

# Towards an Afrikan Approach in Resolving the Conundrum Between a Civil and Customary Marriage

**Aubrey Manthwa**

<https://orcid.org/0000-0001-5510-3558>

University of South Africa

[manthat@unisa.ac.za](mailto:manthat@unisa.ac.za)

## Abstract

Since the dawn of colonialism, customary marriages have been considered inferior to civil marriages. The treatment of customary law as inferior, has racial connotations, as the colonists viewed Africans as barbaric. Since the Constitution of the Republic of South Africa, 1996 took effect, the Constitutional Court pledged a commitment to afford Afrikan jurisprudence an independent identity to prevent it from being viewed as inferior to the common law. Section 10 of the Recognition of Customary Marriages is problematic because it states that a customary marriage can be overridden by a civil marriage. The courts' argument that customary law and common law enjoy equal status is not true when one considers how courts have relied on the common law in customary law disputes. South Africa needs a decolonised option because judicial pronouncements and legislation have reaffirmed the superior state of the common law, as introduced by the colonists. Developments in the wake of the death of King Zwelithini, who was in a polygynous marriage, have implications for the debate whether a customary marriage concluded after a civil ceremony is valid, or whether a civil marriage and a customary marriage could co-exist. A solution is needed for this conundrum, because declaring customary marriages invalid is not beneficial to women married under this system.

**Keywords:** Customary marriages; family property; King Zwelithini; KwaZulu-Natal; polygynous marriages; Afrikan approach

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## Introduction

In 2022 the first wife of the late King Zwelithini, Queen Sibongile Dlamini, lodged an application in the Pietermaritzburg High Court, claiming fifty per cent of the late king's estate. The estate is worth more than R71 million and includes the Ingonyama Trust, of which the king was the sole trustee.<sup>1</sup> Their marriage was contracted under civil law in community of property in 1969. The marriage took place before the coronation of King Zwelithini, in accordance with Zulu custom. King Zwelithini concluded customary marriages with other women while married to Queen Dlamini,<sup>2</sup> who contends that she is the only legitimate wife of the deceased as she was married under civil law. This case calls for a revisit of the debate by scholars and courts on whether a customary marriage and a civil marriage can co-exist, and if one overrides the other, which one should it be?

Before colonialism, traditional customary marriages were the only recognised marriages. However, after the Dutch colonists introduced their system of Roman Dutch law, civil marriage was the only legally recognised form of marriage in South Africa, with customary marriages receiving limited recognition. The civil marriage enjoyed superior status where Native Appeal Courts could hold that its conclusion terminated an existing customary marriage.<sup>3</sup> The problem today is that, although South Africa is under a constitutional dispensation where the Constitutional Court has committed to afford customary law its space, free of the control of colonial and apartheid practices, a hierarchy still exists where the status of the civil marriage is superior to that of the customary marriage.<sup>4</sup> If a civil marriage cannot co-exist with another form of marriage, the women in polygynous relationships will face dire consequences as it will mean that their marriages are not legally recognised. The marriages of the late King Zwelithini indicate that at least five wives stand to be affected by this situation.

This contribution aims to ascertain whether customary law indeed functions independently of the common law. It argues that the legislative reforms of the Constitution, legislation and judicial pronouncement to date have not improved the position of customary law or customary marriages. A different approach that is rooted in decolonising the law of customary marriage must be considered. Firstly, a historical background of customary marriage in South Africa is provided, including the position

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1 Sandisiwe Shoba, 'Goodwill Zwelithini's Eldest Wife Says Hers Was the Only Legitimate Marriage to late King – and Demands Half of his Estate' *Daily Maverick* <<https://www.dailymaverick.co.za/article/2021-05-04-goodwill-zwelithinis-eldest-wife-says-hers-was-the-only-legitimate-marriage-to-late-king-and-demands-half-of-his-estate/>> accessed 22 April 2022.

2 *ibid.*

3 *Matchika v Mnguni* (1946 NAC 78 (N&T) 79) para 61–62; *Tonjeni v Tonjeni* (1947 NAC 8 (C&O) 9) and the *Malaza* para 74.

4 Papa Maithufi and GMP Moloi, 'The Current Legal Status of Customary Marriages in South Africa' 2002 TSAR 602. Section 10 of the Recognition of Customary Marriages Act for example, allows for a customary marriage to be converted into a civil marriage, but a civil marriage cannot be converted into a customary marriage.

in KwaZulu-Natal, followed by an account of legislative reform in the post-apartheid era. It then provides an overview of the development in the matter of King Zwelithini, followed by a conclusive argument that customary marriage law needs to be separated from the Roman-Dutch law approach by finding solutions in indigenous value systems.

