle of living, actually observed customary law, as it 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.' (my emphasis)

46 Considering the nature and duration of the relationship between the deceased and the Applicant, the surrounding circumstances, community interest and the spirit of customary law, I am satisfied that the Applicant has made out a proper case. In keeping with the living values of customary law, I am not prepared to accept that the Applicant was merely a female companion to the deceased for 47 years. She bore him children and gave a home to him from time to time. He allowed her to stay in one of his properties and trade from another. These are not the actions of a man who keeps a female companion his wife does not agree to. Discriminating against the Applicant by virtue of a lost lobolo letter is untenable in our democratic dispensation.

THE RELUCTANCE TO ACCEPT AFRICAN COURTS AS PART OF THE LEGAL SYSTEM AND MEMBER OF THE JUDICIARY.

Apartheid South Africa passed legislation called The Black Administration Act 38 of 1927 (the BAA) and according to its preamble it was to provide for the better control and management of Black affairs. Chapter IV of the BAA provided for Judicial Organisation and Procedure in sections 9-21A. To focus on African courts, this paper will only discuss section 12 and 20, which survived into a democratic and constitutional democracy. In terms of section 12, Black chiefs, chief's deputies and headmen recognized or appointed by the Minister of Bantu Administration and Development were authorized to hear and

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47 The deceased's marriage to the Third Respondent might have been invalid, in so far as the necessary declaration in terms of the Black Administration Act was not made. Only the deceased would be able to truthfully tell the Court whether he abided by the Act or not. Whether he declared the marriage or not, would not matter after his death.[33] The Third Respondent is, by virtue of the Second Respondent, not in possession of her lobolo letter. She mourned the deceased's death together with the Applicant and the First Respondent. She had at least a 33 year long relationship with the deceased. She bore him children and gave him a home. She stays in one of the deceased's properties and trades from another. Again, this is not the actions of a man who kept a female companion without his wife's blessing. On the face of the facts before me, the deceased treated all three his wives equally. Post his death he would have expected the Court to respect his wives and also treat them equally.

48 My judgment is in keeping with the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. This Act repealed sections 22 and 23 of the Black Administration Act. The new Act provides that all the deceased's wives, whether married to him by civil law or customary marriages shall be considered equal upon his death. Section 7(1) and 7(2) of the Act provide as follow:
'7(1) A marriage under the Marriages Act, 1961 (Act 25 of 1961) does not affect the proprietary rights of any spouse of a customary marriage or any issue thereof if the marriage under the Marriages Act, 1961 was entered into -
(a) On or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriages and Matrimonial Property Law Amendment Act, 1988 (Act 3 of 1988); and …
(b) …..
7(2) The widow of the marriage under the Marriages Act, 1961, referred to in subsection (1), and the issue thereof have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the marriage under the Marriages Act, 1961, had been a customary marriage.'

49 Finally and as held in Mayelane:[34]
'[43] This Court has accepted that the Constitution's recognition of customary law as a legal system that lives side-by-side with the common law and legislation- requires innovation in determining 'living' content, as opposed to the potentially stultified version contained in past legislation and court precedent…'

50 The Application stands to be granted with costs on a party and party scale. I do not see any reason why the Applicant has to be penalized with a cost order apart from that for the postponement occasioned on 13 June 2023."

determine civil claims arising out of African law brought before them by Blacks against Blacks resident within that chief, deputy chief or headman's area of jurisdiction. A deputy chief could only be recognized or appointed by the Minister upon request by the applicable chief. The procedure in connection with the trial of civil claims was in accordance the African law recognized by the tribe.[21] The power granted did not include the power to decide on the nullity, divorce or separation arising out of a marriage.[22] The Minister could revoke the authority granted to a chief, deputy chief or headman.[23] A judgment given by such chief, headman or chief's deputy was executed in accordance with the procedure prescribed by regulation issued by the Minister.[24] A judgment of the chief, deputy chief or headman lay for appeal at the magistrates' court. Unless the appeal was withdrawn or lapsed, execution of the judgment was suspended by the lodging of the appeal. An appeal did not lie against a judgment where the value was less than R10 unless the magistrates' court, after summary enquiry, certified that the issue involved an important principle of law.[25]

In terms of section 20 the Minister could confer upon any chief, deputy chief or headman the jurisdiction to try and punish any Black who had committed an offence, in the area under the control of the chief, deputy chief or headman concerned.[26] The jurisdiction included any offence any offence at Roman-Dutch law or under African law, as well as statutory offences other than offences referred to in the Third Schedule to the BAA.[27] If any of the accused was not Black, or the victim was not Black, the African court did not have jurisdiction over the matter except when the matter involved property held in trust for Blacks.[28] The procedure at any trial before the African court, the manner of execution of any sentence imposed and the appropriation of fines was in accordance with African law save where the Minister prescribed otherwise by regulation.[29] The chief, deputy chief

[21] Rule 1 of the Rules or Regulations issued by the Minister in terms of section 12(6) of the BAA.
[22] Section 12(1).
[23] Section 12(2) read with section 20(4).
[24] Section 12(3).
[25] Section 12(4) read with section 20(6).
[26] Section 20(1)(a) read with section 21(1)(b).
[27] Section 20(1)(a)(i) and (ii).
[28] The proviso to section 21(1)(a).
[29] Section 20(2).

or headman could not inflict sentence involving death, corporal mutilation, grievous bodily harm, imprisonment or a fine in excess of an amount determined by the Minister or two head of large stock or ten head of small stock.[30]

If a chief, deputy chief or headman failed to recover from a person any fine or a portion of such fine imposed upon such person, he could arrest or cause such person to be arrested by his messengers, and within 48 hours bring or cause such person to be brought before the magistrates' court which has jurisdiction in the district in which the trial took place.[31] A magistrate before whom such person was brought could, upon being satisfied that the fine was duly and lawfully imposed and was still unpaid either wholly or in part, order such person to pay the fine or the unpaid portion thereof forthwith and, if such person failed to comply forthwith with such order, sentence him to imprisonment for a period not exceeding three months.[32] The magistrate could issue in respect of any person sentenced to imprisonment in terms of section 20 subsection (5) a warrant for his detention in a prison.

