The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to sections 3(1)(b) and 7(6) – Part 1

Pieter Bakker
BLC LLB LLD
Professor of Law, University of South Africa

1 INTRODUCTION


1 Tydskrif 2016.pdf 61 2016/04/29 10:27:40 AM
was not promulgated to merely recognise customary marriages but also to promote the equal status and capacity of spouses in customary marriages. The Act is a tool to reform customary marriage law rather than merely recognising the current customary marriage under a constitutional obligation to recognise customary law. The main objective of the Recognition of Customary Marriages Act is to apply and develop customary law to such an extent that it is compliant with the Bill of Rights. This approach is further strengthened by section 8(d) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The section prevents unfair gender discrimination by any traditional, customary or religious practice. The Recognition of Customary Marriages Act grants the wife in a customary marriage with equal status and capacity to her husband. By equalising the capacity and status of the husband and his wife (wives) the Act endeavours to depart from the strict patriarchal nature of customary law. With this principle, combined with the court’s duty to interpret the Act in a manner that promotes the spirit, purport and objects of the Bill of Rights, the legislature set the stage for progressive development of customary law. When the courts develop customary law they must be mindful of the traditional framework within which the customary marriage law functions. Unfortunately the courts only pay lip service to this principle. The courts tend to merely embed common law principles in the customary law system without investigating the impact such changes will have on the affected indigenous society. Ultimately customary law is a system based on customs that people in the customary community live by. This cannot be changed without the community buying into the changes. By creating law that is out of synchronisation with the community, the courts

5 S 6.
6 Bhe v Magistrate Khayelitsha 2005 1 SA 580 (CC) para 78; Mwambene and Kruuse 2013 AJ 292 294.
7 Brink v Kitshoff 1996 4 SA 197 (CC) para 44; Phumelela Gaming and Leisure Ltd v Gründlingh 2007 6 SA 350 (CC) paras 26–27.
8 Alexkor Ltd v The Richtersveld Community 2004 5 SA 460 (CC) para 51.
9 In Bhe v Magistrate Khayelitsha 2005 1 SA 580 (CC) the court applied the Intestate Succession Act 81 of 1987 (legislation based on common-law principles) to customary law succession. The Reform of Customary Law of Succession and Related Matters Act 11 of 2009 was promulgated to provide for aspects that were not regulated under Act 81 of 1987. In Gumede v President of the Republic of South Africa 2009 3 SA 152 (CC) the court replaced the customary law matrimonial property system with that of the common law by declaring monogamous customary marriages concluded prior to 15 November 2000 in community of property.
are merely increasing the divide between living customary law and official customary law.\textsuperscript{11}

Customary marriages concluded after the promulgation of the Recognition of Customary Marriages Act on 15 November 2000\textsuperscript{12} must comply with the validity requirements in the Act.\textsuperscript{13} The requirements are the following: parties must be 18 years of age (or have the necessary consent if they are minors, similar to a civil marriage in terms of the Marriage Act 25 of 1961); both parties must consent to conclude a customary marriage and the customary marriage needs to be “negotiated and entered into or celebrated in accordance with customary law”.\textsuperscript{14} The last requirement\textsuperscript{15} is the object of contention in the majority of cases concerning the validity of customary marriages under the Act.\textsuperscript{16} The section incorporates living customary law requirements into the Act.\textsuperscript{17}

Living customary law is regarded as an unwritten and adaptable body of law that can differ from tribe to tribe and vary from geographical area to geographical area.\textsuperscript{18} It can even be dissimilar in different family groups.\textsuperscript{19} This does not sit well with the western legal tradition that law should be certain or at least easily ascertainable.\textsuperscript{20} It further provides ample opportunity for a party to dispute the validity of a customary marriage if such a strategy is in his or her favour.\textsuperscript{21}

A dispute concerning the proof of a valid Tsonga customary marriage in the North Gauteng High Court, Pretoria, went on appeal to the Supreme Court of Appeal and concluded in the Constitutional Court. The judgement changed the

