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CHALLENGES FACED BY WOMEN IN UNREGISTERED CUSTOMARY LAW UNIONS

Tino Guru (not real name) paid lobola for Chipo Bira (not real name) in December 2011. They did not take the further step of having the marriage officially registered and getting a marriage certificate. Chipo became for all intents and purposes wife to Tino from the day that lobola was paid. She was and still is expected to play her role as a wife. She is recognised by the Guru family as Tino's wife. On the other hand Tino became in the eyes of the Bira family, a son-in-law. Society at large recognises the two as husband and wife. Chipo became, "*mai Guru*". The law however has a different take. Theirs is not a valid "marriage" but a union simply because it is not registered. This is ironic considering the fact that the same legal expectations from a valid marriage-love, affection, companionship, conjugal rights are also expected in the union.

The recent Magistrate Court ruling in favour of Lorcadia Karimatsenga that effectively stopped the wedding of the Honourable Prime Minister of Zimbabwe and its upholding by the High Court can therefore be best described as a "victory of sorts" for women's rights. Whilst seemingly providing relief to many women in unregistered customary law unions to mount a legal challenge to any would be Chapter 5:11 marriage between their husbands and some other woman, the judgement does not address the fundamental issue in question, that of the limited recognition of unregistered marriages. This issue is further complicated by the existence of customary law side by side with general law as permitted by our current Constitution. The complexities raised by the existence of customary and general law, a phenomena known as legal pluralism is best illustrated by the issue of bigamy where the Criminal Code states that it is a criminal offence for a man who is in an unregistered customary law marriage to go on to enter into a Chapter 5:11 marriage with another woman without first terminating the customary law marriage. On the other hand, the Customary Marriages Act states that an unregistered marriage is invalid except for certain purposes. The fact that in the Lorcadia Karimatsenga case there was even contestation on whether or not what was

paid was lobola or “damages” speaks volumes to the need to address the plight of women with unregistered marriages through legislative intervention.

Anecdotal evidence suggests that there are more unregistered marriages than there are registered ones in Zimbabwe. There are many reasons why marriages are not registered. These range from ignorance, fears that registration of a marriage gives women too many “freedoms” and “rights” and a perception by some men that registration is signing one’s “death warrant” as the wife will “kill” her husband so that she can take away all property. The other reason is that it is easy to “walk in and out” of an unregistered marriage because there is no need to go through complex divorce procedures. Whatever the reasons are the most poignant fact remains that non-recognition of unregistered marriages poses a threat to the rights and welfare of many women. According to the law, the mere fact of paying lobola does not result in a marriage but an unregistered customary law union. Section 3 of the Customary Marriages Act clearly states that the union can only be recognised as a marriage if it is solemnised, in other words, if it is registered. The same section goes on to give limited recognition to the union for purposes of guardianship, custody, access inheritance in relation to children only under customary law.

Rightly so in the first legal challenge filed by Lorcadia Karimatsenga, the Honourable Justice Guvava acknowledged that there are many women who are in a similar situation. Indeed many African women are blissfully unaware of the legal consequences of the lack of registration of their marriages and despite repeated calls by the judiciary for legislative intervention to remedy the situation, this has not been done. The challenge by Lorcadia Karimatsenga is therefore a clarion call for reform to the marriage laws as the current situation is clearly detrimental to women. This has nothing to do with politics as this issue affects women of Zimbabwe across the political divide. Zimbabwe is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) the SADC Protocol on Gender and Development and the Optional Protocol to the African Charter on the Rights of Women in Africa. All these instruments call upon governments to eliminate discrimination against women and marriage is one of the issues where discrimination is prevalent. By signing these instruments, Zimbabwe made a

commitment to better the lives of women and by reforming marriage laws to specifically recognise unregistered marriages and to provide a framework for registration, Zimbabwe would have gone a long way in fulfilling some of the commitments she made on promotion and protection of women's rights.

The marriage framework in Zimbabwe can be summarised as below:

1. **Chapter 5:11: Marriage Act** -This marriage is conducted at the Magistrate Court or in church by a registered marriage officer. It allows a man to have one wife at any given time. Only the High Court of Zimbabwe can dissolve this marriage.
2. **Chapter 5:07: Customary marriages Act** – This marriage is conducted at the Magistrate Court only. A man may have more than one wife and each wife will have their own marriage certificate. It is therefore a potentially polygynous marriage in the sense that a man can marry many wives. Most people refer to it as polygamy. This marriage can be dissolved at either the High Court or Magistrate Court.
3. **Unregistered customary law union:** - This arises in a situation where a man pays lobola for his wife. A man may also pay lobola for many wives. At law, this union is given limited recognition because it is not registered. For purposes of inheritance, it is recognised as a marriage. The union is also recognised as a marriage for purposes of maintenance. This means that the customary law "wife" can claim maintenance from her customary law "husband" even at or after termination of the union. Similarly the customary law "husband" can claim maintenance from his "wife". This is in accordance with the Maintenance Act.

