Modjadji Florah Mayelane v Mphephu Maria Ngwenyama [2013] ZACC 14

The effect of lack of consent of a spouse of a customary marriage on the validity of a further or subsequent customary marriage of her husband. Lack of such consent renders the subsequent marriage invalid in terms of Xitsonga customary law.

1 Introduction

The effect of failure to comply with the provisions of section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) on the validity of a subsequent or further customary marriage has been finally settled by the Constitutional Court in *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama* ([2013] ZACC 14), which will hereinafter be referred to as *Mayelane*. The court held that failure to comply with these provisions did not lead to the invalidity of a subsequent or further customary marriage and that the said marriage must be regarded as being out of community of property (*Mayelane* 41 par 83). It was further held that the consent of an existing first wife of a customary marriage was a requirement for the validity of the second or further customary marriage, that is, in the absence of such consent, the subsequent customary marriage wold be invalid (*Mayelane* 21 par 41).

Before the decision in *Mayelane*, conflicting decisions were reached by the North Gauteng High Court and South Gauteng High Court respectively as to the effect of failure to comply with the provisions of section 7(6) of the RCMA. The North Gauteng High Court had held that non-compliance with these provisions led to the invalidity of the subsequent customary marriage (*MM v MN* 2010 4 SA 286 (GNP) 290 parr 24-25). In *MG v BM* (2012 2 SA 253 (GSJ)), the South Gauteng High Court concluded that failure to comply with these provisions did not lead to the invalidity of the subsequent customary marriage (264-268 parr 18-23). An appeal was lodged with the Supreme Court of Appeal against the decision of the North Gauteng High Court (*MM v MN* (GNP)). On appeal, it was held that the subsequent customary marriage was valid despite failure to comply with section 7(6) of the RCMA and that this marriage was out of community of property (*MN v MM* 2012 4 SA 527 (SCA) 533-534 parr 16-18, 536-537 parr 21-23, 543 par 38).

2 Questions for Determination by the Constitutional Court

The main issue for determination before the North Gauteng High Court and the Supreme Court of Appeal was the validity of a further customary marriage entered into by a husband who was already married by

customary law to another wife where such husband had failed to obtain a written contract aimed at regulating the future matrimonial property system of his marriages in terms of section 7(6) of the RCMA.

On appeal, the Constitutional Court indicated that two other legal issues, which were closely related to the dispute in this case, had to be dealt with in order to provide an answer as to the validity or otherwise of a further or subsequent customary marriage entered into in terms of the RCMA. These legal issues were:

(i) Whether the consent of an existing wife in a customary marriage has a role to play in the determination of the validity of her husband's subsequent polygynous customary marriage; and

(ii) The manner in which the content of an applicable rule of customary law has to be ascertained and, if necessary, developed in a manner that gives effect to the Bill of Rights (*Mayelane* 2 par 1).

It has to be noted that the court *a quo* in *MM v MN* (GNP) did not decide whether the consent of the existing spouse of a customary marriage was a requirement for the validity of her husband's subsequent customary marriage (*Mayelane* 3-4 par 5). Although this was the position, the applicant in this case had alleged that "she was unaware of the fact that her husband had entered into another marriage according to customary law until after his passing" (*MM v MN* (GNP) 287 par 111). With regard to this issue and the question of consent as a requirement, the court *a quo* remarked that:

> The Act is silent on the question whether the consent of the first or earlier spouses to the proposed further marriage is required, or whether their views on the proprietary and economic considerations only need to be considered by the court. The absence of a specific reference to the consent of an earlier spouse would at first glance, suggest that the legislature intended to leave this question to the determination by the provisions of the relevant customary legal system in this respect. If so, the compatibility with the Bill of Rights enshrined in the Constitution of such an approach may in future have to be considered – it clearly does not arise in this case.
> (*MM v MN* (GNP) 291-292 par 29).

