

**VALIDITY OF A CIVIL MARRIAGE CONTRACTED
AFTER 2 DECEMBER 1988 DURING THE SUBSISTENCE
OF A CUSTOMARY MARRIAGE**

TM v NM 2014 4 SA 575 (SCA)

OPSOMMING

**Geldigheid van 'n burgerlike huwelik gesluit na 2 Desember 1988
gedurende die bestaan van 'n gebruiklike huwelik**

Die Suid-Afrikaanse reg is oor 'n aantal jare gekonfronteer met die taak om die geldigheid van 'n burgerlike of 'n gebruiklike huwelik te bepaal in gevalle waar 'n man met meer as een vrou op 'n slag getroud was. Dit was as gevolg van die feit dat gebruiklike huwelike nie as geldige huwelike erken is nie. Gevolglik het die totstandkoming van 'n burgerlike huwelik, gedurende die bestaan van 'n gebruiklike huwelik met 'n ander persoon, die ontbinding van die bestaande gebruiklike huwelik bewerkstellig. Hierdie posisie is in 1988 verander deur die Wysigingswet op Huweliks- en Huweliksgoederereg van 1988 wat op 2 Desember 1988 in werking getree het. Sedertdien word gebruiklike huwelike nie meer ontbind deur die sluit van 'n burgerlike huwelik nie. Die posisie word tans gereguleer deur die Wet op Erkenning van Gebruiklike Huwelike van 1998 wat die man in 'n gebruiklike huwelik belet om 'n burgerlike huwelik met 'n ander vrou te sluit. Die mees onlangse saak wat hieroor handel, is *TM v NM 2014 4 SA 578 (HHA)*, ook gerapporteer

as *Murabi v Murabi* [2014] JOL 31715 (HHA). Die hof in hierdie saak het bevind dat burgerlike huwelike gesluit na 2 Desember 1988 gedurende die bestaan van 'n gebruiklike huwelik nietig is. Die Wet op Erkenning van Gebruiklike Huwelike van 1998 maak ook hierdie huwelik ongeldig. Daar is beslis dat die frase “afdoende bewyse” soos gebruik in enige statutêre bepaling nie beteken dat die sluiting in alle omstandighede bestand is teen aanval of dat dit nie ongeldig verklaar kan word op die basis dat dit bedrieglik verkry is nie.

1 Introduction

Whether a marriage, customary or civil, should be regarded as valid or invalid when a man married more than one wife has been a thorny issue for determination by South African courts since *Nkambula v Linda* 1951 1 SA 377 (A). The most recent case in this regard is *TM v NM* 2014 4 SA 578 (SCA), also reported as *Murabi v Murabi* [2014] JOL 31715 (SCA). It is an appeal from the decision of the Limpopo High Court (Thohoyandou) to the Supreme Court of Appeal. It followed on the heels of another case, also an appeal from the decision of the Limpopo High Court (Thohoyandou), where the Supreme Court of Appeal remarked that customary marriages that had been dissolved by a civil marriage, were “revived” by the dissolution of a civil marriage that was contracted by a husband who was a spouse to those customary marriages at the time when he contracted the dissolved civil marriage. The “revived” customary marriages in this case were therefore held to be valid (*Netshituka v Netshituka* 2011 5 SA 453 (SCA) 458 para 15). The court held these customary marriages to have been “revived” by the dissolution of the civil marriage of one Martha Mosele Netshituka with the deceased on 5 July 1984, despite the fact that these customary marriages were contracted before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act 3 of 1998.

The relationship between customary and civil marriages contracted in South Africa has been governed by a number of legislative measures until 15 November 2000, when the Recognition of Customary Marriages Act 120 of 1998 came into operation. One of the earliest measures in this regard was the Black Administration Act 38 of 1927, which did not recognise a customary marriage as a valid marriage. As a customary marriage was not recognised as a valid marriage, it was dissolved by a subsequent civil marriage of a husband to another person (*Nkambula v Linda supra*; *Mutandaba v Murenwa* 1971 NAC 326 (N-E); *Malaza v Mndaweni* 1975 BAC 45 (C)). This was the position from 1 January 1929 (the date of commencement of ss 22 and 23 of the Black Administration Act of 1927) and 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act of 1988).

Another measure of note was the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, which amended section 22 of the Black Administration Act 38 of 1927 and came into operation on 2 December 1988. Its aim was to make a subsisting customary marriage an impediment to contracting a civil marriage by a spouse of such customary marriage (see Bakker and 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: *Netshituka v Netshituka* 2011 5 SA 453 (SCA)” 2012 *TSAR* 586 587–588). Not much has been written about the effect of this measure until the decision in *Thembisile v Thembisile* 2002 2 SA 209 (T) (see, however, Dlamini “The new marriage legislation affecting Blacks in South Africa” 1989 *TSAR* 412;

Sinclair *The law of marriage* (1996) 222–224). According to this amendment, a spouse to a subsisting customary marriage was not competent to contract a civil marriage with another person.

