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SAILING BETWEEN SCYLLA AND CHARYBDIS: *MAYELANE V NGWENYAMA***H KRUISE*****J SLOTH-NIELSEN******1 Introduction**

In Greek mythology - as epitomised in Homer's epic poem - there is a decisive moment in Odysseus' travels. He has to sail the impossible: in between a six-headed monster and a whirlpool of such magnitude that it engulfs whole ships. Odysseus is - as similar idioms suggest - between a rock and a hard place; or between the devil and the deep blue sea. Faced with this choice, Odysseus chooses the lesser of the two evils: he sails close to Charybdis and loses a couple of sailors, but justifies his decision as having saved his entire ship, his travels, and his mission. The Constitutional Court Justices (and for that matter, the judges in both the court *a quo* and the Supreme Court of Appeal) faced this same dilemma in the recent case of *Mayelane v Ngwenyama*.¹ Decided on 30 May 2013, more than 6 months after a hearing in the Constitutional Court, one pictures the judges in conference trying to travel through this seemingly impassable section of the journey: a journey no less important to our legal system than Odysseus's trip for Greek culture: that is, to recognise and affirm customary law within a constitutional democracy.

The question in this article is whether the court charted the correct course or not. This will be resolved once the context of the court's particular journey is set out, starting with a brief overview of the facts and judgments prior to the Constitutional Court's decision. In considering the case, it seems to us that there are multiple issues that arise.² However, we confine ourselves to a number of areas in the case

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¹ *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) (*Mayelane*).

² For excellent (but in some parts, opposing) views on related aspects of the case, see Himonga and Pope 2013 *Acta Juridica* 318-338. Also see striking discussions of the High Court and Supreme Court of Appeal decisions by Van Niekerk 2012 *SUBB Jurisprudentia* 5-20; Bekker and Van Niekerk 2010 *THRHR* 679-689; Maithufi 2012 *De Jure* 405-412; and Rautenbach and Du Plessis 2012 *McGill L J* 749-780. The analogy of Odysseus's travels is inspired, in some part, by a

which we believe require further analysis, the first of which occupies a significant part of this article: (a) the practical difficulties associated with ascertaining living customary law and problems of identifying legal versus social norms; (b) the meaning of consent as a requirement of a customary marriage; (c) the implications of the case for equality between multiple wives in a customary marriage, and as between wives across customary marriages of different cultural traditions; and (e) the implications of the case for equality considerations more broadly.

2 Brief overview of the facts and previous judgments

Mayelane v Ngwenyama dealt with a situation where a man, Mr Hlengani Dyson Moyana (now deceased), allegedly entered into customary marriages in terms of Vatsonga law with two different women, with the first marriage taking place in 1984 and the later one in 2008. Ms Modjadji Mayelane alleged that she married under Vatsonga customary law in 1984, but the marriage was never registered. Three children were born of the marriage. After Mr Moyana's death in 2009, Ms Mayelane tried to register her customary law marriage to the deceased. While at the Department of Home Affairs, she was informed that Mr Moyana had married another woman in 2008 (Ms Ngwenyama), also under customary law, and that that particular marriage was already registered in terms of the *Recognition of Customary Marriage Act's* (RCMA)³ provisions. The primary issue before the court *a quo* was whether the second marriage was valid, since this would affect how Mr Moyana's estate would devolve. The first wife applied to the court to register her marriage and declare the second marriage void on two bases: (1) her custom (Xitsonga) required the consent of the first wife for a second marriage to be valid; and (2) her husband had not applied to court in terms of section 7(6) of the RCMA, which provides that a "a husband in a customary marriage who wishes to enter into a further customary marriage with another woman ... must make an application to the court to approve a

blog written shortly after the case by De Vos (De Vos 2013 <http://constitutionallyspeaking.co.za/between-a-rock-and-a-hard-place-for-wives-in-polygynous-marriages/>).

³ *Recognition of Customary Marriages Act* 120 of 1998.

written contract which will regulate the future matrimonial property system of his marriages".⁴

Both the court *a quo* and the Supreme Court of Appeal based their findings on the latter contention, without interrogating the former averment that the requirements of custom had not been complied with. As noted in both courts *a quo*, the problem with section 7(6) (and which has been the subject of debate among commentators)⁵ is that it does not set out the consequences of a failure to obtain a court-approved contract. It was clear from the evidence before the court that Mr Moyana had not made such an application in respect of his 2008 marriage, and it was the failure to do so that occasioned the dispute. In finding for Ms Mayelane (the first wife), Bertelsmann J in the court *a quo* found that the failure to approach a court for approval invalidated the second marriage. The court based its finding on the pre-emptory wording of section 7(6), but was swayed more trenchantly by the likely prejudice that would be suffered by the first wife due to the non-disclosure of the subsequent marriage:⁶

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. Cronje and Heaton argue in *South African Family Law* 2ed at 204, that the court's intervention would be rendered superfluous - which the legislature could not have intended - if invalidity did not result from a failure to observe ss (6).

