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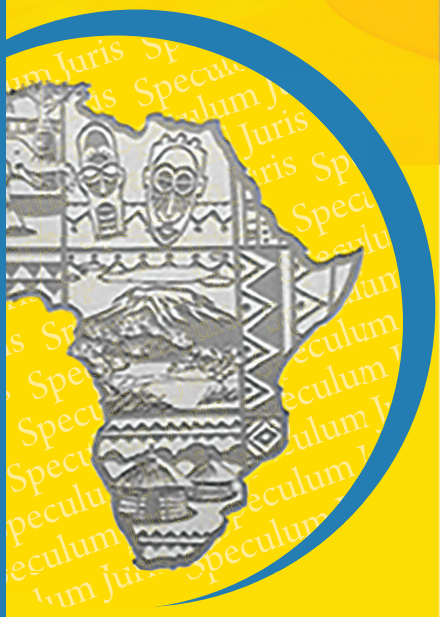

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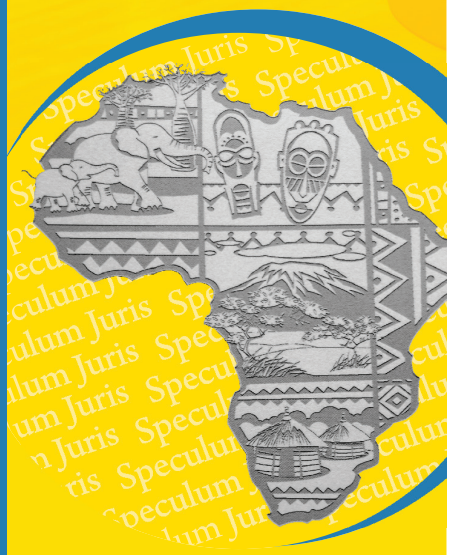

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Embracing Living Customary Law: Rethinking the Teaching of African Customary Law: The Case of *Mgenge v Mokoena*

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Abstract

Promoting living customary law in the teaching of African customary law is crucial, as it recognises the dynamic and evolving character of the legal system. Traditional approaches to teaching have often relied on codified or "official" versions of customary law, which tend to be static, outdated, or shaped by colonial influences. In contrast, living customary law reflects the actual practices, beliefs, and norms as they develop within communities themselves. South African courts are frequently confronted with cases that demand a nuanced understanding of and sensitivity to the realities of African customary law. This underlines the need to critically assess whether current methods of teaching African customary law are adequate for preparing future legal practitioners to handle such intricate disputes. The judgment in Mgenge v Mokoena exemplifies the evolving nature of living customary law and demonstrates the progress made by South African courts in engaging with it. Notably, the court in Mgenge went beyond merely accepting documentary evidence, such as a marriage certificate, and undertook its own investigation to determine the substance of living customary law regarding the existence of a customary marriage. This reflects a commitment to ensuring that the genuine practices and requirements of customary law are

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understood and applied, rather than relying exclusively on formal documents. Given these advances in the judiciary, legal academia must reform its teaching methods. This case note draws on lessons from Mgenge v Mokoena *and proposes a framework for teaching African customary law which places emphasis on contextual analysis when establishing the realities of living customary law.*

Keywords: legal education; living customary law; official customary law; African customary law; contextual approach

1 INTRODUCTION

The judgment in the matter of *Mgenge v Mokoena*[1] (*Mgenge* judgment) highlights significant challenges that courts face when ascertaining living customary law. The *Mgenge* judgment is not unique in this respect, but it is emblematic of a broader category of cases that reveal the inherent complexities in identifying and applying living customary law. Courts frequently adopt a contextual approach, often necessitating the presentation of oral evidence to accurately capture the lived realities of the communities involved. The evolving nature of living customary law, as demonstrated in the *Mgenge* judgment, compels judges to move away from a traditional reliance on codified legal sources towards a more flexible and responsive methodology.

Judgments like *Mgenge* underscore the need for legal education to adapt to the distinctive character of living customary law. Teaching living customary law cannot simply mirror the approaches used for other branches of law. Although case law, textbooks, and legislation offer valuable context, the dynamic and context-specific nature of living customary law requires heightened sensitivity and the adoption of innovative pedagogical methods. *Mgenge* is particularly notable because of the court's intentional effort to ascertain the substance of living customary law, even in the face of documentary evidence such as a marriage certificate. This illustrates the importance of engaging with the lived experiences and practices of communities when teaching and adjudicating African customary law.

The approach adopted by the court in the *Mgenge* judgment builds upon the foundations established in earlier cases that are mentioned in this case note, which demonstrate an increased sensitivity to the realities of living customary law. Unlike judgments that often relied heavily on codified or official versions, the *Mgenge* decision embodies a more nuanced engagement with the lived practices and evolving norms within communities. This marks a notable progression towards a contextual and dynamic understanding of customary law in South African jurisprudence.

