The courts revisit polygyny and the Recognition of Customary Marriages Act 120 of 1998

Ngwenyama v Mayelane 2012 4 SA 527 (SCA);
Mayelane v Ngwenyama 2013 4 SA 415 (CC)

1 Introduction

Historically, African customary marriage was regarded as abhorrent by the European community owing to its polygynous nature and the institution of *lobolo*, and because of which they did not recognise such marriages and relegated them to the official status of 'unions'. As a consequence, the courts had in effect 'bastardised almost the entire Native population'.[1] It is trite to say that this caused immense suffering for African families, especially for women and children who were excluded from legal protection in the familial environment. Over the years their position was remedied to a limited extent by legislation that, in certain circumstances, afforded them the same protection provided to spouses and children from civil marriages.[2]

The eventual recognition of customary marriages by the Recognition of Customary Marriages Act 120 of 1998 was widely welcomed, as was the certainty and uniformity it ostensibly engendered.[3] Unfortunately this Act cast the majority of the requirements for and consequences of customary marriages in a Western common-law form. This has led to the development of a new type of statutory marriage, one that is far removed from the true and living customary marriage. It has further buttressed the official customary law that has developed over the years and that has added a new dimension to the legal pluralism prevailing in

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[1] South African Law Reform Commission *Report on Customary Marriages* Project 90 (Aug 1998) (hereafter *Report*) para 2.3.10; *Seedat's Executors v The Master (Natal)* 1917 AD 302.

[2] For an overview of this distressing history, see Maithufi and Moloi 'The current legal status of customary marriages in South Africa' (2002) *TSAR* 599 at 602 and the sources referred to therein; Du Plessis 'Poligamie, buite-egtelikheid en intestate erfreg: *Dhansay v Davids* 1991 4 SA 200 (K)' (1993) 56 *THRHR* 151 at 151-152.

[3] *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) para 24.

South Africa. It is not surprising that the interpretation of this Act has led to the resolution of issues on an *ad hoc* basis, causing wide uncertainty in many respects.[4] The status of polygyny is one of the issues still shrouded in uncertainty. Indeed, in *MG v BM*[5] Moshidi J observed with regard to section 7(6) of the Act (regulating the proprietary consequences of polygynous marriages) that 'legal journals and publications are replete with uncertainty regarding the proper and future interpretation of the section'.

Of course, the difficulties relating to the interpretation of legislative enactments regulating the application of African customary law in general, and specifically of customary marriages and polygyny, are nothing new. More than a century ago the courts grappled with similar problems: *prima facie* contradictory provisions and, in general, clumsy legislative drafting made it as difficult then to determine the intention of the legislature as they do now. For example, in the early 1890s, referring to Proclamation 140 of 1885 (Cape) and its impact on polygynous marriages, Maasdorp J remarked in the Eastern Districts Court in *Nbono v Manoxoweni*: 'To my mind it is not quite clear what was really intended to be done with reference to the recognition of marriages under native custom'.[6] Ironically, this Proclamation was passed in pursuance to the recommendations of the 1883 Commission enquiring into 'native laws' that polygynous marriages should be recognised, not unlike the recommendation of the South African Law Reform Commission in the 1990s.[7] Interestingly enough, notwithstanding the contemporary legislation, nineteenth-century courts in certain circumstances gave effect to polygynous customary marriages, applying customary law. In *Dantile v M'Tirara*,[8] for example, De Villiers CJ found that polygynous marriages entered into before Proclamation 140 of 26 August 1885 (Transkei) were valid marriages as the Proclamation did not have retrospective effect. In this case the appeal against a decision of a magistrate's court, awarding a husband damages for the adultery with his sixth wife, was accordingly dismissed.

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[4] See, eg, the divergent decisions in *Fanti v Boto* 2008 5 SA 405 (C); *Mabuza v Mbatha* 2003 4 SA 218 (C); *Nontobeko Virginia Gaza v Road Accident Fund* (SCA), unreported case no 314/04; South African Law Reform Commission *Statutory law revision (legislation administered by the Department of Co-operative Governance and Traditional Affairs)* Discussion Paper 120 (Nov 2010) paras 2.83, 2.91, 2.99, 2.101-104; Van Niekerk 'Reflections on the interplay of African customary law and state law in South Africa' (2012) 3 *Studia Universitatis Babeş-Bolyai: Iurisprudentia*, available at http://studia.law.ubbcluj.ro/articol.php?articolId=508 (accessed 2013-06-01).

[5] 2012 2 SA 253 (GSJ)) in para 19.

[6] 1891-1892 6 EDC 62 at 74.

[7] See *Nbono v Manoxoweni* 67; see, also, the comments of Barry JP in *Sengane v Gondele* (1880-1881) 1 EDC 195 at 204, regarding the implied recognition of polygyny through the Native Succession Act 18 of 1864 (Cape); see, further, Kerr 'Back to the problems of a hundred or more years ago: Public policy concerning contracts relating to marriages that are potentially or actually polygamous' (1984) 101 *SALJ* 424.

[8] 1891-1892 9 SC 452.

The uncertainty surrounding polygyny persists today and is pertinently illustrated by the decision in *Mayelane v Ngwenyama*.[9]

The decision of the North Gauteng High Court turned on the interpretation of section 7(6) of the Recognition of Customary Marriages Act. The Court found that the husband's failure to regulate the matrimonial property consequences contractually and have the contract approved by a court in terms of this section and registered at the Deeds Office in terms of section 7(9) rendered the subsequent customary marriage invalid. This decision was reversed on appeal in *Ngwenyama v Mayelane*[10] and the subsequent marriage was declared valid. Then, in *Mayelane v Ngwenyama*,[11] the Constitutional Court granted leave to appeal against the decision of the Supreme Court of Appeal, upheld the appeal and found the subsequent marriage void.

