

Mshengu v Estate Late Mshengu 9223/2016P

Considering the ownership of house property in customary law

SUMMARY

The Recognition of Customary Marriages Amendment Act 1 of 2021 was enacted to address the proprietary consequences of customary marriages. This note examines the implications of the Amendment Act in light of the *Mshengu v Estate Mshengu 9223/2016P* judgment, which was decided shortly after the Amendment Act came into effect. Three key issues are analysed: first the potential conflict between the Amendment Act and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 in relation to the ownership of house property; second the challenges in classifying property as house or family property; and third the impact of the devolution of property on the rights of other family members. The analysis emphasises the importance of soliciting input from communities who live according to customary law and highlights the need for legislation that is flexibly drafted to accommodate nuanced customary law practices and provide avenues for redress in cases where statutory provisions yield unfair outcomes.

1 Introduction

In June 2021, the legislature brought into force the Recognition of Customary Marriages Amendment Act 1 of 2021 (Amendment Act). The Amendment Act amends the Recognition of Customary Marriages Act 120 of 1998 (Recognition Act) to reflect judicial interventions in the proprietary consequences of customary marriages. Just a few days after the Amendment Act came into force, the Pietermaritzburg High Court, in the unreported judgment of *Mshengu v Estate Mshengu 9223/2016P*, considered the Amendment Act's provisions in respect of the proprietary consequences of polygamous customary marriages concluded before the commencement of the Recognition Act. This note considers the implications of the *Mshengu* judgment on three particular issues. First, it notes the potential conflict between the Recognition Act (as amended) and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (Reform Act) in regulating the ownership of house property. Second, it examines the difficulties in the classification of property as house or family property in a customary marriage. Finally, the note considers the implications of the devolution of house and family property as envisaged in the *Mshengu* case on the entitlements of other family members to property in customary law.

2 *Mshengu v Estate Late Mshengu*

The facts of the *Mshengu* case are briefly summarised as follows. The deceased had concluded a customary marriage with the applicant in 1972 and a further customary marriage with the third respondent in 1981 (para 2). The deceased and the third respondent also concluded a civil marriage in 1994 (para 2), the validity of which was not disputed by

the parties but questioned by the court (para 6). The court did not pronounce upon the validity of the civil marriage and decided the matter based on the proprietary system applicable to polygamous customary marriages. The customary marriages were concluded before the commencement of the Recognition Act and, therefore, referred to as an “old polygamous customary marriage”. The deceased died in 2016 and left behind a will in which he bequeathed his entire estate to the third respondent (para 2). The deceased’s will was accepted by the Master of the High Court and the third respondent was appointed as the executrix of the deceased’s estate (para 2). The applicant sought an order to declare “that the estate of the deceased be liquidated, distributed fairly in accordance with customary law and the Master of this Court be directed to divide the deceased’s estate equally between the applicant and the third respondent” (para 3).

The applicant claimed that her customary marriage with the deceased was in community of property and that she was therefore entitled to half of the estate (para 3). On the other hand, the third respondent claimed that the customary marriage between the deceased and the applicant was out of community of property and that, in any event, the deceased’s will negated the applicant’s claim to the deceased’s estate (para 3). The litigants did not rely on the provisions of the Recognition Act, as amended, which the court speculated was because the Amendment Act had been enacted a mere two days before the matter was argued in court (para 20). The parties, further, offered no evidence or argument regarding the allotment of property to either party or interpretation of the newly amended Recognition Act (paras 20 and 23). In other words, there was no argument on whether the property had been allotted to the applicant or the third respondent and constituted a particular party’s house property or more general family property. Rather the claim was articulated in terms of “the applicant’s share of ownership to the deceased’s property by virtue of her customary marriage to the deceased.”

The court examined the provisions of the Recognition Act that relate to the proprietary consequences of old polygamous marriages (para 17). The provisions provide:

- 7(1)(a) The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act, are that the spouses in such a marriage have joint and equal
- (i) ownership and other rights; and
 - (ii) rights of management and control, over marital property.
- (b) The rights contemplated in paragraph (a) must be exercised –
- (i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and

- (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
- (c) Each spouse retains exclusive rights over his or her personal property.
- (d) For purposes of this subsection, ‘marital property’, ‘house property’, ‘family property’ and ‘personal property’ have the meaning ascribed to them in customary law.

