

## Onlangse regspraak/Recent case law

---

### ***Kambule v The Master*** **2007 3 SA 403 (E)**

*Requirements for a valid customary marriage in terms of the Transkei Marriage Act (21 of 1978). The validity of an unregistered customary marriage. Whether failure to register the customary marriage renders it invalid.*

#### **1 Introduction**

The case of *Kambule v The Master* 2007 3 SA 403 (E) makes interesting reading. For a long time, the legal position of a customary marriage contracted during the subsistence of a civil marriage was uncertain until the promulgation of the Marriage and Matrimonial Property Law Amendment Act (3 of 1988) on 2 December 1998. This legal uncertainty gave rise to numerous hardships to widows and children of such marriages. At some stage, children born of these marriages were regarded as illegitimate while their fathers were held to have had no legal duty to support their mothers (see Dlamini CRM “The legal status of illegitimate Black children” 1984 *Obiter* 8 and *Samente v Minister of Police* 1978 4 SA 632 (E)).

A customary marriage, in the past termed a customary union, was denied recognition on the basis that it allowed polygamy and could be dissolved extrajudicially. It was not a “union for life of one man and one woman to the exclusion of all others” (*Hyde v Hyde and Woodmansee* (1866) LR & PD 130, Sinclair *The Law of Marriage Vol 1* (1996) 305). Consequently, a civil marriage contracted during the subsistence of a customary marriage had the effect of dissolving the existing customary marriage and a customary marriage contracted during the subsistence of a civil marriage was regarded as null and void *ab initio* (Peart “Civil or Christian marriage and customary unions: The legal position of a discarded spouse and children” 1983 *CILSA* 39 and *Thembisile v Thembisile* 2002 2 SA 209 (T)).

As a result of the problems encountered, various legislative measures were enacted to improve the legal position of customary marriages. The most important of these were, in my view, the Marriage and Matrimonial Property Law Amendment Act (3 of 1988), Transkei Marriage Act (21 of 1978) and various other enactments passed before 27 April 1994 (see Justice Laws Rationalisation Act, 18 of 1996). The South African Law Reform Commission investigated customary marriages and its report culminated in the enactment of the Recognition of Customary Marriages Act, 120 of 1998.

It is against this background that the decision in *Kambule v The Master* 2007 3 SA 403 (E) is to be discussed. The effect of certain provisions of the Recognition of Customary Marriages Act of 1998 on customary marriages contracted before it came into operation, especially unregistered

customary marriages contracted in the then Transkei, will also be highlighted.

## 2 The facts

The dispute in this case revolved around the validity of a customary marriage which was contracted in the then Transkei in terms of the Marriage Act (21 of 1978) on 25 May 1985.

The deceased, Burton Baltimore Zitha Baduza, married Norah Khupela Baduza by civil rites in terms of the repealed Black Administration Act (38 of 1927) on 3 October 1956 after divorcing his first wife on 26 July 1956. This marriage, which was out of community of property and of profit and loss (section 22(6) of Act (38 of 1927) and *Ex Parte Minister of Native Affairs in re: Molefe v Molefe* 1946 AD 315), was alleged to have subsisted until the death of the deceased on 21 June 2002.

The applicant had a close relationship with the deceased after the death of her husband in 1984 and was married to him by customary rites in 1985 in terms of the Transkei Marriage Act, of 1978. This marriage was not registered in terms of the said Act. The applicant was provided with accommodation by the deceased at his house situated at Ezibeleni, Queenstown, whose ownership was later transferred to her by the deceased. The applicant later resided in a house situated at Milner Street, Queenstown, which was purchased by Burton CC of which the deceased was a sole member until September 2001. She thereafter occupied another house purchased by the deceased, situated at Longview Crescent, Queenswood. She was still occupying this house at the time of the hearing of this case.

It was after the death of the deceased that the respondents started to question the validity of the marriage between the applicant and the deceased and attempted to claim rental from the applicant for the occupation of the Longview house. The applicant refused to pay any rental and an eviction order as well as a declaration that the marriage with the deceased was void *ab initio* on failure to register it in terms of the then Transkei Marriage Act, were sought.

