



# **FAMILY LAW UNDER CUSTOMARY LAW IN BOTSWANA**

By Patient “Pepsi” Thuto

# Introduction



## Definition of a Tribes man;

- **CONCISE OXFORD ENGLISH DICTIONARY, TENTH EDITION - "TRIBESMAN"** ... *member of a tribe in a traditional society.*
- **CUSTOMARY LAW ACT - "TRIBESMAN"** means member of a tribe or tribal community of Botswana or member of a tribe or similar group of any other country in Africa prescribed by the Minister by notice published in the Gazette for the purposes of the Customary Courts Act, and includes the legal personal representative of such member;
- **ADMINISTRATION OF ESTATES ACT, SECTION 2 - "TRIBESMAN"** means a member of a tribe or tribal community of Botswana or a member of a tribe or similar group of any other country in Africa prescribed for the purposes of this Act;

# Definition of a Tribal Community

- **CUSTOMARY LAW ACT - "TRIBAL COMMUNITY"** *means any community which is living outside a tribal territory but is organized in a tribal manner."*
- **ADMINISTRATION OF ESTATES ACT - "TRIBAL COMMUNITY"** *means any community which is living outside a tribal territory but is organized in a tribal manner;*
- **CONCISE OXFORD ENGLISH DICTIONARY, TENTH EDITION**  
**"TRIBE"** - *A social division in a traditional society consisting of linked families or communities with a common culture and dialect*



# CASE LAW

- **SAMSAM V SEAKAREA [2004] 1 B.L.R 378-** *“In determining whether or not a person is a tribesman ... the decisive issue is the mode of life of the deceased and the assets involved in the estate.”*
- The Samsam case reiterated the views of the court in the case of **MMEREKI V SELEKE AND ANOTHER [2001] 2 BLR 601 HC.**



# DISSOLUTION OF MARRIAGES OF PERSONS SUBJECT TO CUSTOMARY LAW (DISPOSAL OF PROPERTY)

- *“where on the dissolution of the marriage by decree of a competent court or by the death of one of the spouses a question arises as to the disposal or devolution of any property of either or both of the spouses the question shall be heard and determined in accordance with the law of Botswana”*
- *...by a court presided over by a Magistrate Grade I if it appears to that court on application made to it **that regard being had to the mode of life of the spouses** or to any disposition of the property made by either of the spouses during the subsistence of the marriage it would not be just and equitable that such property should be dealt with according to customary law.”*



# MARRIAGE



- A marriage is concluded or solemnized under Customary Law when the “patlo” is concluded. This “patlo” entails the parents of the man going to the parents of the woman to ask for hand in marriage.
- If the woman’s parents accept to give their daughter’s hand in marriage then a customary law marriage is said to have come into existence and therefore various rights and obligations flow from this. Bogadi (dowry) is also paid as part of the patlo but failure of payment of bogadi does not vitiate the customary law marriage.

# MARRIAGE WRECKING

- This is a delict peculiar to Customary Law, see the case of **Mabuaaeme v. Mokgweetsi 2011 1 BLR 365 HC**. The court therefore in dealing with marriage wrecking matters must deal with using Customary Law.
- There are various cases of marriage wrecking that are dealt with in the Customary Court. Due to the fact that Customary Courts are not courts of record the cases are largely unreported and can therefore be garnered from newspapers.





# MARRIAGE WRECKING

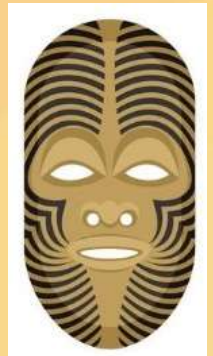


- Reported cases of marriage wrecking are those appealed to the High Court and Court of Appeal from the lower court, see the case of **Segole v. Mosala 2012 1 BLR 803 CA.**
- Compensation for marriage wrecking have ranged from P6, 000.00 to P120, 000.00.
- The rationale for allowing marriage wrecking cases by the Customary Court is not really about the money but to bring shame on the third party for wrecking another party's marriage and that such shame would deter their and other people's behaviour in that respect.



# MARRIAGE WRECKING

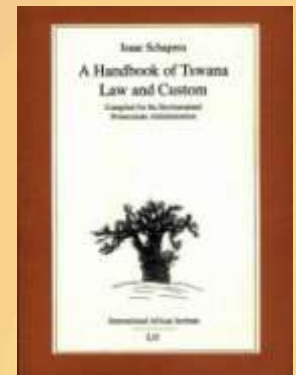
- The major issue with the marriage wrecking delict is that there is no punishment for the spouse that was involved in the affair and there is no requirement for the said spouse to be present at court.
- There is no requirement for the spouse that had the affair to be cited as a party to the proceedings and therefore marriage wrecking cannot deter unruly spouses.



# CHILDREN

- Children's status and rights like in any other law arise due to different variables under Customary Law. These variables include issues such as marriage and adoption.
- It used to be the case, under Customary Law, that where a man and woman were married under Customary Law but “**bogadi**” was not paid then children born of the said union were not considered to be the children of the marriage and therefore were not the children of the man but only of the woman.

Outlined by **Professor Schapera** in his work **A Handbook of Tswana Law and Custom (1994 Lit Hamburg)**



# CHILDREN



- In the case of **Tangane and Others v. Kaote and Others 2002 (1) BLR 300 (HC)** held, *inter alia*, as follows:
- *“I hold the view that in this day and age, principles of customary law which seek to bastardise the children of a formal union simply because no bogadi has passed hands is inimical to what African people consider to be consistent with 'morality, humanity or natural justice' as provided for in the Common Law and Customary Law Act.”*

# CHILDREN

- The court in the case of **Tangane and Others v. Kaote and Others 2002 (1) BLR 300 (HC)** cited with approval from Schapera in his book, *A Handbook of Tswana Law and Custom* at p139 where he stated that *“Should a man die before having paid bogadi for his wife, the obligation to do so falls upon his eldest son, if old enough, or A upon his own brother failing this.*
- *The boy brings cattle to his mother's people, with the words Ke nyadisa mme, "I am causing my mother to be married".* Once bogadi has been paid after the death of the children's father then the children would be entitled to inherit from their father's estate and maintenance if they are minors.



