

**REVISITING THE “TO BE OR NOT TO BE” DEBATE AND
COMMENTS ON *NETSHITUKA v NETSHITUKA* 2011 5 SA 453 (SCA)**

1 INTRODUCTION

Determining the validity of a customary marriage or a civil marriage which was contracted during the subsistence of another marriage (a civil or customary marriage) has plagued South African courts for a number of years (see Maithufi “To be or not to be: Does this question still arise?” 2013 *TSAR* 723). The general principle since *Nkabula v Linda* 1951 1 SA 377 (A) was that no customary marriage could exist in the face of a civil marriage. The effect was that a civil marriage dissolved a subsisting customary marriage between a husband and a woman other than his wife, by customary rites. It also meant that a customary marriage which was entered into during the subsistence of a civil marriage was null and void *ab initio* (Bennet *Customary law in Southern Africa* (2004) 239–240).

At that time, while a civil marriage was the only marriage recognised as valid for all intents and purposes of South African law, a customary marriage was denied this recognition by virtue of being potentially polygynous. Thus, whereas a blind eye was turned to polygyny and it was allowed in respect of customary marriages, this was not the case in respect of civil marriages (Jansen “Customary family law” in Rautenbach *et al* (eds) *Introduction to legal pluralism in South Africa* (2010) 72–73).

This continued to be the position until the promulgation of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The rationale behind this Act was to ensure that a customary marriage was no longer dissolved or superseded by a civil marriage. It was the intention of the legislature to declare that an existing customary marriage was not dissolved by a subsequent civil marriage and that a valid customary marriage could not be entered into by a husband of a subsisting civil marriage (see Maithufi 2013 *TSAR* 723 727). Despite this prohibition, customary or civil marriages continued to be entered into during the subsistence of a civil or a customary marriage (see 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: *Netshituka v Netshituka* 2011 5 SA 453 (SCA)” 2012 *TSAR* 586). The Recognition of Customary Marriages Act 120 of 1998, the aim of which was to recognise customary marriages for all intents and purposes of South African law, was passed subsequently to ensure that a customary marriage and a civil marriage could not exist at the same time between a husband and more than one wife.

Although the issues discussed herein have been a subject of analysis by various authors, it is necessary to revisit them in the light of the Supreme Court of Appeal’s decision in *Netshituka* (see *inter alia* Peart “Civil or Christian marriage and customary unions: The legal position of the ‘discarded’ spouse and children” 1983 *CILSA* 39; Dlamini “Recognition of a customary marriage: A postscript”

1983 *De Rebus* 253; Mqoke “Protection of a customary union spouse” 1980 *De Rebus* 597; Mafubelu “Civil marriage and customary unions – To be (valid) or not to be (valid) that is the question” 1981 *De Rebus* 873; Maithufi “Causing the death of a breadwinner – the customary marriage widow’s problems” 1986 *De Rebus* 555; Maithufi 2013 *TSAR* 723; Bakker and Heaton 2012 *TSAR* 586).

This note deals with the decision of the Supreme Court of Appeal in *Netshituka v Netshituka* 2011 5 SA 453 (SCA) and the effect of a civil marriage on subsisting or subsequent customary marriages. It was decided in this case that a civil marriage contracted while one spouse was a partner in an existing customary marriage with another party was invalid (458 para 15). Although this is correct in respect of the current legal position, it is submitted that the date on which a marriage – civil or customary – is contracted is important in determining its validity (see Buchner-Eveleigh *Netshituka v Netshituka* 2011 (5) SA 453 (SCA)” 2013 *De Jure* 596). This issue and others related to it are discussed in detail below.

Netshituka is an appeal from the decision of the Limpopo High Court. The court *a quo* dismissed the application to declare the civil marriage between the deceased and the first respondent (wife married by civil rites), which was contracted on 17 January 1997, invalid. The court *a quo*, therefore, had held that the civil marriage was valid. Consequently, an appeal against this decision was lodged with the Supreme Court of Appeal (454 para 2).

