

# The registration of customary marriages: *Banda v General Public Service Sectoral Bargaining Council* (JR3273/2009) (26 February 2014)

## 1 Introduction

In *Banda v General Public Service Sectoral Bargaining Council*,<sup>1</sup> the Labour Court of Johannesburg reviewed the arbitration award of the Public Service Sectoral Bargaining Council, following its confirmation of the dismissal of the appellant, an employee in the Department of Home Affairs. An important issue that emerged in this case was that of the employer's inconsistent treatment of the employee – the role of the parity principle in disciplinary fairness. The Court held that as the employee had failed to discharge the burden of proving a *prima facie* case of inconsistency, the employer did not have to answer to the allegation.<sup>2</sup>

Principles that came to the fore were that where differing personal circumstances of employees who committed similar transgressions enable an employer to differentiate between them, or where the employer was ignorant of a similar misconduct, and had failed to take action against an employee, an inconsistency challenge should fail.<sup>3</sup> Another was that an employer is not required to follow a previous decision that was made in error.<sup>4</sup> But this discussion will not focus on issues of labour law.<sup>5</sup> The focus here will be on, from a labour law

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<sup>1</sup>Unreported, case no JR3273/2009, 26 Feb 2014 (Labour Court, Johannesburg), available at <http://saflii.austlii.edu.au/za/cases/ZALCJHB/2014/46.html> (accessed 2014-08-01).

<sup>2</sup>Paragraphs 49-51, 55.

<sup>3</sup>In this case the employee introduced as evidence three application forms completed in a manner similar to the form he had completed. (In the arbitration the forms were introduced as evidence of a lack of, or wrong, training and not of inconsistency) (para 52.) The Court held that the context of the introduction of the forms was necessary to determine whether they could be used in comparison and further that the mere fact of their existence *in vacuo* did not prove inconsistency as the surrounding circumstances of their completion may have been different (para 53).

<sup>4</sup>The Court pointed out that there was no indication that the employee had been 'singled out for treatment' and that the 'responsible management' was in fact unaware that other forms had been completed in same manner (see paras 54, 58, 62, 63).

<sup>5</sup>See paras 3-8.

perspective, a peripheral, if not irrelevant matter: the registration of customary marriages. This case provides a rare insight into the actual registration process and highlights some of related practical problems.

The Recognition of Customary Marriages Act 20 of 1998, was widely welcomed not only for taking the bold step of giving official recognition to customary marriages (including polygynous marriages), but especially for addressing the plight of customary wives and widows.<sup>6</sup>

The provision for the registration of customary marriages brought South African law in line with the regional and international conventions to which it is a signatory.<sup>7</sup> Even though non-registration does not affect the validity of a customary law marriage,<sup>8</sup> in practice the absence of a registration certificate severely affects the spouses. Registration, which ensures that 'marital status is made more certain and easier to prove'<sup>9</sup> is in fact fundamental to the protection of women in (and children from) customary marriages.<sup>10</sup> Thus a registration certificate is necessary, for example, to access pension benefits, to inherit, and to divorce.<sup>11</sup> It is not surprising then that the Court in this case, albeit incorrectly,

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<sup>6</sup>Its preamble confirms the goal 'to provide for the equal status and capacity of spouses in customary marriages'.

<sup>7</sup>South Africa is signatory to and has ratified various relevant international conventions and was accordingly obligated to bring its law in line with these. Important in this regard are the 1981 Convention on the Elimination of all forms of Discrimination against Women, available at <http://www.un.org/womenwatch/daw/cedaw/> (accessed 2014-08-03), of which art 16(2) reads: 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory'. See also the 1990 Convention on the Rights of the Child and the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. See para 2.3.3 of the South African Law Reform Commission Report: *The harmonisation of the common law and the indigenous law: Report on customary marriages* (August 1998). De Souza 'When non-registration becomes non-recognition: Examining the law and practice of customary marriage registration in South Africa' 2013 *Acta Juridica* 239-272 at 244 holds that South Africa is in fact not honouring its international obligation as s 4(9) of the Act explicitly states that registration will not affect the validity of the marriage. South Africa ratified the Protocol on the Rights of Women in Africa, but placed a reservation on art 6 which determines that registration is essential for the validity of a marriage: Women's Legal Centre 'Recognition of Customary Marriages' (2011), available at <http://www.wlce.co.za/images/relationship%20rights/general/Recognition%20of%20Customary%20Marriages.pdf> (accessed 2014-08-20) 15.

