# *MM v MN*
# 2010 (4) SA 286 (GNP)

*Requirements for a valid customary marriage. Contracting a further customary marriage in terms of the Recognition of Customary Marriages Act of 1998. Failure to comply with section 7(6) of the Act leads to the invalidity of the ensuing marriage.*

## 1 Introduction

The Recognition of Customary Marriages Act (120 of 1998) (the "RCMA") brought about fundamental changes to the legal position of a customary marriage in South African law. The RCMA ensured that a customary marriage is, for all purposes of South African law, recognised as a valid marriage.

The RCMA further recognises customary marriages which were contracted before it came into operation on 15 November 2000. Such customary marriages are afforded recognition provided that they were in existence and valid at the time when the Act came into operation. Therefore all customary marriages that were invalid at the time when this Act came into operation, remained invalid. There are several examples of these invalid customary marriages. They include, among others, those that did not comply with the various statutory measures that regulated their requirements. Examples of these enactments are the KwaZulu Act on the Code of Zulu Law (16 of 1985), the Transkei Marriage Act (21 of 1978), the various provisions of the repealed Black Administration Act (38 of 1927) which regulated the relationship between civil and customary marriages and the Marriage and Matrimonial Property Law Amendment Act (3 of 1988). Similarly, a customary marriage which was contracted prior to the date of commencement of the RCMA which did not comply with the rules of customary law or contracted contrary to such rules was not rendered valid by this Act. In accordance with these enactments, a spouse of a civil marriage was prohibited from concluding another marriage during the existence of his or her marriage. On the other hand, when a spouse of a customary marriage had contracted a civil marriage with another person during the subsistence of such marriage, this had the effect of dissolving it (Bekker *Seymour's Customary Law in Southern Africa* (1989) 249-253) This remained the position until 2 December 1988 when the Marriage and Matrimonial Property Law Amendment Act (3 of 1988) came into operation. Polygamy was allowed only in respect of customary marriages except in the then Transkei where the Marriage Act (21 of 1978) provided for the exercise of polygamy when the existing civil marriage was out of community of property and of profit and loss (see Koyana *Customary Law in a Changing Society* (1980) 161-180; Van Loggerenberg "The Transkei Marriage Act of 1978: A new blend of family law" 1980 *Obiter*

1; Maithufi "*Thembisile v Thembisile* 2002 2 SA 209 (T)" 2003 *De Jure* 195).

Besides recognising a customary marriage as a valid marriage, the RCMA lays down certain requirements for the validity of customary marriage contracted after 15 November 2000. These are contained in section 3 which provides that:

> (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.

The RCMA further provides (s 2(4) RCMA) that:

> If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.

It is further expected of a husband who wishes to contract another customary marriage with another woman to "make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages" (s 7(6) RCMA).

It is necessary to keep the legal position outlined above in mind in dealing with the dispute that the court was faced with in *MM v MN* 2010 (4) SA 286 (GNP). This dispute concerned the validity of a customary marriage which was contracted by a husband who was, at the time when the said marriage was contracted, a spouse to another subsisting customary marriage. The husband was supposed to have complied with the requirements of section 7(6) of the RCMA in order to render his second customary marriage valid. The requirements for a section 7(6) application will also be addressed to explain the reasons for declaring this second customary marriage invalid.

## 2 The Facts

On 1 January 1984, the deceased husband married the applicant by customary rites at Nkovani Village. The deceased passed away on 28 February 2009. On 6 January 2008 before he passed away, he married another woman, the first respondent, according to customary law. The applicant was not aware or was not made aware that her husband, the deceased, had contracted another customary marriage with the first respondent until after his death. The applicant's customary marriage to the deceased was not registered nor was his marriage to the first respondent.

## 3 Dispute

The second customary marriage with the first respondent was contracted after 15 November 2000, that is, after the coming into operation of the

RCMA. According to the RCMA, a customary marriage contracted after this date is recognised for all purpose if it "complies with the requirements of this Act" (s 2(2) RCMA). The most important requirement (s 7(6) RCMA) is that:

> [a] husband … who wishes to enter into a further customary marriage 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 marriages.

