RECOGNITION OF CUSTOMARY MARRIAGES

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RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998
RECOGNITION OF CUSTOMARY MARRIAGES

1. INTRODUCTION

The Recognition of Customary Marriages Act, 120 of 1998, came into operation on 15 November 2000, and gives full legal recognition to customary marriages for the first time in the history of South Africa.

Prior to the commencement of the Act, customary marriages, (better known as customary unions) did not enjoy the same status as civil marriages concluded in terms of the Marriage Act, 25 of 1961. Customary unions received partial recognition for purposes of some legislation and common law, if they were registered under the Black Administration Act 38 of 1927. Partners in customary unions were treated as spouses for the purpose of workmen's compensation, income tax, and maintenance.

Customary unions, as codified in the Black Administration Act, were also institutions in which women suffered unequal status and rights to men. The Black Administration Act treated all women, regardless of age, capacity and marital status, as minors. Women were not allowed to own property, sue or be sued in court, or exercise the power of contract. Women could not negotiate or terminate their marriages, nor could they have legal custody of their children.

The unequal status of customary marriages reflected the general approach of the pre-democratic governments to customary law in South Africa. It was viewed as a system of law that was inferior to common law and legislation. Its acceptance

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1 Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 1.  
2 The Income Tax Act 58 of 1962, s 1.  
3 Maintenance Act 23 of 1962, s 1.  
4 The Black Administration Act, 38 of 1927, s 11(3)(b).
as ‘law’ was based on a concept of ‘repugnancy’ defined by western, colonial and Christian values. For example, customary unions were not fully recognised because, potentially polygamous, they were against good morals.

2. THE LEGAL RECOGNITION OF CUSTOMARY MARRIAGES

2.1 Which marriages are recognised?

According to section 1 of the Act, ‘customary marriage’ means a marriage concluded in accordance with customary law, while ‘customary law’ means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

In view of the fact that the definition of ‘customary law’ is limited to the customs and usages traditionally observed among the indigenous African peoples of South Africa, the Act does not apply to customary marriages concluded by African people outside of South Africa.

From the above definitions it is also clear that customary marriages concluded in terms of Hindu and Muslim rites are not affected by the Act, and remain invalid unless they were solemnised in terms of the Marriage Act, 25 of 1961 or the Civil Unions Act, 17 of 2006.

2.2 Customary marriages entered into before 15 November 2000

Section 2(1) of the Act recognises customary marriages entered into before the commencement of the Act (15 November 2000), provided that such marriages

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5 Justice College, Customary Marriages Bench Book, February 2004, par. 2.1
were validly concluded in terms of customary law and existed at the commencement of the Act. According to section 2(3) if a person was a spouse in more than one validly concluded customary marriage as at date of the commencement of the Act, all the marriages are recognised as marriages. Polygamous marriages are thus given legal recognition.

2.3 **Customary marriages entered into after 15 November 2000**

Section 2(2) recognises customary marriages entered into after the commencement of the Act (15 November 2000), provided the marriage complies with the requirements of the Act. This also includes polygamous marriages entered in terms of the Act [s 2(4)].

The general requirements for a valid customary marriage entered into after the commencement of the Act are as follows:

a) The prospective spouses must both be above the age of 18 years;

b) They must both consent to be married to each other under customary law; and

c) The marriage must be negotiated and entered into or celebrated in accordance with customary law.

d) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the

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6 *Gama v Mchunu & Others*, Case No 10/37362 dated 22.11.2011 in the South Gauteng High Court, Johannesburg.