<sup>8</sup>Section 4(9).

<sup>9</sup>See para 4.5.17 of the South African Law Reform Commission's *Report on customary marriages*.

<sup>10</sup>Should the Department of Home Affairs refuse to register a marriage the courts (which are often geographically and financially out of the reach of many – especially women) are the applicant's only alternative.

<sup>11</sup>See De Souza (n 7) 244-246, esp 247-249 for the effect non-registration has on children; also Mwambene & Kruuse 'Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa' 2013 *Acta Juridica* 293 at 301.

stated that a registering officer's decision whether to register the marriage or not, 'affects the status of people' and 'carries with it a duty of integrity, honesty and responsibility'.<sup>12</sup>

The sections of the Act dealing with registration, like many, if not most, of its provisions have been scrutinised by the courts and academics alike and have been subject to relentless criticism.<sup>13</sup> Because customary marriage is a protracted process and its validity easily challenged, the Act provides that the marriage may be registered in the absence of one of the spouses and even at the request of another person with a sufficiently proven interest. While registration of the marriage should protect women who have the most to lose when the marriage is not registered, in reality the actual registration process by the Department of Home Affairs has favoured husbands who are often reluctant to have their marriages registered.<sup>14</sup> Among other reasons, men resist registration because they do not want to share the marital property or a deceased estate,<sup>15</sup> or because they do not want to get divorced.

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<sup>12</sup>See para 10: The Act confers on the registering officer a discretion whether or not to register the marriage (s 4(6)).

<sup>13</sup>A host of academic comments followed in the wake of the promulgation of the Recognition of Customary Marriages Act and its coming into operation in 2000. The following are some of the articles: Robinson 'The evolution of the concept of marriage in South Africa: The influence of the Bill of Rights in 1994' (2005) *Obiter* 488 at 494ff; Van Schalkwyk 'Law reform and the recognition of human rights within the South African family law with specific reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic marriages' (2003) *De Jure* 289 at 291ff; Bonthuys 'Accommodating gender, race, culture and religion: Outside legal subjectivity' (2002) *SAJHR* 41; Bronstein 'Confronting custom in the new South African state: An analysis of the Recognition of Customary Marriages Act 120 of 1998' (2000) *SAJHR* 558.

<sup>14</sup>The Women's Legal Centre intervened in three cases where the Department of Home Affairs refused to register marriages in the absence of the relevant husbands. The Centre managed to have the marriages registered after convincing them that the requirement of the husband's presence was contrary to the Act. See Women's Legal Centre (n 7) 13; see, also, Kovacs, Ndashe and Williams 'Twelve years later: How the Recognition of Customary Marriages Act of 1998 is failing women in South Africa' 2013 *Acta Juridica* 273-291 at 280; Mwambene and Kruuse (n 11) 302. For women, the detrimental effect of non-registration is felt especially in polygynous marriages: See, eg, *Mayelane v Ngwenyama* 2013 4 SA 415 (CC); *MG v BM* 2012 2 SA 253 (GSJ); *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC); De Souza (n 7) 241-243; 253-260; Van Niekerk '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)' (2013) 28 *SAPL* 469-487 and the sources referred to there; Mwambene & Kruuse (n 11) 296 and the sources referred to there.

<sup>15</sup>See Mwambene and Kruuse (n 11) at 301.