The court *a quo* did not therefore determine whether the relevant applicable customary law in this case required the consent of the existing wife to be obtained as, in its opinion, this question did not arise. The matter was therefore determined on the basis of the effect of failure to comply with the provisions of section 7(6) of the RCMA. It was thus found that non-compliance with these provisions led to the invalidity of the subsequent customary marriage (*MM v MN* (GNP) 290 par 24, 292 par 31).

The South Gauteng High Court on the other hand, although dealing with the validity of a second or subsequent customary marriage contracted before the coming into operation of the RCMA went on to determine the question relating to the validity of a customary marriage entered into without complying with the provisions of section 7(6)

thereof (*MG v BM* 2012 2 SA 253 (GSJ) 265-267 parr 20-21), The second or subsequent customary marriage was held to be valid on the ground that it had complied with all the requirements for a valid customary marriage (*MG v BM* 260-262 parr 12-14). After finding this customary marriage valid, the court dealt with "... what appears to be the most contentious aspect of the matter," namely, failure to comply with the provisions of section 7(6) of the RCMA (*MG v BM* 262 parr 15-17). The court then held that this failure did not affect the validity of the second or subsequent customary marriage (*MG v BM* 264 par 18). It is, however, clear from this case that the first wife appears to have granted consent to her husband to enter into a second customary marriage (*MG v MB* 262-264 parr 16-17).

The decision in *MM v MN* (GNP) was reversed on appeal (*MN v MM* 2012 4 SA 527 (SCA)). The Supreme Court of Appeal held that non-compliance with the provisions of section 7(6) of the RCMA did not lead to the invalidity of the subsequent or further customary marriage but that the said marriage was out of community of property while the matrimonial property system of the first customary marriage remained or continued (*MN v MM* (SCA) 543 par 38).

The determination by the Constitutional Court of the disputes or legal issues mentioned above is dealt with below.

3 Requirements for Validity

A customary marriage entered into after 15 November 2000 must comply with the requirements prescribed by the RCMA (s 3). The second customary marriage in *Mayelane* was entered into on 26 January 2008 while the first was contracted on 1 January 1984 (*Mayelane* 3 par 4). A customary marriage entered into after this date (which was the case with the second customary marriage) therefore has to comply with the following requirements:

(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

(s 3(1) RCMA).

The validity of the first customary marriage was not in dispute. The dispute in *Mayelane* concerned the question as to whether the requirements for a valid customary marriage were complied with in relation to the second customary marriage which was entered into on 26 January 2008 (*Mayelane* 3-4 parr 4-5). This customary marriage was entered into after 15 November 2000 and therefore had to comply with the requirements prescribed by the RCMA (*Mayelane* 16-17 par 28-29).

Compliance with the requirements laid down in section 3(1)(a) of the RCMA was not in dispute (*Mayelane* 51 par 102). There was as such no doubt that the parties to this marriage were above the age of eighteen years and had consented to be married to each other under customary law (s 3(1)(a) RCMA). The other question dealing with consent as a requirement related to whether the consent of an existing spouse of a customary marriage was a requirement for the validity of a subsequent or further customary marriage with another woman (*Mayelane* 35 par 71, 51 par 102). The answer to this question, according to the court, entailed determining whether the RCMA or Xitsonga customary law prescribes consent as a requirement for validity (*Mayelane* 18 par 34, 21 par 42). Flowing from this, that is, if consent is not prescribed as a requirement by the RCMA and Xitsonga customary law, the next question was whether the Constitution required that customary law be developed so as to include the consent of an existing wife as a requirement for a subsequent valid customary marriage (*Mayelane* 6-7 par 12).

There was no doubt that the dispute in this case, that is, the validity of the second customary marriage with the first respondent (Mrs Ngwenyama) was to be determined by the application of customary law in light of the Constitution and legislation that specifically deals with customary law. The principles of customary law regarding consent as a requirement for the validity of a polygynous customary marriage in Xitisonga customary law also had to be explored (*Mayelane* 7-8 par 13).