The learned judge continued at para 25:

A further argument ... arises from the peremptory language of the provision: the word "must", read with the provisions of subsection (7)(b)(iii), empowering the court to refuse to register a proposed contract, indicates that the legislature intended non-compliance to lead to voidness of a marriage in conflict with the provision.⁷

⁴ The judgment in the court *a quo* is reported as *MM v MN* 2010 4 SA 286 (GNP).

⁵ Heaton *South African Family Law* 212 and the references cited in fn 50.

⁶ *MM v MN* 2010 4 SA 286 (GNP) para 24.

⁷ In this regard, Bertelsmann J cited *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith* 2004 1 SA 308 (SCA) para 32, where it was held that "language of a predominantly imperative nature such as 'must' is to be construed as peremptory unless there are other circumstances which negate this construction".

As hinted at above, Bertelsmann J found that:

[t]he most persuasive consideration must however be the gross infringement of the first or earlier spouses' fundamental rights: to respect of their dignity, physical and emotional integrity; their right to protection from abuse - in this instance both emotional and economic or material; their right to be treated on an equal footing with their husband, as decreed by the Act; their right to equal status as marriage partners, arising from the Act; their right to marital support from their husband; and their right to marital intimacy and trust, which rights flow naturally from those guaranteed by the Act and the Constitution. A gross infringement of these rights would be committed if the husband were to be allowed to enter into a further marriage without their knowledge and acquiescence.⁸

On appealing the ruling to void her marriage to the Supreme Court of Appeal, Ms Ngwenyama (the "second wife") succeeded.⁹ The SCA (per Ndita JA) found that section 7(6) was *not* peremptory and that it could not have been the intention of the legislature to effect so fundamental a change to the customary law of polygamy by subjecting the validity of a second marriage to prior consent by a (secular) court - which could withhold it. The court also highlighted the discrimination that would be visited upon the *second* wife if Judge Bertelsmann's reasoning was upheld, as she would not have her marriage recognised because of her husband's omission.¹⁰ The court then came to the conclusion that section 7(6) had nothing to do with the validity of the marriage (which was the proper concern of section 3(1) of the Act), but merely affected the proprietary consequences of the polygamous marriage.¹¹

⁸ *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith* 2004 1 SA 308 (SCA) para 27. As an aside, it is interesting that Bertelsmann J ascribes marital intimacy and trust as "rights which flow naturally from those guaranteed by the Act and the Constitution". It implies a western form of *consortium omnis vitae* which, we believe, is not axiomatic, especially if one considers the original foundation of customary marriages as a union between families. Bonthuys 2007 *SAJHR* 534 argues that the customary concept of marriage is "flexible enough to accept different family formations" in demonstrating that the Civil Union Act is a poor cousin to the Marriage Act in South Africa. Woman-to-woman marriages with no "sex" is an example of such a marriage. See Gumede 2009 *Speculum Juris* 112.

⁹ Recorded as *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) (*Ngwenyama*).

¹⁰ *Ngwenyama* para 17. Also see *MG v BM* 2012 2 SA 253 (GSJ), where Moshidi J declined to follow Bertelsmann J's decision in his own division. In coming to this conclusion, Moshidi J stated that once there is a valid subsequent customary marriage, the second wife also acquires certain rights. He further questioned why the second wife should be penalised or prejudiced on account of the failure of the husband to comply with s 7(6).

¹¹ See the argument made by Rautenbach and Matthee that a contrary reading of the s 7(6) provision is plausible: Rautenbach and Matthee 2013 http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=115467&cat_id=1584#.UmFJrUpBvGg.

Importantly, and in a separate judgment which was concurred by all,¹² Ponnán JA held that non-compliance with 7(6) would not invalidate the second marriage, and went further to find that where the husband had not complied with the provision requiring court sanction of a second marriage, this marriage would have to be one out of community of property: "It plainly cannot be a marriage in community of property as that would imply the existence of two joint estates, which it is clear cannot co-exist."¹³

Notwithstanding the fact that the section 3(1)(b) requirements for a valid customary marriage were not the locus of debate in the High Court and Supreme Court of Appeal decisions, the Constitutional Court – on the final appeal discussed here – gave two sets of practice directions¹⁴ to the litigants and *amicus*¹⁵ prior to the hearing. The Court requested the parties to deal specifically with the issue: "whether under Tsonga customary law the first wife's consent was required before the husband could enter a second marriage". This question redirected the focus of the parties - and the dispute - from section 7(6) to section 3(1)(b) of the Act. Section 3(1) provides for express validity requirements in section 3(1)(a), namely majority age and the consent of both parties, but importantly it introduces the further requirement in section 3(1)(b) that the marriage must be "registered and entered into or celebrated in accordance with customary law". The logical inference to be drawn from these directions was that if the appellant could establish that Vatsonga

