ARTICLE

CUSTOMARY LAW AND ADOPTION: THE *'O E GAPA LE NAMANE'* CUSTOM AS A REFLECTION OF CUSTOMARY-LAW DEVELOPMENT IN SOUTH AFRICA

Stephen Monye[1]
B Crim Justice (Unibo) LLB (Uniwest) LLM (UOFS), Department of Criminal and Procedural Law, School of Law, Unisa
Email: monyesm@unisa.ac.za

'There can be no keener revelation of a society's soul than the way in which it treats its children.' Nelson Mandela

ABSTRACT

This submission uses the case of *Motsepe v Khoza* to investigate the Setswana practice encapsulated in the idiomatic expression *o e gapa le namane.* It is argued that this practice is a form of adoption that should be recognised and developed by courts in terms of the Constitution of the Republic of South Africa, 1996. The author argues that a child adopted in terms of the practice is adopted to all intents and purposes and should not be required to undergo the adoption proceedings prescribed by the Children's Act 38 of 2005 in order to confirm that adoption has formally occurred. He submits further that a customary marriage as recognised in terms of the Recognition of Customary Marriages Act 120 of 1998 is a necessary condition of the *o e gapa le namane* adoption of a child.

Keywords: adoption; customary law; customs; children; *namane*; law; customary marriage

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INTRODUCTION

Like any other societies, African societies have rules and regulations that govern their daily lives. These rules and regulations are intended to ensure both posterity and continuity in community life and customs. Families form the basis of society and each family is designed and fashioned by its members including, most importantly, the husband and wife. In African societies the husband and wife form part of a greater relationship/kinship[2] that affects its members. Procreation is, and has always been, central to African society. It is believed that through reproduction the family line is preserved. However, other forms of preserving the family line are promoted, and these include adoption.

Motsepe v Khoza[3] presents a case of adoption[4] in African society even though the matter was not couched precisely in these terms. The case involved the maintenance of two children, born to the wife of the defendant, prior to their entering into marriage according to the customs and traditions observed by the couple.[5] The children were, in other words, not the biological issue of the defendant. And although they were not

2 African cultures see kinship differently from Europeans. Kinship is created through cattle – not necessarily through procreation. Literally translated, '*Ngwana o tswalwa ke kgomo*' means 'cattle not men begat children'. In custom, an adult man can be adopted into any family by giving a cow, a bull or an ox (*kgomo*). In marriage, a woman's child-bearing capacity is transferred to her husband's family through the giving of cattle.

3 *Motsepe v Khoza* (unreported case number 15078/2012, South Gauteng High Court, 8 April 2013).

4 Chuma Himonga argues that there may be practices of adoption in customary law, but that is not backed up by sufficient research. He is of the view, however, that the practice of fostering is more common among tribes than adoption: *Family Law in Zambia* (Kluwer Law International, 2011) 192. Although WCM Maqutu uses the term 'adoption' in his book *Contemporary Family Law* (the Lesotho position) (Morija Printing Works, Lesotho, 2005) at 227, he has refrained from defining the term except to say that 'there are ways that the Basotho adopt children or *get* children legally in circumstances in which Europeans would have adopted children' (my emphasis). Thus, he equates getting a child with adoption. He treats the matter under the concept of legitimacy, where he uses the term 'adoption' interchangeably with 'get'.

5 Although this was a matter for another hearing in which in the respondent disputed the conclusion of the customary marriage, the court concluded that it was 'satisfied that the applicant has set out facts, which, if proved, will sustain a finding that the parties were customarily married on 21 May 2011' (*Motsepe* (note 3) para 6). The court went on to indicate the various facts it referred to, among which were that (*a*) the elders of the families of the two parties met and negotiated a customary marriage for the parties;(*b*) there was an amount paid by the elders of the respondent to the elders of the applicant, which both parties agree was *lobola*; (*c*) the elders of the applicant handed her over to the elders of the respondent; (*d*) the negotiations and payment of *lobola* were followed by a celebration, which both parties acknowledge took place. This amounts to and satisfies the requirements of a customary marriage as set out in section 3 of the Recognition of Customary Marriages Act 120 of 1998. See also at para 8, where the court asserted that, in cases of dispute about the existence of a customary marriage, it is for the parties to set out the facts, with sufficient particulars as to the requirements for the validity of the marriage. The case of *Baadjies v Matubela* [2002] 2 All SA 623 (W) was considered and distinguished by the court in this instance.

biologically related to the defendant, they had resided with him and their mother at a common homestead.

The applicant's claim before the court was for maintenance *pendente lite,* and a contribution towards the costs of the pending matrimonial action.[6] The claim for maintenance was for spousal maintenance and for that of the two children not fathered by the respondent. The applicant in the matter is a Motswana,[7] which has a bearing on later argument in this submission. The applicant relied on the *o e gapa le namane*[8] concept or practice[9] as the basis of the respondent's liability towards children who are not the respondent's biological issue.[10]

It is submitted that although the court did not directly spell out the issue of the customary adoption of a child in South African traditional communities, it did address it indirectly.

In addition, although at first glance the Children's Act[11] appears not to provide specifically for the recognition of customary-law adoptions, a closer analysis indicates that it in fact does. In this regard, some principles of the Recognition of Customary Law Marriages Act 120 of 1998 are invoked to support the argument regarding the recognition of customary-law adoption in terms of the *o e gapa le namane* practice.

