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The Recognition of Customary Marriages in South Africa: Law, Policy and Practice

BACKGROUND

In the past, African women in KwaZulu-Natal did not have the right to own property or perform any legal actions without the assistance of a male guardian. According to the law, these women had the legal status of children, no matter how old they were. The hardship of women was made worse by marriage laws that put women under the power of their husbands and made husbands the sole owners and controllers of property in the marriage.

Since the transition to democracy in South Africa, the new Constitution and Bill of Rights requires equality between men and women and between people of all races in South Africa. This means that discriminatory laws are unconstitutional – in other words, against the law. It is for this reason that a new law on customary marriages was passed by Parliament. The new law attempts to recognise custom and also protect the rights of women.

THE BASICS

What is the Recognition of Customary Marriages Act 120 of 1998?

The Recognition of Customary Marriages Act 120 of 1998 is a law of Parliament that came into force on 15 November 2000. This law tries to correct the past discrimination against African women by officially recognising all African customary marriages in South Africa. It gives women in customary law marriages the same status and protection as women in civil law marriages. The Act also introduces equality between husband and wife into the marriage relationship. Both monogamous and polygynous customary marriages are recognised as legal under the Act.

What is a customary marriage?

A customary marriage is a marriage that is entered into according to the customs and traditions of indigenous African people in South Africa.

What are the requirements for a valid customary marriage?

According to the Recognition of Customary Marriages Act, the following is necessary for a customary marriage entered into after 15 November 2000 to be valid:

1. Both spouses must be above the age of 18 years. If either the man or the woman is below the age of 18 years, the parents or legal guardian must give their consent to the marriage for it to be valid.
2. Both spouses must agree to be married to each other under customary law.
3. The marriage negotiations, rituals and celebrations must be according to customary law.

If the customary marriage was entered into before 15 November 2000, then it is valid if it meets the customary law requirements for a valid marriage. The law recognises that these requirements vary in different parts of South Africa.

Is lobolo required for a valid customary marriage?

Agreement or payment of lobolo is not a legal requirement for a customary marriage to be valid. When a customary marriage is registered at Home Affairs, the official will make a note of whether a lobolo agreement was made between the families of the two spouses and what the terms of the lobolo agreement were. However, if no lobolo agreement was made or lobolo has not been paid, the official must still register the marriage.

Can I marry by both civil law and customary law?

If you are a spouse in a customary marriage, you cannot enter into a civil marriage with any person, except your customary spouse, while your customary marriage still exists. Spouses in a customary marriage may enter into a civil law marriage with each other, but only if their marriage is monogamous. A civil law marriage between two customary marriage spouses will be in community of property (see explanation below) unless the spouses specifically say that this is not the case in a contract drawn up for them by lawyers before the marriage.

If you are a spouse in a civil law marriage, you cannot legally enter into any other civil or customary marriage while the civil marriage still exists.

What if my customary law husband married another woman under civil law without my knowing? Which marriage is valid?

If your husband entered into a civil marriage with another woman while you were already married to him, and you had entered into your customary marriage any time after 3 December 1988, the civil law marriage with the other woman is not valid [*Netshituka v Netshituka*, judgment in the Supreme Court of Appeal, 20 July 2011]. Your marriage will be the valid one. The law is unclear about what the status will be if you and your husband entered into your marriage before 3 December 1988 and your husband subsequently married a civil law wife.

If your husband entered into the civil law marriage before your customary law marriage, and the civil law marriage was not terminated (through divorce) by a court by the time that you married him, then the civil law marriage to the other woman is valid. Your customary law marriage will not be valid.

PROPERTY: WHO OWNS WHAT?
What rights do women have in a customary marriage?

In a customary marriage, women have equal rights as men to buy or sell property, be parties to contracts and to go to court. Customary law wives now have the same protection and rights as civil law wives.

What is meant by “in community of property”?

