A Note on *Mandela v Executors, Estate Nelson Mandela* 2018 (4) SA 86 (SCA) and the Conundrum around the Customary Marriage between Nelson and Winnie Mandela

Sipho Nkosi
Lecturer, University of Johannesburg
Email: snkosi@uj.ac.za

Abstract

The note is about the appeal lodged by the late Mrs Winnie Madikizela-Mandela to the SCA against the decision of the Eastern Cape High Court, Mthatha, dismissing her application for review in 2014. In that application, she sought to have reviewed the decision of the Minister of Land Affairs, to transfer the now extended and renovated Qunu property to Mr Mandela and to register it in his name. Because her application was out of time, she also applied for condonation of her delay in making the application. The court *a quo* dismissed both applications with costs, holding that there had been an undue delay on her part. Mrs Mandela then approached the Supreme Court of Appeal, for special leave to appeal the decision of the court *a quo*. Two questions fell for decision by the SCA: whether there was an unreasonable and undue delay on Mrs Mandela's part in instituting review proceedings; and whether the order for costs was appropriate in the circumstances of the case. The SCA held that there was indeed an unreasonable delay (of seventeen years). Shongwe AP (with Swain, Mathopo JJA, Mokgothloa and Rodgers AJJA concurring) held that the fact that there had been an undue delay does not necessarily mean that an order for costs should, of necessity follow, particularly where, as in this case, the other litigant is the state. It is the writer's view that two other ancillary points needed to be raised by counsel and pronounced on by the Court: (*a*) the lawfulness and regularity of the transfer of the Qunu property to Mr Mandela; and (*b*) Mrs Mandela's status as a customary-law widow—in relation to Mr Mandela.

Keywords: transfer of property; Mandela; review; costs; customary law and marriage

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Introduction

This case—*Mandela v Executors, Estate Nelson Mandela*[1]—involved an appeal lodged by Mrs Winnie Madikizela-Mandela[2] against the decision of the Eastern Cape Local Division, Mthatha. The High Court had dismissed her application in which she sought a review of the decision of the Minister of Land Affairs[3] to donate to Mr Mandela[4] a certain property in Qunu, Eastern Cape,[5] and have it registered in the latter's name alone. Mrs Mandela averred that the registration of the property was effected on 6 November 1997; and that Mr Mandela had since bequeathed it (including the latter's share or interest in it) to his third wife, Ms Graca Machel, and her children.

The Facts

From what could be gleaned from the court papers, Mr Mandela and Mrs Mandela married each other by custom in the Transkei in 1958.[6] Later that year, on 14 June, the couple entered into a civil marriage which was out of community of property.[7] It is important to note that Mrs Mandela was the second wife that Mr Mandela married before he was convicted, sentenced and interned on Robben Island in 1964. After spending twenty-seven years on the island and in other correctional facilities,[8] Mr Mandela was released. In 1996—six years after his release—the marriage between him and Mrs Mandela broke down, irretrievably. As a result, he instituted divorce proceedings in the Witwatersrand Local Division.[9] Two years after that, Mr Mandela married for the third time—with Ms Graca Machel. Mr Mandela died on 5 December 2013. In August 2014, Mrs Mandela discovered that Mr Mandela had bequeathed, by will, the Qunu property to Ms Machel and her children.

The Legal Issues

The main issues that required determination and resolution were: (*a*) whether the Court *a quo* was correct in dismissing Mrs Mandela's application with costs, on the basis that she had delayed unreasonably in launching it; and (*b*) whether the decision in *Biowatch*

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1 2018 (4) SA 86 (SCA); [2018] All SA 669 (SCA).

2 Hereinafter referred to as 'Mrs Mandela'.

3 Hereinafter referred to as 'the minister'.

4 Hereinafter referred to as 'Mr Mandela'.

5 Described in the court papers as 'Lot KwaMadiba (Portion AA), also called Qunu)', hereinafter referred to as 'the Qunu property'.

