

# Polygynous marriages and patrimonial consequences, does one size fit all?

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## **Abstract**

This paper is an analysis of the effect of the Supreme Court of Appeal's interpretation of section 7(6) of the Recognition of Customary Marriages Act on the matrimonial property system regulating polygynous marriages and the order that failing to comply will result in the subsequent marriage being out of community of property of profit and loss. In 2012 the Supreme Court of Appeal in the *Ngwenyama v Mayelane* decision provided much needed clarity on the effect of section 7(6) of the Recognition of Customary Marriages Act. Section 7(6) regulates the matrimonial property system for polygynous marriages concluded after the Act. The provision requires a court application by a husband to approve a contract that sets out the division of matrimonial property for his marriages. The section was found not to be a validity requirement for these marriages. The court did, however, state that where section 7(6) was not complied with, that the subsequent marriage between the spouses would automatically be out of community of property. This statutory mechanism exists because none of the traditional matrimonial property regimes are appropriate for polygynous marriages. A conclusion that renders these marriages out of community of property is at odds with one of the aims of the Act, to protect the interests of women in customary marriages.

**Keywords:** *Customary marriage; polygyny; matrimonial property; family law*

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## **1. Introduction**

The Supreme Court of Appeal decision, *Ngwenyama v Mayelane*,<sup>1</sup> was handed down in 2012 and provided much needed clarity on the effect of section 7(6) of the Recognition of Customary Marriages Act. Section 7(6) regulates the matrimonial property system for polygynous marriages and was found not to be a validity requirement of these marriages. The provision requires the husband to lodge an application in court in which he sets out the future division of matrimonial property prior to concluding a subsequent marriage. The court did, however, state that where section 7(6) was not complied with, that the marriage between the spouses would automatically be out of community of property without the accrual system. This one size fits all approach to these marriages is problematic.

I will argue that the existing matrimonial property systems are not appropriate for polygynous marriages. Section 7(6) was included by the legislature because none of the traditional matrimonial property systems will work with multiple spouses or provide adequate protection for wives in these marriages. A conclusion that renders these marriages out of community of property is at odds with one of the aims of the Act, to protect the interests of women in customary marriages. This paper will briefly discuss the history of customary marriages in South Africa; it will examine the court's interpretation of this provision and provide a critique on the practical implications of an order that tries to implement a one size fits all approach to provisions that were legislated for the purposes of civil marriages.

## **2. History of Customary Marriages**

The Recognition of Customary Marriages Act came into operation on 15 November 2000, and gave full legal recognition to customary marriages for the first time in the history of South Africa. Prior to the commencement of the Act, customary marriages, or as they were known then "customary unions", did not have the same status as civil marriages concluded in terms of the Marriage Act.<sup>2</sup> Customary unions had partial recognition for the purposes of certain legislation and the South African common law, if they were registered under the

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<sup>1</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012)

<sup>2</sup> 25 of 1961. Section 35 of the Black Administration Act 38 of 1927 defined customary unions as "the association of a man and a woman in a conjugal relationship according to black law and custom, where neither the man nor the woman is party to a subsisting marriage".

Black Administration Act.<sup>3</sup> Partners in customary unions were treated as spouses for the purpose of workmen's compensation, income tax and for maintenance claims.

What is important from the outset is that customary unions, as codified under the Black Administration Act, were also institutions in which women suffered unequal status and rights to men. The Black Administration Act and customary law treated all women, regardless of age, capacity and marital status as minors. Women were subject to the marital power of their husbands and were in a state of perpetual minority. Women were not allowed to own property, sue or be sued in court, or exercise the power of contract. Women could not negotiate or terminate their marriages, and they could not have legal custody of their children. The unequal status of customary marriages was reflected the general approach of the pre-democratic government to customary law in South Africa. It was viewed as a system of law that was inferior to the common law and legislation. Its acceptance as 'law' was based on a concept of 'repugnancy' defined by Western, Colonial and Christian values. Customary unions were not fully recognised because they were potentially polygamous and therefore against good morals.

The impact of the Recognition of Customary Marriages Act on customary marriages has been drastic. It recognises all customary marriages concluded before the Act came into operation and those concluded after. In terms of section 2(1) all marriages that were validly concluded in terms of customary law and existed at the commencement of the Act are valid marriages. According to section 2(3) if a person was a spouse in more than one validly concluded customary marriage at the date of the commencement of the Act all the marriages would be recognised as valid marriages. The Recognition of Customary Marriages Act gives full legal recognition to polygynous marriages.

All customary marriages concluded after the commencement of the Act are regulated by section 2(2) and are recognised as valid marriages provided they comply with the requirements of the Act. The requirements for a valid customary marriage are listed in section 3. The Act requires spouses to be 18 or older, both parties must consent to the marriage and the marriage must be negotiated and celebrated in accordance with customary law.