When a marriage is “in community of property” it means that husbands and wives have equal power and equal shares in the property in the marriage. Property includes things such as land, houses, cattle and businesses. If the spouses are married in community of property, a husband cannot sell any of the marriage property without his wife’s consent, and the wife cannot sell anything without her husband’s consent. The spouses are also meant to share all income equally.

If the marriage is in community of property and it ends (through divorce), then the marriage property will be divided equally between the spouses.

Does the Recognition of Customary Marriages Act change my marital property rights?

Yes, all monogamous customary marriages are now “in community of property”, unless both spouses to the marriage make a contract before they marry which says that they agree to a different property arrangement for their marriage. This means that in monogamous customary marriages property is shared equally between the husband and wife. Monogamous customary marriages will be in community of property whether or not the marriage is registered and whether the marriage was entered into before or after the Act came into existence [*Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC)]. Unfortunately, in practice many women find it difficult to enforce their community of property rights.

The Act also changed the property rights of spouses in polygynous marriages entered into after 15 November 2000. A husband cannot enter into another customary marriage before a court approves a written contract that says how the property will be divided between the husband and all the wives in the future. The property rights of the husband and wives will then be according to the terms of the contract.

The Act does not change the marital property rights of spouses in polygynous marriages that were entered into before 15 November 2000. The property in these marriages will be governed by customary law. In practice, this could restrict a wife’s ability to buy and sell marriage property, unless these are currently her rights under living customary law.

MARRIAGE REGISTRATION

What practical reasons are there for registering a customary marriage?

The first reason for registering a customary marriage is that the Recognition of Customary Marriages Act says that spouses must register their marriage. However, the Act specifically says that failing to register the customary marriage does not make the marriage invalid.

For practical reasons though, it is a good idea to register your customary marriage at a Home Affairs office as soon as possible. If you register your marriage, you will be given a marriage certificate. This will make it much easier for you to prove to courts, companies, government and others that you are or were married. This is especially true for widows and women whose husbands work far away from home. Many women find it difficult to claim death benefits from their husband's workplace after he has died because the company demands to see a marriage certificate. It is also important to have a marriage certificate so that children can receive their father's surname when they are registered at Home Affairs. Without a marriage certificate, children will be given their mother's surname unless the father goes with the mother to Home Affairs.

Who can register a customary marriage?

The Recognition of Customary Marriages Act says that either one of the spouses can go to a Home Affairs office to register the customary marriage between them. This means that the wife should be able to go to Home Affairs to register her customary marriage without her husband going with her.

In practice though, Home Affairs often does not register the marriage unless both spouses are present at Home Affairs for registration. This is because the Home Affairs form for registration requires the signatures of both the husband and the wife at the time of registration. This requirement has made it very difficult for widows and women whose husbands work far away from home to register their customary marriages. In the case of such women, Home Affairs will usually not accept statements from the families of the spouses or letters from the traditional council. Instead, the women are told to go to court.

In 2009, Home Affairs wanted to change the law so that it would be a legal requirement for both spouses to go together to Home Affairs to register their customary marriage. This would make it impossible for a woman to register her customary marriage without her husband. These changes have not yet been included into the law. This means that it may be possible to legally challenge the refusal of Home Affairs officials to register customary marriages when only the wife is present.

Can I register the customary marriage of my parents?

Yes, where a particular customary marriage is not registered, the Recognition of Customary Marriages Act allows a person with "sufficient interest" to apply to Home Affairs for a registering officer to enquire into the existence of that customary marriage. This could include the children of persons who were in a customary marriage. After the enquiry, if the registering officer is satisfied that a customary marriage does exist or did exist in the past, then the officer must register that marriage and issue a marriage certificate.

Can a woman register a marriage after her husband has died?

Although the Recognition of Customary Marriages Act does not require both spouses to be present for registration of the customary marriage, in practice Home Affairs insists on this requirement. This means that in practice a woman often cannot register her customary marriage after her husband has already died. Home Affairs will tell her to go to court where a judge will decide whether her marriage can be registered or not.