A distinction was made between the provisions dealing with the requirements for the validity of customary marriages on the one hand and their proprietary consequences (*Mayelane* 21 par 41). This distinction was made in an earlier judgment of the South Gauteng High Court where it was held that the provisions dealing with failure to obtain a written contract envisaged by section 7(6) of the RCMA had nothing to do with the requirements for the validity of a subsequent customary marriage and that failure to comply therewith did not lead to the invalidity of such marriage (*MG v BM* 264-268 parr 18-22). The Supreme Court of Appeal also made this distinction in *MN v MM* (SCA) (536-538 parr 22-24).

The Constitutional Court found that the consent by the existing wife of a customary marriage to a second or subsequent customary marriage of her husband could be interpreted as a requirement for validity from the provisions of section 3(1)(b) of the RCMA, which state that "the marriage must be negotiated and entered into or celebrated in accordance with customary law" (*Mayelane* 16-17 par 29). Therefore, besides the requirements relating to consent as prescribed in section 3(1)(a) of the RCMA, the validity of a customary marriage would depend on whether or not it was "negotiated and entered into or celebrated in accordance with customary law" as required by section 3(1)(b) of the RCMA. Among the essential requirements envisaged by this subsection would be the negotiations relating to *lobolo* and its delivery in anticipation of a customary marriage and any other ceremony or tradition that normally

precedes the entering into of a customary marriage (Jansen "Family Law" in *Introduction to Legal Pluralism in South Africa* (eds Rautenbach, Bekker & Goolam) (2010) 53-54).

According to *Mayelane* (16-17 par 29), section 3(1)(b) of the RCMA has to be interpreted as meaning that:

> Customary law may thus impose validity requirements in addition to those set out in subsection (1)(a). In order to determine such requirements a court would have to have regard to the customary practices of the relevant community.

The interpretation aforementioned, it was pointed out, would make it possible for the development of customary law in accordance with the changing circumstances and the values enshrined in the Constitution to make it (customary law) living law among the communities in which it is observed (*Mayelane* 17-18 par 32).

Relying on section 3(1)(b) of the RCMA, the Constitutional Court concluded that the consent of an existing spouse of a customary marriage was a requirement for the validity of a subsequent customary marriage of her husband with another woman in accordance with living Xitsonga customary law (*Mayelane* 41 par 83, 43 par 87). This conclusion was reached by interpreting section 3(1)(b) of the RCMA in light of the provisions of the Constitution dealing with the right to equality and dignity (*Mayelane* 32-35 parr 62-69; ss 9, 10 Constitution). It was also concluded that if the applicable Xitsonga customary law did not prescribe consent as a requirement for a further customary marriage, such law "… [m]ust be developed … to include a requirement that consent of the first wife is necessary for the validity of a subsequent customary marriage" which "[i]s in accordance with the demands of human dignity and equality" (*Mayelane* 37 par 75).

The above is a brief exposition of the approach of the main judgment of Froneman J, Khampepe J and Skweyiya J with whom Moseneke DCJ, Cameron J and Jacoob J concurred (*Mayelane* 1-44). Zondo J penned down a separate but concurring judgment, as did Jafta J (*Mayelane* 44-81). Although both addressed the main issue in this case, namely, the consent of the existing spouse of a customary marriage as a requirement for the validity of a subsequent or further customary marriage, they adopted different approaches in coming to the conclusion that such consent was a requirement. These approaches are hereinafter discussed.

4 Ascertainment, Proof and Development of Customary Law

It was common cause in this case (*Mayelane*) that customary law had to be applied to determine whether the consent of the existing spouse of a customary marriage was a requirement for the validity of a subsequent customary marriage (*Mayelane* 11-15 parr 21, 25). The court therefore had to look at all the provisions of the Constitution which affect the

application of customary law in order to arrive at a decision (ss 211(3), 9, 10, 39(2) Constitution; *Mayelane* 12-15 parr 23-25, 32 parr 62-69). As the RCMA is legislation that specifically dealt with the issues raised in this case, its relevant provisions to these issues were also considered (ss 3,6, 7 RCMA). The main judgment also relied on additional evidence which was presented in the form of affidavits deposed by individuals who were involved in polygynous customary marriages under Xitsonga customary law, evidence from an advisor to traditional leaders, evidence from various traditional leaders, expert evidence as well as affidavits that were prepared for the proceedings in the court *a quo* (*Mayelane* 27-32 parr 54-61). Further evidence relating to the role of living Xitsonga customary law to determine whether the consent of the existing spouse of a customary marriage was a requirement for the validity of a subsequent customary marriage was also explored (*Mayelane* 21-27 parr 42-53, 35-44 parr 70-84). The court therefore had to ascertain the existence of the rule of customary law relating to consent as a requirement for the validity of a subsequent customary marriage by means of evidence relating to such rule.