In terms of section 12(6) the Minister made regulations prescribing the procedure which was followed in civil disputes. In terms of section 20(9) the Minister made regulations in regard to all matters required or permitted by section 20, prescribed the manner and period regarding appeals and procedures in any action taken under section 20. If the defendant was personally served whilst within the area of jurisdiction, judgment was granted by default for an amount not exceeding the claim and costs.[33] If the plaintiff was absent at the date, place and time of set down, the claim could be dismissed at defendant's request.[34] An application for rescission of a judgment granted by default could be brought within two months after judgment.[35] The rescission could be granted by the successor in title and in the absence of the person against whom judgment was given.[36]

[30] The proviso to section 20(2).
[31] Section 20(5)(a).
[32] Section 20(5)(b)
[33] Civil Regulation 2(1).
[34] Civil Regulation 2(2).
[35] Civil Regulation 2(3).
[36] Civil Regulation 2(4).

A rescission of judgment was reported to the clerk of the magistrates' court.[37] A hearing could be adjourned as the circumstances required.[38] If the African court unreasonably delayed, refused to deal with a case or to adjudicate upon a matter, any party to the proceedings could apply, on notice to all other parties, to the magistrates' court for the hearing of the matter.[39] After hearing the application referred to in subrule (2) the Magistrate could give such order as he shall think fit for the speedy trial of the case or matter by the chief; or if it appeared that the interests of justice so require, order that the case or matter shall be tried initially in the Bantu Affairs Commissioner's and later Magistrates' court[40], whereupon the proceedings in. the chief's court were stayed.[41] If the magistrate decided to hear the case, he/she called upon the parties to file statements of claim and defence or at their option pleadings, in terms of the Rules of the African Court, at the time the magistrate fixed, and the magistrate proceeded to hear and determine the matter in accordance with the African court rules.[42]

A chief, deputy chief or headman could not adjudicate upon any matter or thing in which they were pecuniarily or personally interested.[43] No legal representation by legal practitioners were allowed. No advocate or other legal practitioner could appear or act for any party in the African court.[44] The African court kept a written record of its proceedings. The chief, deputy chief or headman as the case may be, prepared or caused to be prepared a record in quadruplicate setting out the plaintiff and particulars of claim, the defendant and particulars of the defence, the judgment and its date.[45] The written record was signed off by the chief, deputy chief or headman as the case may be, and two other members of his court.[46] The chief, deputy chief or headman as the case may be, kept one copy for their records.[47] One copy was handed to the plaintiff and the other to the

[37] Civil Regulation 2(5).
[38] Civil Regulation 3(1).
[39] Civil Regulation 3(2).
[40] Section 54A of the Magistrates' Courts Act 32 of 1944.
[41] Civil Regulation 3(3).
[42] Civil Rule 3(4).
[43] Civil Regulation 4.
[44] Civil Regulation 5.
[45] Civil Regulation 6(1).
[46] Civil Regulation 6(2).
[47] Civil Regulation 6(5).

defendant. The fourth copy was delivered by the chief to the clerk of the magistrates' court where the party against whom judgment was made resided, within one month of delivery of the judgment. Either of the parties may deliver a copy of the judgment to the clerk of the magistrates' court in which the person against whom judgment was made party resided, within two months of the date of judgment.[48] If the chief, deputy chief or headman could not complete or cause to be completed a written record due to illiteracy, he/she could personally or through a messenger verbally furnish the particulars and the clerk of the court would produce the written record.[49]

All judgments of an African court were registered. The particulars of the written record and the date of registration were kept in a register by the clerk of the magistrates' court.[50] The judgment lapsed if it was not registered with the clerk of the court within two months.[51] The procedure in connection with the execution of a judgment was in accordance with the African law of the tribe of the chief, deputy chief or headman concerned.[52] Any claim to property attached, made by any person other than the judgment debtor, was beard and. determined by the person who delivered the judgment resulting in such attachment or by his successor in office.[53] Where the property to be attached was outside the area of jurisdiction of the chief, deputy chief or headman who delivered the judgment or where the person resisted with force the seizure by a messenger of that chief, deputy chief or headman in the lawful execution of a judgment and the messenger was of the opinion that that seizure could not be effected without breach of the peace, the messenger reported the circumstances to the judgment creditor who if he so desired, may apply to the clerk of the magistrates' court for enforcement of the judgment.[54] The clerk of the court could not take steps for the enforcement of a judgment which was not registered.[55] The judgments were enforced in the same way as judgments of the magistrates' court.[56] Any

