

Does a customary marriage automatically dissolve if parties walk away? - Monyepao v Ledwaba and Others (1368/18) 2020 ZA

Customary marriages are valid and are recognised in terms of the *Recognition of Customary Marriages* Act, 120 of 1998. A customary marriage can be defined as a marriage concluded in accordance with Customary Law.

For a customary marriage to be valid, certain requirements must be met. Firstly, the marriage must be negotiated and be entered into or celebrated in accordance with Customary Law. Secondly, the parties must be over the age of 18 years. Lastly, the parties must consent to be married to each other by customary rights.

It should be noted that customary marriages are deemed to be in community of property and of profit and loss between the parties. A customary marriage may, therefore, be dissolved by a decree of divorce, based on the ground of the irretrievable breakdown of the marriage. Furthermore, where a court grants a decree of divorce in respect of a customary marriage, the court also has the powers in terms of section 9 of the Divorce Act, 70 of 1979 to make an order of forfeiture of benefits.

In the recent judgment of *Monyepao v Ledwaba and Others* (1368/18) 2020 ZASCA 54 (hereafter the Ledwaba case), the court dealt with the question of whether a civil marriage concluded with a person, who is customarily married, dissolves the latter.

Mr Phago concluded a customary marriage with one Ms Ledwaba in June 2007. The marriage continued until February 2008, when Ms Ledwaba entered into a civil marriage with one Mr Kwele. Mr Phago then went on to conclude another customary marriage with Ms Monyepao in July/August 2010. On 22 December 2012, Mr Phago died intestate.

The question that the court had to answer was which marriage was valid, as both Ms Ledwaba and Ms Monyepao claimed to have been married to Mr Ledwaba at

the time of his death. The court held that the customary marriage between Mr Phago and Ms Ledwaba was still valid and that the allegations of its dissolution do not comply with section 8(1) of the *Customary Marriages Act*. In addition, the court declared the marriage of Ms Ledwaba to Mr Kwele to be null, with no impact on the validity of her prior marriage to Mr Phago.

Therefore, this judgment makes the position clear that a person cannot just simply walk away from a customary marriage with the impression that such an act would automatically dissolve the marriage. The customary marriage will remain valid until it has been dissolved by a court of law in terms of section 8(1) of the *Customary Marriages Act* read together with the *Divorce Act*.

It is of paramount importance that where a marriage, either civilly or customarily, between two parties has reached a stage of disintegration, both parties should have the marriage dissolved by a competent court, as any subsequent marriage concluded while the other one still subsists, will be null and void.

Johannes Mokotedi, Van Velden-Duffey Inc