THE VALIDITY OF A SECOND OR FURTHER CUSTOMARY MARRIAGE: CALL FOR THE AMENDMENT OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT OF 1998

***Ngwenyama v Mayelane* (474/11) [2012] ZASCA 94 (1 June 2012)**

1 Introduction

Interpreting legislation dealing with the validity of customary marriages in South Africa has proven to be a daunting task (see Bekker and West "The validity of 'further' customary marriages: A legal conundrum" 2012 *THRHR* 515–519). The reason for this is that the interpretation revolves around the balancing of competing interests or rights of the most vulnerable members of the society, namely, wives and children of customary marriages (see *Kambule v The Master* 2007 3 SA 403 (E); *Wormald NO v Kambule* 2006 3 SA 562 (SCA) and *Wormald v Kambule* [2004] 3 All SA 392 (E)). This was recently shown by the decisions of the North Gauteng High Court in *MM v MN* 2010 4 SA 286 (GNP)) and the South Gauteng High Court in *MG v BM* 2012 2 SA 253 (GSJ). Although distinguishable, both cases deal with the validity of a subsequent or further customary marriage entered into by a husband during the subsistence or existence of a customary marriage with another woman. In the first case (*MG v BM*), the North Gauteng High Court held that the second or subsequent customary marriage was invalid because of the husband's failure to comply with the provisions of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998. In the second case (*MG v BM*), the South Gauteng High Court expressed doubt as to the correctness of the decision of the North Gauteng High Court to the effect that failure to comply with the abovementioned provisions leads to the invalidity of the subsequent customary marriage. The decision of the North Gauteng High Court was taken on appeal to the Supreme Court of Appeal (*Ngwenyama v Mayelane* (474/11) [2012] ZASCA 94 (1 June 2012)).

This note deals with the latter decision of the Supreme Court of Appeal, which is an appeal against the decision in *MM v MN* in which it was held that non-compliance with the provisions of section 7(6) of the Recognition of Customary Marriages Act leads to the invalidity of a subsequent or further customary marriage of a husband who was already married to another wife by customary rites.

This case (the Supreme Court of Appeal decision) was later reported, after the preparation of this note, as *MM V MN* 2012 4 SA 527 (SCA); 2012 10 BCLR 1071 (SCA) and [2012] 3 All SA 408 (SCA) (1 June 2012). It shall, for the purposes of this discussion, be referred to as *Ngwenyama* in order to distinguish it from *MM v MN* 2010 4 SA 286 (GNP).

A further appeal was lodged with the Constitutional Court (*Mayelane v Ngwenyama* (case CCT 57/12 [2013] ZACC 14 (30 May 2013)). The Constitutional Court case is hereinafter be referred to as *Mayelane*. The finding of the Supreme Court of Appeal was endorsed, that is, it was held that failure to comply with the provisions of section 7(6) of the Recognition of Customary Marriages Act of 120 of 1998 does not lead to the invalidity of the subsequent customary marriage (*Mayelane* 21 para 41). The subsequent customary marriage was, however, held invalid on the basis of lack of consent by the wife of the existing customary marriage (*Mayelane* 43 para 87).

2 Facts

In *MM v MN*, the deceased who died on 26 February 2009, was married to the respondent by customary rites at Nkovani Village (Limpopo) on 1 January 1984. Three children were born of this marriage. The deceased later married another woman, the appellant, according to customary law on 26 January 2008, that is, after the coming into operation of the Recognition of Customary Marriages Act of 1998 on 15 November 2000.

As the customary marriage between the deceased and the respondent was not registered, the respondent requested to have it registered with the Department of Home Affairs after the death of the deceased. When she sought to do so, she discovered that the appellant had also requested to register a customary marriage between her and the deceased which was contracted on 26 January 2008. Because the deceased had failed to comply with section 7(6) of the Recognition of Customary Marriages Act, the respondent (wife married on 1 January 1984) asserted that the subsequent customary marriage was null and void *ab initio* (*Ngwenyana* 3 para 3).