As the law stands, it appears *prima facie* that children who are part of the *o e gapa le namane* do not have a legitimate claim against the estate of their stepfather,[12] who can simply exclude them at a whim from his maintenance duties and inheritance. This can occur despite the fact that he has, in accordance with the concept of *o e gapa le namane,* adopted the children.

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6 On 27 March 2012 (case no 11255/12) the respondent launched an application against the applicant in which he sought inter alia that it be declared that he was not married to the applicant. See at para 2 of the *Motsepe* judgment (note 3).

7 The significance of this is that the question that the court was required to resolve derives from a Setswana language. Setswana is one of the official languages in South Africa and is spoken by Batswana people. Motswana comes from the Batswana people, one of the major South African tribes. They speak a common language called Setswana. 'Motswana' signifies singular and 'Batswana' signifies plural.

8 Literally translated, it says 'you lead it with its calf'; stripped of its metaphor, it means that the child follows her mother into the marriage. See the full discussion of the concept below.

9 The court used the term 'idiom' as well as 'concept' in the text. The author prefers to use the term 'practice' simply because, while it is used in an idiomatic expression, it has taken root in the *lobola* negotiations as a practice. However, the author will use the terms 'concept' and 'practice' interchangeably in this text, depending on the context of the argument.

10 *Motsepe* (note 3) para 9.

11 Act 38 of 2005.

12 The author uses the word advisedly as there is no equivalent term in Setswana. The word *rrago* (your father) is the only word used to refer to your father, otherwise *rra* (father) is used when referring to your father in the first person sense.

It is submitted, however, that the question the court should have answered in *Motsepe*,[13] before it considered any other issue, was whether the children were the respondent's adopted children in terms of the customary-law practice of *o e gapa le namane*. If the court had found the answer to be in the affirmative, the matter would have ended there, as adoptive parents have a duty of support towards their adopted children.[14] It would also have been unnecessary for the court to dissect the various phases of childhood in terms of Batswana custom,[15] since the duty to support would then have been settled by the law.

In what follows the author analyses the legal framework of adoption in South African law in an attempt to clarify the concepts raised in *Motsepe*.

THE LEGAL FRAMEWORK OF ADOPTION

The word 'adoption' is not defined in any South African statute. However, it has been described as a process by which a person assumes a parenting role over another, usually a child, from that person's biological or legal parent or parents; in so doing, the adopter permanently assumes all the rights and responsibilities of a parent.[16] The process entails a person or persons taking over the rights and responsibilities of the natural parent of a child. It is a legal act that creates a legal relationship between a parent and a child.[17] Once the adoption process has been finalised, all the rights and responsibilities of the biological parents cease. Equally, an adopted child loses all legal ties with their birth

13 *Motsepe* (note 3).

14 The duty to support in South Africa arises in some instances as a result of a valid marriage or blood relations. See J Neethling and JM Potgieter 'Uitbreiding van die toepassingsgebied van die aksie van die afhanklike' 2001 *THRHR* 483 at 487–488, where it is stated: 'Gemeenregtelik is 'n onderhoudsplig wat voorspruit uit 'n ooreenkoms, en nie suiwer uit bloedverwantskap of ouerskap nie, reeds ten minste in beginsel en by implikasie deur ons Howe erken, vergelyk.' See further, for more detail concerning the nature and consequences of customary marriages, TW Bennett *Customary Law of South Africa* (Juta & Co, 2004) ch 8.

15 See *Motsepe* (note 3) para 13, where the court provided an analysis different stages of a child according to Sotho- and Nguni-speaking nations. The court said the following: 'In the Sotho-speaking nations, child is *ngwana*. In its generic sense, everyone is ngwana to his or her parents. However, specifically, a child most often refers to a person under the age of 14. This is because from the age of 14, a boy-child graduates from being ngwana to lesogana and a girl-child from being *ngwana* to *lekgarebe*. In the Nguni-speaking nations, the child is *umtwana* and from 14 years a boy-child is *Isoka* and a girl-child is *Intombi*. *Lesogana/Isoka*, loosely translated, is a suitor; and *lekgarebe/intombi* is a maiden. At 18 years, you then have *Monna/Indoda* loosely translated as "a man" or *Mosadi/Umfazi* loosely translated as "a woman".'

16 See D Singh 'Adoption of children born out of wedlock' 1996 *De Jure* at 305. See further TL Mosikatsana 'Comment on the adoption by K and B' (1995) 31 CRR (20) 151 (Ont Prov Div) 1996 at 582.

17 See *Robb v Mealey's Executor* (1899) 16 SC 133–136.

parents and becomes a legal member of the adoptive family, usually taking the family's name.