## 3 *Wormald v Kambule* [2004] 3 All SA 392 (E) and *Wormald v Kambule* 2006 3 SA 502 (SCA)

This case (*Kambule v The Master*) commenced in the Eastern Cape Division as *Wormald v Kambule* [2004] 3 ALL SA 392 (E)) and culminated in the Supreme court of Appeal (*Wormald v Kambule* 2006 3 SA 502 (SCA)). The dispute in these cases centred around one issue, namely, the validity of the customary marriage contracted by the applicant and the deceased on 25 May 1985. The ground on which the validity of this marriage was attacked was that it was not registered as required by the Transkei Marriage Act.

The Eastern Cape Local Division dismissed the application. The marriage was consequently not declared invalid on the basis that registration was not an essential requirement for its validity. The application for an eviction order was also not granted.

The reason for arriving at this decision appears to be:

“The deceased’s first wife, Mami Cynthia Baduza and Bishop Bethlehem Nopece, the Anglican Bishop of Port Elizabeth attest to the existence of the customary marriage. . . . the requirements for entry into a customary marriage were complied with. The deeming provisions in section 2(1) of the Transkei Marriage Act accorded the marriage the status of a customary marriage” (*Wormald* [2004] 3 ALL SA 392 (E) at 397 par 13).

The learned judge continued:

“I agree with the learned judge (Jafta AJP in *Swalakhe Sokhwevu and another v Minister of Police*, unreported case no 293/94 of the Transkei Division) that the Transkei Marriage Act did not invalidate customary marriages which were not registered. It merely accorded it an equivalent status to a civil marriage” (at 398 par 15).

Referring to the Zimbabwean decision of *Zimnat Insurance Co Ltd v Chawanda* (1991 2 SA 825 (ZS)), it was held that to regard an unregistered customary marriage as invalid by reason of failure to register it in terms of the Transkei Marriage Act “would be inimical to one’s sense of justice. In my judgment that perceived impediment to validity is removed by the Recognition of Customary Marriages Act (120 of 1998) which expressly provides in section 4(9) ‘that failure to register a customary marriage does not affect the validity of that marriage’” (at 398 par 16).

The decision of the Eastern Cape Local Division was reversed by the Supreme Court of Appeal. An eviction order was granted and applicant was ordered to vacate the house at Longview within 12 months of the date of the judgement. The court did not deal with the application for the declaratory order concerning the validity of the customary marriage in its majority decision as it was regarded as superfluous to the claim for eviction. The reasons for not dealing with the declaratory order were:

“. . . it is well established that a court has a discretion to grant or withhold declaratory relief and that it will not deal with abstract, hypothetical or academic questions in proceedings for declaratory relief. The declaratory order that was sought is superfluous to the appellant’s claim for eviction and no proper reason has been advanced us to consider granting it” (at 569 par 16).

It has to be noted that the eviction proceedings were launched against the applicant because of her demand that:

- (a) her marriage to the deceased be recognised;
- (b) she be provided with reasonable and suitable accommodation having regard to her station in life and the ability of the estate to pay for such accommodation; and
- (c) her contemplated claim for maintenance from the estate be recognised.

It is clear that applicant’s demand was based on the fact that she was married by customary rites to the deceased and this marriage subsisted until his death in 2002. Despite this, no declaratory order was made as to the existence or validity of the alleged customary marriage and an eviction order was granted on the basis that it was just and equitable to do so. Furthermore, it is noteworthy that in the majority decision the following was stated:

“it must be emphasised that if the respondent is able to establish that she was indeed married to the deceased by customary law, that fact would be a valid basis for a maintenance claim against the estate. In that case, even if the estate, through its executor, has evinced a negative attitude towards her intended maintenance claim, nothing precludes her from pursuing this option in an appropriate forum” (at 571 par 21).

