REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/37362

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

MAKHOSAZANE ZERISH GAMA Applicant

and

BONISILE MCHUNU First Respondent
As an executrix of the late estate
Buzamashinga Mchunu

THE DEPARTMENT OF HOME AFFAIRS Second Respondent

THE MASTER OF THE SOUTH GAUTENG HIGH COURT Third Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The applicant seeks three orders. Firstly, she seeks an order condoning the late registration of the customary marriage entered into

between herself and Buzamashinga Mchunu ("*the deceased*"). Secondly, the applicant seeks an order compelling the second respondent to register the customary marriage entered into between herself and the deceased on 8 June 2000. Finally, the applicant seeks an order directing the second respondent to issue a marriage certificate to her.

[2] The application is opposed strenuously by the first respondent. On the other hand, the second and the third respondents, who were served with the current application, have not filed opposing papers, and appear to abide the decision of this Court. In fact, the second respondent advised the applicant to launch the present application in a letter addressed to her on 29 October 2010. The letter, "*Annexure 17*" to the founding papers, becomes relevant later herein. The second respondent is the Department of Home Affairs a Government Department charged with the responsibility for the registration of all marriages, in particular, in terms of Regulation 5B of the Regulations made under the Marriage Act 25 of 1961. The third respondent is the Master of the South Gauteng High Court.

COMMON CAUSE FACTS

[3] From the papers several facts are common cause. At this stage it is appropriate to state that whilst the applicant is resident in Pimville, Soweto, the first respondent resides in Ladysmith, in the KwaZulu-Natal Province. It is common cause that the deceased and the first respondent entered into a valid customary marriage at Weenen on 9 May 1996. The customary marriage

certificate was duly issued on 13 December 2002. At the time of his death on 1 February 2010, the deceased was still married to the first respondent. The deceased was conducting and operating a taxi business, and appears to have been financially secured. Three children were born out of the marriage between the deceased and the first respondent. The first respondent has since been appointed by the third respondent as executrix in the estate of the deceased. It is further common cause that out of the relationship between the deceased and the applicant, which commenced at least prior to 8 June 2000, four minor children were born. These children were born on 9 October 2000, 14 April 2003, and 3 June 2007 (twins), respectively. The children presently stay with the applicant at the Pimville, Soweto, address which the applicant refers to as "*the common home*" with the deceased.

THE ISSUES IN DISPUTE

[4] The only issue to be determined by this Court is whether there existed a valid customary marriage between the deceased and the applicant. If the answer is in the affirmative, it may become necessary to also determine the status of such customary marriage. There is also a dispute as to whether the first respondent currently maintains and cares for the minor children living with the applicant. However, this issue is irrelevant to the determination of the main dispute.

THE APPLICANT'S CONTENTIONS

[5] The applicant contends that prior to 8 June 2000, the deceased together with his family, as well as the first respondent, convened a meeting to discuss the issue of the applicant becoming the second wife to the deceased. At that meeting the first respondent in fact gave her consent. Thereafter, on 8 June 2000, a delegation of the deceased's family attended at her parental home to resume the lobolo negotiations. In this regard there is attached to the founding papers a handwritten letter in the isiZulu language. In terms of the letter, the appellant's family was represented by her biological father, M J Gama, and N Gama as well as B Gama. The deceased's family was represented by B Ximba and T Mhlongo. The agreed lobolo was R7 800,00, representing seven head of cattle. The confirmatory affidavit of M J Gama, who represented the applicant's family, is also attached. Also attached to the founding papers is a confirmatory affidavit of B Ximba, the biological father to the applicant, who was representing the applicant's family. The lobolo letter is dated 8 June 2000 and signed by all the witnesses on the same date. The addresses of the applicant's father and B Ximba, her uncle, is the address in Pimville, Soweto. This suggests, overwhelmingly that the lobolo negotiations occurred at the venue referred to by the applicant as the "*common home*", which she shared with the deceased. It is common cause that the address of the applicant in Pimville, Soweto, is in fact the immovable property of the deceased. The first respondent concedes that the deceased and the applicant lived together at this address, although not as husband and wife on her version.