\begin{itemize}
  \item The moment a court decides on a principle of living customary law, that law becomes official customary law. The principle is entrenched in our law and loses its adaptable nature due the precedent system. The courts are therefore creating a new body of official customary law (see Bennett “Re-introducing African customary law to the South African legal system” 2009 \textit{Am J Comp L} 1 29–30).
  \item Proc R66 GG 21700 (1 Nov 2000).
  \item S 2(2).
  \item S 3.
  \item S 3(1)(b).
  \item \textit{Motsoato v Roro} [2011] 2 All SA 324 (GSJ); \textit{Southon v Moropane} [2012] ZAGPJHC 146; \textit{MM v MN} 2013 4 SA 415 (CC); Bekker and West “Possible consequences of declaring civil and customary marriages void” 2012 \textit{Obiter} 351 354; Bakker “Beweys van ’n gebruiklike huwelik kragtens artikel 3(1)(b) van die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998: \textit{Southon v Moropane} [2012] ZAGPJHC 146” 2013 \textit{Obiter} 579.
  \item \textit{MM v MN} 2013 4 SA 415 (CC) para 29. However, see Bakker 2013 \textit{Obiter} 579 586–589 who argues that the purpose of s 3(1)(b) was not to incorporate additional requirements for a valid customary marriage into the Recognition of Customary Marriages Act.
  \item Bennett \textit{Customary Law in South Africa} (2004) 44.
  \item \textit{Mabena v Letsalo} 1998 2 SA 1068 (T) 1070J–1071A. “It is not unheard of that within the same broader group of African People we find customary-law rules which differ. This may occur as a result of development that takes place in various communities within a group” (Jafta J in \textit{MM v MN} para 140). The question does, however, arise when a particular custom becomes legally binding. A deviation by one family group from the norm does not necessarily imply that such a custom becomes living customary law. In this regard, see Bennett 2009 \textit{Am J Comp L} 1 13–14.
  \item Van der Westhuizen J in \textit{Stilubane v Nqumela} 2009 2 SA 66 (CC) para 47 states that “[t]he need for flexibility and the imperative to facilitate development [of customary law] must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights”.
  \item Bakker 2013 \textit{Obiter} 579 589.
\end{itemize}
requirements for a valid polygynous customary marriage concluded under the Recognition of Customary Marriages Act.\textsuperscript{22} The decision further affected the patrimonial consequences of polygynous customary marriages concluded after the Act had come into operation. The High Court and Supreme Court of Appeal dealt with the question whether section 7(6) of the Recognition of Customary Marriages Act creates an additional requirement before a valid polygynous customary marriage can be concluded.\textsuperscript{23} \textit{MN v MM} 2012 4 SA 527 (SCA) declared that section 7(6) is not a requirement for a valid polygynous customary marriage concluded after the Act.\textsuperscript{24} On appeal, the Supreme Court of Appeal decision was confirmed in \textit{MM v MN} 2013 4 SA 415 (CC). The Constitutional Court however developed living Tsonga customary law to such an extent that the first wife’s consent is required for a further polygynous customary marriage to be valid.\textsuperscript{25}

The motivation behind all three the above decisions are to protect the interests of wives in customary marriages.\textsuperscript{26} By shifting focus between the protection of the first wife and the second or further wife, the courts came to different conclusions under the same set of facts. In all of the decisions regarding section 7(6) and section 3(1)(b), the courts emphasised the protection of either one or both wives but did not consider the practical implications of their decisions. Although the above cases have been discussed by several authors, none of the authors have provided a holistic view of the consequences of the court decisions ending with the Constitutional Court in \textit{MM v MN}.\textsuperscript{27} The purpose of this publication is to provide a holistic account of the implication of the above court decisions.

\textsuperscript{22} MM v MN 2010 4 SA 286 (GNP); MN v MM 2012 4 SA 527 (SCA) and MM v MN 2013 4 SA 415 (CC).


\textsuperscript{24} MN v MM 2012 4 SA 527 (SCA) para 23.

\textsuperscript{25} MM v MN 2010 4 SA 286 (GNP) para 22; MN v MM 2012 4 SA 527 para 12 and MM v MN 2013 4 SA 415 (CC) para 72.

SECTION 7(6) OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT

Section 7(6) requires a husband who wishes to enter into a further customary marriage, after the promulgation of the Recognition of Customary Marriages Act, to apply for the court’s approval of a written contract that will regulate the proprietary consequences of his future marriages. It is clear from the wording of section 7(6) that a single contract will regulate the matrimonial property of the future spouses. Consequently, when a man in a polygynous customary marriage intends to marry a further wife, he will again have to apply for a new contract to regulate his existing and new marriages.

2 1 Background and purpose of section 7(6)

Prior to Gumede v President of the Republic of South Africa the patrimonial consequences of monogamous and polygynous customary marriages entered into prior to the Recognition of Customary Marriages Act was regulated by customary law. The default position of customary marriages concluded after the Act was and still is in community of property. The South African Law Reform Commission (SALRC) initially proposed that a customary marriage concluded after the Act should be with separation of all property. It was reasoned that customary marriages with the separation of all property is more compatible with the property system of polygynous customary marriages. The traditional matrimonial customary property system is however sui generis and cannot be compared to any of the existing civil marriage matrimonial property systems. The SALRC’s proposal was met with extreme opposition by the public, as well as women’s rights groups and traditional leaders. The SALRC had to amend its initial proposal to that of community of property.

The SALRC was faced with the dilemma that the current matrimonial property systems do not provide for polygyny. The civil marriage is a strict monogamous concept according to the common law. Logically the existing matrimonial property systems are not designed to accommodate polygyny. In lieu of determining a suitable matrimonial property system the SALRC proposed that the court act as intermediary in determining a suitable matrimonial property system for the polygynous family, including the first wife, her children and extended family. The SALRC therefore proposed a court approved contract that will regulate the future matrimonial property system of all the customary marriages. One contract will regulate the patrimonial consequences of both (all) customary

