

**BROADENING THE DIVIDE BETWEEN OFFICIAL AND  
LIVING CUSTOMARY LAW**

**Mayelane v Ngwenyama**  
**2010 4 SA 286 (GNP); [2010] JOL 25422 (GNP)**

**1 Introduction**

Legal and anthropological literature on polygyny in South Africa abounds and the issue whether this institution in African customary law should be recognised officially has been thoroughly considered by academics, interested parties and, not least, the South African Law Reform Commission. It was certainly then not a rash decision to give recognition to polygynous African marriages in the Recognition of Customary Marriages Act 120 of 1998 (hereafter “the Act”).

The opponents of the institution argue, among others, that polygyny objectifies women; that it oppresses women within marriage; and that it entrenches the subordination, inequality and humiliation of women. In contrast, proponents for the institution contend that the polygynous marriage keeps families together; provides extra dignity and respect to women; is socially beneficial to the extent that it offers security by a division of labour, by offering opportunities to perform outside work and to accumulate wealth, by lightening the burden of household responsibilities, and by providing companionship.

As far as could be determined, there are no comprehensive current statistics available on the prevalence of polygynous marriages in South Africa. The 2001 population census and limited empirical studies by individuals and groups yield some information on the extent to which such marriages are still entered into. But these statistics cannot give a complete picture of how many still exist. (See eg the empirical studies referred to by Bonthuys and Albertyn *Gender, law and justice* (2007) 177ff; the surveys preceding the Law Reform Commissions' *Report on customary marriages* (1998); Boonzaaier *Die familie-, erf- en opvolgingsreg van die Nkuna van Ritavi* (unpublished DPhil thesis UP 1991); Vorster *et al Urbanites' perceptions of lobolo: Mamelodi and Atteridgeville* (2000). Schnier and Hintmann, in an article entitled "An analysis of polygyny in Ghana: The perpetuation of gender based inequality in Africa" 2000–2001 *Georgetown J of Gender and the Law* 795, provide interesting statistics on the incidence of polygyny in sub-Saharan Africa, but do not refer to South Africa.)

Nevertheless, it is certain that the number of polygynous African marriages has been dwindling for some time. Already in 1938, Schapera *A handbook of Tswana law and custom* (1938) 13 observed:

"It is seldom nowadays that the household is based upon a polygamous family. Probably even in the olden days most of the men had only one wife; and few commoners had more than two or, in exceptional instances, three. Large polygamous households, of four wives or more, were met with only among the Chiefs, their relatives, important headmen, and other prominent or wealthy people. Under modern conditions, polygamy is obviously declining. This is due in the main to the spread of Christianity. All mission societies operating in the Protectorate forbid their converts to have more than one wife, nor will they allow a woman belonging to the Church to become the wife of a polygamist."

And, according to the 2001 population census, there were 26 651 black people in polygynous marriages which, in the context of the South African population as a whole, would mean that such marriages are rare. (These statistics may be accessed online through the official webpage of Statistics South Africa at <http://www.statssa.gov.za/>; see also Bonthuys and Albertyn 177.) But, of course, no matter how rare such marriages may be, or how few we are in fact aware of, each one of them represents different individuals and households and how the legal system deals with such marriages affects the fundamental rights of a large number of people.

While Christianity may have been the main reason for the continuing decline of this cultural phenomenon some eight decades ago this certainly no longer holds true. Today one should look at other factors for the decline, such as the fact that the status of women has generally improved; that their psychological and emotional needs and interests have changed; that they perceive marriage in terms of companionship and love; and, importantly, that from a financial point of view, it has become largely unaffordable to maintain more than one wife and household (see eg Mungazi *Gathering under the mango tree. Values in traditional*

*culture in Africa* (1996) 43ff; Kaganas and Murray "Law, women and the family: The question of polygyny in a new South Africa" 1991 *Acta Juridica* 116 131–132).

