

CHAPTER 3

ADMINISTRATION OF JUSTICE IN THE TRADITIONAL COURT

*The administration of justice in rural South Africa is predominantly carried out by chiefs' courts, which administer justice largely on the basis of customary law.*³⁵

One of the responsibilities of a traditional leader is to settle disputes in the traditional community. This is done through the traditional court (also known as the chief's court or, as recommended by the South African Law Reform Commission, 'customary court'). This court deals with all disputes that are brought to it as long as they are not serious cases. Asked what they regard as serious cases, traditional leaders invariably mention rape, murder and assault with intent to do grievous bodily harm (GBH), i.e. serious assault. The court also deals with dissolution of customary marriages, with the proviso that the maintenance of children is referred to the magistrate's court for resolution.

According to the traditional leaders interviewed, it is not for lack of jurisdiction that traditional leaders do not deal with maintenance cases, but due to practical constraints. For example, as the traditional councillors of Mokopane stated, the traditional court does not have the capacity to make sure that maintenance orders are enforced. On the contrary, they reason, the magistrate's court has the necessary resources, as evident in that court's ability to get maintenance money directly from the employer of the parent.

From the previous chapter it appears that in dealing with the administration of justice, traditional leaders are acting within their legislative mandate. In terms of Schedule 6 of the Constitution, laws that applied to the different homelands are part of South African law.³⁶ For instance, laws that applied in the former homeland of Lebowa remain in force until legislative or judicial intervention. Equally important to note in this respect is the recent work of the South African Law Reform Commission, which, though not having a binding legal effect, shows that the move is towards allowing traditional leaders to proceed with their judicial functions. Both the Discussion Paper of 1999 and the report – with the proposed Bill – submitted to Parliament in January 2003 show that

the issue is not so much whether traditional leaders should be responsible for the administration of justice, but the extent and nature of their involvement. Moreover, through the 2003 Act, the legislature has reaffirmed this function, as demonstrated by the Preamble to that Act, which unequivocally states:

...the institution of traditional leadership must...promote an efficient, effective and fair dispute-resolution system, and a fair system of administration of justice as envisaged in applicable legislation.

It is noteworthy that both the administration of justice (which seems to refer to or include trial of cases), and dispute resolution are specifically provided for in this Act. In a traditional court, the two are not necessarily seen as distinct functions but as aspects of one process. While it is true that a traditional court would try a case and hand down a verdict (i.e. find someone guilty or innocent), it is also true that the ultimate objective of the proceedings is dispute resolution and restoration of a healthy relationship between the parties. This restorative attribute of traditional courts finds expression in the rituals that many traditional communities conduct at the end of the trial, which are aimed at restoring the relationship between the parties and ceremoniously readmitting the deviant party into society. While this attribute was not observed in any of the cases witnessed during the course of this study, it was, however, confirmed by traditional leaders that this practice did not apply to all cases but only to those that are serious and are seen to have affected relations (sometimes among relatives) negatively. This seems to be one of those instances where it proves difficult to document customary law, for it is often a situation of playing it by ear.

In grappling with the problem of documenting customary law, observers differentiate between 'official customary law' and 'living customary law'.³⁷ Official customary law refers to traditional or cultural legal practices that have been captured and made part of the written law (often reflected in statutes and case law), while living customary law³⁸ refers to the non-static unwritten law that is practiced by traditional communities on a day-to-day basis. In practice, the difference between the two manifests itself in that customary law is applied by state courts, while living customary law is applied by traditional courts.

This application of living customary law is reflected in the following account of two cases that were heard in the traditional court of Mokopane. This court – constituted by members of the royal council³⁹ – sits every Monday, Tuesday and Friday, with at least two cases reported on each of these days.⁴⁰ The court

is composed of four men and one woman. While a number of cases were observed, two cases will be referred to in detail in this monograph. They both involved domestic disputes.

Case 1

This case was brought to court on 14 June 2004 by one Sylvia (complainant).⁴¹ She started by stating that she had come to the court to report 'motho yo ke dulago le yena' (someone I stay with). The chairman of council asked her if that was her 'mokgalabja' (husband). She responded to this in the affirmative. The complainant then proceeded to state that she was reporting the man because he was refusing to leave the house. The chairman intervened at this stage to state that the court was not dealing with the case as yet so there was no need for detail. The chairman also enquired whether this problem had been dealt with at home with relatives and neighbours, to which the complainant responded in the affirmative and added that they (relatives and neighbours) had told the respondent (man) to leave the settlement.

The chief councillor then intervened and asked: "What really is the problem there?" To this the complainant stated that the problem started because the respondent had found a new stand for himself and wanted to leave. But the respondent wanted to take building material from the shack they occupy together. At the time he had already taken seven sheets of corrugated iron. This seemed to elicit sympathy from the court.