In the minority judgment, Combrinck AJA (as he then was) also confirmed the appeal and granted the eviction order. His reasons, however, differed from the majority judgment. In his view, the granting of the order depended on the determination of the existence of a valid customary marriage between the deceased and the applicant. He thus found that no valid customary marriage was contracted in terms of the Transkei Marriage Act due to failure to have it registered. This decision was based on *Khitshwane* 1994 SA 610 (Tk). He concluded that:

“... the respondent’s marriage to the deceased was invalid in that it was not registered in accordance with the provisions of the Transkei Marriage Act. She is therefore an unlawful occupier. It further follows that the conclusion I have reached also resolves the issue of the declaratory order sought in para 3 of the notice of motion. For the reasons given above the declaratory order should have been granted by the court *a quo*” (at 574–5 para 36).

#### 4 The dispute

As a result of the majority judgment in *Wormald NO and Others v Kambule* 2006 3 SA 562 (SCA), the applicant lodged a claim against the deceased estate in terms of section 2 of the Maintenance of Surviving Spouses Act (27 of 1990). The respondent decided to “refute the claim and repudiate any claim for maintenance which might be made against the estate by the applicant on the basis that no marriage existed between the deceased and Mrs Kambule under customary law or any other law” (*Kambule v The Master* 2007 3 SA 403 (E) at 408 E). Consequently, an application was launched by the applicant for an order in the following terms:

1. Setting aside the decision of the Master of the High Court (the above-mentioned first respondent) not to take a decision in response to an objection lodged by applicant to the first and final liquidation and distribution account of the massed joint estate of the late Burton Baltimore Zitha Baduza who died on 21 June 2002 and Miss Norah Khupela Baduza.
2. Directing Hugh Anthony Wormald NO (the above-named second respondent) to amend the first and final liquidation and distribution account by admitting the applicant’s claim for maintenance in the amount of R7 927 per month from 21 June 2002 until her death or remarriage (less R2 500 per month in the period from 21 June 2002 to the date of her vacation of 44 Longview Crescent, Queenstown).
3. Directing that the costs of this application be borne by the massed joint estate of the late Burton Baltimore Zitha Baduza and Norah Khupela Baduza” (at 406 D–F).”

As in the Supreme Court of Appeal, and earlier before Chetty AJA in the Eastern Cape Local Division, it was evident that the determination of these issues hinged upon the validity of the customary marriage con-

tracted by the deceased and the applicant. This customary marriage was contracted during the subsistence of a civil marriage which was out of community of property and profit and loss (with the third respondent) in terms of the repealed section 22(6) of the Black Administration Act. Although this customary marriage was contracted in terms of the then Transkei Marriage Act, it was not registered.

As the parties were agreed that there was a material dispute of fact relating to the existence or validity of the customary marriage between the deceased and appellant or whether they had a mere casual relationship, it was agreed that the following questions arising from the papers should be dealt with:

- (a) whether or not the failure to register the customary marriage led to its invalidity; and
- (b) in the event of (a) above being determined in favour of the applicant, whether applicant was to be considered as a 'survivor' in terms of the Maintenance of Surviving Spouses Act.

The parties were further agreed that should these issues be resolved in favour of the applicant, the matter should be referred for the hearing of oral evidence on the question of whether the deceased and the applicant were married by customary rites from 1985 until 2002 when the deceased died (*Kambule* (2007) at 408 – 9H–A).

After going through conflicting decisions which dealt with the effect of failure to register a customary marriage in terms of the then Transkei Marriage Act of 1978, the judge concluded:

“In the view that I take of this matter it is not necessary to determine what the effect of the non-registration of the customary marriage was in terms of the Transkei Marriage Act because, in my view, whatever perceived impediment there may be to the validity of the marriage because of the fact of non-registration under that Act, the marriage has been validated by the Recognition of Customary Marriage Act 120 of 1998 (the Recognition Act). I reach this conclusion despite what was stated by Combrick AJA at 575 B (650 f ALL SA) in the second *Wormald* case (*supra*), namely: (*Kambule* (2007) 410 B–C)”.