## Historical Background

The practice of customary marriage was an important legal building block and process for traditional families.<sup>5</sup> It constitutes a value system that not only centred on the needs of individuals but also the group they belonged to.<sup>6</sup> Traditionally, the negotiation and conclusion of a polygamous marriage involved two kinship families, the conclusion of which was the establishment of a different house for each wife. These were economic units that functioned according to a ranking system of wives and their children. The first/great wife occupied the highest-ranking house, and the others were ranked based on the date of marriage.<sup>7</sup> Property was divided into general and family property. The general property consisted of contributions by the individual members of the houses (wives and children) together with *lobolo* money and property allotted by the head of the family.<sup>8</sup> Family property was acquired by the head of the family and he used it to support the houses.

Traditionally, polygyny was an important hedge against poverty. It also ensured that husbands were not lured away by other women because of the imbalance in the number of men and women.<sup>9</sup> The responsibility to care for wives and children lay with men who could handle this because of the balance in agricultural subsistence.<sup>10</sup> However, the position of customary law changed with the advent of colonialism. Roman-Dutch law and the custom of civil marriage became the general law of the land, with the result that polygamous customary marriages were legally frowned upon. Customary marriage was viewed as contrary to the Christian belief that a man must have only one wife. The colonists viewed polygyny as a form of slavery that needed to be abolished and replaced with monogamy.<sup>11</sup> Many men converted to Christianity, which also meant converting to civil marriage with one wife.<sup>12</sup> This resulted in the customary wives of the husband

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5 Chuma Himonga and Thandabantu Nhlapo (eds), *African Customary Law in South Africa – Post Apartheid and Living Perspective* (Oxford University Press 2014) 92.

6 Thandabantu Nhlapo, *Marriage and Divorce in Swazi Law and Custom* (Websters 1992) 44.

7 Jackie Heaton, *South African Family Law* (2nd edn, Lexis-Nexis 2010) 210–211.

8 TW Bennett, *Customary Law in South Africa* (Juta 2004) 1–7.

9 Sylvia Wairimu Kang'ara, 'Beyond Bed and Bread: Making the African State Through Marriage Law Reform Constitute and Transformative Influence of Anglo-American Legal Thought' (2012) *Comp L Rev* 46.

10 JK Muthungi, 'Polygamy and the Church in Africa' (1995) *Africa Journal of Evangelical Theology* 57.

11 Kang'ara (n 9); Bennett (n 8) 189.

12 Dial Dayana Ndima, 'The African Law of the 21st Century in South Africa' (2003) *CILSA* 318.

being left without legal protection after the conclusion of the civil marriage.<sup>13</sup> The conversion to and conclusion of civil marriage resulted in customary marriages being declared invalid because the two marriages could not co-exist.

Section 22(5) of the Black Administration Act provided that the customary marriage was invalid, and this was confirmed in several other judgments.<sup>14</sup> In *Malaza v Mndaweni*,<sup>15</sup> the court concluded that the customary marriage was void and in conflict with the common law, which provides that a marriage must be monogamous.<sup>16</sup> This was confirmed in other judicial pronouncements such as *Ndlovu v Ndlovu*.<sup>17</sup> Monogamous marriages were afforded preferential treatment, and those who concluded customary marriages would be refused entry into the church. Polygyny continued, notwithstanding the pressure to put a stop to it. Some who resisted Christianity formed their own churches, such as the Nazarite Baptist Church in South Africa.<sup>18</sup> Customary marriages, however, received less recognition, and special courts were created to legally recognise marriages between Blacks, provided they were not against public policy.<sup>19</sup>

### **Piecemeal Recognition of Customary Law**

Customary law eventually received piecemeal legal recognition, for the purpose of tax and maintenance.<sup>20</sup> In *Ex parte Minister of Native Affairs: In re Yako v Beyi*,<sup>21</sup> the court followed a standard approach to customary law—it was applied to individual cases in exceptional circumstances. The legal recognition was dependent on the court, and the individual had no choice. The court decided, based on the culture and lifestyle of the individual, which laws were applicable.<sup>22</sup>

In *Kumalo v Jones*,<sup>23</sup> for example, the court departed from the previous by declaring that the customary marriage enjoyed legal status for the protection of the children and wife, and that the validity of the marriage should be determined in terms of customary law.<sup>24</sup> Thus, whether a customary marriage continued, should be based on the living customary law—it could not be determined in terms of the common law. Living

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13 Bennett (n 8) 239–240; Nicole Peart ‘Civil or Christian Marriage and Customary Unions: The Legal Position of the “Discarded” Spouse and Children’ (1983) CILSA 42.

14 38 of 1927.

15 1975 BAC 45 (C) 55).

16 Papa Maithufi and G M B Moloi, ‘The Need for the Protection of Rights of Partners to Invalid Marital Relationships: A Revisit of the “discarded spouse” Debate’ (2005) *De Jure* 144–145.

