

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 2*

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3 Consent as requirement for a valid polygynous customary marriage

In *MM v MN* 2013 4 SA 415 (CC) the court did not consider section 7(6), but rather decided the matter on whether the consent of a first wife is a requirement for a valid customary marriage under Tsonga law in terms of section 3(1)(b) of the Recognition of Customary Marriages Act.¹³⁶

Section 3(1)(b) determines that a customary marriage “must be negotiated and entered into or celebrated in accordance with customary law”.¹³⁷ According to the majority decision of *MM v MN* 2013 4 SA 415 (CC), section 3(1)(b) provides for customary law to “impose validity requirements in addition to those set out in ss (1)(a)”.¹³⁸ To determine what these requirements are, the court will have to look at the “customary practices of the relevant community”.¹³⁹ According to the court, the purpose of section 3(1)(b) is to provide space for living customary law to evolve by imposing additional requirements under section 3(1)(b) that might be relevant in a particular community and so prevent the stagnation of the dynamic nature of living customary law.¹⁴⁰ Such adaptations include changes to

* See 2016 *THRHR* 231 for Part 1.

136 The Constitutional Court approved of the Supreme Court of Appeal’s decision that s 7(6) of the Act is not a requirement for a valid customary marriage (para 41).

137 “Customary law” is defined as “the customs and usages usually observed among the indigenous peoples of South Africa and which form part of the culture of those peoples” (s 1).

138 *MM v MN* 2013 4 SA 415 para 29. *Contra* see Bakker 2013 *Obiter* 579 588–589.

139 *Idem* para 29.

140 *Idem* para 32. Ironically, the interpretation of the courts contributes to the stagnation of customary marriage law. The courts use s 3(1)(b) to elevate all the validity requirements that existed prior to promulgation of the Recognition of Customary Marriages Act to requirements for a valid customary marriage concluded after the Act came into operation (*MM v ES* 2014 JDR 1085 (SCA); *Southon v Moropane* [2012] ZAGPJHC 146; *Matsoaso v Roro* [2011] 2 All SA 324 (GSJ); *Mrapukana v Master of the High Court* [2008] ZAWCHC 113; *Maloba v Dube* [2008] ZAGPHC 434). This resulted in a list of additional requirements to s 3(1)(a) that need to be present for a valid customary marriage. The traditional requirements were not regarded as absolute requirements prior to the

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customary law to protect the rights of women in customary marriages and, upon divorce, in compliance with the purpose of the Recognition of Customary Marriages Act.¹⁴¹

The following requirements for a valid customary marriage were identified by the courts under section 3(1)(b): the parties need to pay or at least negotiate *lobolo*; a marriage ceremony has to take place; and the wife needs to be integrated into her husband's family.¹⁴² The Constitutional Court in *MM v MN* 2013 4 SA 415 (CC) introduced an additional requirement that the first wife in a customary marriage must consent to a further marriage before an additional polygynous customary marriage may be concluded.

3 1 Requirement of consent for a valid marriage in customary law

Before discussing the available information regarding traditional customary law and the consent of the first wife to the marriage of a second wife, a note on methodology is required. The writer often receives criticism with regard to the use of authoritative sources that are regarded as "old" by some critics. At the heart of this is the question as to the way in which customary law should be determined in our law. Customary law is first and foremost found in official sources such as textbooks, codifications, legislation, case law and restatements of the law.¹⁴³ These official sources are often regarded as tainted and a distortion of the true living customary law; however, they do still provide an accessible means to determine whether certain customary law rules exist(ed).¹⁴⁴ Although these sources might not represent the exact living rule of today, it is indicative of the existence of a particular customary law rule that might or might not have developed over time. The official law, therefore, is a good starting point, whereafter it can be ascertained whether the position has changed.¹⁴⁵ Clear proof that an official customary law rule is a distortion of the living law or no longer practiced by the relevant community is required. Such proof may be found in recent case law, new restatements of the law and field studies.¹⁴⁶ If only old sources are available it is presumed that this is the current position, due to a lack of proof to the contrary. Not all indigenous customs can be regarded as customary law.¹⁴⁷ Confirmation that a custom complies with the requirements set out by *Van Breda v Jacobs*¹⁴⁸

Recognition of Customary Marriages Act. The absence of some of the traditional requirements did not necessarily render the customary marriage void (*Mabena v Lesoalo* 1998 2 SA 1068 (T) 1073A–C; *Sila v Masuku* 1937 NAC 121 (N&T) 123; *Sibiya v Mtembu* 1946 NAC 90 (N&T) 90; *Memami v Makaba* 1950 NAC 178 (S) 180; *Ngcongolo v Parkies* NAC 103 (S) 105).