5.1 The applicant further alleges that she had established a relationship with the first respondent. The latter in fact knew in advance about the lobolo negotiations and the customary marriage between the deceased and the applicant. Both wives visited each other during the December holidays and attended family functions as the wives of the deceased. However, the relationship soured after the death of the deceased on 1 February 2010. The main reason for the breakdown of the relationship was the disagreement over the distribution of the assets of the deceased. The deceased passed away at the Pimville, Soweto, common home where the applicant and the deceased had been living together as husband and wife from the month of their customary marriage (8 June 2000).

5.2 The applicant continues to make some significant allegation which may have an important bearing on the outcome of this matter. This is that, in 2006 at Ladysmith, KwaZulu-Natal, she and the deceased instructed Dion Röder Attorneys of Ladysmith, KwaZulu-Natal, to register their customary marriage and prepare a written contract, as envisaged in sec 7(6) of the Recognition of Customary Marriages Act 120 of 1998 ("*the Customary Marriages Act*"). The attorneys duly drafted the necessary documentation which the deceased and the applicant commissioned later on 22 April 2008. However, due to lack of funds and the ill-health of the deceased, the attorneys could not

proceed with the formal court application as is required by sec 7(7), (8) and (9) of the Customary Marriages Act. Attached to the replying papers is correspondence and a copy of the written contract from Attorneys Dion Röder. I deal later in this judgment with these annexures.

5.3 On 29 June 2010, the applicant approached the second respondent to register the customary marriage. However, the second respondent refused to accede to the request, which resulted in the instant application.

THE FIRST RESPONDENT'S CONTENTIONS

[6] The first respondent opposes the relief claimed by the applicant. The main grounds for such opposition are that, the deceased at no stage intended to enter into a customary marriage with the applicant; the marriage cannot be registered after the death of a deceased; the applicant and the deceased merely cohabitated as boyfriend and girlfriend; the sole reason why the applicant now seeks to register the marriage is her desire to access the assets of the deceased; there was never any lobolo negotiations between the applicant's family and that of the deceased; and that the deceased never sought her consent to enter into a second customary marriage with the applicant, which consent she would, in any event, have withheld. In support of her allegations, the first respondent attaches to her papers a confirmatory affidavit of the deceased's elder brother, M Mchunu, who disclaims any

knowledge of lobolo negotiations involving his family and that of the applicant. The first respondent also claims that she continues to take care of the applicant's children since they are her late husband's children.

[7] In the replying affidavit and annexures thereto, the applicant refers to documentary proof that completely dispels the first respondent's assertions about the customary marriage between the deceased and the applicant. For example, Annexure "MZ1" to the replying papers is an affidavit sworn to by the first respondent at Ladysmith Police Station on 3 July 2002. In this affidavit, the first respondent stated, *inter alia*, that:

> "*I wish to state under oath that I am married (legally) to Buzamashinga Mchunu ID No. 610505 5283 08 0. I hereby give consent to him taking a second wife Makhosazane Zerish Gama ID No. 720915 0653 08 7.*"

In a further affidavit annexed to the answering papers, the first respondent admitted that both she and the applicant are the wives of the deceased. These annexures show convincingly that, not only that the first respondent gave her consent for the deceased to marry a second wife, but also that she regarded the applicant has one of the wives of the deceased. The applicant also alleges that both the first respondent and the deceased's elder brother, in spite of their denials, were in fact present at the traditional wedding between the deceased and the applicant and partook in the celebrations. The house at the Pimville, Soweto, address, was bought by the deceased for the applicant and her children.