¹² The strange way in which the judges concur in each other's judgment is an issue in and of itself. Ndita JA gives the main judgment and order and ends with saying in *Ngwenyama* para 27: "It remains to mention that I have had the privilege to read the concurring judgment of Ponnán JA, and I find nothing different from what I have already said. It is substantially a repetition of what I have said, except for what is contained in paras [5] and [10]. For that reason, I concur in it." Then Ponnán J gives his judgment where he uses the analogy of the consent of a minor in terms of the Marriage Act (para 5) and the finding that a subsequent marriage would be out of community of property (para 10). There is no reference to a different order, as he has concurred in Ndita's order. Then finally, Mthiyane DP says at the end in para 39: "I have had the privilege of reading the judgments of my colleagues Ndita AJA and Ponnán JA. I concur in both, save for para [27] of the main judgment." It is not clear what Mthiyane DP is disagreeing with in para 27. One presumes it is that Ponnán J's judgment is not substantially a repetition, but this is by no means clear. For another interesting but more fraught "concurring" issue in the SCA, see *Phodidclinics (Pty) Ltd v Pinehaven Private Hospital (Pty) Ltd* 2011 4 All SA 331 (SCA).

¹³ *Ngwenyama* para 38.

¹⁴ Practice directions given on 1 August 2012 and 25 February 2013.

¹⁵ The Women's Legal Centre had participated as an *amicus* in the SCA, and again applied (and was admitted) as an *amicus* in the Constitutional Court, together with the Commission for Gender Equality and the National Movement for Rural Women in a combined brief.

law required the first wife's consent (as set out in section 3(1)(b)) as part of her custom, it would follow that this would render the 2008 marriage void for want of compliance with section 3(1)(b) (regardless of compliance or not with section 7(6)).¹⁶ On the facts, it was common cause that no consent had been sought from or given by Ms Mayelane to her husband's taking a second wife.

In heads of argument filed with the court, the *amici's* representations can be broadly summarised as follows: the Women's Legal Centre Trust supported the findings of the SCA, and argued that the High Court's approach was "unduly and unnecessarily harsh" on subsequent wives whose unions do not have the consent of the first wife (the decision deprived the subsequent wives of important "legal and constitutional protections", they argued). The Rural Women's Movement and the Commission for Gender Equality (in a joint brief) submitted that insufficient evidence was presented at the High Court to entertain the question on whether or not prior consent from the first wife was part of the customs of the Vatsonga people. Accordingly, they argued the matter should be remitted back to the High Court for reconsideration.¹⁷

As is apparent, the court decided against remitting the matter back to the High Court because of the important interests involved and the need for finality. Instead it called for, and considered, additional evidence itself on the question raised in the practice direction. Ultimately the judgment was then centred on this question (*viz* if Vatsonga customary law required the consent of the first wife in order for the second marriage to be valid). In turn, it was necessary to establish the content of the custom in order to determine if the requirements of the applicable statute had been met, ie if the conditions in section 3(1)(b) had been satisfied. The majority (six justices), found that the Vatsonga law requires the first wife be "informed" about the

¹⁶ Himonga and Pope 2013 *Acta Juridica* 321 correctly point out that the Court's reliance on and reference to s 3 of the RCMA was in fact unnecessary since the first marriage pre-dated the Act. That being so, the essential question (establishing the content of the custom for marriage) remains the same.

¹⁷ The recent minority approach in two Constitutional Court judgments, namely *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) and *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) are examples of where the minority would have, in each instance, referred the case back to the High Court to develop the common law. Harms 2014 *SALJ* (forthcoming) finds this kind of approach inappropriate, thereby placing trial judges "in an invidious position".

second marriage.¹⁸ Two separate dissenting judgments, a single judgment penned by Zondo J and another supported by three judges, reflect the divided responses to the issue. While the Constitutional Court "endorsed" the SCA's interpretation of section 7(6),¹⁹ it overturned the order of that Court, preferring to deal with the matter in terms of the first basis mentioned originally in Ms Mayelane's application, that is, whether Vatsonga custom requires the consent of the first wife. As already said, in order to determine this point the court called for and considered largely contradictory evidence on the custom (although the court felt otherwise, a matter to which we will return to later).²⁰

Justice Froneman, writing for the majority, was at great pains to point out that evidence of consent was a question of law rather than of fact. As such, it could not simply be settled on the papers, and on the normal rules of civil procedure.²¹ This conclusion also enabled the court to find that the custom, as a matter of law, did indeed require that the first wife needed to be informed about the second marriage.²² Given that she knew nothing of the second marriage, the court found that the second marriage was invalid. In addition, the court determined that – prospectively – the lack of consent by a first wife in Vatsonga customary marriage would invalidate any further customary marriage. The court explicitly sets out that this "development" of Vatsonga custom was "in accordance with the demands of human dignity and equality" set out in both the Constitution and the RCMA itself

¹⁸ *Ngwenyama* para 87.