141 *Ibid.*

142 See fn 141.

143 Bekker and Van Niekerk 2009 *SAPL* 206 218; Bennett 2009 *Am J Comp L* 1 19. Codifications, legislation and case law are binding whereas textbooks and restatements of the law have persuasive value.

144 There are, however, a number of authentic restatements of customary law: see Bekker and Van Niekerk 2009 *SAPL* 206 219.

145 Bennett 2009 *Am J Comp L* 1 19.

146 *Idem* 19–25.

147 *Idem* 24.

148 1921 AD 330. The *Van Breda* test requires that a custom must be certain, uniformly practiced, observed for a very long time and reasonable. Due to the adaptable nature of customary law, the requirement that a custom must be observed for a very long time can be indicative of a customary law principle, but it cannot be regarded as an absolute

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is required. Any other approach would create a fictitious customary law devoid of living reality.¹⁴⁹

The moment the court considers a rule of living customary law, it becomes part of a body of case law. In this regard, Bennett states: “The fact that sources of customary law are so varied in both form and content suggests that we should not make a clear-cut distinction between official and living customary law.”¹⁵⁰ It is therefore beneficial to use the rich body of official customary law as far as it is consistent with the living law and the Constitution.¹⁵¹

Below is a statement of traditional customary law with regard to the requirement that the first wife’s consent is required for a further customary marriage by her husband.

In traditional customary law, marriage is a family affair.¹⁵² The primary purpose of marriage is to strengthen ties between two families and procreation of clan members to enhance survival of the family groups.¹⁵³ Consequently, arranged marriages were the norm and a traditional customary marriage could be concluded without the consent of the bride or groom.¹⁵⁴ Although forced marriages were possible, parents did consider their children’s wishes.¹⁵⁵ The parents knew that if their child is unhappy in marriage it might cause a breakdown in family ties, rather than strengthening them.¹⁵⁶ The bride or groom could elope with someone else if they did not want to enter into an arranged marriage.¹⁵⁷ This could, *inter alia*, happen by means of *ukuthwala*¹⁵⁸ or they could conclude a civil marriage.¹⁵⁹ Due to the strict patriarchal upbringing of children in customary

requirement (see *Shilubana v Mwamitwa* 2009 2 SA 66 (CC) paras 52–57). Bennett 2009 *Am J Comp L* 23–24 argues that an additional requirement similar to the proof of customary international law is required. The community needs to regard the rule as obligatory.

149 For a detailed discussion on how customary law should be determined, see Bennett 2009 *Am J Comp L* 1–31.

150 *Idem* 21.

151 In this regard, Bennett 2009 *Am J Comp L* 1 3 commented: “Most African countries would regard this body of materials [official customary law] as a valuable resource, but in South Africa, it is seen as problematic. Here, the official sources are thought to be tainted by their association with colonialism and apartheid.”

152 Hartman *Aspects of Tsonga law* (1991) 4 54; Olivier *et al* (1992) 41; Rammutla *The “official” version of customary law vis-à-vis the “living” Hananwa family law* (LLD thesis Unisa 2013) 143; Button *South Africa’s system of dispute resolution forums: The role of the family and the state in customary marriage dissolution* CSSR Working Paper No 339 (2014) 13.

153 Van Tromp *Xhosa law of persons* (1947) 33; Ashton *The Basuto* (1952) 16–21; Hammond-Tooke *Bacha society* (1962) 91; Hartman (1991) 4 54.

154 Boonzaaier *Die familie-, erf-, en opvolgingsreg van die Nkuna van Ritavi met verwysing na ander aspekte van die privaatreg* (D Phil thesis, UP, 1990) 91; Coertze (1990) 144.

155 Boonzaaier (1990) 91–92; Coertze (1990) 144; Olivier *et al* (1992) 41–42; Bennett (2004) 200.

156 Boonzaaier (1990) 92.

157 Coertze (1990) 145; Hartman (1991) 19; Bennett (2004) 200.

158 The Xhosa term means “to carry away”. *Ukuthwala* can take the form of elopement or mock abduction with or without consent of the woman’s guardian. Not all indigenous tribes adhere to the *ukuthwala* custom. For a discussion on this custom, see Van Tromp (1947) 63–75; Hammond-Tooke (1962) 100–102; Olivier *et al* (1992) 17–18.