6 The Transkei was an 'independent homeland' under apartheid and is now part of the Eastern Cape Province.

7 Presumably in terms of the provisions of s 22 (6) of the Black Administration Act 38 of 1927.

8 These being Pollsmoor Prison and Victor Verster Prison.

9 Now known as the South Gauteng High Court.

Trust v Registrar, Genetic Resources[10] was relevant *in casu*, particularly on the question of costs.

In the High Court

As set out above, Mrs Mandela applied for an order declaring the decision of the minister null and void. Alternatively, she sought an order reviewing that decision and setting it aside. She also sought an order declaring certain provisions of Mr Mandela's will invalid, alleging that, as Mr Mandela's customary-law wife in terms of AbaThembu custom, she was entitled to inherit the Qunu property. The material part of the will reads as follows:

> I bequeath the Qunu Property and the movable assets in or on it at the time of my death, to the NRM FAMILY TRUST. It is my wish that the trustees of the NRM FAMILY TRUST administer the Qunu Property for the benefit of the Mandela family and my third wife and her two children, MALENGANE MACHEL and JOSINA MACHEL. The Qunu Property should be used by my family in perpetuity in order to preserve the unity of the MANDELA family.[11]

Mrs Mandela's contention was that, at the time when the bequest was made, the property had already been allotted to her by one Daliguba Joyi, in consultation with members of the local community. It is not clear from the judgment what the position and status of Joyi was in relation to that community or to Mrs Mandela herself. Along with the minister, Mrs Mandela also cited the executors of Mr Mandela's deceased estate, the Nelson Rolihlahla Mandela Family Trust[12] and Ms Graca Machel as respondents. The respondents opposed her application, alleging that a reasonable person in her position would have asserted his or her rights before Mr Mandela's death.[13]

On the question of Mrs Mandela's delay (of seventeen years) to make the application for review, the Mthatha High Court came to the conclusion that she had indeed 'unduly and unreasonably delayed in launching the application for review.'[14] The Full Bench comprising Makgoba JP, Van der Merwe and Teffo JJ, held that the question to be asked in this regard is: 'When would a reasonable person in Mrs Mandela's shoes have acquired the knowledge of the minister's decision?'[15] That question was answered by saying that such a person would have taken steps during the 1996 divorce proceedings between the parties; and would certainly have uncovered the steps taken by the minister. Even though the High Court was prepared to accept that Mrs Mandela approached it soon after becoming aware of the decision of the minister, and that there had not been

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10 2009 (6) SA 232 (CC).

11 See para 2.

12 Commonly known as the 'Nelson Mandela Family Trust'.

13 Paragraph 28.

14 Paragraph 11 of the judgment of the Supreme Court of Appeal.

15 ibid.

any undue or unreasonable delay on her part, however, the Court, however, emphasised the following points: (*a*) Mrs Mandela had produced no proof of her financial contribution to the building of the house that was erected on the Qunu property between 1993 and 1995; (*b*) the original site was actually extended from nine hectares in extent, to a massive 101.5 ha structure, with the approval of the local tribal authority; (*c*) the allotment of the property to Mr Mandela was a public affair which included a ceremony that was attended by Chief Buyelekhaya Dalindyebo and other traditional leaders; (*d*) after the above-mentioned divorce, Mr Mandela conducted himself, openly, as the sole owner of the property; (*e*) in 1998, after it was registered in Mr Mandela's name (alone), the property was vastly extended and renovated; and (*f*) at the material time hereto, Mr Mandela and Mrs Mandela were not on speaking terms. The cumulative effect of all of these factors, in the view of the High Court, was that the delay was unreasonable and should not be condoned. The Court also held that there was no reasonable prospect that Mrs Mandela would succeed in proving that she was still Mr Mandela's customary-law widow.[16] Nor would she be able to demonstrate that Joyi actually donated the Qunu property to her, in her individual capacity, to the exclusion of Mr Mandela.[17] In the absence of any right inhering in Mrs Mandela, the Court said, nothing meaningful would be achieved by reviewing and setting aside the decision of the minister.[18] The High Court then dismissed the application with costs, holding that 'the unreasonable delay of the applicant should not be condoned, regard being had to the nature and strength of the merits of the (main) application.'[19] Mrs Mandela then applied for leave to appeal, which was itself dismissed. She then approached the Supreme Court of Appeal for special leave, which was granted in 2017.

