
The requirements for validity and proprietary consequences of monogamous and polygynous customary marriages in South Africa: Some observations

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OPSOMMING

Die Vereistes vir die Geldigheid en Vermoënsregtelike Gevolge van Monogame en Poligene Gebruiklike Huwelike in Suid Afrika: 'n Paar Waarnemings

Die Wet op die Erkenning van Gebruiklike Huwelike van 1998 erken beide monogame en poligene gebruiklike huwelike. Dit gee die vereistes vir geldige gebruiklike huwelike en stipuleer die vermoënsregtelike gevolge daarvan. Monogame gebruiklike huwelike mag óf binne gemeenskap van goedere wees óf buite gemeenskap van goedere. Waar daar geen voorhuwelikse kontrak bestaan nie sal monogame gebruiklike huwelike binne gemeenskap van goedere geag word. Hierdie reëling kan tot die nadeel wees van 'n gade wat nie verkies of bedoel het dat dié huweliksgeedere bedeling toepassing moes vind nie. 'n Gebruiklike huwelik is 'n proses, wat aanvang vind by die onderhandeling rakende lobolo en eindig by die oorhandiging van die bruid aan die familie van die bruidegom. Dit is daarom moontlik dat daar aan al die vereistes vir 'n geldige gebruiklike huwelik voldoen word, voordat die aanstaande gades 'n ooreenkoms rakende die vermoënsregtelike gevolge bereik het. Dit word aangevoer dat 'n ooreenkoms rakende die vermoënsregtelike gevolge 'n vereiste vir die totstandkoming van 'n geldige gebruiklike huwelik moet wees.

Wilsooreenstemming is een van die belangrikste vereistes vir 'n geldige gebruiklike huwelik. Die aanstaande gades moet wilsooreenstemming bereik om met mekaar te trou, onderworpe aan die gewoontereg. Op dieselfe wyse waarop wilsooreenstemming, om ooreenkomstig die gewoontereg te trou, bereik word, moet die aanstaande gades toegelaat word om die vermoënsregtelike gevolge van hulle huwelik te bepaal om sodoende te voorkom dat regsprobleme ontstaan in die geval waar die man besluit om met meer as een vrou te trou.

Waar 'n man in 'n gebruiklike huwelik besluit om nog 'n vrou te trou ooreenkomstig die gewoontereg, sal hy 'n kontrak moet verkry wat die vermoënsregtelike gevolge van sy huwelike bepaal. Die proses om aansoek te doen vir hierdie kontrak word volledig bespreek, alhoewel die versuim om dit te doen nie die geldigheid van die opvolgende gebruiklike huwelike raak nie.

1 Introduction

Very interesting and sometimes controversial decisions have been reached by South African courts in their interpretation of the provisions of the Recognition of Customary Marriages Act.¹ One such decision is *Netshituka v Netshituka*,² which dealt with the validity of a civil marriage contracted before the coming into operation of this Act³ where the Supreme Court of Appeal decided that the said civil marriage was a nullity on the ground that the deceased's previously subsisting customary marriages were "revived" because his wives by customary rites did not leave him after he married another woman by civil rites. The deceased in this case was married to four wives by customary rites. The first wife was married on 1 December 1956 and the rest were married thereafter. The deceased married another woman by civil rites during the subsistence of these customary marriages and this civil marriage was dissolved by divorce on 5 July 1984. The deceased thereafter married another woman by civil rites on 17 January 1997. Despite the fact that the legal position at the time when the said civil marriage was contracted was that an existing customary marriage was dissolved by a subsequent civil marriage with another wife, the court held that the customary marriages of the deceased were "revived" when the deceased divorced his wife by civil rites on 5 July 1984. The reason for this conclusion appears to be that the wives did not leave the deceased after he married another woman by civil rites and further that he did not *phuthuma* them.⁴ The Supreme Court of Appeal therefore decided to depart from the precedent established since *Nkambula v Linda*⁵ that a civil marriage had the effect of dissolving a subsisting customary marriage. Applying the provisions of the Marriage and Matrimonial Property Law Amendment Act⁶ read with the Recognition of Customary Marriages Act, and following the decision in *Thembisile v Thembisile*,⁷ the court came to the conclusion that "... the civil marriage between the deceased and the first respondent, having been contracted while the deceased was a partner in existing customary unions with Tshinakaho and Diana, was a nullity".⁸

The other decision is that of *Gumede v President of the Republic of South Africa*⁹ which dealt with the interpretation of section 7(1) of the

1 Act 120 of 1998.

2 *Netshituka v Netshituka* 2011 5 SA 453 (SCA).

3 Act 120 of 1998.

4 *Netshituka v Netshituka supra* n 2 at parr 8-10.

5 *Nkambula v Linda* 1951 1 SA 377 (A).

6 Act 3 of 1988.

7 *Thembisile v Thembisile* 2002 2 SA 209 (T).

8 *Netshituka v Netshituka supra* n 2 at par 15. See further criticism by Bakker & Heaton "The co-existence of customary and civil marriages under the Black Administration Act 38 of 1927 and the Recognition of Customary Marriages Act 120 of 1998 – The Supreme Court of Appeal introduces polygyny in civil marriages: *Netshituka v Netshituka* 2011 5 SA 453 (SCA)" 2012 *TSAR* 586-589).