## 2 Facts

The employee was a chief administration clerk in the Department of Home Affairs, tasked with the registration of customary marriages. He had been dismissed on two charges of misconduct:

The first charge was one of fraud, relating to the completion of an application form for the registration of a customary marriage and the 'processing and registering of the customary marriage' between a certain Mfeka (the alleged husband) and Nkosi (the alleged wife).<sup>16</sup> Part A of the application form requires the husband's particulars; Part B a declaration by the husband and, should he refuse, according to the court record, 'details of the circumstances' of his refusal to participate and 'where applicable the response to the application recorded in the application'.<sup>17</sup> Parts C and D require the same information from the wife. The registering officer must furnish reasons for his or her decision whether or not to register the marriage in Part I.

The second charge involved the registration of the marriage outside the time limit set in section 4(3) of the Recognition of Customary Marriages Act.<sup>18</sup> The parties entered into their customary marriage on 6 December 2003. The wife applied for its registration in 2007. The employee registered the marriage on 15 August 2007, well outside the time limit set by the Act and without the husband's involvement in the application process.

On arbitration, the General Public Service Sectoral Bargaining Council found the employee's dismissal to have been fair and dismissed the referral. This decision was taken on review to the Labour Court. It found that the arbitrator's finding on the merits of the case – that the employee's dismissal was substantially fair – did not constitute an irregularity. The Court further found that the arbitrator had come to a reasonable conclusion, having evaluated all the facts before him; and that the issue whether the Department treated its employees inconsistently did not render the arbitration award unreasonable. The outcome of the arbitration was thus found to be reasonable and the arbitration award was upheld.<sup>19</sup>

## 3 Discussion

The charges against the employee bring to the fore the untenable situation that has evolved around the registration of customary marriages. And, importantly, the labour law issue of inconsistent treatment of an employee by an employer confirms the fact that there are severe problems in the registration process.

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<sup>16</sup>Paragraph 19.

<sup>17</sup>*Id* para 12.

<sup>18</sup>*Id* para 14.

<sup>19</sup>*Id* paras 25, 67.

In this case, subsequent to the registration of the marriage, the husband complained to the Department of Home Affairs about the registration of his marriage without his consent and also laid a charge at the South African Police. The only information in the judgment is that the Department of Home Affairs 'was compelled, in the end, to deregister the marriage and the entire saga then led to High Court litigation'.<sup>20</sup> This is alarming: the Department of Home Affairs assumed the power to invalidate the registration of a customary marriage without the approval of a court despite the fact that section 7 of the Act clearly states that upon application, a court may order the registration or the cancellation or rectification of any registration of a customary marriage 'upon investigation instituted by that court'.<sup>21</sup> Yet, here, deregistration was effected before the matter went to court. In fact, the wife approached the Women's Legal Centre for assistance after the registration of her marriage was cancelled. The Centre applied for a review of the decision, arguing that the Department had acted *ultra vires* and had rescinded the registration unlawfully; it further argued that the Department's conduct was procedurally unfair as the wife had not received adequate notice of the nature and purpose of their decision; and it contended that the Department's decision had been based on an incorrect interpretation of section 4 of the Recognition of Customary Marriages Act.<sup>22</sup> For some unknown reason the wife then instructed the Women's Legal Centre to withdraw the application for review.

The Labour Court had to decide, with reference to the evidence that served before the arbitrator and the applicable legal principles, whether the arbitrator had come to a reasonable decision.<sup>23</sup> As to the first charge of fraud, the arbitrator had found that the employee had misrepresented the facts by certifying on the application form (BI – 1699) that the husband had made a declaration and by registering the marriage without any of his witnesses being present; and further, that the employee had failed in his duty to confirm the existence of the marriage with the husband, in effect registering the marriage 'based on a lie'.<sup>24</sup> The arbitrator's conclusion was that this amounted to fraud and prejudiced the Department of Home Affairs. He rejected the employee's defence that he was never trained in completing the forms; that he was unaware of the provisions of the Act; that the actual provisions of the Act and accompanying regulations did not require that the husband had to be present or had to make a declaration; that

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<sup>20</sup>Paragraph 18. I could not trace this High Court decision.

<sup>21</sup>This was recently confirmed by the North Gauteng High Court in *Molefe v Director General Home Affairs*: case no 46248/12, 8 Nov 2013, available at: <http://saflii.austlii.edu.au/za/cases/ZALCJHB/2014/46.html> (accessed 2014-08-07) in para 4.

