

TO BE OR NOT TO BE: DOES THIS QUESTION STILL ARISE?

1 Introduction

Some years back, two articles with the titles “Civil marriage and customary union – ‘To be (valid) or not to be (valid) that is the question’” (Mafubelu 1981 *De Rebus* 573) and “Protection of a customary union wife” (Mqeke 1980 *De Rebus* 597) which commented on the validity of an existing customary marriage when a husband to such marriage had contracted or entered into a civil marriage were published. Other articles appeared during this period which pleaded for the recognition of the then so-called customary union as a valid marriage in South African law (Dlamini “Recognition of a customary marriage” 1982 *De Rebus* 593; Maithufi “Causing the death of a breadwinner – the customary marriage widow’s problem” 1986 *De Rebus* 555; Labuschagne “Erkenning van die inheemse huwelik” 1991 *THRHR* 843). This debate was sparked by the failure of South African law to recognize certain types of marital relationships, in particular customary marriages, as valid marriages. The only marriage recognized at that time was a civil marriage. The debate revolved around the effect of a civil marriage on an existing customary marriage and on the validity of a customary marriage entered into during the subsistence of a civil marriage in the course of interpreting the provisions of section 22 of the repealed Black Administration Act 38 of 1927 (*Nkambula v Linda* 1951 1 SA 377 (A); *Malaza v Mndaweni* 1975 BAC 45 (C); *Khumalo v Ntshalintshali* 1971 NAC 59 (C)).

One would have thought that the debate would cease after the passing of the Recognition of Customary Marriages Act 120 of 1998 which was aimed at recognizing customary marriages as valid marriages for all intents and purposes of South African law. But alas, this was not to be the case, as the debate still rages on (*MM v MN* 2010 4 SA 286 (GNP); *MG v BM* 2012 2 SA 253 (GSJ); *Netshituka v Netshituka* 2011 5 SA 453 (SCA); *MN v MM* 2012 4 SA 527 (SCA), which for the purposes of this discussion will be referred to as the *Ngwenyama* case to distinguish it from the case in the court *a quo* *MM v MN* (2010 4 SA 286 (GNP)). On appeal to the constitutional court, the interpretation of the court *a quo* of the effect of failure to comply with the provisions of section 7(3) of the Recognition of Customary Marriages Act was endorsed in *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama* (neutral citation *MM v MN* 2013 4 SA 415 (CC)). The second or further

customary marriage was declared invalid on the ground that the first wife did not consent to her husband's second customary marriage. (The constitutional court case will hereafter be referred to as the *Mayelane* case to distinguish it from the case in the court *a quo*.)

2 Background to the debate

In order to fully understand the current debate relating to the effect of a civil marriage on an existing or subsequent customary marriage, it is necessary to look at the legal position of customary marriages in South African law before the coming into operation of the Recognition of Customary Marriages Act. The various territories that came to form the Union of South Africa had different legislative measures relating to this position (Seymour *Bantu Law in South Africa* (1970) 237-251). In 1927, uniformity was achieved by the passing of the Black Administration Act 38 of 1927 which repealed all those measures that were specially enacted to deal with civil and customary marriages contracted by black persons. In terms of this measure, a civil marriage was clearly distinguished from a customary marriage and defined as

“the union of one man with one woman in accordance with any law for the time being in force in any province governing marriages, but does not include any union recognized as a marriage in Native Law and custom under the provisions of section one hundred and forty-seven of the Code of Native Law contained in the schedule to Law 19 of 1891 (Natal) or any amendment thereof or any other law” (s 35).

This definition excluded all forms of marital relationships which were not exclusive, that is, of one man and one woman, from being recognized as valid marriages. A customary marriage was defined as an “association of a man and a woman ... where neither the man nor the woman is a party to a subsisting marriage”. A “subsisting marriage” in this definition referred to a legally recognised marriage, that is, a civil marriage.