The respondent applied for a declaratory order in the North Gauteng High Court that the customary marriage between the appellant and the deceased was null and void *ab initio* and also sought an order directing the Department of Home Affairs to register the customary marriage between her and the deceased (*Ngwenyana* 3 para 2).

The North Gauteng High Court held that non-compliance with the provisions of section 7(6) of the Recognition of Customary Marriages Act leads to the invalidity of the second or subsequent customary marriage. It therefore held that the customary marriage between the deceased and the appellant was invalid and the court ordered the department to register the customary marriage between the deceased and the respondent (*MM v MN* 293 para 41).

On the other hand, in *MG v BM* the applicant applied for an order compelling the Department of Home Affairs to register a customary marriage entered into between her and the deceased on 8 June 2000 and for the condonation of the late registration of the said customary marriage. The application was opposed by the respondent who was the deceased's first wife and executrix of his estate. The customary marriage between the deceased and the applicant was entered into on 8 June 2000, that is, before the coming into operation of the Recognition of Customary Marriages Act. Although this case dealt with the validity of a subsequent customary marriage entered into before 15 November 2000, the court remarked on the effect of failure to comply with the provisions of section 7(6) of the Recognition of Customary Marriages Act. This Act imposes a duty on spouses to ensure that their customary marriage is registered but at the same time provides that failure to have a customary marriage registered does not affect its validity (s 4(1) and (9)). The evidence in this case revealed that the deceased had, while still alive, attempted to register this customary marriage and had prepared an application as required by section 7(6) but the application was not completed (*MG v BM* 257 para 5.2).

Regarding failure by the husband to comply with the provisions of section 7(6) of the Act, the court remarked that "it is clear, in my view, that the current confusion regarding the provisions of s7(6) of the Customary Marriages Act is a matter that requires the immediate attention of the legislature" (*MG v BM* 268F–G para 23).

The "confusion" referred to immediately above related to whether a subsequent or further customary marriage entered into contrary to the provisions of section 7(6) should be regarded as valid or null and void. This arises from the fact that the legislature did not make any provision relating to the validity or otherwise of this subsequent customary marriage if these provisions were not complied with. The legislature had, however, indicated that failure to register a customary marriage did not lead to its invalidity (s 4(9)) but the Act is silent as to the effect of the husband's failure to comply with section 7(6).

Although not called upon to determine the effect of failure to comply with the provisions of section 7(6), the South Gauteng High Court proceeded to make a comparison between the effect of these provisions and section 4 of the Act. Section 4 places a duty on the spouses to register their customary marriage and the Act at the same time provides that failure to register it does not affect its validity (s 4(1) and (9)).

On the other hand, the duty to comply with the provisions of section 7(6) is imposed on a husband of a customary marriage who wishes to contract another customary marriage. It is therefore the husband who has to make an application to court to ensure that a written contract that will regulate the future matrimonial property system of his marriages is obtained. In the court's opinion the wife, who is not saddled with the duty to obtain the envisaged order, cannot be penalised or prejudiced for the failure by the husband to comply with the provisions of section 7(6). The court concluded that:

> "the failure by the deceased and/or the applicant to apply to the court timeously to approve a written contract which would regulate the future matrimonial property systems of their customary marriage, does not invalidate their customary marriage as contended for the first respondent. It is a valid customary marriage" (*MG v BM* 267 para 22C–D).

It appears that if the Act had contained an express provision dealing with the effect of failure to comply with these provisions, the court would have been prepared to give effect to such provision. It is against this background that the decision of the Supreme Court of Appeal in *Ngwenyama* is discussed.

3 Legislative framework

It is necessary to deal with the legislative framework that governs the question that was to be decided by the Supreme Court of Appeal in *Ngwenyana* in order to appreciate the reasons behind the decision that was reached.

The Recognition of Customary Marriages Act, which came into operation on 15 November 2000, provides that a husband of a customary marriage who wishes to enter into a further customary marriage with another woman must apply to court to approve a written contract that will govern the future proprietary consequences of his marriages (s 7(6)).