THE SECOND RESPONDENT'S REASONS FOR DECLINING TO REGISTER THE CUSTOMARY MARRIAGE

[8] In the letter addressed to the applicant on 29 June 2010, and in declining to register the customary marriage, the second respondent stated:

> "*Recognition of Customary Marriages Act, 1998 (Act 120 of 1998) came into operation with effect from the 15th November 2000. Section 4(3)(a) of the Act provides that a customary marriage entered into before the commencement of the Act, and which is not registered in terms of any other law, must be registered within the period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe the extension of the registration of the customary marriages entered into before the commencement of the Act from period of 12 months after commencement (i.e. 15th November 2001) to 14th November 2002. Section 4(3)(b) provides that a customary marriage entered into after the commencement of this Act, must be registered within a period of three months after the conclusion of the marriage or within such longer period as the Minister may from time or time* (sic) *prescribe by notice in the gazette* (sic). *No further extension was prescribed thereafter, and therefore it means that a registering officer may not register any customary marriage entered into before the commencement of the Act. Any such registration will be contrary to the provision of section 4(3)(b) of the Act. You may invoke the provisions of section 4(7) of the Act and make an application to the court for an order to register your customary marriage …*"

In terms of sec 1 of the Customary Marriages Act, "*customary marriage*" means "*a marriage concluded in accordance with customary law*". "Minister" means "*the Minister of Home Affairs*".

[9] Based on the above facts, common cause or disputed, it is necessary to deal with some applicable legal principles, coupled with the relevant provisions of the Customary Marriages Act. However, prior to doing so, it is noteworthy that in argument, neither of the parties contended that, based on

the conflicting versions of the parties, there are present in this application disputes of fact which are incapable of resolution on affidavits. See for example *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) (para [5]. Instead, counsel for the respondent in his heads of argument argues that, "*since a dispute of fact exists in this matter, the test for final relief to be granted as stated in Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), at 634H-635C, must be applied*", in resolving the disputed issue in this matter. I agree with this approach unreservedly.

[10] The starting point in the line of some applicable legal principles, is the trite requirement that the applicant bears the *onus* of proving on a balance of preponderance that a customary marriage existed between her and the deceased. In *Baadjies v Matubela* [2002] 2 All SA 623 (W), the issue to be determined was whether the applicant was a spouse in terms of customary law. In upholding a point *in limine* to the effect that no customary marriage existed, Francis AJ (as he then was), at para [17] said:

> "*… where there is a dispute about whether such a marriage was entered into, the production of a certificate of registration of a customary marriage issued either in terms of the Act or any other applicable statute would be prima facie proof of the existence of that marriage. A spouse who is not in possession of such a certificate, can also approach this Court on application that such customary marriage is entered into in terms of section 4(7)(a) of the Act.*"

See also *Mabuza v Mbatha* [2003] 1 All SA 706 (C). It is common cause that in the instant matter, the applicant has produced no certificate of registration of her customary marriage to the deceased, hence the present proceedings.

It is equally a notorious fact that prior to the new political democratic dispensation in 1994, the registration of customary unions or marriages was almost non-existent due to the negative attitude towards customary law.

[11] However, the advent of the Constitution, followed by the Recognition of Marriages Act, commenced to improve matters. Much has since been written about the recognition of customary marriages. The preamble to the Customary Marriages Act, which came into operation on 15 November 2000, provides:

> "*To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.*"

In regard to particularly the requirements for valid customary marriages, sec 3(1) of the Customary Marriages Act provides as follows:

> "*(1) For a customary marriage entered into after the commencement of this Act to be valid –*
>
> *(a) the prospective spouses –*
>
> *(i) must both be above the age of 18 years; and*
>
> *(ii) must both consent to be married to each other under customary law; and*
>
> *(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.*"

In regard to the registration of customary marriages, sec 4(1), (2) and (3) provide as follows:

> "*(1) The spouses of a customary marriage have a duty to ensure that their marriage is registered.*
>
> *(2) Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering officer with the prescribed information and any additional information which the registering officer may require in order to satisfy himself or herself as to the existence of the marriage.*
>
> *(3) A customary marriage –*
>
> *(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the Gazette.*"

In terms of Government Notice No. 51 in Government Gazette 32916 of 5 February 2010, the prescribed period for the registration of customary marriages referred to in sec 4(3)(a), was last extended to 31 December 2010.