The proprietary consequences of these marriages are regulated by section 7 of the Act. All monogamous marriages concluded after the promulgation of the Act would automatically

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<sup>3</sup> 38 of 1927.

be in community of property and all polygynous marriages concluded after the Act would be subject to section 7(6). In terms of section 7(6), a husband in a customary marriage who wishes to enter into a further marriage or marriages is required to lodge an application in court to approve a written contract which will regulate the future matrimonial property system of his marriages. This section was the point of contention in the *Ngwenyama v Mayelane* case.

### 3. *Ngwenyama v Mayelane*

The respondent was married to the deceased according to customary law on the 1<sup>st</sup> of January 1984. This marriage was never registered. The deceased died on the 28<sup>th</sup> of February 2009. After her husband's death the respondent wanted to register the customary union at the Department of Home Affairs where she was informed that the appellant had also wanted to register a customary marriage allegedly entered into with the deceased on 26 January 2008. The respondent asserted that the marriage concluded between the second wife and the deceased was null and void *ab initio* because firstly, she was not consulted before it was concluded<sup>4</sup> and secondly, the deceased had failed to comply with the requirements of section 7(6) of the Recognition of Customary Marriages Act. The deceased had not made the application as required by the Act.<sup>5</sup>

The court of first instance interpreted the provision to be peremptory.<sup>6</sup> The section reads: "a husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of the Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages."<sup>7</sup> The court *a quo* relying on the peremptory language used in the section and the position of certain authors decided that the failure to observe the requirement

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<sup>4</sup> The decision of the Supreme Court of Appeal was appealed to the Constitutional Court on the basis that the consent of the first wife is required in terms of isiTsonga customary law before a husband can validly take a subsequent wife. The court decided that consent was a requirement in terms of the isiTsonga law. *Mayelane v Ngwenyama* SA 415 (CC) 2013 (8).

<sup>5</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012) par [3].

<sup>6</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012) par [7].

<sup>7</sup> Section 7(6) The Recognition of Customary Marriages Act 120 of 1998.

in section 7(6) should result in a void marriage.<sup>8</sup> The Act itself is silent about the consequences if there is no approved contract.

The court *a quo* decided that the husband's competence to enter into a further customary marriage should be dependent on the court's approval of the intended matrimonial property system.<sup>9</sup> The provision would have no meaning otherwise and the interests of existing wives and other family members would be unprotected.

On appeal in the Supreme Court of Appeal, counsel for the appellant argued that the conclusion reached by the court *a quo* was incorrect because the section is not peremptory. The intention of the legislature could not have been to affect such a fundamental change to the customary law of polygamy by subjecting the second or subsequent marriages to prior consent by a court.<sup>10</sup> It was also asserted that the interpretation of the court *a quo* was in conflict with section 39(2) of the Constitution, which states that "when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights".<sup>11</sup>

Amicus for the appellant testified that an interpretation of the provision needs to consider the historical inequalities based on race, gender, marital status and class as well as the realities faced by women married in terms of customary law generally and women in polygynous marriages in particular. An interpretation that renders the second or subsequent marriages void would undermine these wives' rights to dignity and equality. The practical effect of invalidity would have serious consequences at divorce, death and succession. The effect it would have on the social standing of second wife and her children would need to be taken into consideration.<sup>12</sup>

In the Supreme Court of Appeal the purpose of the Act and the purpose of the section were examined. The Act's stated purpose is "to make provision for the recognition of customary marriages; to specify the requirements for a valid marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and

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<sup>8</sup> *MM v MN and Another* [2010] ZAGPPHC 24 (24 March 2010) par [41].

<sup>9</sup> *MM v MN and Another* [2010] ZAGPPHC 24 (24 March 2010) par [29] – [33].

<sup>10</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012) pars [19] – [20].

<sup>11</sup> Section 39(2) The Constitution of the Republic of South Africa, 1996.

<sup>12</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012) par [10].

the capacity of spouses of such marriages.”<sup>13</sup> Section 7(6) is intended to protect the matrimonial property rights of the spouses by ensuring a fair distribution of the matrimonial property in circumstances where the husband wants to enter into a further customary marriage.<sup>14</sup>

There are divergent views on the purpose and interpretation of the section and its impact on polygynous marriages. The court *a quo* read section 7(6) with section 7(7)(b)(iii) which empowers the court to refuse to register the proposed contract where the court is of the opinion that the contract does not sufficiently safeguard the interests of parties involved. Relying on this section and the authors Cronje and Heaton, the court *a quo* found that where a failure to comply with section 7(6) does not result in a void marriage it would render the court’s intervention superfluous and that this could not have been intended by legislature.<sup>15</sup>

Opposing this view are the arguments of Maithufi and Moloï and Bakker. Maithufi and Moloï argue that the marriage would not be void. The marriage would be out of community of property of profit and loss and the main purpose of this provision is to avoid unnecessary litigation with regard to property brought into the marriage and property acquired during the marriage.<sup>16</sup> Bakker argues that the second marriage will not negatively affect the first wife where the marriage is out of community of property.<sup>17</sup> The problem with Bakker’s argument is that monogamous customary marriages, entered into after the Act, are automatically in community of property and a change in the matrimonial property system would have to be effected before the subsequent marriages are concluded.