17 1937 NAC 80 (N&T) 84–85. See *Nkambula v Linda* 1951 1 SA 377 (A) and *Kumalo v Kumalo* 1954 NAC (S) 54.

18 *ibid.*

19 Section 11 of the BLA.

20 Fatima Osman, ‘The Ascertainment of Living Customary Law: An Analysis of the Constitutional Court’s Jurisprudence’ (2019) 51(1) *The Journal of Legal Pluralism and Unofficial Law* 98.

21 1948 (1) SA 388 (A).

22 Himonga and Nhlapo (n 5) 83.

23 *Kumalo v Jonas* 1982 AHK 111 (S).

24 *ibid.*

customary law rests upon unwritten laws based on the binding authority of the people whose customs are under consideration.<sup>25</sup>

The position of the court in *Kumalo* was that a statutory repeal was required to state that the contracting of a civil marriage would annul the customary marriage. However, the court argued that it was not in a position to declare the customary marriage void if the legislature had not done this.<sup>26</sup> The outcome in *Kumalo*, nonetheless, seemed to consider the fact that although the validity of the customary marriage was uncertain, it had consequences for the spouses and children. Section 22(7) of the Black Administration Act provided that the customary wives of the husband were still entitled to claim financial rights in the form of support. The husband had to declare any property that he had allocated to his customary wives and children as limited protection before entering into a civil marriage. The customary marriage wife was further entitled to a maintenance claim upon the husband's death in terms of the law of succession.<sup>27</sup>

In 1988 the Black Administration Act was amended by section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 to allow spouses in a customary marriage to enter into a civil marriage, provided the husband was not a partner of another woman in an existing customary marriage. The Black Administration Act was, however, not the only legislation regulating customary marriages. KwaZulu-Natal had its own statutory regulation of customary marriages.

### **The Position in KwaZulu-Natal**

The legal regulation of customary marriages in KwaZulu-Natal was divided, based on the positions held by the KwaZulu Act,<sup>28</sup> on the Code of Zulu Law<sup>29</sup> and the Natal Code of Zulu Law of 1987. Section 36 of the Code of Zulu Law did not allow a person to contract a customary marriage during the subsistence of a civil marriage. In *Nontobeko Virginia Gaza v Road Accident Fund Durban and Coastal Local Division*,<sup>30</sup> the deceased was married to the plaintiff by customary rites registered in terms of the Natal Code of Zulu Law and also to another wife by civil law, concluded before the customary marriage. Both women claimed for loss of support. The court ordered absolution from the instance on the grounds that legislation for claiming loss of support is not intended for plaintiffs who concluded a customary marriage. The decision was set aside by the

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25 Chuma Himonga, 'The Future of Living Customary Law in African Legal Systems in the Twenty-first Century and Beyond with Specific Reference to South Africa' in J Fenrich, P Galizi and T E Higgins (eds), *The Future of African Customary Law* (CUP 2011); South African Law Commission, *Project 90: The Harmonisation of the Common Law and the Indigenous Law 1998* (SALRC 1999) 31.

26 *Kumalo v Jones* para 114–115 cited by Osman F 'The Million-rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?' (2019) PELJ 4.

27 Bennett (n 8); Chuma Himonga, 'Marriage' in F Du Bois and others (eds), *Wille's Principles of South African Law* (Juta 2007) 362.

28 16 of 1985.

29 See also *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) para 29.

30 Unreported, case number 314/04.

Supreme Court of Appeal (SCA), which did not deal with the issues between the parties but did order that the spouse in a customary marriage was entitled to a claim for loss of support.<sup>31</sup>

The continued regulation of customary marriages by means of the above pieces of legislation is problematic because it constitutes official customary law.<sup>32</sup> Any legislation regulating customary law associated with colonialism and apartheid is a no-go area in post-apartheid South Africa.<sup>33</sup> The entire Zulu Law Code should be declared unconstitutional by the KwaZulu-Natal Traditional Leadership and Governance Act,<sup>34</sup> because of its subjugation of customary law to civil law.<sup>35</sup> Moreover, it constitutes precedent, and the regulation of customary law by relying on precedent is discouraged because customary law differs from one community to the next. Circumstances, and thus the precedent, may also differ from one community to the next.<sup>36</sup>

It is important to determine whether the discrimination against Black women in customary marriages and the preferential treatment of civil marriages have changed in the post-Apartheid era. The preferential treatment of civil marriages has been problematic to vulnerable women as they did not have a choice as to whether the matrimonial property regime of their marriages was in or out of community of property, for example.<sup>37</sup> Preferential treatment of the civil marriage can have devastating consequences for King Zwelithini's other wives.