The Black Administration Act also contained special requirements which had to be complied with by black male persons who intended to contract or enter into a civil marriage. The first requirement related to the capacity to contract a civil marriage. The relevant provision read:

“No male...shall during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared upon oath, before a Magistrate or ...Commissioner of the district in which he is domiciled, the name of every such first-mentioned woman; the name of every child of such customary union; the nature and amount of the movable property (if any) allotted by him to each such woman or house; and such other information relating to any such union as the said official may require” (s 22(1)).

A superficial reading of this provision may have led one to the conclusion that a male spouse of a customary marriage was prohibited from contracting a civil marriage without declaring on oath what was required. It is, however, clear from case law that a valid civil marriage could be contracted without the required declaration or where it was falsified (*Nkambula v Linda*).

Other related provisions dealing with the capacity of an already married black male person who intended to contract a civil marriage with another woman were contained in the repealed section 22 (3), (4) and (5) of the Black Administration Act. Section 22(3) provided: “No marriage officer shall solemnize the marriage of a ...male unless he has first taken from him a declaration to the effect that he is

not a partner in a customary union with any woman other than the one he intends marrying.” The taking of the declaration referred to in this provision appears to have been compulsory, but again failure to comply with this requirement did not lead to the invalidity of the subsequent civil marriage. The latter marriage simply had the effect of dissolving the existing or subsisting customary marriage (see, *inter alia*, *Kos v Lephaila* 1945 NAC 4 (C&O)). Moreover, the contravention of this provision by any person, including the marriage officer, was regarded as a crime and the perpetrator was liable on conviction to a fine or imprisonment (s 22(4) of Act 38 of 1927).

The repealed section 22(5) of the Black Administration Act provided: “A ... man who willfully makes a false declaration to a marriage officer with regard to the existence or not of a customary union between him and any woman, shall be guilty of an offence and liable on conviction to the penalties which may by law be imposed for perjury.” No provision was made as to the effect of failure or falsification of the required declaration on the validity of the ensuing civil marriage, and the understanding was always that a customary marriage could not exist in the face of a civil marriage (Seymour 249).

Despite overwhelming case law to the effect that non-compliance with these provisions did not have any effect on the validity of the ensuing civil marriage, conflicting academic views were expressed in this regard. Mqoke argued that as the language used by the legislature was peremptory (it used “shall” and was also couched in negative terms), failure to comply with these provisions should have led to the invalidity of the civil marriage. He submitted that

“to construe the section as being peremptory would not cause an injustice. ... It is a matter of regret that the court, in *Nkambula’s* case did not feel called upon to consider the effect of non-compliance with the provisions of the section; perhaps the court was limited in its enquiry by the question it had to consider on appeal... *Nkambula’s* case neatly illustrates the fact that the courts demonstrate some unwarranted laxity in the construction of s 22 – they do not observe the peremptoriness of the language of the section – and this results from non-recognition of customary union as a valid marriage” (1980 *De Rebus* 597-598).

Mafubelu, on the other hand, submitted that the intention of the legislature in enacting these provisions was to safeguard whatever property was allotted to the female spouse of a customary marriage if such allotment was made (1981 *De Rebus* 573). He also pointed out that although this was the intention, the male spouse was under no legal obligation to make any allotment prior to the contemplated civil marriage, and, where an allotment was made, he was merely required to state what was allotted. The correctness of the declaration was not enquired into nor was the female spouse required to confirm the accuracy of such declaration. The female spouse was not even informed of her spouse’s intention to contract a civil marriage with another woman. Despite this, the resultant civil marriage was regarded as valid (Peart “Civil or Christian marriage and customary unions: the legal position of the ‘discarded’ spouse and children” 1983 *CILSA* 39).

The abovementioned provisions applied only to a black male person who contemplated contracting a civil marriage during the subsistence of a customary marriage with another woman. No requirements of a similar nature were prescribed for women, whether married by customary rites or not, who wished to contract a civil marriage. The result was that a black woman could, while still married to a man by customary rites, contract a civil marriage with another man. Her civil marriage had the effect of dissolving her existing customary marriage (see Jansen “Customary Family Law” in Rautenbach, Bekker and Goolam (eds) *Introduction*

to *Legal Pluralism in South Africa* (2010) 72). At that time, the law protected the “material rights” of the wife whose customary marriage was rendered invalid when her husband contracted a civil marriage with another woman. The relevant legislative provision read as follows:

“No marriage contracted after the commencement of this Act during the subsistence of any customary marriage between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof; and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate than she or they would have had if the said marriage had been a customary marriage” (the repealed s 22(7) of Act 38 of 1927).