The Supreme Court of Appeal found that the purpose of section 7(6) needed to be determined “in light of the legislative scheme which guided its promulgation”.<sup>18</sup> The intention of the Recognition of Customary Marriages Act is to advance the rights of women married according to customary law, to enable women to acquire rights to matrimonial property that they did not have before the promulgation of the Act. Section 7(6) aims to protect the interests of both existing and prospective wives. Section 3 of the Act sets out the

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<sup>13</sup> Preamble of the Recognition of Customary Marriages Act 120 of 1998.

<sup>14</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012) par [12].

<sup>15</sup> Cronje and Heaton *South African Family Law 2ed* at 204.

<sup>16</sup> Maithufi, I P and Moloï, G M B “The current legal status of customary marriages in South Africa” *TSAR* 2002 599.

<sup>17</sup> Bakker, P “The new unofficial customary marriage: Application of Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998” *THRHR* (70) 2007 482.

<sup>18</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012) par [19].

requirements for a valid customary marriage and when these requirements are met a valid customary marriage comes into existence.

Section 7(6) is not a validity requirement for a customary marriage. The section exists to regulate the proprietary consequences of polygynous marriages. Section 7 of the Act makes sure that there is fairness and equity when dealing with matrimonial property in customary marriages and does not affect the validity of the marriage. To invalidate a marriage because a husband failed to comply with the provisions of the Act would be unjust. The section must be read in light of the Constitution and the court concludes that the legislature could not have intended a situation where non-compliance would invalidate the customary marriage. The court decided that where section 7(6) was not complied with, that the subsequent marriages will automatically be out of community of property of profit and loss.<sup>19</sup>

#### **4. Problems with the existing matrimonial property regimes**

Interpreting the provision not to invalidate the marriage is undoubtedly correct; however the haphazard order to declare all polygynous marriages out of community of property in cases of non-compliance creates a certain set of problems. Customary communities do not exist in isolation and the real world impact of a marriage out of community of property needs to be considered. The position of women living under customary law will also need to be considered as a marriage out of community of property presupposes that the wives in these marriages have their own assets.

The subsequent marriages would be out of community of property of profit and loss, but would not have a registered ante nuptial contract. The formality requirements for the ante nuptial contract will not be met.<sup>20</sup> Would the effect be that only the spouses in the marriage will be bound by the matrimonial property system? Would third parties, like creditors, be expected to observe the matrimonial property system or would the estate be treated like an estate in community of property? The same considerations would have to apply in instances of insolvency. The entire estate would be subject to sequestration because there would be no registered ante nuptial contract. Creditors would not be bound by the matrimonial property regime.

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<sup>19</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012) par [38].

<sup>20</sup> Deeds Registries Act 47 of 1937 sections 86 and 87. Antenuptial contracts must be written, notarised and registered for them to be enforced against third parties. Failure to observe the formality requirements will result in the contract only being enforced against the parties (spouses) themselves.

The existing matrimonial property regimes are not sufficient for the purposes of polygynous customary marriages.<sup>21</sup> A marriage in community of property cannot exist, because two or more joint estates cannot exist. The court was clear on this matter, stating that two joint estates cannot co-exist.<sup>22</sup> A marriage out of community of property subject to the system of accrual has its own additional set of problems, how would the accrual be calculated with numerous wives. The Recognition of Customary Marriages Act specifically excludes the system of accrual and requires the court when considering the section 7(6) application to terminate this matrimonial property regime.<sup>23</sup> That leaves the marriage out of community of property, which I believe does not provide adequate protection to women in polygynous marriages. I submit that section 7(6) exists because none of the existing matrimonial property regimes work within the context of polygynous marriages.

The position of women living under customary law remains tenuous and women in polygynous marriages under this court ruling would not have adequate protection. The Constitution of South Africa provides the right to equality<sup>24</sup> and the right to culture.<sup>25</sup> In this context there is a potential conflict. How should these rights be balanced? Women living under customary law are subject to a plurality of laws and authorities and this makes securing their rights an unpredictable task.<sup>26</sup> In customary law the husband is the head of the family, and he is in control of all family and personal property.<sup>27</sup> Family property is under control of the head of the family or his heir and it has been argued that family members who are not heirs may be disadvantaged in accessing family property if this property forms part of a new joint estate.<sup>28</sup> In traditional customary settings women do not have their own assets, even if they acquired their own personal property it remains under the control of the family head.<sup>29</sup> An estate out of community of property at divorce would leave women unprotected when considering the entire matrimonial estate.