<sup>22</sup>Women's Legal Centre (n 7) 14-15.

<sup>23</sup>(N 1) para 27.

<sup>24</sup>*Id* paras 30, 32.

employees who had completed the forms in the same way were treated inconsistently; and that the employee had acted *bona fide* and had not committed fraud.<sup>25</sup> The Court agreed with the arbitrator's rejection of the employee's defence that he had been unaware of the content of the Recognition of Customary Marriages Act and that he had not received any training, finding it inexcusable that the employee did not know the provisions of the 'the very legislation he was tasked to apply'. It further stated that if this was indeed true, it should have been a ground for the termination of his employment.<sup>26</sup>

In the Court's analysis of the manner in which the employee had completed the form and registered the customary marriage, several inconsistencies in the registration process emerged.

It appeared that the 'normal process' in the Department of Home Affairs was that '*both parties must be present [and] ask for the marriage to [be] registered, and both parties [must] then complete and sign the relevant documents in the presence of witnesses of each party*'.<sup>27</sup> This seems to be a rather misguided interpretation of regulation 2(1) of the regulations made in terms of section 11 of the Act which states that the application for registration of a marriage must be 'duly confirmed and signed' by the registering clerk.<sup>28</sup> Nevertheless, the Department felt obliged to make a concession in this regard because the husbands often resisted the registration of a marriage by refusing to be present and sign the application documents, deliberately stymieing the registration process. This, in fact, was the very reason why the Legislature in the first place did not make the presence of both parties a requirement. The Department issued a directive, Circular 34 of 2001,<sup>29</sup> allowing the registration officer adiscretion to register a marriage in the absence of one of the parties if certain requirements were met. These requirements were that the 'husband party must be given the opportunity to respond to the application' (that is, he must be aware of the application); that independent evidence of the existence of the marriage be produced; and that evidence of the date of the marriage be produced. Reasons had to be given should the registration officer refuse to register the marriage. The Court accepted Circular 34 of 2001 as undisputed evidence.<sup>30</sup>

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<sup>25</sup>(N 1) para 35.

<sup>26</sup>*Id* para 40.

<sup>27</sup>My emphasis; paras 11, 42.

<sup>28</sup>See the Regulations in terms of the Recognition of Customary Marriages Act 120 of 1988 in GN 1101, GG 21700 of 200-11-01 (amended by GN R359, GG 25023 of 2003-03-14 (at <http://www.justice.gov.za/legislation/regulations/archive.html> (accessed 2014-08-13)); see, further, Women's Legal Centre (n 7) at 12.

<sup>29</sup>(For an example of 'Form A: Application for registration/enquiry into existenceof customary marriage' see the annexure at the end of this case note.)

<sup>30</sup>(N 1) para 41.

The Department's 'normal process' of requiring both parties to be present directly contradicts section 4(2) of the Act that states that '[e]ither spouse may apply ...' and section 4(4)(a) that determines that '[a] registering officer *must*, if satisfied that the spouses concluded a valid customary marriage, register the marriage by recording the identity of the spouses, the date of the marriage, any *lobolo* agreed to and any other particulars prescribed'. The fact that the Legislature had no intention of requiring the presence of both parties, is confirmed also by section 4(5)(a) of the Act. This section allows for *anyone* who satisfies the registering official that he or she has 'a sufficient interest in the matter', to enquire into the existence of the marriage. This may occur without the knowledge of the parties and irrespective of whether any of them is still alive. If the registering clerk is satisfied that 'a valid customary marriage exists or existed between the spouses, he or she *must* register the marriage and issue a certificate of registration as contemplated in subsection (4)'.<sup>31</sup>

The directive of the Department of Home Affairs that contradicts the provisions of the Act is inexplicable. The regulations under section 11(1) of the Act that empowers the Minister to make, among others, regulations – regarding '(i) the requirements to be complied with and the information to be furnished to a registering officer in respect of the registration of a customary marriage; ... (vi) any matter that is required or permitted to be prescribed in terms of this Act; and (vii) any other matter which is necessary or expedient to provide for the effective registration of customary marriages or the efficient administration of this Act'<sup>32</sup> – certainly do not permit a directive to directly contradict the provisions of the Act.