The court identified three types of property from the provisions namely:

- (a) Family property that is allotted to a specific house, being property that is owned, managed, and controlled jointly by the husband and wife in that particular house concerned (para 19). Property allotted to a particular house is usually regarded as house property (Pienaar “Law of Property” in Rautenbach *Introduction to Legal Pluralism in South Africa* (2018) 122) and the Amendment Act explicitly refers to house property in setting out the proprietary consequences of an old polygamous customary marriage, as evident from the provisions quoted above. It is not apparent from the judgment why the court avoided the term “house property” in its discussion and referred to it as family property allotted to a specific house.
- (b) Family property that is not allotted to any of the wives’ houses and which is owned, managed, and controlled jointly by the husband and all the wives (para 19).
- (c) Finally, personal property is property over which a spouse has exclusive ownership (para 19).

The court’s definition of “property” refers to the spouses’ ownership and control of the property but is silent on the entitlements and rights of other family members to the property, which is explicitly provided for in section 7(1) of the Recognition Act. Furthermore, the court referred to section 4(3) of the Reform Act to affirm the right of the deceased to dispose of his property in a will (para 22). Section 4(3) of the Reform Act permits any party subject to customary law to dispose of their property through a will. The court rejected the applicant’s claim that the estate be distributed in terms of customary law on the basis that the deceased had left a valid will, which had not been challenged (para 22). The issue was thus a question of the extent of the applicant’s entitlement to the deceased’s estate based on her customary marriage. In other words, what were the applicant’s matrimonial property rights to the deceased estate?

The court interpreted the relevant statutory provisions to create a joint estate between the husband and wife in respect of house property and a joint estate shared equally between all spouses in respect of the family property. The court held that the applicant was entitled to “half of the family property that is allotted to her house, if any” (usually referred to as house property) and “one-third of the family property that is not allotted to any of the wives’ house[s], if any” (usually referred to as family property) (paras 1–2 of the order). The court ordered the third respondent to transfer to the applicant such property, and the third respondent was by implication entitled to retain the remainder of the

estate. The court made no order as to whether the applicant and third respondent's ownership of the property was curtailed by the interests of other family members. This is important because the statutory provisions provide that spouses must exercise their rights in respect of the property in the best interests of family members. It is not clear whether this restriction persists upon the devolution of the property.

3 Implications of the *Mshengu* case

The *Mshengu* case appears to be the first case to consider the proprietary consequences of old polygamous marriages under the new regime. The judgment raises several important implications regarding rights to house and family property which I discuss below.

3.1 Conflict between the Recognition Act and the Reform Act?

As discussed earlier on in this note, the court referred to the Reform Act which permits individuals who live according to customary law to dispose of property in their will. The court, however, made no mention of section 4(1) of the same Act which provides that:

Property allotted or accruing to a woman or her house under customary law by virtue of her customary marriage may be disposed of in terms of a will of such a woman.

The section provides that a woman may dispose of property accruing to her or her house – known as house property – by virtue of her customary marriage in terms of her will. Given the common-law rule that one cannot transfer more rights than one has, (the *nemo plus iuris* rule), it would be expected that women are the owners of house property to be able to dispose of such property in their wills. However, this conflicts with the Recognition Act which provides that spouses in a marriage have joint and equal ownership and rights of management and control over marital property which rights in respect of house property must be exercised jointly and in the best interests of the family unit constituted by the house concerned. The crux of the issue is whether women are the owners of house property (as envisaged by the Reform Act) or share joint ownership of house property with their husbands (as envisaged by the Recognition Act).

I propose that the Recognition Act takes precedence over the Reform Act in the regulation of the ownership of house property and that spouses have joint and equal ownership rights that must be exercised in the best interests of the family of the house concerned. This is because the statutory principle of interpretation *lex specialis* provides that where two or more pieces of legislation deal with the same subject matter, priority should be given to the legislation that is more specific to the subject matter (Tladi “Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga” 2016 *African Human Rights Law Journal* 317). In this regard, the Amendment

Act was specifically enacted to regulate the proprietary consequences of old customary marriages and provide for matters connected therewith (Preamble to the Amendment Act). The Act was precipitated by the Constitutional Court's declaration that the statutory provisions regulating the proprietary consequences of old polygamous marriages were unconstitutional and invalid (*Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) (*Ramuhovhi* CC)). The declaration of invalidity was suspended for two years to allow parliament to decide how to regulate the matter best (*Ramuhovhi* CC para 50). The very purpose of the Amendment Act was to bring the Recognition Act in line with, among others, the *Ramuhovhi* judgment and to regulate the proprietary consequences of old customary marriages (see Preamble to Amendment Act; and "National Assembly passes Recognition of Customary Marriages Amendment Bill" 2021 <https://www.parliament.gov.za/press-releases/national-assembly-passes-recognition-customary-marriages-amendment-bill> (last accessed 2023-06-01).