This process should be differentiated from the concept of foster-parenting. Foster-parenting is a temporary arrangement in terms of which a child is placed in the care of another person without the rights and responsibilities of parenthood being transferred permanently to such a person.[18]

The origin of adoption

Writers on the subject of adoption argue that the legal institution of adoption is as old as humankind,[19] that it can be found in the writings of the Greeks, Egyptians and Romans. It is argued that the institution was the result of the core structure of the society that was founded on the family, with marriage centred on procreation and maintaining family blood lines. Van der Walt[20] argues that the Bible provides an example of adoption in the story of Moses and Jesus, in that Jesus was the adopted child of Joseph.[21] She further argues that Paul uses the word 'adoption' five times in his letters to the Ephesians. She also points out that the New Testament uses the Greek word *Huothesia* when referring to adoption and that the word means 'to place a son'. Ferreira[22] argues that the practice can be traced to Roman mythology. She argues that, according to the Roman legend, Romulus and Remus, the twin sons of Mars, the God of War, and Rhea Silvia, the daughter of the King of Alba Longa, were saved from drowning and reared by a wolf. Romulus grew to become the King of Rome.

In South Africa, although adoption was not known in Roman-Dutch law, which is part of South African common law, the practice of giving childless families children has existed in one form or another throughout the legal history of South Africa.[23] It was practised ordinarily within families and was thus not legislated or formalised.[24] The introduction of the Adoption of Children Act in 1923[25] changed the position. The Act

18 Himonga (note 4) at 192 argues that there may be practices of adoption in customary law but that is not backed by sufficient research. He is of the opinion, however, that the practice of fostering is more common among tribes than adoption.

19 G van der Walt 'The history of the law of adoption in South Africa' 2014 *Obiter* 421–422; PQR Boberg *The Law of Persons and the Family* (Juta & Co, 1977) 350; F du Bois (ed) *Wille's Principles of South African Law* 9 ed (Juta & Co, 2007) 193; S Ferreira 'Interracial and intercultural adoption: A South African legal perspective' (LLD thesis, Unisa, 2009) 29. <http://uir.unisa.ac.za/bitstream/handle/10500/2881/dissertation_ferreira_s.pdf?sequence=1> (accessed 9 March 2014).

20 Van der Walt (note 19).

21 Van der Walt (note 19).

22 Ferreira (note 19).

23 Van der Walt (note 19).

24 Cf *Robb v Mealey's Executor* (note 17) 133–136.

25 25 of 1923.

was followed by a host of other Acts[26] that addressed adoption and which eventually culminated in the Children's Act 38 of 2005.

While the law in this area continued to develop in the broader South Africa under the common law, the same cannot be said of customary law: it was not recognised, and when it was begrudgingly given recognition, such recognition was always subject to Eurocentric restrictions.[27] This aggravated the lack of development and standardisation of customary-law adoptions in South Africa.

Adoption under the Children's Act 38 of 2005[28]

The Children's Act outlines adoption in South Africa. The Act regulates issues relating to consent to adopt,[29] procedures relating to the adoption of children born out of wedlock,[30] exclusions regarding consent, and the issue of who is eligible to adopt a child.[31] Among those who are permitted to adopt a child are married couples, partners in a life-partnership (including same-sex partners), a person who has married the natural parent of a child, or a single person (a widow or widower or an unmarried or divorced person) with the consent of the Minister.[32]

In terms of section 18, the Act further requires that the adoption of a child be effected by a court order. In effect, this means that an adoption that has not been endorsed as prescribed is not recognised as such.

The Children's Act also defines an adopted child as 'a child adopted in terms of any other law'.[33] It further provides that an adoptive parent[34] includes a parent who has

26 Children's Act 31 of 1937, Children's Act 33 of 1960, Child Care Act 74 of 1983, and Child Care Amendment Act 96 of 1996.

27 The customary restrictions here were based on ethnocentric-biased standards, see Moseneke J in *Daniels v Campbell NO* 2004 (7) BCLR 735 (CC), 2004 (5) SA 331 (CC), where the learned justice said the following: 'True to their worldview, the judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition ... is inequality, arbitrariness, intolerance and inequity.' The requirements were that the customary law should not be contrary to public morals and such public morals were Eurocentric.

28 38 of 2005 (hereinafter referred to as the Children's Act).

29 Sections 233 and 236.

30 Sections 237 and 238.

31 See section 231.

32 Section 231.

33 Section 1 of the Children's Act. It was initially defined as 'a child adopted under the provisions of Chapter 4 of this Act or of the Children's Act, 1960 (Act 33 of 1960), or of the Children's Act, 1937 (Act 31 of 1937), or of the Adoption of Children Act, 1923 (Act 25 of 1923)'.

34 Section 1 of the Children's Act initially defined as 'a person who adopts or has adopted a child under the provisions of Chapter 4 of this Act or of the Children's Act, 1960 (Act 33 of 1960), or of the Children's Act, 1937 (Act 31 of 1937), or of the Adoption of Children Act, 1923 (Act 25 of 1923)'.

'adopted a child in terms of any other law'. It provides further that a child is adopted if the child has been placed in the permanent care of a person in terms of a court order that is contemplated in terms of section 242[35] of the Act. Section 242 provides for the implementation of an adoption order, which includes terminating the responsibilities that any person may have had towards the child prior to the order. The order confers full parental responsibilities and rights in respect of the child upon the adoptive parent; allows the child to adopt the adoptive parents' surname, and prohibits marriage or sexual intercourse between the child and the adoptive parent. All property lawfully possessed by the child prior to the adoption remains theirs and is not transferred to the adoptive parents. The entire process gives effect to the creation of a parent–child relationship between the adopting parties and the adoptee.