It appears from these provisions that a customary marriage could exist side by side with a civil marriage for the purposes of succession, as the latter was equated to the former in determining who the heirs of the deceased were. The effect was that the customary law of succession was made applicable to the administration and distribution of the intestate estates acquired during the existence of both the customary marriage and the civil marriage (see, *inter alia*, *Tonjeni v Tonjeni* 1947 NAC 8 (C&O)).

The legal position after the coming into operation of the abovementioned provisions of the repealed Black Administration Act, that is, 1 January 1929, and before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 which came into operation on 2 December 1988, was that a customary marriage was dissolved by a civil marriage of the husband with another woman. Where a customary marriage was entered into during the subsistence of a civil marriage with another woman, it was regarded as null and void *ab initio* (Bekker *Seymour’s Customary Law in Southern Africa* (1989) 266). A civil marriage therefore always had the effect of either dissolving or superseding a customary marriage (Seymour 247-250).

Despite elaborate provisions prescribed by the repealed Black Administration Act, which detailed the requirements to be met in contracting a civil marriage, no provisions of a similar nature were made in respect of contracting customary marriages, whether monogamous or polygynous. The requirements for the validity of customary marriages were left entirely to be regulated by customary law, while in the then provinces of Natal and KwaZulu, the Codes of Zulu Law applied (Natal Code of Zulu Law, Proclamation R151 of 1987 and the KwaZulu Act on the Code of Zulu Law 16 of 1985). Later, the Transkei Marriage Act 21 of 1978 was enacted to regulate the requirements and consequences of both customary and civil marriages entered into in the then Transkei. This act allowed polygyny in civil and customary marriages (see Van Loggerenberg “The Transkei Marriage Act of 1978 – a new blend of family law” 1980 *Obiter* 1) and the Codes of Zulu Law prohibited a husband already married by customary rites from contracting a civil marriage with another woman (see Dlamini “The new marriage legislation affecting Blacks in South Africa” 1989 *TSAR* 408 411).

3 *The Marriage and Matrimonial Property Law Amendment Act, 1988*

The legal position of a customary marriage was slightly improved by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. This act, which came into operation on 2 December 1988, made the provisions of the Matrimonial Property Act 88 of 1984 applicable to civil marriages contracted by black persons. An example of the changes effected is that these civil marriages were, before then, automatically

out of community of property and of profit and loss unless the intending spouses had made a joint declaration prior to the marriage that they wished to be married in community of property (see the repealed s 22(6) of Act 38 of 1927; *Ex Parte Minister of Native Affairs in re: Molefe v Molefe* 1946 AD 315). Bekker described the effect of this change on the proprietary consequences of these civil marriages as follows:

“The matrimonial property system which has been introduced on 1 November 1984 consequently now applies to marriages of Blacks as well and the marriage will be in community of property unless they enter into an antenuptial contract” (*Seymour’s Customary Law in Southern Africa* (1989) 253).

Of importance for the purposes of this discussion was the introduction of provisions which were aimed at prohibiting a spouse of a customary marriage from contracting a civil marriage with another woman during the subsistence of his customary marriage. The Black Administration Act was amended to ensure that a person who was already a spouse in a customary marriage was prohibited from contracting a civil marriage with another person. It, however, made it possible for such a spouse to contract a civil marriage with his or her customary marriage spouse (see, the repealed s 22(1) and (2) of Act 38 of 1927 as amended). As a result of these provisions, a customary marriage was no longer dissolved or superseded by a civil marriage (Dlamini 1989 *TSAR* 411). The legislature had envisaged that where a spouse to a customary marriage had contracted a civil marriage with another woman, the civil marriage should be regarded as invalid (s 22(1) and (2) of Act 38 of 1927). Despite this prohibition, the material rights of a female spouse whose customary marriage was dissolved by a civil marriage before 2 December 1988 were still protected by the following provision:

“No marriage contracted after the commencement of this Act (1 January 1929) but before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (2 December 1988) during the subsistence of any customary marriage between the husband and any woman other than the wife shall in any way affect the material rights of any partner of that marriage or any issue thereof; and the widow of any such marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary marriage” (s 22(7) of Act 38 of 1927 as amended).