This case note is organised as follows. The first part consists of the introduction, the second section lays the foundation for understanding the concept of living customary law. The third section explores how courts ascertain living customary law. The fourth section examines the facts of the *Mgenge* judgment, its application of living customary law, and its relevance to legal education. The fifth section discusses the notion of living customary law in the broader context of legal education. The final section proposes a framework for effectively teaching living customary law in contemporary legal education.

2 UNDERSTANDING LIVING CUSTOMARY LAW

Living customary has been referred to as the day-to-day practices and customs of people in

1 *Mgenge v Mokoena* and Another (4888/2020) [2023] ZAGPJHC 222; [2023] 2 All SA 513 (GJ) (14 March 2023).

a particular community and may differ from one community to another.[2] Living customary law is embedded in the social realities of indigenous peoples' lives.[3] The sources of living customary law are established through the narratives of community members living according to customary law or tradition.[4] The importance of ascertaining living customary law has been discussed by Manthwa, wherein he mentions the importance of considering what communities are doing and the changing conditions in living customary law.[5] Manthwa mentions that "if courts do not determine what is occurring in living customary law, they may find themselves rubber-stamping practices not observed by communities on the ground."[6]

Unlike written or official customary law, living customary law comprises of unwritten customary practices that regulate the daily lives of people within a particular community.[7] These practices emerge organically from ongoing social interactions, rendering the system dynamic and adaptable.[8] Importantly, these customs can vary significantly between communities and clans.[9] Official customary law, on the other hand, consists of codes of customary law and legislation, court precedents and textbooks.[10] This system of the law might not always represent the customs of the parties involved in a legal dispute.[11]

Since living customs are unwritten, establishing them in court can be challenging.[12] This complexity has, at times, led to a reliance on official customary law.

3 APPLICATION OF LIVING CUSTOMARY LAW BY COURTS

The challenge of ascertaining living customary law is prevalent in cases involving the determination of whether a valid customary marriage has been concluded. There are several court cases in which the High Courts have required oral evidence in line with living customary law to prove the existence of a valid customary marriage. This viewpoint has been endorsed by the Supreme Court and the Constitutional Court in the cases of *Mayelane v Ngwenyama*,[13] *Southon v Moropane*,[14] and *Sengadi v Tsambo: Tsambo v Sengadi*.[15] The mentioned judgments placed greater emphasis on the views of the community and witness testimony in ascertaining living customary law.

3 1 *Mayelane v Ngwenyama*

The Constitutional Court in *Mayelane v Ngwenyama* dealt with the question of whether the absence of the first wife's consent to her husband's subsequent polygamous marriage affects

2 Manthwa "The Interplaying Between Proving Living Customary Law and Upholding the Constitution" 2019 *Stell LR* 464–476.

3 Himonga and Diallo "Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law" 2017 *PELJ* 1–19.

4 Griffiths "Broadening the Legal Academy, the Study of Customary Law: The Case for Social-Scientific and Anthropological Perspectives" 2017 *PELJ* 1–24.

5 Manthwa 2019 *Stell LR* 467.

6 *Ibid*.

7 Himonga, Nhlapo and Badejogbin (eds) *African Customary Law in South Africa* 2 ed (2024) 60.

8 Manthwa 2019 *Stell LR* 465.

9 *Ibid*.

10 Himonga *African Customary Law* 60.

11 *Ibid.*

12 Manthwa 2019 *Stell R* 467.

13 *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 4 SA 415 (CC).

14 *Moropane v Southon* (755/2012) [2014] ZASCA 76 (29 May 2014).

15 *Sengadi v Tsambo* (40344/2018) [2018] ZAGPJHC 613; 2019 4 SA 50 (GJ) (3 November 2018).

the validity of the later customary marriages.[16] The Constitutional Court in *Mayelane* called for evidence on the content of Tsonga customary marriage. The deceased (husband) married the applicant (first wife) in terms of customary marriage in 1984. In 2008, the deceased entered into another customary marriage with a second wife.[17]

The applicant approached the High Court seeking an order declaring the second marriage invalid, arguing that she had not consented to it.[18] The core legal issue was whether, according to Tsonga custom, the consent of the first wife is a requirement for the validity of a subsequent polygamous customary marriage.[19]

In determining this matter, it was necessary to establish, based on evidence and expert testimony, whether Tsonga customary law requires the first wife's consent for a husband to validly enter a further customary marriage.[20] The outcome would hinge on whether such consent is a recognised validity requirement within the Tsonga tradition, impacting the legal status of the second marriage.