Those whose marriages are registered and they have marriage certificates do not face many challenges. They simply produce the marriage certificate to prove their status as legally married persons. On the other hand, women whose marriages are not registered and do not have marriage certificates are not so fortunate.

The major challenges

The first major challenge lies in the fact that there are no clear or standard guidelines on when a union comes into being. This is due to the fact that culture is not homogeneous. In one case that WLSA handled, a young woman lived with a man for a number of years. They had one child together. They purchased a house in Chitungwiza. It was registered in the name of the man and the woman and the child were put on the certificate of occupation. The man had only paid “*tsvakirai kuno*” and nothing more. He had made several promises that he would pay lobola but at the time of his death, he had not done so. Upon his death, his relatives went to court, they stated that this woman whom all along was their late relative’s “wife” was in actual fact, not a “wife” since lobola had not been paid. The court agreed with them and the woman lost out. In yet another case, the dispute centred around the issue of what is considered the major component of “lobola”, for instance if a man only pays “*zvirehwa rehwa*” and nothing else, does that result in a customary law union? What is it that the man must pay to enable his in-laws to confidently state that “now he is our son-in-law (*mukwasha*)” under customary law. Due to many uncertainties, greedy relatives have managed to convince courts that there was no union in the first place. The same relatives obtain death certificates indicating that the deceased was single and the person’s assets are distributed as if he were single.

Usually the task of proving the existence of the union is left to the woman. In another case, the “*munyai*” had passed on, the lobola “list” had disappeared and as a result, the dispute court ruled that there was no union. If the woman had a marriage certificate she would not have faced any problems in proving that she was married.

Due to the fact that the marriage is unregistered and not given full recognition, there is no “divorce” through the courts as is the case with registered marriages. Under customary law, “divorce” is done by giving of a rejection token. The most commonly accepted token before the advent of multiple currency was 10 cents and now it seems Two Rand has been adopted as the amount. Again due to cultural differences, there is no certain manner of giving the rejection token. Some say that it should be given to the woman herself and

others state that it should be given to the “*munyai*” who will in turn take it to the woman’s family. And yet others state that the aunt should be involved. Disputes have therefore arisen as to whether or not the union has been terminated. For those with marriage certificates, if they want to divorce, they approach the appropriate court and the marriage is dissolved. On the other hand for unregistered marriages, sometimes there is a bruising battle just to prove that the union has been terminated.

Again in the event of a divorce, those with registered marriages fare much better. The courts use the Matrimonial Causes Act to divide assets acquired during the marriage. Though there are still challenges in relation to the discretion given to the courts, the Matrimonial Causes Act acts as a starting point. On the other hand women in unregistered marriages face an uphill task in getting a fair share of the property they acquired during the existence of the union. Firstly they have to prove that even though they are “married” in a customary law union, general law should apply to their case because under customary law, the only property they are entitled to is “*mavoko*” property meaning, property they acquired through proceeds from using their hands such as pottery and knitting. If they overcome the hurdle of convincing the court that general law should apply, they still face the added challenge that the courts themselves have no clear formula or guidelines on how to divide the property. As a result, different Judges have used different guidelines on how to apportion property. Even then, the union is treated as more like a business arrangement which is not the case. For instance, the court may look at the unregistered union as a partnership and then go on to use rules applicable to the dissolution of a partnership. This leaves most women confused because to them and rightly so, they were in a “marriage” and not a partnership. The court may also look at the union as a mere contract and divide the assets in such a way as not to leave the other person richer than the other from assets they acquired. Realistically no woman enters into a customary law union on the premise that this is a mere contract. A partnership is a profit making venture that is very different from a marriage. In the later those recognised notions of love, affection and companionship have no place in a partnership and yet the court asks the woman to prove what she contributed to the partnership.

Similarly for purpose of getting pension, one has to be officially a surviving spouse, meaning husband or wife. A woman can qualify for pension upon producing a marriage certificate. Not so for one who has an unregistered marriage. There have been cases where women whose marriages are not registered have been denied pension benefits and this flies in the face of gender equality.

Even more ironic is the fact that a woman who is in an unregistered marriage cannot sue any other woman who has an affair with her “husband”. The law simply states that she is not in a valid “marriage” or that the “husband” can have as many unions as he wants and therefore the woman cannot claim any exclusivity over the man. In the face of HIV and Aids, this phenomenon does little to contribute to a reduction in rates of infection.

The calls by the judiciary legislative intervention need to be heeded seriously as on a daily basis , women whose marriages are not registered and therefore unrecognised suffer prejudice. South Africa that faced a similar situation made legislative intervention through the Recognition of Customary Marriages Act to remedy the situation. Although there are challenges related to the application of the Act, that law has provided relief to many South African women who were or are in unregistered marriages. Calls have been made for harmonization of marriage laws, but the issue is much more complex than just harmonization because there are women who are in monogamous and also polygamous unions. Harmonising may mean having one marriage law regime but this may not be practical. Zimbabwe needs to go through a process to develop its own law based on the situation prevailing. This should involve all stakeholders so that whatever law that is developed is practical and effective and protects the rights of women who are married both under customary and general law.

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