On the other hand, the Reform Act was enacted to regulate customary law succession and the devolution of property of people subject to customary law (Preamble to the Reform Act). In particular, section 4(1) of the Reform Act was enacted to address section 23(1) of the Black Administration Act 38 of 1927 which provided that:

movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.

The rationale for section 23(1) of the Black Administration Act was that all property in a household was considered to belong to the family head and provision was made for how the property would devolve upon the family head's death (South African Law Reform Commission *Report on the customary law of succession* Project 90: Customary law succession, (2004) 46). The South African Law Reform Commission (SALRC), however, noted that section 23(1) of the Black Administration Act was impractical under the current regime where customary marriages are by default in community of property unless provided for otherwise, and customary wives are equal to their husbands and can acquire and dispose of assets (*Report on the customary law of succession* 46). The SALRC thus recommended the repeal of section 23(1) of the Black Administration Act and for provision to be made for property allotted or accruing to a customary law wife to be devisable by will or in the event of no will in terms of the Intestate Succession Act 81 of 1987 (*Report on the customary law of succession* 46).

Section 4 of the Reform Act was thus meant to reinforce freedom of testation and make clear that women had freedom of testation over property allotted to them or accruing to their house rather than to regulate the proprietary consequences of spouses. The section means that women may in a will dispose of their share of property allotted to them or accruing to their house. This interpretation accords with the idea

that spouses are joint owners of the property while reaffirming a woman's right to freedom of testation. The proprietary consequences of a customary marriage are thus arguably regulated by the Recognition Act, as amended.

3 2 Classification of house/family property

The classification of property as family, house, or personal property has serious implications for the entitlements of individuals to the property. For example, in *Mshengu*, the court ordered that the applicant had an entitlement to a portion of the house and family property, if any, in the deceased's estate. The manner in which the case was pleaded (in that there was no evidence or argument as to whether the property had been allotted to a particular house) meant that the court did not actually decide whether any property constituted house or family property. This is very similar to the *Ramuhovhi* case where the court's ground-breaking order changed the proprietary regime of old polygamous customary marriages. The court in *Ramuhovhi* never engaged with the issue of whether the property in dispute, a shopping centre, would be classified as a house or personal property because the spouses to the marriage had predeceased the case and were not affected by the order. But this classification of property is of utmost importance and determinative of parties' proprietary rights.

For example, if the deceased's estate in the *Mshengu* case comprised personal property only, the applicant would have had no claim to the property. This is because the Recognition Act (as amended) provides that spouses retain exclusive rights over their personal property (section 7(1)(c) of the Recognition Act). The deceased in the *Mshengu* case left his entire estate to the third respondent in his will, and if the estate consisted of personal property only, the will would have been given effect to, and the applicant would have had no claim to the property. The classification of property is thus important and courts going forward are likely to face disputes regarding the classification of property and must be cognisant of the implications thereof.

In this regard, house property was historically understood as property that was allotted or accrued to a specific house (which consisted of a wife and her children) and was to be used for the benefit of that house (Bennett *Customary law in South Africa* (2004) 256). The family head retained control over the property but consulted the wife and oldest son the house in the use and control of the property (Pienaar (2018) 121). Historically, it typically consisted of the house itself, fields assigned to a particular wife, anything the wife brought into the marriage or the members of the house earned, damages paid for adultery, lobolo received for the marriage of a daughter, cattle earmarked for the house, and furniture and household items used in the house (Kerr *The customary law of immovable property and of succession* (1976) 160; Coertze *Bafokeng family law and law of succession* (1990) 245; and Bennett (2004) 256). The property formed a separate household estate and if there were three

wives, there were three household estates (Kerr (1976) 159). The wife and the children had a special interest in the property (Pienaar (2018) 122), reflected in the Amendment Act which requires a husband and wife to exercise their interests in respect of house property in the best interests of the family unit constituted by the house concerned (section 7(1)(b)(i) of the Recognition Act as amended).