2 FACTS IN NETSHITUKA

The facts reveal that one Masewa Joseph Netshituka, who died on 4 January 2008, was married by customary rites to several women. One such woman, Tshinakaho Netshituka, alleged that she was married to the deceased by custom on 1 December 1956. It was further alleged that the deceased was also married by custom to three other women, Masindi, Martha and Diana. The facts do not reveal the date(s) on which these customary marriages were entered into (454 paras 3–4). It also appears from the facts that the deceased had also married one Martha Mosele Netshituka by civil marriage “and got divorced from her on 5 July 1984” (455 para 7). After this divorce, the deceased married the first respondent by civil rites on 17 January 1997 (454 para 4 455 para 7).

Immediately after the deceased’s death, his wives by customary rites learnt that he had executed a will in terms of which the first respondent (the wife married by civil rites on 17 January 1997) was appointed as *executrix* of his estate. In response, the wives married by customary rites and one of the children born of the customary marriage with Masindi, instituted proceedings to challenge the validity of the civil marriage between the deceased and the first respondent as well as the validity of the will (454 para 5).

The ground on which the validity of the civil marriage was contested was that “it fell foul of the provisions of s 22(1) of the Black Administration Act 38 of 1927 (Act 38 of 1927) read with s 1(a) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988, regard being had to the fact that Tshinakaho’s customary marriage and those of the other three customary law wives to the deceased, respectively were recognized in terms of ss 2(1) and (3) of the Recognition of Customary Marriages Act 120 of 1998” (454 para 6).

3 WAS THE DECEASED COMPETENT TO CONTRACT A CIVIL MARRIAGE WITH MARTHA MOSELE NETSHITUKA?

Although the date on which the deceased contracted the civil marriage with Martha Mosele Netshituka is not revealed by the facts, it cannot be disputed that this marriage was entered into before the deceased's civil marriage to the first respondent on 17 January 1997. It is also certain that at the time when the civil marriage with Martha Mosele Netshituka was entered into, the deceased was already married by customary rites to four other wives, namely, the first applicant, Tshinakaho, Masindi, Martha and Diana. Martha Mosele Netshituka's civil marriage was terminated by divorce on 5 July 1984. This was before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

The Marriage and Matrimonial Property Law Amendment Act 3 of 1988 came into operation on 2 December 1988 (see Bekker *Seymour's Customary law in Southern Africa* (1989) 252–253; Jansen in Rautenbach *et al* (eds) 72–73; Oliver *et al Indigenous law* (1995) 90–93). The legal position regarding the co-existence of civil and customary marriage contracted before 2 December 1988 was regulated by section 22 of the Black Administration Act 38 of 1927 before its amendment by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. As the customary marriage between the deceased and Tshinakaho was entered into on 1 December 1956 and his civil marriage with Martha Mosele Netshituka was terminated on 5 July 1984, the validity of any of the deceased's customary marriages had to be determined in accordance with the law as it was before 2 December 1988 (Buchner-Eveleigh 2012 *De Jure* 596 601–604).

As indicated above, the legal position prior to 2 December 1988 was regulated by section 22 of the Black Administration Act before its amendment by the Marriage and Matrimonial Property Law Amendment Act. Much has been written about the effect of these provisions on the co-existence of civil and customary marriages (see Bakker and Heaton 2012 *TSAR* 586). At that time, section 22 of the Black Administration Act *inter alia* provided that:

“No male . . . shall during the subsistence of any customary union between him and any other woman, contract a marriage with any other woman unless he has first declared upon oath . . . the name of 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 such woman or house, and any such information relating to any such union as the said official may require” (s 22 (1); see also *Netshituka* 455–456 para 9).

Despite the peremptory nature of these provisions, that is, that a man was prohibited from contracting a civil marriage with another woman during the subsistence of a customary marriage with another, it was held that the subsequent civil marriage had the effect of dissolving the subsisting customary marriage (*Nkabula v Linda*). As a result of the fact that a customary marriage was dissolved by a civil marriage, the “material rights” of the wife of a dissolved customary marriage were protected by section 22(7) of the Black Administration Act. Conflicting opinions were expressed about the desirability or otherwise of this legal position (see, *inter alia*, Mqoke 1980 *De Rebus* 597; Mafubelu 1981 *De Rebus* 573; 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* 14). The effect of a civil marriage on a customary marriage at that time was that the former dissolved or superseded the latter (see Bekker (1989) 249–252).