[12] From the provisions of sec 3(1) of the Customary Marriages Act, quoted above, there is no doubt that the deceased and the applicant satisfied all the requirements prescribed when they entered into the customary marriage on 8 June 2000. They were both adults over 18 years. They both consented to the marriage. Their marriage was negotiated through the lobolo process. An amount of R7 800,00 was agreed to by the respective family representatives. The customary marriage was celebrated. There was a traditional wedding. The couple cohabitated as husband and wife at the Pimville, Soweto, address. Between the period 2000 and 2007, four minor

children were born of the customary marriage. The version of the applicant in regard to the existence of the customary marriage is not only corroborated by the deceased's uncle, B Ximba, and brother of the applicant, M J Gama, but also by the first respondent, despite her current denials. I find that on the credible evidence, the version of the applicant is more probable and she has succeeded in discharging the *onus* placed on her. The evidence show overwhelmingly that, not only was the first respondent aware of the lobolo negotiations, the customary marriage, and the celebration thereof, but she also regarded the applicant as one of the wives of the deceased. She says she looks after and cares for the children born of the customary marriage between the deceased and the applicant. The sudden change of heart by the first respondent is most likely caused by the greed to exclude the applicant from the assets of the deceased.

[13] Insofar as the requirements for registration of a customary marriage are concerned, and as prescribed by sec 4 of the Customary Marriages Act, it is clear that both spouses have the duty to ensure that their marriage is registered. It is further plain that either spouse has the option to apply to the registering officer in order to register their customary marriage after 8 June 2000. It is common cause that both the deceased and the applicant did not do so until much later when their attempt to register failed, as discussed below. The applicant provides a plausible explanation for the delay when she states that she and the deceased were unaware that they had to register their customary marriage earlier. It was only after she had approached the second respondent to register the marriage (29 June 2010), that she became aware

of the requirement to register the marriage. The first respondent, in the answering affidavit merely denies this allegation of the applicant and puts her to the proof thereof. In any event, the failure of the deceased and the applicant to register their customary marriage as prescribed, is, in my view, not fatal to her application since sec 4(9) of the Customary Marriages Act provides clearly that:

> "*Failure to register a customary marriage does not affect the validity of that marriage.*"

In *Wormald NO and Others v Kambule* [2005] 4 All SA 629 (SCA), Combrink AJA, whilst arriving at the same conclusion as the majority judgment, at para [37] said:

> "*In conclusion I need to mention that section 4(9) of the Recognition of Customary Marriages Act 120 of 1998 provides that registration of a customary marriage is not essential to its validity.*"

Furthermore, the Customary Marriages Act is a relatively new law on the statute book. It came into operation as we know, on 15 November 2000, some five months after the applicant and the deceased entered into their customary marriage. The Minister of Home Affairs has deemed it fit to extend, on several occasions, the prescribed period within which registration of customary marriages must be made. In my view, the reason for such extensions is simply to allow the huge population of the participants in customary marriages and customary law to fully become acquainted with the provisions of the legislation. To make the point, the initial extension of the 12 months period within which to register customary marriages under sec 4(3) of

the Customary Marriages Act, was extended by the Minister of Home Affairs until 14 November 2002 as published under Government Notice No. 1228 in Government Gazette 22839 of 23 November 2001. As stated earlier in this judgment, the last known extension was made until 31 December 2010.

[14] I conclude therefore that on the disputed issue, whether or not there existed a valid customary marriage between the deceased and the applicant, the credible evidence of the applicant has established convincingly the existence of such a marriage. I also find that the customary marriage between the applicant and the deceased is a customary marriage entered into validly on 8 June 2000, and as envisaged in sec 4(3)(a) of the Customary Marriages Act. I am therefore satisfied that on the evidence, I am enjoined, in the exercise of my discretion, to issue an order for the registration of the customary marriage between the deceased and the applicant as provided for in sec 4(7) of the Customary Marriages Act. However, if I am incorrect in my determination above, I believe that the applicant should succeed on another ground. This is that, at the time of the conclusion of the customary marriage between the deceased and the applicant (8 June 2000), their marriage was not registered in terms of any other law, including the legislation under discussion. This much is common cause. From the preamble to the Customary Marriages Act, quoted in full earlier in this judgment, it is more than plain that the Legislature indeed made a serious statement to recognise the existence of customary marriages as well as the registration thereof for a variety of cogent reasons. In this regard, sec 2(1) of the Act provides that:

> "*A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.*" (my underlining)

Furthermore, sec 2(3) of the Act provides that:

> "*If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.*" (my underlining)

In the absence of the prescribed registration, there is no evidence to suggest that the marriage between the deceased and the applicant was not a valid marriage at customary law. It existed before the commencement of the Customary Marriages Act. It was concluded, as stated above, on 8 June 2000, whilst the Act came into operation on 15 November 2000. Additionally, the deceased was already a spouse in another customary marriage with the first respondent. There is no reason why this customary marriage to the applicant should not be recognised.

[15] Finally, pursuant to my finding that there was a valid customary marriage between the deceased and the applicant, I now turn to what appears to be the most contentious aspect of the matter. This is the criticism levelled against the deceased for failing to timeously invoke the provisions of sec 7(6) of the Customary Marriages Act when entering into a further customary marriage with the applicant. It is appropriate to reproduce in full the provisions of sec 7(6), (7) and (8) of the Customary Marriages Act, which provide as follows:

"*(6) A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriage.*

(7) When considering the application in terms of subsection 6 –

(a) the court must –

(i) in the case of a marriage which is in community of property or which is subject to the accrual system –

(aa) terminate the matrimonial property system which is applicable to the marriage; and

(bb) effect a division of the matrimonial property;

(ii) ensure an equitable distribution of the property; and

(iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;

(b) the court may -

(i) allow further amendments to the terms of the contract;

(ii) grant the order subject to any condition it may deem just; or

(iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

(8) All persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6)."

[16] This issue is intimately linked to the question of the registration of the customary marriage between the applicant and the deceased, which I dealt with above, and the reasons for my finding. The evidence of the applicant is that in an endeavour to have their customary marriage properly registered, she and the deceased approached, and instructed Attorneys Dion Röder, as stated earlier in this judgment. The applicant went further to state in para 17 of the replying affidavit that:

> "*I aver that the deceased, First Respondent and myself went to an attorney in KwaZulu-Natal and we attempted to have the marriage between the deceased and myself registered and have the matrimonial regime between her and the deceased changed. We were all given supporting affidavits by the attorney to commission and we never went back to return the affidavits because of financial difficulties.*"

The intended application and memorandum of agreement prepared by Attorneys Dion Röder show that the first applicant, the second applicant, and the third applicant therein, were the deceased, the first respondent, and the applicant, respectively. The application was to be launched in the North-Eastern Divorce Court, held at Newcastle. The memorandum of agreement was entered into by the same three parties. However, the supporting affidavit of the first respondent in this matter is for some inexplicable reason, not part of the papers attached to the replying affidavit. What is of significance, however, are the contents of the signed and commissioned supporting affidavits of the deceased and the applicant. In her supporting affidavit, the present applicant stated, *inter alia*:

> "*I have met the Second Applicant (the first respondent in the present matter) and have been informed by her that she no objection to the proposed marriage between First Applicant (the deceased) and myself. The two families live in Ladysmith and Soweto respectively and there is no conflict or opportunity for disputes between us. I was also fully involved with both the other applicants in the negotiations and discussions with our attorney and fully approve of and agree with the terms and conditions contained in the agreement filed herewith as Annexure 'A'*." (my insertions).

For his part, the deceased, as the first applicant, stated in his affidavit, *inter alia*, that:

> "*The second proposed marriage was arranged with the full cooperation and support of the first wife, the Second Applicant. She fully informed of the negotiations and the progress thereof and she contributed in the collecting of the lobola goods to be paid to the family of the Third Applicant. Both Second and Third Applicant also took part in all discussions with our lawyer in the drawing of the contract annexed to the application and both made the necessary inputs to conclude the agreement to the satisfaction of the three of us. … It is now necessary to obtain the permission of this Court to terminate the matrimonial property system of my first customary marriage with the Second Applicant and effect a division of the matrimonial property as detailed in the annexed agreement between the three Applicants.*"

The signature of the first respondent in the present matter does not appear on the proposed contract.