2 The facts

Mayelane, the first wife of Moyana, entered into a customary marriage with him in 1984. On his death, she attempted to have their marriage, which had never been registered in terms of section 4 of the Act, registered at the Department of Home Affairs. She then learnt that Ngwenyama, who had entered into a customary marriage with the deceased as his second wife in 2008, had also attempted to have *her* marriage registered at the Department of Home Affairs.

Mayelane instituted proceedings in the North Gauteng High Court to have the customary marriage of her deceased husband to Ngwenyama declared void *ab initio* as her husband had not consulted her about the subsequent marriage and had not applied to a court in terms of section 7(6) to have a contract regulating the proprietary consequences approved. She further sought an order directing the Minister of Home Affairs to register her own marriage to the deceased.

The High Court granted this application, finding that that as the wording of section 7(6) is peremptory the failure to comply with that subsection rendered the subsequent customary marriage invalid. It further held that the fundamental rights of the existing spouse would be infringed if the subsequent marriage were to be recognised as valid. In view of this, the Court found it unnecessary to make a finding on the issue of Mayelane's consent to the subsequent marriage.

Ngwenyama appealed against this decision and succeeded in her appeal. The Supreme Court of Appeal confirmed the order affirming the validity of Mayelane's marriage. However, it found that section 7(6) of the Recognition of

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[9] 2013 4 SA 415 (CC), preceded by *Ngwenyama v Mayelane* (2012 4 SA 527 (SCA), and by *Mayelane v Ngwenya* (2010 4 SA 286 (GNP)) the most recent case in which a subsequent polygynous marriage was found to be void. See, also, *Sokhewu v Minister of Police* [2002] JOL 9424 (Tk) especially in para 8.

[10] 2012 4 SA 527 (SCA).

[11] 2013 4 SA 415 (CC).

Customary Marriages Act is not aimed at invalidating a subsequent marriage but merely regulates proprietary consequences and, accordingly, that the second marriage was not null and void. It ordered the Minister of Home Affairs to register the marriage between the deceased and his second wife, Ngwenyama. The Supreme Court of Appeal, too, declined to deal with the issue of consent, finding it sufficient to deal only with the interpretation and application of section 7(6).

On further appeal, the Constitutional Court, in turn, declared the subsequent marriage void for not complying with customary law and it then developed the customary law to bring it in line with the Constitution.

3 Analysis

3.1 The prevalence of polygyny

It is perhaps apt to start the discussion with the Constitutional Court's observation that 'there appears to be agreement that polygynous marriages are not the norm in Xitsonga society'.[12] It is not clear on what evidence the Court based this finding. A superficial search of literary sources on the Tsonga revealed the contrary. In a recent in-depth study in the Giyani area in the former homeland of Gazankulu (designated for Tsonga-Shangaan people in the present Limpopo Provence), Buis found that '[p]olygyny is commonplace in Giyani, especially in villages but [that] women [are] not comfortable talking about it'.[13] The reaction to the decision of the Constitutional Court on a Polokwane news site[14] likewise shows that polygyny is certainly not an exceptional occurrence in that society.[15]

In 1998, in its *Report*[16] the South African Law Reform Commission commented that over the years, customary law has been 'all but eliminated in the cause of western moral standards'. It nevertheless found that as polygyny is an inherent part of the African concept of marriage, banning it would bring about black-letter law; and would lead to husbands entering into informal unions, leaving

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[12]Paragraph 59.

[13]*Surviving transition in the Giyani District: The role of small-scale rural development projects in a period of rapid socio-political and economic change* (PhD thesis UP (Pretoria)) (2011) 219; see also 269.

[14]Chauke 'Polygamy ruling met with mixed reaction' *Gateway to KZN* (2013-06-04) available at http://www.looklocal.co.za/looklocal/content/en/polokwane/polokwane-news-general?oid=7517779&sn=Detail&pid=4730433&-Polygamy-ruling--met-with-mixed-reaction (accessed 2013-08-15).

[15]For polygyny among the Tsonga see, generally, Hartman *Aspects of Tsonga law* (1991) 57; the work of the Swiss missionary and anthropologist, Henri-Alexandre Junod *The life of a South African tribe* vol 1 *Social life* (1966) 282-289, especially at 284-285 *re* the complicated position with relation to property, and asking of consent in the case of a chief/headman. See, also, Kriel and Hartman *Khindli mukani Vatsona: The cultural heritage and development of the Shangana-Tsonga* (1991) at 25; Mwakikagile *South Africa as a multi-ethnic society* (2010) 202-213 at 205.