The Supreme Court of Appeal

There were essentially two questions that arose for determination by the Supreme Court of Appeal: (*a*) whether the Court *a quo* exercised its discretion properly in holding that Mrs Mandela's delay to launch her application should not be condoned; and (*b*) whether she should have been ordered to pay the costs of the failed application.

On the question whether the Court *a quo* had exercised its discretion properly, the SCA, *per* Shongwe AJP (with Swain and Mathopo JJA and Mokgothloa and Rodgers AJJA concurring), held:

16 The Court held that her assertion that the couple's customary marriage had survived the1996 divorce appeared tenuous (at best).

17 Paragraph 24.

18 ibid.

19 Paragraph 24.

> It must be made clear from the outset that the administrative action and the impugned decision must be adjudicated in terms of the common law and not in terms of the Promotion of the Administrative Justice Act.[20]

For authority, the Court relied on the decision in *Associated Institutions Pension Fund v Van Zyl*:[21] that it is in the public interest that finality be reached within a reasonable time where administrative decisions and the exercise of administrative functions are concerned.[22] The Acting Judge President emphasised the power of the courts to regulate their own proceedings, and to refuse an application for review, where the aggrieved party has himself or herself been guilty of unreasonable delay.[23] He also said that the rationale for this 'long-standing rule'[24] was two-fold. First, to prevent undue prejudice to the respondent. Second, to ensure finality in the performance of administrative functions.[25] The Acting Judge President also stated that there were two other important, but subsidiary, questions to be asked in this context: (*a*) Was there any unreasonable delay? (*b*) If so, should the delay, in the circumstances of the case, be condoned?[26] This, the SCA emphasised, is a matter of 'factual inquiry upon which a value judgment is called for in light of all the relevant circumstances, including any explanation that is offered for the delay.'[27] Shongwe AP proceeded to state that the present case was distinguishable from *Van Zyl* in that, *in casu*, there was really no unreasonable delay on Mrs Mandela's part, particularly if one considers the date on which she learned of the minister's administrative decision, and the time it took her to launch the application.[28] However, the Acting Judge President added a word of caution:

> In my view…the same [*Van Zyl*] principle (also) applies where there are circumstances which should have alerted an applicant to the existence of a decision adverse to her rights. Reasonable vigilance of one's rights is required. The failure to investigate such circumstances has the same potential to prejudice other parties as a failure to act promptly after learning of the adverse decision.[29]

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20 Act 3 of 2000, hereinafter referred to as 'PAJA'.

21 2005 (2) SA 302 (SCA).

22 Paragraphs 46–47.

23 Paragraph 9.

24 ibid. Counsel for Mrs Mandela had argued that there was indeed something meaningful to be gained by her if the decision of the Minister were set aside. He contended that she would be entitled to prevent Ms Machel (and her children) from using the Qunu property (assuming that the relevant parts of the will would be struck out or declared *pro non scripto*).

25 ibid.

26 ibid.

27 Paragraph 10 and authorities cited therein.

28 Paragraph 13.

29 Paragraph 13. In other words, Mrs Mandela acted only after Mr Mandela's death, not when she actually should have—around the time when the Qunu property was actually donated to, and registered in, the latter's name.