## Post-apartheid Legal Regulation

The post-apartheid era in South Africa commenced with the enactment of the 1996 Constitution,<sup>38</sup> which suggested that customary law would be treated more fairly. Section 9(3) of the Constitution prohibits discrimination based on ethnic origin and culture and confers the right to be governed in terms of one's custom.<sup>39</sup> Section 15 also supports the integration of customary law into the mainstream legal system. The Constitutional Court stated in *Alexkor v Ritchveld* that the time had passed where customary law is glossed over and observed through the common law lens.<sup>40</sup> In *Thembisile v Thembisile*, the court seemed to rely on apartheid legislation in the form

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31 See discussion by J C Bekker and I P Maithufi, 'The Existence and Proof of Customary Marriages for Purposes of the Road Accident Fund Claims' (2009) *Obiter* 168.

32 Himonga and Nhlapo (n 5) 34.

33 *Dalisile v Mgoduka* (5056/2018) [2018] ZAECMHC.

34 See s 51(3) of Act 5 of 2005.

35 Himonga and Nhlapo (n 5) 83.

36 Tshepo Aubrey Manthwa, 'Handing Over of the Bride as a Requirement for Validity of a Customary Marriage' (2019) THRHR 662.

37 *Mshengu v Mshengu* 9223/2016P.

38 Act 103 of 1996.

39 Himonga and Nhlapo (n 5) 18–19.

40 Paragraph 51.

of the Marriage and Matrimonial Property Amendment Act.<sup>41</sup> As a positive, the court held that a civil marriage concluded while a customary marriage existed, was invalid. Regrettably, the court referred to a customary marriage as a union as described in section 35 of the Black Administration Act.<sup>42</sup> This is a clear indication that customary marriages enjoyed an inferior status—they were not even recognised as marriages but as customary unions. In *Ngqobela v Sihele*,<sup>43</sup> the court stated that a union founded on native customs and usages is not a marriage, regardless of the rights that may have been bestowed upon it. In *Netshituka v Netshituka*, the SCA declared a civil marriage invalid because it was contracted while a customary marriage was still in existence.<sup>44</sup>

The Recognition of Customary Marriages Act was enacted in 1998 and brought significant changes to customary law.<sup>45</sup> These were targeted at patriarchal elements and the treatment of women as inferiors.<sup>46</sup> The Act introduced section 6, which aims to achieve equality between spouses; it introduced court-granted divorces, the codification of the matrimonial property system and the introduction of the registration process. Some of the provisions of the Act are, however, not without controversy. This includes the management of polygyny, the question whether *lobolo* is still a requirement for validity of a customary marriage, the unpredictable nature of *lobolo* and the integration of the bride.<sup>47</sup> Section 7(6) of the Recognition of Customary Marriages Act requires the husband to conclude a court-approved written contract when he wishes to conclude a polygamous marriage. If the husband does not conclude it, then the second and subsequent wives will not be protected.<sup>48</sup>

To date, it is not clear whether court-approved contracts do in fact get registered by husbands at the Department of Home Affairs. If so, it is suspected to be very few.<sup>49</sup> Questions remain on how best to regulate the proprietary consequences of a polygamous marriage. Should the first marriage be in community of property, what property regime will apply to the second marriage? Can two matrimonial property regimes co-exist in community of property? Heaton and Kruger<sup>50</sup> argue that the application of community

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41 Paragraph 32. See also Elsje Bonthuys and Sanele Sibanda, ‘Till Death Us Do Apart: *Thembisile v Thembisile*’ (2003) SALJ 786.

42 2002 (2) SA 209 (T) para 2–3.

43 1982–1983 10 SC 346 at 352.

44 2011 (5) SA 453 SA.

45 120 of 1998.

46 Himonga and Nhlapo (n 5) 91.

47 Gardiol van Niekerk and Gugu Nkosi, ‘The Unpredictable Judicial Interpretation of Section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998: *Eunice Xoliswa Ngema v Sifiso Raymond Debengwa* (2011/3726) [2016] ZAGPJHC 163 (15 June 2016)’ (2018) 81 THRHR 349.

48 See Rita Ozoemena, ‘Legislation as a Critical Tool in Addressing Social Change in South Africa: Lessons from *Mayelane v Ngwenyama*’ (2015) PELJ 985.

49 M de Souza, ‘When Non-registration Becomes Nonrecognition: Examining the Law and Practice of Customary Marriage Registration in South Africa’ (2013) AJ 261.