The Act further regulates who may adopt a child. Of significance here is that a child may be adopted by a married person whose spouse is the parent of the child or by a person whose permanent domestic life partner is the parent of the child.[36] The section further allows for the biological father to adopt a child born out of wedlock. This section also caters for instances where a male spouse sires a child while married or before marriage to another woman. The Act further allows foster-parents to adopt the children being fostered by them. Section 230 provides a list of children who are adoptable and makes any child adoptable if it is in the interests of the child to be adopted.

The requirements for adoption are to be welcomed as they make it easy to identify formal adoptions. This is more apparent as a result of the fact that the order for adoption is made by the Children's Court after it has considered the application for adoption in terms of section 240 of the Act.

Adoption in customary law

Writers on customary-law adoptions recognise the uniqueness of the institution under customary law and in African societies. In customary law it takes different forms. At its core it is a method of ensuring that a family that cannot have an heir can raise an heir through the adoption of children without parents, who are then raised within a family environment conducive to good upbringing.

Bennett[37] states that adoption is not an established practice of customary law; however, he acknowledges the inter-family practice of pseudo-adoption. There are various ways in which a person in African society may be taken by another family as their own. This is usually achieved within the family group.[38] One instance is where the

35 Section 242.

36 Section 231(*c*).

37 Bennett (note 14).

38 See IP Maithufi '*Metiso v Road Acident Fund* no 44588/2001: Recent case law' 2001 *De Jure* 391. Adoption according to customary law was followed in *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (Tk); see also IP Maithufi 2009 2(34) *De Jure* 390–397.

child is raised by a family member whose parent or parents are deceased.[39] However, any child can be adopted customarily.[40] The process to do so begins with all the family members related to the child coming together to decide on who should be tasked with raising that child. The process of choosing the person to raise the child is informed by various factors, including, but not limited to, the closeness of the relationship between the deceased parents and that person, or with the child.

Whether the *Kgosi* (traditional ruler) is informed or not does not influence the validation of the adoption. Maithufi[41] argues that the validity of an act of adoption in terms of customary law largely depends on the agreement between the families concerned.

There are no monetary considerations in this arrangement and the person taking responsibility does not expect any financial gain for their deeds: such an act merely accepts that the child requires a proper environment in which to grow up. The child's inheritance, if any, is administered by such a person for the benefit of the child.

Another instance is where the prospective adoptee's parents were raised by the person seeking to adopt him or her. The child is regarded as the child of the person who raised the parents, regardless of any blood relations.[42] This normally happens in cases where the initial person who adopted the children dies.

Usually, African men have children through polygamous marriages. Those children born to different wives are regarded as the children of the husband and are not differentiated by being classified as children would be under the common law. It is for this reason that they are not referred to as stepchildren but as children.[43]

However, in some instances the husband does not need to be involved in a polygamous marriage to have children of his own. This could be through the practice of *gonyala mpa*[44] ('to marry the womb'). In this instance Maqutu explains that the married couple resort to this practice where the wife is unable to bear children of her own. Through consultation with his family and the wife's family, and with their consent, the husband is allowed to take a sister of the wife to bear children for him. In this instance,

39 This was the case in *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T), where the court appears to have been heavily influenced by the notion of the best interests of the child. However, the court correctly indicated that the 'Act of adoption possibly incomplete – Offer to adopt children a binding offer which can and should be enforced on behalf of children. Recognition of such duty to maintain enforceable in terms of customary law and reconcilable with *boni* mores.'

40 See *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (Tk), in which several traditional Xhosa rituals were performed and signified the adoption of the child.

41 Maithufi (note 38) 391.

42 Maqutu (note 4).

43 There is no term equivalent to 'step-child' in Setswana; the words *Ngwana* (singular) and *Bana* (plural) are the only words used in the case of a child or children.

44 Maqutu (note 4).

the sister is not married to the husband and her purpose is merely to bear children for her sister.

The other way in which children born outside the marriage, by the husband or man, could be brought into the family realm is through the custom referred to as *go nyala ngwana* ('marrying the child').[45] The practice is one in which the biological father who has children with a woman but does not desire to marry her for one reason or another is allowed to negotiate and pay *lobola* for them, as if he were to marry their mother. In this instance, the children's mother is not part of the marriage but she gives her consent to the children's being adopted by the father. The father will be expected to pay *lobola* for those children.[46] A full negotiation process precedes the ceremony. In this regard the father assumes all responsibilities for the children and the children are regarded as his.

The other way is through the custom called *go nyala lebitla* ('marrying the grave').[47] In this instance the wife of a deceased husband is allowed to have children with another family member where the husband died before having children of his own. The children born through the arrangement become the deceased person's children and carry the surname of the deceased.

Although these practices are not as common in modern society as they were in the past, they represent the ways in which the welfare of children is protected through African customs and practices. These practices, like most African customs, are uncodified but are observed as such by their practitioners.

In what follows the author discusses one particular customary practice in order to contextualise his later arguments.

O e gapa le namane custom

It is not clear how the custom of *o e gapa le namane* came about.[48] Thulare J pointed out that 'Africans generally allow themselves lessons from nature, which includes from land, animals, birds and plants'.[49] From such observations lessons are learned and refined into idioms. Idioms are the pinnacle of the African way of life and, as such, practices emanating from idioms are developed, maintained and followed. According to Mojela,[50] idioms and proverbs use figures of speech to express figurative meanings in culture.[51] He points out that these idioms and proverbs are important carriers of culture

45 Maqutu (note 4).

46 Maqutu (note 4).

47 Maqutu (note 4).

48 This is because customary law is unwritten and it is difficult to ascertain.

49 *Motsepe* (note 3) para 10.