7 Section 3

8 *Fanti v Boto and Others* 2008 (5) SA 405(C); *Maluleke & others v Minister of Home Affairs & another* [2008] JOL 21827 (W); *Ndlovu v Mokoena & others* [2009] JOL 23452 (GNP); *Maloba v Dube & others* [2010] JOL 25852 (GSJ)
e) The parties must not be prohibited from marriage because of relationship by blood or affinity as determined by customary law.

f) In addition to the above requirements, a husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of the Act, must comply with a further requirement set out in section 7(6) of the Act, namely an application to the Court to approve a written contract which will regulate the future matrimonial property system of his marriages. Failure to comply with the provisions of 7(6) of the Act will render the purported further customary marriage void.\textsuperscript{10}

The requirement that the marriage must be negotiated and entered into or celebrated in accordance with customary law, as mentioned in (c) above, deserves special attention. It should be noted that this requirement means more than merely an agreement to pay lobolo. In \textit{Fanti v Boto and Others}\textsuperscript{11} it was held that the requirements for a valid customary marriage are: (i) a consensual agreement between two family groups with respect to the two individuals who are to be married and the lobolo to be paid; and (ii) the transfer of the bride by her family group to the family of the man.\textsuperscript{12} The payment of lobolo is only one of the essential requirements and even if the payment of lobolo is properly alleged and proved, that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements.

\textsuperscript{9} Refer to sections 3(b), 4(a) & 4(c).
\textsuperscript{10} Legal opinion dated 5.11.2001, given by the Chief State law Adviser to the Dept. of Home Affairs, under reference 415.2001, and the decision of \textit{Mayelane v Ngwenyama and Another} [2010] JOL 25422 (GNP)
\textsuperscript{11} 2008 (5) SA 405 (C).
\textsuperscript{12} The requirement that the woman must be formally transferred or handed over to her husband or his family was also confirmed in \textit{Sithole v Majekke & another} [2011] JOL 27944 (GSJ).
The requirement of transfer of the bride by her family group to the family of the man is usually accompanied by well-known extensive rituals and ceremonies involving both families. The importance of these rituals and ceremonies is that they indicate in a visible way that a customary marriage is being contracted and that lobolo has been paid and/or that arrangements which are acceptable to both families regarding the payment of lobolo have been made. Where these rituals and ceremonies have not taken place, or if such celebrations took place and were not in conformity with the specific customs of the families concerned, then such celebrations amounted to nothing but a party devoid of customary recognition.

It is also important to note that it is not a requirement for a valid customary marriage that the lobola in terms of the agreement must have been paid in full.

### 2.4 Subsequent civil marriages.

A man and a woman between whom a customary marriage subsists may marry each other in terms of the Marriage Act, 25 of 1961, if neither of them is a spouse in a subsisting customary marriage with any other person.\textsuperscript{13}

A spouse in a customary marriage may however not marry another person in terms of civil law during the subsistence of such customary marriage.\textsuperscript{14}

### 3. REGISTRATION OF CUSTOMARY MARRIAGES

#### 3.1 Duty to register

\[\text{\textsuperscript{13} Section 10(1).}\]
\[\text{\textsuperscript{14} Section 3(2).}\]
In terms of section 4(3)(a) of the Act, customary marriages entered into before the commencement of the Act, which are not already registered in terms of any other law, had to be registered within a period of 12 months after the commencement of the Act, or within such a period as the Minister may from time to time prescribe by notice in the Gazette.

Section 4(3)(b) of the Act provides that marriages entered into after the commencement of the Act must be registered within a period of three months after the conclusion of the marriage or within such period as the Minister may from time to time prescribe by notice in the Gazette.

In terms of Notice No. 51, published in Government Gazette 32916 dated 5 February 2010, the period in terms of which a customary marriage could be registered in terms of both 4(3)(a) and 4(3)(b) of the Act was extended up to 31 December 2010.

In view of the fact that the Minister of Home Affairs did not further extend the date within which application for late registration of existing customary marriages could be made to the Dept of Home Affairs, no late registration is possible after 31 December 2010. The only remedy available to parties who want their existing customary marriage registered is to apply to court for an order authorizing the late registration. Refer to section 4(7) of the Act in this regard.\(^\text{15}\)

Although registration of a customary marriage is peremptory in terms of the Act, section 4(9) provides that failure to register a customary marriage, does not affect the validity of that marriage. It makes no difference whether the customary marriage was registered.