The other requirements are that the prospective spouses must be above the age of eighteen years and must have consented to be married to each other by custom. Furthermore, the marriage must be negotiated and entered into or celebrated in accordance with customary law (s 3 RCMA).

The applicant contended that the second marriage with the first respondent was null and void as a result of failure to obtain the section 7(6) order. The first respondent, on the other hand, contended that as "her marriage to the deceased was properly and publicly performed, in accordance with customary law, [this] was sufficient to establish an unassailable second marriage by the deceased" (par 14). As a result of the dispute relating to the validity of this customary marriage, the second respondent (the Minister of Home Affairs) refused to register the applicant's marriage to the deceased.

The RCMA makes provision for the registration of customary marriages contracted before and after its date of coming into operation (s 4 RCMA). A duty is imposed on the spouses of a customary marriage to ensure that their marriage is registered in terms of the RCMA (s 4(1), (2) RCMA). If satisfied that a valid customary marriage was concluded, "the registering officer must record the identity of the spouses, the date of the marriage, any lobolo agreed to and any other particulars prescribed" (s 4(4) RCMA). A registration certificate is issued in the case where the registering officer is satisfied about the existence of a valid marriage (s 4(5)(b) RCMA). A registering officer may refuse to register a customary marriage if not satisfied that a valid customary marriage was entered into by the spouses (s 4(6) RCMA).

The refusal by the registering officer to register a customary marriage does not leave the parties without recourse. They may apply to court to obtain an order for the registration of their customary marriage (s 4(7) RCMA). The certificate of registration constitutes *prima facie* proof of the existence of a customary marriage and of the particulars contained therein (s 4(8) RCMA). The Act, however, provides that "[f]ailure to register a customary marriage does not affect the validity of that marriage" (s 4(9) RCMA).

The customary marriage contracted by the applicant and the deceased was not registered in terms of any law that regulated registration at the time when it was contracted, that is, on 1 January 1984, nor was it subsequently registered in terms of the RCMA after had come into operation. At the time when it was contracted, the registration of customary marriages was regulated in terms of the regulations contained

in Government Notice R1979 of 25 October 1968 which was promulgated in terms of the repealed section 22 *bis* of the Black Administration Act 38 of 1927 (see Bekker 393-404). Even at that time, failure to register a customary marriage did not affect its validity and the certificate of registration was deemed to be *prima facie* proof of its contents in any court of law or in any administrative proceedings in which it was produced.

Realising that her customary marriage was valid although not registered, which is not a requirement for its validity in terms of the RCMA, the applicant requested the court to declare the second marriage of the deceased with the first respondent null and void for failure to comply with section 7 of the RCMA. The second respondent had also refused to register the applicant's marriage as a result of "the competing claims by the applicant and the first respondent" (par 15).

## 4 Argument by First Respondent

The first respondent argued that her marriage with the deceased was valid as it was contracted or entered into in accordance with customary law. What she in fact argued was that as all the requirements for a valid customary marriage were complied with, her marriage with the deceased was valid (see s 3 RCMA). The court phrased this argument as follows: … the fact her marriage was properly and publicly performed, in accordance with customary law, was sufficient to establish an unassailable second marriage entered into by the deceased" (par 14).

This could have been the position if her marriage was contracted before the coming into operation of the RCMA, that is, 15 November 2000 (s 2(3) RCMA). Customary marriages contracted after this date must comply with all the requirements laid down by the RCMA. Besides the requirements provided for by section 3 of the RCMA, the provisions of section 7(6) also have to be complied with in the case where a husband wishes to enter into a further customary marriage with another woman. This was not the position in this case. In fact this marriage would have been valid if it had been contracted before 15 November 2000. At that time no court order was required where a husband of a customary marriage wished to contract a further customary marriage. The position at that time and since 15 November 2000 may be summarised as follows (Maithufi & Moloi "The need for the protection of rights of parties to invalid marital relationships: A revisit of the 'discarded spouse' debate" 2005 *De Jure* 144):

> Previously the state played no role in authorising spouses of existing customary marriages to contract further marriages. It was therefore very easy for a husband of a customary marriage to marry as many women as he wished provided that he complied with the requirements laid down by customary law. Since the coming into operation of the Recognition of Customary Marriages Act of 1998, a court has to be approached by a husband of a customary marriage to approve a written contact which will regulate the future matrimonial property system of his marriages".