50 Jackie Heaton and Hanneretha Kruger, *South African Family Law* (4th edn, Lexis-Nexis 2015) 224; Pieter Bakker, ‘The New Unofficial Customary Marriage: Application of S 7(6) of the Recognition of Customary Marriages Act 120 of 1998’ (2007) 70 THRHR 485–489.

of property in polygynous marriages is unfair because more than two parties cannot share equally in a joint estate. The High court in *Ramuhovhi v President of the Republic of South Africa*<sup>51</sup> recognised that by declaring the second marriage out of community of property is prejudicial to the second wife, especially when one considers that traditionally women have been excluded from property ownership by the colonists in cahoots with some traditional leaders.<sup>52</sup> In many cases, marriages were entered into from unequal positions. The Act was enacted with the purpose of achieving gender equality and protect women from hardship,<sup>53</sup> but it is difficult to achieve these goals in practice.<sup>54</sup>

The Recognition of the Customary Marriages Amendment Act was enacted to change the proprietary consequences of polygynous Afrikan marriages to achieve a measure of equality.<sup>55</sup> Section 2 of the Amendment Act states that the proprietary consequences will ‘continue to be governed by customary law.’ The Act refers to joint and equal ownership of a house and family property and management rights and control of the marital property. This does not reflect a system of Afrikan law where family and house property are jointly owned. What, for instance would be the role of the other women in the polygynous marriage when the first wife already has joint ownership in a system where such concepts are foreign? Joint ownership of the family's property by the man and first wife must be seen as an attempt to kill polygyny because the other wives would have no say. Joint ownership can, after all, only exist between two people—it cannot exist in polygynous marriages.

Thus, it is argued that the civil marriage is still a superior form of legal marriage, despite legislative and judicial pronouncements meant to change the outcomes of customary marriages. Part of the reason is the Amendment Act’s reference to joint ownership of family and residential property, which is borrowed from common law proprietary consequences of marriage. Moreover, the superiority status can be seen in section 10 of the Recognition of Customary Marriages Act.

### **Impact of Section 10 of the Recognition of the Customary Marriages Act**

Of interest for this contribution is the interpretation of section 10 of the Recognition of the Customary Marriages Act, which provides that a customary marriage can be converted into a civil marriage by the parties if neither of them has concluded a marriage with a third party. Section 10 also states that the parties can conclude an antenuptial

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51 *Ramuhovhi v President of the Republic of South Africa* 2016 (6) SA 210 (LT).

52 Anthony Diala and Bethsheba Kanga, ‘Rethinking the interface between customary law and constitutionalism in Sub-Saharan Africa’ 2019 *De Jure* 197.

53 Tshepo Aubrey Manthwa, ‘Towards a New Form of Customary Marriage and Ignorance of Precedence’ (2021) *TSAR* 198 at 200.

54 Roxanne Juliane Kovacs, Sibongile Ndashe and Jennifer Williams, ‘Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa’ (2013) *AJ* at 291.

55 Act 1 of 2021.



contract to regulate the proprietary conditions of a civil marriage. It is, however, unclear what this means for the subsisting customary marriage. Will the customary marriage be regulated by the antenuptial contract, or is the estate dissolved by customary law?

There are still parties who prefer to conclude a customary marriage only. For many, it will be the only form of marriage socially acceptable within their families and communities.<sup>56</sup> These parties must be protected because it might be the only form of marriage they understand and prefer because of its association with ancestral acquiescence and social acceptance by families and communities.

It is, however, common in South Africa for parties to enter into a civil marriage after concluding a customary marriage. Many still deliver *lobolo* and perform the integration of the bride with a ritual to appease the ancestors and families.<sup>57</sup> But then they will also conclude a civil marriage as they would want it to be solemnised by a pastor or marriage officer,<sup>58</sup> with a marriage certificate providing official proof of marriage.<sup>59</sup> However, some argue that in many cases, this is done for the purpose of concluding dual marriages which are common in South Africa, but not because the parties want to convert their marriage to a civil marriage, believing that it is the better marriage.

In terms of section 10 of the Act it is unclear whether two marriages can co-exist or whether a civil marriage overrides the customary marriage. The position of law reform in South Africa is that the civil marriage is the preferred one because of legal certainty and because it is easier to regulate one marriage.<sup>60</sup> This position is, however, problematic because it reinforces the historical dominance of the civil marriage over customary marriages.<sup>61</sup> Even more important is the question of whether the husband in a civil marriage is prohibited from concluding further customary marriages. Another issue arises when parties who concluded both a civil and a customary marriage decide to go through only one divorce; that is, to dissolve either the customary or the civil marriage. Does this nullify both marriages?

An example of this is *Mandela v Executor Estate Late Nelson Rolihlahla Mandela*.<sup>62</sup> The late Winnie Madikizela-Mandela argued that her marriage to Nelson Mandela continued to exist until death despite the latter concluding a civil marriage with another woman without first dissolving the customary marriage. The question is whether the

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56 WCM Maqutu, 'Lesotho's African Marriage is not a "Customary Union" (1983) CILSA 377.