¹⁹ *Ngwenyama* para 41.

²⁰ See s 3.1 below.

²¹ *Ngwenyama* para 47. This point was made in obvious contradistinction to the minority judgment of Zondo J, who felt that the matter should have been decided on the papers (viz records from the High Court and SCA) and that the new evidence was contradictory and therefore ran afoul of Rule 31 of the Court Rules, which require new evidence to be introduced only if it is common cause or otherwise incontrovertible; or is of an official, scientific, technical or statistical nature capable of easy verification. As an aside, it is hard to understand why the Court was prepared to accept the affidavits *in casu* in terms of Rule 31, but reject a social science study by an *amicus* (CALS) which dealt with the impact that unmarried cohabitation was likely to have on women in the case of *Volks v Robinson* 2005 5 BCLR 446 (CC) paras 31-35. The *Volks* court found the study to be "controversial" and "not incontrovertible" in terms of Rule 31. See Lind 2005 *Acta Juridica* 119, who argues that the evidence should have been admitted in terms of Rule 31 of the Rules of the Constitutional Court.

²² *Ngwenyama* para 37.

(and the issue of the "development" of customary law as addressed in this matter is also discussed further below).²³

3 Issues raised as a result of the *Mayelane* decision

3.1 Proof of living customary law

As is apparent, this dispute was aired in three different courts at all three levels of the South African judicial system, with all three courts arriving at different conclusions. Moreover, in the final Constitutional Court decision, only a bare majority of the justices could agree on the issue, with two justices concurring with their decision on a different basis and a dissenting judgment penned by Jafta J and concurred to by Mogoeng and Nkabinde JJ. This emphasises the difficulties and challenges that face courts when dealing with the application and enforcement of an undocumented "living" law such as customary law. Langa DCJ (as he then was) captured this problem in the *Bhe*²⁴ matter when he commented that "[t]he difficulty lies not so much in the acceptance of the notion of 'living' customary law ... but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights".²⁵

It is well known that the legislature attempted to ameliorate this problem when it amended the *Law of Evidence Amendment Act*²⁶ even prior to these cases in 1988.²⁷ The amendment provided that all courts may take judicial recognition of indigenous law. However, and as the *Mayelane* court (and other courts) have recognised, taking judicial notice has its own difficulties, not the least of which are its unwritten nature, as well as the tendency of the civil courts to view customary law through the prism of legal concepts that are foreign to it.²⁸

²³ *Ngwenyama* para 75.

²⁴ *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC).

²⁵ *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 109.

²⁶ *Law of Evidence Amendment Act* 45 of 1988.

²⁷ For a good overview of the Act, see Bekker and Van der Merwe 2011 *SAPL* 116.

²⁸ For commentary on these difficulties, see *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) paras 53-54, *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) paras 44-49 where Van der Westhuizen J attempts to identify factors informing any process of determining the content of a

The application of section 1 of the *Law of Evidence Amendment Act* is possible only where the customary law is "reasonable and certain". We argue that the issue of consent in *Mayelane* was anything but certain. In these circumstances, the court correctly called for evidence (as is permitted under the *Law of Evidence Amendment Act*),²⁹ but how the evidence was dealt with leaves one with a sense of unease. The evidence, in the form of affidavits, can be split into four categories (as the court itself found):³⁰ (a) evidence from three individuals in polygamous marriages; (b) evidence from one advisor to traditional leaders and a male commissioner in the Commission on Traditional Leadership Disputes and Claims; (c) evidence from three traditional leaders (one of whom also falls into the first category above); and (d) two academic experts (from different disciplines), who purportedly drew conclusions from available primary material.

In the first category, two men (Hosi Bungeni and Mr Shirinda) and one woman (Mrs Rikhotso) confirmed that, while the consent of the first wife was required for the validity of a subsequent marriage in Vatsonga custom, the legitimacy of the children and rights of inheritance would not be affected. In this evidence, at least one of the individuals indicated that while consent should be sought, if the first wife did not have a "good reason" (not explained) for refusing her consent, then the elders would impress the point upon her and that issues would usually be resolved that way.³¹

In the second category of informants, the advisor to traditional leaders: Mr Mayimele, indicated that it is the husband who makes the decision. According to the first deponent in this category, the wife is usually involved only where her daughter's *lobolo* is used as *lobolo* for the subsequent wife. A male commissioner (Dr Shilubane) in the Commission on Traditional Leadership Disputes and Claims³²

particular customary norm. See also Bekker and Van der Merwe 2011 *SAPL* 123-124 for a discussion on the judicial approach towards the proof of customary law.