Yet, in a certain sense, it is a tenacious practice and in some cases does serve the purposes which will briefly be highlighted below. The current practice has been analysed from various perspectives and, as indicated, there are copious academic materials that may be consulted for a comprehensive commentary and evaluation of polygyny in customary law. (See eg Ruppel (ed) *Women and custom in Namibia: Cultural practice versus gender equality* (2008), especially the contribution of Anyolo "Polygyny among the Ovambadja: A female perspective"; Bonthuys and Albertyn 177ff; Bekker and Boonzaaier "How equal is equal? A legal-anthropological note on the status of African women in South Africa" 2007 *De Jure* 277 285–286; Bennett *Customary law in South Africa* (2004) 243–248; Pienaar "African customary wives in South Africa: Is there spousal equality after the commencement of the Recognition of Customary Marriages Act?" 2003 *Stell LR* 256 265ff; Pieterse "Beyond the reach of law? HIV, African culture and customary law" 2000 *TSAR* 428 430–431; Kisaakye "Women, culture and human rights: Female genital mutilation, polygamy and bride price" in Benedek *et al Human rights of women. International instruments and African experiences* (2002) 276–280; Armstrong *et al* "Uncovering reality: Excavating women's rights in African family law" 1993 *Int J of Law and the Family* 333–338; Dlamini "Should we legalise or abolish polygamy?" 1989 *CILSA* 330 and "The role of customary law in meeting social needs" 1991 *Acta Juridica* 77–78; Kaganas and Murray 116ff.)

## 2 *Mayelane v Ngwenyama*: The facts

The facts of this case are simple. The judgment revolved around two customary marriages entered into by the late Hlengani Dyson Moyana. On January 1984, he married the applicant, Mdjadji Florah Mayelane, in terms of customary law. This marriage was never registered.

On 6 January 2009, he entered into a second customary marriage with the first respondent, Mphephu Maria Ngwenyama. As confirmed by her village headman, this marriage took place openly and publicly, conforming to all the requirements of customary law, except that the existing wife, Mayelane, was never informed of the second marriage. However, the second marriage, too, was never registered and, in addition, was not preceded by an application to a court of appropriate jurisdiction for an order approving a contract to regulate the future matrimonial property system of the two marriages, as is required by section 7(6) of the Act. Moyana passed away on 28 February 2009 (see paras 5–8).

Upon the death of Moyana, his first wife attempted to register their marriage, but learnt that this was not possible. The reason why the Department of Home Affairs refused to register the marriage was not that it was too late to do so, but that there was another competing claim by Ngwenyama. Neither of the women had knowledge of the existence of the other nor of the fact that Moyana had simultaneously been married to them both (see paras 37–40).

### 3 The judgment

#### 3.1 The issue

Mayelane, the first wife, asked the court to declare the second marriage to Ngwenyama, the second wife, null and void on the grounds that it did not comply with the requirements of the Act.

#### 3.2 The legislative framework

The court based its decision on the Act. As evidenced by its preamble, this legislative measure was passed to effect the equality of customary and civil marriages. In terms of sections 2, 3 and 6, respectively, customary marriages are recognised as valid marriages, requirements for valid customary marriages are laid down, and the equal status of spouses in a customary marriage is safeguarded. However, the Act nowhere explicitly addresses the status of multiple wives in a polygynous marriage or accords them equal status. Section 4 deals with the registration of such marriages.

Section 7 regulates the proprietary consequences of customary marriages. Marriages entered into before the commencement of the Act are governed by customary law and spouses may apply jointly (and if there are multiple wives, all spouses and interested parties must be joined in the proceedings) to a court to change the matrimonial property regime (s 7(1) and (4)). Customary marriages (to a single spouse), entered into after commencement of the Act, are in community of property and profit and loss and are subject to the provisions of the Matrimonial Property Act 88 of 1984 (s 7(2), (3) and (5)). Section 7(6)–(9) regulates the proprietary consequences where a further customary marriage is contracted after the commencement of the Act. Sub-sections 7(6) and (9) were of particular importance in the decision in *Mayelane v Ngwenyama*. Section 7(6) of the Act determines that:

“A husband in a customary marriage who wishes to enter into a further 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.”

