***Ukuthwala:* Is it all culturally relative?**

By Diana Mabasa

One of the fundamental ideals set out in the Preamble of the Constitution is the attainment of a society based on social justice. This ideal will remain a pipedream if the dehumanisation, sexist exploitation and suffering of black women and girls under patriarchal tyranny are allowed to continue under the guise of custom, in particular *ukuthwala.*

The practice of *ukuthwala* has been thrust into the spotlight by a criminal appeal case of *Jezile v S and Others* (WCC) (unreported case no 127/2014, 23-3-2015). In a landmark judgment delivered by a full Bench of the Western Cape Division, the court held that *ukuthwala* is no defence to crimes of rape, human trafficking and assault with the intent to do grievous bodily harm.

This judgment can be applauded as an example of where the experience of a black girl sensitised judges to the harm that can be caused by a cultural practice. Oppression is a beast with many faces and *ukuthwala* is a classic example of overlapping forms of oppression on the grounds of age, race, gender and culture. Black women are uniquely situated at the focal point where these exceptionally powerful and prevalent systems of oppression come together, resulting in gender specific, and race specific harm. It is this, multi-layered harm that is highlighted by the concept of intersectionality.

The next section briefly summarises the facts and findings of the judgment – which comprehensively deals with the meaning and history of *ukuthwala.* It then demonstrates the importance of this judgment by linking it to intersectionality, in particular to highlight the plight of those multiply burdened. It concludes that such rethinking will lead to significant social change and realisation of constitutional ideals for black women and children.

Facts and the findings of the court

In a nutshell, the criminal appeal case is about whether the cultural practice of *ukuthwala* is a defence against the crimes of rape, human trafficking and assault with the intent to do grievous bodily harm. The facts appear from the judgment. It records that during December 2009, the appellant, a 28 year old male, residing in Philippi, went to a rural village in the Eastern Cape in search of a bride. He was specifically looking for someone around 16 years of age, with no children (at para 5).

Early in January 2010 he noticed the complainant who was then 14 years old, and decided that she would make a suitable wife. At this point he was a complete stranger to her. She was still at primary school and had just commenced Grade 7. She was residing with her extended family and maternal grandmother, since her father was deceased and her mother was working in another town (at para 6).

On the same day that the appellant first saw the complainant, he requested his family to start traditional *lobola* negotiations with the complainant's male family members. These negotiations were concluded in one day. The following morning the complainant was called to a gathering where only male members of the two families were present. She was informed of the impending marriage. Her uncle and another man then took her by the hand to the house of the appellant, who had never been introduced to her (at paras 7 – 8).

The complainant was instructed to change into *amadaki* (which is attire especially designed for a new bride or *makoti*). An amount of R 8 000 was paid as *lobola* and various traditional ceremonies were performed. She was now the appellant's customary law wife (at para 9).

Desperately unhappy, she fled from her new marital home a few days later and hid in a forest, and then at another house. She was found and promptly returned to the appellant by her own male family members. She was beaten with a sjambok by the appellant and his uncle for refusing to put back on the *amadaki.*

Shortly thereafter she was taken to Cape Town in a taxi by the appellant, completely against her will. She refused to have sexual intercourse with the appellant and he simply proceeded to rape her, severely beating her in his attempts to subdue her. After she had been raped seven times, suffered open, septic wounds as a result of the assaults, she managed to escape to a nearby taxi rank where two women assisted her by taking her to the nearest police station. She was deeply traumatised (at paras 10 – 29).

The appellant was charged with the offences mentioned above, and convicted in the magistrate's court. On appeal he raised as one of his defences that he was in a customary marriage with the complainant, and that it is an integral part of *ukuthwala* that the 'bride' may not only be coerced, but will invariably pretend to object (in various ways) since it is required, or at least expected of her to do so (at para 52).

In light of the important cultural and constitutional implications raised by this defence, the court invited several organisations and experts on the practice of *ukuthwala* in customary law to assist as *amici curiae,* and to present oral submissions. These organisations include the National House of Traditional Leaders, the Women's Legal Centre Trust, the Centre for Child Law, the Commission for Gender Equality, the Rural Women's Movement, Masimanyane Women's Support Centre, and the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities.

The court was mindful of the fact that the South African Law Reform Commission (SALRC) is currently investigating the practice of *ukuthwala*, its impact on girls, as well as the appropriateness and the adequacy of the current laws on *ukuthwala.*

What is *ukuthwala*?