This was a clear indication by the legislature that if a civil marriage was contracted during the subsistence of a customary marriage, such civil marriage was to be regarded as invalid *ab initio*. Similarly, a customary marriage entered into during the subsistence of a civil marriage with another woman was rendered invalid by this prohibition. Despite this, South African courts continued to be plagued by problems relating to the determination of the validity of marriages, whether civil or customary, contracted contrary to this prohibition (see, *inter alia*, Maithufi “Do we have a new type of voidable marriage?” 1992 *THRHR* 628; Maithufi and Bekker “The existence and proof of customary marriages for purposes of Road Accident Fund claims” 2009 *Obiter* 164; Jansen 73-74).

4 *The Recognition of Customary Marriages Act, 1998*

The intention of this enactment was to recognize a customary marriage as a valid marriage for all intents and purposes of South African law. A customary marriage, no longer termed a customary union, is defined as a “marriage concluded in accordance with customary law” (s 1 of Act 120 of 1998). Monogamous and

polygynous customary marriages, whether contracted before or after 15 November 2000, are recognised, while polygyny is prohibited in respect of civil marriages (s 2 of Act 120 of 1998).

The act came into operation on 15 November 2000 and recognises existing customary marriages entered into before this date as valid if they were valid under customary law (s 2(1) of Act 120 of 1998). This refers to both monogamous and polygynous customary marriages, which were in existence on that date. It means that customary marriages, which were dissolved by a civil marriage before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, are excluded from this provision. It is only the material rights that arose from such customary marriages that are protected (see s 22(7) of Act 38 of 1927 as amended). Polygynous customary marriages that were valid and in existence when the Act came into operation are also afforded legal validity (s 2(3) of Act 120 of 1998).

A man and a woman between whom a valid customary marriage subsists may contract a civil marriage with each other (s 10(1) of Act 120 of 1998). As long as a customary marriage exists between them, both are prohibited from contracting a civil marriage with another person (s 3(2) of Act 120 of 1998). Conversely, both spouses to a subsisting civil marriage are prohibited from entering into a customary marriage (s 10 (4) of Act 120 of 1998). Such spouses may not even contract a customary marriage with each other during the subsistence of a civil marriage. The resultant customary marriage would be null and void, as a civil marriage cannot be converted into a customary marriage (s 10(4) of Act 120 of 1998; Jansen 72).

A valid customary marriage entered into after 15 November 2000 must comply with the following requirements:

- “3(1) ...
- (a) The prospective spouses-
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
 - (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.
- (2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act No 25 of 1961), during the subsistence of such customary marriage” (s 3(1) and (2) of Act 120 of 1998).

The requirements relating to age and consent by the prospective spouses as well as those relating to the negotiation and entering into or celebration of a customary marriage are self-explanatory (s 3(1)(a) and (b) of Act 120 of 1998). The provision relating to the competence or capacity of a spouse of a customary marriage to enter into a civil marriage during the subsistence of such customary marriage is aimed at protecting the wife of a customary marriage from being left as a “discarded spouse” (see Maithufi and Moloi “The need for the protection of rights of partners to invalid marital relationships: A revisit of the ‘discarded spouse’ debate” 2005 *De Jure* 144). A valid subsisting customary marriage is therefore regarded as an impediment on the part of a spouse thereto to contract a civil marriage with another person. A civil marriage entered into contrary to these provisions is invalid (*Thembisile v Thembisile* 2002 2 SA 209 (T)).