The judgment in *Mayelane v Ngwenyama* is commended for its attempt to propose how courts should ascertain and apply customary rules or principles. The court, in its majority judgment, stated that:

> Importantly, however, the Recognition Act does not purport to be – and should not be seen as – directly dealing with all necessary aspects of customary marriage. The Recognition Act expressly left certain rules and requirements to be determined by customary law, such as the validity requirements referred to in section 3(1)(b). This ensures that customary law will be able to retain its living nature and that communities will be able to develop their rules and norms in the light of changing circumstances and the overarching values of the Constitution.[21]

The court held that section 3 of the Recognition of Customary Marriages Act[22] does not answer the question of whether the first wife's consent is indeed a valid requirement for a subsequent polygamous marriage.[23]The court, therefore, held that it should turn to the living Xitsonga customary marriage to determine the issue.[24] The court turned to four categories of evidence, namely: (i) evidence from individuals in polygamous marriages; (ii) evidence from an advisor to traditional leaders; (iii) evidence from various traditional leaders; and (iv) expert testimony concluding available primary material. [25]

The above entails that a court should not merely view legislation and case law or any other documentary evidence as the only source in determining the existence of a customary marriage. The court further expressed that recognising African customary law requires innovation in determining its "living" content instead of the potentially stifled version contained in past legislation and court precedent.[26]

The *Mayelane* judgment highlighted that proper recognition of African customary law requires courts to engage with its living, evolving nature, rather than relying solely on written sources.

16 *Mayelane v Ngwenyama* para 1.
17 *Ibid* para 4.
18 *Ibid*.
19 *Mayelane v Ngwenyama* para 12.
20 *Ibid* para 54.
21 *Mayelane v Ngwenyama* para 32.
22 120 of 1998.
23 *Mayelane v Ngwenyama* para 38.
24 *Ibid* para 42.
25 *Ibid* para 54.
26 *Ibid* para 43.

Ultimately, the court's approach is applauded for providing a framework for ascertaining and applying customary law in a way that respects both tradition and constitutional values.

3 2 *Moropane v Southon*

The case of *Moropane v Southan* is an appeal from a High Court decision concerning the validity of a customary marriage.[27] The proceedings began when a woman initiated divorce proceedings against the man she claimed was her customary law husband.[28] The man disputed the existence of a valid customary marriage, contending that the payment of *lobola* (bride price) was merely a gesture to commence marriage negotiations (referred to as *go bula molomo* or *go kokota*), and therefore did not establish a binding marriage under customary law.[29]

On the other hand, the woman asserted, supported by witnesses who had participated in the *lobola* negotiations, that these negotiations and the payment of *lobola* resulted in the conclusion of a valid customary marriage.[30] The core issue before the appellate court was whether the payment of *lobola* and the associated negotiations, in this instance, constituted a customary marriage according to the relevant legal standards.

The case highlights the legal complexities involved in determining the existence and validity of customary marriages, especially where the parties contest the meaning and effect of traditional practices such as *lobola* negotiations.

Noteworthy, the judgment in *Moropane v Southan* proceeds with a somewhat cautionary introduction that the question of whether a valid customary marriage has been entered into cannot be answered easily by only applying section 3(1) of the Recognition of Customary Marriages Act 120 of 1998.[31] The judgment illustrates that determining the existence of a customary marriage is not as simple as merely applying the Recognition of Customary Marriages Act 120 of 1998.[32] This introduction prepares one for a judgment that looks beyond written customary law to determine whether a valid customary marriage has been concluded.[33]

The court acknowledged that African customary law is not static, but dynamic and that it develops and changes along with the society in which it is practised. The court further stated that:[34]

> It is incumbent on courts to take steps to satisfy themselves as to the content of the customary law, and where necessary, to evaluate local custom in order to ascertain the content of the relevant rule.

In ascertaining the content of the applicable customary law in this case, the court relied on two expert witnesses, the testimony of three witnesses who testified in favour of the respondent and the photographs of the day of the negotiations. The court also considered the circumstances and events, relying on evidence that witnesses and expert witnesses corroborated concerning establishing the existence of a customary marriage. [35] Notably, the court also expressed that it should be borne in mind that customary law is not uniform. However, the court mentions subtle

27 *Moropane v Southan* para 3.
28 *Ibid*.
29 *Ibid* para 2.
30 *Ibid* para 7.
31 *Ibid* para 1.
32 *Ibid.*
33 *Ibid.*
34 *Moropane v Southon* para 37.
35 *Ibid* para 56.

differences between the different ethnic groups.[36] In that regard, the court took steps to satisfy itself regarding the content of living customary law as recommended[37] in the case of *Mayelane v Ngwenyama.*[38]

3 3 *Sengadi v Tsambo: Tsambo v Sengadi*

The matter in the judgment of *Sengadi v Tsambo* was also referred to in the judgment of *Mgenge v Mokoena*. The matter is an appeal from a High Court judgment. The respondent, the deceased's father, disputed that a valid customary marriage had been concluded.[39] He argued that the applicant's transfer to the deceased's family did not occur.[40] The respondent alleged that *go gorosiwa*, which refers to a handing over of the bride, had not taken place and that a goat or lamb had not been slaughtered as required by custom for the cleansing of the couple.[41] He (the respondent) also alleged that the family had to consume a goat or lamb to signify the couple's union. According to the respondent's evidence, the bride's proper transfer or handing over had not occurred in the absence of the later-mentioned ritual. Thus, the respondent disputed the validity or coming into existence of a customary marriage between the applicant and the deceased.[42]

The court observed from the evidence submitted before it that a symbolic handing over of the bride had occurred.[43] This conclusion was based on the fact that the deceased's aunts had congratulated the applicant on becoming the deceased's wife and provided the couple with matching traditional outfits on the day of the celebration. Furthermore, the families knew that the applicant and the deceased continued cohabitating, and the families never disputed such cohabitation.[44]

In the mentioned cases, [45]the courts were not bound solely by legal precedent but instead focused on the evolving nature of living customary law by relying on oral evidence from witnesses who could confirm the existing practices. Every case discussed was judged on its merits, and the courts recognised and appreciated different traditional and cultural communities.[46] It is also noteworthy that the judgments confirm that over-reliance on judicial precedent is unsuitable when dealing with living customary law disputes but can be used as a mere starting point.