---

28 2009 3 SA 152 (CC).
29 S 7(1).
30 S 7(2).
32 Ibid.
33 However, an attempt is made to harmonise the customary matrimonial property system with that of a marriage out of community of property in para 2 4 4.
34 SALRC para 6.3.4.12.
35 SALRC para 6.3.4.11–13.
36 SALRC para 6.3.4.15.
37 Ebrahim v Mahomed Essop 1905 TS 59; Seedat’s Executors v The Master (Natal) 1917 AD 302 209.
38 SALRC 148–149.
marriages concluded by a man. Where the spouses are married in community of property or out of community of property without exclusion of the accrual, the estate of the husband and his first wife needs to be dissolved before the new matrimonial property system can take effect.\textsuperscript{39} To protect all the parties concerned, including the first wife and the prospective spouse, the SALRC proposed that all parties with a sufficient interest must be joined in the proceedings.\textsuperscript{40}

Although the SALRC remained silent on the interaction between the two diverse and incompatible matrimonial property systems, the Department of Justice in its Memorandum on the Objects of the Recognition of Customary Marriages Bill, 1998 indicated that the Recognition of Customary Marriages Bill\textsuperscript{41} “bridges the gap between, existing customary marriages with their vested customary proprietary rights and a future dispensation that aims to improve the position of women and children”.\textsuperscript{42} It describes the role of the court in clause 7(5) of the Bill as an “umpire” that “referees” the transition from the customary proprietary system to that of a new proprietary system governed mainly by the Matrimonial Property Act 88 of 1984.\textsuperscript{43} It was consequently foreseen that it would be problematic for a customary matrimonial property system to co-exist with the matrimonial property systems available under the common law and the Matrimonial Property Act.

Section 7(6)–(9) place the onus on the court to facilitate the transition of the proprietary consequences of a monogamous marriage governed by customary law or by the Matrimonial Property Act to that of a matrimonial property system suitable for a polygynous marriage which will protect the interest of the first and second (or further) wives, their children and any extended family that might have a sufficient interest that needs to be protected.

2.2 Patrimonial consequences in terms of section 7

Section 7(6) and 7(7) regulates the patrimonial consequences of polygynous customary marriages entered into after the Recognition of Customary Marriages Act. Section 7(7)(a) is applicable to the existing matrimonial property system while section 7(7)(b) regulates the future property contract.

The court has a duty to terminate and effect division of the current matrimonial property system when the existing customary marriage is in community of property or subject to the accrual system.\textsuperscript{44} Section 7(7)(a)(ii) requires an equitable distribution of property. It is, however, uncertain whether this implies that the court can effect division other than that required by the matrimonial property system to reach an equitable distribution of property.\textsuperscript{45}

\textsuperscript{39} S 7(7)(a) of the Recognition of Customary Marriages Act.
\textsuperscript{40} SALRC 148–149. S 7(8) of the Recognition of Customary Marriages Act provides for this.
\textsuperscript{41} B10–98.
\textsuperscript{42} Idem para 3.7.
\textsuperscript{43} The gist of clause 7(5) of the Bill is contained in section 7(6) of the Recognition of Customary Marriages Act.
\textsuperscript{44} S 7(7)(a)(i).
\textsuperscript{45} Van Schalkwyk 2000 THRHR 492 argues that s 7(7)(a)(ii) and (iii) should only be applicable to customary marriages where the matrimonial property regime is regulated by customary law.
The Constitutional Court in *Gumede* found that the restrictions applicable to civil marriages with regard to redistribution in terms of section 7(3) of the Divorce Act do not apply to customary marriages. Moseneke DCJ indicated that “customary marriages should not be seen through the prism of the matrimonial proprietary regimes under common law . . . and must be understood in their own setting which does not place a premium on the dichotomy between marriages in and out of community of property”.46 He further explained that the Recognition of Customary Marriages Act strives to protect vulnerable parties and to resolve conflicts equitably.47 Consequently, it can be argued that the court can equitably distribute assets under section 7(7)(a)(ii) heedless of the matrimonial property system applicable to the customary marriage. Any other interpretation would defeat the purpose of the Act as set out by Moseneke DCJ and would “place a premium on the dichotomy between marriages in and out of community of property”.

The SALRC did not regard the nature of the property system of importance in practice “during a harmonious marriage, since problems tend to emerge only when the union is dissolved”.48 The SALRC was predominantly concerned with an equitable distribution upon divorce. The Commission did not grasp the importance of a matrimonial property system during marriage with regard to the protection of third parties. The SALRC further regarded polygynous marriage as nearly extinct: “All the provisions regulating control of property in polygynous households, for instance, have no bearing on the requirements of modern marriages, which are nearly all monogamous”.49 Polygyny is still practised.50 Under this misconception, the SALRC did not properly consider the proprietary consequences of a polygynous marriage. Consequently, the Act remains silent on a matrimonial property system compatible with customary law. The decision was left to the courts under section 7.51

2 3 Section 7(6) as requirement for a valid customary marriage

The Recognition of Customary Marriages Act is silent on the consequences of non-compliance with section 7(6). The question emerged whether non-compliance would lead to invalidity of the second marriage.52 The court settled the matter in *MM v MN* 2013 4 SA 415 (CC) by confirming the Supreme Court of Appeal decision that section 7(6) merely determines the patrimonial consequences and non-compliance does not render the second marriage void.53 It is however necessary to consider the various arguments advanced regarding compliance with