Section 7(9) of the Act in turn provides that:

“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.”

#### 3.3 Decision

The court, per Bertelsmann J, came to the conclusion that the “purported” second marriage (paras 1 and 41) was null and void because of the absence of a contract approved by an appropriate court as envisaged in section 7(6).

The reasoning of Bertelsmann J is interesting, if at times somewhat forced. In his discussion of the validity of the second marriage, his first observation is that “[s]ection 7 emphasises that spouses in a customary marriage have equal status and capacity” (para 21). Then, in paragraph 22, he remarked that the *consent* of the court is an essential requirement for the validity of a subsequent marriage of a man who is already married in terms of customary law. According to Bertelsmann J, this requirement is contained in section 7(6) of the Act, and is expressed “in proprietary terms”. Consent of a court is necessary to protect the proprietary

positions of both or all the wives, among others, by ensuring that they are aware of the position and able to contribute to the regulation of the proprietary consequences.

Referring to case law, the court further pointed out that the word “must”, should be interpreted as peremptory rather than directory (paras 25–26). In this case, read together with section 7(7)(b)(iii) which gives the court the power to refuse the application to approve such a contract, the only logical interpretation is that a marriage that does not comply with this requirement, is void, even though the Act does not contain an express provision to that effect.

The final and most important reason for the finding that polygynous marriages which do not comply with the requirements of the Act, are void, was that further marriages infringe on the fundamental rights of earlier spouses and later spouses. The court named a number of such rights (para 27): a woman’s rights to dignity, physical and emotional integrity, to be treated equally with her husband, to marital intimacy and trust, and the right to be protected against emotional and economic or material abuse.

Bertelsmann J observed that the Act does not explicitly require the consent of the existing spouses (which, incidentally is a requirement at customary law) and that it appears that the intention was to leave this issue to be dealt with under customary law. (He remarked that if this is indeed the case, “compatibility with the Bill of Rights enshrined in the Constitution of such an approach may have to be considered in future”: para 29.) The absence of such a requirement, according to the judge, only strengthens the view that it is obligatory that “the court seized with the formulation of the contract” takes into account the needs and views of the earlier spouses and that in the absence of a contract approved by a court, no further marriage may be entered into.

#### 4 Discussion

In its *Report on customary marriage* 84–92, the South African Law Reform Commission highlighted the issues of polygyny from various angles. It made the following critical remark (88): “Not only would it [banning of polygynous marriages] be impossible to enforce, but men would also be encouraged to engage in informal unions, which offer women and children no legal protection at all.” To this may be added that recognition or not would in any event not have affected the continued existence of polygynous marriages or the fact that people still enter into such marriages: This is after all evidenced by the well-known disparity between official customary law and living customary law. The Commission understandably came to the conclusion that “[t]o declare the second marriage invalid would constitute such a grave departure from customary laws that few people would pay any attention to the penalty” (90).

Yet, by his decision in *Mayelane v Ngwenyama* that a polygynous marriage is void when the requirements of sections 7(6) and (9) of the Act concerning the conclusion of a contract regulating proprietary consequences and its approval by a court, have not been met, Bertelsmann J in effect declared all polygynous marriages void which had been entered into after the Act came into operation. An enquiry to the Deeds Offices revealed that no such contracts have been registered since the Act came into operation on 15 November 2000. (This enquiry was made by a staff member of the Justice Training College in 2010.)

The first reason that comes to mind why people fail to comply with the requirements of sections 7(6) and (9) is the simple fact that the people affected by the Act do not know of its existence or do not understand its contents. (Research has shown, eg, that decades after its promulgation, very few people were aware of the existence of the Transkei Marriage Act 21 of 1978: see Pienaar 270–271.) Unfortunately, even though academics recommended the widest possible publication of the Act, this never happened. Even today, a decade later, many people still come to know of the Act only when they want a marriage dissolved or when the Master of the High Court requires proof of a marriage to administer an estate. Invariably the parties must then obtain a High Court order to have their marriage registered.