## 5 Decision

Various opinions have been expressed, even before this case, as to the validity of a further customary marriage contracted in terms of the RCMA (see, *inter alia,* Maithufi & Moloi 2005 *De Jure* 144 145). The legal position of polygamous customary marriages contracted before 15 November 2000 is straightforward. Their validity is regulated by section 2 of the RCMA. If such marriages complied with the provisions of the law as at 15 November 2000, that is, were in existence and valid, they were regarded as valid (s 2(1), (3) RCMA).

A further customary marriage contracted after 15 November 2000 must, however, be preceded by the application envisaged by section 7(6) of the RCMA to be valid. This is evident from the peremptory language employed in this provision, namely, the use of the word "must". In this respect, the court concluded (par 23) that:

> The failure to comply with the mandatory provisions of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect.

Besides the peremptory provisions of section 7(6) of the RCMA, to hold that a further customary marriage contracted contrary to these provisions is valid would be against the rights or interests of the spouses and others who may have a "sufficient interest in the matter" (see s 7(7)(b)(iii) RCMA).

## 6 Section 7(6) Application

Although no application was lodged by the deceased husband when he purported to contract a further customary marriage with the first respondent, it is necessary to note the requirements for the application to be launched in terms of section 7(6) of the RCMA to render the intended customary marriage valid. This will explain the reasons that persuaded the court to declare the customary marriage with the first respondent invalid.

According to the RCMA, a husband of a customary marriage who wishes to contract a further customary marriage with another woman has to apply to court for an order which will regulate the future matrimonial property system of his marriages (s 7(6) RCMA). The RCMA does not expressly provide the consent of the existing spouse to the customary marriage as a requirement for the validity of the intended customary marriage or in determining whether or not to approve the proposed written contract.

The application to approve a written contract aimed at regulating the future matrimonial property system of the intended polygamous marriages is to be lodged by the husband. The order sought has to, among others, include:

(a) the approval of the proposed written contract to govern the future matrimonial property system of the marriages, which has to be made an annexure to the application;

(b) that the court may allow amendments to the proposed written contract; and
(c) that the court may grant the order subject to any condition it may deem just.

It is of importance that the applicant ensures that "all persons having a sufficient interest in the matter" are joined in the proceedings (s 7(8) RCMA). The most important persons to be joined in these proceedings are the applicant's existing spouse or spouses and his prospective spouse. This indicates that this application must be accompanied by at least three affidavits, that is, of the applicant husband, his current wife or wives as well as that of his prospective spouse.

It is also important to note the averments that the affidavits mentioned above must contain. The affidavit of the husband applicant must state:

(a) his full personal particulars;
(b) the full personal particulars of his existing spouse or spouses;
(c) the full personal particulars of his prospective spouse;
(d) the full particulars relating to his current customary marriage or marriages, that is, the date and place where it or each was contracted, the proprietary consequences of such marriage or marriages, the number of children born of the marriage or marriages; and
(e) the terms of the proposed written contract.

The existing wife (or wives) of the applicant also has (have) to depose to an affidavit (affidavits) stating the following:

(a) her full personal particulars;
(b) that she is also an applicant;
(c) confirming the existence of a valid customary marriage with the applicant husband; and
(d) confirming that she is or was made aware of the contents of the proposed written contract relating to the future matrimonial property system.

If there is more than one existing wife, all of them must depose to affidavits stating what is mentioned above.