\(^\text{15}\) Also see *Gama v Mchunu & Others*, Case No 10/37362 dated 22.11.2011 in the South Gauteng High Court, Johannesburg in this regard.
or after the Act. In *Kambule v The Master and Others* 16 it was held that a customary marriage concluded in accordance with customary law as defined in section 1 of the Recognition of Customary Marriages Act, prior to the commencement of the Act, was valid despite the fact that it had not been registered.17

Proving the existence of a customary marriage that has not been registered, can pose a problem to both the executor in an estate as well as the Master when an estate is reported, especially when the existence of such marriage is being disputed by interested parties. It is for this reason that the Master usually insists on proof of registration of a customary marriage.

Section 4(8) provides that 

*A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.*

The provisions of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009, which came into operation on 20 September 2010, could have an impact on the Masters’ insistence on a certificate of registration as proof of the existence of a particular customary marriage, especially in respect of intestate estates of persons who lived in terms of customary law.

Section 5(1) of the Act provides that if any dispute or uncertainty arises in connection with the status of any person in relation to a person whose estate or part thereof must, in terms of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009, devolve in terms of the Intestate Succession Act, then the Master of the High Court having jurisdiction under the

16 2007 (3) SA 403 (E)
17 This was confirmed in *Gama v Mchunu & Others* supra.
Before making a determination as set out above, the Master may direct that an inquiry into the matter be held by a magistrate or a traditional leader in the area in which the Master has jurisdiction.¹⁸

It is submitted that where the surviving spouse(s) cannot furnish proof of registration of the customary marriage(s), and there is also no dispute or uncertainty regarding the existence of such marriage(s), that the Master should convene a family meeting between the families of the deceased and the surviving spouse(s) to confirm the existence of such marriage(s). Form MBU 16 is used as record of the meeting. The following requirements should be called for:

a) Evidence that the customary marriage was negotiated and entered into in accordance with customary law (e.g. lobola receipt).

b) If the agreement or negotiations and the marriage were concluded in the rural area, the written confirmation from the Tribal Chief or King from that area to the effect that the marriage took place in that area.

c) At least one representative each of the bride and the groom's family must accompany the surviving spouse to the meeting scheduled at the Master or Service Point of the Master. All the parties must produce their identity documents at the family meeting.

If at the family meeting, as contemplated above, it appears that there is a dispute or uncertainty with regard to the existence or not of a customary marriage between the deceased and the alleged surviving spouse, the matter must be

¹⁸ Section 5(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009.
3.2 **Who may apply to register a marriage?**

Section 4(2) specifically allows *either spouse* to register a marriage on behalf of both spouses. During the process of developing the law, the women’s rights lobby argued strongly for a provision that would allow wives to register marriages without their husbands. The purpose was to ensure that spouses who are reluctant to register their marriage do not frustrate the other spouse or the purpose of the Act. Because customary marriage is a process that occurs over time and may involve more than a ceremony, it is easy to challenge its existence. Women, in particular, have the most to lose if the customary marriage is not registered. Essentially, the Act accepts that it is not always in the interests of both spouses to register their marriage.\(^{19}\)

The Act also allows interested parties to apply to register a customary marriage on behalf of the spouses.\(^{20}\)

An interested party may be a friend, a relative, a traditional leader or one of the people who participated in the marriage negotiations between the two families. He or she could also be one of the husband’s other wives, or the children of the husband from another marriage. Also relevant may be persons with an interest in communal land under the control of the husband, business partners and fellow trustees. It appears to be left within the discretion of the registering officer as to who constitutes an interested party. As long as the party seeking to register the marriage satisfies the registering office that he or she has a sufficient interest in the matter they may apply.\(^{21}\)

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\(^{19}\) Justice College, Customary Marriages Bench Book, February 2004, par. 4.5

\(^{20}\) Section 4(5)(a)

\(^{21}\) Justice College, Customary Marriages Bench Book, February 2004, par. 4.5
It should be noted that if a customary marriage is only registered after the death of one of the spouses, the Dept. of Home Affairs will not issue a marriage certificate, as death terminates a marriage. Dept. of Home Affairs will only issue a certificate of registration.