²⁹ *Law of Evidence Amendment Act* 45 of 1988, s 1(2). See *Hlope v Mahlalela* 1998 1 SA 449 (T).

³⁰ *Mayelane* para 54.

³¹ *Mayelane* para 55.

³² The Commission on Traditional Leadership Disputes and Claims (Commission) is established by the *Traditional Leadership and Governance Framework Act* 41 of 2003 (*Framework Act*). The purpose of the establishment of the Commission on Traditional Leadership Disputes and Claims

confirmed that where the decision to marry comes from the husband³³ or from his relatives, the first wife must be informed, but if she disagrees with his decision and his family supports him, he may proceed without her blessing. It is only where the husband acts without his relatives' support that the second wife will be regarded as a concubine.

In the third category (that of traditional leaders), a headman (Acting Headman Sithole) reported that the wife is "*always*" expected to agree to a husband's taking a second or third wife. If she unreasonably (again not explained) withholds consent she would be sent to her parents homestead to reconsider. If she returns to her husband and remains "unreasonable" the husband may marry without consent or divorce her. A second headman (Headman Maluleke) indicated that the consent of the first wife is not necessary, and that the openness of the *lobolo* negotiations (which are a precondition to the marriage) makes it unlikely that the first wife will not know about the impending marriage.³⁴

In the final category, the experts came to different conclusions. An anthropologist with extensive research in the field of Vatsonga customary law (Prof Boonzaaier) indicated that informing or obtaining consent is not a requirement for validity. A law academic (Dr Mhlaba) indicated that it is uncertain what the consequences would be regarding the validity, but he confirmed that where the wife does not consent, the families become involved in order to resolve the matter.

In taking into account this evidence, the court then commented that it could "safely find the following":

- (a) although not the general practice any longer, VaTsonga men have a choice whether to enter into further customary marriages;
- (b) when VaTsonga men decide to do so they must inform their first wife of their intention;
- (c) it is expected of the first wife to agree and assist in the ensuing process leading to the further marriage;
- (d) if she does so, harmony is promoted between all concerned;
- (e) if she refuses consent, attempts are made to persuade her otherwise;
- (f) if that is unsuccessful,

is said to be to restore the dignity and integrity of the traditional leaders and traditional communities and the entire institution of traditional leadership in South Africa.

³³ The male commissioner indicated that the decision could also come from the wife, but obviously this poses no problems.

³⁴ *Mayelane* para 57.

the respective families are called to play a role in resolving the problem; (g) this resolution process may result in divorce; and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but the children of the second union will not be prejudiced by this as they will still be regarded as legitimate children.³⁵

Is this a fair finding (especially the finding in para (h)? A tabular-format of the evidence as described by the court looks as follows:

Does the first wife need to *consent* to her husband's intention to marry?³⁶

Yes	No	Uncertain
<p>4, subdivided into:</p> <p>(i) 2 (Bungeni & Rikhotso: the second marriage is not valid, but the inheritance and the legitimacy of the children of the second marriage are not affected thereby³⁷</p> <p>(ii) 2 (Shirinda & Sethole): the second marriage is not valid, but</p>	<p>4, subdivided into:</p> <p>(i) 3 (Mayimele, Boonzaaier³⁸ and Maluleke)</p> <p>(ii) 1 (Shilubane: if the wife is not informed at all, the second marriage is valid only if the husband's relatives support the husband)³⁹</p>	<p>1 (Dr Mhlaba)</p>

³⁵ *Mayelane* para 61. Our emphasis. Given the disappearing language of legitimacy in South Africa and worldwide (recognising that the word has pejorative consequences), the *amici* and court's reference to this status is somewhat unfortunate. See Schafer *Child Law* 26-27.

³⁶ As mentioned earlier, the practice directions requested the *amici* to provide evidence to answer the question of whether or not the consent of a first wife was a requirement (para 53, fn 51 of the judgment). The practice directions further stated that the *amici* should attempt to ascertain the "manner and form" of this consent. See the discussion *infra* regarding the finding of the court as to "informing" the wife versus her "consenting".

³⁷ The affidavit of a Hosi Nkanyani from the Vhembe district is referred to in both the judgments of Zondo and Jafta JJ (*Mayelane* paras 119 and 137 respectively). It appears as if his affidavit forms part of the submission by the CGE and NMRW. Notwithstanding, this affidavit was not referred to in the majority judgment and is therefore discounted for the purposes of this table.

³⁸ See Zondo J's judgment at para 116, which posits that the case study upon which Boonzaaier relied to support his opinion actually supported the view that informing the first wife was necessary.