Although the directive in Circular 34 of 2001 is in line with the Act in that it allows the registering clerk to register the marriage where only one spouse is present, it nevertheless, contradicts the Act in requiring that the 'husband party must be given the opportunity to respond to the application'.

To further cloud the issue, the information regarding the registration of customary marriages on the Department of Home Affairs' webpage likewise contradicts the Act. There the requirements for the registration of a customary marriage contracted after 15 November 2000 are stated as follows:<sup>33</sup>

Customary marriages must be registered within three months of taking place. This can be done at any office of the Department of Home Affairs or through a designated traditional leader in areas where there are no Home Affairs offices.

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<sup>31</sup>Section s 4(5)(b).

<sup>32</sup>Subsection (2) requires that regulations made under subsection (1) must be submitted to Parliament before their publication in the *Gazette*.

<sup>33</sup>Available on the home page of the Department of Home Affairs at <http://www.dha.gov.za/index.php/marriage-certificates> (accessed 2014-07-31).

The following people should present themselves at either a Home Affairs office or a traditional leader in order to register a customary marriage:

- the two spouses (with copies of their valid identity books and a *lobola* agreement, if available)
- at least one witness from the bride's family
- at least one witness from the groom's family
- and/or the representative of each of the families.

These requirements also appear *verbatim* on the webpage of the Department of Justice and Constitutional Development.<sup>34</sup>

In spite of the discrepancies between the requirements of the Act and those contained in the directive of the Department of Home Affairs, the Court unfortunately regarded the latter as law, stating that 'it surely cannot take much insight to appreciate that where a husband party is not present to complete his part of the form and make a declaration, *as prescribed*, that the registration officer must at least ascertain if this party is actually aware of the application and give that party an opportunity to explain why he is not there'.<sup>35</sup> Of course, it may also be ignorance of the provisions of the Act that prompted the Court to prefer the departmental directive: in paragraph 45 it stated that it was a matter of 'common sense' and 'simple logic' that both parties should be present and, should one be absent, that the registering officer makes sure that he or she be informed and be provided the opportunity to give an explanation for his or her absence.

In addition, the Court accepted the dissemination of directives such as Circular 34 of 2001 as confirmation that adequate steps had been taken by the Department to train and inform its registering clerks. The question is, of course, how a clerk could be expected to distinguish – or choose – between the directives of the Department and the provisions of the Act ('the very legislation he must apply every day as part of his core duties' as the Court had it<sup>36</sup>).

Furthermore, the Court rejected the employee's explanation of a lack of training, among others, because he had contradicted himself by stating that he had in fact received 'in occupation' training.<sup>37</sup> Again, the question arises which guidelines were followed in the 'in occupation' or other training: those of the Act or those of the Department? After all, the employee averred – and introduced as evidence three other forms – that many of his colleagues had followed the same practice he had followed without any disciplinary steps having been taken against them.<sup>38</sup>

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<sup>34</sup> Available at <http://www.justice.gov.za/services/getting-married-cusmar-law.html> (accessed 2014-08-03)

<sup>35</sup> My emphasis; para 41.

<sup>36</sup> (N 1) para 40.

<sup>37</sup> *Id* para 43.

<sup>38</sup> *Id* para 52.



The Court further found that it was not apparent from the form that the husband had been informed of the application (under Part B, the employee recorded 'unavailable' where information was required about other customary marriages and the reasons for the husband's absence or steps taken to inform him of the process were not recorded);<sup>39</sup> that the employee had signed 'as registering officer *as if Mfeka had made a declaration in part B* of the application'; that the employee had completed Parts A and B of the form as if the husband had been there; and that he recorded 'unavailable' where the husband's witnesses were to have signed. Accordingly the Court ruled that there was no irregularity in the arbitrator's finding that the employee should not have registered the marriage and that his doing so constituted misconduct.<sup>40</sup>