How does registration of a polygynous customary marriage differ from registration of a monogamous customary marriage?

Since 15 November 2000, if a husband is already married under customary law and wishes to marry another customary wife, he must have a written contract approved by a Magistrate's or High Court before he can do so. The contract must say how the marriage property will be divided between all of his customary wives, and a judge can say whether the division is fair or not. All of his existing wives must also consent to the new marriage.

Home Affairs will only register a polygynous customary marriage that was concluded after 15 November 2000 if the husband shows that a court has approved such a contract. If there is no contract, they will refuse to register the polygynous marriage. When registering a monogamous customary marriage, court approval is not necessary.

The effect of not getting a court-approved contract in these situations has recently been debated in court judgments, but there is no final decision on this question yet. Some people argue that the new customary marriage will be invalid if there is no contract. This would mean that the law of South Africa does not recognise the marriage. This could cause many problems for the new wife. For example, she will not be able to claim property or benefits if the husband dies.

In practice, very few polygynous customary marriages are registered because the requirements are very difficult to meet. The property contract does not need to be written by a lawyer, but it is difficult for ordinary people to write proper contracts. It is also expensive to go to court and to pay for lawyers. Many husbands cannot afford to follow the correct procedure or to take time off from their work. As a result, their new polygynous customary marriages cannot be registered. If the court also decides that these marriages are invalid, then new polygynous wives can be left in a very vulnerable position.

What or who should I take with me to Home Affairs?

In accordance with the Recognition of Customary Marriages Act, the Minister of Justice (in consultation with the Minister of Home Affairs) has made regulations about what information spouses are required to take to Home Affairs to register a customary marriage. The regulations include the form that people must complete when applying to register a customary marriage. Based on this form, the Department of Home Affairs has set certain requirements for people who go to register their customary marriage.

The Home Affairs website and other sources say that you must have the following when you go to register your customary marriage at a Home Affairs office:

1. The physical presence of both spouses at Home Affairs (and all the husband's other wives also, in the case of polygynous marriages)
2. The physical presence of at least one witness/representative from the husband's family
3. The physical presence of at least one witness/representative from the wife's family
4. The physical presence of a witness who represents the couple's traditional leader (only where this is possible)
5. The physical presence of the spouse's parents (only if one or both of the spouses is a minor)
6. ID booklets for all spouses and all witnesses
7. Proof of lobolo agreements, if there is an agreement
8. The contract that was approved by a court and which divides the marriage property of all polygynous spouses (only in the case of polygynous marriages)

It is a good idea to also take any other documents or agreements that can help to prove that you were married.

When do I register a customary marriage?

The Recognition of Customary Marriages Act says that any customary marriage entered into after 15 November 2000 must be registered within three months after the marriage date. If the customary marriage registration deadlines have been missed, Home Affairs will tell the spouses to go to court first so that the court can order Home Affairs to register the customary marriage. The spouses will then have to prove to the court that they were validly married.

Customary marriages that were entered into before 15 November 2000 had to be registered within 12 months of that date. The Minister of Home Affairs extended this deadline to 31 December 2010. Now that both deadlines have passed, it is unclear whether Home Affairs will still register customary marriages that were entered into before 15 November 2000. If Home Affairs refuses to register the marriage after the deadlines, spouses can go to court to have their valid customary marriages registered.

How much does it cost to register a customary marriage?

According to regulations issued by the Department of Justice, applying to register your customary marriage at a Home Affairs office should be free of charge. Upon registration you will be issued with a marriage certificate at no extra cost. However, if you can it would be wise to ask Home Affairs for a duplicate of your customary marriage certificate. The regulations say that the duplicate copy will cost you R6.

Do traditional leaders play a role in the registration process?

No, but according to the Recognition of Customary Marriages Act, registering officers are appointed by the Minister of Home Affairs. This means that traditional leaders could play a role in registering customary marriages in the future if the Minister of Home Affairs authorises them to play a role in registration.