After finding that the consent of the existing spouse of a customary marriage was a requirement for the validity of a subsequent customary marriage from the evidence contained in all the affidavits before it, the court considered whether the RCMA could be interpreted as providing this as a requirement (*Mayelane* 31-32 par 61). Reference was made to various sections of the RCMA, *inter alia*, sections 3(1)(a) and (b), 6 and 7 before concluding (*Mayelane* 41 par83) that:

> The Recognition Act is thus premised on a customary marriage that is in accordance with the dignity and equality demands of the Constitution. A customary marriage where the first wife has consented to the further marriage conforms to the principles of equality and dignity as contained in the Constitution. Where the first wife does not give consent, the subsequent customary marriage would be invalid for non-compliance with the Constitution.

The development of customary law was also considered in determining its consistence with the Constitution (s 39(2)). It was concluded that Xitsonga customary law had to be developed, to the extent that it did not as yet do so, to include a requirement that the consent of the first wife was necessary for the validity of a subsequent customary marriage (*Mayelane* 37 par 75).

The separate concurring judgment of Zondo J relating to the determination of the consent of the existing spouse of a customary marriage as a requirement for the validity of a subsequent customary marriage is also instructive (*Mayelane* 44-67 parr 90-131). The question for determination was phrased as whether "... that marriage was valid despite the fact that the first respondent did not give her consent to that marriage" (*Mayelane* 46 par 93). According to this judgment, it was not necessary to call for additional evidence to determine whether the consent of the first wife was a requirement for validity but that the matter

could be dealt with by having regard to the effect of the definitions of "customary law" and "customary marriage" as well as the provisions dealing with the recognition of and requirements for the validity of customary marriages (*Mayelane* 55 par 111, 47-55 parr 95-109).

In the same manner as in the main judgment, it was pointed out that the provisions of section 3(1)(a)(i) and (ii) of the RCMA could not be used to determine whether the consent of an existing spouse of a customary marriage was a requirement for the validity of a further customary marriage. Instead such interpretation could be justified by section 3(1)(b) of the RCMA, that is, to arrive at the conclusion that such consent was a requirement for the validity of a further customary marriage (*Mayelane* 51 par 102). The second or further customary marriage was thus held to be invalid on the basis of the allegations contained in the applicant's founding affidavit, the supporting affidavit of the deceased's older brother as well as the fact that the respondent had failed to challenge the allegations that the applicant did not consent to the said customary marriage (*Mayelane* 52-54 parr 104-107). The conclusion was therefore that the respondent had failed to prove the existence of a valid customary marriage between herself and the deceased (*Mayelane* 65-66 par 128). Although disagreeing with the relevance of the additional evidence, Zondo J concluded that even if regard is had to this evidence the same conclusion could still be reached, namely, that no valid customary marriage existed between the respondent and the deceased at the time of the latter's death (*Mayelane* 55-65 parr 110-127). The effect of the approach to this judgment is best captured by the following (*Mayelane* 67 par131):

> Whether I deal with the matter on the basis of the affidavits that were before the High Court and the Supreme Court of Appeal or on the basis of those affidavits plus additional affidavits, I would grant leave to appeal, uphold the appeal, set aside the relevant part of the Supreme Court of Appeal and replace it with an order declaring that there was no valid customary marriage between the first respondent and the deceased at the time of the latter's death.