[48] Civil Regulation 6(3) and (4).
[49] Civil Regulation 6(6).
[50] Civil Regulation 7(1).
[51] Civil Regulation 7(2).
[52] Civil Regulation 8(1).
[53] Civil Regulation 8(2)
[54] Civil Regulation 8(3)(a).
[55] Proviso to Civil Regulation 8(3)(a).
[56] Civil Regulation 8(3)(b).

person who obstructed the messenger of a chief, deputy chief or headman in the execution of their duties was guilty of an offence and upon conviction could be sentenced to a fine or in default of payment to imprisonment for a period not exceeding one hundred days.[57]

An appeal, in person or through a legal representative, against the decision of the African Court lay with the Magistrates Court.[58] No appeal lay against a judgment by default until an application for rescission was refused.[59] An appellant noted the appeal and paid prescribed fees for the African Court.[60] If the judgment lapsed, the appeal lapsed.[61] On good cause shown the magistrate could extend the period prescribed for noting an appeal.[62] A party did not lose their right of appeal by satisfying the judgment or accepting the benefit from the judgment.[63] The clerk of the court to whom the notice of appeal was made forthwith recorded the noting of the appeal,[64] fixed a time and date for the hearing of the appeal and notified the appellant thereof;[65] issued a notice for service on the respondent in which they set forth the information contained in the register kept in terms of rule 7 (1) and also the time and date fixed for the hearing,[66] and issued a notice to the chief who heard the case that an appeal has been lodged and calling upon him to comply with the requirements of rule 11 (1).[67] The appellant could personally serve on the respondent personally in the presence of a witness, or on some adult member of the kraal or dwelling at which the respondent resided.[68] In the event of non-personal service, if the respondent was in default on the date fixed for the hearing, the magistrates could require personal service in the manner that they directed, and if the appellant so requested and paid the required sheriff's fees to the clerk of the court, the notice could be service in the

[57] Civil Regulation 8(4).
[58] Civil Regulation 9(1).
[59] Proviso to Civil Regulation 9(1).
[60] Civil Regulation 9(2).
[61] Proviso to Civil Regulation 9(2).
[62] Civil Regulation 9(3).
[63] Civil Regulation 9(4).
[64] Civil Regulation 10(1)(a).
[65] Civil Regulation 10(10(b).
[66] Civil Regulation 10(1)(c).
[67] Civil Regulation 10(1)(d).
[68] Civil Regulation 10(2)(a).

manner prescribed for the service of summons in a magistrates' court.[69] No costs or charges were recoverable in respect of the service of such notice by the appellant himself.[70]

As soon as possible but not later than 14 days after receiving the notice of appeal the African court furnished the clerk of the court with reasons for judgment which if not in writing were recorded by the clerk of the court and formed part of the record of the case. When the reasons for judgment were furnished, the clerk of the court paid over to the chief the fees deposited with him under rule 9 (2).[71] If the chief failed to furnish his reasons for judgment the magistrates' court could issue an order calling upon him to do so within a stated time and could adjourn the hearing until such time as he complied with such order.[72] The magistrates' court could in its discretion and subject to the provisions of rule 12 proceed with the hearing without such reasons for judgment.[73]

Seven days before the hearing of the appeal the plaintiff could file with the clerk of the court and serve upon the defendant a written statement amplifying their claim.[74] Within the same period, seven days before the hearing, the defendant could also file with the clerk of the court and serve on the plaintiff the statement of defence and could raise, even for the first time, a counterclaim.[75] The statement of claim, defence and counterclaim could also be raised at or before the hearing of the appeal notwithstanding that they were not submitted on time, and the plaintiff could be required to plead to the counterclaim.[76] The magistrates' court heard the matter as if it was the court of first instance and gave the judgment as provided in section 12(5) of the BAA and the successful party could cause execution of the order.[77] The clerk of the court immediately notified the African

[69] Proviso to Civil Regulation 10(2)(a).
[70] Civil Regulation 10(2)(b).
[71] Civil Regulation 11(1).
[72] Civil Regulation 11(2).
[73] Civil Regulation 11(3).
[74] Civil Regulation 12(1).
[75] Civil Regulation 12(2).
[76] Civil Regulation 12(3).
[77] Civil Regulation 12(4).

Court of the outcomes of the appeal, including the noting and outcome of any further appeal in due course.[78]

The fees payable and recoverable in connection with any proceedings in a chief's court were in accordance with the recognised customs and laws of the chief or his authorised deputy's tribe to which he has been appointed and in the case of a headman, the tribe occupying the location or area over which he has been appointed.[79] This sub-rule only applied for one year. Thereafter the fees as prescribed by the Regulations applied.[80] If no fee was payable in terms of subrule (1) then the fees were as prescribed and the amount was the current value of the amounts as on 29 December 1967, set out in Regulation Gazette 885 No. R2082 dated 29 December 1967. The following fees were payable and recoverable against the party ordered to pay the costs:

- R c (0) To chief for first day of hearing and judgment (to be paid by plaintiff in advance)..... R2-00
- To chief for second and each subsequent day of hearing... .....•..... R1 00
- To chief for furnishing written record in terms of rule 6.....R0-25c
-To chief for attending and giving reasons in terms of rule II (1).....R0-25c
- To chief for necessary travelling (per mile-for forward and return journeys by shortest route)..... .R0-05c
- To messenger for necessary travelling, other than to deliver written record in terms of rule 6 (3) (per mile) - forward and return journeys by shortest route) …R0-2.5c
- To messenger for each process delivered or executed; or attempt at service, delivery or execution. . . . . • . . . . . • . . . . . .R0- 20c.