159 Boonzaaier (1990) 103–104; Coertze (1990) 145; Olivier *et al* (1992) 42.

communities, they usually obeyed the wishes of their families and rebelled in exceptional cases only.¹⁶⁰

Consent of the bride and groom is required under the Recognition of Customary Marriages Act.¹⁶¹ Today, a customary marriage is still a bond between two family groups and not merely between two individuals.¹⁶² On the whole, the involvement of the families remains a requirement for the conclusion of a customary marriage.¹⁶³ However, there are exceptions to the general rule.¹⁶⁴ A man who is economically independent sometimes is able to afford the *lobolo* of his first marriage, which makes it possible for him to conclude a marriage without assistance of his father and even without his father's consent.¹⁶⁵ There is a trend developing towards a more individualistic customary marriage with the consequence that the involvement of the extended family is eroded.¹⁶⁶

Legislation and most academic publications remain silent on whether the first wife's consent is required before her husband may conclude a further customary marriage. The author could not find any quantitative research on this subject. It must be kept in mind that the purpose of customary marriage is to maintain family relationships.¹⁶⁷ A husband will need to act with his wife's approval in all family matters if he wants to maintain a good relationship with her and her family.¹⁶⁸

In this regard, Boonzaaier comments:

“Alhoewel hierdie saak bevestig dat 'n man se vrou hom nie kan verhinder om 'n verdere huwelik te sluit nie, is dit volgens informante 'n dwase man (*xiphukuphuku*) wat 'n huwelik teen sy vrou se wens sluit. Die praktyk bewys dat daar gewoonlik nyd, twis en spanning in so 'n man se kraal ontstaan wat uiteindelik tot 'n egskeiding lei.”¹⁶⁹

Discord in the family will result if the husband continuously ignores the wishes of his wife. This can eventually lead to divorce. Logically, for this reason a husband will consult his wife before entering into a further marriage rather than facing

160 Hartman (1991) 19; Olivier *et al* (1992) 41; Bennett (2004) 200. If a woman severely opposed a marriage and her parents do not heed her wishes, she can break the *hlonipa* rules (rules of conduct towards her father-in-law and groom's family) which is a clear indication of the repudiation of the marriage (Van Tromp (1947) 34). Usually, the *lobolo* for the first marriage was paid by the groom's father and he could influence his son in the choice of a bride (Olivier *et al* (1992) 41; Bennett (2004) 205).

161 S 3(1).

162 Boonzaaier (1990) 195–196; Coertze (1990) 141; Higgins *et al* 2006 *Fordham Int LJ* 1653 1671–1673; Rammutla (2013) 144; Button (2014) 13.

163 Jansen (2010) 45 47.

164 *Ibid*; Bakker 2013 (3) *Obiter* 579.

165 Even where the man can afford to pay his own *lobolo*, he will still ask the permission of his father. Nowadays, there is not much the father can do to prevent his son from marrying and he is not allowed to withhold his consent without a sound reason. It is highly irregular for a man to conclude a marriage without his father's assistance as there can be dire consequences. However, such marriages do take place and is regarded as valid. See Coertze (1990) 145; Hartman (1991) 18–19; Bennett (2004) 205.

166 Bennett (2004) 205; Rammutla (2013) 188. According to Ashton *The Basutu* (1952) 82, this trend was already notable in 1952 and should be much more prominent today. In this regard, the wishes of the bride and groom are starting to play a more prominent role than the wishes of the families they belong to.

167 Coertze (1990) 131; Boonzaaier (1990) 46; Olivier *et al* (1992) 9; Bennett (2004) 188.

168 Laydevant *The Basutu* (1952) 71.

169 Boonzaaier (1990) 201.

a breakdown in rapport between the families. The question however remains whether actual consent of the wife is a requirement for a valid further customary marriage under living customary law?

