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)

1 *Introduction*

In South African law, civil marriages are monogamous. Thus, as a rule, a party to an existing civil marriage may not enter into another marriage regardless of whether the subsequent marriage is a civil marriage, a customary marriage or a marriage (or civil partnership) under the Civil Union Act 17 of 2006. Any marriage (or civil partnership) concluded in violation of this rule is invalid. These rules have been confirmed by the legislature and the courts, and are straightforward and easy to apply (see *eg* s 8(3) of the Civil Union Act 17 of 2006; *Tutu v Tutu* 2 NAC 167 (1911) 169; *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Sogoni v Jacisa* 1970 BAC 76 (S) 77; *Qitini v Qadu* 1981 AC 42 (S) 77; *Zulu v Zulu* 2008 4 SA 12 (D)).

The position as regards the capacity of a party to an existing customary marriage to conclude a civil marriage, the validity of such civil marriage and the fate of the customary marriage once the civil marriage has been concluded are much less straightforward, *inter alia*, because of different legislative provisions having applied at different times in the past. In *Netshituka v Netshituka* (2011 5 SA 453 (SCA)) the supreme court of appeal had to grapple with these issues in the context of a civil marriage that was concluded during the subsistence of a polygynous customary marriage.

To be able properly to analyse the decision in the *Netshituka* case, a historical overview of the various legislative provisions and some of the judicial interpretations of these provisions must first be provided. Consequently, this case note begins with such historical overview. Next, we summarise the facts of the case, followed by a discussion of the judgment of the court. Then we set out our criticism of the judgment. Finally, we provide brief concluding comments.

2 *Historical overview*

Prior to the coming into operation of the Recognition of Customary Marriages Act 120 of 1998, customary marriages were referred to as "customary unions" and were not recognised as valid marriages (see the definition of "marriage" and "customary union" in s 35 of the Black Administration Act 38 of 1927). As they were not recognised as valid marriages, they presented no obstacle to the conclusion of a civil marriage during their existence.

Customary unions were regulated by the Black Administration Act (which came into operation on 1 September 1927: procl 201 *GG* 1650 (5-08-1927)). Of particular interest for present purposes is section 22 of the act, which came into operation on 1 January 1929 (procl 296 *GG* 1746 (21-12-1928)). This section did not render an existing customary union an impediment to a civil marriage. It provided that when a husband in a customary union entered into a civil marriage with somebody other than one of his wives at customary law he had to make a declaration upon oath before the magistrate or commissioner of the district in which he was domiciled stating

the names of all his customary wives and the children born from such marriages. The declaration also had to contain a statement relating to all property allotted to his customary wives or their respective houses and children. The husband was, however, not obliged to allot any property to his customary wives and their children before entering into the civil marriage (*Malaza v Mndaweni* 1975 BAC 45 (C) 55).

The act was silent on the validity of a civil marriage concluded without the required declaration. Section 22(5) merely stated that it was an offence to enter into a civil marriage without having made the declaration. Initially, in *Ndhlovu v Ndhlovu* (1937 NAC 80 (N&T) 84-85), it was held that the subsequent civil marriage was void. However, in *Malaza v Mndaweni* (1975 BAC 45 (C) 58), it was held that the civil marriage was valid. (The court in the *Malaza* case was not bound by the *Ndhlovu* decision, for although the *Ndhlovu* case was reported in the BAC it was in fact a Bantu divorce court decision. Further see *Mutandaba v Morenwa* 1971 NAC 326 (N-E).)

Because the civil marriage was valid, the status of the husband's customary union had to be established in terms of the common law. As the common law dictates that marriage is strictly monogamous, the wives in the husband's customary union were regarded as having been "discarded" as spouses when the husband entered into the civil marriage (see *eg* Bennett *Customary Law in South Africa* (2004) 65 239-240; 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* 144 145; Peart "Civil or Christian marriage and customary unions: the legal position of the 'discarded' spouse and children" 1983 *CILSA* 39 42.) However, section 22 protected the discarded spouses in two instances – upon termination of the customary union and upon the death of the husband. Section 22(1) conferred limited protection on the discarded wives and their children by obliging the husband to declare any property he had allotted to them or their respective houses before entering into a civil marriage, while section 22(7) provided that the "material rights" (that is, the financial rights) of the customary wives and their children were not affected by the civil marriage. Thus, the wife in the civil marriage did not have a greater right to the estate of her husband than she would have had if she were married to him by customary law (*ie*, if she were also one of his customary wives). Only material rights that had already been allotted were protected under section 22. This rule left the husband's customary wives with no recourse if he did not make the required declaration before entering into the civil marriage. However, discarded spouses received better protection upon their husband's death, because the customary union was regarded as still being in existence for the purposes of succession (Bennett 240; Himonga "Marriage" in Du Bois *et al* (eds) *Wille's Principles of South African Law* (2007) 362). Thus, the wife in the civil marriage was regarded as a customary wife insofar as inheritance was concerned. This rule, however, placed the wife in the civil marriage in a detrimental position, because she found herself in the position of a customary spouse when her husband died (Bennett 240).