The Regulations also provided pro-forma forms for the written record, the register of civil matters to be kept by the clerk of the magistrates' court, notice of hearing of appeal to parties, notice of appeal to the African Court and the request for reasons, notice of result of appeal and notice of further appeal.

[78] Civil Regulation 12(5).
[79] Civil Regulation 13(1).
[80] Civil Regulation 14(3).

In Regulation R.45 dated 13 January 1961 the Minister of Bantu Administration and Development made Regulations in respect of criminal proceedings published in Regulation Gazette no. 75, Government Gazette no. 6609. Regulation 2 thereof provided that any person who wished to appeal against a conviction should within 30 days of such conviction give notice to the African court, the other party and file the notice with the clerk of the magistrates' court. Regulation 3 provided that upon receipt of the notice, the clerk of the court fixed the date and place for the hearing and notified the parties as well as the African court. Regulation 4 provided that if at the hearing the appellant failed to appear, the magistrate could dismiss the appeal or postpone the hearing.

AFRICAN LAW COURTS ARE PART OF THE JUDICIARY OF THE REPUBLIC OF SOUTH AFRICA.

The Traditional Courts Act[81] (the TCA) affirm the role of traditional courts[82] as a court established in terms of section 166 of the Constitution.[83] Traditional courts promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law; and function in accordance with customary law, subject to the Constitution.[84] Traditional Courts are also included in item 16(1) of

[81] Act 9 of 2022.
[82] Section 2(b) of Act 9 of 2022.
[83] Section 1 of Act 9 of 2022, definition of "court".
''court' means any court established in terms of section 166 of the Constitution;"
Section 166 of the Constitution reads:
"Judicial System
166. The courts are-
(a) The Constitutional Court;
(b) The Supreme Court of Appeal;
(c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa;
(d) the Magistrates' Courts; and
(e) any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts."
[84] Section 6 of the TCA provides:
"6 Nature of traditional courts
(1) Traditional courts-
(a) are courts of law the purpose of which is to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law; and
(b) function in accordance with customary law, subject to the Constitution.

Schedule 6 of the Constitution.[85] Customs and practices which infringe on the dignity, equality and freedom of persons are prohibited in terms of section 3(3).[86] African Courts

(2) Traditional courts must be constituted and function under customary law so as to-
(a) promote access to justice;
(b) prevent conflict;
(c) maintain harmony; and
(d) resolve disputes where they have occurred,
in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation, in accordance with constitutional imperatives and the provisions of this Act.
(3) The traditional court system is made up of the following levels of traditional leadership as contemplated in the applicable legislation providing for the recognition of traditional leadership and recognised in terms of customary law:
(a) A headman or headwoman's court;
(b) a senior traditional leader's court;
(c) a principal traditional leader's court; and
(d) a king or queen's court, where available.

[85] "Schedule 6
Transitional Arrangements
…
Courts
16. (1) Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of legislation applicable to that office, subject to-
(a) any amendment or repeal of that legislation; and
(b) consistency with the new Constitution."
In *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) it was said at para 199:
"[199] Traditional courts functioning according to indigenous law are not entrenched beyond the reach of legislation. NT 166 does indeed provide for their recognition. Subsection (e) refers to 'any other court established or recognized by an Act of Parliament'. This would cover approximately 1 500 traditional courts recognised in terms of the Black Administration Act 38 of 1927.* The qualification 'which may B include any court of a status similar to either the High Courts or the magistrates' courts' can best be read as permitting the establishment of courts at the same level as these two sets of courts. It does not, as the objectors contended, provide for a closed list. This interpretation is supported by NT 170, which says that '(m)agistrates' courts and all other courts may decide any matter determined by an Act of Parliament' - it does C not say magistrates' courts or all other courts of a similar status. More directly, NT sch 6 s 16(1) says that '(e)very court, including courts of traditional leaders . . . continues to function'. In our view, therefore, NT 166 does not preclude the establishment or continuation of traditional courts."

[86] Section 3 Guiding Principles
"3(3) (a) Without detracting from the generality of the provisions of this Act, the conduct set out in Schedule 1 to this Act is intended to illustrate and emphasise some customs and practices which infringe on the dignity, equality and freedom of persons and which are prohibited."
"Schedule 1
PROHIBITED CONDUCT WHICH INFRINGES ON THE DIGNITY, EQUALITY AND FREEDOM OF PERSONS
(Section 3 (3))
Conduct of any nature which tends to-
(a) discriminate against the dignity of members of the Lesbian, Gay, Bisexual, Transgender and Intersexed community;
(b) promote homophobia;

should observe the letter and spirit of the Bill of Rights and must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law.[87] The rules of precedent

(c) denigrate, or discriminate against, elderly persons who suffer from mental health conditions such as memory loss, dementia and Alzheimer's disease;
(d) discriminate against persons who are mentally or physically infirm or disabled on the basis of existing perceptions or beliefs;
(e) discriminate against persons with albinism; and
(f) discriminate against unmarried persons."