The legislature also ensured that failure to comply with the provisions of section 22(1) of the Black Administration Act was regarded as an offence (s 22(4) and (5) of Act 38 of 1927). It has been argued that if the intention of the legislature was to declare the ensuing civil marriage null and void, it would have done so in express terms (Mafubelu 1981 *De Rebus* 573). Despite these opinions, South African courts have held that the subsisting customary marriage was rendered invalid by the subsequent civil marriage (*Malaza v Mndaweni* 1975 BAC 45 (C); see also Maithufi 2013 *TSAR* 723).

The first respondent, that is, the wife married to the deceased by civil rites on 17 January 1997, denied that a customary marriage existed between the deceased and any woman at the time when she and the deceased got married. She alleged that: “The deceased was married to Martha Mosele Netshituka (born Lebona) and got divorced from her on 5 July 1984” (455 para 7).

The first respondent’s argument was, therefore, that when the deceased married Martha Mosele Netshituka by a civil marriage, this had the effect of dissolving the deceased’s customary marriages with his other wives. In fact, the customary marriage spouses became what have been termed “discarded spouses” in terms of the South African legal system at that time (see Peart 1983 *CILSA* 39). The court in *Netshituka* decided to use the term “deserted customary law wives” (456–457 paras 11–13). Despite holding that they were “deserted customary law wives”, the court found that the civil marriage with the first respondent was invalid as the deceased was at that time (17 January 1997) still married by customary rites.

It is submitted that when the deceased married Martha Mosele Netshituka by civil rites, he was competent to do so in terms of South African law. The civil marriage with Martha Mosele Netshituka had the effect of dissolving the subsisting customary marriages with the first applicant (Tshinakaho), Masindi, Martha and Diana. These wives became “discarded spouses” despite having not left the common household. The Black Administration Act of 1927 (Act 38 of 1927) did not at that time preclude a husband who was a spouse in a customary marriage from contracting a civil marriage with another woman (see s 22(1) of Act 38 of 1927; Bekker (1989) 253–269; Jansen in Rautenbach *et al* (eds) 72–73). When the husband had failed to provide the declaration required by section 22(1) of the Black Administration Act or falsified such declaration, he was only guilty of an offence and this did not have any effect on the validity of the ensuing civil marriage.

4 A CUSTOMARY MARRIAGE, DESERTION AND *PHUTHUMA*

In order to arrive at the decision that the deceased’s civil marriage with Martha Mosele Netshituka was invalid, the court relied on the fact that the customary marriage wives did not leave the deceased after his civil marriage to the said Martha Mosele Netshituka. As a result of this, the court concluded that this case was distinguishable from the *Nkambula*’s case where the customary marriage wife had left her husband after he had married another woman by civil rites (456 para 11). According to the court, the deceased did not therefore have to *phuthuma* his wives by customary rites as they did not leave him after his marriage by civil rites (547 para 13).

When is *phuthuma* resorted to?

A customary marriage is not only a relationship between the spouses but it also involves the families of both spouses in its conclusion and dissolution (Jansen in Rautenbach *et al* (eds) 47–49). Both families are involved in the negotiations preceding this marriage, especially *lobolo* negotiations, up to the handing-over of the woman to the man's family (Bekker (1989) 97–109).

The role of the custom of *phuthuma* in the resolution of disputes arising from a marriage concluded in accordance with customary law has been a subject of discussion in a number of cases (see Bekker *Phuthuma/ngala* "en siviele huwelike" 1985 *De Jure* 176; Bekker (1989) 181–192). The custom of *phuthuma* is related to another custom known as *ukutheleka* which is closely linked to the provision of *lobolo* or further *lobolo* by a husband of a customary marriage (*idem* 160–165). *Ukutheleka* is a procedure that may be used by a woman's guardian in order to claim *lobolo* when it was not fully furnished before the customary marriage was entered into (*ibid*). Where the guardian had resorted to *ukutheleka* in enforcing his right to *lobolo*, the husband is obliged to go and fetch her (his wife) from her guardian and to provide the outstanding *lobolo*. The fetching and subsequent provision of the outstanding *lobolo* by the husband is known as *phuthuma* (see Verloren van Themaat "*Ngake v Mahahle* 1984 2 SA 216 (O)" 1986 *THRHR* 100). *Phuthuma* is practised by those indigenous African communities of South Africa "where the amount of *lobolo* payable is as a rule not limited, and constitutes a bond of good faith between the families of the bride and bridegroom; during the whole of the wife's life" (Bekker (1989) 63).