Further to the requirements mentioned above, the Recognition of Customary Marriages Act of 1998 also provides for a procedure which has to be followed by a husband who is already married to a woman in a customary marriage when he wishes to contract a further or second customary marriage with another woman

(s 7(6) of Act 120 of 1998). These provisions are contained in section 7, which is titled “Proprietary consequences of customary marriages and contractual capacity of the spouses”, while the provisions of section 3 are contained in a provision titled “Requirements for validity of customary marriages” of Act 120 of 1998.

Section 7 of the act generally regulates the proprietary consequences of customary marriages entered into before and after the date of its commencement (s 7(1)-(9) of Act 120 of 1998). A monogamous customary marriage entered into before or after the date of the commencement of this act is in community of property and of profit and loss unless this was excluded by means of an antenuptial contract (s 7(2) of Act 120 of 1998; *Gumede v President of Republic of South Africa* 2009 3 SA 152 (CC)). As the legislature had envisaged that the proprietary consequences of customary marriages, monogamous or polygynous, entered into before 15 November 2000 would continue to be regulated by customary law, provision was made for spouses of such marriages to change the matrimonial property systems applicable to their marriage or marriages (s 7(4) of Act 120 of 1998). Such spouses may apply to court for authorization to enter into a written contract “in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court” (s 7(4) of Act 120 of 1998). In the case of a polygynous customary marriage, the husband is obliged to have all persons having a sufficient interest in the matter, in particular his existing spouses, joined in the proceedings (s 7(4)(b) of Act 120 of 1998). It is also expected of a husband in a monogamous customary marriage to have his existing wife joined in these proceedings.

A procedure is prescribed for a husband who is already a spouse in a customary marriage and who, after 15 November 2000, wishes to enter into a second or further customary marriage with another woman. It is provided that such husband has to obtain an approved written contract which is to regulate the future matrimonial property system of his marriages. The relevant provision reads as follows:

“A husband in a customary marriage who wishes to enter into a further customary 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” (s 7(6) of Act 120 of 1998).

The aim of this application is to ensure that the future matrimonial property system of the marriages are specified or made certain. The proprietary consequences of monogamous customary marriage are clearly spelt out by the act (s 7(1) and (2) of Act 120 of 1998). Such customary marriages, whether contracted before or after 15 November 2000, are in community of property and of profit and loss unless regulated otherwise in an antenuptial contract (see *Gumede v President of the Republic of South Africa*). In respect of polygynous customary marriages, such consequences are or have to be regulated by the approved contract as envisaged by section 7(6) of Act 120 of 1998.

The court may refuse to grant the application, that is, not to approve the written contract, “if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract” (s 7(7)(b)(iii) of Act 120 of 1998). The court may also allow further amendments to the terms of the contract or grant the order subject to any condition it may deem just (s 7(7)(b)(i) and (ii)). As the existing customary marriage, at the time when the application is made, would be in community of property in the case where no antenuptial contract was concluded or subject to the accrual system, the court is authorized to terminate the matrimonial property system applicable to such customary marriage and effect a division of the

matrimonial property in the case of a customary marriage in community of property and ensure an equitable distribution in the case of a customary marriage subject to the accrual system (s 7(7)(a)(i), (ii) and (iii) of Act 120 of 1998).

No provision is made in the act regarding the result or consequences of failure to comply with the abovementioned provisions by a husband who wishes to enter into a further customary marriage. It has been held that this failure does not affect the validity of the resultant or further customary marriage (the *Mayelane* case; *MG v BM*). The North Gauteng high court had declared a customary marriage entered into contrary to these provisions null and void (*MM v MN*). This decision was reversed on appeal in the *Mayelane* case, which held that the second or further customary marriage was valid despite failure to comply with the provisions of section 7(6) of Act 120 of 1998. The constitutional court also held that failure to comply with these provisions does not lead to the invalidity of the subsequent customary marriage (the *Mayelane* case par 41).