As this customary marriage was not prohibited by any provisions of the then Transkei Marriage Act (section 3(1)) and the Recognition of Customary Marriages Act (section 10(1) and (4)) and the latter measure did not prescribe registration as an essential for the validity of the customary marriage, it was held that “a failure by parties to a customary marriage to register such marriage in terms of the Transkei Marriage Act would not affect its validity. The first issue must accordingly be decided in favour of applicant” (*Kambule* (2007) 413 B–C).

The second issue, that is, whether the applicant may be regarded as a “spouse” for the purposes of the Maintenance of Surviving Spouses Act, was also decided in favour of the applicant (*Kambule* (2007) 414 F). Relying on a number of cases as to the meaning to be accorded to the word ‘spouse’ (*Daniels v Campbell* 2004 5 SA 331 (CC), *Robinson and Another v Volks NO* 2004 6 SA 288 (C) and *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as *Amicus Curiae*), *Shibi v Sithole*, *South African Human*

*Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC), the court concluded:

“Once the conclusion has been made that there is no room for any discriminatory interpretation of the section it cannot be contended that the surviving partner to a valid customary marriage, which in terms of s 2(1) of the Recognition Act is to be ‘for all purposes’ recognised as a marriage, is not a ‘spouse’ within the meaning of s 2(1) of the Recognition Act and on a proper, constitutionally acceptable interpretation of s 2(1) of the Maintenance of Surviving Spouses Act, that, if applicant can establish that she was validly married at customary law to Burton at the time of his death, she would fall within the definition of ‘survivor’ in terms of s 2(1) of the Maintenance of Surviving Spouses Act” (*Kambule* (2007) 414 D–F).

After deciding both issues in favour of the applicant, the application was postponed for the hearing of oral evidence to determine, *inter alia*, the existence or validity of the customary marriage, that is, “whether or not the applicant was the customary-law wife of Burton Baltimore Zitha Baduza from 1985 until his death in 2002” (*Kambule* (2007) 414 H–I).

## 5 Is registration of a customary marriage a requirement for its validity?

The earliest provisions dealing with the registration of customary marriages in South Africa are to be found in Government Notice R1970 dated 25 October 1968 which were promulgated in terms of the repealed section 22 *bis* of the Black Administration Act. These regulations made provision for the registration of existing and valid customary marriages, the annulment of the registration of customary marriages, the registration of the *lobolo* due and the registration of the annulment or dissolution of customary marriages. Although this was the position, registration was not prescribed as a requirement for the validity of customary marriages nor was it compulsory. Thus, an unregistered customary marriage could be valid if all the requirements for its validity were met. Registration merely served as proof of the existence, annulment or dissolution of a customary marriage or of the amount of *lobolo* due (see also (The KwaZulu Act on the Code of Zulu Law, 16 of 1985 and Natal Code of Zulu Law, Proclamation R151 of 1987).

The existence or validity of a customary marriage, when such was disputed, was proven in various ways. When the requirements (codified or uncoded) for contracting a customary marriage were met, the marriage was regarded as valid despite failure to register it (*Bekker Seymour’s Customary Law in Southern Africa* 1989 105–109, 117–120). The following factors were, *inter alia* considered as indications that a valid customary marriage was contracted:

- (a) when two people lived openly as husband and wife (*Kumalo v Kumalo* 1942 NAC (N & T) 31);
- (b) when an agreement regarding *lobolo* had been reached (*Mabena v Letsoalo* 1998 2 SA 1067 (T), *Thibela v Minister van Wet en Orde* 1995 2 SA 147 (T)); and
- (c) where all the usual rites and ceremonies were performed (*Mabuza v Mbatha* 2003 4 SA 218 (C)),

In the majority of the cases, however, it was held that the most important indication of the existence of a valid customary marriage was the agreement relating to the provision of lobolo (Bekker *Seymour's Customary Law in Southern Africa* 1998 112–116). Despite what is said above, this list should not be regarded as exhaustive. The role of the usual rites and ceremonies has been described as follows:

“The absence of the ceremonies, if the essential requirements have been met does not affect the validity of the marriage – although, of course, they have probative significance in the sense that a *prima facie* presumption could be drawn from them that a valid marriage was concluded and that all the legal requirements were satisfied. Not all marriages take place with full ceremonial; the economic situation of the parties is no doubt an important factor. Full ceremonies are usually absent when the marriage follows on the *thwala* of the girl” (Olivier *et al Indigenous Law* 1995 23. See also Vorster *Urbanities' Perception of Lobolo: Mamelodi and Atteridgeville* (UNISA) 2000).