The applicant, his current wife or wives and prospective wife may not be the only persons who have a sufficient interest in this application. Other persons may also have such interest, for example, the applicants' creditors. The husband's in-laws, current and prospective, may also be interested parties. It is therefore advisable that all persons who may have a sufficient interest in the matter be joined in these proceedings to afford them an opportunity to object, if they so wish, to the terms of the proposed written contract in the case where their interests may be adversely affected or would not be sufficiently protected.

After considering the application brought in terms of section 7(6) of the RCMA, the court must make an order:

(a) terminating the matrimonial property system applicable to a marriage in community of property or subject to the accrual system; or
(b) regarding the division of property in respect of a marriage in community of property or subject to the accrual system, or

(c) relating to the distribution of property in the case of a marriage out of community of property and of profit and loss without any accrual sharing (s 7(7)(a)(i), (ii) RCMA); and
(d) requiring the registrar or clerk of the court to furnish each spouse with the order of the court including a certified copy of the contract and to cause such order and certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated (s 7(9) RCMA); and
(e) relating to the registration of the marriage, if this was prayed for.

In its determination of the distribution of the property of the marriage, the court has to "take into account all the relevant circumstances of the family groups which would be affected if the application is granted" (s 7(7)(a)(iii) RCMA).

The applicant (husband) therefore has to specifically pray for the order relating to the termination of the property system applicable to his existing marriage. The existing marriage would normally be in community of property, whether entered into before or after the coming into operation of the RCMA (s 7(1), (2) RCMA; *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC)). This will be the position in respect of a customary marriage contracted after the commencement of the Act where such consequences were not specifically excluded by means of an antenuptial contract (s 7(2) RCMA). The spouses of a customary marriage contracted before the commencement of this Act may also have jointly applied for leave to change the property system applicable to their marriage. The main purpose of terminating the previous matrimonial property system is to ensure that the proprietary rights of the spouses of such marriages and their children, if any, are protected. The order regarding the termination of the matrimonial property system has to be accompanied by an order relating to the division of property or the distribution of such property. If a further customary marriage were to be regarded as valid despite failure to comply with the provisions of section 7(6) of the RCMA the effect would be that (par 33):

> … the additional wife might, as a result of a favourable marriage contract with the husband, receive considerable financial and other benefits to the detriment, possibly even to the total impoverishment, of the first spouse and her children. This would surely fly in the face of the legislature's intention.

And (par 35):

> [t]he intending spouse of a further marriage is obviously at risk if her marriage is not sanctioned by entering into the required contract, as she will find herself not to have been married at all or if her husband passes away or becomes embroiled in a divorce.

If the court is satisfied that the interests of all those affected would be sufficiently protected, including the relevant circumstances of the family groups involved, the order mentioned above would be granted and the proposed written contract would also be approved. The husband will therefore be in a position to legally marry another woman by customary rites. This marriage will be valid in accordance with the RCMA.

Furthermore, when considering the application lodged in terms of section 7(6) of the RCMA, the court may allow further amendments to the terms of the proposed contract or grant such order subject to any condition it may deem just (s 7(7)(b)(i), (ii) RCMA). The court may also "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" (s 7(7)(b)(iii) RCMA). Where the application is refused, the husband cannot contract a further valid customary marriage. A further customary marriage contracted without compliance with these provisions is null and void *ab initio*.

## 7 Conclusion

The judgment in *MM v MN* is a wake-up call to all husbands married by customary rites who wish to contract more than one marriage. It also serves as an eye-opener to all would-be second, third, etcetera, prospective wives. Such prospective wives should ensure that they are aware or made aware of the marital status of their prospective husbands. The prospective husbands should also be aware that although they may have the capacity to contract further customary marriages, their capacity is limited. Something more than the normal requirements for the validity of a customary marriage has to be complied with, namely, the lodging of an application and granting of the order in terms of section 7(6) of the RCMA. Without this, the resultant customary marriage is null and void irrespective of the fact that the parties thereto might have lived together as "husband and wife" for a number of years.

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