Overall, these cases illustrate the courts' progressive approach to the application of customary law, emphasising its living, adaptable character, and the need for courts to engage with community evidence and evolving practices rather than relying solely on written law or precedent.

The approach adopted by the courts is not unique to South Africa; Namibia also employs a similar method for ascertaining living customary law, referred to as the self-statement of

36 *Ibid* para 35.

37 *Ibid* para 37.

38 *Mayelane v Ngwenyama* para 48.

39 *Sengadi v Tsambo; In Re: Tsambo* para 13.

40 *Ibid* para 16.

41 *Ibid.*

42 *Ibid.*

43 *Ibid* para 19.

44 *Ibid*.

45 *Mayelane v Ngwenyama; Sengadi v Tsambo;* In Re: Tsambo ;*Mgenge v Mokoena*.

46 Manthwa "An Analysis of The Significance of Integration of The Bride in Customary Marriages and its Potential Constitutionality" 2023 *PELJ* 1–22.

customary law. [47] This approach involves a process of determining customary law by enquiring about practices directly from the community members and traditional leaders, who are regarded as the custodians of the applicable customary law.[48] Crucially, the outcome of the self-stating process is that the law ascertained is shaped by the very community that is expected to observe and apply it, ensuring that the customary law reflects the current values and practices of that group.[49] This approach acknowledges customary law as a living system that changes over time and is created by the people themselves, as opposed to being imposed externally.[50] This contrasts with other methods of ascertaining customary law, such as through external codification or court decisions.

4 APPLICATION OF LIVING CUSTOMARY LAW: *MGENGE V MOKOENA*

The *Mgenge* judgment marks a significant milestone in the evolution of living customary law in South Africa. Building upon earlier cases, the judgment reinforced the judiciary's commitment to interpreting and applying customary law in a way that reflects contemporary social realities. Uniquely, the court in *Mgenge* sought to establish the existence of a customary marriage by ascertaining the content of living customary law, even in the presence of a marriage certificate as documentary proof. This demonstrates the courts' increasing willingness to develop customary law with reference to lived practices and contemporary realities, rather than relying solely on formal documentation or strict historical precedent.

4 1 Facts and Background

The matter in the case of *Mgenge v Mokoena* was first heard before the Johannesburg High Court on 21 April 2021, wherein the case was referred for oral evidence, which was crucial to the court in establishing the existence of a customary marriage. The case was later heard in 2023, wherein oral evidence was provided through witnesses, including neighbours, family members present during *lobola* negotiations and expert testimony from a legal scholar specialising in customary law.[51] The applicant in this matter was the deceased's mother, who disputed the existence of a customary marriage between her deceased son and the respondent, Maleshoane Mokoena.[52] The respondent provided evidence that *lobola* negotiations took place and that certain rituals took place to symbolise the conclusion of a customary marriage.[53] The respondent furthermore provided a *lobola* negotiation letter and a marriage certificate, which were only obtained after the death of her husband.[54]

This matter concerned the challenge of ascertaining the existence of a valid customary marriage. The applicant (Mgenge), in this case, argued that a valid customary marriage had not been concluded between her deceased son (Siphiwe Mgenge) and the respondent (Ms Maleshoane Rose Mokoena).[55] The Applicant alleged that it was only after communication with the Master's Office after her son's death that she became aware of a marriage certificate indicating that

47 Hinz "The Ascertainment of Customary Law: What is the Ascertainment of Customary Law and What is it For? The Experience of the Customary Law Ascertainment Project in Namibia 2012 *Onati Socio-Legal Series* 85–105.

48 Hinz 2012 *Onati Socio-Legal Series* 85.

49 *Ibid.*

50 *Ibid*.

51 *Mgenge v Mokoena para 1.*

52 *Ibid.*

53 *Ibid* para 7.

54 *Ibid*.