The proprietary consequences of polygynous customary marriages where the second or further marriage is entered into after the commencement of this Act are therefore regulated by the written contract which has to be approved by the court as intended in section 7(6). On the other hand, a monogamous customary marriage, whether entered into before or after the commencement of the Act, is in community of property and of profit and loss except if such consequences were excluded by an antenuptial contract (s 7(2); *Gumede v President of the Republic of South Africa* 2009 3 SA 243 (CC).

In considering the application to approve the written contract which is aimed at regulating the future matrimonial property system of intended polygynous marriages, the court must terminate the matrimonial property system applicable to the existing or current customary marriage and divide it between the existing spouses (s 7(7)(i)). The court must also ensure an equitable distribution of property and take into account the relevant circumstance of the family groups which would be affected if the application is granted (s 7(7)(ii) and (iii)). The customary marriage envisaged in this section is a marriage in community of property and of profit and loss unless if provided otherwise by the spouses in an antenuptial contract (s 7(2)).

According to section 7(7)(b),

> "the court may –
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> (i) allow further amendments to the terms of the contract;
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> (ii) grant the order subject to any conditions it may deem just; or
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> (iii) refuse the application if in its opinion the interests of the parties involved would not be sufficiently protected by means of the proposed contract".

There is no doubt that the written contract that has to be obtained in terms of these provisions is very important in that it is aimed at specifying and protecting the proprietary rights of spouses to polygynous customary marriages. This is made even more important as the court is empowered to refuse the application if, in its opinion, "the interests of the parties involved would not be sufficiently protected by means of the proposed contract" (s 7(7)(b)(iii)). Thus the court has to ensure that the interests of the parties involved, namely the existing wife, the husband as well as the prospective spouse, are protected by the proposed contract. The effect of these provisions has been described as "making it difficult for men to become polygamists, thus discouraging polygamous marriages" (Maithufi and Moloi "The current legal status of customary marriages in South Africa" 2002 *TSAR* 599 606). This does not, however, imply that polygamy is outlawed as it may be practised if the provisions of the Act are complied with (s 3).

The Act provides for the following requirements for the validity of customary marriages entered into after 15 November 2000:

> "(a) the prospective spouses –
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> (i) must both be above the age of 18 years; and
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> (ii) must both consent to be married to each other under customary law; and
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> (iii) the marriage must be negotiated and entered into or celebrated in accordance with customary law" (s 3(1)).

It has to be noted that in all the requirements mentioned above, that is, in sections 3(1) and 7(6), the legislature uses the word "must" which is employed mainly in provisions of a peremptory nature (Bekker and West 2012 *THRHR* 516; *MM v MN* 290 para 25).

4 Decision and reasons

The Supreme Court of Appeal was called upon to determine the effect of non-compliance with the provisions of section 7(6) on the validity of a second or further customary marriage. Conflicting decisions were previously reached by the North Gauteng and South Gauteng High Courts with regard to this issue (see *MM v MN* 2010 4 (SA) 286 (GNP) and *MG v BM* 2012 2 SA 253 (GSJ)).

On appeal, it was contended on behalf of the appellant that:

4 1 the conclusion arrived at by the court *a quo* that non-compliance with section 7(6) led to the invalidity of the second customary was incorrect as these provisions were not peremptory;

4 2 it could not have been the intention of the legislature to effect fundamental change to the law of polygamy by subjecting the validity of the second marriage to prior consent by a court which could be withheld; and

4 3 the interpretation accorded to section 7(6) by the court *a quo* was in conflict with section 39(2) of the Constitution of the Republic of South Africa of 1996 (*Ngwenyama* 5–6 para 9).