In a summary of all the evidence presented by the *amici*, the court found that there is a distinction between the traditional understanding of *ukuthwala* and the current prevailing practice of the custom. It noted that

customary law posits both regular and irregular means of initiating and concluding a customary marriage. *Ukuthwala* is one such irregular method which would, if the precepts of the custom were correctly followed, eventually lead to the conclusion of a valid marriage under the customary law. It was described as a method instigated by willing lovers to initiate the marriage negotiations by the respective families where there was some form of resistance to the marriage by the parents. The idea is to circumvent obstacles to the proposed marriage such as extreme parental authority, or where the man is unable to afford payment of the *lobola* in full, or where a woman objects to an arranged marriage and would rather marry a lover of her choice.

Ukuthwala in its traditional form is a collusive strategy by the willing lovers to secure marriage negotiations. In this form it has been described as 'innocuous, romantic and a charming age-old custom'. Certain essential requirements must be met –

- the woman must be of marriageable age, which in customary law is usually considered to be childbearing age;
- consent of the parties is necessary;
- as part of the process the parties would arrange a mock abduction of the woman at dusk. She would put up a show of resistance for the sake of modesty but in fact would have agreed beforehand to the arrangement;
- the woman would then be smuggled into the man's homestead and placed in the custody of the women folk to safeguard her person and reputation;
- the father of the man would then be informed of the presence of the woman in his homestead and of his son's desire to marry her;
- sexual intercourse between the couple is strictly prohibited during this period; and
- the man's family would then send an invitation to the woman's family to inform them that they wish to commence marriage negotiations.

It was highlighted by the experts that in customary law no marriage is possible without the consent of the woman's parents. If her family rejected the proposal she had to be returned to her home along with the payment of damages for the unsuccessful *ukuthwala* (at paras 72 – 74).

However, over time the practice has mutated and taken on a pernicious form in flagrant disregard of fundamental rights of the girl. In what the court termed *ukuthwala* in its 'aberrant' form, young women or girls are abducted and subjected to violence, including sexual abuse and assault to coerce them into submission. This is criminal conduct under the guise of custom (at paras 75 – 76).

It often occurs with the agreement of the girl's parents and family, who are paid a fee, improperly described as '*lobola*' for permission to abduct their daughter. This is often the case where the family is trapped in a cycle of poverty and poor socio-economic circumstances. It is endemic in certain rural villages in South Africa.

The practice was denounced as an extreme and fundamental violation of women and girl's most basic rights, including the right to dignity, equality, life, freedom and security of the person, and freedom from slavery. It was condemned as 'sexual slavery under the guise of a customary practice' – made possible only because of the patriarchal nature of customary law (at para 78).

The High Court correctly rejected the appellant's reliance on the aberrant form of *ukuthwala* as justification for his criminal conduct. The appeal was dismissed.

Ukuthwala and intersectionality

This case clearly demonstrates that *ukuthwala* negatively affects only young, black women and girls. Since the interests of this group is not well-served by formalism the time has come for the rethinking of conventional approaches to law and policy that affect this group. I suggest that intersectionality as developed in critical race theory (CRT) should be considered as the basis of any legislative intervention that concerns this vulnerable group.

CRT is a race conscious critique of oppression and injustice, and the role of law in maintaining and perpetuating these. Intersectionality analyses the combined effect of race and gender discrimination to articulate a particular perspective: That of women who suffer as a result of multiple forms of oppression. It was first introduced into the legal lexicon by African American law professor Kimberlé Crenshaw. Subsequent critical race feminists like Patricia Hill Collins, Patricia Williams and Angela Harris have gone to great lengths to demonstrate that being black and female subjects women to a particular kind of harm, which requires a particular kind of intervention. Intersectionality is the tool they recommend for such intervention. An intersectional approach to law and policy reform will combine the effects of race and gender discrimination to assist in delivering effective strategies for the security and well-being of those historically marginalised as a result of race and gender.

In view of the current investigation by the SALRC into the practice of *ukuthwala* the cogent support for the multi-dimensional approach championed by intersectionality must be considered in shaping advocacy and public policy for this group.

Conclusion

This year we celebrate 21 years of our democracy. It is perhaps appropriate to look back and consider the very first case decided by the Constitutional Court, *S v Makwanyane* 1995 (3) SA 391 (CC) at para 262 where Mohamed J wrote:

‘What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex’.

The question is: Why are we still tolerating patriarchal social structures and harmful cultural practices that cause and reinforce inequality, which disempowers young girls by robbing them of an education, robbing them of dignity and of an opportunity to free their potential guaranteed in the Constitution? Does it mean that the contrasting future aspired to remains just that, an aspiration?

This article emphasises the continued importance of intersectionality in any law and policy initiatives for black women and girls. It can be an effective strategy to combat oppression and to bring about social justice. In the coming of age of our democracy the time has come to demand just such an approach for the simple reason; race matters, gender matters, and black girls matter.

Diana Mabasa *LLM (Wits)* is an attorney at Diana Mabasa Inc in Johannesburg.