According to Boonzaaier and Hartman, under the Tsonga the approval of the first and other wives is expected before a man can enter into a further customary marriage, although it will not affect the validity of the second marriage.¹⁷⁰ This is common courtesy and prevents discord between the wives, but is not a legal requirement.¹⁷¹ However, his wives may not withhold consent or prevent him from concluding a further marriage.¹⁷² Should the first wife object, she can take the matter to the husband's family council.¹⁷³ If she has a compelling argument against the conclusion of a further marriage, the family council will ask the husband to reconsider.¹⁷⁴ Her consent is consequently not required.¹⁷⁵ The husband merely has a moral duty to inform his wife or wives.¹⁷⁶ If she does not agree and has a valid concern, she can take the matter further. It is not sufficient to withhold consent or expressly state that she does not consent to the second marriage. The husband is able to proceed with the marriage if she fails to approach the family council with her concern.¹⁷⁷

Coertze indicates that under the Bafokeng¹⁷⁸ the first wife has authority over the lesser wives and her concurrence is required before the husband can enter into a further marriage.¹⁷⁹ He explains that the husband has to use cattle from their joint property to pay *lobolo* for the further wife and that custom dictates that she must be informed before such property can be used.¹⁸⁰ He refers to a particular case decided in the traditional court¹⁸¹ where a man used joint property to pay for the *lobolo* of his second wife without informing his first wife.¹⁸² The court ordered him to pay back the money; however, it remained silent on the validity of the second marriage.¹⁸³ This example confirms that the husband has a moral

170 *Idem* 200–201. Further, see Hartman (1991) 57–58.

171 Boonzaaier (1990) 200–201.

172 *Ibid.*

173 Boonzaaier (1990) 200–201; Hartman (1991) 57.

174 Hartman (1991) 57–58.

175 In this regard, Boonzaaier (1990) 200–201 and Olivier *et al* (1992) use the word “instemming” (closest translation might be “accord”) rather than “toestemming” (“consent”). In this regard, in *MM v MN* 2013 4 SA 415 (CC) Froneman J, Khampepe J and Skweyiya J state: “Courts must also not assume that such a notion as ‘consent’ will have a universal meaning across all sources of law” (para 49).

176 It is important to differentiate between a social practice, such as a moral obligation, and a legal norm with legal consequences. Not all social practices are legally binding. In this regard, see Bennett 2009 *Am J Comp L* 1 13; Kruuse and Sloth-Nielsen 2014 *PELJ* 1710 1771–1722.

177 Boonzaaier (1990) 200–201; Hartman (1991) 57–58.

178 One of the Tswana-speaking tribes classified under the Sotho-group. Bekker and Rautenbach (2010) 21.

179 *Bafokeng family law and law of succession* (1987) 171.

180 Poulter *Family law and litigation in Basotho society* (1976) 176 indicates that the husband is under a strong moral obligation to consult his wife but, if he fails, this does not render the transaction void.

181 *Lekgotla lê legolo*.

182 190–191. The concept of family property does not exist under the Bafokeng. The husband's unallocated property falls into the estate of the first wife's house (191).

183 Poulter (1976) 176 indicates that although the husband is under a strong moral obligation to consult with his wife before he uses house property, the lack of consultation does not render the action invalid.

obligation to inform his wife, but the validity of the second marriage is not dependent on the consent of the first wife.¹⁸⁴

Under the Xhosa, it is customary for the husband to discuss any further marriage with his first wife.¹⁸⁵ She preserves peace and harmony in the family and the dignity of the family unit depends largely on her.¹⁸⁶ Hammond-Took¹⁸⁷ indicates that permission of the relevant wife is needed in order for the husband to use house property.¹⁸⁸ Under the Xhosa, it seems that the husband will need consent from the wife to use cattle of her house as *lobolo* and not consent for the further marriage to be valid.

The above is indicative that the consent of the first wife is not a requirement for a valid second marriage under traditional customary law.¹⁸⁹ To maintain harmony in the home and, for proprietary reasons, the husband is under a moral obligation to inform his first wife of a further marriage. Should the first wife be opposed to a further marriage, she can approach the husband's elders to convince the husband not to marry a further wife.¹⁹⁰ The husband's elders will convince the wife to accept the further marriage should she not have a valid reason for opposing the further marriage. The decision ultimately remains with the husband, although he would be influenced by the consideration to maintain harmony in the family and remain respectful towards his elders.¹⁹¹

3 2 Constitutional Court decision on consent under Tsonga customary law

Both the High Court¹⁹² and the Supreme Court of Appeal¹⁹³ decided the matter based on section 7(6) of the Recognition of Customary Marriages Act.¹⁹⁴ The courts did not consider whether the first wife's consent is necessary for a valid

184 There is an exception under the Bafokeng. Where the husband concludes a second marriage after he has sired children with the first wife, his first wife's express consent is required (165). According to Coertze, no polygynous marriages were left under the Bafokeng in 1987 (188). Whether this is currently the position is uncertain.