The sympathy, however, was very short-lived as one of the councillors asked the following question: "Are you married to each other?" The complainant stated that they were not married to each other but were nevertheless staying together. To this there were murmurs of disapproval among the members of the court with the chairman of council stating that they did not deal with "vat en sit" (people staying together without marrying each other). After saying this the chairman enquired as to whom the stand belonged to and the complainant stated that it was hers. The chairman also wanted to know who owned the sheets of corrugated iron that the respondent had taken away. To this the complainant stated that the respondent owned the sheets. A follow-up question to this was: "If he is taking the sheets that belong to him, what is your problem then?" The complainant stated that she had not come to report his taking of the corrugated iron sheets but the fact that when the respondent took them (the sheets) he also swore at her. The court then decided that the respondent should be called to come and answer for the swearing. A letter was issued, summoning the respondent to come to court.

Case 2

This case involved a husband and wife, James and Winnie, and came straight to the chief's court as it did not fall under the authority of any ntona (headman).⁴² It took place in the morning of 17 June 2004 at Mokopane Traditional Authority before a traditional court comprised of the royal council. The two were the only people present in the hall facing the council, besides the two researchers.

The chief councillor asked them who their witnesses were. The complainant (the wife) indicated that her sister and the respondent's (the husband) aunt were the witnesses. She further stated that the sister should have arrived already but to her surprise she was not yet at court. The respondent's aunt, she stated, was sick, and should not be expected to attend. The chief councillor indicated that it would be difficult to proceed with a case that did not have witnesses.

The chairman of council and the other three councillors started talking to one another. Then the chairman of council indicated to the chief councillor that the case could proceed even in the absence of witnesses and, should it become apparent that witnesses were necessary for the resolution of the dispute, the matter would be postponed. The chief councillor expressed his reluctance to deal with the two disputants in the absence of witnesses because "Lena ba babedi le ka se kwane ka selo. Le tlo phigisana" (the two of you will not agree on anything. You will start arguing about what really happened). Having said this, however, he asked the two parties (complainant and respondent) if they would like to proceed with their case in the absence of witnesses. They both said they would like to proceed. The chief councillor then ordered the complainant to stand up. She stood up and the chief councillor told her to state what her complaint was. She stated that she was complaining about her husband, after which she related her story as follows:

I am someone who is sick. My sickness relates to ancestors. So I went to a priest where I am being healed. It has now become necessary that I slaughter a goat in order to appease the ancestors. Therefore last week I organised a function where the goat was slaughtered. I had brewed some beer for the occasion. Unfortunately the beer was not ready on Sunday when the function was scheduled to take place. The function was taking place at my parental home not at my own home. My husband was not present at the time when we went to communicate with the ancestors. He only arrived later in the day and

I approached him and told him that we had proceeded with the function so that he could also go to the spot and communicate with the ancestors. He said he would do so later. This never happened but I did not worry much about it. He spent some time with us and left. The following day he came back in the company of my sister's husband. When he arrived there was one man sitting with us still drinking beer. On arrival he greeted us and demanded to know who the man was. I said: "You left people drinking here yesterday and now you come back today to ask who they are. These are the very people we invited to come and be with us for the function." My husband then became angry. "A thoma go ntshwara ka di watshene a nkisa pele le morago" (he started grabbing me by my clothes and pushing me to and fro repeatedly). I pushed him into my sister's room and ran away. I went to our house where I intended to inform my eldest son about his father's behaviour. Unfortunately my son was not there as he had gone to his fiancée's home where he often sleeps. I, however, informed my other two sons about my problem. Then I slept at home until the following day when I went to look for my son. I found my son and informed him about his father's behaviour of the previous night. My son suggested that we should go back and see how he (my husband) is and what may have transpired after I had left. We went back. When we arrived there I was horrified to find that he had burnt all my clothes that were in the wardrobe and had also taken the beer and smeared it all over the walls. That is why I am here to complain.

At this stage the chief councillor informed the complainant that this was the matter they would be dealing with and asked her if she was certain that she had stated all that she wanted the court to know. The complainant answered in the affirmative. Then the chief councillor warned her that she would not be allowed to raise any more issues later. The complainant said she understood. The chief councillor ordered the respondent to stand up. Then he asked him whether he had heard the complaint against him. The respondent answered in the affirmative. The first councillor was then told to proceed with the case. The first councillor asked him to respond to what his wife had to say. His (the respondent's) response was as follows:

I admit that my wife had a function relating to her sickness where a goat was slaughtered. My problem is that she now stays at her parental kraal where she even claims to be a healer herself even before she has been completely healed. The right approach is for her to get healed

first and then I will come here to mosate (royal office) with her to inform you that she is now a healer. Instead of following the correct procedure, she starts practising healing on her own and she does that at her parental home so that whatever she earns will be enjoyed by that family. That is all I have to say on the matter.