He then stated that even though Mrs Mandela had acted promptly after seeing the contents of the will, her conduct was not consistent with that of a reasonable person who would have taken steps to establish the outcome of her counterclaim (in the course of the aforesaid 1996 divorce proceedings) and the fate of her claim to the property.[30]

Agreeing with the court *a quo*, the Acting Judge President pointed out that the Qunu Property was handed over to Mr Mandela at a public ceremony which was attended by Chief Dalindyebo of the AbaThembu and other dignitaries representing the Ebotwe Tribal Authority;[31] that Mr Mandela had renovated the house extensively, from his own resources; and that he had continued to conduct himself 'as the (sole) owner of the house, without any recognition of any rights of the appellant.'[32] He also said that the primary objective of an enquiry of this nature was to determine (and prevent) 'the inherent potential for resultant prejudice to the heirs of Mr Mandela if the challenged decision is set aside.'[33] It entails 'comparing the present position of the other parties involved with what it would have been had proceedings been instituted within a reasonable time.'[34] The Court was of the view that Mrs Mandela had adopted a supine attitude and had done nothing to assert her rights to the property; nor had she provided any acceptable proof of her financial contribution to the improvements effected to it.[35] However, because of Mr Mandela's demise, the SCA intimated, there was a significant part of the couple's story that the two forums never got to hear.[36] For that reason, Mrs Mandela's evidence seemed much more credible than it would actually have been; and that 'in good time [Mr Mandela] would perhaps have devolved his estate differently.'[37]

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30 Paragraph 14.

31 Paragraph 15. Prior to that, Chief Mtirara, a local traditional leader, had sent a letter to the magistrate in the district advising him that the increase in the size of the property had already been approved by the Local Authority.

32 Paragraph 16. The Court held that this should 'have raised (Mrs Mandela's) eyebrows as regards the land itself"; and that it would be unthinkable that Mr Mandela would, after the divorce, erect a mansion for her benefit' (ibid).

33 Paragraph 17.

34 *Liberty Life Association of South Africa v Kachelhoffer NO* 2000 (1) SA 1094 (C) 1114. This exercise, the Court said, involves looking at whether a lapse of time, in the particular set of circumstances, has affected the recollection capacity on the part of witnesses; and whether documentary or any other form of evidence is no longer available. The Acting Judge President then said:
In this case Mr Mandela is not available to put his side of the story, which comprises the principle of *audi alteram partem*. Although the appellant had a number of witnesses in support of her version as to how the Qunu property was allocated to her by the tribal leaders, the weight of this evidence might have been diminished if Mr Mandela himself had been alive to give his version. All the evidence and the conduct of Mr Mandela indicate that he genuinely believed that the Qunu property was his to the exclusion of the appellant (see para 27).

35 Paragraph 27.

36 ibid.

37 ibid. The Court emphasised this point, again, in the following terms:
If he had known that the appellant laid claim to the Qunu property for herself and for the benefit of the children of her marriage to Mr Mandela, he may well not have made these bequests or may have

Even though the SCA was prepared to assume, without deciding, that the prospects favoured Mrs Mandela succeeding on the merits, that was not sufficient to swing the scales in her favour, and for the Court to overlook the delay in making the application for review.[38] The Acting Judge President said that due regard had to be paid 'to the potential for severe resultant prejudice if the decision of the minister is set aside.'[39] There had been 'excessive undue' delay on the part of Mrs Mandela, he said, and Mrs Mandela had not provided any acceptable explanation for it.[40]

Even though the SCA cannot be faulted for its conclusion on this point, there are other factors that should have been considered by both forums, particularly the SCA. That would have helped to provide a clearer perspective on the legal principles at issue. First, the building and erection of the Qunu mansion is not ancient history. The fog of time is not so thick as to cloud South Africa's collective memory of Mr Mandela's passing. It occurred a mere six years ago. Second, the relevant evidence (pertaining to the property) is largely documentary in nature and ought to be kept under the lock and key of a designated government functionary in terms of the rigours and strictures of the law.