On 2 December 1988, section 22 of the Black Administration Act was amended by section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 (procl 414 *GG* 11171 (4-03-1988)). As the amendment was not retroactive, the position of parties who had entered into a civil marriage during the subsistence of a customary union before 2 December 1988 was left unchanged.

As a result of the amendments effected to section 22(1) and (2), the parties to a customary union were able, after 2 December 1988, to convert their customary union into a civil marriage by concluding a civil marriage with each other, but neither of them was allowed to enter into a civil marriage with another person. As

the amended section expressly provided that no person "shall be competent" to enter into a civil marriage while he or she is a party to a customary union with another person, the parties lacked capacity to marry, with the result that a civil marriage concluded in violation of the section was clearly void (Sinclair assisted by Heaton I *The Law of Marriage* (1996) 222-224 n 52; Jansen "Family law" in Rautenbach *et al Introduction to Legal Pluralism* (2010) 52; *Thembisile v Thembisile* 2002 2 SA 209 (T)).

When the Recognition of Customary Marriages Act came into operation on 15 November 2000 (procl R66 *GG* 21700 (1-11-2000)), "customary unions" were turned into "customary marriages". The act also afforded retrospective recognition to all customary unions that were valid in terms of customary law and existed at the time of commencement of the act (s 2(1)). The act also repealed section 22(1)-(5) of the Black Administration Act (s 13 read with the Schedule of the Recognition of Customary Marriages Act). However, as the repeal does not have retroactive effect, section 22(1) and (2) of the Black Administration Act still applies to marriages which were concluded prior to the coming into operation of the Recognition of Customary Marriages Act.

The upshot is that a distinction has to be made between civil marriages concluded during the subsistence of a customary union between 1 January 1929 and 2 December 1988 and those concluded between 2 December 1988 and 15 November 2000. This distinction is crucial for a proper understanding of the dispute and judgment in the *Netshituka* case.

3 *Facts*

In the *Netshituka* case, the deceased entered into a civil marriage with M at a date which is not indicated in the judgment of the court. The marriage had to have taken place by 1984, as the spouses were divorced in that year. In 1997, the deceased entered into another civil marriage, this time with the first respondent (N). At the time, he was married to four other women in terms of customary law. One of these customary marriages had already been concluded in 1956, which was apparently before the deceased had entered into the civil marriage with M. The deceased died in 2008, leaving a will in which he appointed N executrix of his estate. One of the deceased's customary wives and her daughter contested the validity of the deceased's civil marriage to N as well as the validity of his will. The trial court dismissed their application for an order declaring the civil marriage between N and the deceased void and declaring the deceased's will invalid. The appellants appealed to the supreme court of appeal.

This case note does not deal with the validity of the deceased's will. It focuses solely on the family-law issue the court had to decide, namely whether the civil marriage between the deceased and N was valid even though it had been concluded while the deceased was married to other women at customary law.

The appellants alleged that the deceased's civil marriage with N violated section 22(1) and (2) of the Black Administration Act read with the amendments effected by the Marriage and Matrimonial Property Law Amendment Act. They contended that, by virtue of section 22, a husband in a subsisting customary marriage was incompetent to enter into a civil marriage unless he was marrying his only customary wife.

N denied that the deceased was married in terms of customary law when they entered into their civil marriage. She argued that the deceased's customary marriages had automatically been dissolved when he and his first wife at civil law,

M, had entered into their civil marriage. Therefore, the deceased was an unmarried man when she (N) had entered into a civil marriage with him after the dissolution of his civil marriage to M by divorce in 1984. In support of this argument, she cited *Nkambula v Linda* (1951 1 SA 377 (A)). In that case, the then appellate division held that

> "[a] man who is a partner to a customary union and subsequently contracts a civil marriage with another woman during the subsistence of the customary union must be regarded by this act as having deserted his wife, and under these circumstances the woman to the customary union is justified in leaving her husband without rendering her guardian liable for a refund of the lobola" (384D–E).