The Women's Legal Trust, which was admitted as *amicus curiae* contended that the interpretation by the North Gauteng High Court of the effect of section 7(6) on the validity of the second marriage did not take into account the "historical inequalities based on race, gender, marital status and class, as well as the realities of women married under customary law generally and women in polygamous marriages, in particular" (*Ngwenyama* 6 para 10). According to this argument, the interpretation by the court *a quo* of this measure undermined the second or subsequent wife's right to dignity and equality in that it prioritized "the rights of the first wife and in so doing defeats the purpose of the Act to protect all wives in a polygamous marriage by creating a mechanism for a certain and equitable matrimonial property regime" (*Ngwenyama* 6 para 10).

The respondent, on the other hand, argued that the appellant had failed to establish the validity of her customary marriage to the deceased and further that the provisions of section 7(6) were aimed at protecting the interests of the existing wife, which was the reason that she must be joined in the proceedings.

The Supreme Court of Appeal held that the court *a quo* erred in finding that non-compliance with the provisions of section 7(6) by the husband rendered the subsequent or second customary marriage null and void *ab initio* on the basis that these provisions were peremptory. According to this judgment, if regard is had to the purpose and object as well as the context leading to the promulgation of the Act, the inescapable conclusion to arrive at is that it was not the intention of the legislature to visit non-compliance with the nullity of the subsequent or second customary marriage (*Ngwenyana* 8–11 paras 14–18). Furthermore, the court held that the provisions of section 7(6) have to be interpreted with due regard to the rights enshrined in the Bill of Rights and in light of section 39(2) of the Constitution of the Republic of South Africa of 1996. The court therefore concluded that:

> "The purpose of the section must be determined in the light of the legislative scheme which guided its promulgation. At the heart of the Act, is the intention to advance the rights of women married according to customary law in order that they acquire rights to matrimonial property they did not have . . . Effectively, the Act seeks to realise the right to equality envisaged in the Bill of Rights. With this in mind, it becomes difficult to reason that s 7(6) could be intended solely for the protection of the wife in an existing marriage. The court *a quo* correctly considered and acknowledged that the equal status and capacity afforded to spouses in a customary marriage and came to the conclusion that s 7(6) is aimed at protecting the proprietary interests of the existing and prospective spouses, but failed to afford a purposive interpretation to the section so that the second wife is equally protected. Properly construed s 7(6) is for the benefit of women in both monogamous and polygamous customary marriages" (*Ngwenyama* 11–12 para 19).

5 Evaluation

Although the decisions of the Supreme Court of Appeal and the court *a quo* (North Gauteng High Court) on the effect of failure to comply with the provisions of section 7(6) are different, they may nevertheless be reconciled. In both, the courts realised that any decision reached must have the effect of protecting the rights of all parties in a valid customary marriage, namely the husband and the wife or wives as well as the rights of children (*Ngwenyama* para 19; *MM v MN* 290 paras 22–23).The North Gauteng High Court emphasised the rights or interests of the wife of the first customary marriage but at the same time realised that the interests of the spouse and children of the subsequent or second customary marriage, which was declared invalid for failure to comply with section 7(6) were also worthy of legal protection (*MM v* MN 290 paras 22–23). Consequently, the court in *MG v BM* called upon the legislature to intervene by amending the law governing the conclusion and consequences of customary marriages to provide expressly that a further customary marriage entered into without obtaining the contract required by the Act is valid (268 para 23F–G). It has to be noted that the legislature had provided for the validity of a customary marriage even in the case of failure to register it (s 4(9)).

The decision of the Supreme Court of Appeal, on the other hand, is premised on the ground that it could not have been the intention of the legislature to visit non-compliance with the provisions of section 7(6) with the invalidity of the second or further customary marriage if regard is had to the purpose of the Act and the Bill of Rights as provided for in the Constitution. A purposive approach was adopted in the interpretation of this Act and the court came to the conclusion that failure to comply with these provisions did not lead to the invalidity of the second or further customary marriage (*Ngwenyama* 15 para 24 and 35 para 14). The reason for this conclusion was that the Act does not prescribe consequences for failure to comply with what is provided for by section 7(6). According to this judgment obtaining the required order is not a requirement for the validity of a second or subsequent customary marriage but a method through which the proprietary consequences of a polygynous marriage may be arranged (*Ngwenyama* 12 para 19).