[16]Paragraph 2.3.10.

women and children without legal protection. Importantly, however, it found that the practice of polygyny was obsolescent.[17]

It is true that there are various factors that may be regarded as confirmation of the general decline of polygyny in South Africa: between 2002 when the Recognition of Customary Marriages Act came into force and 2010, no contracts regulating the proprietary system of polygynous marriages in terms of the Act had been registered at the Deeds Office.[18] This may be due, of course, to the fact that the Act is unknown amongst the rural communities or simply because it is ignored. In 2004 Himonga[19] commented that while section 7(6) of the Act is clearly designed to protect the matrimonial property rights of spouses, the whole procedure of going to court and employing a legal representative is not only time consuming, but also expensive. Indeed, cost was the reason advanced by the parties in *MG v BM* (*supra*) for failure to comply with section 7(6).[20] Himonga rightly concluded that this provision constituted mere paper law: 'Of course, whether or not many people are likely to know or understand these highly complicated legal procedures is another matter ... people [will] carry on marrying as they have always done, as though the Act did not exist'.[21]

The statistics of the 2001 population census[22] are still the most recent available on the official website of Statistics South Africa. According to these results 28 155 of the 1 395 752 customary marriages were polygynous marriages. Further, a community survey (household questionnaire) of Statistics South Africa, conducted in 2007 in all the provinces among participants of 15 years and older, revealed that there were 23 695 polygynous customary marriages at the time.[23] Unfortunately the latest release on the 2011 census, that of 10 December 2012 stated that while 'it would be of interest to distinguish between first time spouses and those who have married before (ie, those in polygynous marriages, divorcees, widows and widowers) ... in the absence of data on marital status at

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[17]Paragraphs 6.1.1-25.

[18]See Bekker and Van Niekerk 'Broadening the divide between official and living customary law *Mayelane v Ngwenyama* 2010 4 SA 286 (GNP); [2010] JOL 25422 (GNP)' (2010) 73 *THRHR* 679 at 680.

[19]'Transforming customary law of marriage in South Africa and the challenges of its implementation with specific reference to matrimonial property' (2004) *International J of Legal Information* 260 at 268-269.

[20]See, also, Maithufi and Moloi 609; Bakker 'The new unofficial customary marriage: Application of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998' (2007) 70 *THRHR* 482 at 484.

[21]At 269; see, further, Himonga '*Mayelane v Ngwenyama and Minister for Home Affairs*: A reflection on wider implications' available at: http://www.customcontested.co.za/mayelane-v-ngwenyama-and-minister-for-home-affairs-a-reflection-on-wider-implications/#more-442 (accessed 2013-08-15).

[22]The statistics appear to be the basis also of the 25th edition of *South African statistics 2011* available at http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2011.pdf (accessed 2012-10-23).

[23]At http://www.statsonline.gov.za/news_archive/12March2008_1.asp (accessed 2012-10-23).

the time of the registration of customary marriage, this distinction cannot be made'.[24]

Of course, it does not really matter how prevalent polygynous marriages still are. What is important is that in 2011 there were still more than 28 000 such marriages recorded and that each of these marriages affected at least two wives and usually a number of children. This has also been confirmed by various empirical studies.[25] What is further important is that the regulation of polygynous marriages in the Recognition of Customary Marriages Act had the effect of many such marriages being declared void and this has caused widespread misery for many women and children.

3.2 Polygyny in the Recognition of Customary Marriages Act

In the main judgment of the Supreme Court of Appeal, referring to the seminal decision of the Constitutional Court in *Gumede v President of the Republic of South Africa*, Ndita AJA pointed out that an important aim of the Recognition of Customary Marriages Act is the protection and advancement of the rights (of dignity and equality) of women in customary marriages, in line with the Constitution and South Africa's international treaty obligations. Consonant with the general purpose of the Act, section 7(6) seeks to afford protection of the spouses' matrimonial property rights by ensuring a fair distribution of matrimonial property. Although the Act states in plain language that the contract regulating the proprietary consequences of the marriage has to be approved by a court and registered, it does not attach any sanction to non-compliance with this obligation.

Whilst acknowledging that the primary rule of statutory interpretation is to afford words their ordinary grammatical meaning, the Supreme Court of Appeal emphasised that it was equally important to give effect to the context and purpose of the Act (it referred with approval to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[26] and *Jaga v Dönges*.[27] It held that in this instance a purposive interpretation was preferred as a strict interpretation would infringe upon the second wife's constitutional rights to dignity and equality. This was also the line of argument presented by the Women's Legal Trust who acted as *amicus curiae*, pointing out that section 7(6) of the Act should be interpreted against the background of South Africa's 'historical inequalities based on race, gender, marital status and class' and that the court should consider 'the realities of women married under customary law generally and women in polygamous marriages, in

[24] Statistics South Africa 'Marriages and divorces, 2011' (2011) available at http://www.statssa.gov.za/Publications/P0307/P03072011.pdf (accessed 2013-8-30).
[25] See Bekker and Van Niekerk *THRHR* 680 and the references to empirical research quoted there.
[26] 2004 4 SA 490 (CC).
[27] 1950 4 SA 653 (A).

particular'.[28] It was further argued by the second wife (Ngwenyama),[29] that it could not have been the intention of the legislature to determine that the validity of a subsequent polygynous marriage should be subject to the consent of a court, thus effecting a fundamental change to the customary law position.

The Court reasoned that legislation should be interpreted purposively as a strict interpretation of the Act that renders the second marriage void would defeat the objective of the Act to attain the equality of all wives, and would ultimately be against the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which South Africa ratified in 1996. Of course, should one's point of departure be CEDAW and other international human rights instruments such as the Universal Declaration of Human Rights, including the Protocol on the Rights of Women in Africa and the International Covenant on Civil and Political Rights, the recognition of polygyny cannot be justified at all.[30]

Referring to the Constitutional Court's decision in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO*[31] the Court held that the fundamental values of the Constitution should direct the interpretation of legislation. It implicated that the way in which the High Court interpreted the section was contrary to section 39(2) of the Constitution, as its decision did not 'promote the spirit, purport and objects of the Bill of Rights'.