Previously, the requirements for contracting valid customary marriages in the then KwaZulu and Natal were laid down in the Codes of Zulu Law (KwaZulu Act on the Code of Zulu Law, 16 of 1985 and the Natal Code of Zulu Law, Proclamation R151 of 1987). Besides the usual requirements relating to the consent of the prospective spouses and their guardians, where necessary, the codes also provided for the appointment of official witnesses who had to officiate at wedding ceremonies and for the registration of customary marriages (sections 44–50). The latter requirements were aimed at facilitating proof of the existence of a valid marriage when its validity was in dispute. Although registration of a customary marriage was conclusive proof of its existence, failure to have it registered did not invalidate or nullify it where all the requirements were met. In the case of non-registration, the existence of a valid customary marriage could be proven by means of oral evidence and the presence of the official witness at the ceremony as well as a public declaration made to him by the prospective bride assisted in this regard (*Moloi v Moloi* 1979 AC (N–E) 273)).

The Transkei legislature enacted the Transkei Marriage Act which had as its main aim:

“To consolidate and amend the laws relating to the solemnization and registration of civil marriages, to the consummation and registration of customary marriages, to the consequences of marriages, to the dissolution of marriages by the court and matters incidental thereto” (Long title).

The most important effect of this Act was to bring about equality between civil and customary marriages in Transkei and to provide for polygamy in both these types of marriage. Before this Act came into operation, it was not possible for a man married by civil rites to marry another woman by customary rites. Where this had taken place, the subsequent customary marriage was regarded as null and void. Contracting a civil marriage with another woman while married to another by customary rites also had the effect of dissolving the subsisting marriage by customary rites (*Nkambula v Linda* 1951 1 SA 377 (A)). It was therefore not possible that the two types of marriage could exist side by side at the same time. A man could, however, marry as many women as he wished by customary rites. Registration of a customary marriage was not prescribed as a requirement for its validity. In fact at that time, the relationship between civil and custom-

ary marriages was regulated by the provisions of the repealed Black Administration Act of 1927 (section 21(1), (2), (3),(4) and (5)). This legislative measure clearly prohibited a husband who was a spouse to a civil marriage from contracting a customary marriage with another woman during the subsistence of a civil marriage (see Mqeke "Protection of a customary union spouse" 1980 *De Rebus* 597, Mafubelu "Civil marriage and Customary union – To be (valid) or not to be (valid) that is the question" 1981 *De Rebus* 873).

The Transkei Act recognised or legalised polygamy in both civil and customary marriages, that is, a man could be a spouse to a civil marriage with woman and still marry woman by customary rites. For the purposes of this discussion, the provisions of section 3 are of paramount importance. It provided that:

- "(i) Nothing in this Act or any other law contained shall be construed as prohibiting –
  - (a) any male person from contracting-
    - (i) . . .
    - (ii) . . .
    - (iii) a customary marriage with any female person during the subsistence of any civil marriage which produces the legal consequences of a marriage out of community of property or any customary marriage between such male person and any other female person; or
  - (a) . . .
  - (b) a magistrate from registering any customary marriage referred to in paragraph (a)(iii).
- (2) Subject to the provisions of this Act, a civil marriage contracted by any male person with any female person during the subsistence of a customary marriage between such male person and any other female person, shall not affect –
  - (a) the continued existence of such customary marriage; or
  - (b) the legal consequences of such customary marriage; or
  - (c) the rights and privileges of the female party to such customary marriage or of any children born of such marriage."