The custom of *phuthuma* may also be used in a case where there is a conflict between the husband and his wife in a customary marriage. The conflict may have been caused by several factors. Among such factors may be ill-treatment, abandonment, desertion, failure to maintain and other causes recognised by customary law (see Maithufi "A civil marriage and the custom of *phuthuma*" 1987 *De Rebus* 387). This custom cannot be resorted to by a husband in a marriage by civil rites (*Ngake v Mahahle* 1984 2 SA 216 (O); see also Bekker 1985 *De Jure* 176). Similarly, the custom of *ukutheleka* cannot be utilised by a woman's guardian to enforce his right for the further provision of *lobolo* in a civil marriage. It has been held that this is contrary to the legal principles that govern the relationships between the husband and wife in a civil marriage (*Ngake v Mahahle*).

It appears that the custom of *phuthuma* is applicable among the whole indigenous African population groups of South Africa (see Bekker 1985 *De Jure* 176). Although this is the position, it is known by different names (*ibid*). It is accordingly applicable when a wife in a customary marriage:

- (a) has left her husband as a result of ill-treatment;
- (b) was driven away from her family home by her husband or left such home as a result of any fault on the part of her husband;
- (c) has left without any good cause; and
- (d) was taken away by the *lobolo* holder from her husband (*theleka*) in an attempt to claim the outstanding *lobolo* (see Bekker (1989) 182–183; Buchner-Eveleigh 2012 *De Jure* 596 602–603).

Where a customary marriage wife leaves her family home as a result of any of the circumstances mentioned above, her husband is expected to *phuthuma* her in order to restore the marriage relationship. Failure to do so, or failure by the wife

to return home, is regarded as a repudiation of the customary marriage in terms of customary law. Any action for the recovery of *lobolo* by the husband is regarded as premature before an attempt to *phuthuma* her has been made (Bekker (1989) 191–192). This custom therefore has to be resorted to before instituting proceedings for the dissolution of a customary marriage and the claim for the return of *lobolo* by the husband. The families of the husband and wife are therefore expected to try to reconcile the spouses before the dissolution of a customary marriage.

Relying on the fact that there was no need for the deceased to *phuthuma* his customary law wives as they (the wives) did not leave him when he contracted a civil marriage with Martha Mosele Netshituka, the court concluded:

“But on the authority of *Nkambula* a customary law wife who has left her husband as a result of his having contracted a civil marriage with another woman would be entitled to refuse to return to him when he goes to *phuthuma* her. She would be entitled to assert that he had terminated the union between them. It seems to me, however, that nothing would prevent her from returning to him if she were prepared to do so. No fresh *lobolo* negotiations would have to be undertaken because customary law does not recognise a dissolution of the union by mere desertion. The husband might be called upon to pay a beast or more as a penalty for his ‘misdeed’” (457 para 12).

Although it might have been the position in traditional customary law that mere desertion was not a good ground for the dissolution of a customary marriage, this applied only where the husband was not a spouse in a subsequent civil marriage with another woman, as the effect of a civil marriage was that the subsisting customary marriage was dissolved. This was the position before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act. As the civil marriage with Martha Mosele Netshituka ended in a divorce on 5 July 1984, it is evident that it was contracted before 2 December 1988, the date of the coming into operation of the Marriage and Matrimonial Property Law Amendment Act.

It is submitted that the court should have determined the validity of the customary marriage of the deceased with the first applicant (Tshinakaho), Masindi, Martha and Diana with the law as it existed at the time when the deceased married Martha Mosele Netshituka by civil rites (see, however, Buchner-Eveleigh 2012 *De Jure* 596 603–605). At that time, a customary marriage was not an impediment to the conclusion of a civil marriage with another woman (*Nkambula v Linda; Malaza v Mndaweni* 1975 BAC 45 (C)).

5 WAS PHUTHUMA APPLICABLE IN THIS CASE?

The circumstances under which a husband of a customary marriage is expected to *phuthuma* his wife has been indicated above. *Phuthuma* is therefore resorted to when a wife of a customary marriage has left the home she used to share with her husband under any of the circumstances mentioned above. In the case where the wife did not leave such home, as it happened in *Netshituka*, there is no need on the part of her husband to *phuthuma* her.