57 Tshepo Aubrey Manthwa, 'Lobolo, 'Consent as Requirements for the Validity of a Customary Marriage and the Proprietary Consequences of a Customary Marriage' (2017) *Obiter* 437; Gabriel Setiloane, *The Image of God Among the Sotho-Tswana* (Rotterdam Balkema 1975) 43; Tiyo Soga, *Intlalo KaXhosa* (Lovedale Press 1937) 129–130.

58 Chuma Himonga and Elena Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (1st edn, Juta 2015) 114–115.

59 *ibid.*

60 Osman (n 26) 10.

61 Bennett (n 8) 237–238.

62 2016 2 AIC 833.

conclusion of the civil marriage rendered the customary marriage invalid, or did they co-exist? The favoured position by courts is that the civil marriage should be the preferred marriage because it is easy to prove.<sup>63</sup>

Courts should be alert to the dangers of genuflecting towards the civil marriage as the preferred marriage because of its outcome after divorce or death. This should be avoided in the King Zwelithini matter so that the colonial subjugation of customary law is not affirmed. It has the same racial connotation as the colonial and apartheid era when the Code of Zulu Law and the Black Administration Act allowed the conversion of a customary marriage into a civil marriage but did not make provision for parties to conclude a customary marriage after a civil marriage. This was left to the courts, who have been unpredictable in their pronouncement on the validity of a customary marriage.<sup>64</sup>

It is argued that if the Constitution was negotiated in good faith or if it was meant to usher South Africa into a bright future, then section 10 of the Recognition of Customary Marriages Act should be declared unconstitutional. Not only does the preference of the colonial, white, civil marriage have racial connotations, but it also conflicts with the constitutional recognition of customary law as being equal to civil law regarding marriages.<sup>65</sup> It does not make sense that parties in a customary marriage must convert to a civil marriage when the two marriages are supposed to have equal status and proprietary consequences. It is problematic that this happens under a Constitutional South Africa. It is difficult to buy into an argument that the wording of section 10 allowing parties to convert their customary marriages into civil marriages but not allowing the opposite does not mean that the customary marriage is treated as inferior.<sup>66</sup> Inadvertently or deliberately, the legislature has created a position where a marriage concluded by civil law cannot be converted into a customary marriage.<sup>67</sup> The husband would have to divorce his wife before he can conclude a customary marriage with her.

The position is unrealistic because people do not structure their lives in terms of concluding either one or the other; they marry adhering to rituals while observing the Western system.<sup>68</sup> The truth is that the conclusion of a civil marriage results in the dissolution of a customary marriage. This historically enabled a situation where a husband could abuse the legal system to get rid of his existing customary wives.<sup>69</sup> The Transkei Marriage Act<sup>70</sup> made it possible for a man in a civil marriage to marry another

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63 Osman (n 26) 14.

64 Van Niekerk and Nkosi (n 48) 349.

65 Osman (n 26) 11.

66 South African Law Reform Commission, *Project 90: The Harmonisation of the Common Law and Indigenous Law, Report on Customary Marriages 1998* (SALRC 1999) para 3.3.6.

67 Elsje Bonthuys and Marius Pieterse, 'Still Unclear: The Validity of Certain Customary Marriages in Terms of the Recognition of the Customary Marriages Act' (2000) THRHR 623.

68 Bonthuys and Pieterse (n 67) 624.

69 Bennett (n 8) 190.

70 21 of 1978.

wife under customary law, provided the civil marriage was out of community of property. It is unclear whether parties who concluded their marriages under the Code of Zulu Law enjoy protection under the Recognition of Customary Marriages Act. It is further not clear if marriages concluded in terms of the Black Administration Act are regulated in terms of the Recognition of Customary Marriages Act.<sup>71</sup>

The lack of clarity on the position of colonial legislation is concerning because this suggests that such legislation still have a role to play today despite their racial and oppressive nature, as stated above. Customary law is still treated with suspicion despite the commitment to better recognition in the post-apartheid era. In practice, this is just lip-service because in several cases, the courts have resolved customary law disputes based on the common law. An example of this is how the court replaced primogeniture with section 1 of the Intestate Succession Act.<sup>72</sup> This position is exacerbated by the Constitution; section 211, for example, states that customary law can only be recognised if it is not inconsistent with the Bill of rights. Similarly, under apartheid, provision existed in terms of the repugnancy clause in the Black Administration Act, which only recognised customary law if it was not inconsistent with public policy.<sup>73</sup> The Black Administration Act was used as a colonial tool to control the indigenous people of South Afrika.<sup>74</sup> Section 211 returned the old order repugnancy clause, for it did not improve the position of the African jurisprudence.<sup>75</sup>

The reason why this contribution argues that the civil marriage still enjoys supremacy is because in the hierarchy of marriages, the civil marriage remains the preferred union. However, before discussing this further, it is opportune to provide the facts of the Zwelithini matter with the objective of articulating how the superiority of a civil marriage and a Western-style proprietary marriage threatens the protection of women in polygamous marriages. This further has a knock-on effect on succession to traditional leadership.