On the face of the form as it was gazetted,<sup>41</sup> it is not apparent how the Court could have come to the conclusion that the employee had committed a fraud by signing his name in the designated place in Part B of the application form; by filling in 'unavailable' where information had to be given on possible other customary marriages; by failing to record the reasons for the husband's absence (there is simply no space on the existing form for recording such information);<sup>42</sup> and by filling in 'unavailable' in Part G of the form which is the section containing the declaration by the spouses' representatives.<sup>43</sup> It is only if the application form is regarded within the context of the departmental directive that the employee's completion of it could be questioned.<sup>44</sup>

As far as the second charge – that of registering the marriage out of the time limit – was concerned, the arbitrator's evaluation of the time frame was straightforward: The marriage had been celebrated in 2003 and the registration took place in 2007. That, he found, was well outside the time limit of three months and constituted misconduct.<sup>45</sup> The Labour Court agreed, indicating that the Act clearly prohibits the registration of a customary marriage after three months and that 'it was simply not competent' for the employee to have registered the marriage'.<sup>46</sup>

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<sup>39</sup>The employee obtained an affidavit from the wife to the effect that her husband, who had been caught cheating on her, refused to have the marriage registered (para 16).

<sup>40</sup>See paras 16-17, 41-42: 46-47 of the decision.

<sup>41</sup>For an example of the gazetted form see the 'annexure' at the end of this case note.

<sup>42</sup>In para 12 the Court referred the husband's declaration in Part B but then added that should he refuse to participate, 'details of the circumstances' and 'where applicable the response to the application [should be] recorded in the application'.

<sup>43</sup>See para 17.

<sup>44</sup>The Department of Home Affairs' Manual apparently requires the presence of both spouses and states that the application for registration must be accompanied by the husband's declaration: see Women's Legal Centre at 13.

<sup>45</sup>(N 7) para 29.

<sup>46</sup>*Id* paras 15, 40.

How the three months is determined is, of course, a rather tricky matter. It is well-known that a customary marriage comes into being through a lengthy process that may take several years to complete, making its existence both variable and negotiable.<sup>47</sup> Moreover, the period of three months within which a customary marriage has to be registered, has been extended by the Minister several times in terms of section 4(3)(b) of the Act. First it was extended until 2001 and then to 1 November 2009<sup>48</sup>; and finally to 31 December 2010.<sup>49</sup>

It is interesting to note that according to the Women's Legal Centre,<sup>50</sup> the Department of Home Affairs instructed registering clerks by means of Circular 27 of 2008 to *continue registering* (my emphasis) customary marriages even though there was no official extension of the time limit gazetted during that period.<sup>51</sup> It appears from this information that less than a year after the events of this case, it was not only common practice to register customary marriages outside the required three-month period, but that late registration was actually condoned by the Department.<sup>52</sup>

Finally, proof of the existence of the customary marriage and specifically the role of *lobolo* and the handing over of the bride are interesting questions that have been the subject of numerous academic articles and judicial decisions.<sup>53</sup> This will not be pursued in the present note. But the decision does illustrate how clouded the issues surrounding *lobolo* have become.

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<sup>47</sup>See, eg, the discussion by Armstrong 'Law, marriage, the family and widowhood: Tying the threads' in Ncube and Stewart (eds) *Widowhood, inheritance laws, customs and practices in Southern Africa* (1995) 149.

<sup>48</sup>GN 8 GG 31735 of 2008-12-24.

<sup>49</sup>GN 51 GG 32916 2010-02-05.

<sup>50</sup>(N 7) 14.

<sup>51</sup>I could not access any of the Department's internal circulars, but the possible existence of this circular aligns with the Government Notice that was issued on 24 December 2008 to extend the time for registration.

<sup>52</sup>Significantly, in *Molefe v Director General Home Affairs* (n 21) the Department of Home Affairs conceded that registration had taken place outside the cut-off date but indicated that an investigation of the matter yielded 'no corruption in the registration of the marriage' (para 3).