185 Van Tromp (1947) 85.

186 *Idem* 85.

187 (1962) 150–151.

188 According to Van Tromp 109–110, the house property belongs to the husband and he does not need the consent of his wife to use the property for the payment of *lobolo*.

189 The court in *MM v MN* 2013 4 SA 415 (CC) para 51 remarked that customary law is not uniform and consent may have different manifestations in different communities. This is true to some extent, but the general principles of family law are similar amongst all the communities with variations in the rituals. It is, nevertheless, true that more development might have taken place in one community due to certain needs in the community. The court can therefore take judicial notice of the traditional principles, but the parties need to prove any development in the community. In this regard, see *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

190 It is accepted of the wife to agree to a further marriage as polygyny is part of her culture. However, when the wife has a valid objection it will be discussed in the family to resolve the issue. See De Souza 2013 *AJ* 239 269–270.

191 There might be exceptions in modern society where the husband does not have strong family ties and will then proceed as he pleases, which will render the traditional protection of the wife void.

192 *MM v MN* 2010 4 SA 286 (GNP).

193 *MM v MN* 2012 4 SA 527 (SCA).

194 For a discussion of these cases, see Bekker and Van Niekerk 2010 *THRHR* 679; De Souza 2013 *AJ* 239; Van Niekerk 2013 *SAPL* 469; Müller-Van der Westhuizen 2014 (1) *LitNet Akademies* 155; Himonga and Pope 2013 *AJ* 318; Maithufi 2013 *De Jure* 1078.

Tsonga customary marriage. There was no need for the High Court to consider consent of the first spouse as it found that compliance with section 7(6) is a requirement for the conclusion of a second customary marriage. Even though the requirement of consent was argued before the High Court, the Supreme Court of Appeal did not consider the question due to the absence of a cross-appeal challenging the validity of the second marriage.¹⁹⁵ This created the unfortunate state of affairs where the Constitutional Court in *MM v MN* 2013 4 SA 415 (CC) had to consider the question whether the consent of the first wife is required for a valid second marriage under Tsonga customary law. This should have been done by a lower court to prevent a new precedent being set by the Constitutional Court as court of first and final instance.¹⁹⁶

In order to determine whether the consent of the first wife is a requirement for a valid second customary marriage, the court allowed evidence from four groups of witnesses: individuals living in Tsonga customary marriages; an advisor to a traditional leader; traditional leaders and academic customary law experts.¹⁹⁷ The court found from the witness statements that the husband must inform the first wife of the further marriage. She is expected to agree and assist with the further marriage. Harmony is promoted in this manner between all concerned. If the wife refuses to “consent” to the further marriage, the husband will try to persuade her and, if he is unsuccessful, the respective families will be called upon to assist.¹⁹⁸

On the evidence of the witness statements, the court concluded that the living Tsonga customary law requires the wife to be informed of a further marriage before such a marriage is valid.¹⁹⁹ This conclusion seems to be either a distortion of the traditional requirement as discussed in paragraph 3 1 above, or proof that the traditional rule developed over time. Nevertheless, there is not sufficient proof from the evidence that such a rule does exist in the living Tsonga customary law. Traditionally, the husband merely has a moral obligation to inform his wife. No legal rule exists that the second marriage will be void if the first wife is not informed.²⁰⁰

Although the Constitutional Court warns that consent with regard to marriage under customary law may have a different meaning than that in common law,²⁰¹ the court developed the customary law concept of consent to comply with the common law understanding thereof.²⁰² A moral obligation was made law by the Constitutional Court’s order with the consequence of rendering a marriage void and disregarding the relationship between families and the customary law dispute resolution structures.²⁰³

195 Para 11.

196 See minority decision of Jafta J (Mogoeng CJ and Nkabinde J concurring) para 142.

197 In the minority judgement of Zondo J, he indicated that the case should have been decided on the same record as the High Court and Supreme Court of Appeal and no additional evidence should have been called (paras 95 111). For a discussion of the evidence led by the witnesses, see Kruuse and Sloth-Nielsen 2014 *PELJ* 1710 1717–1721.