46 *Gumede* para 43.
47 Ibid.
48 SALRC 6.3.4.9.
49 SALRC 6.3.1.11.
50 This is evident from current cases such as *MM v MN* 2013 4 SA 415 (CC) and case studies such as De Souza 2013 *AJ* 239. However, it is indicated by Mwambene and Kruuse in a recent field study that actual polygyny is on the decline although there is a movement towards extra-marital affairs by the husbands without marrying the second woman (“Unfulfilled promises? The implementation of the Recognition of Customary Marriages Act in South Africa” 2015 *Int J Law & Fam* 237 252).
51 For a discussion of the nature of such a contract, see Bakker 2007 *THRHR* 481.
52 *MM v MN* 2010 4 SA 286 (GNP); *MG v BM* 2012 2 SA 253 (GSJ); *MN v MM* 2012 4 SA 527 (SCA).
53 Para 23.
section 7(6) prior to the Constitutional Court decision. Analogous arguments can be advanced under the requirement that the first wife needs to consent to a further marriage discussed in paragraph 3 in part 2.

The courts and authors agree that section 7(6) protects both the patrimonial property interests of the existing spouse or spouses and the prospective spouse. Their notions regarding the validity of a customary marriage in contravention of section 7(6) are dictated by the emphasis placed on the rights of the first wife as opposed to the rights of the further wife. Authors ranking the first wife’s rights above those of the second wife argue that the second or further marriage should be void. This is a natural reaction within a family law system historically based on monogamy. In a monogamous system the marriage relationship is protected against outside parties at all costs. This is, inter alia, why the common law accommodates the crime of bigamy.

Although Bertelsmann J in *MM v MN* 2010 4 SA 286 (GNP) confirms that section 7(6) needs to protect the rights of all the parties concerned, he emphasises the first wife’s fundamental rights. By acknowledging the validity of the second marriage without a court-approved contract, Bertelsmann J argues, the court would compromise equality between the spouses as protected by the Recognition of Customary Marriages Act. Due to the financial prejudice and the infringements of the first wife’s fundamental rights and those of her children Bertelsmann J regards a subsequent marriage without a court-approved contract as void. According to him, the purpose of section 7(6) is therefore to protect the rights of the first wife and her children and section 7(6) will, by implication, protect the second spouse when the court considers her views in the approval process of the future contract.

Bertelsmann J states in this regard:

“Most customary marriages are concluded by persons whose access to worldly goods is limited and whose financial security may be severely prejudiced by an earlier, or the conclusion of another, marriage if such fact is not disclosed to the spouses and dealt with by the contract and the court’s approval.”


55 Heaton 212 is of the opinion that an interpretation that regards the second marriage concluded without a s 7(6) contract as valid will make s 7(6) superfluous and leave the interests of the existing wives unprotected. Further, see MM v MN 2010 4 SA 286 (GNP); Bronstein “Confronting custom in the Customary Marriages Act 120 of 1998” 2000 SAJHR 561 562–563.

56 Bronn v Frits Bronn’s Executors (1860) 3 Searle 313; Hyde v Hyde and Woodmansee (1886) LR 1 P&D 130 133; Seedat’s Executors v The Master (Natal) 1917 AD 302 309; *Ex parte Soobiah: In re Estate Pillay* 1948 1 SA 873 (N) 879; *Ismail v Ismail* 1983 1 SA 1006 (A) 1019H.

57 Bakker “Bestaanbaarheid van bigamie as misdryf in ’n kultureel heterogene samelewing” 2006 THRHR 64 74–75.

58 2010 4 SA 286 (GNP) para 32. A second or further customary marriage concluded without the first wife’s consent is regarded by him as a gross violation of her rights to dignity, physical and emotional integrity and from emotional and economical abuse.

59 *Idem* para 27.

60 *Idem* paras 23–24.


63 *Idem* para 23.
Ironically, the limited access to “worldly goods” is one of the reasons why section 7(6) is not complied with and merely exists as paper law. Defiance of section 7(6) denies the second wife any legal protection, if the approach of Bertelsmann J is followed.

Bennett predicted that few husbands would comply with section 7(6). Although Bennett argues that it is essential to protect the first wife’s rights, he is of the opinion that the second wife’s rights should also be protected when the first wife does not object to the second customary marriage. He therefore proposes that the second marriage, when concluded without a contract in terms of section 7(6), should be voidable. A voidable marriage is not the ideal approach; however, it is more consistent with living customary law than regarding the second marriage as void.

Contrary to the court a quo, the Supreme Court of Appeal in MN v MM 2012 4 SA 527 (SCA) emphasised the protection of the second wife’s interests. The majority decision found that the harsh application of section 7(6) rendering the further marriage void, would not be analogous to the living customary law. A second wife would be regarded as married by the customary community if she complied with the customary requirements of a valid marriage but, officially, she would not be regarded as married due to the husband’s failure to comply with section 7(6). Ndita AJA regards this interpretation as contrary to the purpose of the Act of promoting the equality of all the spouses in a customary marriage. His approach is bolstered by the requirement that all spouses must be joined in a section 7(6) application. The court regards an interpretation that declares polygynous marriages void as contrary to the constitutional recognition of customary law and contrary to the purpose of the Recognition of Customary Marriages Act. Applying the purposive interpretation, the court finds that a disregard of section 7(6) does not render the subsequent customary marriage void. The court further emphasises that the only validity requirements contained in the Recognition of Customary Marriages Act are contained in section 3. The purpose of section 7(6) is merely to determine and regulate the proprietary consequences of a polygynous customary marriage and not to determine the validity of a customary marriage. The decision was confirmed by the Constitutional Court.