The Supreme Court of Appeal held that in the event of failure to obtain this contract, the resultant customary marriage would be out of community of property and of profit and loss (*Ngwenyama* 24 para 38). In arriving at this decision, the court relied on the Bill of Rights in interpreting the Act "in accordance with the spirit and purport of the Constitution"(*Ngwenyama* 25 para 38).

The decision of the Supreme Court of Appeal may signal an end to the long-raging debate about the validity of a second or further customary marriage entered into contrary to the provisions of section 7(6). Although this may be the case, it does not provide answers to a multitude of legal problems that may arise at the death of any of the spouses or divorce. Some problems may relate to the determination of who the spouses are and their respective shares in the case of intestacy. This may again involve the determination of the validity of the respective customary marriages that may have been contracted. Another typical problem that may have to be solved relate to the right to bury the deceased (*Thembisile v Thembisile* 2002 2) SA 209 (T)).

The main purpose for enacting the Recognition of Customary Marriages Act was to ensure that customary marriages were recognised for all purposes of

South African law as valid marriages (see the long title of the Act). To achieve this, the Act provides that "a customary marriage entered into after the commencement of this Act, which complies with all the requirements of this Act, is for all purposes recognised as a marriage" (s 2(2)). It is also provided that "a marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a valid marriage" (s 2 (1)). The Act also recognises the validity of polygynous customary marriages entered into after its date of commencement which comply with its provisions (s 2(4)).

The second customary marriage contracted by the deceased in *Ngwenyama* was entered into on 26 January 2008. The Act provides that such a customary marriage is valid if it complies with its provisions (s 2(4)). The requirements for the validity of customary marriages are provided for by the Act in section 3. These have to be complied with before a valid customary marriage can come into existence. What constituted the bone of contention in *Ngwenyama*, however, related to the validity of the second customary marriage contracted on 26 January 2008 where the provisions of section 7(6) were not complied with, that is, where no contract to govern the proprietary consequences of the marriages was obtained. Phrased differently, the question was whether it was sufficient compliance with the provisions of the Act to enter into a second customary marriage without complying with the provisions of section 7(6) but only with the requirements of section 3. If that was the case, that is, if the second customary marriage was to be regarded as valid, would this not render the provisions of section 7(6) redundant? An attempt is made below to address these issues.

Before the judgment in *Ngwenyama,* an opinion was expressed that non-compliance with the provisions of section 7(6) would lead to the invalidity of the second or further customary marriage (Jansen "Customary family law" in Rautenbach, Bekker and Goolam (eds) *Introduction to legal pluralism in South Africa* (2010) 64). This implies that the capacity of a man who is already married by customary rites depends upon the availability of a written contract envisaged by section 7(6) to enter into another customary marriage. Without this, such a man does not have the capacity to marry another woman by custom. Another view was that the second or further customary marriage had to be deemed to be a putative marriage (Mofokeng "Black women are you aware that you are concubines? The legal implications of South African family law" 2007 *Agenda* 124–128).

It should be noted that polygyny in customary marriages may be achieved by marrying a first wife and taking another wife after a number of years while still married to the first wife (see *inter alia MM v MN* paras 8–9). This is the most common form of polygyny found in South Africa. Another method of practising polygyny is to enter into a customary marriage with more than one woman at the same time (Maithufi and Moloi "The current legal status of customary marriages in South Africa" 2002 *TSAR* 599). The issue to be determined, and which may obviously affect the validity of these customary marriages, is whether the provision of section 7(6) have to be complied with, that is, whether a written contract which regulates the proprietary consequences of these marriages has to be obtained.