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71 Bonthuys and Pieterse (n 67) 622.

72 *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) para 222; For criticism see Chuma Himonga, 'Reflection on *Bhe v Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' (2018) SAPL 118; Sanele Sibanda and Tshepo Bogosi Mosaka, '*Bhe v Magistrate, Khayelitsha*: A Cultural Conundrum, Fanonian Alienation and an Elusiveness Constitutional Oneness' (2015) AJ 312; Sindiso Mnisi Weeks, 'Customary Succession and the Development of Customary Law: The *Bhe* Legacy' (2015) AJ 215 255; Himonga and Nhlapho (n 5) 98–100; Jan Bekker and Digby Sghelo Koyana, 'The Judicial and Legislative Reform of Customary Law of Succession' (2012) De Jure 568 584; Magdalena Carolina Schoeman-Malan, 'Recent Developments Regarding South African Common and Customary Law of Succession' (2007) 10(1/2) PELJ 1–2.

73 Phillipus Johannes Thomas and Dire Tladi, 'Legal Pluralism or a New Repugnancy Clause' (1999) 32 CILSA 361.

74 Fatima Osman, 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) PELJ 2.

75 Thomas and Tladi (n 73) 361.

## King Zwelithini Facts

The upholding of a civil marriage as the preferred marriage, as argued above, entails that the subsequent marriages concluded by the deceased would be void if the first marriage was a valid civil marriage. This is the position in terms of the Code of Zulu Law and section 22 of the KwaZulu-Natal Act, which were the legislation in effect when the King's civil marriage to his first wife was concluded. These may be upheld as there is a tendency to uphold common law values.

The first wife in the Zwelithini matter has asked the court to set aside the execution of the deceased King's will. The will appointed the king's third wife, the late Majesty Queen Shiyiwe Mantfombi Dlamini Zulu, as the regent. She was a regent of the Zulu nation at the time of her death, affording her exclusive rights to appoint the heir to the throne.<sup>76</sup> The late Queen Mantfombi was the only 'heir-bearing queen because she is the only one of royal blood. She was often referred to as *izalankosi* (the one who bears the heir to the throne).'<sup>77</sup> She was of royal descent, chosen and married by the Zulu nation to give birth to their heir, Misuzulu, who rightfully succeeded his father.<sup>78</sup> The wider effect on the community of having the marriage being declared invalid, are likely to be harsh.

The disadvantage of a civil marriage is that the court will only consider the interests of one woman to the detriment of the others, as it did in *MM v MN*.<sup>79</sup> Customary law, on the contrary, protects the right to equality and dignity of women. Therefore, the court should consider competing interests if a customary marriage and a civil marriage allegedly have co-existed. In *MM v MN* the Constitutional Court concluded that the second or any subsequent marriage concluded without the consent of the first wife is invalid.<sup>80</sup> The problem with this decision is that the customary law marriage affects not only the wife and husband, but the families as well, as since property belonging to the individual might also belong to the families.<sup>81</sup> However relief may be found in the proposed draft Single Marriage Bill,<sup>82</sup> by enacting new legislation in 2019 and 2020 in the form of a single marriage legislation. Two draft Bills are proposed in the Discussion Paper; the Protected Relationships Bill, and the Recognition and Registration of

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76 Stephanie Saville, 'Zulu Queen Shiyiwe Mantfombi Dlamini Zulu, Regent of the Zulu Nation, Has Died' *The Witness* (2021) <<https://www.news24.com/witness/news/just-in-zulu-queen-has-died-20210429>> accessed 14 August 2021.

77 'Misuzulu Remains King of AmaZulu 2021' <<https://sundayworld.co.za/breaking-news/misuzulu-remains-king-of-amazulu/>> accessed 15 August 2021.

78 *ibid.*

79 *MM v MN* 2013 4 SA 415 (CC) para 75.

80 See paras 80–85.

81 Tshepo Aubrey Manthwa, 'A Re-interpretation of the Families' Participation in Customary Law of Marriage' (2019) THRHR 418.

82 The South African Law Reform Commission (SALRC) issued both a Paper (SALRC, *Project 144 Single Marriage Statute Issue Paper 35*) and a Discussion Paper (SALRC, *Discussion Paper 152 on the Single Marriage Statute: Project 144*).

Marriages and Life Partnerships Bill.<sup>83</sup> The draft Bill requires that not only the interests of the first wife should be considered but also those of the other wives in the marriage. It is proposed however that the interests of the community must also be considered. The interests of the community were not considered in *MM v MN*, they are also not considered in the Single Marriage Bill. The draft Bill can be amended to make provision for communal interests.