The last measure to deal with the co-existence of customary and civil marriages was the Recognition of Customary Marriages Act 120 of 1998. This is an important measure that gave recognition to customary marriages for all intents and purposes of South African law (see Maithufi and Moloji “The current legal status of customary marriages in South Africa” 2002 *TSAR* 599). It recognises customary marriages, monogamous and polygynous, entered into before and after its date of commencement as valid marriages. The Act also provides for requirements for valid customary marriages, their proprietary consequences, registration and various other related matters.

This note deals with the Supreme Court of Appeal’s decision in *TM v NM supra*. Sketching the background relating to the different legislative measures that regulate the relationship between civil and customary marriages was necessary in order to understand the reasons behind the decision in this case as well as the arguments raised on behalf of the parties. The effect of the registration of a customary marriage on its validity was also an important question for consideration by the court. A certificate of registration of a customary marriage is currently not a requirement for its validity (see s 4(9) of Act 120 of 1998). It was not even regarded as a requirement for the validity of a customary marriage before the commencement of the Act. (See Bekker *Seymour’s Customary law in Southern Africa* (1989) 117–122 393–404; Olivier *et al Indigenous law* (1995) 23; Maithufi and Bekker “The existence and proof of customary marriages for purposes of Road Accident Fund claims” 2009 *Obiter* 164; *Wormald v Kambule* 2006 3 SA 562 (SCA).) Proving the existence of a customary marriage can, however, be a very difficult task without the registration certificate (see *Baadjies v Matubela* 2002 3 SA 427 (W)). The decision in *TM v MN* is also important in ascribing a meaning to the phrase “conclusive proof” in the interpretation of a statutory provision.

2 Facts

The appellant and the first respondent were married to the deceased by customary rites. The first respondent entered into a customary marriage with the deceased in 1975 while the appellant’s customary marriage with the deceased was contracted in 1979 (*TM v NM* 576 para 3). The appellant averred that she was married to the deceased by custom on 1 November 1970 and that R600 was furnished as *lumalo* (*lobolo*) to her parents (see the definition of *lobolo* in s 1 of Act 120 of 1998). She further alleged that in 1975 the deceased married the first respondent according to Venda custom. After the death of the deceased, and on 7 April 2011, the appellant attempted to register the deceased’s death in terms of section 7(1)(a) of the Administration of Estates Act 66 of 1965, whereupon she discovered that the death had already been reported by the first respondent and that the latter had been appointed as executrix of the estate as the sole surviving spouse because she and the deceased had married by civil rights in 1995 (577 para 6).

3 Dispute

The appellant instituted proceedings in the High Court (Thohoyandou) for an order against the respondents that

- “(a) the ‘civil marriage’ contracted between the first respondent and the deceased on 2 August 1995 be declared null and void *ab initio*; and
- (b) the customary marriage concluded between the appellant and the deceased on 1 November 1970 be declared valid” (576 para 2).

An order was also sought against the second respondent (the Minister of Home Affairs) for the registration of the appellant’s customary marriage and to expunge the civil marriage between the first respondent and the deceased from the marriage register. The second and third respondents (Minister of Home Affairs and the Master of the High Court) did not oppose the application and filed notices to abide the decision of the court (para 3).

On 29 June 2012, and before the matter could be heard, the parties reached a settlement agreement in terms of which the disputed issues were defined and limited. It was agreed that the appellant had entered into a customary marriage with the deceased in 1970. The validity of this marriage was, however, placed in dispute (578–579 para 9). The High Court held that no valid customary marriage existed between the appellant and the deceased and that the civil marriage between the deceased and the first respondent, contracted on 2 August 1995, was valid. It held that the first respondent was the only surviving spouse of the deceased (578 para 9).

The matter was brought on appeal to the Supreme Court of Appeal where it was pointed out that the issues for determination were whether (a) the appellant’s customary marriage to the deceased was valid; and (b) the civil marriage between the deceased and the first respondent contracted on 2 August 1995 was valid (579 para 12).

The Supreme Court of Appeal also pointed out that the answer to the first question depended on the proper or correct interpretation of the provisions of the repealed section 22(1) of the Black Administration Act, and that the answer to the second question hinged on the proper construction of section 1 of the Marriage and Matrimonial Property Law Amendment Act of 1988 and the status of the appellant’s customary marriage to the deceased, that is, whether it was valid or not. This meant that if the court were to hold that the customary marriage with the appellant was valid, this would render the civil marriage with the first respondent invalid (*ibid*). The court held that the above-mentioned were the only two issues that had to be determined following the settlement agreement concluded by the parties on 29 June 2012, before the trial could proceed in the High Court. The High Court also took this agreement into account in deciding the issues which were in dispute (*ibid*).