On the question whether Mrs Mandela was still Mr Mandela's customary-law wife when the latter died in 2013, the SCA merely referred to the provisions of section 2 of the Recognition of Customary Marriages Act,[41] and held that customary marriages were now fully recognised in South Africa.[42] This terse reference to the RMCA is an indication that very little actually turned on the couple's customary marriage. The point that Mrs Mandela's 'customary law rights … were not simply ignored' seems to have been mentioned as an afterthought. The Court's focus seems to 'exclusively (have been) based on the excessive undue delay coupled with the potential for severe resultant prejudice to be suffered by the respondents.'[43] It is for this reason that it was said that even if Mrs Mandela were to succeed in proving her alleged right to the Qunu property, she would be entitled only to a small portion of it—that was purportedly allotted to her by the King of the AbaThembu.[44] In other words, if Mrs Mandela had confined her claim to that portion—without conflating it with the bigger part that was donated to Mr Mandela by the minister—the case might have been adjudicated differently.[45]

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bequeathed more modest amounts. He may have taken steps to exclude her as a beneficiary of family trusts on the basis that the value of the Qunu property would be sufficient for her and the descendants from that marriage (see para 29).

38 Paragraph 30.

39 ibid.

40 Paragraph 30.

41 Act 120 of 1998.

42 Paragraph 31.

43 ibid.

44 ibid.

45 ibid.

On the question of costs, the SCA said that even though Mrs Mandela's case was not, at first glance, a constitutional one, the administrative action of the minister implicated the constitutional principle of legality and her right to property.[46] Citing *Biowatch*,[47] the Acting Judge President said that it was settled law that 'unsuccessful litigants who approach the court, in good faith, to assert constitutional rights, should not be discouraged to do so for fear of having costs awarded against them.'[48] He then proceeded to point out that the Court *a quo* had ordered Mrs Mandela to pay the costs of the application, not because she did not raise any constitutional issue, but because her instituting the proceedings was frivolous or vexatious.[49] He then proceeded, and cautioned: that the specific facts of the case did not warrant a departure from the *Biowatch* principle. Nor was he persuaded by the assertion that the 'appellant's institution of the proceedings was vexatious or frivolous or manifestly inappropriate.'[50] The fact that the delay is found by a Court to be objectively unreasonable, he emphasised, does not mean 'that the litigation is frivolous or vexatious in the sense contemplated in the Constitutional Court jurisprudence.'[51] Accordingly, the SCA concluded that the Court *a quo* had misdirected itself in ordering Mrs Mandela to pay the costs of the application—instead of each party bearing their own costs—in so far as it related to the minister.[52] Even though the *Biowatch* principle does not apply where 'private parties in their private capacities' are involved, the SCA said, the court *a quo* was correct in holding that the application should fail on the merits.[53] This is because the common-law rule, that review proceedings should be instituted without undue delay had been violated, the Court said. *In casu*, it took Mrs Mandela seventeen years to institute review proceedings.

Discussion

It is important to note that both the Court *a quo* and the SCA left open two other questions which, if properly ventilated, could have swung the pendulum in Mrs Mandela's favour:[54] (*a*) whether the disposal of the Qunu property was lawful or not; (*b*) and whether, as Mr Mandela's customary-law widow, she was entitled to the property (or a portion of it). The reason for this approach seems to have been a lack of satisfactory or credible documentary evidence was provided on these points. The Court *a quo*, in particular, should have asked counsel (on both sides) to file additional

46 Paragraph 32.
47 2009 (6) SA 232 (CC).
48 Paragraph 32.
49 Paragraph 33.
50 ibid.
51 ibid.
52 Paragraph 34.
53 ibid.
54 It is important to bear in mind that both the High Court and the SCA were not so much concerned with the merits of Mrs Mandela's application as with the unreasonableness of her delay in launching it.

affidavits and attach relevant documentary evidence; and to argue and address it on these issues. After all, the documents pertaining to the Qunu property can be obtained from the Deeds Registry with relative ease. These documents and argument would have helped the Court to determine the lawfulness, validity, regularity or otherwise of the donation, and purported transfer of the property to Mr Mandela. It would also have helped to clarify the legal consequences, if any, that the couple's civil marriage had on the customary one they had concluded prior to it. It also would have helped the Court to determine whether some parts of Mr Mandela's will should be declared invalid or *pro non scripto*.