By contrast, the fact that a customary marriage wife did not leave her husband after his civil marriage with another woman does not leave her customary marriage intact. Such marriage remains dissolved and cannot be “revived”, even when the wife of a civil marriage is divorced (Maithufi 2013 *TSAR* 723–731).

The custom of *phuthuma*, it is submitted, was not applicable in this case. Even if the deceased had tried to *phuthuma* his customary marriage wives, assuming that they had left him after his civil marriage to Martha Mosele Netshituka, this would not have had the effect of reviving their customary marriages. These marriages were dissolved when the deceased contracted a civil marriage with the said Martha Mosele Netshituka.

6 WAS THE DECEASED COMPETENT TO CONTRACT A CIVIL MARRIAGE WITH THE FIRST RESPONDENT ON 17 JANUARY 1997?

According to the first respondent, she was married to the deceased by a civil marriage in community of property on 17 January 1997 after the deceased had divorced Martha Mosele Netshituka, who was also married by civil rites, on 5 July 1984. At that time, that is on 17 January 1997, the Marriage and Matrimonial Property Law Amendment Act was already in operation. It came into operation on 2 December 1988. One of the aims of this Act was to ensure that a customary marriage was no longer dissolved or superseded by a civil marriage. Act 3 of 1988 provided in this respect as follows:

- “(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman.
- (2) Subject to subsection (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union (ss 22(1) and (2) of Act 38 of 1927 as amended by the Marriage and Matrimonial Property Law Amendment Act of 1988” (see also *Netshituka* 458 para 14).

The term “marriage” as used in these provisions refers to a civil marriage. The Act thus allowed spouses in a monogamous customary marriage to marry each other by civil rites. This was in fact converting the customary marriage existing between the parties into a civil marriage. It had the same effect as sections 3(2) and 10(1) of the Recognition of Customary Marriages Act of 1998 (Act 120 of 1998). See also Maithufi “The Recognition of Customary Marriages Act of 1998: A commentary” 2000 *THRHR* 509).

In the same manner as its predecessor (the Black Administration Act), the Marriage and Matrimonial Property Law Amendment Act provided that contracting a civil marriage with another woman by a husband who was married to another by customary rites contrary to its provisions was an offence (s 22(3) and (5)). The validity of a civil marriage contracted contrary to these provisions led to contradictory opinions or views. Some authors were of the view that the ensuing civil marriage should be regarded as voidable (see Maithufi “Do we have a new type of voidable marriage?” 1992 *THRHR* 628) while others regarded this marriage as invalid (see Sinclair *The law of marriage* (1996) 222–224).

The court in *Netshituka* interpreted failure to comply with these provisions as follows:

- “[A] man who made a false declaration as to the existence or otherwise of a customary union between him and any other woman made himself guilty of an offence. A marriage officer could thus not solemnize a marriage where a man intended to marry a woman other than the one with whom he was a partner in an existing customary union. That, in my view, was the clear intention of the legislature when it amended s 22 of the Act” (458 para 14).

Although the conclusion reached by the court that the intention was to ensure that an existing customary marriage was no longer to be dissolved by a civil marriage is correct, the main question for determination in this case was whether the deceased was still married by customary rites to the applicant (Tshinakaho), Masindi, Martha and Diana when he married the first respondent by civil rites on 17 January 1997. The deceased's first civil marriage with Martha Mosele Netshituka was terminated by divorce on 5 July 1984 before his civil marriage with the first respondent on 17 January 1997.

Does this imply that the deceased's civil marriage with Martha Mosele Netshituka had no effect whatsoever on his subsisting polygynous customary marriage with Tshinakaho (the first applicant), Masindi, Martha and Diana?

With respect, the court appears to have concluded that the civil marriage of the deceased and Martha Mosele Netshituka had no effect on the subsisting polygynous customary marriage with the women mentioned above. The court even went further to rely on the custom of *phuthuma* and the fact that these women did not leave the deceased when he contracted a civil marriage to come to the conclusion that the civil marriage with the first respondent was a nullity (485 para 15).

It is submitted that the determination of the validity of the civil marriage between the deceased and the first respondent would have been preceded by the determination of the validity of the civil marriage between the deceased and Martha Mosele Netshituka. At that time, the civil marriage had the effect of dissolving a subsisting customary marriage. The court therefore should have concluded that the customary marriages of the first applicant, Masindi, Martha and Diana were dissolved by the civil marriage with Martha Mosele Netshituka. Thus at the time when the deceased entered into a civil marriage with the first respondent on 17 January 1997, he was competent to do so as there existed no customary marriage between him and another woman or women.