The first councillor interrupted to say that it could not be all he had to say while the complainant had spoken about burning of clothes and other things. In reaction to this reminder he continued:

That part has been dealt with at home because I have asked for forgiveness. I have also offered and still offer here to buy all the clothes I burnt or pay compensation for them. If we talk about the assault on the day she (complainant) is the one who hit her brother-in-law with an open hand twice. You see, she hit him and then ran away. That is when she left and then came back the following day.

At this point, the first councillor informed the parties that the witness (the complainant's sister) would be called to tell the court what she saw on the day in question before the court asked the parties questions. The witness had disappeared and efforts to look for her outside the courtroom were not successful. At this stage the council agreed to proceed with the case, with the next step being the opportunity for council members to ask questions. The first question came from the chairman of council and his interaction with the complainant proceeded as follows:

Q: You and your husband agree that you had a function and a goat was slaughtered for that purpose. Where did this goat come from?

A: My young son and myself bought it.

Q: Where was your husband because it is strange that it should be your son's responsibility to buy a goat for the function?

A: I told my husband and he said 'ga Kekana ga gona badimo' (there are no ancestral spirits at the Kekana family).

The chairman of council at this stage ordered the complainant to sit down. He then ordered the respondent to stand up and asked him to explain to the court why his wife and son had to buy the goat. To this the respondent answered by stating that he was aware that his son had bought the goat but this was because at the time when his wife (complainant) asked him to buy the goat he had no money. As the wife and son had the money ready they decided to buy

it. He, however, emphasised that this was done with his blessing. The chairman ordered the respondent to sit down and the complainant to stand up. Then he asked her:

Q: Are you aware that if there is a family dispute you should go and report to the people who stay next to you?

A: Yes.

Q: Why did you not go and report your husband to someone then?

A: I went to Sinah and asked for some towel to wear as my clothes were torn by my husband. Only then did I go to my son.

Q: Did Sinah not take you back to go and see what was happening with your husband? To find out what his problem was.

A: No. They are all tired of him because it is not the first time that he beat me. Even his aunt is tired of him because I always complain about him. Our children are also tired of this man. Even this court knows that it is not the first time that we come here. Baba (father) over there knows it as well because on a number of occasions he told my husband to stop giving me trouble. I am now tired and to tell you the truth the real reason why I brought him here today is for the court to let us part ways so that I can live in peace. I now have grown up children and even grandchildren. I cannot allow my husband to continue humiliating me in this way.

The chairman of council indicated that he would give other council members the chance to proceed with the questioning. The chief councillor intervened and stated that he thought the discussion was going in circles as the complainant had already indicated what her wish was. "Ge pitsa e thubegile o ka se e bope gape wa e kgona" (once a pot has broken into pieces, you cannot successfully mend it). There seemed to be consensus on this observation among council members. After confirming with the complainant that she had fully thought the issue through and was sure that she would like to have their marriage terminated, the chief councillor – at the instigation of the chairman – asked the respondent whether he had heard what the complainant said and if so, what his reaction was. The respondent stated that he had no problem with them parting ways. The outcome of this case was that the court referred the parties back to their respective families who negotiated their marriage in the first place, to deal with the matter. The parties were advised to come back to the traditional court if the matter was not dealt with to their satisfaction.

Issues arising from the two cases

The cases reported above, and the way in which they were dealt with, represent the types of cases that are generally brought to the traditional courts and also the manner in which they are dealt with. There are a number of problems with the court's approach. For the present purposes, however, only two will be dealt with:

Gender and traditional justice

First, it is debatable whether a court dealing with a domestic problem should be composed of a majority of men. While this fact in itself is not necessarily a serious flaw of the system, it could boost the image of the court if women were represented in a more active way, especially given that the trial and the procedures followed are not rigid, but open to influence by the members throughout the proceedings.

However, it remains to be seen whether the mere presence of women would add value to the court and its approach, given that the women who appear before the court are supportive of this approach. While the male dominance of the court is conspicuous, given the current democratic dispensation, of greater concern is the dominant approach that sees the man as the head of the household and therefore a guardian of his wife, as well as the assumption that the man has a duty to take care of his household. In this line of thinking the wife can only contribute to the household if the man is unable to do so. This can be seen in the above example (case 2) where it is clear that all the parties before court had a common understanding that the woman had to first get permission from the husband for the son to help her buy a goat.