On the other hand, historically, the family property belonged to the home (Ndima “The African law of the 21st century in South Africa” 2003 *Comparative and International Law Journal of Southern Africa* 330). The family head was not the owner of the property, even though he may have controlled the property as he exercised his rights over the property in the interests of other family members that shared in the property (Pienaar (2018) 120), not just the spouses (Ndima (2003) 332). Mbatha describes it as fields and livestock that have a production function and serve family interests (Mbatha “Reforming the customary law of succession” 2002 *SAJHR* 262).

Bolt and Masha discuss the significance of a “collective family house” in contemporary society. They argue that houses are often the most significant form of property and that family houses that serve the broader family interests may operate in urban areas though it has largely been ignored by the formal legal system (Bolt and Masha “Recognising the family house: A problem of urban custom in South Africa” 2019 *SAJHR* 148). The respondents in Bolt and Masha’s study describe a family house with reference to a custodian “who takes care of and preserves the property for future use” (Bolt and Masha 2019 *SAJHR* 156). It provides “shelter for family members in need of housing, rather than simply property owned by an individual or an asset on the market” (Bolt and Masha 2019 *SAJHR* 156). The property does not devolve in accordance with the rules of testate or intestate succession after the death of an elder but has a social function (Bolt and Masha 2019 *SAJHR* 156). It is used by the collective family, a place extended family members should have access to, and often assumed by a relative who does not have their own home as a way to afford them a sense of dignity (Bolt and Masha 2019 *SAJHR* 156). The interests of other family members in the family property are reflected in the Amendment Act which requires the husband and all the wives to exercise their rights in respect of family property jointly and in the best interests of the whole family constituted by all the houses (s 7(1)(b)(ii) of the Recognition Act as amended).

However, it is questionable whether every polygamous marriage has family and house property as discussed above. Imagine a scenario where a man marries a woman in accordance with customary law. The husband (in an all-too-common scenario) abandons his wife without divorcing her (similar to what happened in *Fungisani v Minister of Home Affairs* 2017 JOL 38091 (LT)). The wife builds up a small business to support herself and her children. The man then marries another woman in accordance with customary law, and the second wife supports the man until his death. This is a polygamous marriage as the husband never divorced his

first wife, but it is questionable whether any property in the marriage should be considered family property. I argue no, seeing as the property in question does not meet the definition of family property. It does not serve the broader family interests, nor is it administered by a custodian for use by current and future generations. The more difficult question is whether the property may be classified as house property. Historically, the earnings of members of the house would have been considered house property, such that the earnings of the respective wives would be considered house property. But this must be re-considered on the facts of each case and given the greater individualised manner in which people live. In the hypothetical scenario, the first wife, abandoned by her husband, accumulated the property and administers and manages the property herself. While the first wife may use the property to care for her family, this is done at her discretion, and it would be more accurate to describe the property as the personal property of the first wife. The second wife's property is more contentious as it is used by the second wife to support the husband and other members of the house. However, the determinative factor is arguably whether members of the household have a say in the use of the property. Where an individual exclusively manages and administers the property, the property is more appropriately described as personal property.

The difficulty, of course, is that in many instances, the husband will be the owner of the property, and notions of fairness and equity would often suggest that women should be able to share in the property. For example, consider our hypothetical scenario above in which a husband abandoned his first customary law wife without divorcing her and married another woman under customary law. In a slight tweak of the scenario, imagine that the husband relocated to Cape Town, where he married his second wife and runs a successful taxi business. The husband provides no support to the first wife, who is still in the Eastern Cape but supports the second wife. The taxi business in the hypothetical scenario is exclusively owned, operated, and administered by the husband, and while he may use it to provide for his family, he does it at his sole discretion. What are the matrimonial property rights of the wives in the polygamous marriage? The first wife does not appear to have any house property and the nub of the problem is whether the husband's business, which has not been allotted to any house, may be considered family property in which all spouses share equally. Such a classification would provide an equitable outcome as it would allow both wives to share in the property. However, the desire for an equitable outcome should not unduly stretch the meaning of family property to render it an artificial construct. As previously mentioned, family property was historically not owned by the family head but administered by the family head for the benefit of all family members. In our scenario, the husband operates the taxi business on his own accord, and the family does not have a say in how the business is run. Here the family members are not the owners of the taxi business and the property arguably does not fit the definition of family property – property that is owned by the collective family. The

property should rather be classified as the personal property of the husband.