9 *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC).

Recognition of Customary Marriages Act. Before this Act came into operation on 15 November 2000, the proprietary consequences of customary marriages were regulated in terms of customary law. The Act had initially provided that the matrimonial property consequences of customary marriages entered into before 15 November 2000 were to be regulated in terms of customary law. This applied to both monogamous and polygynous customary marriages.¹⁰ The court held that this provision was unconstitutional in relation to proprietary consequences of monogamous customary marriages and that no distinction should be made between monogamous customary marriages, whether entered into before or after the date of the commencement of the Act, with regard to such consequences.¹¹ Monogamous customary marriages, therefore, are in community of property, with profit and loss, unless these consequences are excluded by means of an antenuptial contract. Although proprietary consequences of polygynous customary marriages are still regulated in terms of customary law, the Act provides that such consequences may be governed by an approved contract – as envisaged by the Act. This arrangement will be elaborated on below.¹²

*MM v MN*¹³ is another interesting decision that dealt with the requirements for valid customary marriages, their proprietary consequences and the effect of a civil marriage on the validity of an existing or subsisting customary marriage. It is an appeal against the decision in *MM v MN*¹⁴ and *MM v MN*.¹⁵ Closely related to it, is the decision in *MG v BM*.¹⁶ It was held in *MM v MN*, *inter alia*, that failure to comply with the provisions of section 7(6) of the Recognition of Customary Marriages Act does not lead to the invalidity of the second or further customary marriage and that this marriage should be regarded as being out of community of property and of profit and loss.

The Recognition of Customary Marriages Act has brought about profound changes to South African family law. As suggested in the name, the main aim of the Act is to recognise customary marriages as valid marriages on the same footing as civil marriages in South Africa. The Act came into operation on 15 November 2000. It recognises all customary marriages which comply with its requirements; that is, those contracted after 15 November 2000, as well as those entered into before it came into operation – provided that they were in existence and valid at such date of coming into operation.¹⁷

10 S 7(1) of Act 120 of 1998.

11 See Bekker & van Niekerk “*Gumede v President of the Republic of South Africa* or the creation of new marriage laws” 2009 *SAPL* 206.

12 See par 4 2 – 5 *infra*.

13 *MM v MN* 2013 4 SA 415 (CC).

14 *MM v MN* 2010 4 SA 266 (GNP).

15 *MM v MN* 2012 4 SA 527 (SCA).

16 *MG v BM* 2012 2 SA 253 (GSJ).

17 S 2 of Act 120 of 1998.

This discussion deals with the requirements and proprietary consequences of monogamous and polygynous customary marriages. A monogamous customary marriage is, irrespective of when it was entered into, in community of property, with profit and loss, in the absence of an antenuptial contract. As this may be contrary to the intention of one or more of the prospective spouses, it is suggested that the spouses to this marriage be allowed to regulate these consequences by means of a postnuptial agreement as opposed to approaching the court in terms of section 7(4)(a) of the Act (which may be quite costly for the applicants).

A second, or further, customary marriage has been held to be valid even in the case where the provisions, dealing with intended proprietary consequences, have not been complied with. The contract required in this instance is very important in the determination of any dispute relating to a title to property that may arise between spouses in a polygynous customary marriage. As a result of the close connection between the requirements for validity and proprietary consequences of customary marriages, it is necessary that spouses who decided to enter into a polygynous customary marriage obtain the required written contract as provided for by section 7(6) of the Act. These issues are addressed in paragraphs two, three and four below. Is a customary marriage preceded by *ukuthwala* valid? It is submitted that when there was consent by the prospective spouses to resort to *ukuthwala*, for whatever reason, the resultant customary marriage should be regarded as valid as the parties have shown a clear intention to marry one another in accordance with customary law.

2 Requirements for Validity

The requirements for a valid customary marriage are contained in section 3 of the Recognition of Customary Marriages Act. The Act prescribes the following as requirements:

- Both parties to the marriage must be eighteen years or older;
- Both must consent to be married to each other by customary rites; and
- The marriage must be negotiated and entered into or celebrated in accordance with customary law.

The first two requirements mentioned above are self-explanatory. It means that persons who are below the age of eighteen years cannot conclude a valid customary marriage. In the case of a minor – that is, a person below this age who wishes to conclude a customary marriage – either his or her parents or guardian must give their consent to the said marriage.¹⁸ Alternatively, the minor may approach the Commissioner of Child Welfare in the case where the parents or guardian refuse to grant the necessary consent. When parental consent or the consent of the Commissioner of Child Welfare cannot be obtained, a court may be

¹⁸ S 3(3) of Act 120 of 1998.

approached to grant such consent. The Minister of Home Affairs or any authorised officer in the Public Service may also be approached to grant consent to a customary marriage of a minor if the refusal to grant it, by the parent(s), guardian or Commissioner of Child Welfare, was without adequate reason and contrary to the best interests of the minor.¹⁹