<sup>53</sup>See, among others, Mwambene and Kruuse (n 11) 303 and further; De Souza (n 7) at 249 and further; Kovacs *et al* at 282-286; West and Bekker 'Possible consequences of declaring civil and customary marriages void' (2012) *Obiter* 351; Bennett 'Legal pluralism and the family in South Africa: Lessons from customary law reform' (2011) *Emory International LR* 1029 at 1045-1046; Bekker 'Proof of existence of a customary marriage: *Fanti v Boto* 2008 5 SA 305 (C)' (2009) *THRHR* 684; Mofokeng 'The lobola agreement as the silent prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriages Act' (2005) *THRHR* 277 at 279; Maithufi and Bekker 'Recognition of Customary Marriages Act 1998 and its impact on family law in South Africa' (2002) *CILSA* 182; De Koker 'Proving the existence of a customary law marriage' 2001 *TSAR* 257; and see the recent decision in *Rasello v Chali; Chali v Rasello* unreported case no A69/2012, 683/2011 (Free State High Court) 24 October 2013, available at: <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAFSHC/2013/182.html> (accessed 2014-08-23).

It is clear that according to the Department of Home Affairs, the proof of *lobolo* goes far in establishing the existence of a customary marriage. This begs the question why a registering clerk should be held liable of misconduct for recognising payment of *lobolo* as such. According to Circular 21 of 2003, registering officers may use proof of a *lobolo* agreement, an affidavit from a traditional leader, or other evidence from the wedding itself to determine whether a customary marriage existed.<sup>54</sup> Part E of the application form is the part on 'proof of customary marriage and *lobolo* agreement': here is required the 'date of the celebration of the marriage', the 'place of the customary marriage' and 'particulars of *lobolo* agreement'. It is thus not surprising that the employee accepted the *lobolo* agreement as proof of the existence of the marriage. Yet in paragraph 42 the Court dismissively stated that '[a]ll that the applicant relied on was the *lobolo* agreement<sup>55</sup> and an affidavit by the wife herself, which was woefully inadequate'.

At the time of the events, interesting information came to the fore in newspaper articles in the *Sowetan*. These facts did not serve before the arbitrator and their veracity can obviously not be confirmed. However, I mention them here as it further evidences the uncertainty that prevails, both in the Department and among the people whose lives are directly affected by its administrative decisions. According to one of the articles<sup>56</sup> the husband admitted that he had paid *lobolo* in 2003. In the same article a spokesman of the Department of Home Affairs is quoted as having said that any of the two parties may have the marriage registered and, importantly, that 'paying *lobolo* was not the first step in getting married ... it was marriage itself'. The spokesman further stated that 'the only way out for Mfeka [was] a divorce because by law the marriage stands'.

Against this backdrop, it is not surprising that there is so much uncertainty, for spouses, interested parties and registering clerks alike.<sup>57</sup>

## 4 Conclusion

The registration of a customary marriage was the reason for the dismissal of the employee in this labour dispute. An important issue that had to be considered by the Court was the inconsistent treatment of an employee by an employer. Even

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<sup>54</sup>See Women's Legal Centre (n 7) 11; see also the information on the Department's webpage referred to above.

<sup>55</sup>The *lobolo* agreement formed part of the evidence before the arbitrator.

<sup>56</sup>See 'Married in absentia' *Sowetan* (2007-11-23). The fact that *lobolo* had been paid was also confirmed in another article 'Victory for women' *Sowetan* (2007-11-28). In the latter article the husband averred that he had paid only the first instalment of the *lobolo*.

<sup>57</sup>The following articles in the *Sowetan* illustrate the uncertainty surrounding the registration of customary marriages: 'Married in absentia' (2007-11-27); 'The perils of customary marriage' (2014-08-01); 'Women's victory' (2007-11-28); 'Making it legal' (2009-02-05); 'Home Affairs errs in marriage again' (2007-12-06). "'Illegally married" man lays charges' (2007-11-29).

though the facts surrounding the registration were seminal in the Labour Court's evaluation of the arbitrator's decision that the employee had not been unfairly dismissed, the information reflected in the court record is rather skimpy and raises several questions that are not answered.