The deceased in this case was married to Norah Baduza (third respondent) by civil rites, out of community of property and of profit and loss in terms of the repealed section 22(6) of the Black Administration Act on 3 October 1956. On 25 May 1985, he married the applicant by customary rites in terms of the then Transkei Marriage Act. The Act came into operation on 2 July 1979 (Van Loggerenberg "The Transkei Marriage Act of 1978: A new blend of family law" 1980 *Obiter* 1). The deceased was indeed entitled to marry another wife by customary rites in terms of this legislative measure.

The Act further made provision for the registration of customary marriages. Parties to a customary marriage and the father or guardian of any such party who was under the age of twenty-one, were saddled with the responsibility to ensure that the customary marriage was registered as soon as possible after its consummation (section 33). They, as well as the magistrate before whom they appeared for the purpose of registering the

customary marriage, were obliged to sign the register of customary marriages in the presence of two competent witnesses (section 34). The Act also made provision for the lodging of objections to the registration of a customary marriage as well as the procedure to be followed. Depending on the decision of the magistrate in the light of the objections lodged, he or she could register or refuse to register a customary marriage. The decision of the magistrate could be appealed to the secretary for the Interior and Social Services (sections 32–36).

Does failure to register a customary marriage in terms of the then Transkei Marriage Act of 1978 affect its validity? Put differently, is registration of a customary marriage in terms of the then Transkei Marriage Act of 1978 a requirement for its validity?

This issue has been dealt with in a number of cases since the coming into operation of the Transkei Marriage Act. The earliest case dealing with this issue was *Kwitshane v Magalela and Another* 1999 4 SA 610 (TkD). The court held that failure to register a customary marriage leads to its invalidity, that is, registration is a requirement for the validity of a customary marriage contracted in terms of the Act. The court looked at the overall structure of the provisions dealing with registration (PART 2) and concluded:

“In my view, customary marriages could not be regarded as valid marriages after the coming into operation of the Transkei Act 21 of 1978 unless they were registered. The community might have regarded them as legal; this was not the case in terms of the law” (*Kwitshane* (1999) 613 H).

In three unreported cases, the decision in *Kwitshane* was not followed. These cases were *Shwalakhe Sokhevu v Minister of Police* (case no 293/94 of the Transkei Division), *Feni v Mgudlwa* (unreported case No 21/02 and *Nomaza Mvunelo v Minister of Home Affairs* (unreported case No 744/02) (see *Kambule* (2007) 409).

With respect, the Supreme Court of Appeal, missed the opportunity to deal with this important issue on the basis that “the declaratory order that was sought was superfluous to the applicant’s claim for eviction and no proper reason has been advanced for us to consider it” (*Wormald* (2006) 569 I). The Eastern Cape Local Division did not also consider it necessary to determine this issue on the grounds that “whatever perceived impediment there may be to the validity of the marriage because of the fact of non-registration under that Act, the marriage has been validated by the Recognition of Customary Marriages Act (120 of 1998) (the Recognition Act). I reach this conclusion despite what was stated by Combrinck AJA at 575 (640f ALL SA in the second *Wormald* case . . .” (*Kambule* (2007) 410 B–C).

With respect, I do not agree with this conclusion. I agree with the minority decision of Combrinck AJA (as he then was) in *Wormald* (2006) where he held that an unregistered customary marriage is invalid in terms of the Transkei Marriage Act of 1978 as well as the decision of Kruger AJ (as he then was) in *Kwitshane v Magalela* (*supra*). The manner in which the provisions of PART 2 of the Transkei Marriage Act of 1978 was formulated is, in my view, a clear indication that registration is a *sine qua non* for the validity of a customary marriage. The long title to this Act is also an

indication to this effect, namely, to consolidate the laws relating “to the consummation and registration of customary marriages”. Academic opinion also appears to be in line with this conclusion (Mqoke *Basic Approaches to problem solving in Customary Law: A study of conciliation and consensus among the Cape Nguni* 1997 180, Van Loggerenberg 1980 *Obiter* 15, Bekker 123, Bennett *Human Rights and African Customary Law* 1995 117).