64 De Souza 2013 AJ 239 266.
65 Bakker 2007 THRHR 481 489.
68 This approach was rejected by Bertelsman J in MM v MN 2010 4 SA 286 (GNP) para 32 who stated that to regard the second marriage as voidable will “create a morass of uncertainty”.
69 2012 4 SA 537 (SCA).
70 Per Ndita AJA; Mthiyane DP and Ponnan JA concurring.
71 Para 21.
72 Ibid. Further, see Bakker 2007 THRHR 489 in this regard.
73 Ibid.
74 S 7(8); para 23.
75 Paras 21 24.
76 Para 21.
77 Para 23.
78 Paras 23–24.
79 MM v MN 2013 4 SA 415 (CC).
Determination of the question whether section 7(6) must be complied with is therefore dictated by whether an Afrocentric or Eurocentric approach is followed. In an Afrocentric approach the rights of the group, in this instance the family, carries more weight than that of the individual. A Eurocentric approach emphasises the rights of the individual above the rights of the group. The Constitutional Court followed an Afrocentric approach and confirmed that the family group needs to be protected. The first wife’s rights therefore do not weigh more than the rights of the second or further wives.

A decision regarding the validity of a customary marriage concluded without a court-approved written contract would influence one or both of the wives’ rights negatively. Should the subsequent marriage be void, the first wife’s interest would be entrenched, but the second wife would be left without recourse. The decisions of the Supreme Court of Appeal and Constitutional Court can be commended for not following the all-or-nothing approach of the High Court. The decision of the Supreme Court of Appeal provides the most practical solution, albeit not without its difficulties. By balancing the rights of the first and second wife both wives would have lesser means than in a monogamous marriage, but both their interests would be protected.

Although it is clear that the purpose of section 7(6) is to protect the patrimonial interests of the first and further wives in a customary marriage, the wives’ patrimonial interests are directly opposed to each other. Compliance with section 7(6) provides protection to both the first and further wives and ensures their participation in the process. Section 7(6) intends to protect the rights of rural women indirectly through an application by their husband. The application cannot be brought by one of the wives. The application process is expensive, complicated and unattainable for people living in a rural area. It is no surprise that section 7(6) is rarely complied with and women will not obtain the intended protection under this section.


81 See, eg, MM v MN 2013 4 SA 415 (CC) paras 62–74. The decision of the Constitutional Court hinges on the first wife’s right to “protect her own position” under the right to equality (para 72) and her autonomy and control over her own life under the right to dignity (para 73).

82 See also Van Niekerk 2013 SAPL 469 477.

83 The practical issues with regard to matrimonial property are discussed in para 2 4.

84 In this regard, see part 2 para 3.

85 Bekker and Van Niekerk 2010 THRHR 679 683 indicated that no contracts were registered in the deeds office by 2010. According to Franny Rabkin “Judgement puts the validity of Zuma’s marriages in doubt” Business Day 7 July 2010 (available at http://bit.ly/1SO15EW) only three such contracts were registered by 2010 according to the Women’s Legal Centre. Faranaaz Parker “Left in the lurch: New hope for women in polygynous limbo” Mail & Guardian: Web Edition Articles (online) 6 Jun 2012 (available at http://bit.ly/1IEuFMG) states that only a handful of such contracts were registered by 2012 according to the Women’s Legal Centre. Although the exact number of such contracts cannot be ascertained, it is safe to assume that very few contracts are registered.
2.4 Future matrimonial property system of polygynous marriages without a section 7(6) contract

In *MN v MM* 2012 4 SA 527 (SCA) the court found that a further marriage concluded without a court-approved contract in terms of section 7(6) will be a marriage out of community of property.86 The court did however not investigate other options. The Recognition of Customary Marriages Act is silent on the patrimonial consequences of a customary marriage concluded without the required court-approved contract. Polygynous customary marriages concluded prior to the Act are regulated by customary law.87 The patrimonial consequences of polygynous customary marriages concluded after the Act should have been determined by a court-approved contract. Defiance of section 7(6) creates a lacuna in the law that has been partially filled by the decision in *MN v MM* (SCA).88 The question is whether exclusion of community of property and accrual is the only suitable solution?89

2.4.1 Matrimonial property regulated by customary law

The Act does not prohibit the application of the customary matrimonial property law to polygynous marriages where the second or further marriage is concluded under the Act. *Prima facie* this seems to be the appropriate solution. There is no compatible matrimonial property system in the common law that can accommodate polygyny due to the strict monogamous nature of a civil marriage.90 The traditional patrimonial consequences of a polygynous customary marriage consist of three estates: family property, house property and private property.91 Each marriage forms a new house which is an independent patrimonial unit to be administered by the family head to the benefit of that house.92