### 3.3 Requirements to register a customary marriage

Section 4(2) of the Act provides that the applicants must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy him- or herself as to the existence of the marriage.

The Minister of Justice, in consultation with the Minister of Home Affairs, is responsible for creating the registration form and for identifying the necessary information the spouse or couple must provide to the registering officer. The application procedure is set out in Regulation 2 of the Regulations in terms of the Recognition of Customary Marriages Act 120 of 1988 as published in GN 1101 in Government Gazette 21700 of 1 November 2000 and amended by GN R359 in Government Gazette 25023 of 14 March 2003.

According to information obtained from the Pretoria Regional Office of the Department of Home Affairs the following information is required to register a customary marriage after one of the spouses is deceased. (Note that since the late registration period expired on 31 December 2010, these requirements will only apply to a customary marriage that was entered into after the commencement of the Act, and then only in those instances where one of the parties dies within a period of three months after conclusion of the marriage without the marriage being registered.)
The family lobolo agreement, which contains the date of the marriage, the lobolo amount and any other agreed information, duly signed by all the parties concerned.

b) If the agreement and the marriage was concluded in the rural area, the written confirmation from the Tribal Chief or King from that area to the effect that the marriage took place in that area.

c) The death certificate, or a certified copy thereof, in respect of the deceased spouse whose estate is reported.

d) One representative each of the bride and the groom’s family must accompany the surviving spouse to the nearest office of the Dept. of Home Affairs. All the parties must produce their identity documents during the registration process.

e) A fee of R10.00 is payable in respect of the application for registration of the customary marriage.

4. STATUS AND CAPACITY OF SPOUSES

In terms of section 6 of the Act, a wife in a customary marriage is placed on an equal footing with that of her husband as far as her status and capacity is concerned, subject, however, to the matrimonial property system governing the marriage. This means that she may now acquire assets and dispose of them, enter into contracts and litigate, on a basis of equality with her husband, in addition to any rights and powers that she might have at customary law.
5.1 Introduction

According to the Act, the consequences of a customary marriage differ according to whether the marriage was entered into before or after the commencement of the Act.

For marriages entered into before the commencement of the Act, the Act provides that the proprietary consequences continue to be governed by customary law, unless an application is made to change the property regime in terms of section 10 of the Act. See, however, the discussion below in paragraph 5.2.

For marriages entered into after the commencement of the Act the proprietary consequences will depend on whether the marriage is monogamous or polygamous.

5.2 Customary marriages in existence before the commencement of the Act

Section 7(1) provides that the proprietary consequences of a customary marriage entered into before the commencement of the Act will continue to be governed by customary law. The question, however, is which customary law?

As customary law does not recognise either in or out of community of property, but rather subscribes to a family orientated property system, the view has always been in the past that such marriages be regarded as out of community of property for estate purposes.
Court decision of *Gumede v President of the Republic of South Africa and Others*, 2009 (3) BCLR 243 (CC) handed down on 8 December 2008, it was held that section 7(1) of the Recognition of Customary Marriages Act is inconsistent with the Constitution and invalid to the extent that its provisions relate to monogamous customary marriages. This means that monogamous customary marriages entered into before the commencement of the Act are now also deemed to be in community of property.

The *Gumede* decision did not however decide on polygamous marriages entered into before the commencement of the Act, and therefore such marriages are governed by customary law and deemed out of community of property, until the legislature or court decides otherwise.

The Act allows spouses married under customary law prior to the Act to apply to a court to change their marital property regime. Section 7(4) requires the application for change to be made by both the husband and the wife. The court will grant the application if:

a) there are sound reasons for the change;

b) written notice is given to all creditors owed amounts of over R500.00;

c) no one will be prejudiced by the change.