In essence most authors agree that the purpose of section 7(6) is to protect the interests of the wives in polygynous marriages by making provision for an equitable matrimonial property regime. The High Court, too,[32] argued that the security of property is obtained 'by ensuring that the husband must obtain the court's consent to a further customary marriage, albeit that such consent is expressed in proprietary terms'. However, there are conflicting academic views as well as conflicting judicial decisions on the consequences of non-compliance with section 7(6).

Bakker[33] contends that although the section is phrased in a peremptory manner, language alone should not direct the courts in their interpretation of the Act, unless there is a clear indication to the contrary. An interpretation that non-compliance with section 7(6) leads to invalidity of the subsequent marriage is untenable as it would thwart the purpose of the Act and specifically that of section

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[28]See paras 10 and 12.
[29]Paragraphs 9 and 15.
[30]See Andrews 'Who's afraid of polygamy? Exploring the boundaries of family, equality and custom in South Africa' (2009) *J of Law and Family Studies* 303 (also (2009) *Utah LR* 251) at 323-324, 326, 329; *idem* '"Big Love?" The recognition of customary marriages in South Africa' (2007) 64 *Wash and Lee LR* 1483 at 1493-1494.
[31]2001 1 SA 545 (CC) in para 22.
[32]Paragraph 22.
[33]At 483, 487.

7(6). In addition, he points out that the Act does not impose a sanction on the non-compliance with this section; that section 3 – that contains the requirements for a valid customary marriage – does not refer to section 7(6); and, that registration of such a contract (in terms of s 7(9)) is not a requirement for a valid marriage and was consequently not included in section 3. He argues that had the intention of the legislature been that compliance with section 7(6) will be a requirement for a valid marriage this section would have been included in the requirements listed in section 3. He concludes that non-compliance will not affect the first wife, had she been married out of community of property. And, due to the application of section 8(4)(b), non-compliance would likewise 'not lead to any injustice against the first wife'.[34]

Although it is true that section 8(4)(b) – which determines that a court 'must make any equitable order it deems fit' upon dissolution of a polygynous marriage – gives the court a wide discretion to make any equitable division of the matrimonial property, one has to bear in mind that section 8 deals with marriages dissolved by a court of law. Subsection (4)(b) is accordingly not applicable where the marriage was dissolved by the death of one of the parties, as happened in this case.

Also Maithufi and Moloi[35] contend that a subsequent marriage should not be invalid where there is non-compliance with section 7(6). They argue that the marital regime should be changed to one out of community of property as the Act makes it clear in section 7(2) that this should be the matrimonial property regime of polygynous marriages. One has to ask why, if this had been the intention of the Legislature, it was not specifically stated in the Act in the same way it is expressly stated that non-compliance with the registration requirement is not visited with nullity.

The Supreme Court of Appeal per Ndita AJA, referred with approval to *MG v BM* in which it was held that non-compliance with section 7(6) should not render the subsequent marriage invalid.[36] In that case[37] the Court remarked that a woman who contracts a valid subsequent customary marriage acquires certain rights and that it could not have been the intention of the legislature to remove such rights. However, one should not lose sight of the fact that the Court's observations in *MG v BM* were *obiter* as the application of section 7(6) was not in issue. Moreover, Moshidi J expressly indicated in that decision[38] that the decision of Bertelsman J in *Mayelane v Ngwenyama* could not be followed since the facts of the two cases were distinguishable in significant respects: In *MG v*

[34]At 288.
[35]At 609.
[36]Paragraph 17.
[37]Paragraph 22 of *MG v BM*.
[38]*Id* at para 20.

BM the first marriage was registered; the first wife was aware of the second marriage and had given her consent; a contract in terms of section 7(6) had been drawn up but the registration had for practical purposes not taken place (it was too expensive and the deceased was in ill health); and, importantly, the second marriage was concluded *before* the Recognition of Customary Marriages Act came into operation and thus did not fall within the ambit of section 7(6) but was regulated by section 2(3).

Although the Supreme Court of Appeal overturned the decision of the High Court in *Mayelane v Ngwenyama* and came to a contrary decision regarding the effect of non-compliance with section 7(6), both courts based their decisions on the fact that theirs was the only interpretation of the section that would uphold the equality of the wives.

In brief, the High Court found that 'the most persuasive consideration must however be the gross infringement of the first or earlier spouses' fundamental rights'[39] enshrined in the Constitution and protected by the Act: these include rights to dignity, physical and emotional integrity, protection from (emotional and economic or material) abuse; as well as rights protected in the Act: these are rights to marital support, to be treated equally with her husband, and so on. The High Court also found that 'the rights of any children born from the earlier marriage and still dependent upon their parents may obviously be vitally affected'.[40]

In turn, the Supreme Court of Appeal found[41] that should the second marriage be declared invalid, it would constitute 'a gross and fundamental infringement of their [the subsequent spouses'] right to dignity, right to equal status in marriage as well as the rights to physical and emotional integrity'. Moreover, it found that such an interpretation would also impact on the rights of children born from the subsequent marriage as they would be regarded as illegitimate. And it would trounce the Act's purpose of attaining equality of the spouses of the marriage. The Court pointed out that within the historical context of the Act, which was drafted in response to constitutional demands of equality and non-discrimination, section 7(6) cannot be interpreted in any other way but to give recognition to the subsequent marriage.

Whichever way one argues, reading these two decisions together, the inevitable conclusion is that section 7(6) is drafted in a manner that non-compliance with it would undermine the equality of one or both of the wives and impact on the rights of the relevant children.