But the Act is not completely unknown. According to Statistics South Africa, between 2003 and 2008, the proportion of customary marriages registered in terms of the Act, in the year they were entered into, ranged from 4,7 per cent to 8,5 per cent. While the registrations have been fluctuating, there appears to have been a significant decline in 2007 and 2008. Exactly what percentage these numbers constitute of all customary marriages entered into during this period, is not known (Statistical release p0307: [www.statssa.gov.za/publications/P0307/P03072008.pdf](http://www.statssa.gov.za/publications/P0307/P03072008.pdf) (accessed 14 Jul 2010)). All the same, of the more than 26 000 customary polygynous marriages that were in existence in 2001, there is no evidence of a single certified copy of a contract as contemplated in section 7(9) and none for any such marriages thereafter.

The court starts its reasoning for declaring the second marriage invalid by indicating (para 21) that according to section 7 spouses in a customary marriage have equal status. The immediate assumption is that Bertelsmann J accidentally referred to section 7, instead of to section 6. However, he then continues that this section (7) is clearly aimed at the protection of all existing and future spouses by ensuring that the husband must obtain the court's consent for further marriages (para 22), thereby interpreting section 7 as indirectly entrenching the equality of all the wives, again "in proprietary terms". Unfortunately, though, the Act nowhere explicitly addresses the status of multiple wives in a polygynous marriage.

The Act is vague on what the implication of a failure to enter into such a contract is. Bennett 248 argues that it should be voidable rather than void, but the court did not agree. Importantly, although section 2(4) states that polygynous marriages entered into after the commencement of the Act "*which comply with the provisions of this Act*, are for all purposes recognised as marriages" (our emphasis), it is nowhere expressly stated that marriages without such contracts are void. The omission to declare such marriages void may be due to inept drafting. But, the intention may also have been that such marriages are not in fact void. After all, the same Act affords a great deal of lenience as regards unregistered customary marriages: Section 4(1) requires the registration of customary marriages, but section 4(9) explicitly states that "[f]ailure to register a customary marriage does not affect the validity of that marriage".

In respect of the contract required for polygynous marriages, section 7(7)(b) likewise provides ample leeway:

"[T]he court may

- (i) allow further amendments to the terms of the contract;
- (ii) grant an 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."

The Act further does not make it clear who the parties to the contract should be, but it may be assumed that at least all the existing and future spouses should be included, if not also all interested parties who must be joined in the application proceedings in terms of section 7(8). What appears to be rather far-fetched though, is that the court to which the application is made is “seized with the formulation of the contract” (para 29).

Admittedly the Act does not cater for a case such as the present one where there was no contract and the husband had passed away. But to declare polygynous marriages contracted after 15 November 2000 void for a failure to enter into a contract has far-reaching consequences. At this juncture it is perhaps necessary to briefly describe the true nature of polygynous marriages.

Firstly, it is important to distinguish between the marriages of senior traditional leaders and those of ordinary people, or commoners.

Section 7(6) of the Act makes no distinction between such marriages. In consequence, a senior traditional leader, too, must conclude a contract and apply to a court of law for its approval before he marries. In view of the manner in which such marriages are in fact entered into, the required process and approval of a contract to regulate the future matrimonial property system of (all) the marriages appear to be ludicrous and it is small wonder that no such contracts have been registered.

In the case of a senior traditional leader, he is but one of the role players. The principal wife (candle wife) is selected by the *bakgomo* and *bakgomana* (closest relatives of the chief) and her *bogadi* is paid by the whole community (tribe). If she cannot give birth to a son, a substitute (*seantlo*) from her family is betrothed in her place. This is called a sororate marriage – which one might flippantly call a marriage within a marriage. So the inchoate nature of the marriage may go on. If the *kgosi* does not succeed in impregnating either the candle wife or the *seantlo*, or if he dies before he had one son, a member of the royal family is appointed by the *bakgomana* (royal advisers) to raise seed with her, that is, to enter into a levirate. What is more, if the chosen candle wife had not even been betrothed at the time of the death, she may still be married by the tribe in the name of the deceased (see generally Oomen *Chiefs in South Africa, law, power and culture in the post-apartheid era* (2005) 219).