[17] What emerges from the above affidavits in support of the intended application to court, albeit in the absence of the first respondent's supporting affidavit, more than enough, fortifies me in the finding made above that there existed a valid customary marriage between the deceased and the applicant. The affidavits referred to establish, with convincing probability that, not only did the first respondent know and consent to the deceased's customary marriage to the applicant, but she also actively and constructively took part in

the negotiations and activities leading up to the fruition of the customary marriage. She was prepared to be a co-applicant in the abandoned court proceedings as envisaged in sec 7(6) of the Customary Marriages Act. The first respondent did not file any further affidavits to rebut the allegations made in the replying affidavit dealing with her role in the intended court application. Her bare denial is rather unhelpful. As a consequence, based on the principles enunciated in *Plascon-Evans Paints Ltd (supra*) and *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H, the probabilities overwhelmingly favour substantially the version of the applicant.

[18] The crisp and critical issue in this application remains the question whether the failure of the deceased to invoke the provisions of sec 7(6) of the Customary Marriages Act, is fatal to the applicant's case. I think not. I have already found that the failure to register the customary marriage timeously or as prescribed, does not signal the end of the applicant's case. I must add that in *Kambule v Master of the High Court and Others* [2007] 4 All SA 898 (E), the key issue was whether the applicant and the deceased were parties to a valid customary law marriage. As in the present matter, there were also disputes of fact as to the existence or not of a customary law marriage. In finding that the failure by the parties to a customary marriage to register such marriage in terms of the Transkei Marriage Act would not affect its validity, Pickering J, at 902-903, said:

> "*In the view that I take of the matter it is not necessary to determine what the effect of the non-registration of the customary marriage was in terms of the Transkei Marriage Act because, in my view, whatever perceived impediment there may be to the validity of the marriage*

> *because of the fact of non-registration under the Act, the marriage has been validated by the Recognition of Customary Marriages Act 120 of 1998 ('the Recognition Act').*"

See also *Wormald NO and Others v Kambule (supra)*.

[19] Indeed, the real issue in adjudicating the failure of the deceased in the present case to register his customary marriage, as described above, is the proper and correct interpretation of the provisions of sec 7(6) of the Customary Marriages Act. Legal journals and publications are replete with uncertainty regarding the proper and future interpretation of the section. The critical words in sec 7(6) are:

> "*A husband … who wishes to enter into a further customary marriage … must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.*"

More recently, in *M M v M N* 2010 (4) SA 286 (GNP) Bertelsman J had occasioned to consider the provisions of sec 7(6) of the Customary Marriages Act. The facts were, briefly, as follows. The deceased husband was alleged to have married the first respondent according to customary law on 6 January 2008. The marriage was confirmed by the headman of the first respondent's village. The applicant was unaware of the fact that her husband had entered into another marriage according to customary law until after his passing. The applicant had married the deceased in accordance with customary law and tradition on 1 January 1984. This marriage was not registered. It was common cause in that case that the second marriage was not preceded by an application to a court of appropriate jurisdiction for an order approving a

contract to regulate the future matrimonial property system of the two marriages, as prescribed for in sec 7(6) of the Customary Marriages Act. The applicant contended that the second marriage was null and void because of the failure to obtain such an order. Bertelsman J considered the matter in great and admirable depth, including the relevant provisions of the Bill of Rights enshrined in the Constitution. Bertelsman J, at para [24] of the judgment, found that:

> "*The failure to comply with the mandatory provisions of this subsection (section 7(6)) cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect. Cronje and Heaton argue in South African Family Law 2 ed at 204, that the courts' intervention would be rendered superfluous – which the legislature could not have intended – if invalidity did not result from a failure to observe ss (6). See further S Human, op cit, who endorses this view.*" (my insertion)

Having come to the conclusion that the first respondent's purported marriage to the deceased, entered into after the Act was promulgated, was not proceeded by the conclusion of a contract as envisaged in sec 7(6) of the Act, Bertelsman J declared the purported marriage of the first respondent to the deceased to be void. The applicant was ordered to be entitled to have her marriage to the deceased registered.