Jafta J, with whom Mogoeng CJ and Nkabinde J concurred, also delivered a separate concurring judgment concerning the determination of whether the consent of a spouse of an existing customary marriage was a requirement for the validity of a subsequent customary marriage of her husband (*Mayelane* 68-81). He held that the subsequent customary marriage was invalid as it was not "negotiated and entered into or celebrated in accordance with customary law that applied to the community to which the 'spouses' in that marriage belong" (*Mayelane* 68 par 132). According to this judgment, it was not necessary to develop customary law to include the consent of an existing spouse of a customary marriage as a requirement for a subsequent valid customary marriage (*Mayelane* 68 par 133). The reason for the refusal to do so was that the issue of the development of customary law was not raised before the High Court and the Supreme Court to Appeal and none of the parties had shown any special circumstances which could justify such

development by the Constitutional Court as a court of first and last instance (*Mayelane* 72-77 parr 142-150). Jafta J therefore held that it was not necessary to embark upon such development to come to a decision in this case.

5 Proprietary Consequences and Requirements for Validity

The proprietary consequences of customary marriages entered into after 15 November 2000 are regulated in terms of the RCMA. Such consequences are the same as those of civil marriages (Jansen 63). Except as may otherwise be provided for in an ante-nuptial contract, monogamous customary marriages are in community of property (s 7(2) RCMA). This applies also to monogamous customary marriages contracted before 15 November 2000 (*Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC)). It is possible, however, to change or alter these consequences (Jansen 62).

The RCMA provides that the proprietary consequences of polygynous customary marriages contracted before 15 November 2000 shall continue to be regulated in terms of customary law (s 7(1)). This implies that these marriages are presumed to have created "houses" where each "house" has its own separate and distinct property (Jansen 61-62). For polygynous customary marriages entered into after 15 November 2000, the procedure prescribed in section 7(6) of the RCMA may be used to settle or determine their proprietary consequences. Where section 7(6) of the RCMA is not adhered to, that is, where no contract was approved by a court to regulate proprietary consequences, the resultant customary marriage remains valid but is out of community of property (*Mayelane* 21 par 41; *MN v MM* (SCA) 543 par 38; *MG v BM* 266-268 parr 21-23).

Proprietary consequences of customary marriages, monogamous or polygynous, entered into before or after 15 November 2000, may be changed or altered (s 7(4)(a), (b) RCMA). To achieve this, spouses to such customary marriages have to apply jointly for leave to change the matrimonial property system applicable to their marriage or marriages and the court may order that such matrimonial property system will no longer apply and authorise the parties to the said marriage or marriages to enter into a written contract which will govern the future matrimonial property system of such marriage or marriages on conditions determined by the court (s 7(4)(a) RCMA). In the case of a polygynous marriage, all persons having a sufficient interest in the matter (especially the existing spouse or spouses) have to be joined in the proceedings (s 7(4)(b) RCMA). The proprietary consequences of customary marriages entered into after 15 November 2000 may, in the same manner, be altered in terms of section 21(1) of the Matrimonial Property Act 88 of 1984 (s 7(5) RCMA).

Proprietary consequences of polygynous customary marriages entered into after 15 November 2000 are dealt with in terms of section

7(6) of the RCMA. The section requires a husband who wishes to enter into a further customary marriage to apply to court to have a written contract approved which will regulate the future matrimonial property system of his marriages. Before the decision in *Mayelane*, the effect of failure to comply with this provision was uncertain. It is now clear that the effect of failure to comply with it does not affect the validity of the subsequent or further customary marriage. The Constitutional Court expressed this as follows (*Mayelane* 21 par 41):

> On a more fundamental level, section 7 does not deal with the validity requirements for a marriage at all – it deals with the applicable matrimonial property regime. To interpret it as imposing validity requirements over and above those set out in section 3 would undermine the scheme of the Recognition Act. For these reasons we endorse the Supreme Court of Appeal's interpretation of section 7(6).

These provisions are therefore not additional requirements for the validity of a further marriage in the case of polygynous customary marriages.