It has been submitted that the provisions of section 7(6) are applicable in both instances mentioned above. In the case where a husband wishes to enter into another customary marriage while still married to his first wife, section 7(6) has

to be complied with to ensure that the future proprietary consequences of his marriages are governed by the approved contract. The Act is silent with regard to a man who marries a number of women at the same time. It is submitted that in this instance an antenuptial contract may be concluded in order to regulate the proprietary consequences of these customary marriages as only a monogamous customary marriage can be in community of property and of profit and loss (see s 7(2)). The provisions of section 7(6) may also be used to achieve this aim. About non-compliance with the provisions of section 7(6)) it has been submitted that:

> "non-compliance in these circumstances will not lead to the nullity of the marriage and that such marriages will be regarded as out of community of property and of profit and loss. The main purpose of the requirement is to avoid unnecessary litigation concerning property brought into the marriage and property that may be acquired during the subsistence of the marriage" (Maithufi and Moloi 2002 *TSAR* 599 600. See also Maithufi and Moloi "The need for the protection of partners to invalid matrimonial relationships: A revisit of the discarded spouse debate" 2005 *De Jure* 144 and Bakker "The new unofficial customary marriage: Application of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998" 2007 *THRHR* 482).

Although the decision in *Ngwenyama* is commendable, it does not adequately address the problem relating to the proprietary consequences of a further customary marriage entered into contrary to the provisions of section 7(6). In order to address this, it would be worthwhile that a section is included in the Act which sets out the proprietary consequences of these customary marriages in more detail. As it is now (that is, as a result of the decision in *Ngwenyama*), it appears that the provisions of section 7(6) have been rendered futile or superfluous (see Heaton *South African family law* (2010) 211–214; Jansen in Rautenbach *et al* 63–64).

The same is true of the Constitutional Court judgment (*Mayelane v Ngwenyama* (CCT case 57/12 [2013] ZACC 14 (30 May 2013)). In an appeal to the Constitutional Court, the interpretation placed on section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 by the Supreme Court of Appeal to the effect that failure to comply with these provisions does not lead to the invalidity of the second or further customary marriage was endorsed. The Constitutional Court therefore concluded that these provisions do not deal with the validity requirements of further customary marriages but with the matrimonial property regime of such marriges (*Mayelane* 21 para 41). The Constitutional Court, however, held that the second or further customary marriage was invalid as a result of failure to comply with the consent requirement in terms of Xitsonga customary law (*Mayelane* 43 para 87).

6 Conclusion

The Recognition of Customary Marriages Act prescribes that a written contract in terms of which the future matrimonial property system of polygynous customary marriages are to be regulated must be obtained. This procedure requires a husband who wishes to enter into a further customary marriage to apply to court for the approval of a written contract which will regulate the future matrimonial property system of his marriages. This application is prescribed for all further customary marriages entered into after 15 November 2000, that is, the date on which the Recognition of Customary Marriages came into operation. Before this

date, the patrimonial consequences of polygynous customary marriages were regulated in terms of customary law (s 7(1)). In respect of monogamous customary marriages, the Act provides that they are, unless the parties had entered into an antenuptial contract, in community of property and of profit and loss. This applies to monogamous customary marriages, whether contracted before or after the date of commencement of the Act (*Gumede v President of the Republic of South Africa supra*).

The Supreme Court of Appeal in *Ngwenyama* held that failure to comply with section 7(6) does not lead to the invalidity of the second or further customary marriages and that these marriages have to be regarded as being out of community of property and of profit and loss.

The decision of the Supreme Court of Appeal relating to the effect of failure to comply with the provisions of section 7(6) of the Recognition of Customary Marriage Act of 1998 was confirmed by the Constitutional Court (Mayelane 21 para 41).

In the interpretation of the effect of failure to comply with this measure, the court stressed that this has to be done in light of and in conformity with the Constitution, in particular Chapter 2 thereof. Construed in this manner, it becomes clear that the intention was to safeguard the rights of both the existing and prospective spouses to polygynous customary marriages.

Following the finding in *Ngwenyana and Mayelane,* it is hoped that the legislature would consider the amendment of the Recognition of Customary Marriages Act so as to clearly set out the proprietary consequences of further customary marriages contracted contrary to the provisions of section 7(6) of the Act.

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