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[39] *Id* at para 27.
[40] *Id* at para 30.
[41] Paragraphs 20-21.

3.3 The context of the Act

Ndita AJA, who delivered the main judgment in the Supreme Court of Appeal (as well as Ponnan JA[42]) stated that section 7(6) should be viewed within the context of the Act or the 'scheme of the Recognition Act as a whole' and that as such it is not linked to section 3 that deals with the requirements for a valid customary marriage. She came to the conclusion that within its context, the purpose of section 7(6) is merely to regulate the proprietary consequences of polygynous marriages in a fair and equitable way.[43] An equitable finding in a case of non-compliance with section 7(6) would be to treat a subsequent marriage as one out of community of property.[44]

The Constitutional Court[45] endorsed these sentiments, noting that a different interpretation would 'undermine the scheme of the Recognition Act'.

In the Supreme Court of Appeal, Ponnan JA further explained that within the scheme of the Act, the requirements for a valid customary marriage as set out in section 3 should be read with sections 2(2) and 2(4). The requirements of section 3 deal with the age of majority and the consent of both parties and go beyond the customary law requirements.[46] Section 2(2) determines that '[a] customary marriage entered into after the commencement of this Act, *which complies with the requirements of this Act*, is for all purposes recognised as a marriage' (my emphasis); and section 2(4) that '[i]f a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, *which comply with the provisions of this Act*, are for all purposes recognised as marriages' (my emphasis).

These sections are straightforward, specifically the italicised phrases containing the conditions for validity: Customary marriages are recognised if they comply with the requirements or provisions of the Act. That is stated at the outset. The Act then makes it abundantly clear under which circumstances marriages that do not comply with the provisions of the Act should still be regarded as valid marriages. In other words, the context of the Act clearly states when failure to abide by a peremptory provision should *not* affect the validity of the marriage. Two examples will suffice, both sections having been drafted in a peremptory manner.

The first is section 3(1)(a)(i) that determines that one of the requirements for a valid customary marriage is that spouses must be above the age of eighteen. Non-compliance with this requirement is specifically dealt with in section 3(4)(c) which determines that the validity of the marriage is not affected by the fact that one or both of the spouses are under the prescribed age and section 3(5) the Marriage Act[47] is made applicable to such marriages.

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[42]Paragraphs 32 and 36.
[43]Paragraphs 22-23.
[44]Paragraphs 37-38.
[45]Paragraph 41.
[46]See, also para 29 of the Constitutional Court decision.
[47]25 of 1961.

The second example is section 4(1) that provides that the 'parties have a duty to ensure that their marriage is registered'.[48] Nevertheless, section 4(9) makes it clear that a failure to register the marriage will not affect its validity.

The wording of the Act is not ambiguous. In fact, it is not difficult to establish the intention of the legislature. Having regard to these clearly defined provisions, it appears that the reasoning of the High Court was more consistent with the intent of the legislature as it is set out in the Act, specifically if one does not see section 7(6) in isolation, but as part of a comprehensive legislative enactment giving official recognition to African customary marriages. In the High Court Bertelsman J made specific reference also to section 7(7)(b)(iii) which reads: 'When considering the application in terms of subsection 7(6) the court must refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract'. He held that this subsection is a clear indication that non-compliance with section 7(6) should lead to nullity.[49] It is noticeable that this subsection at the same time restates the purpose of section 7(6), namely to safeguard the interests of *all* the parties contractually. Bertelsman J agreed with the view of Cronje and Heaton[50] that section 7(6) would have been superfluous if non-compliance with it had no effect on the validity of the subsequent marriage. He further affirmed the dictum of the Supreme Court of Appeal in *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing* (*Pty*) *Ltd*; *Minister of Environmental Affairs and Tourism v Smith*[51] that where a statute 'provides for the acquisition of a right or privilege – as opposed to the infringement of an existing right or privilege – compliance with formalities that are prescribed for such acquisition, should be regarded as imperative'.

Even if the High Court's reasoning appears to be the purer reasoning, one cannot deny that such an interpretation would have far-reaching consequences for subsequent wives who found themselves in the unfortunate position of Ngwenyama (and also for children born of such subsequent marriages) and would lead to the infringement of their rights. Further, subjecting the second marriage to the consent of a court is untenable in a customary-law context, especially when it comes to the marriages of traditional leaders.[52] And this was

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[48]'Have a duty' in effect means 'must': see para 4.5.18 of the Law Reform Commission's *Report* that determined that '[a]lthough registration should be compulsory, no obvious penalty exists to induce noncompliance'; see also Bekker and Van Niekerk '*Gumede v President of the Republic of South Africa*: Harmonisation, or the creation of new marriage laws in South Africa' (2009) 24 *SAPR/PL* 206.

[49]Paragraphs 24-26.

[50]*South African family law* (2010) 204; see also, Skelton and Carnelley *Family law in South Africa* (2010) 187-188.

[51]2004 1 SA 308 (SCA) para 32.

[52]This has been discussed in some detail in Bekker and Van Niekerk *THRHR* 685.

indeed raised by Ponnan JA[53] as one of the reasons why non-compliance with section 7(6) should not lead to invalidity of the second marriage.