[87] Section 7 provides:
"7 Procedure in traditional courts
(1) Sessions of a traditional court are held at the time and at a place which is accessible to members of the community in question.
(2) Subject to subsection (3), the procedure at any proceedings of a traditional court, including the notice to attend the proceedings of that traditional court and the manner of preserving the dignity of the traditional court and the manner of execution of any order imposed by it, must be in accordance with customary law and custom.
(3) During its proceedings, a traditional court must ensure that-
(a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following:
(i) That women, as parties to any proceedings or members of the traditional court, are afforded full and equal participation in the proceedings, as men are; and
(ii) that vulnerable persons, with particular reference to children, the elderly, the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity, are treated in a manner that takes into account their vulnerability; and
(b) the following rules of natural justice are adhered to:
(i) That persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made; and
(ii) that any decision by the traditional court must be impartial.
(4) (a) Subject to paragraph (b), a party to a dispute before a traditional court may be assisted by any person of his or her choice in whom he or she has confidence.
(b) No party to any proceedings before a traditional court may be represented by a legal practitioner acting in that capacity.
(5) (a) Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the traditional court must apply the system of customary law that the parties expressly agree should apply.
(b) In the absence of any agreement contemplated in paragraph (a), the traditional court must decide the matter in accordance with the following guidelines:
(i) The system of customary law applicable in the area of the traditional court should take precedence over any other system of customary law; or
(ii) the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection.
(6) Traditional courts must be open to all members of the community.
(7) Proceedings of traditional courts must be conducted in the presence of both parties to the dispute and traditional courts must allow the full participation of all interested parties without discrimination on any of the prohibited grounds of unfair discrimination referred to in section 9 (3) of the Constitution.
(8) The customary law of procedure and evidence applies in traditional courts.
(9) Subject to the provisions of subsection (10), the proceedings and records of traditional courts, as contemplated in section 13, must be in the language most widely spoken in the area of the traditional court in question.

(*stare decisis)* apply. This doctrine is necessary for legal uniformity and certainty.[88] African courts function in terms of the duality of national legislation and the Constitution. The State has a responsibility to ensure that legislative and other measures are taken to address these customs and practices.[89] The Minister of Justice has a responsibility to assess the relevance of these practices and make recommendations for the amendment of the list[90], which is not conclusive and must be continuously considered for revision.[91] Regrettably, the TCA limited the jurisdiction of the traditional courts worse than the BAA.[92]

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(10) If any of the parties does not understand the language used in the traditional court, an interpreter must be provided.
(11) The Minister, in consultation with the Cabinet member responsible for traditional affairs and the National House of Traditional and Khoi-San Leaders, may by notice in the Gazette, determine fees payable to a traditional court in terms of customary law.
(12) A member of the traditional court must declare any direct personal interest that he or she or his or her immediate family member may have in a dispute before a traditional court in which that member is participating, and where appropriate, withdraw from participating in the resolution of that dispute."

[88] *Shabalala v Attorney-General, Transvaal and Another; Gumede and Others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 618F-H.

[89] Section 3(3)(b).

[90] Section 3(3)(c).

[91] Section 3(3)(d).

[92] Section 4 (2) and (3) reads:
"4 Institution of proceedings in traditional courts
(2) (a) A traditional court may, subject to subsection (3), only hear and determine a dispute contemplated in Schedule 2-
(i) that is not being dealt with by any other person or structure recognised in terms of customary law for purposes of the resolution of disputes; or
(ii) that has been dealt with by any person or structure in terms of subparagraph (i) but there has not been any resolution of that dispute.
(b) A traditional court may not hear and determine a dispute which-
(i) is being investigated by the South African Police Service;
(ii) is pending before any other traditional court or any other court; or
(iii) has already been finalised by a court, which means that a verdict has been given in a criminal matter or final order has been made by the court in a civil matter.
(3) A traditional court may only determine or make an order in terms of section 8 in respect of any matter referred to in Schedule 2 to this Act: Provided that if a person approaches the traditional court for any relief in respect of any matter not referred to in Schedule 2 and the matter is placed before the court, nothing precludes such a traditional court from-
(a) counselling, assisting or guiding a party to the dispute who has approached it; or
(b) facilitating the referral of the matter to another traditional court, court or an appropriate institution or organisation, and provided it is done in a manner that does not have the potential of influencing the proceedings or outcome of the matter in a court or forum which has jurisdiction to hear the matter."
Schedule 2
(Section 4 (2) (a))
Matters which traditional courts are competent to deal with in terms of this Act:
(a) Theft where the amount involved does not exceed R15 000,00.
(b) Malicious damage to property where the amount involved does not exceed R15 000,00.

Worse still, is the erosion of the institutional independence of the traditional courts which goes to the heart of their functioning, by creating dependency on the State, which was non-existent before the TCA, on the cost prioritization and staff establishment principles of the public service, thus placing the functioning of the African Courts on the generosity of both the Director-General and the political will and maturity of the Minister of Justice. One suspects that the courts operate today, limping, because the post provisioning for clerks of the traditional courts as envisaged in section 5(4)[93] have not been budgeted for, and as a result there are no funds, and the African courts await the mercy of the Ministers in Cabinet to function. If the Traditional Courts were not prioritized by government, the dependency on government, and not the industry of traditional leadership and a tribe, would result in a slow death of the vibrancy of African courts. If the spirit of the economic practices of the African people had been developed, which ironically the BAA had preserved, in that the African courts were self-funding as they always have been, with their fees prescribed in accordance with established practice, these courts would not be waiting with the begging bowl on the national fiscus. The mercy of a Director General and

(c) Assault where grievous bodily harm is not inflicted.
(d) Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute where the amount involved does not exceed R15 000,00.
(e) Receiving any stolen property knowing it to be stolen where the amount involved does not exceed R15 000,00.
(f) Crimen injuria.
(g) Advice relating to customary law practices in respect of-
(i) ukuThwala;
(ii) initiation;