### **The Impact of Common Law Solutions**

The King Zwelithini matter has not been concluded in court yet but it highlights the uncertainty surrounding the debate whether the conclusion of a civil marriage invalidates the subsisting customary marriages. Velaphi Mkhize, a cultural expert, has correctly argued that the matter is a clash between ‘two worlds’ because historically, the conclusion of a customary marriage did not depend on whether a civil marriage was in existence.<sup>84</sup> The matter should be concluded outside the courts in terms of custom.<sup>85</sup> The court must thus order the parties to go back and resolve the matter in terms of their custom.

South Africa should stop embracing Roman-Dutch law. Under customary law, a wife would not have tried to claim half of a joint estate because she was in possession of a civil marriage certificate. Moreover, regulating customary marriages in terms of a property regime where marriages are either in or out of community of property is problematic because it favours the rights of a woman in the marriage but ignores the rights of the family to property that are conferred in terms of customary law. Property that traditionally belongs to the children and wives, including the house and family property, can now be claimed by an individual based on a civil marriage.<sup>86</sup> This has the potential of enriching one woman while leaving the rest of the women and children in polygyny in poverty. This could be the destiny of the wives in the King Zwelithini matter if the civil marriage of the first wife is upheld at the expense of the other marriages.

The colonial and Apartheid rule in terms of Roman-Dutch law, stipulating that civil marriage is the only marriage recognised as legal, as reaffirmed by section 10 of the Recognition of Customary Marriages Act, is problematic. Removing it will make all marriages equal, thus devaluing customary marriages. This will result in an approach where the status of the extended family is denied for the benefit of one woman. The way forward is to return to the tried and tested customary law property regime that ensured all women were protected. More importantly, this is an opportunity to decolonise the

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83 SALRC, *Single Marriage Statute Discussion Paper 152* (SALR 2021 Annexure B2), 153–171.

84 Shoba (n 1).

85 *ibid.*

86 Chuma Himonga, ‘Determining the Content of Indigenous Law with Special Reference to Recording of the Law - Continental Views’ (2019) PELJ 8–9.

law of customary marriage by removing the influence of Roman-Dutch law and ensuring customary marriage does not play a role secondary to civil marriage.

### **Maintenance of a Hierarchy of Marriages**

Legislation such as the Customary Marriages Act and the Civil Union Act<sup>87</sup> has been enacted to co-exist with civil marriage. However, they have similar proprietary consequences:<sup>88</sup> they create the impression that civil marriage is holy and should not have its image tainted by mixing with others, such as customary and same-sex marriages.<sup>89</sup> The Marriage Act already existed when these subsequent Acts were enacted; it could have been amended to include all forms of marriages in a single law with different chapters for different marriages. The intention of the legislature to afford recognition to all intimate relationships was good, but why do it through different pieces of legislation?<sup>90</sup> The grievance of parties in customary marriages and same-sex relationships have historically been their exclusion from mainstream legal recognition by regulating them through separate legislation. This entails that these marriages are viewed as not worthy of being in the same document as the Marriage Act, although they all have similar consequences after dissolution.

After the definition of a civil marriage was declared unconstitutional in *Minister of Home Affairs v Fourie: Lesbian and Gay Equality Project Minister of Home Affairs*,<sup>91</sup> the legislature did not opt to include same-sex marriages as part of the Marriages Act.<sup>92</sup> Rather, different legislation came into being, in the form of the Civil Union Act,<sup>93</sup> but this imposed the consequences of a common law marriage on a customary marriage. This is not practical, especially in the case of polygamy as argued below.

### **Conclusion**

Since colonialism, customary marriages have been treated as inferior in South Africa. Regrettably, this position continued in the post-apartheid era. The preferential treatment of civil marriages at the expense of customary marriages is problematic because it leaves successive wives in polygynous marriages in the lurch. The King Zwelithini matter, where the first wife has approached the high court to recognise her marriage to the King as the only valid marriage, should not be upheld by the court due to the devastating effect it will have on the second and other wives. An Afrikan approach should be followed in resolving the dispute—one that considers the interests of the other wives

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87 17 of 2006.

88 Pieter Bakker, 'Chaos in Family Law: A Model for the Recognition of Intimate Relationships in South Africa' (2013) PELJ 124.

89 *ibid.*

90 *ibid.*

91 2006 1 SA 524 (CC).

92 Bakker (n 88) 124.

93 17 of 2006.

and the community as well. As stated above, the third wife was married by the community, meaning the community has an interest in the validity of the marriage. Declaring subsequent marriages invalid will disregard the community to give effect to the monogamous civil marriage. This is a case of conflict of interest. The court should not err as it did in *MM v MN*, where it only focused on the first wife and justified its decision on the need to protect her right to equality and dignity. The dignity of the second and other wives is also in need of protection.

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