Evolution of customary marriages

If you would take the time to read the preamble off the *Recognition of Customary Marriages Act, 120 of 1998*, ("the Act") you might find it hard to believe that one of the reasons for its enactment was to provide for equal status and capacity of spouses in customary marriages. However, since its commencement on 15 November 2000 it has been on the receiving end of criticism for causing exactly the opposite.

According to section 7(2) of the Act a customary marriage entered into after the commencement of the 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 unless such consequences are specifically excluded by the spouses in an antenuptial contract. As a result, spouses who got married under customary law after the commencement of the act enjoyed the benefit of community of property which benefit was not available to spouses who got married before commencement of the Act. In addition, section 7(1) ensured unhappiness amongst pre-Act spouses because in terms of this section customary marriages entered into before the commencement of the Act continued to be governed by customary law.

This imbalance was addressed by the Constitutional Court in *Gumede v President of the Republic of South Africa and Others 2009 (3) SA 152 (CC)*. The words "entered into after the commencement of this Act" was declared inconsistent with the Constitution and invalid. The effect of the judgement was that al monogamous customary marriages were to be treated as being in community of property, irrespective of whether they were entered into before or after the commencement of the Act. Unfortunately, the decision was restricted to monogamous customary marriages and did not affect the legal consequences of acts or omissions existing before the order was made.

It is only in more recent times that issues surrounding polygamous customary marriages enjoyed legal scrutinization. As a starting point one must take note of sec 7(6) of the Act which provides that 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 make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages. In the case of *Ngwenyama v Mayelane 2012 (4) SA 527 (SCA)* the court declared that non-compliance with sec 7(6) does not render the subsequent marriage void, but simply one out of community of property.

Again, as was the case with section 7(2), the phrase “entered into after the commencement of the Act” created a prejudicial situation for spouses who got married before 15 November 2000. It is only 18 years after the commencement of the Act that the Constitutional Court gives us clarity on the marriage regime of polygamous customary marriages entered into before the commencement of the Act, and the effect thereof on the matrimonial property. This relief came in the form of *Ramuhovhi & Others v President of The Republic of South Africa & Others 2018(2) SA CC* where the court made the following order:

Wives and husbands (of polygamous customary marriages) will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows:

in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and

in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses. Each spouse retains exclusive rights to her or his personal property.

With regards to the family property one might be excused from foreseeing the possibility of disputes between families if they all have equal rights of management and control over such property. Section 5 of the *Reform of Customary Law of Succession and Regulation of Related Matters, Act 11 of 2009* provides some relief in the case of deceased estates. This section gives a Master, with jurisdiction, the authority to make a just and equitable determination to resolve a dispute regarding the devolution of family property.

Parliament was also provided, and arguably tasked, with an opportunity to correct the defect giving rise to the constitutional invalidity within 24 months by failing which the consequences, as set out above, will prevail indefinitely.

What makes this judgement more noteworthy is the fact that its retrospective effect is not as limited as the Gumede case. The court declared that this order will invalidate the winding up of a deceased estate that has been finalised, or transfer of marital property that has been finalised, if at the time of such transfer the transferee was aware that the property concerned was subject to a legal challenge on the grounds upon which the applicants, in the Ramuhovhi case, brought the challenge. Because this order may have unforeseen prejudicial repercussions the court invited any interested parties to approach the Court for a variation of the order in the event that a party suffers harm not foreseen in the judgment.

For the sake of completeness, I now turn to the relationship between civil and customary marriages after the commencement of the Act. Section 10(1) of the Act provides that a man and a woman between whom a customary marriage subsists may contract a marriage with each other under the Marriage Act, 1961, if neither of them is a spouse in a subsisting customary marriage with any other person. Section 10(4) further provides that no spouse of a marriage entered into under the Marriage Act is competent to enter into any other marriage during the subsistence of such marriage. It is therefore my submission that one can not be a spouse to a civil and a customary marriage with different spouses.

In closing, practitioners are warned to tread cautiously when entering the minefields that are customary marriages. One should also take heed of the special customs connected to the culture of your client.

Janus Olivier, Van Velden-Duffey Inc.