What could be gained from the law report is that the employee, a clerk in the Department of Home Affairs, registered a customary marriage outside the three-month time limit of the Recognition of Customary Marriages Act; that he had done so in the absence and without the knowledge of the husband; and that he had completed the application form in a manner that, according to the Court, amounted to fraud. However, venturing into the social media<sup>58</sup> and reading the report of the Women's Legal Centre on the Recognition of Customary Marriages Act, many of the gaps could be filled, and a different light cast on the matter. While the Court regarded the 'husband' as prejudiced by the 'fraudulent' registration of the customary marriage – this was also the impression gained from some of the newspaper reports – the Women's Legal Centre regarded the wife as the prejudiced party and attempted to intervene on her behalf.

The large number of reported cases where women battled for the registration of their marriages – and did so despite the cost involved – attests to the necessity of registration which primarily protects wives in customary marriages, and not only against their husbands.<sup>59</sup> Women are also prejudiced when, after his death, the husband's family turns hostile simply because they want to lay claim to the estate.

But the central problem is one of uncertainty. The Department of Home Affairs' requirements for registration are not in line with those of the Act. The Minister's response to the increasing problems emanating from the registration of customary marriages was the Draft Recognition of Customary Marriages Amendment Bill, 2009. Ironically, this Bill largely confirms the requirements of the Department. Should it become law, the position of many women in customary marriages will basically revert to that before the promulgation of the Recognition

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<sup>58</sup>The registration and the rescission of the registration of the marriage in question were widely covered in a daily newspaper. I was alerted to this media coverage by the judge's reference to it in his decision.

<sup>59</sup>See, eg, *Molefe v Director General Home Affairs* (n 21) where the sister of the deceased lodged an application that the registration of his customary marriage after his death be declared *ultra vires*; and that the Department of Home Affairs be ordered to deregister the marriage. In this case the registration had taken place after the cut-off date of 1 November 2009 (in terms of GGo 31735 published on 2008-12-24).

of Customary Marriages Act<sup>60</sup> because few have the means to approach a court to prove the existence of their marriages.

This proposed change is, of course, nothing but an implied recognition that the Department's practices were in contravention of the Act, but that will be of little consolation to the dismissed employee.

Gardiol van Niekerk  
*University of South Africa (Unisa)*

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<sup>60</sup>In terms of the Bill, the registration of a marriage by one party alone will be an offence. Section 4(a) determines: 'Both spouses must *together* apply to the registering officer in the prescribed form for the registration ...' (own emphasis). And the new cl (s) 10D criminalises registration that is not authorised under the Act, or in contravention of the provisions of this Act. Importantly, the Bill further prohibits the registration of a marriage where one of the parties is deceased (cl 6B).

**ANNEXURE (See footnote 29)**

**FORM A: APPLICATION FOR REGISTRATION/ ENQUIRY INTO EXISTENCE OF CUSTOMARY MARRIAGE**

\* Delete whichever is not applicable.

**A. PARTICULARS OF HUSBAND**

Identity number:

Surname:

Forenames in full:

Date of Birth:

Marital Status:

Name of husband's father:

Name of husband's mother:

Name of traditional leader:

**B. DECLARATION BY HUSBAND**

I, the undersigned, hereby declare that:

(1) I consented to the customary marriage between myself and the woman whose particulars are set out hereunder.

(2) The marriage was contracted in accordance with the laws and customs of the ..... traditional community.

(3) I was not a partner in a civil marriage when I contracted the aforesaid customary marriage.

\* (4) At the time of the aforesaid customary marriage I was married by customary law to the following woman/women, namely:

Full names:

Date of marriage:

(5) The above particulars are to the best of my knowledge and belief, true, complete and correct.

Signature of declarant:

Date:

Contact Address:

Postal Code:

The above declaration was duly confirmed and signed before me.

Signature: \*Registering officer/\*designated person:

Initials, surname and appointment number of designated person:

Date:

The application form is contained in reg 2 of the Regulations in terms of the Recognition of Customary Marriages Act 120 of 1988 (n 28).