In truth, though, as indicated, whether the High Court's interpretation is followed or that of the Supreme Court of Appeal, the rights of some of the parties to the marriage will be infringed. The only conclusion, then, is that the problem lies in the way in which the Act regulates the proprietary consequences of the wives in a polygynous marriage. Over the years different attitudes of different judges towards legislative interpretation have contributed to the uncertainty engendered by the inept legislative drafting of the Recognition of Customary Marriages Act. Ideally the language of the text and the intention of the legislature should not be negated, and a compromise should be found between a purposive interpretation and the language of the text. Even the Constitutional Court has warned against the overemphasis of the underlying values of the Constitution.[54]

Regulation of the proprietary consequences of polygynous marriages is certainly necessary as intricate rules determine the duties, prerogatives and privileges of the houses created by the marriages to different wives at customary law. Every marriage establishes a new house which forms a social, domestic and economic unit, and house property serves for the benefit of the individual houses. Ranking of houses which vary from one society to the next and depends on whether commoners or aristocrats are involved, and the linking of wives, complicate the system and have important consequences for the children as these factors determine their social position and their rights and order of succession.[55]

The High Court[56] regarded section 7(6) as the essential safeguard of the proprietary positions of all the wives in a polygynous marriage. However, as the Act stands, it rather protects the interests of the first wife.[57]

Ponnan JA advanced various reasons why the husband's failure to regulate the proprietary consequences by contract should not lead to invalidity.[58] He indicated, amongst others, that in terms of section 7(7)(a), if the existing marriage is in community of property, the court should terminate the existing matrimonial

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[53]Paragraph 37 of the SCA decision.

[54]See *S v Zuma* 1995 2 SA 642 (CC); Church, Schulze and Strydom *Human rights from a comparative and international perspective* (2007) 201.

[55]See, further, Bennett *Customary law in South Africa* (2004) 243; Rautenbach *et al Introduction to legal pluralism* (2010) 77; Preston-Whyte 'Kinship and marriage' in Hammond-Tooke (ed) *The Bantu-speaking peoples of Southern Africa* (1974) 179-182; Church *Marriage and the woman in Bophuthatswana: An historical and comparative Study* (LLD thesis University of South Africa (Pretoria)) (1989) 59; Schapera *Ethnographic survey of Africa. Southern Africa. Part III The Tswana* (1976) 40; Vorster 'Kinship' in Myburgh (ed) *Anthropology for southern Africa* (1981) 94-95.

[56]Paragraph 23.

[57]See Himonga '*Mayelane v Ngwenyama and Minister for Home Affairs*: A reflection on wider implications'.

[58]Paragraph 37.

property system and ensure that the property is fairly distributed. Should the husband fail to comply with section 7(6), the matrimonial property system of the first marriage will remain unaffected and that 'ought to adequately protect the rights of the first spouse whilst leaving in place and valid the subsequent customary marriage, with all of the attendant consequences and advantages of marriage'. The Constitutional Court agreed with this interpretation[59]. One may ask whether this interpretation would accord with the intention of the legislature as contained in section 7(7)(a), given that the existing marriage of the first wife, Mayelane, had to be in community of property (in accordance with the decision in *Gumede*?

In *Gumede*[60] section 7(1) of the Act was held to be constitutionally invalid and all monogamous customary marriages concluded before the Act came into operation were held to be in community of property. In that case the Constitutional Court remarked that community of property was not compatible with polygynous marriages and that the invalidity of the section did not relate to the proprietary consequences of polygynous marriages (contracted before the Act came into operation?). It nevertheless conceded that the decision sustained the inequality between wives in monogamous and polygynous marriages and held that polygynous marriages should continue to be 'regulated by customary law until parliament intervenes'.[61]

It is not clear where this decision leaves the matrimonial property system in the present case. In the main judgment in the Supreme Court of Appeal, Ndita AJA made no mention of the proprietary consequences but in his minority judgement, Ponnan JA indicated that the subsequent marriage (of Ngwenyama) should be considered out of community of property. Although the general opinion is that community of property is untenable in polygynous marriages some opine that a polygynous marriage in community of property is indeed viable:[62] it would comprise a community of house property for the husband and the wife of each house; and a community of the household property: the husband and all the wives being equal partners in the property that belongs to the comprehensive polygynous household.

As indicated above, if section 7(6) is not peremptory, there would have been no necessity of enacting section 7(7)(b)(iii), and if section 7(7)(a) is not peremptory, there seems to be little protection for the rights of either wives. Matrimonial property in polygynous marriages is a complicated issue and an area in dire need of explicit rules that protect the interests of all the wives and children.

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[59]Paragraph 41.
[60]Paragraphs 56 and 58.
[61]Paragraph 56 of the *Gumede* decision.
[62]It was also the opinion of Ponnan JA in para 37; Kerr 'The nature and future of customary law' (2009) 126 *SALJ* 686-689; see also the opinions of Du Plessis and Rautenbach in para 6.3.4.16 and n 149 of the *South African Law Reform Commission Report*.

3.4 Consent

Neither the High Court nor the Supreme Court of Appeal deemed it necessary to enquire into the customary Xitsonga law regarding consent; both decided the case purely on section 7(6).

The High Court indicated[63] that if an existing earlier marriage or the conclusion of subsequent marriage is not disclosed *and dealt with by a contract* in terms of the Act, it may jeopardise the financial security of the persons in a polygynous customary marriage. Further, as the Act was silent on the requirement of consent of the existing spouse(s), the matter had to be dealt with under customary law (which would lead to a future enquiry as to the compatibility with the Bill of Rights.[64] It then concluded that in the absence of a requirement of consent in the Act, the obligation to ensure that the needs and views of the earlier spouse(s) are protected rests on the court, remarking that the lack of 'knowledge and acquiescence'[65] would constitute a gross infringement of the spouse's human rights. In essence, the Court circumvented the issue of consent in customary law by approaching the matter singularly from a human rights angle.