Although it was held that failure to comply with these provisions does not lead to the invalidity of the second customary marriage, this does not adequately address the proprietary consequences of the second or further customary marriage. The court merely concluded that the second customary marriage must be regarded as being out of community of property (the *Mayelane* case par 38). This implies that the first customary marriage may be in community of property, while the second one is out of community of property. It is submitted that the interests of the spouses to these marriages cannot be sufficiently safeguarded by holding that the second or further customary marriage should be regarded as a marriage out of community of property. Be that as it may, the two customary marriages are regarded as valid and continue to exist side by side until one or all of them are terminated. Although the constitutional court endorsed this view, it held that the second customary marriage was invalid, as the first wife did not give her consent when her husband contracted the said marriage (the *Mayelane* case par 41).

5 *A customary or civil marriage?*

May a husband who is already married by customary rites to another woman contract a civil marriage with another woman, and may a husband already married by civil rites enter into a customary marriage with another woman? This question is closely related to the issues discussed in the immediately preceding paragraphs, as it involves the possible co-existence of marriages. It has already been mentioned that contracting any marriage, whether civil or customary, is prohibited under these circumstances (s 10 of Act 120 of 1998). Although this is the position, both marriages continue to be contracted despite this prohibition, as revealed by South African case law (see the *Thembisile* case; *Gaza v Road Accident Fund* case nr 314/04 (D) (unreported); *Wormald v Kambule* 2004 3 All SA 392 (E); *Wormald NO v Kambule* 2006 3 SA 562 (SCA); *Kambule v The Master* 2007 3 SA 403 (E)).

A similar matter came before the supreme court of appeal in *Netshituka v Netshituka* (2011 5 SA 453 (SCA)). See also Buchner-Eveleigh “*Netshituka v Netshituka*” 2012 *De Jure* 596; 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” 2012 *TSAR* 586). The deceased, who died on 4 January 2008, was married to the appellant by customary rites on 1 December 1956. This customary marriage was not registered. The deceased was also married to three other women by customary rites and these marriages were also not registered. On 17 January

1997, the deceased married the respondent by civil rites. In determining the validity of this civil marriage, the court held that: “It follows that the civil marriage between the deceased and the first respondent, having been contracted while the deceased was a party in existing customary unions ..., was a nullity” (the *Netshituka* case par 15).

Following this decision, *Ngwenyama* and the provisions of the Recognition of Customary Marriages Act 120 of 1998, marriages entered into under the following circumstances may therefore be held invalid *ab initio*:

- 5.1 a civil marriage contracted either before or after 15 November 2000 where the husband was a spouse to an existing customary marriage;
- 5.2 a customary marriage entered into either before or after 15 November 2000 where the husband was a spouse in an existing civil marriage; and
- 5.3 a customary marriage which was entered into contrary to the provisions of section 3 of Act 120 of 1998.

The decision in the *Netshituka* case, to the effect that a civil marriage entered into under the circumstances indicated in 5.1 above is invalid, is contrary to the legal position that existed before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act of 1988 (Act 3 of 1998) on 2 December 1988. At that time, a customary marriage was dissolved or superseded by a civil marriage and could not, under any circumstances, be revived. It was only after 2 December 1988 that a civil marriage did not have the effect of dissolving or superseding a customary marriage. Despite this criticism, the decision in the *Netshituka* case confirms the legal position of a customary marriage entered into during the subsistence of a civil marriage, as indicated under the circumstances mentioned in 5.2 above.

Is it possible to enter into a customary marriage as indicated in 5.3 above? A typical example that may arise is where the *ukuthwala* custom was used. In the case where the custom was properly carried out, it would appear that the resultant marriage would be valid (see Bekker and Koyana “The indomitable *ukuthwala* custom” 2007 *De Jure* 139). Where this custom was abused – for example, where there was no consent on the part of the woman or where the woman was below the marriageable age – the resultant customary marriage would be null and void (Jansen 47-48).

Finally, it has to be noted that the decision in the *Mayelane* case (par 41) may be said to have brought about a new type of a valid marriage, namely, a customary marriage entered into contrary to the provisions of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998.