House property consists of property allotted to the house by the family head, income of the wife or the income of siblings and property bought from the income and income that naturally accrues to the house due to the occupants of the house.93 Traditionally, in rural areas, the family head allots agricultural property and other means to his different houses to provide them with means of support.94 The wife’s access to property is therefore indirect through her husband.95 House property however still falls under the control of the husband to

86 Para 38.
87 S 7(1) of the Recognition of Customary Marriages Act.
88 The order is not applicable to polygynous customary marriages that existed prior to the Recognition of Customary Marriages Act (para 84).
89 The patrimonial consequences of s 7(6) have been discussed by several authors prior to the decision in *MN v MM* 2012 4 SA 527 (SCA) – see, eg, Van Schalkwyk 2000 *THRHR* 479 491–493; Bakker 2007 *THRHR* 481; Heaton (2010) 211–214.
90 See para 2.1.
91 Maganu 1938 NAC (N&T) 14; Sijila v Masumba 1940 NAC (C&O) 42; Zulu 1955 NAC 107 (NE); Olivier *et al* Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes (1992) 140–148.
92 For a detailed discussion, see Olivier *et al* (1992) 140–148.
94 Fanekiso v Sikade 5 NAC 178 (1925); Mgogoli 1966 BAC 53 (S).
be administered to the benefit of the particular house. There is a duty on the husband to maintain his wife and children from the house property but he is free to use the house property for his own benefit after he complied with this duty. He can however not transfer house property from one house to another without the wife’s consent.

Family property consists of the assets of the husband that are not allotted to a particular house. The husband is free to use family property as he pleases. This principle is a distortion of traditional customary law where ownership of family property was communal and used for the good of the family.

Personal property consists of items that can only be of value to the individual such as clothing, jewellery and livestock that ensure the spiritual wellbeing of a person.

Family and house property are administered by the husband and the wife has control over her personal property. Under the customary matrimonial property system the husband is regarded as the owner of family and house property. The house property includes the income of the wife. The wife has control over her personal property, which usually does not include anything of economic value. Upon death of the husband, the family property was inherited by the heir of the husband, usually the eldest son of the first or main wife and house property was inherited by the eldest son in the house. The system was adequate under traditional customary law where survival of the group was the primary concern and mere subsistence of the individual was sufficient. In modern society, this construction is to the detriment of women and children since survival depends on ownership of property. The patrimonial consequences of a customary marriage place the wife in a disadvantaged position upon divorce. Traditionally, she

97 Sithole 1945 NAC (N&T) 50; Ngcobo 1946 NAC (N&T) 14; SALRC 6.3.1.8.
98 Upon such a transfer, a debt relationship exists between the two houses. Fanekiso v Sikade 5 NAC 178 (1925); Mbuli 1939 NAC (N&T) 85; Sijila v Masumba 1940 NAC (C&D) 42.
100 Ibid.
102 Cases dealing with personal property of the wife: Yimba 1940 NAC (N&T) 35; R v Njokweni 1946 NPD 400; Xakaza v Mkize 1947 NAC (N&T) 85; Pungose v Shandu 1956 NAC 180 (NE) and Dhlamini 1967 BAC 7 (NE).
104 Ibid 255. In terms of s 89 of the Natal Code of Zulu Law Proc R151 GG 10966 (09-10-1987) the earnings of a medicine woman or midwife belongs to her and falls under personal property.
105 This was, however, changed by the decision in Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA 2005 1 BCLR 1 (CC). The traditional customary law of succession was replaced by the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 which applies the Intestate Succession Act 81 of 1987 to customary succession with the inclusion of certain women as spouses in the context of customary law. The traditional law of succession will only be applicable if the man concludes a will to that effect.
107 Gumede v President of Republic of South Africa 2009 3 SA 152 (CC) para 46.
would have returned to her father’s house and he would have supported her and the children from the marriage remained with the husband’s family.\textsuperscript{108} There would have been no need for further support from the husband.

The customary position is untenable under the Constitution. The wife’s plea led the court in \textit{Gumede} to declare section 7(1) of the Recognition of Customary Marriages Act\textsuperscript{109} and section 20 of the Zulu Codes\textsuperscript{110} unconstitutional and invalid with regard to monogamous customary marriages. As a solution the court applied section 7(2) to monogamous customary marriages concluded prior to the Recognition of Customary Marriages Act and regarded all such marriages to be in community of property.

Even though section 6 of the Recognition of Customary Marriages Act provides that the wife in a customary marriage has equal status and capacity to her husband in property matters, her capacity is subject to the matrimonial property system governing the marriage. Under customary law, her capacity will be limited due to her husband’s exclusive capacity to administer the family and house property. Her limited capacity however translates to discrimination based on sex and marital status in terms of section 9 of the Constitution.

From the above, it is incontrovertible that the customary law matrimonial property system is unconstitutional and cannot be applied to future polygynous customary marriages. Most of the consequences of a customary marriage have been replaced by common law principles\textsuperscript{111} and it is inevitable that the customary law matrimonial property system will have to be replaced, due to its discriminatory application.