50 VB Mojela 'Etymological aspects of idiomatic and proverbial expressions in the lexicographic development of Sesotho sa Leboa – A semantic analysis' 2014 *Lexikos* (AFRILEX-reeks/series 14) at 332.

51 Mojela (note 50).

in African communities.[52] Moreover, Adu-Pipim Boaduo[53] has observed that proverbs and idioms are 'used profusely, especially during gathering of the elders'. She explains that proverbs and idioms are cited to provide points of comparison that illustrate general truths about human behaviour and attitudes during, especially, legal proceedings and deliberative occasions. More importantly, she asserts that proverbs and idioms are a way of reinforcing moral and social precepts. In this way they represent to their practitioners the way of life.[54] The consequence is that a practice leads to experience, which in turn informs the customary practice. The customary practice in turn becomes part of the culture of those people observing it. For this reason, Thulare J remarked in the *Motsepe* case that '[i]t is this experience that led the Sotho speaking nations which includes Batswana, Bapedi and Basotho to have this observation as an idiomatic expression, *o e gapa le namane'*.[55] The concept has an influence on and profound meaning to its practitioners.

As already indicated, the concept literally means to 'lead it with its calf'.[56] The concept of *namane* was correctly explained by the court in that the context of the concept equates a calf to a child (*ngwana*). It also conveys the meaning that in a customary marriage context it is premised on the caring and nurturing nature of motherhood.[57] Further, the court pointed out that the concept is influenced by other Batswana observations, for example that *ga e latswe namane e se ya yone.*[58] The court observed that the two concepts are geared towards an understanding of the bond between a mother and a new-born child, and that, as a means of protecting the child, it is important not to separate the child from its mother.

The emphasis is on the bond between the child and its mother as well as the wellbeing of the child. This view accords well with the common-law concept of the best interests of the child and, in particular, with the protections accorded to children in terms of section 28 of the Constitution.[59]

52 Mojela (note 50).

53 Nana Adu-Pipim Boaduo FRC 'Epistemology of proverbs and idioms of the Asante ethnic group of Ghana for introspection' 2012 5(3) *The Journal of Pan African Studies* 84–117.

54 Nana Adu-Pipim Boaduo (note 53).

55 *Motsepe v Khoza* (unreported case no 15078/12, South Gauteng High Court).

56 Supra (note 3) at para 11.

57 Supra (note 3) at para 14.

58 Literally, this means that, unless it gave birth to it, it does not lick off its amniotic fluid. Once more, if its metaphorical meaning is stripped, it refers to the observation that after the birth of its young, an animal does not lick off its amniotic fluid unless it gave birth to it. In this regard it means that a mother would have a strong caring and nurturing bond to her child(ren).

59 Section 28 of the Constitution provides specific protection for the rights of children. The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by s 28, but also to all of the other rights in the Constitution which, when appropriately construed, are also conferred upon children. Section 28 provides that children should be free from violence, coercion, discrimination, intimidation and abuse.

In the final analysis, the concept would be understood to mean that the person who agrees, during the *lobola* negotiations, to *o e gapa le namane,* is actually agreeing to *nyala mosadi ka ngwana yo o sa mo tsalang ka madi,* which means literally 'to take the child born of another man into your marriage with its mother'.[60] The court explained correctly that in doing so and in view of the fact that it is the choice of the man to agree or not to take any children into the marriage with their mother, then, to all intents and purposes, the arrangement is equivalent to the customary adoption of a child.

It is customary practice that if the man does not agree to *o e gapa le namane*, he must communicate his intention clearly, normally expressly, during the negotiation of the customary marriage and prior to entering into the marriage. On this point Masuku[61] remarks:

> when negotiating *Bogadi (lobola)* the family of the bride would ask the family of the groom whether they know that the person they sought to marry has a child. The question is put as *'a lo itse fa sego sa metsi seo le sebatlang se thubegile?'*[62] in this regard the groom's family would give their answer. If the answer indicates that they are aware and want to O *e gapa le namane* they would then reply yes and offer to *go roka sego sa metsi.*[63] The process of *go roka sego sa metsi* means that they would pay a certain amount of money referred to as *tlhale*.[64]

Once the *tlhale* has been paid, the agreement to *o e gapa le namane* is concluded. From this point the *lobola* negotiations proceed in earnest and affect only the mother or prospective wife.

The court in *Motsepe*, however, appears to suggest that the concept is applicable only to children below the age of 14.[65] This the court indicated without giving a clear reason, except when it dissected different types of *Ngwana* (children).[66] This made it

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Section 28(1)(*d*) explicitly states that all children must be protected from maltreatment, neglect, abuse or degradation.

60 Supra (note 3) para 15.

61 F Masuku, a Tswana Indigenous Knowledge System specialist, from Moruleng under the Bakgatla ba Kgafela tribe, Mphebatho cultural heritage, North West province, South Africa. Referred to as such by R Ntsimane 'Do stories of people with disabilities matter? Exploration of a method to acknowledge the stories of people with disabilities as valuable oral sources in the writing of social history'. <www.uir.unisa.ac.za/xmlui/bitstream/handle/10500/5836/Ntsimane.pdf?> 4 (accessed 24 February 2015).