TERMINATION OF THE CUSTOMARY MARRIAGE

How do I end a customary marriage?

Customary marriages can only be ended by obtaining a divorce order in a court or by the death of one of the spouses. In order to divorce your spouse you must show the court that there has been a breakdown in your marriage so that there is no reasonable chance of restoring your normal marriage relationship.

What happens to the property from the marriage after it has ended?

For monogamous customary marriages, it depends on whether or not the marriage is in community of property. All monogamous customary marriages are in community of property unless you signed a specific contract before the marriage. If the monogamous marriage ends and it was in community of property, then in general the marriage property should be divided equally between the two spouses. If the spouses to the monogamous customary marriage made a contract before they entered into their marriage which said that the marriage would not be in community of property (“antenuptial contract”), then the marriage property will be divided according to what the spouses agreed to in the contract.

For polygynous customary marriages, the division of property depends on whether the marriage was entered into before or after 15 November 2000. If the polygynous customary marriage was entered into before 15 November 2000, then the marriage property will be divided according to customary law. This could leave many widows destitute and without any property to their name. If the polygynous customary marriage was entered into after 15 November 2000, then the marriage property will be divided according to the court-approved contract obtained by the husband before entering into his polygynous marriage.

REGISTRATION OF CHILDREN

How and when is a child’s birth registered?

All children that are born in South Africa must be registered at a Home Affairs office within 30 days of their birth. The child’s parent, parents or guardian must fill in a form at the Home Affairs office. After the child’s birth has been registered, a birth certificate will be issued at no cost. This birth certificate is important for proving the child’s age, parents and for many aspects of the child’s future, such as registering the child for school and obtaining an identity book when the child is 16.

If the child has not been registered at Home Affairs within 30 days of its birth, then special rules for late registration apply. For late registration, Home Affairs will require additional proof before they will register the child’s birth.

Is a marriage certificate required for registering a child’s birth?

You can register the birth of a child without a marriage certificate, but Home Affairs will use a marriage certificate as proof that the child’s parents were married. This proof will determine what surname the child can be given.

With whose surname is a child registered at Home Affairs?

If the child was conceived or born at a time when its biological parents were married, then the child can receive the biological father's surname, or the mother's surname or a combination of the surnames of both parents.

However, if the child's biological parents were not married at the time of conception, birth or any time after that, then the child will receive the biological mother's surname. The child can only receive the biological father's surname if both the mother and father agree to it and if the father acknowledges that he is the child's father in writing at Home Affairs.

If the child's biological parents marry after the child has already been born, then the birth register can be changed to show that the child's parents are married and the child can receive the father's surname.

What surname will the child get if the customary marriage of the parents is not registered and there is no marriage certificate?

In practice, Home Affairs has refused to register a child with the biological father's surname if the customary marriage between the father and mother has not been registered and there is no marriage certificate. If the marriage is not registered, there is no proof of the customary marriage and the child's father must go to Home Affairs with the mother and declare that he is the child's father, for the child to get the father's surname. If the father does not do this, then the child will be registered with the mother's surname.

Can a child's surname be changed at Home Affairs at a later stage?

In some situations it is possible to change a child's surname at a later stage. To change a child's surname to the biological father's surname where the parents were not married and the child was registered with the mother's surname, a form needs to be completed at Home Affairs. Both the biological mother and father will need to consent to the child's surname change. If the child was not registered with the biological father's details at the time of birth, then the father's particulars can be added to the child's birth register at a later stage. The child's surname can only be changed to that of the biological father if the father has acknowledged at Home Affairs that the child is his.

It will cost R70 to apply to change the surname of a child.

What happens if the surname of the child's father is incorrectly registered at Home Affairs?

The father of the child should apply to have his surname changed at Home Affairs. He will have to give good reasons for his surname to be changed and the Director-General of the Department of Home Affairs will have to approve the surname change. This application to change the surname of an adult will cost R325, but the cost can include the changing of his spouse's surname and also the surnames of his children to match his new surname.

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