Unfortunately, the hypothetical scenario is an all-too-common reality for many South Africans. For example, see the factual matrix of *Mrapukana v Master of the High Court* 2008 JOL 22875 (C). De Souza also relates how women may have their own property they want to protect from claims from other family members. She relates how a man who was marrying his third wife, sought to register the marriage to protect the third wife's proprietary interests. The third wife established a tuck shop before marrying her husband and used proceeds from the shop to buy a car (De Souza "When non-registration becomes non-recognition: examining the law and practice of customary marriage registration in South Africa" 2013 *Acta Juridica* 240). It is questionable whether such property should be classified as house or personal property.

The reality is that in some polygamous marriages, there will be neither house nor family property and courts should be cautious about labelling property as such. The *Ramuhovhi* judgment and now the Amendment Act does not create a general joint estate between the parties. Rather, it sets out the entitlements of family members to house and family property, where such property exists. Spouses remain the exclusive owners of their respective personal property. This may not always yield a satisfactorily equitable outcome, but the answer is not to distort the customary understandings of house and family property. It may require a reconsideration of how personal property is treated and the use of other legal mechanisms such as maintenance claims and forfeiture and redistributive orders to achieve an equitable result.

3 3 Devolution of house/family property

Finally, the *Mshengu* judgment assumes that house and family property is capable of division and devolution like any other property. In the context of the judgment, in which there was no particular property in dispute, it was not an issue. In other cases, in which there is particular property that may genuinely function as house or family property this is problematic. Bolt and Masha explain this with a poignant example (Bolt and Masha 2019 *SAJHR* 159). The eldest son was the custodian of his deceased parents' home. The son did not reside on the property, but his sister did. Nonetheless, the son had registered the property in his own name. Upon the son's death, his wife claimed the property on the basis of her marriage in community of property with the son and purported to evict the sister and sell the home. The matter was settled outside of court with an agreement to divide the house equally among the surviving siblings and the deceased brother's spouse. This required a reverse transfer of the property from the father to the son and a division of the property amongst all the children and the surviving spouse.

The case illustrates clearly that the devolution of the property to a surviving spouse risks obliterating the rights of other family members.

While one individual may be the custodian of the property and even the registered owner from a state perspective, a family house sustains the collective family whose rights and entitlements to the property should not be so easily overlooked. The custodian of the property is obliged to care for the property for the extended family, who have entitlements of use and enjoyment thereto (Himonga and Moore *Reform of customary marriage, divorce and succession in South Africa: Living customary law and social realities* (2015) 254). Furthermore, it is expected that the property will remain outside the formal administration process to be passed through the patrilineal line (Bolt and Masha 2019 *SAJHR* 157-158). This is confirmed by Himonga and Moore who report that generally family property is excluded from the estate for the purposes of administration and devolution (Himonga and Moore (2015) 256). The exclusion of family property from the formal administration system goes to its purpose and Himonga and Moore affirm the concept of family property “as an umbrella whose radius covers family members’ needs across generations” (Himonga and Moore (2015) 254). For example, the property may be used to perform marriage rituals or as a last resort for family members experiencing difficulties (Himonga and Moore (2015) 255). The property cannot be distributed to the members of one generation as such division deprives future generations of the benefit of the property (Himonga and Moore (2015) 254).

The *Mshengu* case, however, sets a dangerous precedent for courts to order that house and family property may devolve on the spouses of a marriage. However, once again because of the manner in which the case was pleaded, it is unclear what this order of devolution entails or how it was effected in practice. But the principle that house and family property can devolve on spouses is problematic. It results in an almost erasure of the wider family members’ interests as individual ownership is prioritised over family and communal interests in the property (for a discussion of the prioritisation of individual interests over communal interests, see Himonga and Moore (2015) 234; and Weeks “Customary succession and the development of customary law: The Bhe legacy” 2015 *Acta Juridica* 251-252). This further undermines customary law understandings of family property and its function in supporting the greater family.