6 Conclusion

The South African law relating to the co-existence of customary and civil marriages has undergone changes since 2 December 1988. Before then, a customary marriage was not fully recognised as a valid marriage and it was as such dissolved or superseded by a civil marriage of one of the parties thereto, irrespective of whether it was entered into before or after the civil marriage. The position has changed since 2 December 1988, when a customary marriage was made an impediment to contracting a civil marriage (Marriage and Matrimonial Property Law Amendment Act 3 of 1988). Although this is the position, there are a number of cases in which this prohibition was overlooked by spouses of civil and customary marriages (see Maithufi and Bekker 2009 *Obiter* 163; *Wormald v Kambule* 2007 3 SA 403 (E)).

This remained the position until 15 November 2000, when the Recognition of Customary Marriages Act came into operation. This measure makes it clear that a person already married by customary rites is prohibited from contracting a civil marriage with another person, while a person who is already married by civil rites is similarly prohibited from marrying another person by customary rites (s 10(1) and (4) of Act 120 of 1998). Although this is the position, this prohibition appears to be paper law (see the *Gaza* case; *Wormald v Kambule* 2004 3 All SA 392 (E); *Wormald NO v Kambule* 2006 3 SA 562 (SCA); *Kambule v The Master* 2007 3 SA 403 (E)).

Polygynous customary marriages entered into after the commencement of the Recognition of the Customary Marriages Act are regarded as valid if they comply with the provisions of this act. The act lays down requirements for the validity of customary marriages and further provides that in the case of a husband who wishes to enter into a further customary marriage, a written contract approved by the court which regulates the future matrimonial property system of his marriages must be obtained by the husband (s 3 and 7(6) of Act 120 of 1998). These provisions appear to be preemptory, but the supreme court of appeal held that a further customary marriage entered into contrary to section 7(6) of the Act is valid (the *Mayelane* case *a quo* par 23). The constitutional court endorsed this view (the *Mayelane* case par 41).

The meaning of these provisions was restricted by the court to the determination of the proprietary consequences of the second or further customary marriage and not as a requirement for contracting a further customary marriage. The reason for this appears to be that the legislature did not make any provision to the effect that failure to comply with these provisions will be visited with the nullity of the further or second customary marriage. Moreover, it was held that holding the second or further customary marriage invalid may lead to the infringement of “the rights or interests of the female spouse of such a customary marriage” and may be against the “spirit, purport and object of the Bill of Rights” (s 39(2) of the Constitution of the Republic of South Africa of 1996; the *Ngwenyama* case par 35-36 and par 24).

The question relating to the validity of the second or further customary marriage entered into contrary to the provisions of section 7(6) of the Recognition of Customary Marriages Act of 1998 has been finally settled by the court in the *Mayelane* case *a quo* as well as in the subsequent constitutional court decision. Although the constitutional court had endorsed this interpretation, the only issue, in my view, which still needs to be attended to is that the proprietary consequences of polygynous customary marriages contracted contrary to the abovementioned provisions should be clearly spelt out. This calls for the immediate amendment of the Recognition of Customary Marriages Act.

The *Netshituka* case, in my view, has on the other hand opened up a new can of worms in holding that a customary marriage which was extra-judicially dissolved by a civil marriage may be revived if the spouses of that customary marriage continue “with their relationships and roles as partners” after the erstwhile husband had divorced his wife by civil rites (par 13). The supreme court of appeal held that the husband does not have the capacity to contract a civil marriage under these circumstances (par 15).

It is submitted that no marriage, customary or civil, which has been dissolved, that is, where a divorce was granted, can be revived simply by the parties to it living together as husband and wife. A divorced person has the capacity to enter into any type of marriage with any person of his or her choice contrary to what was held in the *Netshituka* case (par 15) (see further criticism of this case by Bakker and Heaton 2012 *TSAR* 587 591-593). According to the *Netshituka* case, the question relating to

the validity of a customary marriage which was dissolved by a civil marriage any time between 1 January 1929 (the date of the coming into operation of the Black Administration Act 38 of 1927) and 2 December 1988 (the date of the coming into operation of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988) where the parties to such customary marriage had continued or commenced to live together as husband and wife during or after the termination of the civil marriage, may still arise. Construed or interpreted in this manner, South African courts are still going to be faced with the determination of whether such “revived” customary marriages are valid or not.

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