62 Loosely translated, it says 'are you aware that the calabash that you are looking for is broken?' Sego refers to a calabash, and the bride to be is idiomatically equated to a calabash.

63 Loosely translated, it means 'to mend the calabash'.

64 Masuku (note 61) per telephone interview on 24/2/2015. Notes on file. '*Tlhale*' means a tread in Setswana.

65 *Motsepe* (note 3) at para 18; see also para 13.

66 The author reserves a different view in this regard as age does not determine the stages of a *ngwana* but that is determined by certain practices among which *Bogwera* in the case of boys and *Bojale* in the case of girls, including marital status. This is likely if regard is given to the provisions of section 12(8) and (9) of the Children's Act. In this regard, the age of 16 seems to be the age limit.

necessary for the court to separate the manner in which the present matter was to be resolved from the principal basis of the action. It is submitted that the differentiation of children based on age is unwarranted because once the adoption in accordance with the *o e gapa le namane* practice has been effected, age plays no role in the validation of the adoption.[67]

The court correctly found that nothing prevents a man from expressing the desire to take children above the age of 14 into the marriage with their mother. Further that, in doing so, the father assumes the role of fatherhood as any children become the children of the father in full. In the light of this, it is submitted that children whose parents accept them through the *o e gapa le namane* concept are adopted in terms of customary law and are to all intents and purposes the legally adopted children of the father.

DEVELOPMENT OF CUSTOMARY LAW IN SOUTH AFRICA

It is trite that customary law was never fully recognised as a system of law that existed in its own right. The various Acts that sought to give customary law its recognition always carried a rider. These statutes insidiously relegated customary law and practices to almost the status of no relevance in the South African legal system, despite the fact that it was still practised by millions of South African people. In 1994, through the new Constitution, customary law was accorded its long-overdue recognition.

It is an injunction of section 30 of the Constitution that everyone has a right to participate in the cultural life of their choice. Section 31 further stipulates that persons belonging to a cultural community may not be denied the right, together with other members of that community, to enjoy their culture. It is in this respect that the development of customary law has to be encouraged because it gives effect to both sections of the Constitution.

Since the advent of the 1996 Constitution, customary law and common law have had to be developed in line with the provisions of section 39(2) of the Constitution[68] to ensure that it conforms to and complies with the Constitution and its values. Importantly, the Constitution, in section 211, enjoins the courts to apply customary law where it is applicable. It is to be applied because it is recognised as law in its own right and it should be applied in a manner that makes it both useful to and respected by its practitioners. The court in *Alexkor Ltd v The Richtersveld Community*[69] clearly felt that customary law

67 The author is mindful of the operation of the Children's Act 38 of 2005, but his submissions are informed by customary law rather than by legislation. The question whether those children have the right to object to the customary adoption or not is entirely different from the matter under discussion.

68 Section 39(2) of the Constitution provides that 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.

69 2004 (5) SA 460 (CC) at para 51. The court had this to say: 'While in the past indigenous law was

should not be treated as a stepchild of the South African legal system but as part of an integrated legal system. It therefore deserves to be approached in a manner similar to any other law. It is accordingly submitted that the courts should do so purposefully so as to be seen to be upholding the constitutional imperative imposed upon them: if it is applicable, the courts have to apply it.

It is in this regard that the author finds the judgment of Thulare J wanting at best. The learned judge said: 'By the whim and paradox of history, I am called upon to not only interpret, but also to be equal to the task of developing customary law.'[70] It is this author's view that it was not by the 'whim' or 'paradox' of history that the judge had to interpret and develop the custom before him but by the mandate he enjoys in terms of section 211(3)[71] read with section 39(2)[72] of the Constitution. This was inescapable *in casu* since the relief sought was not only lodged by a Motswana person but was squarely couched in customary law as practised by the Batswana. The 'developing' in this regard takes the form of recognising and fleshing out the meaning and implication, or effect, of customary law in the scheme of the broader South African legal system as it relates to the adoption of a child.

Mokotong[73] observed that

> it would have been helpful if the court had made reference to any sources dealing with O e gapa le namane customary adoption as there are few anthropological and sociological sources on this subject.

This criticism is warranted in so far as the court failed to illuminate its argument with authority, taking into account that while the concept was first addressed in *Thibela v Minister van Wet en Orde*,[74] the court did so by applying the provisions of section 1(1) of the Law of Evidence Amendment Act 45 of 1988, which in essence required that

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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 the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.' This view was buttressed by the court in Shilubana v Nwamitwa 2009 (2) SA 66 (CC) at para 43, where the court emphasised that customary law is 'an integral part of our law' and 'an independent source of norms within the legal system'.

70 At para 10.

71 The section provides that 'the courts must apply customary law when that law is applicable, subject to the Constitution and any other legislation that specifically deals with customary law'.

72 The section provides that 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.

73 M Mokotong '*Oe gapa le namane* customary law parenting (step-parent adoption from an African perspective) – *ML v KG*' 2015 (78)2 *THRHR* 352.