If the husband has other spouses in a polygynous marriage, then they must be joined in the proceedings to ensure that their rights are protected. Other parties who have interests in the marital property must also be joined, including the dependants of the husband and anyone else who will be affected by the change.

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22 Section 7(4)(b)
5.3.1 Monogamous customary marriages

In terms of section 7(2) of the Act, the marriage property arrangement of a monogamous customary marriage is that of a marriage in community of property and of profit or loss. Monogamous customary marriages concluded after the commencement of the Act thus have the same consequences as a civil marriage.

The spouses to a monogamous customary marriage can marry out of community of property, provided they enter into an antenuptial contract.

Where the marriage is in community of property, it must be noted that the provisions of Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 88 of 1984, apply to the customary marriage.

5.3.2 Polygamous customary marriages

A husband in a customary marriage, who wishes to enter into a further customary marriage with another woman after the commencement of the Act, must comply with the requirement of section 7(6) of the Act, in addition to the general requirements set out in section 3 of the Act. He must make an application to court to approve a written contract which will regulate the future matrimonial property system of his existing marriage and the prospective one. In Mayelane v Ngwenyana and another, [2010] JOL 25422 (GNP) it was held that failure to comply with the provisions of 7(6) of the Act will render the purported further customary marriage void.
One of the critical issues in the matter was the question whether the failure of the deceased to invoke the provisions of section 7(6) of the Recognition of Customary Marriages Act before entering into a further customary marriage with the applicant invalidated the further customary marriage. With reference to the *Mayelane* decision, Moshidi J observed that the facts in that case were distinguishable from those in the *Gama* matter. In the *Mayelane* decision the second customary marriage took place after the commencement of the Act, while in the *Gama* case the second customary marriage took place before the commencement of the Act and consequently section 7(6) did not apply to the second customary marriage.

In the *Gama* decision Moshidi J mentions that there presently exists a great deal of uncertainty regarding the provisions of section 7(6) of the Recognition of Customary Marriages Act, especially the consequences of non-compliance with the provision, and attributes the uncertainty largely to the absence of a penalty provision in the event of non-compliance with the section. He concludes that the matter requires the immediate attention of the Legislature.

Until such time as the legislation has been amended or the courts have determined otherwise, the Master will call for the written contract which regulates the deceased’s marriages, duly approved by the court, if the death notice indicates the following:

a) the deceased was married under customary law;
b) the marriage is polygynous;
c) the second or subsequent marriage was concluded after the commencement of the Act (15 November 2000).

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23 *Gama v Mchunu & Others*, Case No 10/37362 dated 22.11.2011 in the South Gauteng High Court, Johannesburg.
In terms of section 8(1) of the Act a customary marriage may only be dissolved by a court by a decree of divorce, on the ground of the irretrievable breakdown of the marriage. This was confirmed in *Maloba v Dube & others*\(^{24}\)

As with all other estates administered by the Master, a copy of the divorce order and any settlement between the parties, which has been made an order of court, must be called for in appropriate circumstances, e.g. to establish whether the deceased estate is liable for future maintenance.

7. **THE RELATIONSHIP BETWEEN CIVIL AND CUSTOMARY MARRIAGES AND THEIR IMPACT ON ESTATES.**

7.1 **Introduction**

The practice of combining customary with civil ceremonies is common in South Africa, and many variations are possible. The spouses may celebrate a customary marriage and, on the same day, or a short while later, have it solemnized again in a civil registry office. The rites may also be reversed, when a civil marriage is followed by a traditional wedding. Dual marriages by the same spouses entered into prior to the Recognition of Customary Marriages Act, 120 of 1998 created few legal problems, because the customary union was not recognized and the civil marriage was simply allowed to prevail.\(^{25}\)

Where, however, a spouse (normally the husband) purported to marry a third person by different rights, the situation is more complicated. A migrant worker, for instance, might marry one wife in the country according to customary law, and another in the city according to civil rites. The husband, thinking in terms of his

\(^{24}\) [2010] JOL 25852 (GSJ)

customary right to take many wives, might have been unaware of the legal implications of his actions, or a more calculating man, however, might have deliberately kept his wives in the dark.