[20] I must at the outset observe that the facts in the *M M v M N* case were somewhat distinguishable from the facts in the present matter. Firstly, in the instant matter, the customary marriage between the deceased and the first respondent entered into on 9 May 1996, was duly registered as evidenced by the marriage certificate attached to the answering affidavit. Secondly, the

customary marriage between the deceased and the applicant in the instant matter occurred prior to the commencement of the Customary Marriages Act, namely on 8 June 2000, as opposed to the purported and challenged marriage in *M M v M N*, which occurred on 6 January 2008. Thirdly, the first respondent in the present matter has been found to have been fully and completely active and aware of the second customary marriage, as opposed to the applicant in *M M v M N* case, who was unaware of the fact that her husband had entered into another marriage according to customary law until after his passing. Fourthly, and to a visible extent, in the present matter, the uncontroverted evidence is that the deceased, the applicant and indeed the first respondent, made an attempt but, abandoned the envisaged application in terms of sec 7(6) of the Customary Marriages Act. The reasons for the abandonment of the application have been satisfactorily explained, namely the lack of funds, the intervening ill-health of the deceased and his ultimate passing. There is yet another compelling reason, in my view, which makes the failure of the deceased, and the applicant to comply with the provisions of sec 7(6) of the Act free from any sanction. This is that sect 7(6) provides clearly that, "*a husband … who wishes to enter into a further customary marriage with another woman <u>after the commencement of this Act</u> …*" (my emphasis). It is common cause that the customary marriage between the deceased and the applicant was entered into before the commencement of the Act, namely on 8 June 2000. The Customary Marriages Act commenced on 15 November 2000 only. For these reasons, I remain unpersuaded, and with respect, reluctant to follow the conclusion reached by Bertelsman J.

[21] There is another difficulty I have in following the decision in *M M v M N*. This is that, in interpreting the provisions of sec 7(6) of the Customary Marriages Act, Bertelsman J found that failure to comply with the mandatory provisions of sec 7(6) of the Act:

> "*cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect.*"

The immediate question that arises in the context of the present matter is, what is the significance and consequence of the finding that the second customary marriage between the applicant and the deceased is valid? Can it be ignored completely without any prejudice to the applicant? Was it in fact the intention of the Legislature? I think not.

[22] In my view, by concluding a valid customary marriage with the deceased, as I have found, the applicant acquired certain rights. In terms of sec 6 of the Customary Marriages Act, a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including capacity to acquire assets and dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law. In addition, in *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC), the Court declared as unconstitutional and discriminatory against women, the provisions of sec 7(1) and (2) of the Customary Marriages Act governing the proprietary consequences of customary marriages. This related to customary marriages in KwaZulu-Natal

entered into before the commencement of the Customary Marriages Act, as *in casu*, on 15 November 2000. In my view, on a proper interpretation of the provisions of sec 7(6) of the Customary Marriages Act, using the '*golden rule*' of interpretation, it could simply never have been the intention of the Legislature to remove these rights from spouses such as the applicant in the present matter. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), at para [72], Ngcobo J (as he then was) said:

> "*The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. That is the command of s 39(2).*"

See also *Fish Hoek Primary School v G W* 2010 (2) SA 141 (SCA) at para [13]. Furthermore, whilst the provisions of sec 4 of the Customary Marriages Act places the duty to register a customary marriage on the spouses. Section 7(6) makes it clear that it is the husband in a customary marriage who, "*must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriage*". This begs the question why should the wife, the applicant in the present matter, be penalised or prejudiced for the failure of the deceased to comply with this requirement. In any event, as indicated earlier in this judgment, Bertelsman J in *M M v M N* (*supra*), came to the conclusion, and correctly so in my view, that the Act does not contain an express provision to invalidate a subsequent customary marriage for failure to comply with the provisions of sec 7(6) of the Customary Marriages Act. For all these reasons, I conclude that the failure by the deceased and/or the applicant to apply to court timeously to approve a

written contract which would regulate the future matrimonial property system of their customary marriage, does not invalidate their customary marriage as contended for by the first respondent. It is a valid customary marriage. It follows that the applicant has succeeded in making out a case for the relief claimed in the notice of motion.