The Supreme Court of Appeal found[66] that although the issue had been debated in the High Court, there was no cross-appeal challenging that Court's finding that the second marriage was a valid customary marriage and that therefore it could not consider the issue of consent.

The Constitutional Court did address the issue of consent. It found that leave to appeal the decision of the Supreme Court of Appeal that overturned the High Court's order of invalidity of the subsequent marriage should be granted to Mayelane in the interest of justice as a cross-appeal was not necessary for the latter court to have considered the issue of the first wife's consent to a subsequent customary marriage.[67] In view of the fact that it would involve pointless additional costs and be needlessly time-consuming, the Constitutional Court decided to assume the task of obtaining information on the question of consent and not to refer the matter back to the High Court.[68] This course of action was criticised in the minority decisions per Zondo J[69] and per Jafta J.[70]

As the Recognition of Customary Marriages Act does not require the consent of the first wife, the Constitutional Court[71] considered the matter under the rubric of section 3(1)(b) of the Act. It pointed out that this section, which determines that

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[63]Paragraph 23.
[64]See para 29.
[65]Paragraphs 27 and 28.
[66]Paragraph 11.
[67]Paragraphs 13, 15, 19-22.
[68]Paragraph 52.
[69]See paras 110-114.
[70]Paragraph 147.
[71]Paragraph 29.

'the marriage must be negotiated and entered into or celebrated in accordance with customary law', is considered to protect the living nature of customary law and to ensure that it can develop to meet the needs of a changing society.[72]

Importantly, the Court confirmed the status of customary law as a *primary* source of South African law[73] and endorsed its status as an *independent* source of law which has an inherent ability and 'untapped richness ... which may show that the values of the Constitution are recognised, or capable of being recognised, in a manner different to a common-law understanding'.

Divergent evidence was presented to the Constitutional Court on the Xitsonga customary law relating to the consent of the first wife.[74] Three persons (two males – a traditional leader and a traditional healer – and one female) living in polygynous marriages confirmed the view that a subsequent marriage without the first wife's consent would be invalid, but that children born from the subsequent marriage would be 'legitimate' (a Western term that is not known in African customary law). Also the deceased husband's brother affirmed the existence of the first marriage and indicated that in terms of their tradition a husband had to consult his existing wife before he entered into a subsequent marriage and that the husband's blood relatives had to witness the conclusion of a subsequent marriage.

At the outset, the Constitutional Court warned that one should refrain from imposing 'common-law or other understandings' of consent on the customary law and should not assume that the concept carries a 'universal meaning across all sources of law'. [75] This is true. In customary law, conceptions of consent appear to be radically different to those at common law and consent should not be viewed in the narrow dictionary meaning of expressing willingness, giving permission, or agreeing. This is evident in the affidavits submitted to the Court. Consent should be seen against the backdrop of the all-encompassing precept of solidarity, a foundational principle of customary law. Amongst the Tsonga,[76] a husband is expected to seek his principal wife's consent to enter into a further marriage, but this does not mean that she may withhold her consent. If she is opposed to a further marriage, she would have to complain to her husband's family council which will then attempt to discourage the husband from entering into a further marriage.[77] However, polygynous marriages are by nature complex and it is important to distinguish between the marriages of senior traditional leaders and commoners, specifically as regards the requirement of consent. This

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[72]Paragraph 32.
[73]See paras 23-24, 50.
[74]Paragraphs 55-61.
[75]Paragraph 49.
[76]Hartman 57-58.
[77]See generally Bekker and Van Niekerk *THRHR* 687.

was confirmed by the evidence of the traditional healer[78] as well as the traditional leaders.[79] This evidence underscores the fact the Xitsonga conception of consent differs from that at common-law. Essentially, it agrees also with the evidence of the experts.[80] What appears *prima facie* to be dissent amongst the witnesses was rather a matter of different conceptions of consent. Indeed, the Court observed that 'there are nuances and perspectives that are often missed or ignored when viewed from a common-law perspective'.[81]

In the main judgment the Constitutional Court came to the following conclusions on the evidence presented regarding the requirement of consent: in Xitsonga law the husband must inform his principal wife of a subsequent marriage; she is expected to agree, which will advance harmony in the community; her disapproval will be met by attempts to reconcile the parties (and the families concerned); failure to reconcile may lead to divorce; failure to inform her will lead to nullity of the subsequent marriage.[82] The Court declared the subsequent marriage of Ngwenyama void as the principal wife had not been informed of the marriage (as opposed to where she had been informed but withheld her consent).[83]

Significantly, the Court remarked that 'it is the function of a court to decide what the content of customary law is, as a matter *of law not fact*' (my emphasis). By contrast, in the minority decision Zondo J found that the evidence in the affidavits presented 'a material dispute of fact'.[84]

Ndita AJA held that the fact that the principal wife's consent is not required in Xitsonga customary law generally, infringes on her right to equality with her husband (as protected under the Constitution and in ss 3(1)(b) and 6 of the Recognition of Customary Marriages Act) and to dignity and that the customary rule should be developed to require consent in compliance with constitutional dictates.[85]

Both the minority decisions followed a direct practical approach to the application of customary law and disagreed with the finding that customary law should be developed.