Like many black couples in South Africa, Mr and Mrs Mandela concluded what is sometimes referred to as a 'dual marriage'.[55] A dual marriage occurs when the parties—as many black South Africans are wont to do—first enter into a customary marriage, including the payment of lobolo and the performance of other traditional rituals, and later conclude a civil marriage with all the accompanying Judeo-Christian formality and symbolism.[56] However, it is important to point out that at the time when Mr and Mrs Mandela concluded their civil marriage, customary marriages could not exist in the face of civil marriages.[57] The law of the time rendered them inferior and subservient to civil ones.[58] Also, many black couples were not even aware that the payment of lobolo was not a requirement for the validity of the civil component of their composite marriages.[59] The most important question, in this context, is whether the order that was issued by the Witwatersrand Local Division in 1996, dissolving the civil marriage between Mr and Mrs Mandela, automatically revived the customary marriage between them. Before proffering an opinion on this point, it is important to mention that the political milieu and constitutional matrix that the esteemed couple lived in was markedly different to the present. There was no provision similar to section 2 (1) of the RCMA; and customary marriages were not insulated from invalidation by a subsequent civil marriage, entered into by one of the spouses with a third party.[60] In other words, customary marriages

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55 This is the kind of marriage where the parties celebrate 'by two different rites with the intention of ensuring validity under two systems of law or belief'—see TW Bennett, *Customary Law in South Africa* (Juta 2004) 238.

56 See Bennett (n 55) 236–239; see also JC Bekker, *Seymour's Customary Law in Southern Africa* (Juta 1989) 247, where the author says that some black people are 'inclined to regard a civil marriage in some aspects as they do a customary marriage [and requiring the infusion of cultural rites]'; and that often the civil marriage is accompanied by a payment of lobolo. In many instances, if not always, a civil marriage is preceded by a customary one.

57 The subsequent civil marriage automatically dissolved the customary-law one. For the legal position at the material time, see *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307–308; *Nkambule v Lind*a 1951 (1) SA 377 (A) 380–382; *SANTAM v Fondo* 1960 (2) SA 467 (A) 470–474.

58 ibid.

59 There is no longer any need for 'conversion' from the one type to the other, as envisaged by s 10(2) of the RCMA. Both types of marriage now enjoy equal status: see Bennett (n 55) 238.

60 Bennett (n 55) 236–239.

were not recognised;[61] and they could not subsist in the face of a civil one.[62] However, a monogamous customary marriage between black persons was subsumed under, and extinguished by, a subsequent, civil one, between the same parties.[63] Therefore, when Mr and Mrs Mandela entered into and concluded a civil marriage, the customary one was automatically dissolved. The inescapable conclusion is that when the civil marriage was itself dissolved, in 1996, there was *legally* no customary marriage to speak of. The *ratio legis* of the RCMA—particularly the provisions of section 2—was not to resuscitate a 'pre-recognition' customary marriage, which did not exist when it came into operation.[64] It does not even matter whether, at the time of concluding the civil marriage, the parties intended to adhere simultaneously to the cultural and traditional dictates prevailing in their community.[65] Even if one were to assume that the 1996 divorce order resuscitated the customary marriage between the parties (which it did not, it is submitted),[66] a mere return of lobolo to Mr Mandela's family (on its own)[67] would also not have sufficed in this instance. An order by a competent court, on the grounds of irretrievable breakdown, is now the only requirement for that purpose.[68] Nor would such a marriage have been dissolved merely by one of the parties entering into a civil one with a third party.[69] A valid customary marriage, polygynous or not, is now a legal, impregnable impediment to a purported civil one (with another person).[70] It is no longer