\subsection*{2.4.2 Community of property}

Community of property provides each spouse with an undivided and indivisible half-share in all property and liabilities of the spouses prior to the conclusion of the marriage and during the subsistence of the marriage.\textsuperscript{112} Community of property is a common law concept and therefore provides only for a monogamous marriage consisting of two spouses sharing equally in the common estate.\textsuperscript{113} The property system can therefore only be applied to monogamous marriages. Community of property cannot be regarded as a solution.\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{108} Bennett (2004) 266.
\item \textsuperscript{109} S 7(1) determines that customary law regulates the matrimonial property system of customary marriages concluded prior to the Recognition of Customary Marriages Act.
\item \textsuperscript{110} S 20 of the Zulu Codes determined that the husband has control over family and house property.
\item \textsuperscript{111} Bakker 2012 \textit{THRHR} 151 155, 157.
\item \textsuperscript{112} Estate Sayle \textit{v Commissioner for Inland Revenue} 1945 AD 388 395; De Wet \textit{v Jurgens} 1970 3 SA 38 (A) 46D; Du Plessis \textit{v Pienaar} [2002] 4 All SA 311 (SCA) para 1; Mazibuko \textit{v National Director of Public Prosecutions} 2009 6 SA 479 (SCA) para 48.
\item \textsuperscript{113} Van Schalkwyk 2000 \textit{THRHR} 491–492 497 proposes that community of property can be applicable to a polygynous marriage by excluding all the spouses’ assets prior to the marriage, the spouses will then share equally in one joint estate after the further marriage.
\item \textsuperscript{114} Heaton (2010) 213 and 213 fn 53 discusses the myriad of practical issues that may arise should community of property be applied by the court. However, Van Schalkwyk 2000 \textit{THRHR} 491 argues that community of property is possible if property of the spouses prior to the marriage is excluded.
\end{itemize}
2.4.3 Complete separation of property\textsuperscript{115}

Complete separation of property was regarded by the SALRC as the appropriate property system. It was initially proposed as the default matrimonial property system for all customary marriages. However, the proposal was met with opposition\textsuperscript{116} and was changed to community of property for monogamous customary marriages concluded after the Recognition of Customary Marriages Act\textsuperscript{117} and later extended to monogamous customary marriages concluded prior to the Act.\textsuperscript{118} Although separation of property does not provide sufficient protection for the wives during the subsistence of the marriage,\textsuperscript{119} they are protected by the court’s power to redistribute property upon divorce.\textsuperscript{120} The Intestate Succession Act and the Maintenance of Surviving Spouses Act provide some protection upon death of the husband.\textsuperscript{121} An additional benefit of separation of property is that the first wife’s property is protected upon conclusion of a further customary marriage by her husband with another wife.

2.4.4 Patrimonial consequences without compliance to section 7(6)

From the discussion above it is clear that there are only two matrimonial property systems that can be applied to polygynous customary marriages without further amendments to the current law: the proprietary consequences in terms of customary law and complete separation of property. It was established above that the proprietary consequences in terms of customary law is discriminatory in nature without any grounds for justification and therefore unconstitutional. Only one matrimonial property system that can be applied to polygynous customary marriages remains and that is complete separation of property.

The practical implications of non-compliance with section 7(6) will be explained with two examples: where a husband in a polygynous customary marriage concluded prior to the Recognition of Customary Marriages Act concludes a further customary marriage after the Act and where a husband in an existing monogamous customary marriage concludes a further marriage after the Act.

2.4.4.1 Husband in a polygynous customary marriage concluded prior to the Act concludes a further customary marriage after the Act

The patrimonial consequences of the customary marriages concluded prior to the Recognition of Customary Marriages Act are determined by customary law.\textsuperscript{122} The further marriage concluded after the Act will be regarded as a marriage out

\textsuperscript{115} With regard to the application of the accrual to future polygynous customary marriages, see Bakker 2007 \textit{THRHR} 486 and Heaton (2010) 213.

\textsuperscript{116} SALRC para 6.3.4.11.

\textsuperscript{117} S 7(2).

\textsuperscript{118} \textit{Gumede v President of the Republic of South Africa} 2009 3 SA 152 (CC).

\textsuperscript{119} Separation of property is unfair towards wives that do not have the capacity to increase their own estate during the subsistence of the marriage. The accrual system was introduced to circumvent this. See Heaton (2010) 214.

\textsuperscript{120} S 7(3) of the Divorce Act is applicable when a customary marriage is dissolved by divorce into s 8(4)(a) of the Recognition of Customary Marriages Act. The date of the marriage or the particular matrimonial property system applicable is irrelevant (\textit{Gumede} paras 42–44).

\textsuperscript{121} See fn 105.

\textsuperscript{122} S 7(1).
of community of property.\textsuperscript{123} Although the customary law matrimonial property system is communal in nature, individual property rights can be clearly distinguished.\textsuperscript{124} It is therefore possible to harmonise the customary property system with a marriage out of community of property under common law. The husband can be regarded as owner of family property and house property.\textsuperscript{125} The wife is regarded as owner of her personal property.\textsuperscript{126} Personal property in this regard must comply with constitutional values and social reality and therefore cannot merely include property of a personal nature. It would be justified to argue that the nature of ownership in property in living customary law has developed to such an extent that more than personal items are owned by women. Personal property should also include a wife’s income and everything acquired with her income. In effect, house property bought by the wife with her income will fall in her estate under personal property. Such an interpretation would promote the equality between customary spouses in accordance with section 9 of Constitution and section 6 of the Recognition of Customary Marriages Act.