198 Para 61.

199 *Idem*.

200 Kruuse and Sloth-Nielsen 2014 *PELJ* 1710 1724.

201 Para 49.

202 Para 74.

203 The dispute resolution procedure will be discussed in par 3 3.

The court found that the living customary law did not protect the first wife's rights to equality and dignity adequately.²⁰⁴ With regard to the first wife's right to equality, the court found:

"[The first wife] cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent."²⁰⁵

With regard to the first wife's right to dignity the court found:

"Autonomy and control over one's personal circumstances are a fundamental aspect of human dignity. However, a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent ... it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining the partner's consent."²⁰⁶

The court concludes that it is insufficient to merely inform the first wife of the further marriage.²⁰⁷ The Tsonga living customary law infringes on the first wife's rights to equality and dignity. Consequently, the court developed the Tsonga customary law to require the consent of the first wife prior to the conclusion of a further marriage by her husband.²⁰⁸

Paragraphs 85 to 87 initially create the impression that the decision of the court is not limited to Tsonga customary marriage, but is applicable to all other customary marriages. This arises from the statement that the order is not retrospective in nature as

"it may be that *consent was not a requirement in some customary-law systems* and in those cases retrospective application may have inequitable consequences for women who entered into a further customary marriage without knowing that consent was a requirement for the validity of those marriages".²⁰⁹

The court further states that "the general requirement of consent operates only prospectively, to customary marriage entered into after this judgement has been published", without limiting the application to Tsonga customary law. Nonetheless, in the order the court declares that it only developed Tsonga customary law to the extent that the first wife's consent is required for a valid further marriage under section 3(1)(b) of the Recognition of Customary Marriages Act.²¹⁰

All further Tsonga customary marriages concluded after 30 May 2013 require the consent of the first wife.²¹¹ The court emphasised that the decision is only applicable to a monogamous customary marriage where the husband intends to take a further wife. Although the court stated *obiter* that the principles of equality

204 Para 75.

205 Para 72.

206 Paras 73–74.

207 Para 75.

208 Paras 75–76 83. Himonga and Pope 2013 *AJ* 318 322–323 argue that the court did not set a minimum requirement for consent and this can therefore accommodate systems where the wife should only be informed. There are, however, no degrees of consent and a party either consents or not. Under the standard set by the court to merely inform a person, will not be sufficient. The wife will have to indicate her consent (expressly or tacitly) after she has been informed.

209 Para 86. My emphasis.

210 Para 89.

211 Paras 85–86.

and dignity are applicable to polygynous customary marriages where the husband concludes a further marriage, it did not decide on this to provide space for the development of the requirements of polygynous customary marriages.²¹²

3.3 Evaluation of the Constitutional Court's decision regarding consent

There was no need for the court in *MM v MN* 2013 4 SA 415 (CC) to develop the Tsonga living customary law.²¹³ According to Tsonga law, the first wife has to be informed of a further marriage. The second marriage is not recognised should the husband fail to inform his first wife.²¹⁴ This is not the traditional position, but seems to be a development in the living law.²¹⁵ The first wife's interests are consequently protected by the living customary law. Customary law has procedures protecting the rights of the first wife should she not agree to the further marriage after she was informed.²¹⁶ A disagreement is usually resolved through these structures.²¹⁷ By developing the living customary law, the court transplanted the common law concept of consent into the living customary law and, by implication, repealed the customary law dispute settlement procedures that are in place to protect the interests of the first wife. A better approach might have been to acknowledge the dispute settlement process that is followed if the first wife should disagree with the marriage and to emphasise that the wife's rights to dignity and equality should be respected in the process. This would have opened the process for internal development by the community.

The above requires further explanation. As indicated earlier, the aggrieved first wife will approach her family if she does not want her husband to marry a second wife after she has been informed by him of the impending marriage. The family will try and reconcile the parties²¹⁸ and will either convince the wife to continue with her marriage and allow her husband to marry a further wife or, if the wife has a valid reason, convince the husband not to take a further wife. If reconciliation of the parties is in vain, the matter can be taken to the headman or court. However, according to Button, very few women take family matters any further.²¹⁹ Of the few instances where women did approach a forum outside of the family, they tend to approach the court rather than the headman.²²⁰

212 There is a trend for courts to deliberately ignore legal aspects concerning existing polygynous customary marriages; see further *Gumede*. The reason behind this is that the Recognition of Customary Marriages Act provides for equality between the husband and his wives (s 6). However, the customary law system of polygyny is based on a hierarchy of wives which is incompatible with the notion of equality between the spouses.