A senior traditional leader, almost without exception, has to marry a principal wife to bear a successor. The following remark by Mönnig in respect of the Pedi (*The Pedi* (1978) 256) illustrates the deep-rooted nature of this custom:

“A *mohumagadi* is . . . rarely the first wife of a chief, and her marriage must ceremoniously underline the essential difference between her and the other wives of the chief. A *mohumagadi* is chosen by a chief in consultation with his councillors.”

But according to Bertelsmann J’s interpretation of the Act, when a chief wishes to marry the *mohumagadi*, he must round up all his wives and probably also the *bakgoma* and *bakgomana* (as interested parties) to conclude a contract – to a judge’s liking – “to regulate the future matrimonial property system of his marriages”.

There are more than 773 senior traditional leaders and twelve kings or queens in South Africa. (Department of Provincial and Local Government *The role of traditional leadership in democratic governance. A consolidated set of policy instruments* (undated) 22). It is a well-known fact that the rules of succession may differ from one ethnic unit to another. Yet the choice of a chief wife by the

royal council is universal, so much so that in terms of sections 9, 10 and 11 of the Traditional Leadership and Governance Framework Act 41 of 2003, the royal family concerned must identify a person who qualifies in terms of customary law to assume the position of king, queen, principal and senior traditional leaders, headmen or headwomen. It seems highly unlikely that the legislature intended that polygynous marriages should be nullified if the required contracts had not been entered into or approved.

With regard to the marriages of “commoners”, there are likewise factors that advocate against interpreting the Act so that failure to meet with the requirement of sections 7(6) and (9) leads to the invalidation of a polygynous marriage.

For instance, a man may marry a supplementary wife *for* one of his wives. It is normal that the request to marry a supplementary wife is directed by the existing wife herself. The new wife is usually the younger sister of the wife for whom she is married (the wife who requested the marriage). Any wife within a polygynous family unit may request a supplementary wife. When the principal wife becomes old or tires of the daily chores, it is normal practice for her to request her husband to marry a supplementary wife for her. A supplementary wife may also be requested when a wife is infertile or gives birth to daughters only. And when a woman dies, her husband may marry a substitute wife in her place, irrespective of other wives. Again, she is, as a rule, a younger sister of the deceased wife. Other spouses will invariably be consulted (see Boonzaaier 198ff). A man is further at liberty to simply choose to marry a second or further wife (see Hartman *Aspects of Tsonga law* (1991) 57–58).

Kriel and Hartman *Khindli mukani Vatsona: The cultural heritage and development of the Shangana-Tsonga* (1991) 25 observed that also among the Shangana-Tsonga a wife’s younger sisters are considered to be the best candidates for further polygynous marriages, and that an existing wife often insists on her husband’s taking an additional wife not only to reduce her workload, but also to increase her status. Significantly, they point out that in the early 1990s in the former Gazankulu approximately twenty-five per cent of the men still entered into polygynous marriages.

One has to bear in mind that customary marriages are wholly different to civil marriages and one should guard against using the latter as a yardstick when regulating the former. Already in 1940, in *Sijila v Masumba* NAC (C&O) 42, quoted by Kaganas and Murray 129, the court warned against imposing Western individualistic ideas on communitarian African customary concepts. The differences between these two types of marriage have been well documented in textbooks (see eg Bekker *Seymour’s Customary law in Southern Africa* (1989); Olivier *Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) and the works of Bennett, *Customary law in South Africa* (2004) and *The application of customary law in Southern Africa* (1985)) and other academic materials and research (see, among others, Armstrong “Law, marriage, the family and widowhood: Tying the threads” in Ncube and Stewart (eds) *Widowhood, inheritance laws, customs and practices in Southern Africa* (1995) 149–164): She mentions the familiar distinction of a civil marriage being a union of individuals as opposed to customary marriages that involve the extended families of both parties. Importantly, she remarks:

“Similarly, while under general law, written provisions determine whether a marriage exists, usually based on the fact of registration, under customary law it is the family which decides whether a marriage exists. The ceremonies establishing a marriage may take many years to complete and the existence of a marriage may be variable and negotiable.”