Because the Recognition of Customary Marriages Act is not retrospective in effect, marriages contracted prior to the Act are still governed by rules that applied before it came into force on 15 November 2000. These rules can be divided into four (4) categories.

7.2 **Effect of a civil marriage to a third person, on an existing customary union: Situation before 2 December 1988 – Areas outside the Transkei.**

Only civil marriages were deemed proper marriages and consequently the spouses in a customary union were not regarded as being legally married to one another. Therefore, where a husband in a subsisting customary union married a third person or one of his existing polygynous wives by civil rites, the civil marriage automatically terminated the prior customary union(s), causing great hardship for the customary wife or wives and children.26 The wife of such terminated customary union was known as a ‘discarded spouse’ The wife to such customary union could also contract a civil marriage with another person and similarly the existing union was automatically dissolved.

Section 22(7) of the Black Administration Act, 38 of 1927, however, provided some measure of protection for the discarded wife and her children when the husband died. For purposes of succession, the status of the discarded wife and her family were revived when the man died, and the status of the widow and children of the civil marriage were deemed to be equivalent to their customary-law counterparts. By implication, the preferential status given to the civil-law wife and children was lost and they ranked equally with the previously discarded wife (or wives) and their children.

26 *Nkambula v Linda* 1951 (1) SA 377 (A); *Malaza v Mndaweni* 1975 BAC (C) 45
If the Master or Service Point official is confronted with a situation as set out above, both the discarded wife and her children as well as the civil law wife and her children will be deemed spouses and descendants of the deceased for purposes of intestate succession.

The situation set out above has also been confirmed and enacted in section 7(1)(a) and 7(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

7.3 Effect of a civil marriage to a third person, on an existing customary union: Situation after 2 December 1988 until 15 November 2000 – Areas outside the Transkei.

In 1988 the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, which came into operation on 2 December 1988 provided that, although partners to a monogamous customary union could marry one another again by civil rites, a spouse could not validly marry a third person by civil rites during the subsistence of the customary union. Should a spouse in a customary union purport to enter into a civil marriage without first dissolving the customary union, the civil marriage will be invalid. This was confirmed in Thembisile and Another v Thembisile and Another, Thembisile and Another, Mrapukana v Master of the High Court & Another, and Netshituka v Netshituka.

With the repeal of section 22(6) of the Black Administration Act 27 of 1938 by the Marriage and Matrimonial Property law Amendment Act, and the enactment of section 22(1) of the same Act which prohibited a husband of a customary union from contracting a civil marriage with another woman during the subsistence of such customary union, the customary union was given limited legal recognition, in that the customary union first had to be dissolved before the man in such union could marry another woman in terms of civil law.

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27 2002 (2) SA 209 (T)
28 2008 JOL 22875 (C)
When confronted with a situation as set out above, the Master or Service Point official would have to determine which of the marriages (customary or civil) was valid at the date of death of the deceased. If the deceased entered into a customary union (first marriage) with wife A and then into a civil marriage with wife B, without first dissolving the customary union, then the civil marriage is invalid and the customary union is the only valid marriage. If the customary marriage was dissolved before the civil marriage, then the civil marriage will be the only valid marriage.

7.4 **Dual marriages in Transkei.**

The 1978 Transkei Marriage Act, 21 of 1978 allowed the husband of a subsisting civil marriage to contract additional customary marriages, provided that the civil marriage was out of community of property. Likewise, a husband in a customary union could also during the subsistence of such customary union validly contract a civil marriage with a third person, provided the civil marriage was out of community of property.

It should be noted that section 3(1) of the Transkei Marriages Act which permitted polygamous civil marriages under certain circumstances was not applicable to marriages concluded elsewhere than in Transkei.30

Section 3 of the Transkei Marriages Act, 21 of 1978 was repealed by the Recognition of Customary Marriages Act, 120 of 1998 which came into operation on 15 November 2000.