In his dissenting decision Zondo J[86] pointed out that the evidence regarding the consent was in fact divergent: some of the affidavits supported the requirement of consent, while others support the view that that the principal wife

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[78]Paragraph 55.
[79]See paras 56-58.
[80]Paragraph 59.
[81]Paragraph 60.
[82]Paragraph 61.
[83]Paragraph 86.
[84]Paragraph 125.
[85]Paragraph 84.
[86]Paragraph 122.

merely had to be informed of the subsequent marriage. Interestingly, he pointed out that the fact that a principal wife may under certain circumstances be divorced if she withholds her consent to a subsequent marriage, corroborates the view that consent is a necessary requirement.[87] This interpretation evidences the importance of social solidarity in an indigenous African context and confirms the fact that the conception of consent should be seen in its cultural perspective. Zondo J concluded further that the second marriage was void, irrespective of the issue of consent, as the second wife could in any event not produce any evidence that she and the deceased had concluded a customary marriage.[88]. There was in his view thus no need to develop customary Xitsonga law.

In his minority decision, Jafta J too, pointed out that there was no need to develop the customary law: the evidence predominantly supported the view that unlike other Xitsonga communities in which it was sufficient that the principal wife merely be informed of the subsequent marriage,[89] the specific Xitsonga community to which the parties belonged required the consent of the principal wife.[90] Ngwenyama's subsequent marriage should accordingly have been declared void for a lack of consent of the principal wife, or because she had failed to prove that a customary marriage existed.[91] Having established the customary-law position as set out in the evidence, Jafta J went further, indicating that the development of the customary law to require the consent of the first wife is at any rate incongruent with the Constitution, as it discriminates against other existing wives in the marriage who would have no say in a further marriage.[92] He added that a general development of the Xitsonga customary law to include consent as a requirement, did not fall within the scope of the case as neither of the parties had requested such a development and, further, because it had not been pleaded in the High Court or at least raised in the Supreme Court of Appeal: 'A properly pleaded claim allows the other parties to meet it head on and place before a court evidence necessary for assessing the propriety of the development', which in the case of the Tsonga includes the possibility that there is a justification for the rule of general application that 'appears to be inconsistent with the rights to dignity and equality, entrenched in the Bill of Rights'.[93]

The South African Law Reform Commission appreciated the complexity of polygynous customary marriages and commented as regards the requirement of the existing wife's consent that 'legislating a right for the first wife [to refuse] might

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[87]Paragraph 115.
[88]See para 127.
[89]See paras 138, 151-152.
[90]See paras 139-142.
[91]Paragraph 150.
[92]Paragraph 143.
[93]See especially paras 142, 144.

create "paper law"'.[94] Importantly, though, it further stated that 'to declare the second marriage invalid [for a lack of consent] would constitute such a grave departure from customary law that few people would pay any attention to the penalty'.[95]

One should remove the concept of 'consent' from its typical Western tenets and approach it from a customary-law angle: The lack of consent would then be an indication of the fact that the second marriage was a covert marriage and likewise that the first marriage was kept a secret from the second wife. It is a well-documented fact that marriage in customary law is a family affair and that the whole process involves willing participants on both sides (and not only the couple about to get married), something that could not have happened in this case as the husband's family was unaware aware of the existing marriage when they started negotiations with the family of the second wife.

The requirement that the marriage be negotiated and entered into in accordance with customary law has caused much uncertainty, but the courts are generally very lenient where traditional ceremonies and rites have not been followed in celebrating the marriage. And this accords with the sentiments of the Law Reform Commission that 'traditional wedding ceremonies and the handing over of the bride should not be considered essential for the conclusion of a valid customary marriage. Together with lobolo, however, these institutions will serve to identify a union as one celebrated according to African rites'.[96] This observation of the Law Reform Commission however does not refer to the act of negotiating a marriage in accordance with African culture. A covert marriage would certainly threaten social solidarity and under customary law immediately bring the validity of the marriage into question.

4 Conclusion

In *Gumede v President of the Republic of South Africa* the Constitutional Court remarked that the Recognition of Customary Marriages Act introduced 'certainty and uniformity to the legal validity of customary marriages throughout the country'.[97] This clearly does not apply to the way in which the Act regulates polygynous marriages and specifically the proprietary consequences of such marriages.

Indeed, *quot homines tot sententiae*: Opposing academic arguments have been put forward – all of which are solid and well-substantiated – on the consequences of non-compliance with section 7(6). Ultimately one thing is certain: whether non-compliance leads to invalidity of the subsequent marriage

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[94] *Report* in para 6.1.19.
[95] *Ibid.*
[96] *Report* in para 4.4.10.
[97] Paragraph 24.

or not, the interests of one or both of the wives are infringed and their matrimonial property positions remain uncertain, frustrating the purpose of section 7(6). Should the marriage be terminated in a court of law, section 8(4)(b) will ensure that the court makes an equitable division of the property, protecting the interests of both wives. However, if the marriage is dissolved by death, the court does not have such powers.

One has to agree with Himonga[98] that the Constitutional Court has not succeeded in properly balancing 'the competing rights of the first wife and the subsequent wife in the specific context of the South African legal framework for customary law and the realities of its implementation'. No measure of judicial activism can resolve this matter in an equitable manner or provide legal certainty. It is perhaps time that the regulation of polygynous marriages in the Act, and specifically section 7(6), be referred back to the drawing board and that clear and certain rules drafted to regulate the proprietary consequences of such marriages.

GJ van Niekerk
Unisa

[98] '*Mayelane v Ngwenyama and Minister for Home Affairs*: A reflection on wider implications'.