74 1995 (3) SA 147 (T).

the matter be resolved on evidence, since the court could either take judicial notice of customary law or accept expert evidence. In this regard, the court merely accepted the expert evidence regarding the *o e gapa le namane*.

In casu the court needs to have referred to sources, but the writer accepts that there are none in existence on the topic.[75] The writer submits further that the court's ingenuity in recognising the custom as a practice worthy of enforcement by law and in explaining it the way the court did is a welcome development of the customary law in this regard.

The question was asked earlier, which the court should have asked, whether the children were adopted children in terms of the customary-law practice of *o e gapa le namane.*

By way of example, the Recognition of Customary Marriages Act[76] is silent on the adoption of children. What the Act provides for is that marriage should be negotiated and entered into or celebrated in accordance with customary law.[77] It is arguable[78] that the words 'negotiated' and 'entered into' should not be given their literal meanings. On the contrary, it is submitted that these expressions should be read in the context of the accompanying words, namely, 'in accordance with'. In this regard, the negotiations are guided by the customs and traditions of the parties; furthermore, the phrase 'entered into' signifies the importance of those customs and traditions. It is submitted that the words indicate that the parties are entering into a marriage as dictated by the traditions of those who are involved. Therefore, once the dictates of customs and traditions have been observed, the marriage will then be considered to have been entered into. One cannot therefore escape the conclusion that the couple accepts and agrees to be bound by the customary-law dictates that validate their marriage. Such dictates would include the payment of *lobola* and ancillary charges and any customary rituals.[79] A plethora of cases relating to the Recognition of Customary Marriages Act revolve around compliance or

75 See the cases referred to by Mokotong (note 73) at 346; none has ever dealt with the concept of *o e gapa le namane* as an adoption practice, except the case of *Thibela v Minister van Wet en Orde* (note 74), which is clearly distinguishable to the case of *Motsepe in casu*.

76 Act 120 of 1998.

77 Section 3(1)(*b*); however, section 3(1)(*a*) of the Act provides for other requirements and they are: (a) the prospective spouses – (i) must both be above the age of 18 years; and (ii) must both consent to be married to each other under customary law.

78 What the wording of section 3 of the customary law actually means is compounded by the fact that the words were not defined in the Act. See report of the Women's Legal Centre 'Recognition of Customary Marriages Act 2011' <http://winafrica.org/wp-content/uploads/2012/01/RMCA-report-final.pdf> (accessed 21 March 2015) at 8; see also *Mguzulwa v Xulubana & Others* (unreported case no 1340/2012 (Eastern Cape High Court, Grahamstown)) at 23–26.

79 The court in *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 (18 July 2012) expressed the opinion that 'Important as these activities may be from a ceremonial and ritual point of view, they cannot be regarded as 'essential legal requirements'. These ceremonies must be viewed as a ceremonial and ritual process in which essential legal requirement has been incorporated' – at para 111, referring to 2012 (32) *LAWSA*: Indigenous Law, para 125, p 118; Hlophe JP in *Mabuza v Mbatha* 2003 (4) SA 218 (C).

otherwise with the requirements for a customary marriage to be valid. Their outcomes support the view that a marriage will be considered to have been duly entered into when the customs, traditions and practices of the couple's culture have been complied with.

In terms of section 3 of the Act, what could be included or excluded during the negotiations preceding a customary marriage, entering into it or celebrating it will depend on the customs, traditions and practices of the parties to the marriage. In most instances they are known to the parties involved.

It is submitted that since the *o e gapa le namane* is part of the negotiations among the Batswana and Basotho, its legal effect on adoption may be said to find common ground in the Recognition of Customary Marriages Act. However, this does not mean that *o e gapa le namane* is an element essential to the validity of a customary marriage; it does incorporate essential legal consequences into such a marriage, though. Without a valid customary marriage, the adoption of the woman's children by the husband will not be possible. Thus, the validity of the marriage is the necessary condition for adopting a child in terms of the customary-law practice of *o e gapa le namane*. It is argued, further, that this is the reason why the court in *casu* had to decide whether facts existed that would sustain a finding of the existence of the marriage.[80] It can be said that negotiations according to the customs of the parties entering into the marriage validates the marriage.[81] In this regard, all that transpires during the negotiations that constitute the preparations for a customary marriage also forms an integral part of that customary marriage and is binding on the parties throughout the existence of that marriage and upon dissolution of that marriage. This was the view of the court in *Maneli v Maneli,*[82] where the issue was whether the parents, who had customarily adopted a child in terms of the Xhosa law, could, upon the dissolution of the marriage, terminate their duty of support to that child.

Whereas the Children's Act 38 of 2005 sets out the meaning of 'adopted child' and 'adoptive parent', it gives no clarity on the recognition of customary adoptions. It is noteworthy, though, that section 1 defines an 'adopted child as any person adopted *in terms of any law*' and an adoptive parent 'as a person who has adopted any child *in terms of any law*'. From this it can be argued that in South Africa such laws include the common law and customary law, meaning that an adoption can be effected under customary law. What is not clear from the Act is whether adoptions effected by 'any other law' should follow the procedural route of adoption set out in the Act in order to be formally recognised.

Moreover, when dealing with who may adopt, the Act clearly envisages a situation in which the spouses are married. In this regard the Act does not (and correctly so, it is submitted) distinguish between the types of marriage the couples may have subscribed

80 *Motsepe* (note 3) para 6.