The chairman's submission in case 2 made it clear that it was crucial to the case that such permission was sought and granted. This approach seems to affront the gender equality clause in the constitution. Any solution, however, appears to lie in the empowerment and orientation of community members into the post-1994 ethos, especially as regards issues relating to gender equality. The problem seems to lie in the inaccessibility of the state courts to members of the community, which means that the type of justice familiar to the members of this community – a factor that influences their expectations from a justice system – differs from the type of justice that the state courts offer.

By way of an example, in case 2, if this matter had been reported to the state court, chances are that the issue of assault on the woman would have been the only pertinent one. More revealing in this case is the fact that the

complainant (wife) did not see herself as an equal to her husband nor did she challenge the philosophical approach of the court. It would appear that even if the gender composition of the court were better balanced, the lot of women who appear before it would not necessarily be improved. In other words, the outcome of this case does not necessarily depend on the gender composition of the court.

Procedure in the traditional court

The procedure followed by the traditional court is one of common sense. The rules of procedure are not written down, but depend on the extent to which the particular members of the court at the given time are familiar with the appropriate procedure. The approach of the court is mainly inquisitorial and informal in nature. However, legislation requires that the traditional court should record in detail the names of the parties, particulars of the claim, particulars of the defence, judgement and the date of judgement.⁴³

Notwithstanding the absence of clear rules, there is an opportunity for the complainant to give evidence uninterrupted. Particularly striking about testifying before this court is the fact that the witness is free to tell the court whatever she/he thinks is relevant to the case. The only time that the court (in case 2) seemed procedurally strict was at the end of the complainant's testimony when the chief councillor warned her that the court would base its decision on the evidence she had already given, as no new evidence or issues not raised during the testimony would be acceptable. The relative informality of the proceedings, however, implies that the court could – as happened in some other cases observed in this court – still decide to accept new issues if such issues are seen as important for the fair resolution of the dispute.

A notable variation from the general trend in traditional courts – at least as far as literature on the subject goes – is that the disputants in the above case were not allowed to ask each other questions. The court conducted the examination and cross-examination in line with its inquisitorial approach. The complainant in the second case asked to be given an opportunity to ask the respondent questions, to which the chief councillor responded by saying such questioning would not be allowed as it would “just lead to an altercation”.

In line with academic commentary on the issue of procedure, Holomisa⁴⁴ sees the common sense and flexible approach as one of the advantages of the traditional court. He argues that this approach makes the court transparent and democratic. This is one of the reasons why he rejects the possibility of

having legal representatives (attorneys and advocates) appearing in this court, as this – he argues – would distort the procedure. In his words these are “not courts of law but courts of justice”, and that is why there is no need for fixed rules regarding admissibility or otherwise of evidence. He gave the following example:

In a court where someone is being tried for stealing a sheep and such a person denies the charge, someone may just stand up and say: “how can you say you never stole the sheep while just a day after the sheep disappeared, I saw fresh sheep skin in your hut”?

Holomisa suggests that such evidence would not be admissible in a state court because the magistrate would say “if you wanted to be a witness, you should have sat outside the court”. While this example illustrates that witnesses may sit in court throughout the case and even contradict the testimony of a disputant or accused, the Mokopane traditional court required the witness to sit outside court until called to testify.

It appears that the two issues (procedure and gender) have been seen as significant enough to attract the attention of the legislature and the South African Law Reform Commission. This is evident in the provision in the 2003 Act that women should be represented in the traditional authority. Equally important is the apparent quest of the South African Law Reform Commission – as gleaned from the Discussion Paper – to ensure that traditional courts are procedurally fair, just and predictable. Noble as this ideal may seem, such a traditional court created in the spirit of the Discussion Paper would be deprived of the common sense attribute. In practice, attainment of this goal would require training of all those who apply the customary law on what such law is and how it should be applied. In essence, traditional courts would then be required to apply the official and documented customary law instead of the living and oral customary law. If that were to happen, resources would be better spent in empowering magistrates’ courts to apply such customary law. Moreover, should this happen, it would be even more difficult to argue for the retention of traditional courts within a democratic dispensation.

The competence of traditional courts to deal with the administration of justice appears dependent on applying living customary law, which is resonant with the expectations that members of traditional communities have of a court. This living customary law is applied using common sense procedure. This does not, however, deny the need for accountability in respect of decisions

reached in that court. At present this responsibility lies with the magistrate’s court, even though magistrates do not seem to take the responsibility seriously.⁴⁵ There ought to be a competent body⁴⁶ that audits decisions that are reached in traditional courts with concomitant guidelines as to how to assess such decisions and judgments.