Although anthropologists are adamant that the consent of the principal and lesser wives is essential for further marriages, this is not a requirement at customary law. Nevertheless, it is highly unlikely that a man will introduce a new wife without the consent of, at least, his principal wife. Thus, in the case of the Tsonga, Kriel and Hartman 57–58 reported that even though it is expected of a husband to obtain the consent of his principal wife for further marriages, she is in fact not at liberty to refuse her consent. Should she oppose the further marriage, she may complain to her husband's family council. It, in turn, will attempt to dissuade the husband. Further, even though the husband may remove goods from the common estate without the principal wife's consent, it would be considered irresponsible to do so. Nonetheless, he may not use goods which accrued to a wife, to *ndzovolo* without her permission.

Polygynous marriages in indigenous African culture should also be seen in the context of the importance of the family and its continued existence. In this culture, family comprises more than a family of blood relations in the narrow, Western sense of the word. It encompasses a wide variety of living and deceased people, as well as those yet to be born. It is thus not surprising that children are at the core of the African concept of marriage. Hence the expression "cattle beget children". Boys are needed to ensure the survival of the lineage and girls to be given in marriage. The ancestor veneration means that living elders and those already in the afterlife will be cared for. In spite of essential changes experienced in social and economic circumstances, the fundamental principle underlying customary marriages remains that when a woman marries, she creates a house which is more than a physical residence; with her children she creates a distinct legal unit, which represents the multifaceted joint family.

A consideration of the significance of marriage in indigenous African culture, as espoused in the abundant written material on polygyny and the important debate on its advantages and disadvantages, may well have induced the court to come to a different and more equitable conclusion, with less far-reaching consequences. But without the benefit of these materials, the court focused exclusively on the consequences for the first wife of polygynous marriages not preceded by a contract. Thus it observed (paras 32 and 33):

"[32] An existing wife may very often be entirely dependent upon her husband together with her children, may be unaware of her rights, may be illiterate or too timid or impecunious to seek legal advice and may suffer the economic and emotional deprivation brought about by a subsequent marriage long before a separation as a result of death or divorce.

[33] [T]he additional wife might, as a result of a favourable marriage contract with the husband, receive considerable financial and other benefits to the detriment, possibly even to the total impoverishment, of the first spouse and her children."

Unfortunately, there are no indications in this judgment of the submissions made on behalf of the parties. It is known that the applicant's marriage was not registered in terms of the Act, but, as indicated, that did not render it void. Courts nowadays insist on customary marriages being registered before they adjudicate on issues arising from them. This is understandable, in view of the fact that since the Act came into operation persons have been claiming to have been married or single, depending on the most advantageous option. Regrettably, though, the requirement of registration has also to an extent compromised the essence of a customary marriage by diverting the focus to legislative constraints and away from the living customary law. And this is also what happened in this case: the failure to comply with the requirements of sections 7(6) and (9) completely

overshadowed the fact that the second wife's village headman had confirmed that her marriage had taken place openly and publicly, conforming to all the requirements of customary law.

The consequences for the second wife of declaring her marriage void were not contemplated. One cannot help but wonder whether a different conclusion would have been reached had a child been born of the second marriage. But, even though there was no child in this case, the court should at least have considered the consequences of its finding for children borne from such marriages, should this decision be followed by other courts in future cases. After all, the welfare of children from the existing marriage was explicitly considered. Thus the court explained (para 32):

"In addition, the rights of any children born from the earlier marriage and still dependent upon their parents may obviously be vitally affected. The court faced with the question whether a further marriage should be approved must take their interests into account as a constitutional obligation arising from section 28(2) of the Constitution. Their mothers would usually be in the best position to assess their needs and to enlighten the court in that regard, but children of sufficient maturity will also fall into the class of 'having a sufficient interest' intended by subsection (8) of the Act."