55 *Ibid* para 1.

her son had been married to the respondent.[56] The applicant challenged the existence of the customary marriage and argued that there had only been an intention to enter into a marriage as documented in a signed and handwritten *lobola* letter.[57] The applicant further claimed that she was not present at the *lobola* negotiations, and this was required in terms of their customs.[58] The applicant argued that in her absence, a valid customary marriage could not have been concluded, and the applicant further challenged the correctness of the marriage certificate, which she had discovered herself from the Master's office.[59]

On the other hand, the respondent provided evidence that she and the deceased were married according to customary law in 2018.[60] She proved that *lobola* negotiations had been finalised by representatives from both families in QwaQwa through a written, signed and witnessed *lobola* agreement.[61] The respondent further provided that the applicant knew that a delegation had travelled to QwaQwa for the lobola negotiations.[62] Furthermore, according to the respondent's evidence, a customary marriage was celebrated on 17 November 2018 with a celebratory meal and the observance of certain rituals signifying the conclusion of a customary marriage.[63] These rituals involved the slaughtering of sheep and the rubbing of sheep fat on the husband's head. According to the respondent's evidence, this symbolised the conclusion of a customary marriage.[64]

Upon replying to the respondent's evidence, the applicant mentioned that the *lobola* letter merely represented an intention to commence *lobola* negotiations. The applicant also argued that the delegation's first visit to QwaQwa was not to finalise a marriage.[65] The applicant mentioned that the visit merely served as an introduction among the families, which, according to tradition, is referred to as *kopa sego sa metsi* (meaning the introduction of both the Mgenge and Mokoena families to each other).[66]

4 2 Approach of the Court in Ascertaining Living Customary Law and the Existence of the Customary Marriage

The South Gauteng High Court first heard the matter of *Mgenge v Mokoena* in 2020 and referred for oral evidence, which was later heard by the same court again in March 2023. The evidence submitted to the court was in the form of expert evidence from a professor of customary law, who provided evidence on the particular customary tradition applicable in determining whether the customary marriage was validly concluded.[67] The purpose of introducing expert evidence was to assist the court in deciding whether Zulu or Ndebele custom was applicable in determining whether the marriage was concluded in terms of custom.[68] The court furthermore called for oral evidence. Such oral evidence from the applicant's side consisted firstly of a cousin (Letlhake) of the deceased, who provided evidence that a customary marriage between the deceased and the

56 *Ibid* para 5.
57 *Ibid.*
58 *Ibid*.
59 *Ibid*.
60 *Ibid* para 6.
61 *Ibid* para 7.
62 *Ibid.*
63 *Ibid*.
64 *Ibid*.
65 *Ibid* para 8.
66 *Ibid*.
67 *Ibid* para 10.
68 *Ibid*.

respondent had not been concluded, since Zulu customs were not followed as was required.[69] This evidence did not assist the court much since it was held that Letlhake was not qualified to give evidence on the applicability of Zulu custom.[70] The applicant's neighbour (Ms Moripe) provided the second witness evidence. Ms Moripe provided evidence that the respondent did not dispute being instructed to sit on a chair in the living room and not the mattress during the deceased's funeral arrangements.[71] However, the court held that this evidence did not take the matter further in determining whether a valid customary marriage was concluded.[72] The applicant's third witness was another neighbour (Ms Mpye), who provided evidence that the respondent did not travel to the mortuary with the deceased's family or participate in funeral arrangements.[73]

The respondent's first witness was the deceased's uncle (Lehlake), who provided evidence that the deceased requested him to arrange *lobola* negotiations for him and to initiate *lobola* meetings between the two families.[74] Lehlake confirmed that a meeting was arranged between the families, and he furthermore provided evidence on details regarding the delegation of family members present during the *lobola* negotiations. [75]According to Lehlake's evidence, the deceased's representatives travelled to the respondent's family home in QwaQwa on 17 November 2018. They negotiated for *lobola* and reached a written and signed agreement.[76] Regarding the *lobola* agreement, the two families agreed on ten heads of cattle, for which the cost of one is ZAR3,500.[77] The deceased's family paid ZAR10,000, with an outstanding balance of ZAR18, 000 and two living cattle.[78]

In assessing the validity of the customary marriage, the court looked into the requirements for the conclusion of a customary marriage provided for in terms of section 3 of the Recognition of Customary Marriages Act 120 of 1998.[79] From the prerequisites provided in section 3, the court emphasised the prerequisite that the marriage must be negotiated and entered into or celebrated per customary law and that this aspect is often challenging for the courts to ascertain.[80] The court referred to the oral and expert evidence to assess whether this prerequisite had been complied with.[81] The court held that there was sufficient oral evidence to the effect that the *lobola* letter indicated that successful *lobola* negotiations had taken place and went further than a mere introduction between the families, as alleged by the applicant.[82] Thus, there was sufficient evidence that the families had concluded a valid customary marriage on 17 November 2018.[83] The court also paid attention to the integration of the bride, an essential aspect, as highlighted by case law, when determining whether the marriage had been negotiated and entered into or celebrated per customary law.[84] The court had to establish whether the marriage had to be

69 *Ibid* para 11.
70 *Ibid*.
71 *Ibid* para 12.
72 *Ibid*.
73 *Ibid* para 13.
74 *Ibid* para 15.
75 *Ibid*.
76 *Ibid* para 17.
77 *Ibid*.
78 *Ibid*.
79 *Ibid* para 19.
80 *Ibid*.
81 *Ibid*.
82 *Ibid*.
83 *Ibid*.
84 *Ibid* para 41.