THE PROBLEMS WITH THE PROVISIONS OF SECTION 7(6) OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT

[23] I feel duty bound to note, during my research in preparation of this judgment, and as the heads of argument prepared by the parties were extremely unhelpful, it became abundantly clear that much has been written on the provisions of sec 7(6) of the Customary Marriages Act. There presently exists a great deal of uncertainty. The uncertainty is caused largely by the absence of a penalty provision in the event of non-compliance with the section. For example, writing in the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)*, Band 70 Number 1, February 2007, Prof Pieter Bakker, at p 487, wrote:

> "*It is not certain what the consequences would be if a man entered into a second marriage without complying with section 7(6).*
>
> *Maithufi and Moloi argue that the second marriage should be valid and that such a marriage should be regarded as out of community of property and profit and loss (2002 TSAR 609). They contend that the purpose of section 7(6) is to avoid unnecessary future litigation concerning property brought into the marriage and property acquired during the marriage (ibid). They further contend that an invalid marriage, where the wife regarded herself as married, is a very harsh consequence, especially in the case where the wife was also considered married by the community ("The need for the protection of*

> *rights of partners to invalid matrimonial relationships: A revisit of the 'discarded spouse' debate" 2005 De Jure 152) … This section does not contain any sanction should it be disregarded … The second marriage should, therefore, be valid even where the requirements of section 7(6) are disregarded. Non-compliance with section 7(6) will not affect the first wife negatively where she was married out of community of property with the exclusion of the accrual system. Where the first wife was married out of community of property, the property system will continue after her spouse marries his second wife. The only contract that can be drafted is an agreement to continue with the marriage out of community of property. Therefore, non-compliance will have no effect on the first wife if the first customary marriage is out of community of property. Non-compliance with section 7(6) could affect the first wife negatively where she was married in community of property or out of community of property subject to the accrual system. However, this construction will not lead to any injustice against the first wife due to the application of section 8(4)(b):*
>
> > *'[The court] must, in the case of a husband who is a spouse in more than one customary marriage, take into consideration all relevant factors including any contract, agreement or order made in terms of section 7(4), (5), (6) or (7) and must make any equitable order that it deems fit.'*
>
> *(It is unclear why the Act refers to section 7(5) as this section is only applicable to monogamous customary marriages.)*"

The learned Professor went on to conclude that:

> "*If section 7(6) is construed to be peremptory in nature, non-compliance will lead to the invalidity of the second marriage. Consequently, if the man does not comply with section 7(6)(but all other requirements are adhered to, the second wife will be married in the eyes of the community even though the marriage will not be officially recognised by the state. A new unofficial customary marriage will then be created and the dilemma of the discarded spouse will be re-introduced.*"

Based on the opinions expressed in this article, just quoted, it is clear, in my view, that the current confusion regarding the provisions of sec 7(6) of the Customary Marriages Act, is a matter that requires the immediate attention of the Legislature. As was stated persuasively and authoritatively by Schutz JA

in *POSWA v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) [2001] 6 BCLR 545 para [11]:

> "*is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.*"

ORDER

[24] For all the above reasons, the following order is made:

1. The late registration of the customary marriage entered into by the applicant and the deceased, Buzamashinga Mchunu, on 8 June 2000, is hereby condoned.

2. The second respondent (The Department of Home Affairs), is hereby ordered to register the customary marriage entered into between the applicant, and the late Buzamashinga Mchunu, on 8 June 2000.

3. The second respondent is hereby ordered to issue a marriage certificate to the applicant.

4. The first respondent shall pay the costs of this application.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	3 AUGUST 2011
DATE OF JUDGMENT	22 NOVEMBER 2011