There is also the question of succession to the deceased that comes to mind. In spite of the fact that her marriage was declared void, the second wife could still have been an heir. According to section 2(2)(b) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

"a woman, other than a spouse of the deceased, with whom he had entered into a *union* in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased" (our emphasis).

Further, holding that a chief's second or further marriage is invalid would put in disarray the succession to the chieftainship of his community. In cases where a particular chief wife is married, there would be no possibility of resorting to the children of junior wives as successors. In the case of the Cape Nguni, a man (including a chief) might have a great house and a left-hand house with a *qadi* (affiliated house) attached to one of them or to each one (see Seymour 127). If, even in this simplified version, one of the women should be declared not to be married, it would cause enormous uncertainty.

We further have serious misgivings about embodying the patrimonial consequences of a polygynous marriage in a contract. In the case of a senior traditional leader, it would be well-nigh impossible to identify any property that he may assign to his wives *inter vivos* or on dissolution of the marriage by death or divorce. A chief does not own any property in his own right. Myburgh *Die inheemse staat in Suid-Afrika* (1996) 61 (see also Prinsloo *Public law in KwaNdebele* (1985) 21ff) describes the nature of property of the royal house and points out that:

"Ons hou dus daarmee rekening dat goed wat aan lede van die vorstehuis toevertrou word en dié wat hulle deur hul arbeid voortbring, staatsgoed is en dat hulle uit staatsgoed onderhou word. Dit strook ook met die beginsel dat al die weduwees van 'n vors deur sy opvolger onderhou word en nie elk op afsonderlike gesinsgoed aangewese is nie. Verder moet aanvaar word dat die eiendomsreg oor goed wat vrouens van die vors ten huwelik meebring, nie in gesinsvermoëns opgeneem word nie maar volgens die gewone patroon onder publiek-regtelike beheer beland, dus dat die vrouens van die vors van privaatvermoë uitgesluit raak."

In the case of intestate succession, which is now governed by the Intestate Succession Act 81 of 1987, the legislature purported to resolve this question by providing in section 6 of the Reform of Customary Law of Succession and Related Matters Act that

“[n]othing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional community referred to in the Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003).”

That leaves unresolved the question of what constitutes property held in a chief’s official capacity.

## 5 Conclusion

Unfortunately the court in *Mayelane v Ngwenyama* paid no heed to the broader implication which its judgment may have for future polygynous marriages. There is no indication that it meant its judgment to be an *ad hoc* decision. Should this decision be followed, it will have severe consequences for the succession to traditional leadership. Moreover, it is disappointing that the court based its decision on one-sided assumptions about the probable negative consequences of polygynous marriages and completely disregarded any benefits that may have flowed from such marriages. For one, by declaring a further marriage invalid, at least one woman, and possibly children and also others belonging to the house established by the marriage, are deprived of legitimate and enforceable rights. One can but hope that other courts will not follow suit.

It is not possible to say with any measure of certainty exactly how many polygynous marriages exist today, especially as it is extremely difficult to determine the state of affairs in the deep rural areas where polygyny no doubt still forms an integral part of social life. But, it may with reasonable certainty be assumed that it is still practised in South Africa. Declaring void polygynous marriages that have not met the requirements of the Act, will neither force people to comply with the Act, nor stop them from entering into such marriages. This decision in *Mayelane v Ngwenyama* has certainly paved the way for living customary law and official customary law to drift even further apart, while at the same time strengthening the new evolving official statutory customary law that may be in harmony with constitutional principles, but that retains few traces of fundamental African values.

Finally, customary law and culture deserve a more profound insight into what is at stake. One has to endorse Stewart’s remarks (“Intersecting grounds of (dis)advantage: The socio-economic position of women subject to customary law – A Southern African perspective” in Ruppel (ed) 139):

“If we do not interrogate normative systems as to the basis on which they are assumed to regulate and control rights and entitlements of supposedly subject community members, then we are guilty ourselves of violating rights . . . we may fail to discern potential dialogue entry points, especially at a social level, that would enable a useful discussion about changing social practices and how customs and practices are changing to accommodate these . . . we may miss the grounded reality that significant social and customary change has often already taken place within communities.”

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