213 Both the minority decisions by Zondo J and Jafta J (with Mogoeng CJ and Nakabinde concurring) are of the same opinion. The difference between the two minority judgements is that Zondo J was of the opinion that no further evidence should have been called (para 130).

214 Para 127.

215 See para 3.1. If it is merely a distortion of the living rule by the witnesses, then the court could have developed the rule to require the wife to be informed. This would enable her to approach the family council to prevent a further marriage or, at the very least, reconcile the parties.

216 *Ibid.*

217 This was stated by one of the witnesses (para 55).

218 Button (2014) 13–14.

219 *Idem* 20.

220 Higgens *et al* 2006 *Fordham Int LJ* 1653 1702–1703; Button (2014) 22.

The reason why the parties tend not to approach the headman is indicated in Higgins *et al* to be that divorce settlement through mediation in the community is patriarchal in nature and does not protect the wife who seeks a divorce.²²¹ In fact, most of the traditional leaders interviewed in the study indicated that they would not allow for divorce, but rather try and resolve the issues and keep the parties together.²²² The first wife is disadvantaged due to the patriarchal approach to dispute resolution and not the traditional institution of dispute resolution itself. From a patriarchal perspective, the current dispute is merely the first wife being difficult in not allowing her husband to marry a second wife, which is an acceptable customary practice.²²³ In this regard, Higgins *et al* states:

“The general acceptance of customary legal norms coupled with the lack of access to formal legal institutions make customary law especially resistant to change, even in the face of a clear constitutional mandate. Indeed, the quite limited impact of the *Bhe*-decision suggests that neither the choice model nor the equality model is likely to succeed in modifying the patriarchal structure of customary law without significant cultural change having taken place”.²²⁴

The appropriate solution would be to train traditional leaders in effective gender neutral mediation to make them more susceptible to substantive equality issues.²²⁵ Traditional leaders will further be in the position to inform parties of future steps that need to be followed under the Recognition of Customary Marriages Act, should the parties want a divorce.

The court followed an extreme route by effectively disregarding the traditional position and declaring all second Tsonga marriages (and, most likely, all second customary marriages) invalid, should they be concluded without the first wife’s consent. This does not bring substantive equality about. The court has merely empowered the first wife and disempowered the second. The second wife is left without recourse. The only person that really benefits is the husband. He can continue “marrying” wives without the first wife’s consent and, as soon as the second wife wants a divorce, he may merely deny the fact that he is married to her. Effectively, the decision disempowers women further and entrenches the husband’s patriarchal position.

Similar to the enforcement of section 7(6) as a requirement for a valid marriage prior to the Supreme Court of Appeal decision, the court yet again created a process far removed from the reality of customary communities’ lives. Similar to section 7(6), it will simply be ignored by the customary community. The requirement of consent of the first wife will only be used by the marriage denier where it is to his or her advantage at the time of death or divorce to the detriment of the further wife who will be left without legal recourse.²²⁶

Although the court did limit the application of the decision to Tsonga law, the arguments advanced for the protection of the equality and dignity of the first wife are applicable to all first wives in a customary marriage and not only to those under Tsonga law. All first wives’ rights to equality and dignity will be compromised should the husband marry a further wife without his first wife’s

221 2006 *Fordham Int LJ* 1653 1701–1702. See Button (2014) 22 for further reasons.

222 *Idem* 1682–1683.

223 Mwambene and Kruuse 2015 *Int J Law & Fam* 237 250.

224 *Idem* 1703.

225 Higgins *et al* 2006 *Fordham Int LJ* 1653 1708; Button (2014) 23.

226 See Bakker 2013 *Obiter* 579 589.

consent. It is therefore safe to assume that the requirement of consent will be applicable to all customary marriages concluded after 30 May 2013.²²⁷

The court ordered that a copy of the order be sent to Houses of Traditional Leaders and the Minister of Home Affairs.²²⁸ This, however, is not a sufficient measure to reach the communities that live in accordance with customary law. The community will not be aware of the change in customary law and men will continue to conclude second and further customary marriages without the consent of the first wife.