Of course, the courts are empowered to make orders for the devolution of the property by the Amendment Act which explicitly provides that spouses have joint and equal ownership of family property. The reference to the ownership of the property goes further than the High Court judgment in *Ramuhovhi* which conferred on spouses’ equal rights of management and control over the property but stopped short of conferring upon them ownership rights (*Ramuhovhi v President of the Republic of South Africa* 2016 6 SA 210 (LT)); for a comprehensive discussion of the judgment see Osman and Himonga “The constitutionality of section 7(1) of the Recognition of Customary Marriages Act: *Ramuhovhi v President of the Republic of South Africa*” 2017 *The Journal of Legal Pluralism and Unofficial Law* 166). The

Constitutional Court acknowledged that the conferral of ownership on spouses constituted a significant departure from the High Court's order but intimated that this best accords with the equality of spouses (*Ramuhovhi* CC para 51). Neither the Constitutional Court judgment nor the Amendment Act, however, elaborated on the implications of conferring ownership on spouses for other family members' rights to the property. Considering how family property is understood and the entitlements of the broader family thereto, the conferral of ownership on spouses is disconcerting. It raises questions as to the continued rights and entitlements of other family members to family property. The Amendment Act provides that family members have the right to have their interests considered in the administration of the property, but these rights pale in comparison to the rights of ownership. The risk is that spouses may sell the property, leaving other family members with no rights or compensation.

4 Recommendations and conclusion

The SALRC is currently investigating the matrimonial consequences of, amongst others, customary marriages. The Issue Paper called for input on the differences in house, personal, and family property, the nature of property rights in marriages, whether matrimonial property rights are adequately protected and how the matrimonial property rights of customary marriages should be regulated (SALRC "Review of Aspects of Matrimonial Property Law. Project 100E: Issue Paper 41" (2021) 22-23). The solicitation of input from communities who live according to customary law is to be commended as it is vital to drafting laws that adequately recognise and protect people's rights. In this regard, the Amendment Act is based on submissions made by the Women's Legal Centre Trust in the High Court in the *Ramuhovhi* case as to how the proprietary consequences of customary marriages should be regulated which may not reflect lived realities. The submissions by communities must guide the formulation of the law.

Furthermore, I recommend that the legislation be flexibly drafted to accommodate the nuances and variations in customary law. In some instances, the distribution of property to the spouses may be unfair and result in the erasure of other family member entitlements who contributed to the property. On the other hand, in other cases, allowing family members to have entitlements to property may prejudice the already tenuous property rights of women. In this regard, the *Ramuhovhi* judgment provided that parties may approach the court for a variation of the order in the event of harm not foreseen by the judgment (*Ramuhovhi* CC para 71). This degree of flexibility is necessary because of the myriad of ways in which property may be amassed and used and the varied relationships people may have with the property. Forthcoming legislation would do well to similarly allow affected parties to approach courts for relief where the statutory provisions yield unsatisfactory outcomes. While this introduces a measure of uncertainty, flexibility is needed to guard against rigid and definitive orders which often cause unintended

harm in a customary law setting. It also allows for an approach, advocated by Mnisi and Claassens, that acknowledges the constant contestation regarding the content and definition of rights rather than prescribing a fixed legal content (Mnisi and Claassens “Rural women redefining land rights in the context of living customary law” 2009 *SAJHR* 493). The obvious critique of this proposal is that this is impractical, and it is unfeasible to expect courts to adjudicate contestations with such uncertainty. However, the critique – and truthfully our current approach in regulating customary law matters – overlooks the flexible nature of customary law which may yield a different outcome depending on the circumstances. A flexible approach that more accurately reflects the nature of customary law is long overdue, and perhaps will finally yield a more satisfactory outcome.

The *Mshengu* case represents the first occasion the court had to consider the implementation of the Amendment Act for old polygamous marriages. The manner in which the case was pleaded meant that the court did not grapple with the classification of property. Rather the court applied the statutory provisions in general terms to provide that the applicant was entitled to half the house property and a third of the family property. The judgment assumes that such property is capable of devolution to individual spouses. This assumption poses a risk to the understanding of customary law property and ownership and, more dangerously, risks the obliteration of other family members’ interests in the property. There is further a potential conflict regarding the ownership of house property with the Reform Act which provides that women may dispose of house property in their wills. The note explores these difficulties and argues that the SALRC investigation into the matrimonial property rights of customary marriages presents an ideal opportunity for the formulation of legislation that better accords with lived realities and customary law understandings of property and ownership. In addition, the provisions must be flexible to reflect the adaptive nature of customary law and to respond to different needs as they may arise.

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