7 APPLICATION OF RECOGNITION OF CUSTOMARY MARRIAGES ACT OF 1998

The validity of the civil marriage with the first respondent was contested on the basis that it was contracted contrary to the provisions of the Marriage and Matrimonial Property Law Amendment Act read with section 2(1) and (3) of the Recognition of Customary Marriages Act.

It has to be noted that the aforementioned enactments came into operation on different dates. The first enactment came into operation on 2 December 1988 and the second on 15 November 2000. It appears that in arriving at the decision that the civil marriage with the first respondent was invalid, the court did not take into account the different dates on which these enactments came into operation except that "subsections (1)–(5) of the Act as amended, were in force at the date on which the civil marriage between the deceased and the first respondent was contracted" (485 para 15). This is the correct legal position as the deceased and the first respondent were married to each other by civil rites on 17 January 1997 and the Marriage and Matrimonial Property Law Amendment Act came into operation on 2 December 1988.

Does the aforementioned exposition of the law mean that the deceased was still married by customary law to Tshinakaho, Masindi, Martha and Diana when he married the first respondent by civil rites? Phrased differently, was the deceased precluded by the provisions of the Marriage and Matrimonial Property

Law Amendment Act from marrying the first respondent by civil rites on 17 January 1997?

The relevant provisions of the Marriage and Matrimonial Property Law Amendment Act were mentioned above. They precluded a spouse of a customary marriage from contracting a civil marriage with a woman other than his spouse in a customary marriage. Spouses in a customary marriage could, however, conclude a civil marriage with each other (see Jansen in Rautenbach *et al* (eds) 72–73).

The deceased in this case married Martha Mosele Netshituka by civil rites before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act as this marriage was terminated by divorce on 5 July 1984. This civil marriage had the effect of dissolving his customary marriages with his wives and these marriages could not have been revived by the termination of the deceased's civil marriage with Martha Mosele Netshituka by divorce or by the continued residence of the erstwhile wives with the deceased after such divorce (Maithufi 2013 *TSAR* 732–733).

The Recognition of Customary Marriages Act, which came into operation on 15 November 2000, was aimed at recognising monogamous and polygynous customary marriages which were in existence and valid at the time of its coming into operation in the following words:

- “(1) 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 marriage.
- (2) ...
- (3) If a person is a spouse in more than one customary marriage all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages” (s 2(1) and (3)).

The most important issue to be determined by the court in this case was whether the deceased was still married by customary rites to the first applicant (Tshinakaho), Masindi, Martha and Diana when he contracted a civil marriage with the first respondent. The deceased married the first respondent by civil rites on 17 January 1997 after divorcing Martha Mosele Netshituka, also married by civil rites, on 5 July 1984. At that time, the Recognition of Customary Marriages Act was as yet not enacted and therefore not in operation.

Although not yet in operation when the deceased contracted a civil marriage with the first respondent, the Recognition of Customary Marriages Act recognises as valid “a marriage at customary law and existing at the commencement of the Act” (s 2(1)). It also recognises as valid “all valid customary marriages entered into before the commencement of this Act” (s 2(3)).

Were the customary marriages of Tshinakaho (the first applicant), Masindi, Martha and Diana in existence and valid on 17 January 1997 when the deceased and the first respondent contracted a civil marriage with each other?

The court concluded in this regard that:

“Subsections (1)–(5) of the Act, as amended, were in force as at the date on which the civil marriage between the deceased and the first respondent was contracted. (The subsections were repealed by the Recognition of Customary Marriages Act, which came into operation on 15 November 2000). In *Thembisile v Thembisile Bertelsman J* held that a civil marriage contracted while the man was a partner in an existing customary union with another woman is a nullity. It was not argued in

this court that *Thembisile* was wrongly decided. It follows that the civil marriage between the deceased and the first respondent, having been contracted while the deceased was a partner in existing customary unions with Tshinakaho and Diana, was a nullity” (485 para 15).

Another spouse to this polygynous customary marriage, namely Martha, is not mentioned in this conclusion (see Bakker and Heaton 2012 *TSAR* 506 589).