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<sup>21</sup> The Matrimonial Property Act 88 of 1984 makes provision for three matrimonial property regimes. Marriages in community of property, marriages out of community of property subject to the system of accrual and marriages out of community of property of profit and loss.

<sup>22</sup> *Ngwenyama v Mayelane and another* [2012] ZASCA 94 (1 June 2012) par [38].

<sup>23</sup> Section 7(7)(a)(1)(aa) Recognition of Customary Marriages Act 120 of 1998.

<sup>24</sup> Section 9 The Constitution of the Republic of South Africa, 1996.

<sup>25</sup> Section 31 The Constitution of the Republic of South Africa, 1996.

<sup>26</sup> Weeks, S M “Securing Women’s Property Inheritance in the context of Plurality: Negotiations of law and authority in Mbuzini Customary Courts and beyond” *Acta Juridica* 2011 140 – 174 at 156.

<sup>27</sup> Rautenbach C, Bekker J C, Goolam N M I *Introduction to Legal Pluralism 3ed* 2010 77 – 79.

<sup>28</sup> Mbatha, L “Reflection on the Rights created by the Recognition of Customary Marriages Act” *Agenda* 2005 42-47 at 45.

<sup>29</sup> Rautenbach C, Bekker J C, Goolam N M I *Introduction to Legal Pluralism 3ed* 2010 78 – 79.

Further financial consequences would be evident in the role that *lobolo* (bride-wealth) plays in contemporary society. It has been submitted that *lobolo* was seen as a means of security for the wife in the event of dissolution.<sup>30</sup> The practice has been altered and instead of livestock as payment, cash is the prevalent method of payment. This is a less predictable means of securing the financial position of the wife in the customary marriage.<sup>31</sup> If only the subsequent customary marriage is out of community of property then the *lobolo* payment would form part of the joint estate of the husband and the first wife. It has been submitted that women living under customary law do experience financial hardships after the dissolution of the marriage and that their families are not always able to support them.<sup>32</sup>

The Constitutional court in *Gumede v The President of the Republic of South Africa*<sup>33</sup> deferred to the legislature when considering the matrimonial property system of polygynous marriages entered into before the Act.<sup>34</sup> Perhaps it is the legislature's role to draft legislation that would address this problem. It may be necessary to design a fourth matrimonial property regime. It has been argued that a more innovative approach was needed when the reform of the laws relating customary marriage were implemented.<sup>35</sup> The same approach for civil marriages cannot be slotted into customary marriages, because the nature of these marriages is different. Another possibility would be to impose an adequate sanction if the section 7(6) application is not complied with. If the section 7(6) application is made and approved by a court then there would be no need for designing a fourth matrimonial property regime.

## 5. Conclusion

This paper has briefly discussed the history of customary marriages in South Africa, examined the Supreme Court of Appeal's interpretation of section 7(6) of the Recognition of Customary Marriages Act and provided a critique on the practical implications of the court's order. I have argued that the existing matrimonial property systems are not appropriate for polygynous marriages in South Africa. Section 7(6) was included by the legislature because

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<sup>30</sup> South African Law Commission *Project 90 The Harmonisation Of The Common Law and The Indigenous Law, Report On Customary Marriages* August 1998 122.

<sup>31</sup> Moore E and Himonga C "Protection of Women's Marital Property Rights upon dissolution of a Customary Marriage: A view from Inside and Outside the Courts" *CSSR Working Paper No.350* 2015 6.

<sup>32</sup> Moore E and Himonga C "Protection of Women's Marital Property Rights upon dissolution of a Customary Marriage: A view from Inside and Outside the Courts" *Working Paper No.350* 2015 6.

<sup>33</sup> (CCT 50/08) [2008] ZACC 23.

<sup>34</sup> *Gumede v President of the Republic of South Africa* (CCT 50/08) [2008] ZACC 23 par [56].

<sup>35</sup> Mbatha, L "Reflection on the Rights created by the Recognition of Customary Marriages Act" *Agenda* 2005 42-47 at 45.

none of the existing matrimonial property systems are appropriate for a situation where a husband has more than one wife. If one of the aims of the Act is to protect the interests of women in customary marriages, then an innovative solution needs to be incorporated into the existing matrimonial property system. The possibility of a fourth matrimonial property regime may have to be considered or an effective sanction, which does not result in invalidity of the subsequent marriage, needs to be imposed on the husband who fails to comply with the requirements of the Act.

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