The husband’s estate will consist of family and some of the house property.\textsuperscript{127} The wife’s estate will consist of her contribution towards the house property and her personal property, which includes her income and all property acquired with her income. Property acquired by the wife for the benefit of the house will be regarded as house property, but will fall within the wife’s estate.\textsuperscript{128} The rights of the wives are protected but the construction might negatively affect the interests of the husband. However, should this lead to an unfair distribution of assets upon divorce the court could make an equitable order in terms of section 8(4)(a) of the Recognition of Customary Marriages Act. It is conceded that this is not a true representation of the position in traditional customary law but provides a practical solution to the current dilemma of polygynous customary marriages, particularly since section 7(6) is not considered a requirement for a valid customary marriage.

2 4 4 2 Husband in an existing monogamous marriage concludes a further marriage after promulgation of the Act

If section 7(1) was still applicable to monogamous customary marriages concluded prior to the Act, the proposed construction above could have been used

\begin{itemize}
\item \textsuperscript{123} MN v MM 2012 4 SA 527 (SCA) para 38.
\item \textsuperscript{124} De Souza 2013 AJ 239 269.
\item \textsuperscript{125} The husband’s personal property traditionally falls in the family property (Olivier \textit{et al} (1992) 144; Bennett (2004) 258).
\item \textsuperscript{126} It is acknowledged that customary principles should be determined under customary law and not seen through a common law lens. However, the Recognition of Customary Marriages Act replaced the customary consequences with that of the common law and there is no reason why this should not be done with polygynous marriages as well, especially when considering the rights of women in such marriages.
\item \textsuperscript{127} That is house property bought by the husband for the house. This would exclude property that is regarded as a gift to the wife in the particular house (see para 2 4 1).
\item \textsuperscript{128} Another option would have been to regard the polygynous marriage as a marriage with one estate to the benefit of all, similar to a marriage in community of property but with more than two shares in the estate. However, neither the common law nor the customary law provides for such a matrimonial property system. Such a construction can furthermore be to the detriment of wives with regard to property brought into the marriage. See fn 114 above.
\end{itemize}
to make sense of the customary matrimonial property system of a husband in a monogamous customary marriage concluded prior to the Act who concludes a further customary marriage after the Act. Currently monogamous customary marriages concluded prior to the Act are by default in community of property. The spouses to a monogamous customary marriage therefore share equally in the family and house property, which is the ideal position.

Should the husband subsequently conclude a further marriage and not comply with section 7(6), the first marriage would be in community of property and the further marriage(s) would be out of community of property. Practical problems will arise during the subsistence of the marriage: for example, if the husband intends to purchase a family home for his second wife he would need the required consent, under section 15(2) of the Matrimonial Property Act, of his first wife. When the husband purchases immovable property, the first wife would become co-owner of the immovable property, but the second wife would not. Half of the joint estate would belong to the first wife and would go to her upon death before the estate could be divided between the heirs, which would leave the second wife in a detrimental position. Should the immovable property be purchased by both the husband and his second wife, the first wife would still share in the ownership of the immovable property. The first wife’s rights would similarly be limited. She would, for example, not be able to invoke immediate division of the joint estate under section 20 of the Matrimonial Property Act 84 of 1988. An order in terms of section 20 would only be granted if no other person was prejudiced by the order and such an order would prejudice the second wife.

Upon divorce, the court has the power to make an equitable distribution, but what would such a distribution be? The first wife is owner of half the joint estate between her and her husband. The family home of the second wife would be included in the joint estate. The court would not divide the estates of all the parties in three as this would be extremely detrimental to the first wife. To accept that the second wife was not entitled to a share in the family home, particularly where she contributed towards payment thereof from her income, would be detrimental to her. It is unclear how a court would approach such a set of facts. The only conceivable solution would be to disregard the existing matrimonial property dispensation and apply a similar division as the first scenario discussed above.

We are in need of legislative intervention. The Recognition of Customary Marriages Act should be amended to such an extent that the community of property ceases to exist upon the date the husband enters into a further marriage. The future matrimonial property system should then be out of community of property.
property. Until such intervention, the courts would have to regard the particular facts of each case to determine an equitable distribution.

In *MM v MN*\(^{135}\) the court emphasised the rights of the first wife to the detriment of the further wife.\(^{136}\) Balance was restored by the decision in *MN v MM*\(^{137}\) when the Supreme Court of Appeal found that section 7(6) is not a validity requirement. Evident from the discussion above, the practical application of the decision is problematic. However, the decision of the Constitutional Court in *MM v MN*\(^{138}\) yet again toppled the balance by placing more emphasis on the protection of the rights of the first wife. The impact of this decision on polygynous customary marriage in general is investigated in part 2.

(to be continued)

\(^{135}\) 2010 4 SA 286 (GNP).
\(^{136}\) See, in particular, paras 71–75.
\(^{137}\) 2012 4 SA 527 (SCA).
\(^{138}\) 2013 4 SA 415 (CC).