# ADOPTION

- Children born out of wedlock can be adopted by their biological father and this would enable the said child to inherit from the father's estate in the event of the father's passing
- The court in the case of **LESOMO AND ANOTHER v OTUKILE AND ANOTHER 2008 (2) BLR 192 (HC)** acknowledged that children could be adopted under Customary Law and that there were various procedures to be followed for a child to be considered to have been adopted.



# ADOPTION



- The above case stated as follows:
- *“In customary law there are certain procedures which are recognised in order for adoption to take place which ultimately result in the child taking the name of his adoptive father.*
- *In particular ... to put evidence before the court showing when and how they were adopted; who was involved in their adoption and more important whether any payment was made in the form of cattle or other livestock to their maternal parents including uncles for their adoption by Mokganedi. Further, ... any evidence from the maternal relatives who would vouch to their adoption by Mokganedi.”*

# ADOPTION



- Adoption under Customary Law was also considered by the court in the case of **MARMAN v MARMAN AND OTHERS 2003 (1) BLR 97 (HC)**
- **In the said case the court was of the view that payment of bogadi was not an essential element for a child to be adopted.**
- **The judge in the said matter stated as follows:** “*What constitutes adoption therefore seems to me to be the agreement to adopt plus implementation thereof.*” The implementation of such agreement can take any form, these can include the father giving the children his last name, moving the children to his home stead and providing for the children.



# MAINTENANCE

- It used to be the case, under Customary Law, that a child born out of wedlock was not entitled to be maintained by his or her father. Therefore, by extension, maintenance could not be claimed from the father's deceased estate if the father passed away when the child was still a minor and in need of upkeep.
- This position has however changed due to the changes in the Common Law and the rights of a child and obligations on parents as espoused in case law and statutory law.

See the case of **Hendrick v. Tsawe 2008 3 BLR 447 HC.**



# INHERITANCE

- In the event a tribesman that is not married dies intestate then determination of whether or not their child is entitled to inherit will depend on whether or not the said tribesman is a man or a woman.
- A child who is born out of wedlock is entitled to automatically inherit his or her mother's estate but the said child does not automatically inherit from his or her father's estate unless the said child has been adopted.
- The adoption of a child born out of wedlock by the father can be an adoption under Common Law or Customary Law.



# INHERITANCE

- In terms of Customary Law female born of a marriage were not entitled to inherit where the parents died intestate. The estate of parents who died intestate was inherited solely by the male children with the last born son inheriting the matrimonial or family home.
- This position was changed by the High Court in the case of **Mmusi and others v. Ramantele and another 2012 2 BLR 590 HC.**



# INHERITANCE



- The Botswana government expressed its concerns that unequal inheritance rights often leave women vulnerable financially. This was outlined in the report of the Committee on the Elimination of All Forms of Discrimination Against Women;
- *“wherein the Botswana Government is recorded as having stated: 'In the traditional setup women have limited inheritance rights as evidenced by the application of customary law... Daughters generally have no rights to inherit... In this regard the law tends to treat men and women differently. It is more pronounced in circumstances of unmarried women living in their parent's homestead. Upon the death of their parents unmarried women are likely to be evicted by the heir .’”*

# INHERITANCE - GENERALLY



- In terms of the Common Law where a tribesman passes away the question becomes whether or not the said tribes man has a valid will in terms of the Wills Act.
- If at the time of the tribesman's passing he or she did not leave a valid will, that is they died intestate, then their property will devolve according to Customary Law.
- Under Customary Law where an individual dies intestate and they are married but left no children of the marriage then the surviving spouse is the sole beneficiary.
- In the event a married tribesman dies leaving a spouse and children then they are all beneficiaries.

# DIVORCE AND DISSOLUTION OF ESTATE OF THE MARRIAGE

- In terms of the law where married parties are tribesmen and when they married they do not sign either form A, to stipulate that the marriage is out of community of property, or form B, to stipulate that the marriage is in community of property, then upon divorce the dissolution of the property shall be done in terms of Customary Law.
- The reason for the above, being the signing of form A or B, is due to the fact that the wording on the said forms specifically exclude the application of Customary Law to estate of the marriage, see **Section 5 (4) Married Persons Property Act of 2014**



# DIVORCE AND DISSOLUTION OF ESTATE OF THE MARRIAGE



- The above position was changed by the High Court in the case of **Ivy Masusu v. Michael Masusu CAHLB-000001-07 (HC)**. In the said case the High Court over turned the decision of the Customary Court of Appeal which Customary Court of Appeal had held as follows:
  - *“According to the entire Tswana culture, when a woman gets married, she is married into the man’s clan; likewise, if a man divorces a woman, that woman is effectively divorced by the man’s clan. Similarly, if a woman divorces a man, she is in essence divorcing the man’s clan. Even if a couple has built its homestead outside the ward of the man’s clan, to all intents and purposes, that homestead is an integral part of the man’s ward.”*



# CONCLUSUION



- Although the Customary Law has been patriarchal for a very long time and continues to be so, the Botswana Courts have tried to bring the Customary Law of Botswana into the new age of equality before the law, reducing unjustifiable discrimination.

CMC

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