[93] Section 5(4) reads:
"5 Composition of and participation in traditional courts
(4) (a) For every traditional court there must be a clerk of a traditional court who is appointed, designated or seconded in accordance with the laws governing the public service and who has the powers, duties and functions as set out in this Act or as may be prescribed.
(b) The role, functions and responsibilities of the clerk of a traditional court include the following:
(i) Issuing summonses;
(ii) keeping an attendance register of sessions of traditional courts;
(iii) keeping records of proceedings of traditional courts;
(iv) keeping record of all cases reported to traditional courts;
(v) filing decisions of traditional courts with the Provincial Registrar;
(vi) advising traditional courts on cases that should be referred to any other customary institution or structure or court or forum;
(vii) transferring disputes to any other traditional court, court or forum;
(viii) dealing with, recording and filing the information received in the prescribed manner; and
(ix) submitting prescribed reports at the end of each quarter of a financial year to the Provincial Registrar to be dealt with in the prescribed manner."

philosophical enlightenment of a government would be irrelevant, for the TCA to come into operation. The muddied waters of independence extends to messengers of the African courts. Whilst the BAA provided for their fees, it seems that the TCA places reliance of service of African court processes primarily on the South African Police Services as regards criminal offences, without expressly saying so.[94] It seems that also as regards civil summons, the simple established principle of the rule of law, which has an order by default by a court as a consequence of non-appearance, is astonishingly replaced by the involvement of the police, who worryingly now have the power to make a judicial decision. The confusion around the power to make an order by default following the absence of a party is enhanced by section 7(7) which requires of a traditional court that proceedings be held in the presence of both parties.[95] The most telling challenge, is the inability of section 8 to accommodate a claim for customary damages resulting from the impregnation of a girl-child or woman or the enforcement of payment for bogadi/lobola/ilobolo.[96] This is simply because the TCA requires proof of financial loss as

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[94] Section 4 (4) reads:
"4 Institution of proceedings in traditional courts
"(4) (a) The clerk of the traditional court must, if a party, after having been duly summoned to appear in and attend the proceedings of the traditional court, fails to so appear and attend such proceedings, make a determination to that effect and must thereafter refer the matter to a justice of the peace appointed by the Minister in terms of section 2 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963), for purposes of this Act, who must deal with the matter in terms of the powers and duties as may be conferred or imposed on him or her under section 3 of the Justices of the Peace and Commissioners of Oaths Act, 1963.
(b) The role of the justice of the peace referred to in paragraph (a) is to facilitate compliance with the summons and for this purpose the justice of the peace has the following powers:
(i) If non-compliance is not due to fault on the part of the party against whom the summons was issued, the power to negotiate with the party to comply with the summons; and
(ii) if non-compliance is due to fault on the part of the party against whom the summons was issued, the power to request the traditional court to have the matter transferred to the Magistrate's Court having jurisdiction, as contemplated in section 14 (1) (a).

[95] Section 7(7) reads:
"7 Procedure in traditional courts
(7) Proceedings of traditional courts must be conducted in the presence of both parties to thedispute and traditional courts must allow the full participation of all interested parties without discrimination on any of the prohibited grounds of unfair discrimination referred to in section 9 (3) of the Constitution."

[96] Section 8 reads:
"8 Orders that may be made by traditional courts
(1) A traditional court may make any of the following orders after having deliberated on a dispute
before it:
(a) An order in favour of the party who instituted proceedings in terms of section 4 (1), expressed in monetary terms or otherwise, including livestock-
(i) accepting a settlement between the parties to the dispute;

a pre-requisite for financial loss.[97] A High Court is an appellate court and unless necessary, appellate courts should preferably deal with matters where facts are settled, where possible, so that they enjoin with the development of jurisprudence and are not suffering overload of judicial work which was preventable. Against that background, one

(ii) for the payment of any damages in respect of any proven financial loss;
(iii) for the payment of compensation; or
(iv) for the payment of damages to an appropriate body or organisation which is not connected in any manner whatsoever to a member of the traditional court or a traditional leader:
Provided that any such order expressed in monetary terms or otherwise, including livestock, may not exceed the value of the damage giving rise to the dispute in question or the amount determined by the Minister from time to time by notice in the Gazette, for this purpose, whichever is the lesser;
(b) an order directing a party against whom proceedings were instituted in terms of section 4 (1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render to the aggrieved party some specific benefit or service instead of compensation for damage or pecuniary loss, with the consent of both parties;
(c) an order directing a party against whom proceedings were instituted in terms of section 4 (1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render without remuneration some form of service-
(i) for the benefit of the community; or
(ii) for the benefit of any person or persons in the community in need who, in the opinion of the members of the traditional court, are deserving of that service, under the supervision or control of a person or group of persons identified by the traditional court who, in the opinion of the traditional court, promote the interests of the community and who must upon the completion or otherwise of the service in question report to the traditional court thereon: Provided that no service whatsoever may be rendered to a traditional leader or his or her family or to any person acting in an official capacity in that traditional court;
(d) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of;
(e) an order accepting an unconditional apology where such an apology is a voluntary settlement between the parties themselves;
(f) an order reprimanding a party or parties to the dispute for the conduct complained of;
(g) an order requiring a party or parties to keep the peace;
(h) an order that a party attends any form of training, orientation or rehabilitation that is consistent with the relevant customary law and customary practices, the Constitution and this Act and does not include any form of detention or deprivation of any customary law benefits;
(i) an order requiring any party to the dispute to make regular progress reports to the traditional court regarding compliance with any condition imposed by the traditional court;
(j) an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; or
(k) an order, containing a combination of any of the orders contemplated i in paragraphs (a) to (i), except where the matter is referred to the national prosecuting authority under paragraph (j), in which event the decision of the national prosecuting authority prevails.
(2) A traditional court may order that any payment contemplated in subsection (1) be paid in full or instalments and at a time or times it deems just.
(3) A traditional court may order that any payment contemplated in subsection (1) or part thereof be paid to a person injured by an act or omission for which the payment was imposed, on condition that such a person, if he or she accepts the payment, may not bring an action in any court in order to recover damages for the injury he or she sustained."