³⁹ *Mayelane* para 56.

the wife will be strongly impressed upon to accede.		
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While it is unwise to determine the content of customary law through a "numbers game", it seems that the evidence before the court simply did not support its finding as set out above.

More importantly, and in the light of the disagreements amongst informants, the court also failed to ask the antecedent question: if there is a social normative practice of informing the first wife of the intention to conclude a further marriage (which does not look to be set in stone), then at what point does it become the basis of a legal norm with dire consequences regarding the validity of the subsequent marriage? It appears that the court's view of the evidence before it presupposed that a requirement that the first wife be informed would be tantamount to a legal norm, such as those traditionally accepted legal norms requiring the payment of *lobolo* (the bride price) and that of *ukumekeza* (the formal handing over of the bride).⁴⁰

If courts are not alive to the finer distinctions between behavioural norms, there is a concern that "law" and "customary law" will lose any distinctive meaning: everything will be swallowed up to become law.⁴¹ Here the dissenting judgment appears to provide further ballast, as it seems that the custom of one community within a cultural group (ie in rural areas) may not be echoed by others belonging to the same clan (eg with more access to urban and peri-urban areas).⁴² As the legal anthropologist Galanter discusses extensively in his work, this is highly problematic in the context of social life which is full of regulation.⁴³

⁴⁰ See *Fanti v Boto* 2008 5 SA 405 (C) para 22, where the court commented (regarding *ukumekeza*): "All authorities are in agreement that a valid customary marriage only comes about when the girl (in this case the deceased) has been formerly transferred or handed over to her husband or his family." See *Mabuza v Mbatha* 2003 4 SA 218 (C) and *Maluleke v Minister of Home Affairs* 2008 ZAGPHC 129.

⁴¹ See Tamanaha 1993 *J Law & Soc* 192.

⁴² Jafta J in *Mayelane* para 140 and 143.

⁴³ His most influential works being: Galanter "Modernization of Law" 153-165; Galanter 1981 *JLP* 537-556 and Galanter 1992 *MLR* 1-24.

The question then is how can we distinguish indigenous law from social life generally?⁴⁴ As Bennett points out, courts obviously cannot assume that all patterns of behaviour are obligatory.⁴⁵ In the context of the *Mayelane* dispute, the question should have been whether informing the wife is a social norm akin to asking the father for his daughter's hand in marriage in the typical western civil marriage setting, or whether it is indeed a legal norm with the accompanying legal consequences. On the face of the judgment, the evidence points to a continuum where what is required is a courtesy call on the first wife at best, and a veiled threat that she should agree to the marriage at worst.⁴⁶ Further, where informants depose to an affidavit alluding to a requirement that the first wife be informed, the court is not able to interrogate the fuller meaning of such an act for that community as a whole, and as has been the case in some other courts, the court has glossed over the normative status of the social practice asserted by the parties.⁴⁷ As mentioned by Bekker and Koyana⁴⁸ in the context of succession, "incidents of living customary law cannot without more ado be elevated to a general rule of law." In setting out the process of recognising customary law, they argue that a court must find that a fixed line of behaviour is followed by more or less a constant group of persons for a certain period, and in particular, "a custom, in order to be law, must be commonly believed to be obligatory".

An example of where this is put in doubt, is provided by *Mabena v Letsoala*.⁴⁹ The case dealt with the question of whether a customary marriage had been validly celebrated where the groom had negotiated the *lobolo* with his prospective bride's mother, in contrast to the generally accepted rule that such marriages require the

⁴⁴ This relates to the desirability of formal law taking as legally authoritative some pre-legal normative practice, without more inquiry into the matter.

⁴⁵ Bennett 2009 *Am J Comp L* 13. See also Himonga and Bosch 2000 *SALJ* 321.

⁴⁶ The repeated references to "unreasonable" refusal, getting elders to approach the first wife, and sending the wife back to her parents imply some effort at achieving "peace for peace's sake" rather than any autonomous decision making by the wife. See below.

⁴⁷ This is important in the context of understanding that marriage in customary law cannot be viewed simply in linear terms: certain acts (such as the so-called consent issue) could "suggest a marriage or movement towards such a state" (Griffiths *In the Shadow of Marriage* 56). The legal anthropologist, Griffiths, makes this point when describing the difficulties in establishing the requirements for a customary marriage, and the fact that customary marriage is a process rather than a single event.

⁴⁸ Bekker and Koyana 2012 *De Jure* 571.