It is further to be noted that one of the main purposes of the Transkei Marriage Act was to place civil and customary marriages on an equal footing. Before the Act came into operation, a civil marriage had the effect of dissolving or superceding a subsisting or subsequent customary marriage. The Act was thus intended to outlaw this harsh result by, *inter alia*, providing registration as a requirement for the validity of a customary marriage as many of these relationships were rendered invalid by civil marriages. Registration, it is submitted, was made a requirement to provide protection to the wife and children of customary marriages in the event that the husband had contracted or intended to contract a marriage by civil rites with another woman (see section 3(2) of the Act).

## **6 Does the Recognition of Customary Marriages Act of 1998 Validate an Invalid Marriage Contracted In Terms of the Transkei Marriage Act of 1978?**

Having arrived at the decision that it was not necessary to determine the effect of non-registration of the customary marriage, the judge in *Kambule v The Master* 2007 3 SA 403 (E), commented:

“... Whatever perceived impediment there may be to the validity of the marriage because of the fact of non-registration under that Act, the marriage has been validated by the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act)” (at 410 B–C).

The decision to regard the customary marriage as valid despite its non-registration was found in the provisions of sections 1, 2(1), 4(3)(a) and 4(9) of the Recognition of Customary Marriages Act as they have the effect of validating subsisting customary marriages at the time of its coming into operation. Section 2(1) of this Act, however, applies to a customary marriage “which is a valid marriage at customary law and existing at the commencement of this Act. . .” It is submitted that the customary marriage in this case was not in existence when this Act came into operation (2000-11-15) as a result of non-registration in terms of the then Transkei Marriage Act. In the same breath, the definition of a customary marriage and customary law in section 1 of the Recognition of Customary Marriages Act of 1998 cannot, with respect, be employed to validate an otherwise invalid marriage.

The Recognition of Customary Marriage Act of 1998 contains an express provision to the effect that “failure to register a customary marriage does not affect the validity of that marriage” (section 4(a)). The Transkei Marriage Act of 1978, on the other hand, did not contain a similar provision. It is with respect submitted that because of this, the intention was to visit non-registration of a customary marriage with invalidity.

The peremptory word “shall” is used throughout in all the provisions dealing with the registration of customary marriages in the Transkei Marriage Act of 1978 (sections 32–36). This, in my view, is a clear indication that the intention was to prescribe registration as a requirement for the validity of a customary marriage. Although I agree that “the community might have regarded (unregistered customary marriages) as legal; this was not the case in terms of the law” if regard is had to the language used in the Transkei Marriage Act and the Recognition of Customary Marriages Act (*Kwitshane v Magalela* 1999 4 SA 610 (Tk) at 613 H).

## 7 Conclusion

Legal pluralism or dualism became a feature of most African legal systems after the reception or adoption of various foreign systems of law which were mostly of European origin. As these systems were regarded as civilised, the application of indigenous systems of law was subjected to compliance with them in the case of a conflict (Van Niekerk “Legal Pluralism” in Bekker *et al Introduction to Legal Pluralism in South Africa* 2006 5 – 14).

In the case of South Africa, different legislative measures were enacted to govern the requirements and consequences of civil and customary marriages. The first legislation enacted to govern the requirements and consequences of customary and civil marriages contracted by Black persons was the Black Administration Act of 1927. This measure was later amended by the Marriage and Matrimonial Property Law Amendment Act (3 of 1988) which was aimed at equating the requirements and consequences of civil marriages contracted by Black persons with those of other population groups in South Africa (see Bekker (1989) 252–255). These Acts also regulated the relationships between civil and customary marriages. It has to be mentioned that at that time a customary marriage was not recognised as a valid marriage for all purposes of the law (see Maithufi and Bekker “The Recognition of Customary Marriages Act and its impact on family law in South Africa” 2002 *CILSA* 183). Certain territories in South Africa which had legislative capacity or authority to do so, also passed their own marriage laws. These were the then Transkei which passed the Marriage Act of 1978 and Bophuthatswana with its Marriage Act (15 of 1980), the latter being a replica of the provisions of the Black Administration Act governing civil marriages of Black persons (see Maithufi “Marriage and succession in South Africa, Bophuthatswana and Transkei: A legal pot-pourri” 1994 *TSAR* 262).