The second requirement is that both parties must consent to be married to each other by customary rites; that is, they must consent to enter into a customary marriage and not any other form or type of a marriage. Both requirements relating to consent appear to be in conflict with certain customary law transactions which may be concluded in anticipation or contemplation of a customary marriage. Customary marriages may be arranged by parents of prospective spouses while such spouses are still young – that is, below the age determined by the Act or if above the required age, without such prospective spouses' involvement or active participation in the conclusion of the proposed marriage. These transactions include the engagement of infants which is well known in customary law and has been described as follows:

Infants betrothal, although possible and viewed with favour, does not occur very frequently. It occurs, mostly, in families of high political status, where it is important that an heir should be born of a properly designated mother. In such case the preferential partner is usually engaged shortly after birth, or even before birth. If the eventual husband of such a girl should be considerably older than she is, he may marry other wives before she comes of age, but if negotiations for her marriage preceded those of his other wives, she will become the principal wife when her marriage is finalised.²⁰

The practice of *ukuthwala*, which is prevalent amongst the Cape Nguni, also appears to be contrary to both the requirements, regarding consent, prescribed by the Act. *Ukuthwala* is normally resorted to when there is an impediment to the proposed customary marriage.²¹ The impediment may relate to various circumstances, such as when a parents of a prospective bride unnecessarily refuses to grant consent to the marriage or demands an unreasonable amount of *lobolo*. In such a situation, where the prospective spouses are both of the prescribed age, the prospective husband may make use of *ukuthwala* to compel the prospective wife's parent to consent to the marriage or agree to a reasonable amount of *lobolo*. The practice cannot, however, be used to compel a prospective wife to consent to be married by civil rites.²² The consent of the parent of a bride, although not a requirement for validity in terms of the Act when the bride is eighteen years or above, is still regarded as a requirement in traditional customary law. Therefore, it may still be regarded as a requirement, in terms of section 3(1)(b) of the Act, in respect of a prospective bride who was above the age of eighteen years

19 Jansen 'Family Law' in Rautenbach & Bekker (eds) *Introduction to Legal Pluralism in South Africa* (2014) 99-101.

20 Mönnig *The Pedi* (1978) 130.

21 See Koyana *Customary Law in a Changing Society* (1980) 1.

22 Bekker & Koyana 'The indomitable *ukuthwala* custom' 2007 *De Jure* 179.

when *ukuthwala* occurred as he or she is entitled to the *lobolo* to be furnished or provided for in anticipation or contemplation of her customary marriage.

The aforementioned requirements appear to be easy to fulfil. However, if regard is given to the prerequisite that the marriage must be negotiated and entered into or celebrated in accordance with customary law, the picture changes.²³ This requirement entails examining whether the customs, traditions or rituals, that have to be observed in the negotiations and celebration of customary marriages, have been complied with. These include the negotiations leading to the provision of *lobolo*, its actual provision and the “handing over” of the bride to the bridegroom’s family or the bridegroom himself as well as any other tradition, custom or ritual associated with these.²⁴ As held in *Rasello v Chali In re: Chali v Rasello*,²⁵ once a customary marriage has not been concluded in accordance with customary law, it cannot be regarded as valid even though all the other requirements were met. In this case, the appellant’s contention that she was introduced or handed over to the deceased’s family before *lobolo* was provided was held to be contrary to the principles governing the entering into of valid customary marriage. This customary marriage was, therefore, invalid.²⁶

Although the Act does not provide that the provision of *lobolo* is a requirement for a valid customary marriage, it regards it as one in terms of the requirements laid down in section 3(1)(b).²⁷ This is because customary marriages in South Africa are always preceded by negotiations relating to the provision of *lobolo*. Even civil marriages contracted by indigenous African peoples of South Africa are accompanied by *lobolo* negotiations.²⁸

A customary marriage is concluded when a bride is handed over to the family of the bridegroom or the bridegroom himself. The handing over of the bride is an important indication that a valid customary marriage has been concluded.²⁹ At the time of handing the bride over, a celebration is held.³⁰ The handing over of the bride to the bridegroom’s family is a very important requirement without which a valid customary marriage cannot exist.

23 S 3(1)(b) of Act 120 of 1998.

24 *Moropane v Southon* [2014] JOL 32172 (SCA).

25 *Rasello v Chali In re: Chali v Rasello* 2013 JOL 30965 (FB) (“*Rasello*”).

26 *Idem* par 11.

27 Mofokeng ‘The *lobolo* requirement as the “silent” prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act’ 2005 *THRHR* 27; *Fanti v Boto* 2008 5 SA 405 (C).

28 See Vorster (ed) *Urbanites perceptions of lobolo (Mamelodi and Atteridgeville)* (2000).

29 *Mabuza v Mbatha* 2003 7 BCLR 743(C); Bekker ‘Requirements for the validity of a customary marriage: *Mabuza v Mbatha*’ 2004 *THRHR* 146.