⁴⁹ *Mabena v Letsoala* 1998 2 SA 1068 (T) 1070, 1074.

groom and his guardians to negotiate with the bride's male guardian. In this matter the respondent said that although the parties followed Pedi custom: "My people and I, we do not engage in these customary traditions. We did it as it pleased my mother." The court did not attempt to ascertain if the so-called rule in issue was not simply the practice of two people entering a contract, being the woman and her future son-in-law. As Bennett explains, the court merely referred to the respondent's testimony and analogous situations described in a South African Law Reform Discussion Paper, and then concluded that the case was not an isolated one. In Bennett's view, the court

had virtually no evidence of a rule of living law. ... [The woman's] action might have been purely idiosyncratic and not in keeping with a general pattern of behaviour: she might have been a particularly strong-willed character, having no truck with old-fashioned, sexist behaviour. Or her action might have been the result of temporary conditions: adult men were away from home at work, thereby compelling women to assume male roles for the time being. Was there any sense of legal obligation in this practice?⁵⁰

It is telling, for example, that one deponent in *Mayelane* (Headman Maluleke) in an additional affidavit filed by the *amici* in the case stated that:

... the prospective bridegroom should inform his existing wife about his intentions to marry another wife. *He informs her so that she should not be surprised in seeing another wife.* It is not a requirement to even advise as to the identity of the prospective subsequent wife. Whether she gives her consent or not, the prospective bridegroom will proceed with his plan to marry another wife.⁵¹

In this version, the evidence suggests that the so-called requirement to inform the first wife is much more akin to a housekeeping rule than to a legal norm to be adhered to in the face of the invalidity of the second marriage.

Finally, it is interesting (and the court does not raise this issue) that it is mostly the traditional leaders and the experts (bar one) who doubt that informing the first wife is a legal requirement.⁵² While the court was correct to indicate that their finding was one of law and not of fact, it could be argued that the court should have given more weight to the testimony of the so-called experts (from a law-making or law-telling

⁵⁰ Bennett 2009 *Am J Comp L* 13, 18. This concern is also shared by Bekker and van der Merwe 2011 *SAPL* 125.

⁵¹ Recorded in *Mayelane* para 122 of the judgment. Our emphasis.

⁵² *Mayelane* paras 54-59.

perspective) who supposedly deal with these issues as part of their responsibilities or research,⁵³ than to the accounts of the personal experiences of less authoritative individuals.

3.2 *Informing or requiring consent?*

While it is conceded that the court was correct to emphasise that consent in the context of customary marriage must not be seen through the prism of the common law of contract,⁵⁴ it is hard to understand in what way consent can be interpreted otherwise – for the purposes of legal regulation – than as some form of conscious acquiescence. We believe the court's finding that the provision of information to the first wife – rather than requesting her consent – was the custom is somewhat disingenuous, since it is clear from some of the informants that even when pressure is brought to bear by relatives upon a recalcitrant first wife and she remains steadfast, the marriage can proceed. It appears then that the Court missed an opportunity to set a minimum threshold for consent (or at least to establish its meaning in a customary context). This is exactly what the *amicus Women's Legal Centre* had argued for in the context of their view that women do not have an equal bargaining position in relationships.⁵⁵ Thus, even though the Court cautioned that consent will not have universal meaning, it is important to work out a threshold for the purposes of gauging consequences.⁵⁶

3.3 *Equality between multiple wives in a customary marriage*

This case, as with most others in this domain, illustrates that while equality may appear to be a standard against which to measure law (including customary law) and statutes, equality here has theoretical and practical limitations.⁵⁷ What about the equality and dignity of the second wives? It is noteworthy that the equality discussions in the majority and minority judgments of the Constitutional Court omit

⁵³ Noting the table above.

⁵⁴ *Mayelane* para 49.

⁵⁵ WLC notice of motion to be admitted as an *amicus curiae*, affidavit deposed by Jennifer Lynn Williams (*Mayelane* para 35).

⁵⁶ *Mayelane* paras 71-73.

⁵⁷ Kaganas and Murray 1991 *Acta Juridica* 125.

any reference to the potential equality claims of the second wife. Furthermore, what if there are more wives? Would the consent of the second and third wife be required for the valid conclusion of subsequent marriages? Or is the first wife alone privileged in this regard? In addition, would a first wife in another type of customary union be required (or entitled) to go to court to ask for the same consent "development" to apply in her custom? While the court avoided these questions, given the specific factual matrix before it, the avoidance leaves these questions unresolved and consequently impacts on women's access to justice in ascertaining the legal position of their relationship, which in turn affects their financial security.⁵⁸ It may be ironic that in this situation the application of the "official customary law" of the past⁵⁹ (often described as bastardised, inadequate and wanting)⁶⁰ would have been beneficial to the second woman in this situation. Regulation 2(d) of the Regulations for Administration and Distribution of the Estates of Deceased Blacks allowed for a type of statutory putative doctrine to apply.⁶¹ If the second wife in the *Mayelane* case could have shown that she was *bona fide*, her situation would have been ameliorated by the application of the putative spouse doctrine.