It is correct that when the deceased contracted a civil marriage with the first respondent, the provisions of section 22(1) to (5) of the Black Administration Act as amended by the Marriage and Matrimonial Property Law Amendment Act were already in operation. The date of the coming into operation was 2 December 1988 and the civil marriage with the first respondent was contracted on 17 January 1997. When the deceased contracted a civil marriage with Martha Mosele Netshituka, however, the aforementioned provisions were not in operation. It must be noted that the deceased divorced this woman on 5 July 1984, before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act. Therefore, when this woman was married there was nothing that precluded the deceased from marrying her by civil rites. Contrary to what was held by the court, the deceased was competent to contract a valid civil marriage with her (see Buchner-Eveleigh 2012 *De Jure* 596 604–605).

Using section 22(1)–(5) of the Black Administration Act as amended by the Marriage and Matrimonial Property Law Amendment Act read with section 2(1) and (3) of the Recognition of Customary Marriages Act, the court held that the civil marriage between the deceased and the first respondent was invalid as the deceased was still “a partner in existing customary unions” (485 para 15).

The decision in *Netshituka* indicates that the court employed the provisions of the Recognition of Customary Marriages Act as one of its reasons to determine the validity of the civil marriage between the deceased and the first respondent. This Act, however, was not in operation on the date on which the said civil marriage was contracted, that is, 17 January 1997.

Furthermore, this Act does not have retrospective application in the sense that it does not render an invalid customary marriage valid. The Act recognises only customary marriages which were in existence and valid (monogamous or polygynous) at the date of its coming into operation (15 November 2000) (See Maithufi and Bekker “The Recognition of Customary Marriages Act of 1998 and its impact on family law” 2002 *CILSA* 183).

It has to be noted that when the deceased married the first respondent by civil rites on 17 January 1997, section 22(1) and (3) of the Black Administration Act as amended by the Marriage and Matrimonial Property Law Amendment Act was in operation. Although this is the position, these provisions could not and cannot be used to render an invalid customary marriage valid or to revive a customary marriage which was dissolved by a subsequent civil marriage. The customary marriages of the deceased and his customary law wives, Tshinakaho (the first applicant), Masindi, Martha and Diana were rendered invalid when the deceased contracted a civil marriage with Martha Mosele Netshituka.

The decision in *Netshituka* therefore, with respect, was reached without taking into account the different dates on which the aforementioned legislative measures came into operation. This is unfortunate.

Taking into account the reasons advanced in this note, it is concluded that the decision of the court *a quo* to declare the civil marriage between the deceased and the first respondent as valid was correct (see also Bakker and Heaton 2012 *TSAR* 586 587–591).

8 CONCLUSION

It has previously been observed that disputes relating to the validity of a civil or customary marriage will be a feature of South African law for a long time to come despite the enactment of the Recognition of Customary Marriages Act (see Maithufi 2013 *TSAR* 723–733). The provisions of this Act with regard to the co-existence of customary and civil marriages are very clear and straightforward. They prohibit the co-existence of a civil and a customary marriage of a husband, that is, polygyny, with more than one wife. A husband in a monogamous customary marriage may, however, contract a civil marriage with his customary law wife. This will convert the said customary marriage into a civil marriage. Despite the clear prohibition provided by this Act, civil marriages continue to be contracted during the subsistence of valid customary marriages and *vice versa* (see, *inter alia*, *Thembisile v Thembisile*; *Gaza v Road Accident Fund* Case no 314/04 (unreported); *Wormald v Kambule* [2004] 3 All SA 392 (E); *Wormald v Kambule* 2006 3 SA 562 (SCA); *Kambule v The Master* 2007 3 SA 403 (E)).

Is there any need for legislative intervention? Declaring invalid one of the marriages entered into contrary to these provisions may lead to numerous legal problems. A person who might have regarded himself or herself as married may as soon as his or her spouse dies, realise that he or she was in fact not legally married. Such a person may lose certain benefits arising out of marriage, in particular, the right to be an intestate heir of his or her deceased spouse (see the definition of “spouse” in the Intestate Succession Act 81 of 1987 as amended by the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009). The *Netshituka* case is a clear example that there may be a number of such vulnerable persons in South Africa. This, in my view, is a case that needs the attention of the legislature.

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