30 See *Rasello v Chali In re: Chali v Rasello supra* n 25; *Moropane v Southon supra* n 24.

In the case of a subsequent customary marriage, that is, a second or further customary marriage, the consent of the spouse of the existing customary marriage is a requirement for the validity of such second or further customary marriage. This is the position amongst the Tsonga.³¹ There is no doubt that this rule will be extended to polygynous customary marriages of all indigenous African peoples of South Africa.³²

Closely related to the requirements for the validity of customary marriages are the provisions relating to their proprietary consequences.³³ The Recognition of Customary Marriages Act provides that monogamous customary marriages are in community of property, with profit and loss, unless these consequences are excluded by means of an antenuptial contract.³⁴ The proprietary consequences of polygynous customary marriages, contracted after the date of commencement of this Act, are, or have to be, regulated in terms of a contract approved by a court, as envisaged by section 7(6) where an application to this effect has to be made by the husband.

3 Legal Issues that may Arise

Can a valid monogamous customary marriage exist even in the case where the prospective spouses did not agree about its proprietary consequences? Phrased differently, are parties validly married by customary rites if they had only complied with the provisions of section 3 of the Act without agreeing on the proprietary consequences of such a monogamous customary marriage?

The answer to this question is found in section 7, read with section 3, of the Recognition of Customary Marriages Act. Section 7 provides that a monogamous customary marriage is in community of property, with profit and loss, unless these consequences are excluded by an antenuptial contract. The Act, therefore, deems these marriages to be in community of property, with profit and loss.³⁵

From the abovementioned provisions, it appears that even in the case where the prospective spouses in a monogamous customary marriage have failed to determine the matrimonial property system of their marriage by means of an antenuptial contract, the customary marriage between them is valid. It also appears that such a customary marriage is to be regarded as being in community of property, with profit and loss, for the reason that an antenuptial contract was not concluded by the parties. This position may be detrimental to a spouse who was not aware,

31 *MM v MN supra* n 13.

32 See Maithufi 'Modjadji Florah Mayelane v Mphephu Maria Ngwenyama Case CCT 57/12 [2013] ZACC 14 (30 May 2013)' 2013 *De Jure* 1078.

33 See, *inter alia*, *MM v MN supra* n 14; *MG v BM supra* n 16.

34 S 7(2) of Act 120 of 1998

35 Bekker & West 'The validity of "further" customary marriages: A new legal conundrum *MZG and BM Case* no 10/873 62 (GSJ)' 2012 *THRHR* 515.

at the time when the customary marriage was entered into, that the legislature had already decreed that his or her customary marriage was in community of property, with profit and loss.

A customary marriage may be negotiated over a period of time. One of the prospective spouses may not have intended to marry or be married in community of property but nevertheless allowed or left the negotiations in order to bring about a valid customary marriage and, therefore, proceeding to finality before thinking about entering into an antenuptial contract. Another scenario is that the prospective spouses may not have agreed that they were to marry in community of property, with profit and loss, as envisaged by the Act after the completion of the negotiations leading to a valid customary marriage. Once all the requirements prescribed by section 3 of the Recognition of Customary Marriages Act have been met, it appears that the parties would be regarded as being married in community of property, with profit and loss, despite the absence of an agreement or consent relating to the proprietary consequences of their marriage. Is the intention of the parties not of cardinal importance in determining the proprietary consequences of their marriage?

Customary marriages are generally entered into by persons who may hardly be aware or know that the law provides that such marriages are automatically in community of property, with profit and loss, in the absence of an antenuptial contract. I have been approached in a number of divorce disputes where all the requirements for a valid customary marriage have been met but where one of the parties disputed the existence of a valid marriage on the basis that he or she did not have any intention to marry in community of property, with profit and loss. Therefore, some people find themselves, even before they commence to live together as husband and wife or before the actual celebration of their customary marriage, locked in a marriage whose consequences they did not intend or contemplate.

Should the consent or agreement between the prospective spouses, relating to the proprietary consequences of their customary marriages, be made a requirement for the validity of a customary marriage in addition to the requirements provided for by section 3 of the Recognition of Customary Marriages Act? The same question has arisen in respect of the validity of a second or further customary marriage in the event of failure to comply with the provisions of section 7(6) of the Act.³⁶ An attempt is made to address these issues below.

³⁶ *MN v MM supra* n 15.

4 Proprietary Consequences

4.1 Monogamous Customary Marriages

Mention has already been made above that a monogamous customary marriage entered into in terms of the Recognition of Customary Marriages Act of 1998 is in community of property, with profit and loss.³⁷ This is the position in respect of monogamous customary marriages contracted before or after the commencement of this Act.³⁸

Spouses to valid customary marriages contracted before the commencement of the Recognition of Customary Marriages Act may change the matrimonial property system applying to their marriage.³⁹ The court may grant the spouses leave to change the matrimonial property system which applies to their marriage if satisfied that:

- (i) There are sound reasons for the proposed change;
- (ii) Sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500,00 or so much as may be determined by the Minister of Justice by notice in the Gazette; and
- (iii) No other person will be prejudiced by the change.⁴⁰

Once satisfied, the court will order that the matrimonial property system, applicable to the customary marriage of the applicants, no longer applies and authorise the parties to enter into a written contract which will regulate the future matrimonial property system of their marriage on conditions the court may determine.