In the *Nkambula* case, the court further held that, apart from preserving the material rights of the customary wife and the children born of the customary marriage, the Black Administration Act "does not contemplate the existence side by side of a civil marriage and a customary union" (382G).

4 *Judgment on the family-law issue*

The unanimous judgment of the supreme court of appeal was delivered by Petse AJA. Mpati P and Bosielo, Tshiqi and Seriti JJA concurred in his judgment.

Petse AJA indicated that when the deceased had entered into his first civil marriage with M at the unspecified date that fell somewhere between 1 January 1929 and 1984 (the date of the spouses' divorce), the amendments brought about to section 22 of the Black Administration Act by the Marriage and Matrimonial Property Law Amendment Act did not yet apply (par 9). According to Petse AJA, when the deceased had married M, the section had permitted the co-existence of a civil and a customary marriage by one husband provided that the husband made the required declaration before entering into a civil marriage with a woman who was not one of his customary wives (see § 2 above).

Petse AJA pointed out that a number of authors have interpreted *Nkambula v Linda* as authority for the view that an existing customary marriage was automatically dissolved if one of the parties entered into a civil marriage with another person. (See *eg* Maithufi "The Recognition of Customary Marriages Act of 1998: a commentary" 2000 *THRHR* 511; Jansen "Multiple marriages, burial rights and the role of *lobolo* at the dissolution of the marriage" 2003 *Journal for Juridical Science* 120; Maithufi and Moloi 2005 *De Jure* 145; West "'Black marriages': the past and the present" 2005 *South African Deeds Journal* 10. These sources are cited at par 10 n 5 of the *Netshituka* case. Other authors who adopted this interpretation of the *Nkambula* case include Bennett (2004) 65; Hahlo *The South African Law of Husband and Wife* (1985) 34; Heaton *South African Family Law* (2010) 140; Himonga in Du Bois *et al* (eds) 362; Jansen in Rautenbach *et al* 52; Sinclair assisted by Heaton 247 n 121.) He, however, was of the view that the *Nkambula* decision has a narrower reach. He pointed out that in the *Nkambula* case the customary wife of the man who had entered into a civil marriage with another woman had left him because she claimed that he had deserted her by entering into the civil marriage and that, in this context, the appellate division had held that a man who enters into a civil marriage with another woman while he is a party to an existing customary marriage can be regarded as having deserted his customary wife, with the result that his customary wife is justified in leaving him without her guardian having to return the *lobolo* that had been paid in respect of the customary marriage (par 10). Petse AJA did not interpret this decision as entailing that the customary marriage was dissolved automatically because of the husband having entered into a civil marriage with another woman.

Referring to the facts of the present case, Petse AJA stated that it was common cause that the deceased's customary wives did not leave him after he entered into the civil marriage with M. He held that, at customary law, desertion by a husband of his customary wife is not irreparable, because the husband may *phutuma* (fetch) his wife and his desertion does not give her the right to refuse him when he fetches her, unless the circumstances correspond to those set out in the *Nkambula* case (par 12). As regards the possibility – hinted at by Bennett (*A Sourcebook of African Customary Law for Southern Africa* (1991) 261-262) – that *phutuma* might not be practised by all groups, Petse AJA held that although Bennett states that "the term '*phuthuma*' is used by the Southern Nguni people … it was not suggested in this court that the convention is not practised by the nation/s of which the deceased and his customary law wives were members" (par 12 n 10). He therefore simply assumed that the custom applied to the deceased and his customary wives.

Petse AJA further held that, in this case, the deceased never had to *phutuma* his customary wives because they did not leave him after he deserted them by entering into a civil marriage with M. After he divorced M, he again cohabited with his customary wives, thus showing his reconciliation with them. Furthermore, he referred to them as his first, second and third wives in his will (par 13). (What had happened to the fourth customary wife is not indicated in the judgment.)

From these facts, Petse AJA drew the startling conclusion that "to the extent that the deceased's civil marriage to Martha [M] may have terminated his unions with his customary law wives, those unions were revived after the divorce" (*ie*, after he divorced M) (par 13). As it is legally impossible to revive a marriage that has been terminated, one must assume that the acting judge of appeal simply phrased the statement inaccurately and meant to convey that the customary marriages were never terminated by the civil marriage.