6 Decision

The main issue for determination in *Mayelane* was the question of the role that the consent of an existing spouse of a customary marriage plays in the determination of the validity of her husband's further or subsequent customary marriage (*Mayelane* 2 par 1, 46 par 93, 68 par 132). The North Gauteng High Court had earlier declared a further customary marriage entered into without complying with the provisions of section 7(6) of the RCMA as invalid (*MM v MN* (GNP) 290 par 24). The invalidity of this marriage was confirmed on appeal by the Supreme Court of Appeal (*MN v MM* (SCA) 542 par 38). In a further appeal to the Constitutional Court, the main issue for determination was whether the consent of an existing spouse of a customary marriage was a requirement for the validity of a subsequent or further customary marriage of her husband (*Mayelane* 2 par 1). A further issue related to the manner in which a rule of customary law had to be ascertained and, if necessary, developed to give effect to the Bill of Rights (*Mayelane* 2 par 1, 67 par 130, 68 par 132).

The Constitutional Court held that the consent of the existing wife of a customary marriage was a requirement for the validity of a customary marriage of her husband according to Xitsonga customary law (*Mayelane* 43-44 par 89, 67 par 131, 79 par 153). The main judgment was reached by having regard to the provisions of section 3 of the RCMA and interpreting it in light of the equality and dignity provisions of the Constitution (ss 9, 10 Constitution). The court also pointed out that if the said law was not as yet developed to prescribe this consent as a requirement for the validity of a subsequent customary marriage, it had to be developed to give effect to the Bill of Rights (*Mayelane* 37 par 75).

All the judges of the Constitutional Court concurred that a further customary marriage entered into without the consent of the first wife was invalid as a result of failure to comply with section 3(1)(b) of the RCMA. This means that such customary marriage was not "negotiated and entered into or celebrated in accordance with customary law" (*Mayelane* 37-38 par 76. See also *Mayelane* 57 par 102, 77-78 par 151).

The above decision was reached, as pointed out earlier, by invoking the equality and dignity provisions of the Constitution and developing customary law in accordance with the Bill of Rights (*Mayelane* 44 par 89). The separate concurring judgment did not, however, deem it necessary to develop customary law to reach the same conclusion that the consent of the existing spouse in a customary marriage was a requirement for the validity of a further customary marriage in Xitsonga customary law but relied on the evidence that was placed before both the High Court and the Supreme Court of Appeal (*Mayelane* 67 par 131, 68 parr 133-134).

The effect of failure to comply with the provisions of section 7(6) of the RCMA was also dealt with. A distinction was made between the requirements for the validity of customary marriages and their proprietary consequences (ss 3, 7 RCMA). It was then held that failure to comply with the provisions of section 7(6) does not lead to the invalidity of the subsequent or further customary marriage but that such marriage was out of community of property (*Mayelane* 21 par 41).

7 Conclusion

Before the Constitutional Court decision in *Mayelane*, it was uncertain as to whether the consent of the existing spouse of a customary marriage was a requirement for the validity of a further customary marriage of her husband. The effect of failure by a husband of a customary marriage to comply with the provisions of section 7(6) of the RCMA when entering into a further or another customary marriage was also not certain. It is now clear that failure to comply with these provisions has nothing to do with the validity of a further customary marriage as they relate only to proprietary consequence of a polygynous customary marriage. The consent of the wife of a customary marriage as a requirement for the validity of a second or further customary marriage of a husband in Xitsonga customary law has been placed beyond doubt. Although this is the position, the decision in *Mayelane* does not have retrospective effect and the validity of Xitsonga customary marriages contracted before 30 May 2013 is not affected if such consent was not obtained (*Mayelane* 43-44 par 89).

The *Mayelane* decision has far reaching implications and considering the reasons advanced for the decision, it can be concluded that the consent of the existing wife of a customary marriage as a requirement for the validity of a subsequent customary marriage will apply to the whole field of customary law and not only Xitsonga customary law. It is submitted that this conclusion is justified by the duty of the South African

courts to interpret and develop customary law in accordance with the "spirit, purport and objects of the Bill of Rights" (s 39(2) Constitution; see also *Bhe v Magistrate, Khayelitsha* (*Commission for Gender Equality as amicus curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC) 656-657 parr 215-219).

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