The proprietary consequences of polygynous customary marriages, which were entered into before the date of the commencement of the Act, may also be changed in the same manner as described above. In this case "... all persons having a sufficient interest in the matter, and in particular, the existing spouse or spouses, must be joined in the proceedings".⁴¹

Prospective spouses to monogamous customary marriages contracted after the coming into operation of the Act are allowed to regulate the matrimonial property system of their marriage by means of an antenuptial contract in the case where they do not wish or intend to marry in community of property.

As already indicated above, the prospective spouse(s) may not have wished or intended to marry in community of property, with profit and

37 S 7 (2) of Act 120 of 1998.

38 *Gumede v President of the Republic of South Africa* supra n 9.

39 S 7(4)(a) of Act 120 of 1998.

40 Ss 7(4)(a)(i)-(iii) of Act 120 of 1998.

41 S 7(4)(b) of Act 120 of 1998.

loss, but was not aware that an antenuptial contract was necessary to exclude these consequences. Alternatively, the prospective spouses might have intended to fix the consequences of their marriage by means of an antenuptial contract after the handing over of the bride to the bridegroom or his family was done. As all the requirements for a valid customary marriage would have been complied with, can it be concluded that the parties are married in community of property, with profit and loss, because no antenuptial contract was concluded at the time when the handing over took place?

In providing an answer to this question, it is important to make a distinction between the requirements for a valid customary marriage and its proprietary consequences. Once this distinction is kept in mind, it is possible to come to a conclusion that a valid customary marriage may exist even in the case where the spouses did not fix their desired proprietary consequences by means of an antenuptial contract. Therefore, it is possible to come to the conclusion that the parties should not be regarded to have entered into a customary marriage in community of proprietary, with profit and loss, for the mere reason that they failed to regulate the consequences of their marriage by an antenuptial contract. It is submitted that where there is a clear indication that one, or both, of the spouses did not intend to marry in community of property, the resultant valid customary marriage should not be deemed to be in community of property, with profit and loss.

This submission implies that whenever the validity of a customary marriage is disputed by any of the spouses during divorce proceedings – where one spouse alleges that the marriage is in community of property – two questions arise, namely:

- Whether the requirements for a valid customary marriage in terms of the Recognition of Customary Marriages Act of 1998 have been complied with; and
- If it is found that a valid customary marriage was concluded, the next issue for determination is whether the said spouses may be deemed to have contracted the said marriage in community of property and of profit and loss as intended by section 7(2) of the Act.

The spouse who avers that the customary marriage is in community of property bears the burden of proving this on a balance of probabilities. Similarly, the spouse who claims otherwise bears the burden of proving this, that is, that the marriage should not be deemed to be in community of property, with profit and loss. The presumption created by section 7(2) of the Recognition of Customary Marriages Act may therefore be rebutted by evidence to the contrary.

4 2 Polygynous Customary Marriages

4 2 1 Polygynous Customary Marriages Contracted Before 15 November 2000

Polygynous customary marriages contracted before 15 November 2000 are recognised as valid marriages if they were valid and in existence when the Recognition of Customary Marriages Act came into operation.⁴²

The proprietary consequences of polygynous customary marriages contracted before 15 November 2000 are governed by customary law.⁴³ In the same manner as monogamous customary marriages, such consequences may be changed by the spouses by applying to a court of competent jurisdiction.⁴⁴ The court may grant leave to change such matrimonial property system if it is satisfied that there are sound reasons for the proposed change, sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500,00 or so much as may be determined by the Minister in the Gazette and that no person will be prejudiced by the proposed change. If satisfied, the court may order that the matrimonial property system applicable to these marriages will no longer apply and authorise the parties to enter into a written contract which will regulate their future matrimonial property system on conditions determined by it.⁴⁵ Once this order is granted, the proprietary consequences will no longer be regulated by customary law but in terms of a written contract entered into by the spouses and approved by the court. All persons having a sufficient interest in the matter, including the existing spouse, must be joined in the proceedings.⁴⁶

4 2 2 Polygynous Customary Marriages Entered into After 15 November 2000

A customary marriage is potentially polygynous and a husband may, during its existence, contract another customary marriage with another woman. Before 15 November 2000, a further or second customary marriage could be entered into without any condition except that the requirements for a valid customary marriage, which included the consent of the spouse of the existing customary marriage, were complied with.⁴⁷

Irrespective of whether a customary marriage was entered into before or after 15 November 2000, the husband in such existing customary marriage is required to apply to a court for the approval of a written

42 S 2(2) of Act 120 of 1998.

43 S 7(1) of Act 120 of 1998.

44 S 7(4) of Act 120 of 1998.

45 Ss 7(4)(a)(i)-(iii) of Act 120 of 1998.

46 S 7(4)(b) of Act 120 of 1998.

47 *MM v MN supra* n 13.

contract which will regulate the future matrimonial property system of his marriages when he wishes to contract a second or further customary marriage with another woman. At the time when this application is made, the husband would be a spouse to a monogamous customary marriage whose proprietary consequences may be in community of property, with profit and loss, unless excluded by an antenuptial contract. The existing customary marriage may also be out of community of property, with profit and loss and with or without accrual sharing, where an antenuptial contract was concluded. The proprietary consequences may further be regulated in terms of a written contract as envisaged by section 7(4)(a) of the Recognition of Customary Marriages Act.