Thus, when the Master or Service Point official is confronted with dual marriages concluded in terms of the Transkei Marriage Act, both the civil and customary law spouses would be deemed spouses for purposes of intestate succession, provided both marriages took place prior to 15 November 2000.

30 Nkonki v Nkonki 2001 (4) SA 790 (C)
The Recognition of Customary Marriages Act, 120 of 1998 came into operation on 15 November 2002 and revoked section 22(1) to (5) of the Black Administration Act, and the provision in the Transkei Marriage Act which permitted dual marriages.

The revocation of the above provisions is, however, not retrospective in effect and consequently the marriages concluded under those provisions remain valid. Section 2(1) of the Recognition of Customary Marriages Act determines that a marriage which is a valid marriage at customary law and existing at the commencement of the Act, is for all purposes recognised as a valid marriage.

In terms of the Act a man and a woman between whom a customary marriage subsists are competent to contract a civil marriage with each other if neither of them is a spouse in a subsisting customary marriage with any other person.\(^ {31}\) However, no spouse of a civil marriage may during the subsistence of such marriage, enter into any other marriage, albeit civil or customary.\(^ {32}\)

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\(^{31}\) Recognition of Customary Marriages Act 120 of 1998, section 10(1).

\(^{32}\) Recognition of Customary Marriages Act 120 of 1998, section 10(4)
To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.

1 Definitions

In this Act, unless the context otherwise indicates-

'court' means a High Court of South Africa, a family court established under any law or a Divorce Court established in terms of section 10 of the Administration Amendment Act, 1929 (Act 9 of 1929);

[Definition of 'court' substituted by s. 19 of Act 42 of 2001.]

'customary law' means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples;

'customary marriage' means a marriage concluded in accordance with customary law;

'lobolo' means the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage;

'Minister' means the Minister of Home Affairs;

'prescribed' means prescribed by regulation made under section 11;

'registering officer' means any person appointed as registering officer for purposes of this Act by the Minister or an officer acting under the Minister's written authorization;
'traditional leader' means any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy.

2 Recognition of customary marriages

(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.

(2) 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.

(3) If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.

(4) If 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.

3 Requirements for validity of customary marriages

(1) For a customary marriage entered into after the commencement of this Act to be valid-

   (a) the prospective spouses-
      (i) must both be above the age of 18 years; and
      (ii) must both consent to be married to each other under customary law; and

   (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

(2) Save as provided in section 10 (1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.

(3) (a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.
(4) (a) Despite subsection (1) (a) (i), the Minister or any officer in the public service authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question.

(b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

(c) If a person under the age of 18 years has entered into a customary marriage without the written permission of the Minister or the relevant officer, the Minister or the officer may, if he or she considers the marriage to be desirable and in the interests of the parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid customary marriage.

(5) Subject to subsection (4), section 24A of the Marriage Act, 1961, applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

(6) The prohibition of a customary marriage between persons on account of their relationship by blood or affinity is determined by customary law.

4 Registration of customary marriages

(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.

(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.

(3) A customary marriage-

(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette; or
commencement of this Act, must be registered within three months after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.

(4) (a) 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.

(b) The registering officer must issue to the spouses a certificate of registration, bearing the prescribed particulars.

(5) (a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.

(b) If the registering officer 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).

(6) If a registering officer is not satisfied that a valid customary marriage was entered into by the spouses, he or she must refuse to register the marriage.

(7) A court may, upon application made to that court and upon investigation instituted by that court, order-

(a) the registration of any customary marriage; or

(b) the cancellation or rectification of any registration of a customary marriage effected by a registering officer.

(8) A certificate of registration of a customary marriage issued under this section or any other law providing for the registration of customary marriages constitutes prima facie proof of the existence of the customary marriage and of the particulars contained in the certificate.

(9) Failure to register a customary marriage does not affect the validity of that marriage.