The argument raised on behalf of the appellant was that the existence of her customary marriage was established by the certificate of registration issued in 1991. It was further contended that the said certificate constituted conclusive proof of the existence of such marriage and such proof, it was also contended, could only be rebutted by evidence to show that it had been obtained by fraud (579 para 13; *Ex Parte Minister of Justice: In re: R v Jordaan and Levy* 1939 AD 472).

In the same manner as the court *a quo*, the Supreme Court of Appeal relied on *Road Accident Fund v Mongalo*; *Road Accident Fund v Nkabinde* 2003 3 SA 119 (SCA) in determining the meaning to be ascribed to the phrase “conclusive proof”. It must be noted that one of the arguments raised on behalf of the appellant was that the certificate of registration issued on 31 January 1991 was

conclusive proof of the existence of the customary marriage between her and the deceased.

The phrase “conclusive proof” was defined as having the following meaning:

“‘decisive, convincing’ (*The Oxford dictionary*). It suggests that the conclusion or state of affairs it qualifies brings something to a conclusion. It does not mean that the conclusion in question must in all circumstances be unimpeachable or unassailable. In principle, therefore, a statutory provision that a document constitutes ‘conclusive proof’ of a state of affairs immunise a document from attack on the basis that it was procured fraudulently” (580 para 14).

The High Court, basing its judgment on the above-mentioned meaning, came to the conclusion that as the appellant initially asserted that she was married to the deceased by customary rites on 1 November 1970, which later turned out to be untrue,

“she could not rely on the registration certificate issued to her . . . for to allow her to do so would be assisting her to perpetuate a fraud. Second, that the appellant had approached the court with ‘dirty hands’ and withheld material facts in her founding affidavit. Third, that having regard to the prescripts of section 22(1) of the Black Administration Act the [appellant] in any event ‘failed to prove on a balance of probabilities that the deceased concluded a valid customary marriage’ with her” (579 para 11).

The court *a quo* therefore held that the civil marriage contracted by the deceased with the first respondent on 2 August 1995 was the deceased’s only valid marriage and that the alleged customary marriage with the appellant was invalid (578 para 9).

Ascribing the same meaning to the phrase “conclusive proof”, the Supreme Court of Appeal concluded that the certificate of registration of the customary marriage between the deceased and the appellant constituted at least *prima facie* proof of the existence of the said marriage. Therefore, in the absence of evidence aimed at disproving the authenticity of this certificate, it (the certificate) becomes conclusive proof of matters stated therein, that is, it establishes the truth of these matters (580 para 14).

The next issue for determination was the validity of the civil marriage between the first respondent and the deceased, which was contracted on 2 August 1995. It must be noted that the parties in this case had agreed in a settlement agreement of 29 June 2012 that the customary marriage between the appellant and the deceased was entered into in 1970. In terms of this agreement, therefore, the customary marriage with the appellant was concluded before the deceased contracted a civil marriage with the first respondent.

The legal position which regulates any dispute relating to the validity of a marriage, civil or customary, contracted between 2 December 1988 and 15 November 2000, is to be found in the provisions of the Marriage and Matrimonial Property Law Amendment Act of 1988, which amended section 22 of the Black Administration Act of 1927. Section 22 as amended provided as follows:

- “(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.
- (2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union” (see also *TM v NM* 581–582 para 17).

According to the settlement agreement concluded in this case on 29 June 2012, the parties agreed that the customary marriage between the deceased and the appellant was entered into in 1970, while the civil marriage between the deceased and the first respondent was contracted on 2 August 1995. Therefore the date on which the civil marriage was contracted was after 2 December 1988, that is, the date on which the Marriage and Matrimonial Property Law Amendment Act of 1988 came into operation.

Against this background, the Supreme Court of Appeal concluded that “it follows that it was not legally competent for the deceased to contract a civil marriage with the first respondent during the subsistence of the customary marriage between the deceased and the appellant” (582 para 17). The civil marriage contracted between the deceased and the first respondent was therefore declared invalid as it was contracted contrary to the provisions mentioned above.

4 Legal position of first respondent *vis-vis* that of appellant and *vice versa*

During the course of the proceedings before the Supreme Court of Appeal, the positions of the appellant and the first respondent were explained as follows:

“Accordingly, it goes without saying that the marriage of the first respondent to the deceased contracted on 2 August 1995 must ineluctably suffer the same fate. It follows that it was not legally competent for the deceased to contract a civil marriage with the first respondent during the subsistence of the customary marriage between the deceased and the appellant. *The effect of this conclusion is that both the appellant and the first respondent are the deceased’s surviving spouses in terms of customary law*” (582–583 para 17; own emphasis).