In the case of a customary marriage in or out of community of property, but subject to accrual sharing, the court is authorised to terminate the said matrimonial property system and effect its division.⁴⁸ The court may allow further amendments to the terms of the proposed contract and grant the order, subject to conditions it may deem just, or it may refuse the application if the interests of the parties would not be sufficiently protected by means of the proposed contract.⁴⁹ It is clear that the main intention of this is to protect the interests of the existing spouses (that is, the husband and wife) as well as those of the prospective spouse (the woman who the husband wishes to marry by customary rites).⁵⁰ The Act also provides that all persons who have a sufficient interest in the matter have to be joined in the proceedings.⁵¹ Therefore, the intention is to ensure that a person, whose interests may be affected by the proposed contract, is placed in a position to object to what may be prejudicial to him or her with regard to the terms of the proposed contract.

The reason behind the termination of the matrimonial property system of the existing marriage and the division of property, at the time when the court approves the written contract, is to avoid unnecessary future litigation concerning the property of the female spouses to polygynous customary marriages.⁵² Disputes relating to the title to property may arise especially at the time of the death of any of the spouses to this polygynous marriage. Where the proprietary consequences are not clearly spelt out in the proposed contract, this may lead to difficult problems in the interpretation of the Intestate Succession Act,⁵³ as amended by the Reform of Customary Law of Succession and Regulation of Related Matters,⁵⁴ at the death of any of the spouses to a

48 Ss 7(4)(a) & (b) of Act 120 of 1998.

49 S 7(7) of Act 120 of 1998.

50 See Maithufi & Moloi 'The need for the protection of rights of partners to invalid marital relationships: A revisit of the "discarded spouse" debate' 2005 *De Jure* 144.

51 S 7(8) of Act 120 of 1998.

52 See Maithufi & Moloi 'The current legal status of customary marriages in South Africa' 2002 *THRHR* 599.

53 Act 81 of 1987.

polygynous customary marriage. This may be due to the fact that the property which belonged to the deceased was not adequately defined in the proposed contract or no contract, as envisaged by section 7(6) of the Act, was approved by a court because the husband had failed to make the necessary application when he decided to marry another wife by customary rites. A valid will may, however, go a long way in resolving legal disputes of this nature.

During the existence of the various marriages, spouses may also face problems with regard to property that has to be used to maintain the children born as a result of the different marital relationships created for the various wives. What happens if property belonging to one wife is used for the benefit of a child of another wife or the wife herself? Is there any obligation on the part of the wife whose child benefited or on the husband to refund the said property to the impoverished wife? Should resort be had to the old customary law transaction of *ukwethula* in resolving such disputes?⁵⁵

The Constitutional Court in *MM v MN*⁵⁶ confirmed the finding of the Supreme Court of Appeal that where there was failure to obtain the contract envisaged by section 7(6) of the Recognition of Customary Marriages Act, the resultant second or further customary marriage is valid but has to be regarded as being out of community of property with profit and loss. If it is accepted that a second or further customary marriage is out of community of property with profit and loss, polygynous customary marriages may, therefore, be regarded as having created distinct entities which have their own property to be used for their exclusive benefit. This is almost the same as the customary law arrangement of creating a "house" for each customary marriage contracted by a husband. To each wife, the husband was expected, in terms of customary law, to allot property and certain other kinds of property acquired in terms of customary law, automatically accrued, to a particular "house".⁵⁷

The property arrangement envisaged by section 7(6) of the Recognition of Customary Marriages Act, therefore, appears to be similar to the consequences of customary marriages as governed in terms of customary law. What is intended by this proposed contract is that the property belonging to the various wives have to be kept separate from each other and whenever property belonging to one house is used for the benefit of another, an inter-house debt (*ethula*) is created.⁵⁸

54 Act 11 of 2009.

55 See, *inter alia*, Bekker 'Law of Contract' in Rautenbach & Bekker (eds) *supra* n 19 at 145-154.

56 *MM v MN supra* n 13.

57 See Bekker *Seymour's Customary Law in Southern Africa* (1989) 71-77 & 126 - 140; Jansen 'Family Law' in Rautenbach & Bekker (eds) *supra* n 19 at 108.

58 See Bekker *supra* n 57 at 334-335.

The next issue to be dealt with, without which this discussion will not be complete, is the procedure to be followed in obtaining a contract which has to be approved by a court when a husband of an existing customary marriage wishes to contract a customary marriage with another woman. Although this contract is not a requirement for the validity of a second or further customary marriage, it is submitted that obtaining it is important in ensuring that unnecessary disputes between spouses in polygynous customary marriages are avoided.

5 The Application and Annexures

5.1 Notice of Motion and Terms of Order Sought

The Recognition of Customary Marriages Act saddles the husband, of an existing monogamous customary marriage, with the responsibility to obtain the approval of a contract by a court which will regulate the future matrimonial property system of his marriages when he wishes to contract another customary marriage.⁵⁹ Although this is the position, the cumulative effect of this provision is that this has to be a joined application by the husband, his wife or wives by customary rites as well as his prospective wife. This is clear from the provision that “all persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses, must be joined in the proceedings instituted in terms of subsection (6)”.⁶⁰ Moreover, a court may not deal with the termination and division of the matrimonial property system in the absence of a female spouse or spouses of an existing customary marriage or marriages. Therefore, the court cannot grant an order in the case where any of the parties, who are likely to be affected by such order, are not joined in the proceedings. An order issued in terms of section 7(6) of the Act may not only affect the rights of the existing and prospective spouses but may also affect the rights of others with “a sufficient interest in the matter”.⁶¹ This may include any person, including the person who has to receive *lobolo* or who is responsible for the refund of the *lobolo* in the case where a customary marriage is dissolved.