81 See *Southon v Moropane* (note 79), as the finding regarding the validity of a customary marriage is a fact-intensive process.

82 2010 (7) BCLR 703 (GSJ).

to. By providing for adoption in terms of 'any other law', the Act recognises that adoption can be concluded through the operation of another law. It can therefore be concluded that adoptions envisaged in the Act include customary-law adoptions. It is further submitted that adoption in terms of the customary law is adoption to all intents and purposes. In view of the fact that an adopted child could be a person who is so adopted to protect their interests, then the *o e gapa le namane* concept is indeed an adoption in terms of 'any other law' – in this instance, customary law. The failure of the Children's Act clearly to provide explicitly for such an adoption, it is submitted, is an anomaly which creates the impression that customary adoptions are not recognised in our law.

Two problems arise from the current legislation: on the one hand, while having a single piece of legislation that regulates adoption has its advantages, this creates the unsatisfactory situation in which all interpretations of adoption are subjected to the same process; on the other hand, the general approach makes it impossible for individual interpretations and processes of adoption to develop in their own right. The effect of this general treatment of adoption in the Act is to insidiously undermine customary law and its development.

It then becomes easy to conclude that the present position makes customary-law adoptions subordinate to those encompassed by the Act and that they become valid in the eyes of the law only once the Children's Act has been complied with. If this is in fact the case, then a person so adopted in terms of customary law would have to undergo a second adoption in order to validate it.

CONCLUSION

Customary-law marriages have far-reaching effects not only on the couple, but on family relationships. Marriage in customary law is a process that not only binds the individual partners but extends to the families and relatives. It creates family bonds unparalleled in societies in which the common-law prevails. The familial relationships created through customary marriage are grounded in traditions and customs that are predicated in cultural practices imbued with idioms and proverbs.

It is in this context that, in this article, it has been submitted that *o e gapa le namane* is a customary adoption practice that has as contractually binding an effect as any agreement. Its binding effect takes root in the negotiation process that leads to marriage: the husband-to-be (*mokgwenyana*) has the option to agree or disagree to *o e gapa le namane.* If he agrees, he is bound by the agreement and cannot on a whim abandon the children so taken.

Writing on a similar development practice among the Basotho, Maqutu[83] has this to say:

83 Maqutu (note 4) 236.

> There is another fast growing practice of many men – to marry along with mothers' illegitimate children that have been fathered by other men. This agreement is often sanctioned by families on both sides. The sensible idea behind this practice is the woman's loyalty should not be divided by having to secretly fend for the illegitimate child she left with her parents. When this happens, the child adopts the mother's husband's family surname. Are they a form of adoption? Could it be that it all depends on the families of both parties? The answer is far from clear although it is acknowledged the powers of the families are, under Basotho custom, very extensive indeed.

Clearly, although the *o e gapa le namane* is still a developing practice among the Basotho people, it is a definite custom amongst the Batswana.

The *o e gapa le namane* custom has an added advantage, that is, of preventing a situation of divided loyalties – in which a woman, because of leaving her pre-marital offspring at her maiden home, finds herself worrying about those children when she is at her new marital home. The Batswana people and African customs frown on cutting or dividing the mother's link with her children. This is called *go sega mpa ka legare*, which, translated, means 'cutting the woman's belly in the middle'. The link between mother and child is considered sacred – consequently, where severing was possible, it was avoided in African traditional societies.

A further advantage of *o e gapa le namane* is that of protecting the child from being abused by the community by referring to the child as *letla le anya*,[84] a situation in which the child follows the mother to her new marital home without prior agreement that transfers his or her kinship. Such a child has no rights or status in the husband's family.

It is further submitted that the court in the *Motsepe* case dealt with the issue correctly, even if it did not go so far as pronouncing on the *o e gapa le namane* as the adoption of a child in a customary-law context. The court used the concept to find that the father was liable for contributing to the maintenance of the children. It remains debatable, however, whether adoption in customary law is similar to adoption under common law. It is submitted that adoption in both common and customary law is the same, subject to a few logistical issues relating to the understanding of practices and customs in African culture;[85] however, this is an aspect of the law that requires further research.

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84 Literally, it means 'the one who came breastfeeding already'. Among the Batswana, that is derogatory and demeaning as it means you have no roots in the family that raised you. Further, that you are excluded from attending the family gatherings on all important matters affecting the family, including but not limited to burial and marriage ceremonies.

85 One issue that needs to be investigated is what happens to the children after divorce and to their mother. This is based on the other idiom of the Batswana people that *senkgang senkga le ditsa one*, which means: 'He who smells must be left alone with his possessions.' Therefore, when you divorce, you are generally understood to be saying that you discard the spouse to all intents and purposes. This is in direct conflict with the notion that a marriage in the context of Batswana is not ended by a divorce of the couples, as they are not the only parties in the marriage. Furthermore, what is the role of the biological father of the children in the scheme of the *o e gapa le namane* practice?

It is commendable that the presiding officer in *Motsepe*[86] considered the issue before him not in terms of the common law or within a common-law orientation, but by adopting a customary-law orientation, and in the process not only applying but also developing customary law, albeit to a limited extent.

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86 *Motsepe* supra (note 3).

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