concluded in terms of Zulu or Ndebele custom.[85]

Expert witness Professor Nhlapho provided that "*the lex loci domicilii* of the bride's father would point to the appropriate law or tradition governing the customary marital process," in that regard, Sesotho customary law was found to be applicable.[86] According to the expert witness's testimony, the bride's family is usually the centrepiece of the *lobola* negotiations.[87] In that regard, Sotho-Tswana customs would apply to the determination of whether the customary marriage had been validly concluded.[88] The court's final decision was that, according to the evidence submitted, the requirement for the handing over had been met since certain rituals had taken place on 17 November 2018, signifying the handing over of the bride.[89] These rituals involved, among others, the slaughtering of sheep and the rubbing of the sheep's fat on the husband's head, which signified the conclusion of a valid customary marriage.[90] In conclusion, the South Gauteng High Court found that the requirements for a valid customary marriage, as set out in the Recognition of Customary Marriages Act, were satisfied in this case.

4 3 Lesson for Academia

South African courts have demonstrated that, although ascertaining customary law can be cumbersome, it is both possible and feasible. This is illustrated by the bold step taken in the *Mgenge* judgment. In the *Mgenge* matter, the court underscored the importance of thoroughly investigating customary practices, rather than merely relying on documentary evidence such as the *lobola* letter and the marriage certificate, to establish the existence of a customary marriage.

A critical stride in *Mgenge* was the court's decision to call oral evidence from witnesses who participated in the *lobola* negotiations, as well as from neighbours familiar with the couple's community. This allowed the court to ascertain their views and knowledge of local customs as they are practised in everyday life. This approach aligns with prior judgments that emphasise the judiciary's responsibility to actively determine the content of living customary law through concrete, community-based evidence.

The *Mgenge* judgment highlighted the importance of social context when dealing with customary rules. This view has been mentioned by Ndulo, referring to Ngcobo J's comment in the case of *Bhe v Khayelitsha*,[91] imploring practitioners to look at the social context in which customary law rules have originated.[92]

In the teaching of living customary law, law teachers ought to take cognisance of the fact that "customary courts followed a more informal procedure-no lawyers were available in customary courts, nor were technical rules of procedure followed."[93] This aspect is clearly illustrated in the *Mgenge* judgment, where the court struck a reasonable balance between reliance on oral testimony and documentary evidence. The court carefully considered both forms of evidence, giving weight to the oral accounts of the events and the written *lobola* agreement to reach its

85 *Ibid* paras 22, 24, 25, 26, 27.

86 *Ibid* para 26.

87 *Ibid* para 27.

88 *Ibid* para 26.

89 *Ibid* para 41.

90 *Ibid*.

91 *Bhe and Others v Khayelitsha Magistrate and Others (*CCT 49/03) [2004] ZACC 17; 2005 1 SA 580 (CC).

92 Ndulo "Legal Pluralism, Customs Law and Women's Rights" 2017 *Southern African Public Law* 1–21.

93 Ndulo 2017 *SAPL* 3.

conclusion regarding the validity of the customary marriage.

Authors like Diallo and Himonga argue that there is no better place for addressing the development of customary law than in the academy, legal education in particular.[94] Accordingly, academic institutions are uniquely positioned to critically examine, teach, and shape the evolution of customary law, ensuring that it remains relevant and is properly integrated within the broader legal system. By fostering rigorous scholarship and informed debate, these institutions contribute significantly to the ongoing development and modernisation of customary law.

5 LIVING CUSTOMARY LAW IN THE CONTEXT OF LEGAL EDUCATION

The *Mgenge* judgment confirms a judicial trend towards the recognition and promotion of living customary law. However, despite these advances in the courts, the effective teaching of living customary law continues to face significant obstacles that hinder its integration into academic curricula. The following section examines the current state of legal education and highlights the challenges that impede the teaching and incorporation of living customary law within academic institutions.

Legal education in post-apartheid South Africa focuses more on black letter law, with little reference to the historical and social context in which the law operates and is experienced.[95] In this regard, most law courses focus on law as a technical rule application.[96] Klare stated that our legal culture places strong faith in texts and often uses a highly structured, technical, and rule-bound interpretation method.[97] Modiri's work supports this observation, and his views are reflected in the following quote;[98]

> Legal education in post-apartheid South Africa remains firmly in the grip of restricted jurisprudence- focusing as it does on the black-letter law with little to no reference to the wider historical and social context in which law operates and is experienced.