The remarks relating to the position of the appellant and the first respondent as both the surviving spouses of the deceased raise an important question as to the legal position of the appellant and the first respondent *inter se* and the deceased on the other hand. Are they the deceased’s surviving spouses in the sense that all of them are capable of acquiring the rights of surviving spouses in terms of either customary law or common law? Are they, for example, surviving spouses for the purposes of the Maintenance of Surviving Spouses Act Act 27 of 1990 and intestate heirs in terms of the Intestate Succession Act 81 of 1987?

The facts of this case reveal that at the time when the deceased contracted a civil marriage with the first respondent in 1995, he was already married to the first respondent and the appellant in terms of customary law. As the civil marriage between the deceased and the first respondent was contracted in 1995, its validity was regulated by the provisions of section 22 of the Black Administration Act as amended by the Marriage and Matrimonial Property Law Amendment Act. In terms of these provisions, a husband to a customary marriage was precluded from contracting a civil marriage with another during the subsistence of a customary marriage. The husband could, however, contract a civil marriage with his wife by customary rites in the case of a monogamous customary marriage (s 22(1) and (2) of the Black Administration Act as amended). In the present case, the deceased was married to two wives by customary rites, namely, the first respondent and the appellant. He was consequently not competent to contract a civil marriage with the first respondent. The civil marriage with the first respondent therefore did not have any effect on the existing customary marriage of both the appellant and the first respondent. The result was therefore that the deceased remained married by customary rites to both the first respondent and the appellant (*TM v NM* 579 para 12).

As the civil marriage contracted by the deceased and the first respondent had no effect on the existing customary marriages of the appellant and the first respondent, both customary marriages continued to exist until the death of the deceased on 7 April 2011. Consequently, both the appellant and the first respondent became the deceased's surviving spouses. Both were therefore surviving spouses in terms of the Intestate Succession Act of 1987, as amended by the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2000, which defines a spouse as: "'spouse' includes a partner in a customary marriage that is recognised in terms of the Recognition of Customary Marriages Act, 1998" (s 1 of Act 120 of 1998).

Despite what is mentioned above, in the past it was possible to regard a civil marriage, which had dissolved a customary marriage, as a customary marriage for the purposes of succession. This was as a result of the operation of the repealed provisions of section 22(7) of the Black Administration Act, which were aimed at protecting the material rights of the discarded spouse and her children (Maithufi "*Kambule v The Master* 2007 3 SA 403 (E)" 2009 *De Jure* 188 200). The civil marriage was for the purposes of succession regarded as a customary marriage (*Tonjeni v Tonjeni* 1947 4 NAC (C&O) 8). Section 7(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act of 2009, however, still protects the proprietary (material) rights of the discarded spouse and her children as follows:

- "(1) A marriage under the Marriage Act, 1961 (Act 25 of 1961), does not affect the proprietary rights of any spouse of a customary marriage or any issue thereof if the marriage under the Marriage Act, 1961, was entered into –
- (a) On or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act 38 of 1927), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act 3 of 1988)); and
 - (b) During the subsistence of any customary marriage between the husband and any woman other than the spouse of the marriage under the Marriage Act, 1961 (Act 25 of 1961).
- (2) The widow of the marriage under the Marriage Act, 1961, referred to in subsection (1), and the issue thereof have no greater rights in respect of the estate than she or they would have had if the marriage under the Marriage Act, 1961 had been a customary marriage."

The first respondent and the appellant are also "spouses" for the purposes of the Maintenance of Surviving Spouses Act 27 of 1990.

5 Conclusion

TM v NM indicates the legal problems South African courts face with regard to the determination of whether a civil marriage, contracted by a husband who was a spouse to an existing customary marriage, is valid. Before the amendment of section 22 of the Black Administration Act by the Marriage and Matrimonial Property Law Amendment Act, the position was that an existing customary marriage was dissolved by a subsequent civil marriage of a husband to such marriage with another woman (*Nkambula v Linda supra*).

The co-existence of civil and customary marriages is currently regulated by the provisions of the Recognition of Customary Marriages Act 120 of 1998. In terms of this measure, a husband to an existing customary marriage is prohibited from contracting a civil marriage with another person during the subsistence of the customary marriage (s 3(2) of Act 120 of 1998). Spouses in a customary

marriage may, however, contract a civil marriage with each other (s 10(1) of Act 120 of 1998). A civil marriage contracted during the subsistence of a customary marriage with another women is therefore null and void. A customary marriage contracted during the subsistence of a civil marriage is similarly invalid. Despite this prohibition, South African men continue to contract civil marriages during the subsistence of valid customary marriages and *vice versa*, as a result of this, some women who have been living under the impression that they were married may find themselves unmarried at the time of death of their “husbands”. Therefore, they may not be regarded as surviving spouses of their deceased husbands. Realising that this prohibition is not adhered to, is it not opportune for the legislature to step in and introduce polygyny into both civil and customary marriages?

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