Based on the evidence and his interpretation of the *Nkambula* case, Petse AJA concluded that the deceased was still married to his customary wives when he entered into the civil marriage with N.

Petse AJA then considered whether the deceased could validly have entered into a civil marriage with N while his customary marriages existed (par 14). This civil marriage was solemnised before the coming into operation of the Recognition of Customary Marriages Act, but after the amendment of section 22 of the Black Administration Act by the Marriage and Matrimonial Property Law Amendment Act; that is, between 2 December 1988 and 15 November 2000. As explained above (see § 2), during this period, spouses who were married to each other at customary law were competent to enter into a civil marriage with each other, provided that the husband was not also married to another woman at customary law. However, they were not competent to enter into any other civil marriage. Petse AJA referred to the interpretation of section 22 in the *Thembisile* case (par 32) in which it was held that, during this period, a civil marriage that was concluded while the male party was a party to an existing customary marriage with another woman was void (the *Netshituka* case par 15). As it "was not argued … that *Thembisile* was wrongly decided", Petse AJA applied the decision and held that the civil marriage between the deceased and N was void. (As the section expressly provided that no person "shall be competent" to enter into a civil marriage while he or she is a party to a customary marriage with another person, a civil marriage concluded in violation of the section is clearly void – see § 2 above. Thus, the decision in the *Thembisile* case was indeed correct.)

He accordingly upheld the appeal in this regard and substituted the order of the trial court with a declaration of nullity of the civil marriage (par 20).

5 *Criticism*

5.1 The court's interpretation of *Nkambula v Linda*

Our first and most fundamental criticism of the judgment in the *Netshituka* case is that it is questionable whether Petse AJA's interpretation of the *Nkambula* case and, consequently, his finding that the deceased was still married to his customary wives when he entered into the civil marriage with N is correct. Reading the judgment in the *Nkambula* case, one gets the distinct impression that the appellate division held that an existing customary marriage automatically and invariably comes to an end when the husband in the customary marriage enters into a civil marriage with another woman, and that the part of the decision Petse AJA focussed on (*ie*, the appellate division's statement that a man who enters into a civil marriage with another woman while he is a party to an existing customary marriage can be regarded as having deserted his customary wife, with the result that his customary wife is justified in leaving him without her guardian having to return the *lobolo* that had been paid in respect of the customary marriage) dealt primarily with the issue of the return of *lobolo*, that is, one of the consequences of the dissolution. At no point in his judgment did Petse AJA attempt to reconcile the express statement in the *Nkambula* case that, apart from protecting the material rights of the customary wife and her children, the Black Administration Act "does not contemplate the existence side by side of a civil marriage and a customary union" (382G) with his views on the continued existence of the customary marriage. This statement by the appellate division indicates that the court was of the view that an existing customary marriage automatically comes to an end when the husband enters into a civil marriage with another woman.

Support for this interpretation of the *Nkambula* case is to be found in the further statement in that decision that the co-existence of a civil and a customary marriage between one man and two different women "is entirely repugnant to our idea of a civil marriage" (382H). The appellate division further held that if a customary wife were to be compelled to return to her husband who had entered into a civil marriage with another woman, she would be sent "to a life of adultery", which the court would not sanction, as this would be improper and in conflict with "the moral and legal standards which we attach to a civil marriage" (383E). The appellate division further expressly rejected the statement by the court *a quo* that the material rights protected by section 22(7) of the Black Administration Act include the right of the discarded spouse to cohabit with her husband from the dissolved customary marriage (382B; further see *Malaza v Mndaweni* 1975 BAC 45 (C) 61).

It is submitted that these statements indicate that the appellate division indeed held that because of the monogamous nature of a civil marriage, an existing customary marriage must necessarily automatically come to an end if the husband enters into a civil marriage with another woman.

Further support for the view that the civil marriage terminates the husband's customary marriage can be found in *Matchika v Mnguni* (1946 NAC 78 (N&T) 79), *Tonjeni v Tonjeni* (1947 NAC 8 (C&O) 9) and the *Malaza* case (61-62). In the *Matchika* case, spouses in a customary marriage concluded a civil marriage with each other. After the wife deserted her husband, he terminated the civil marriage by divorce. He then approached the court to terminate the customary marriage. The court remarked: "This Court has repeatedly ruled that where natives are married by customary union and subsequently by civil rites the civil ceremony overrides the customary union and there is indeed only one union, viz, the civil" (74).