The section 7(6) application is done by means of a notice of motion. There must be at least three applicants. The first applicant is the husband of a customary marriage who wishes to conclude a second or further customary marriage. The second applicant, in the case of a monogamous customary marriage, is the existing customary marriage wife. In the case of a polygynous customary marriage, all existing wives have to be joined as applicants. The prospective spouse must be joined as the third applicant. There are, therefore, as many applicants, apart from the husband, as the number of already married female spouses and prospective spouses, if more than one wife is intended to be married.

59 S 7(6) of Act 120 of 1998.

60 S 7(8) of Act 120 of 1998.

61 *Ibid.*

The terms of the order sought have to be clearly stated in the notice of motion. The most important of these terms are the following:

- An order, in terms of section 7(6) of the Act, for the approval of the proposed contract to govern the future matrimonial property system of the customary marriages;
- An order to amend the terms of the proposed contract as the court may deem just;
- An order to grant such further or alternative relief as may be just; and
- An order relating to the registration of the customary marriages, if necessary.

5 2 Annexures

5 2 1 The Founding Affidavit

The husband, as the first applicant, must depose to an affidavit (the founding affidavit) that clearly spells out the reasons for the order sought. The other affidavits – those of the existing spouse or spouses of a customary marriage or marriages and those of the prospective spouse or spouses – have to refer to the reasons for the order sought and that the deponents agree with such order. These affidavits, which may be referred to as supporting affidavits, have to, therefore, support the order sought by the husband, namely, that the court approve the proposed contract to regulate the future matrimonial property system of his marriages.

The founding affidavit must disclose the following issues:

- The personal particulars of the first applicant – including his full names and surname, identity number and address or place of residence;
- The personal particulars of the wife, in the case of a monogamous marriage, or wives in the case of a polygynous marriage, her or their identity number or numbers as well as their address or place or places of residence;
- The personal particulars of the prospective wife, her identity number, address or place of residence;
- That the spouse or spouses in the existing customary marriage or marriages were validly married in terms of customary law and that her marriage or their marriages are still in existence;
- That the spouse or spouses referred to above have agreed or consented to the proposed customary marriage with the prospective spouse and the terms of the proposed contract;
- The particulars relating to the current proprietary or matrimonial consequences of the existing customary marriage or marriages;
- That the matrimonial property regime of the existing customary marriage or marriages be terminated, its division be ordered and such consequences be replaced in accordance with the terms of the proposed contract as indicated by section 7(6) of the Act;

- That the matrimonial property regime, as proposed in the contract in terms of section 7(6) of the Act, for all the existing spouse or spouses and the prospective spouse be confirmed by the court;
- The personal particulars of all the children born as a result of the existing customary marriage or marriages with each spouse;
- That all persons having a sufficient interest in the matter have been joined in the proceedings;
- That the interests of all persons having a sufficient interest in the matter will be adequately protected by the terms of the proposed contract;
- That the court grants the order as proposed in the application or that the order be granted subject to such conditions or amendments as the court may deem just; and
- If necessary an order directing the registration of the customary marriages.

5 2 2 Supporting Affidavits

The other applicants, that is, the first applicant's existing spouse or spouses and his prospective spouse, also have to depose to separate affidavits which support the reasons for obtaining the order sought. Besides the personal particulars of all applicants, these affidavits have to deal with the following issues:

- The existence of a valid customary marriage between the first applicant and each of the respective applicants;
- The number and personal particulars of all the children born as a result of the existing customary marriage or marriages with the first applicant;
- The proprietary consequences of the existing customary marriage or marriages with the first applicant;
- That all the applicants have agreed or consented to be married in accordance with the proposed contract, which is intended to regulate the future matrimonial consequences of their marriages;
- That the matrimonial property system of the existing customary marriage or marriages be terminated or its division be ordered and that such consequences be replaced by the terms of the proposed contract;
- That all the applicants have consented to the proposed customary marriage with the prospective spouse;
- That the court grants the order in terms of the notice of motion or on such terms and conditions as it may deem just taking into account the interests of all the parties; and
- If necessary, an order directing the registration of the customary marriages in terms of section 7 (4) of the Act.

5 2 3 Specific Matters to be Dealt with by the Prospective Wife

The affidavit of the prospective wife must confirm the issues indicated above in support of the order sought. In addition, the prospective wife must, *inter alia*, state the following:

- That all the requirements for a valid customary marriage between her and the first applicant have been met;
- That she is aware that the first applicant is a spouse in an existing customary marriage or marriages and mention the name(s) of the existing spouse(s);
- The number and names of children born as a result of her relationship with the first applicant (if any);
- That the spouse or spouses of the existing customary marriage or marriages with the first respondent has or have agreed or consented to her customary marriage with the first applicant;
- That she had consented to the terms of the proposed contract aimed at dealing with the future matrimonial property consequences of their customary marriages; and
- Any other relevant information that the court may consider in the determination of whether or not the terms of the proposed contract should be approved.