The Constitutional Court did not consider the rights of the further wife.²²⁹ The balance of the decision in the Supreme Court of Appeal turned on the construction that the rights of the further wife is negatively affected by the husband's decision not to comply with section 7(6) of the Recognition of Customary Marriages Act. She has no control over the application as only the husband is allowed to apply for approval of the section 7(6) contract. This is contrary to the purpose of the Recognition of Customary Marriages Act to protect all spouses under customary law. Ndita (AJA) states in the Supreme Court of Appeal decision that by

“excluding women in polygamous marriages, validly married according to customary law, and recognised as such in their communities, is deeply injurious to women in such marriages, as it affects them negatively... in the areas of, *inter alia*, succession, death and social standing. It constitutes a gross and fundamental infringement of their right to dignity, right to equal status in marriage, as well as the rights to physical and emotional integrity”.²³⁰

For this reason, amongst others, the court found that section 7(6) cannot be a requirement for a valid further customary marriage. The protection provided to the further wife by the Supreme Court of Appeal was reversed by the Constitutional Court. The Constitutional Court disregarded the rights to equality and dignity of the further wife. She is yet again excluded from protection under the law in a process over which she has no control. Frequently, the further wife is not aware of the first marriage and will only become aware of the truth upon divorce or the death of her husband.²³¹ Before the dire realisation that she is not officially regarded as married, she will continue to live as a married woman and be regarded as such by the community. In this regard, a headman in KwaZulu-Natal commented: “It is a question of this is your body, your flesh. You are one person now [when married in terms of living customary law]. Now there comes the law from Cape Town or Pretoria to separate you.”²³²

4 Conclusion

Section 7(6) of the Recognition of Customary Marriages Act was promulgated to protect the interests of all the spouses in a customary marriage. Unfortunately, the section is not practically feasible. The requirements under the Recognition of Customary Marriages Act are simply ignored by married men who enter into further customary marriages. The Supreme Court of Appeal restored the balance by

227 Maithufi 2013 *De Jure* 1078 1087; De Souza 2013 *AJ* 239 258.

228 Para 89.

229 Kruuse and Sloth-Nielsen 2014 *PELJ* 1710 1724–1725.

230 *MN v MM* 2012 4 SA 527 (SCA) para 21.

231 See, eg, *MM v ES* 2014 JDR 1085 (SCA).

232 Quoted by De Souza 2013 *AJ* 239 272.

finding that, under section 7(6), a court-approved contract is not a requirement for a valid polygynous customary marriage concluded after the Recognition of Customary Marriages Act came into operation. The decision balanced the rights of the first and further wives. The only possible matrimonial property system that can be applicable to a customary marriage which does not comply with section 7(6) is a marriage out of community of property with the exclusion of the accrual system. A marriage out of community of property can co-exist with a customary marriage where the matrimonial property system is regulated by customary law; however, practical issues arise where the first marriage was in community of property and the second marriage is out of community of property. The only possible solution is to disregard the matrimonial property systems of the spouses and divide the property as if the parties are married out of community of property as explained under paragraph 2 4 4 in Part 1.

The commendable approach of the Supreme Court of Appeal in *MN v MM* which focused on the interests of all spouses concerned was negated by the Constitutional Court's decision in *MM v MN*. Under the auspices of respecting the living customary law, the Constitutional Court imposed a Western world view on living customary law by emphasising the rights of the first wife to the detriment of the second wife. The development of customary law has come full circle from the initial question whether the second wife's rights should be protected.²³³ The Constitutional Court placed greater emphasis on the rights of the first wife and, in the process, yet again disregarded the rights of the further spouse in a polygynous customary marriage concluded after the Recognition of Customary Marriages Act came into operation. Although the Constitutional Court limited its decision to Tsonga law, the arguments advanced in the majority decision can be advanced in regard to all first wives in a customary marriage. It follows that the consent of the first wife is a requirement for a valid customary marriage concluded after the Constitutional Court decision in *MM v MN*. The Constitutional Court acted as court of first and last instance and the legislature is the only avenue to protect the further wife's rights that remains. It is time to re-evaluate the current marriage law and develop a new legislative framework that can accommodate all forms of marriage within the ambit of the Constitution.

233 Bakker 2007 *THRHR* 481.