[97] Section 8(1)(a)(ii).

is in doubt of the need for direct review to the High Court on matters which seems appropriate for the Magistrates' Courts to can deal with, as envisaged in section 11.[98]

[98] Section 11 reads:
"11 Review by High Court
(1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take those proceedings on review to a division of the High Court having jurisdiction on any of the following grounds:
(a) The traditional court was not competent to deal with the matter as contemplated in section 4 (2);
(b) the traditional court was not properly constituted as contemplated in section 5;
(c) the requirements relating to the pledge or affirmation contemplated in section 5 were not complied with;
(d) the provisions of section 7 (3) (a), affording-
(i) women, as parties to any proceedings or members of the traditional court, full and equal participation in the proceedings; or
(ii) vulnerable persons treatment that takes into account their particular vulnerability,
were not complied with;
(e) the provisions of section 7 (3) (b) were not complied with;
(f) one or both of the parties were not allowed to represent themselves or be represented by a person of their choice as contemplated in section 7 (4);
(g) the proceedings of the traditional court were not open to all members of the public, contrary to the provisions of section 7 (6);
(h) the proceedings of the traditional court were not conducted in the presence of both parties, contrary to the provisions of section 7 (7);
(i) the proceedings of the traditional court were conducted in a language which one or both of the parties did not understand without the intervention of an interpreter, contrary to the provisions of section 7 (9) or (10);
(j) an order was made contrary to the provisions of section 8;
(k) a member of the traditional court participated in the proceedings of the court contrary to the provisions of section 7 (12);
(l) the provisions of section 3 (3) have not been complied with or have been contravened; or
(m) any procedural shortcoming relating to the conduct of the traditional court in the resolution of the dispute.
(2) (a) The division of the High Court reviewing the proceedings of a traditional court as contemplated in subsection (1) may, at any sitting thereof, hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or article.
(b) The division of the High Court reviewing the proceedings of a traditional court, whether or not it has heard evidence, may-
(i) confirm, alter, set aside or correct the order made by the traditional court in terms of section 8;
(ii) set aside or correct the proceedings of the traditional court;
(iii) generally make such order as the traditional court ought to have made on any matter which was before it; or
(iv) remit the case to the traditional court with instructions to deal with any matter in such manner as the division of the High Court may think fit.
(3) Any request for review as contemplated in subsection (1) after the expiry of the period determined in the regulations may be condoned by the division of the High Court in question on good cause shown.
(4) An order of a traditional court in respect of which the matter is taken on review in terms of this section, is suspended until the review has been decided on.
(5) At the conclusion of the matter before the traditional court, the traditional court must advise the parties of their right to take the matter on review and of the grounds for such review as contemplated in this section."

SOUTH AFRICA IS, DESPITE SELF-DOUBT AND RELUCTANCE, THE PRECEDENT AND TREND-SETTER ON THE APPLICATION OF AFRICAN LAW AND AFRICAN COURTS AS A MEMBER OF THE JUDICIARY.

The complainant is *dominus litis* which includes the choice of law. Whenever both Roman-Dutch law and African law are potentially applicable, it is the complainant who makes a clear and explicit choice of law and court applicable to the facts of a particular case. This means that in the choice of law and court, the complainant has a flexible and simple discretion. This discretion, however, has judicial supervision. The court before which a complaint is instituted, in determining its jurisdiction, inherently discern from the facts, which law would apply. The legal system with which the facts and the expected outcome have the closest connection, should prevail.[99] Where Roman-Dutch system was elected by a complainant, in a matter with the closest connection to African law, the court has a discretion and may elect one of two possibilities. It may call in expert assessors or expert witnesses, or may refer the matter to an African court with the closest connection to the issue. Preference should be given to referral to an African court as a default position, unless substantial injustice may result. In this regard, section 14 of the TCA is a welcome development.[100] Unless the African court was clearly wrong, its decision should not be

[99] Project 90, The Harmonisation of the common law and the indigenous law, Report on Conflicts of Law, South African Law Reform Commission, Summary of Recommendations, point 7, page xviii.

[100] Section 14 reads:

"14 Transfer of disputes

(1) (a) If a traditional court is of the opinion that a dispute before it is not a matter which it is competent to deal with, as contemplated in section 4, or if the matter involves difficult or complex questions of law or fact that should be dealt with in a Magistrate's Court or a small claims court or if it is a matter as contemplated in section 4 (4) (b) (ii) or section 9 (4) (b) (ii), the traditional court may, in the prescribed manner, transfer such dispute to the Magistrate's Court or small claims court having jurisdiction and notify the parties to the dispute of the transfer.