In the *Tonjeni* case, the deceased had three wives. The first two were customary wives and the last wife was married to the deceased by civil rites. The court declared: "A woman so married is in the eyes of the law her husband's only wife. Her marriage annuls the customary unions between her husband and any other women …" (9).

In *Malaza v Mndaweni*, the husband concluded a civil marriage while being a partner in a customary marriage with another woman. The court had to decide whether a civil marriage concluded without a declaration in terms of section 22 of the Black Administration Act is void. The court found that non-compliance with section 22 does not render the civil marriage void (58). It stated: "It is true that under Bantu law the union could in certain circumstances be revived, but this is, of course, not possible where the male partner has married another woman by civil rites" (62). (The reference to revival merely signifies that a husband in a customary marriage can *phutuma* his wife after she has deserted him – which actually means that the customary marriage is not terminated until the husband has tried to fetch his wife and she has refused on valid grounds to return to him. Thus, if the wife returns, the customary marriage simply continues to exist and does not revive in the true sense of the word.)

In view of the above analysis, it is submitted that Petse AJA's interpretation of the *Nkambula* case is incorrect. The application to have the deceased's civil marriage with N declared void should accordingly have been dismissed.

5.2 The court's approach to applying the rules regarding *phutuma*

Another concern relates to the ease with which Petse AJA assumed that *phutuma* is practised by the groups of which the deceased and his customary wives were members. Judicial notice may be taken of all existing principles of customary law, provided that the specific customary law "can be ascertained readily and with sufficient certainty" (s 1(1) of the Law of Evidence Amendment Act 45 of 1988). Petse AJA accepted that *phutuma* is practised by the groups of which the deceased and his customary wives were members simply because there was no proof that it does not exist in the relevant tribe. If it is unclear whether a particular rite is practised by a particular tribe (as is suggested by the statement by Bennett to which Petse AJA referred at par 12 n 10), evidence should be adduced as to whether it is in fact practised by the tribe. The recognition of customary law at the same level as the common law (see ss 39(2) and 211(3) of the Constitution of the Republic of South Africa, 1996; Bekker and Van der Merwe "Proof and ascertainment of customary law" 2011 *SA Public Law* 115 119) and the legislative authorisation of judicial notice of customary law do not empower the court to take notice of fictitious law or, without more ado, to ascribe one tribe's practice to another tribe.

In terms of the precedent system, the offhand remarks by Petse AJA in the *Netshituka* case, unanimously supported by the rest of the full bench of the supreme court of appeal, entail that *phutuma* can be relied upon even though the particular tribal group to which the parties belong might never have practised *phutuma*. Taken to their logical conclusion, these remarks imply that it can be accepted that *phutuma* is practised by all tribal groups in South Africa unless the contrary is proved. Such a "presumption" is not to be supported.

6 *Conclusion*

What is particularly unfortunate about the decision in the *Netshituka* case is the nonchalant approach of the full bench of the supreme court of appeal towards the

application of customary law and the legislation by which it is regulated. The court created a clearly incorrect precedent, because it incorrectly dismissed writers' interpretation of *Nkambula v Linda* without properly considering the whole of the judgment and all *dicta* in it, and because it ignored relevant earlier case law. A customary marriage concluded prior to amendment to section 22 by the Marriage and Matrimonial Property Law Amendment Act cannot be "revived". Furthermore, the only instance where such a customary marriage is regarded as valid is for the purposes of intestate succession upon the death of the husband in circumstances where section 22(7) of the Black Administration Act applies as it read before it was amended by section 1 of the Marriage and Matrimonial Property Law Amendment Act. Since the amendment of section 22 by the Marriage and Matrimonial Property Law Amendment Act, a husband has not been permitted to enter into a civil marriage during the subsistence of a customary marriage, unless the customary marriage is monogamous and the civil marriage is concluded between the customary wife and her husband (see § 2 above).

The practical effect of the decision in the *Netshituka* case is that no customary marriage was terminated in terms of section 22 of the Black Administration Act prior to its amendment by the Marriage and Matrimonial Property Law Amendment Act if the husband in the customary marriage concluded a civil marriage with a different wife. As the Recognition of Customary Marriages Act recognises all customary marriages entered into prior to the coming into operation of this act, the consequence of the decision in the *Netshituka* case is that customary marriages and civil marriages which a husband had concluded with different women before 2 December 1988 *co-exist* as valid marriages. In this way, the fundamentally monogamous nature of civil marriage is negated and polygyny permitted in a particular group of civil marriages.

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