The above view is also reflected by Griffiths, who wrote that legal education is doctrinal and mainly involves a black-letter approach to applying the law.[99] Unfortunately, this approach is not aligned with ascertaining the living customary law. [100] This emanates from the fact that, as Diallo and Himonga mentioned, an LLB curriculum's main features are legal centralism and legal positivism, derived from Roman-Dutch law and English common law.[101] Roman-Dutch law has strong codification features; furthermore, Western law contains a strong element of positivism and centralism, which has been imported into living customary law.[102]

The current methodology used in legal training is contrary to the method required to ascertain living customary law principles. Legal training focuses primarily on training students and legal practitioners to interpret formal sources of law, such as legislation and case law.[103] This is based on a Western legal culture based on the values of certainty, stability, and predictability, and its

94 Himonga and Diallo 2017 *PELJ* 10.

95 Modiri "The Crises in Legal Education" 2014 *Acta Academica* 1–24.

96 Modiri 2014 *Acta Academica* 6.

97 Klare "Legal Culture and Transformation" 1998 *SAJHR* 146–188.

98 Modiri 2014 *Acta Academica* 6.

99 Griffiths "Broadening the Legal Academy, the Study of Customary Law: The Case for Social-scientific and Anthropological Perspectives" 2017 *PELJ* 1–24.

100 Griffiths 2017 *PELJ* 1.

101 Himonga and Diallo 2017 *PELJ* 11.

102 *Ibid*.

103 Griffiths 2017 *PELJ* 3.

sources are fixed, written, and predictable legal rules.[104] Thus, current legal training or teaching places more emphasis on Western legal culture. For instance, a Western approach to law would focus on a rule-centred approach, which regards the law as consisting of rules and regulations.[105]

Living customary law differs because it requires a method that not only relies on rules but also studies and observes the daily lives of indigenous communities[106] when interpreting and applying African law principles. A different methodology and approach are crucial when ascertaining living customary law, as opposed to an over-reliance on traditional legal sources such as case law and legislation. In some instances, conducting field research and gathering oral evidence from community members who actively practise the relevant culture or tradition, along with collecting personal narratives of those living according to the system, can be a more effective approach to resolving living customary law disputes, rather than relying solely on legal texts and academic literature. This method allows for a deeper understanding of the dynamic and evolving nature of customary law as it is lived and experienced within communities.[107]

Reliance on outdated law literature often prevents the court from ascertaining living customary law, which is practised daily by traditional communities.[108] In some cases, false narratives about African customs or traditions were used or followed in the judgments. Nhlapo is among the authors who recommend the calling of evidence to establish how traditional customs have been applied in the day-to-day lives of the traditional communities involved.[109]

In terms of living customary law, it is inconceivable to think of the law as an object separate and distinct from custom, culture, and morality.[110] African societies understand law as a seamless web that binds the community.[111] Western law does not favour subjective thought patterns from an African perspective.[112] According to legal positivism, only common and official laws can be considered laws.[113] This necessitated the creation of official customary laws, which did not consider the changing and diverse nature of African beliefs and ways of life.[114]

Based on the above brief explanation, a student trained according to the influence of the above legal systems would inevitably embark on legal research that strictly focuses on case law, authoritative legal articles, and legislation. This entails a step-by-step approach to legal research, comprising the collection of legislation and case law as one of the first crucial steps in legal research.[115] This approach does not align with the principles of living customary law, which is grounded in a case-by-case assessment and does not place undue emphasis on the precedential value of previous decisions. By focusing on the lived experiences and current practices within communities, this method acknowledges the fluid and evolving nature of customary law, rather

104 Van Niekerk "Indigenous Law and Narrative: Rethinking Methodology" 1999 *CILSA* 208–227.

105 *Ibid* 209.

106 *Ibid.*

107 Griffiths 2017 *PELJ* 4.

108 Zimmerman "The Reconstitution of Customary Law in South Africa: Method and Discourse" 2001 *Harvard Blackletter LJ* 197–228.

109 Nhlapo "Customary law in post-apartheid South Africa: constitutional confrontations in culture, gender and 'living law" 2017 *SAJHR* 1–24.

110 Nunn "Law as a Eurocentric Enterprise1997 *Minnesota Journal of Law & Inequality* 321–371.

111 Nunn 1997 *Minnesota Journal of Law & Inequality* 347.

112 Nunn 1997 *Minnesota Journal of Law & Inequality* 363.

113 Rautenbach *Introduction to Legal Pluralism in South Africa* (2021) 6.

114 Maithufi, Mnisi- Weeks, Mofokeng and Ndima *African Customary Law in South Africa – Post-apartheid and Living Law Perspectives* 33.

115 Kleyn, Viljoen, Zitzke and Maidi *Beginnners Guide for Law Students* (2018) 332.

than treating it as a fixed set of rules derived from past cases.[116]

Despite judicial progress in recognising living customary law as seen in the *Mgenge* judgment, legal education remains largely rooted in Western traditions, such as black-letter law, legal positivism, and legal centralism. These approaches prioritise technical rule application and written legal sources, often ignoring the historical and social contexts in which law operates. Scholars like Klare, Modiri, and Griffiths criticise this doctrinal focus, arguing that it is misaligned with the dynamic and community-based nature of living customary law. Living customary law requires methodologies that engage with the lived experiences and oral traditions of indigenous communities, rather than relying solely on statutes and case law. The prevailing approach in legal education, inherited from Roman Dutch and English common law, hinders the accurate teaching and integration of living customary law, ultimately perpetuating a disconnect between legal training and the realities of traditional African communities.

