

# I don't want your money honey – Recognition of Customary Marriages Act

By  
Magdaleen  
de Klerk

There is a certain scope for confusion or at least uncertainty as to whether s 10(2) of the Recognition of Customary Marriages Act 120 of 1998 (the Act) provides for spouses in a subsisting customary marriage in community of property, who later contract a marriage with each other under the Marriage Act 25 of 1961, to enter into an antenuptial contract thereby in effect changing the matrimonial property system applicable to their marriage without same being sanctioned by the court.

Section 10 of the Act reads as follows:  
'Change of Marriage

System –

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the

marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.'

## Interpretation of s 10(2) of the Act

It was held in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18 that:

'Inter-pretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular

provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

## Purpose of the Act

Having regard to the law before the Act was passed (and as stated in the preamble) the object of the Act is, *inter alia*, to provide for equal status of spouses in customary marriages.

## Context – other relevant provisions of the Act

Section 7 of the Act reads as follows:

'Proprietary consequences of customary marriages and contractual capacity of spouses –

...

(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and Sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act 88 of 1984), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2)...

...

(5) Section 21 of the Matrimonial Property Act, 1984 (Act 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse.'

Section 8 of the Act reads as follows:

'Dissolution of customary marriages –



Picture source:  
Gallo Images/Stock

(1) A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.'

Section 20 of the Matrimonial Property Act 88 of 1984 reads as follows:

'Power of court to order division of joint estate -

(1) A court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just.

(2) A court making an order under subsection (1) may order that the community of property be replaced by another matrimonial property system, subject to such conditions as it may deem fit.'

Section 21 Matrimonial Property Act reads as follows:

'Change of Matrimonial Property System -

(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that -

(a) there are sound reasons for the proposed change;

(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change, order that such matrimonial property system shall no longer apply to their marriage and authorise them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.'

## Language of the provisions

Section 10(1) of the Act specifically provides for spouses between whom a customary marriage already subsists to contract a civil marriage with each other.

Section 10(2) provides that such a civil marriage is in community of property unless such consequences are specifically excluded in an antenuptial contract, which regulates the matrimonial property system applicable to their marriage.

Taking the subsisting customary marriage into account any contract by which the spouses' future matrimonial property system is regulated would be a post-nuptial contract.

In *Honey v Honey* 1992 (3) SA 609 (W) Du Plessis J held that in terms of our common law parties to a marriage cannot by postnuptial agreement change their matrimonial property system. In *Union Government (Minister of Finance) v Larkan* 1916 AD 212 at 224 Innes CJ

phrased the rule thus: 'Apart from statute, then, community once excluded cannot be introduced, and once introduced, cannot be excluded, nor can an antenuptial contract be varied by a post-nuptial agreement between the spouses.' It was further held that the contract between the parties 'purporting to vary their antenuptial contract [was] void and unenforceable as between the parties *inter se*'. It is further evident from the heading of s 10(2) of the Act (to wit 'change of marriage system') that same provides for to a change from a customary marriage to a civil marriage.

Section 21 of the Matrimonial Property Act (which was made applicable to monogamous customary marriages by s 7(5) of the Act), on the other hand as is evident from the heading, (to wit 'change of matrimonial property system') provides for the change of the matrimonial property system applicable to the spouses marriage.

If the spouses want to change their matrimonial property system that existed as a result of the first customary marriage that would apply as from date of their second civil marriage, they would have to approach the court in terms of the provisions of s 21 of the Matrimonial Property Act for the change of their matrimonial property system before entering into a notarial contract by which their future matrimonial property system is regulated.

## Results - a sensible meaning

The mere fact that the spouses contracted a marriage (for a second time) in terms of the Marriage Act does not by itself terminate or divide the joint estate created by entering into a customary marriage in community of property.

The spouses can also not at the same time be married in community of property as a result of the customary marriage and out of community of property as a result of the civil marriage as these matrimonial property regimes are mutually exclusive.

In *Ex Parte Menzies Et Uxor* 1993 (3) SA 799 (C) at 813 King J held:

'Community of property in a joint estate may be dissolved either -

(a) by the death of one or both of the spouses;

(b) by divorce;

(c) by an order of division; or

(d) by a change in the matrimonial property system in terms of s 21 of the Matrimonial Property Act...'

In *Zulu v Zulu and Others* 2008 (4) SA 12 (D) Hugo J held: 'Where a person is married in community of property, all assets, save for those expressly excluded therefrom, form part of a joint estate and each spouse enjoys an equal undivided share of such joint estate. During the subsistence of the marriage the

spouses thereto cannot by agreement divide the estate in such a way that their assets become separate property of the individual spouses and nor can one of the parties transfer his undivided half share of the estate.'

It is evident from the aforesaid that during the subsistence of the marriage the spouses cannot by agreement change their matrimonial property system nor can they terminate and/or divide the joint estate in such a way that their assets become separate property of the individual spouses.

The only way to accomplish this is by way of an application to court in terms of the provisions of ss 20 and 21 of the Matrimonial Property Act.

## Conclusion

If s 10(2) of the Act is interpreted to provide for spouses in a subsisting customary marriage in community of property, who later contract a marriage with each other under the Marriage Act, to enter into an antenuptial contract thereby in effect changing their matrimonial property regime without it being sanctioned by the court same would militate against the provisions of ss 20 and 21 of the Matrimonial Property Act, which provisions were specifically made applicable to monogamous customary marriages.

Such construction would also undermine the purpose of the Act. In this regard instances can exist where a wife in a subsisting customary marriage is not on equal footing with her husband to contract with him when entering into a second civil marriage, *inter alia*, due to her and her children's financial dependence on her husband.

The possibility further exists that other persons, namely, creditors of the spouses would be prejudiced if the spouses could without the intervention of the court amend their matrimonial property regime.

It is trite law that the presumption is that the legislature does not intend to alter the existing law more than necessary.

As is apparent from a reading of the above quoted provisions, s 10(2) of the Act does not provide for spouses in a subsisting customary marriage in community of property who contract a second marriage with each other under the Marriage Act to enter into an antenuptial contract thereby changing the matrimonial property system applicable to their marriage without making an application to the court to approve a written contract that will regulate the future matrimonial property system of their marriage.

Magdaleen de Klerk BA (Hons)  
BPRoc (UFS) Dip Human Rights (UP)  
is an attorney at DDKK Attorneys  
Inc in Polokwane.