5 Determination of age of minor

(1) A registering officer may, in respect of a person who allegedly is a minor, accept a birth certificate, an identity document, a sworn statement of a parent or relative
(2) If the age of a person who allegedly is a minor is uncertain or is in dispute, and that person's age is relevant for purposes of this Act, the registering officer may in the prescribed manner submit the matter to a magistrate's court established in terms of the Magistrates' Court Act, 1944 (Act 32 of 1944), which must determine the person's age and issue the prescribed certificate in regard thereto, which constitutes proof of the person's age.

6 Equal status and capacity of spouses

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

7 Proprietary consequences of customary marriages and contractual capacity of spouses

(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.

(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2).

(4) (a) Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that-

(i) there are sound reasons for the proposed change;

(ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and

(iii) no other person will be prejudiced by the proposed change,
order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(b) In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses, must be joined in the proceedings.

(5) Section 21 of the Matrimonial Property Act, 1984 (Act 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse.

(6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.

(7) When considering the application in terms of subsection 6-

(a) the court must-

(i) in the case of a marriage which is in community of property or which is subject to the accrual system-

(aa) terminate the matrimonial property system which is applicable to the marriage; and

(bb) effect a division of the matrimonial property;

(ii) ensure an equitable distribution of the property; and

(iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;

(b) the court may-

(i) allow further amendments to the terms of the contract;

(ii) grant the order subject to any condition it may deem just; or

(iii) 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.
All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).

(9) If a court grants an application contemplated in subsection (4) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.

8 Dissolution of customary marriages

(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

(2) A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.


(4) A court granting a decree for the dissolution of a customary marriage-

(a) has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984);

(b) must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 7 (4), (5), (6) or (7) and must make any equitable order that it deems just;

(c) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings;

(d) may make an order with regard to the custody or guardianship of any minor child of the marriage; and

(e) may, when making an order for the payment of maintenance, take into account any provision or arrangement made in accordance with customary law.
Nothing in this section may be construed as limiting the role, recognised in customary law, including any traditional leader, in the mediation, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by a court.

9 **Age of majority**

Despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act 57 of 1972).

10 **Change of marriage system**

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect of any marriage which is in community of property as contemplated in subsection (2).

(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.

11 **Regulations**

(1) The Minister of Justice, in consultation with the Minister, may make regulations-

(a) relating to-

(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;

(ii) the manner in which a registering officer must satisfy himself or herself as to the existence or the validity of a customary marriage;

(iii) the manner in which any person including any traditional leader may participate in the proof of the existence or in the registration of any customary marriage;
the form and content of certificates, notices, affidavits and declarations required for the purposes of this Act;

(v) the custody, certification, implementation, rectification, reproduction and disposal of any document relating to the registration of customary marriages or of any document prescribed in terms of the regulations;

(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; and

(b) prescribing the fees payable in respect of the registration of a customary marriage and the issuing of any certificate in respect thereof.

(2) Any regulation made under subsection (1) must, before publication thereof in the Gazette, be submitted to Parliament.

(3) Any regulation made under subsection (1) which may result in financial expenditure for the State or regulations made under subsection (1) (b) must be made in consultation with the Minister of Finance.

(4) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

12 Amendment of laws

(1) Section 17 of the Deeds Registries Act, 1937 (Act 47 of 1937), is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:

'(b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community of property or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998;';

(2) Section 45bis of the Deeds Registries Act, 1937, is hereby amended-

(a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:
(b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorization, under section 20 or 21 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), or under section 7 of the Recognition of Customary Marriages Act, 1998, as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses,”; and

(b) by the substitution for paragraph (b) of subsection (1A) of the following paragraph:

‘(b) forms or formed an asset in a joint estate and a court has made an order, or has made an order and given an authorization under section 20 or 21 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), or under section 7 of the Recognition of Customary Marriages Act, 1998, as the case may be, in terms of which the property, lease or bond is awarded to both spouses in undivided shares,’.

13 Repeal of laws

The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

14 Short title and commencement

This Act is called the Recognition of Customary Marriages Act, 1998, and comes into operation on a date fixed by the President by proclamation in the Gazette.