All the parties – the spouse or spouses in the existing customary marriage or marriages, the husband who wishes to contract another customary marriage and the prospective spouse of the customary marriage to be entered into – must be *ad idem* with regard to the proposed customary marriage and the proposed proprietary consequences of all the marriages.

6 The Proposed Contract to Regulate the Matrimonial Property Regime of Polygynous Customary Marriages

From this discussion it is clear from that the terms of the proposed contract, intended to govern the future matrimonial property system of polygynous customary marriages, is a product of agreement between all the spouses to such marriages. The spouses have to agree as to which assets or properties will belong to a particular customary marriage by reference to a female spouse of each such marriage. Therefore in the case of polygynous customary marriages, there will be as many distinct estates as the number of wives.

Mention has already been made that the arrangement provided for by the provisions of section 7(6) of the Recognition of Customary Marriages Act resembles the customary law concept of creating a “house” for each wife.⁶² The applicant husband must therefore indicate with certainty the properties or assets that belong to his various wives. All properties or assets which, at the time when a customary marriage was entered into, belonged to a particular wife must be indicated in the proposed contract as belonging to that wife. Any property or asset which was donated or

62 See Pienaar ‘Law of Property’ in Rautenbach & Bekker (eds) *supra* n 19 at 124-125; see also par 4 2 2 *supra*.

allotted or is to be donated or allotted to a particular wife by the husband must also be indicated as her property. Any property to be acquired, in whatever manner, during the course of the marriage by each wife is also to be indicated as forming part of the property of such wife. The general rule is that the property or assets of each wife in a polygynous customary marriage should be kept as distinct as possible from the properties or assets of the other wives.⁶³

The properties or assets that were brought into the marriage by all spouses, including the husband, must be fully disclosed and a proposal made as to their ownership in the proposed contract. It is advisable that a separate contract be prepared and approved by the court for each wife of a customary marriage in a polygynous marriage. The arrangement envisaged by section 7(6) of the Act is that of complete separation of property between the husband and all his wives and the wives *inter se*.

7 Conclusion

The Recognition of Customary Marriages Act is one of the most important pieces of legislation in the field of family law in South Africa. It has brought to finality the thorny question relating to the legal status of a customary marriage in South Africa.

The requirements for a valid customary marriage are almost similar to those prescribed for a civil marriage except that a customary marriage has to be negotiated and entered into or celebrated in accordance with customary law.⁶⁴ A clear distinction is still, however, maintained between these marital relationships. One such distinguishing feature is the requirement relating to the provision of *lobolo*. Another feature is that a customary marriage is potentially polygynous. Although *lobolo* is usually negotiated and furnished in respect of a civil marriage by all the indigenous African peoples of South Africa, it is not a requirement for a valid civil marriage. It is, however, not surprising that indigenous African peoples in South Africa negotiate and provide *lobolo* even in respect of civil marriages.

The proprietary consequences of monogamous customary marriages are similar to those of civil marriages. Monogamous customary marriages are in community of property, with profit and loss, unless these consequences are excluded by an antenuptial contract irrespective of whether the customary marriage was entered into before or after the date of the commencement of the Recognition of Customary Marriages Act.⁶⁵

For the reasons mentioned in paragraphs two, three and four above, it is recommended that when the prospective spouses fail to enter into

⁶³ *Ibid.*

⁶⁴ See s 3 of Act 120 of 1998.

⁶⁵ See *Gumede v President of the Republic of South Africa supra* n 9.

an antenuptial contract, they should be allowed to conclude any agreement which will deal with the proprietary consequences of their marriage after the requirements for a valid customary marriage have been fulfilled. This may be achieved by amending section 7 of the Act to the effect that a contract, which has the similar impact as an antenuptial contract, may be entered into by the spouses after the handing over of the bride to the bridegroom or his family.

When a husband in an existing customary marriage wishes to enter into another customary marriage, he is expected to make an application to court for the approval of a written contract which is aimed at regulating the future matrimonial property system of his marriages.⁶⁶ Despite these provisions being phrased in seemingly peremptory language, it has been held that failure to comply therewith does not lead to the invalidity of the ensuing customary marriage, but that the said marriage should be regarded as being out of community of property.⁶⁷ All the requirements for the existence of a valid customary marriage must, however, have been complied with.⁶⁸ It has also been held that the consent of the female spouse of the existing customary marriage is a requirement for the validity of a second or further customary marriage.⁶⁹

Despite the ruling in *MM v MN*,⁷⁰ it is advisable that a husband who wishes to contract another customary marriage apply for the approval of a contract which will regulate the future matrimonial property system of his marriages so as to avoid possible conflicts of interests between his various wives.

66 S 7(6) of Act 120 of 1998.

67 *MM v MN supra* n 13.

68 *Fanti v Boto supra* n 27.

69 *MM v MN supra* n 13.

70 *Ibid.*