(b) If proceedings are transferred from a traditional court to a Magistrate's Court in terms of this section, the Magistrate's Court must commence proceedings afresh.

(2) If a prosecutor, in the case of a criminal matter, before an accused person has pleaded to a charge as contemplated in section 6 (a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), or a magistrate or a commissioner of a small claims court, in the case of a civil matter before him or her, is of the opinion that a dispute before him or her-

(a) in the case of a dispute of a civil nature-

(i) is a matter that can be dealt with more appropriately in terms of customary law in a traditional court; and

(ii) is a matter in respect of which a traditional court has jurisdiction, as contemplated in this Act; or

(b) in the case of a dispute of a criminal nature, is a matter in respect of which a traditional

disturbed.[101] One of the most important departures from apartheid to democracy introduced by the Constitution, as regards African Law, is that courts no longer have to just recognize African law. Where it is a law of choice for one or both of the parties, it must be applied. The application of African law is no longer just a judicial discretion. The parties have a right to enjoy their law, with equal benefit and protection of the Constitution as the supreme law.[102] There is clearly a reluctance to unleash independent, self-sustaining and traditional leader-led African Courts, without some direct control by the government. There is also a measure of self-doubt by traditional leaders themselves to assert their roles without some reliance on the authority of the government, especially its law-enforcement capacity. The provisions of Chapter 4, section 38, of the Criminal Procedure Act 51 of 1977 should be available and applicable to the African court where a person failed to respond to the manner of bringing them before the African court in respect of an offence and a full report under cover of an affidavit was provided to the South African Police Service by the traditional leader or those acting on behalf of the traditional leader or the traditional court.[103] It should then be up to the police, where needs

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court has jurisdiction, as contemplated in this Act, the prosecutor, magistrate or commissioner of a small claims court, as the case may be, may facilitate the transfer of the dispute to the traditional court and notify the parties to the dispute of the transfer."

[101] In *S v Nkohle* 1990 (1) SACR 95 (A) at 100 it was said:
"It need hardly be stressed that where a trial court's findings on credibility are in issue on appeal, as in this matter, then, unless there has been a misdirection on fact, the presumption is that the conclusion is correct, the appellate court will only reverse it if convinced that it is wrong."
In *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para 15 it was said:
"[15[The court's powers to interfere on appeal with the findings of fact of a trial court are limited. … In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA)." … it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (S v Francis 1991 (1) SACR 198 (A) at 204e)."
In *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at para 30 it was said:
"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence may be found to be false, some of it might be found to be unreliable, and some of it might be found only possibly false or unreliable, but none of it may be ignored."

[102] Section 2, 9(1), 30 and 31 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[103] "CHAPTER 4
METHODS OF SECURING ATTENDANCE OF ACCUSED IN COURT (s 38)
38 Methods of securing attendance of accused in court
(1) Subject to section 4 (2) of the Child Justice Act, 2008 (Act 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for the purposes of his or her trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.
[Sub-s. (1) substituted by s. 4 of Act 42 of 2013 (wef 22 January 2014).]

be with the assistance of the public prosecutors, to decide whether a suspect will be arrested as envisaged in Chapter 5 (sections 39 to 53), issued with summons as envisaged in Chapter 6 (sections 54 to 55) will be issued with a written notice to appear before the African court as envisaged in Chapter 7 (section 56) of the Criminal Procedures Act, 1977. The African court should be able to deal with contempt of its own processes in accordance with African law and the Constitution. An appeal from a Magistrates Court is not justiciable in the Magistrates' Courts. If an appeal from the district court does not lie with the regional court, it is worrisome that section 12(1) read with 6(3) seems to suggest that appeals may lie within the hierarchy of the tiers of the African courts on the basis of the seniority of the traditional leader.[104] It must be left to tribes and traditional leaders to decide which cases are justiciable at which level of traditional court superiority, but whatever level, that decision should lie for appeal at the magistrates' courts. This will avoid delays, expenses and will be in the interests of justice. In the midst of these challenges, South Africa is ready to lead the universe as the human rights capital of the world, with the flavor of our African heritage of indigenous wisdom and systems, including in our judicial system and jurisprudence as we engage with our peers on the rule of law and judicial independence. African law courts are members of the Judiciary of the Republic of South Africa. It is about time that they take their rightful place in the judiciary of the nation, and as a pathfinder for other nations of the world. *Ke nako (The time is now)* for the inclusion of the diversity of indigenous people's laws and their courts in a judicial system and jurisprudence of a country. South Africa is a nation at work to realise that, in our lifetime.

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(2) The methods of securing the attendance of an accused who is under the age of eighteen years at a preliminary inquiry or child justice court are those contemplated in section 17 of the Child Justice Act, 2008.
[S. 38 substituted by s. 99 (1) of Act 75 of 2008 (wef 1 April 2010).]

[104] Section 12 reads:
"12 Referral of matters from traditional courts to Magistrates' Courts
(1) A party who is aggrieved by a decision or order of a traditional court on grounds other than those referred to in section 11 (1) may, after exhausting all traditional court system appeal procedures available in terms of customary law as contemplated in section 6 (3), refer that decision or order to the Magistrate's Court having jurisdiction, in the prescribed manner and period.
(2) A Magistrate's Court to which a matter has been referred in terms of subsection (1), may-
(a) hear any evidence and, for that purpose, may summon any person to appear to give evidence or to produce any document or article; and
(b) give any order or decision it deems competent to give in the matter."