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61 See Bekker (n 56) 249–253; see also Bennett (n 55) 188–192; *Seedat's Executors v The Master* 1917 AD 302 at 307–308; *Nkambula v Linda* 1951 (1) SA 377 (A) 380–382, and *Santam v Fondo* 1960 (2) 467 (A) 470–474. For the position under the Recognition of Customary Marriages Act 120 of 1998, see *Thembisile v Thembisile* 2002 (2) SA 209 (T) 213–214. However, cf *Netshituka v Netshituka* 2011 (5) SA 453 (SCA) paras 12–13, and *Murabi v Murabi & Others* 2014 (4) SA 575 (SCA) paras 16–17. For a discussion of *Netshituka*, see Pieter Bakker and Jackie Heaton, 'The Co-existence of Customary and Civil Marriages under the Black Administration Act 38 of 1927 and the Recognition of Customary Marriages Act 120 of 1998 – The Supreme Court of Appeal Introduces Polygyny into some Civil Marriages' (2012) Tydskrif vir die Suid-Afrikaanse Reg 594. It is also important to note that the amendment of s 22 of the Black Administration Act—through the Marriage and Matrimonial Proprietary Amendment Act 3 of 1998—was a half-hearted legislative exercise. Its provisions were not as specific as those of the RMCA, particularly where contravention and non-compliance were concerned.

62 See Bennett (n 55) 190. As indicated above, a valid customary marriage now constitutes a legal impediment to a purported civil marriage between one of the parties and another person.

63 Bennett (n 55) 238.

64 ibid.

65 ibid.

66 The parties were not on speaking terms for many years after the civil marriage between them was dissolved in 1996; and Mr Mandela even proceeded to marry another woman, Mrs Machel, by civil rites. However, cf *Netshituka* (n 61) para 13, where the SCA seemed to suggest that a divorce in these circumstances revives the hitherto dissolved customary marriage.

67 Which is what Mrs Mandela's counsel contended.

68 Section 8(1) of the RCMA.

69 See ss 2(1) and 8(1) of the RCMA; see also *Thembisile* (n 61) 214, where Bertelsman J said that customary marriages have now 'been given constitutional recognition' in terms of s 15(3)(*a*) of the Constitution (which the RCMA is an amplification of).

70 See ss 2 and 10 of the RCMA; see also *Thembisile* (n 61) 214.

beyond the realm of constitutional and legal possibility for a charge of bigamy to be preferred against the offending party—and conviction to follow as a matter of course.[71]

It is also important to note that the provisions of the Transkei Marriages Act[72]—which came into operation thirty years after Mr Mandela and Mrs Mandela were married—have no relevance in this regard.[73] Otherwise, the civil marriage between Mr Mandela and his third wife, Ms Machel, would itself have been a nullity;[74] and some of the provisions of his will would have been open to attack.

Conclusion

The SCA cannot be faulted for holding that the matter fell to be decided, not in terms of PAJA, but in accordance with the applicable common-law rule: that an aggrieved party is required to institute review proceedings without any undue delay. There is nothing constitutionally reprehensible with requiring litigants to institute review proceedings promptly and ensuring that the matter between them is expeditiously brought to finality. The Court was also correct in stating, as a general rule, that an unreasonable delay does not necessarily render litigation vexatious or frivolous. However, the conclusion that Mrs Mandela should not pay the costs was, it is submitted, not correct. There was a clear causal link between her 'undue and unreasonable delay' and the legal costs that her opponents, the respondents, were mulcted in.

Sadly, the conundrum of the 'dual marriage' still remains unresolved. One hopes that the SCA or the Constitutional Court will, in the fullness of time, have occasion to pronounce on it once and for all. The outcome would help clarify the constitutional and legal issues involved, particularly where, as in this case, the customary marriage was dissolved by the parties themselves, by entering into a civil marriage that was, itself, subsequently dissolved by decree.

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71 Irrespective of which form of marriage was concluded first.

72 Act 3 of 1978, which has been repealed by the provisions of the RCMA. See the Schedule to the RCMA itself.

73 They provided for 'polygynous civil marriages'. The term was intended to distinguish (ordinary) polygynous customary marriages from those where a man married one woman by civil rites, and another (or others), by custom (which were pejoratively referred to as a 'customary union')—see s 3 (1) of the Transkei Marriage Act.

74 Unless the civil marriage between them, itself, was preceded by a valid customary marriage between Mr Mandela and another woman (a fourth one in his case)—see *Thembisile* (n 61) 213–214; see also *Netshituka* (n 61) paras 12–13 and *Murabi* (n 61) paras 16–17.

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