6 TEACHING FRAMEWORK FOR AFRICAN CUSTOMARY LAW: EMPHASIZING CONTEXTUAL ENGAGEMENT

The discussion of the *Mgenge* judgment and earlier cases underscores the crucial role of context in determining living customary law. Courts have emphasised this by relying on oral testimony and adopting a case-by-case approach to ascertain the true nature and application of living customary law. This methodology recognises that customary law is dynamic and often shaped by the specific circumstances of each case.

A key issue is whether the teaching of African customary law in South African universities adequately incorporates contextual analysis. A contextual approach in this case implies a holistic method that systematically integrates socio-cultural realities and conditions of learners into the learning environment. While universities do offer compulsory customary law courses, these programmes often fall short in emphasising the importance of contextual engagement.[117] As a result, students may not fully appreciate how living customary law operates differently depending on the specific facts and social settings involved. Strengthening the focus on contextual analysis in legal education would better prepare students to understand and apply living customary law in practice, reflecting the approach adopted by the courts.

This case note recommends a contextual approach to be adopted in the teaching framework of African customary law as follows;

6 1 Incorporate Clinical Teaching Methods

To enhance practical learning and better prepare students for real-world legal practice, clinical teaching methods should be incorporated to provide exposure to real clients. This can be achieved through partnerships with university law clinics, where students could gain a hands-on experience working on actual cases under supervision. Additionally, integrating moot courts into the curriculum fosters participatory, student-led learning, encouraging the development of advocacy skills, legal reasoning, and teamwork in a simulated courtroom environment.[118]

By combining these approaches, legal education bridges the gap between theory and practice, promotes critical thinking, and creates a dynamic, engaging educational experience for

116 Himonga and Diallo 2017 *PELJ* 12.

117 Maimela, Boterere and Lepele *Legal Pluralism Study Guide* 2025 University of Pretoria.

118 Chimbwanda "Embedding Skills in African Customary Law and Culture in the LLB Curriculum: Empirical Study of Pedagogical Approaches in Selected African University Law Schools" (LLD-thesis, School of Advanced Study, 2022) 77.

students.[119]

6 2 Engage Expert Lectures and Community Engagement

In terms of the above-mentioned framework, it is essential to provide students with specialised insights and up-to-date knowledge. This should include the involvement of community engagement through the involvement of experts, particularly focusing on informal forms of education, such as collaboration with chiefs and traditional leaders. Such an approach has been effectively implemented at conferences where traditional leaders have participated. For example, leaders like Hosi Shilubana[120] and Inkosi Patekile Holomisa[121] have played active roles, through their involvement as guest speakers at conferences focusing on African customary law. Involving these figures enriches the educational experience by integrating traditional perspectives and fostering meaningful community engagement.

6 3 Reform the African Customary Law Syllabus

Reforming the syllabus would involve the introduction of practice-based assessments that mirror real-world legal challenges, equipping students with problem-solving skills relevant to resolving disputes that include cultural elements. These assessments could require students to attend a customary law court case and document the proceedings for academic credit. In doing so, students would be tasked with recording the facts of the case and observing the methods used in court to present evidence and ascertain living customary law. This approach has already been employed in modules like the Law of Criminal Procedure,[122] where students have been required to attend court cases as part of their assessments. The proposed syllabus reform thus emphasises the integration of clinical teaching methods and community engagement.

These recommendations are not unprecedented; clinical approaches to legal education have been adopted at academic institutions in South Africa and other African countries, including Botswana, Nigeria, and Kenya.[123] Law clinics are a common feature of these programmes, and examples like McQuid Mason's Street Law module demonstrate the effectiveness of contextually based teaching and learning.[124]

Although implementing these recommendations may present practical challenges, such obstacles can be managed by introducing these measures initially in smaller group settings. This approach could include offering elective modules on African customary law at the undergraduate level, as well as specialised postgraduate courses focused on the subject. Starting with smaller, focused groups enables the gradual development and refinement of teaching methods, making it easier to address challenges and facilitate effective integration into the wider legal curriculum.

7 CONCLUSION

This case note aligns with the approach taken in the *Mgenge* judgment, which embraces the dynamic nature of living customary law. It recognises that living customary law evolves through continuous cultural changes and adaptability, highlighting the need for legal education to move beyond rigid textbook definitions. Instead, it suggests that legal education should appreciate

119 *Ibid.*

120 *Reflections of Gender in the Context of Customary Law in the African Continent,* Conference, (University of South Africa), 12 August 2021.

121 *Customary Law, Culture and Social Justice: Has Transformative Constitutionalism Advanced Equality and Other Human Rights in Customary Law*, Conference, (Stellenbosch University), 25 August 2021.

122 Van der Merwe *Criminal Procedure Study Guide* 2008 University of Pretoria.

123 Chimbwanda 2022 LLD 77.

124 *Ibid.*