It is not surprising therefore that the Constitution of the Republic of South Africa Act (108 of 1996) had to make provision for the enactment of legislation aimed at recognising unrecognised relationships of a marital nature. It provides as follows in this regard:

- “15(3) (a) This section does not prevent legislation recognising –
- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
  - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

- (c) Recognition in terms of paragraph (a) must be consistent with the section and other provisions of the Constitution.”

It is as a result of these provisions that the Recognition of Customary Marriages Act was passed to recognise a customary marriage as a marriage “for all purposes” (section 2(1)). See also Maithufi “Customary Law of marriage and a Bill of Rights in South Africa: *Quo vadis*” 1996 *THRHR* 298).

Despite the operation of the Recognition of Customary Marriages Act of 1998, marriages which were contracted under the enactments it repealed are still in existence. Unless expressly provided for by this Act, the validity of marriages contracted under the Acts it repealed are still governed by the provisions of those repealed enactments. If a marriage so contracted did and still does not comply with the requirements of the repealed enactment, it cannot be validated by the Recognition of Customary Marriages Act. The latter Act only provides for the recognition of a marriage “which is valid at customary law and existing at the commencement of this Act . . . ”(section 2(1)). Any marriage contracted in terms of the then Transkei Marriage Act of 1978 must therefore comply with its requirements, including registration, for its validity. The Transkei Marriage Act of 1978 also provided that an unlawful relationship which was contracted before its commencement may be deemed to be a customary marriage upon registration as a customary marriage (section 2 (1)). This was not the position in this case.

From the foregoing, it is respectfully submitted that the decision in *Kambule* (2007) should not be regarded as authority for the view that an unregistered customary marriage in terms of the then Transkei Marriage Act is valid or rather that registration is not a requirement for the validity of such customary marriage. The same applies to the majority judgment in *Wormald* (2004 and 2006).

The legal problems that were faced by the courts in the case under discussion, are still going to bedevil our courts in future. To come to the aid of vulnerable “spouses” who may unwittingly find themselves in such invalid relationships, it is recommended that:

“. . . the South African marriage law be reformed to make it possible for the simultaneous existence of civil and customary marriages. This would enable a man already married by civil or customary rites to contract another marriage, be it by civil or customary rites, with another woman during the subsistence of the first marriage . . . to make it impossible for these marriages to exist side by side is tantamount to disregarding the many legal problems faced by parties to these relationships” (Maithufi and Moloi “The need for the protection of rights of partners to invalid marital relationship: A revisit of the ‘discarded spouse’ debate” 2005 *De Jure* 144 at 152 – 153).

Criticism may be levelled against this approach to law reform, but it is in my opinion a workable solution to the problems encountered and still to be faced in future. Piecemeal reform of the law relating to customary and Islamic or Hindu marriages (and all other formerly unrecognised forms of marital relationships) and civil marriages by means of different enactments brings about more legal chaos than reforming the whole field of

marriage law by means of a single statute. Is the South African legislature ready for this process?

The case of *Kambule* reminds one of the operation of the repealed provisions of section 22 (7) of the Black Administration Act of 1927. At that time, it was accepted that a civil marriage had the effect of dissolving or superseding a customary marriage. In order to come to the aid of the “spouse” of a customary marriage which was so dissolved, the legislature provided that at the death of the husband, the civil marriage spouse and her children shall have no greater rights in respect of the estate of the deceased than they would have had if the marriage was by customary rites. The civil marriage was thus, for the purposes of succession, equated with a customary marriage in that both marriages were deemed to have created “houses”. The customary marriage was presumed not to have been dissolved by the civil marriage for the purposes of succession and therefore was regarded as an existing valid marriage (see also section 3(1)(c) of Act 21 of 1978). Is this perhaps the import of *Kambule*?

IP MAITHUFI  
*University of Pretoria*