⁵⁸ The recent SCA decision of *Mbaba v Mbaba* 2013 ZASCA 137 also raises the spectre of justice denied for women in these types of situations where the legal professionals involved fail to frame and conduct the case adequately. In this matter two women claimed to be married to the deceased and denied the validity of each other's marriages. The court found the notice of motion and conduct of the case flawed and inept, dismissing the appeal with costs.

⁵⁹ That is, the version developed by colonial administrations in written renditions, case law and legislation. See Rautenbach *et al Introduction to Legal Pluralism* 28-30.

⁶⁰ For example, see DCJ Moseneke's criticism of legislative encroachments on customary law over the years in *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) 161-162.

⁶¹ Regulations in terms of s 23 of the *Black Administration Act* 38 of 1927 and promulgated under GN R200 of 6 February 1987. Section 2(d) sets out that:

When any deceased Black is survived by any partner-

- (i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or
- (ii) with whom he had entered into a customary union; or
- (iii) who was at the time of his death living with him as his putative spouse;

or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European (Our emphasis).

3.4 Parity between wives across customary marriages of different cultural traditions

The SCA's interpretation of section 7(6) was (in its own words) endorsed by the CC.⁶² However, the CC overturned the SCA's order due to the finding that the deceased had not complied with section 3(1) as required in the RCMA. Strictly speaking this means that the SCA's finding relating to section 7(6) is no longer binding as a *ratio decidendi*, but it remains highly persuasive given the Constitutional Court's endorsement of its reasoning. So far so good. However, the finding that the second marriage concluded without prior court approval of the matrimonial property regime to govern the marriage(s) will therefore have to be a marriage out of community of property, while seemingly pragmatic, is in our view problematic for those customary marriages where informing the first wife is not (or is not yet) a legal requirement for the validity of the second marriage.

The obvious concern is that parity between wives across different customs must run on the issue of the proprietary consequences. In the Constitutional Court decision of *Gumede v President of the Republic of South Africa*,⁶³ the Court found section 7(1) and (2) of the RCMA unconstitutional in that it differentiated between the proprietary regime of women married prior to the RCMA and those married after the Act. Those married prior to the RCMA were subject to a *de facto* out of community of property regime, whereas all marriages post the Act are considered *de facto* in community of property.⁶⁴ The court's remedy in *Gumede* was to allow a court to impose a more "favourable" community of property regime on a pre-recognition customary marriage, on the basis that this most accorded with the dignity and equality rights of the wife. However, under the guise of the very same principles of equality and dignity in the *Mayelane* matter, the SCA declined to award the second marriage the status of a marriage in community of property. There are many distinguishing

⁶² *Mayelane* para 41.

⁶³ *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).

⁶⁴ We use the term *de facto* here since pre-Act all customary marriages were subject to customary rules which were neither in nor out of community of property, but were based on patriarchal principles. Given the perpetual minority status of all women under customary law, they did not have legal capacity. As a result women could not own, acquire or dispose of property. In effect then, one can characterise the marriage as out of community of property.

features between the two cases. *Gumede* dealt with a *de facto* monogamous marriage where the dignity and equality rights of only one wife and one husband had to be considered. However, the result is that courts have a discretion to impose an in community of property matrimonial regime for women in pre-RCMA marriages, but may not do so for second and further wives where section 7(6) is not complied with, even if consent is obtained in terms of custom (which then rescues the marriage from invalidity under section 3(1)) for the second marriage). So it seems there is inequality all around: the proprietary positions of women in polygamous unions (as opposed to monogamous unions pre-Act) are different, as are those of women within a polygamous union if section 7(6) is not complied with. This very inequality is justified using the equality and dignity principles which underpin the RCMA in the first place.

The finding that the second marriage will be out of community of property also poses implementation problems. One would expect an ante nuptial contract regulating the second marriage.⁶⁵ This is unlikely to be the case. Nor does it seem that the accrual system could be automatically applied, given its questionable viability in a polygamous setting.⁶⁶ So imagine that a husband and a wife are married in terms of customary law after the Act's inception (and therefore in community of property). The husband obtains the consent of the first wife for the second marriage, but does not approach the court in terms of section 7(6). The husband then dies intestate with an estate valued at R400 000. How will the estate devolve? Given the SCA judgment, the second marriage in this scenario is likely to be out of community of property. If one applies the *Intestate Succession Act*,⁶⁷ the first wife must get half the estate (R200 000), and then each surviving spouse must inherit R125 000 or a child's share, whichever is the greater.⁶⁸ It is assumed that in this scenario then, the first and second wife will each receive R100 000, and any children from both marriages will get nothing. There is no space in this scenario (as there is

⁶⁵ Rautenbach and Matthee 2013 http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=115467&cat_id=1584#.UmfJrUpBvGg 9.

⁶⁶ Heaton *South African Family Law* 213 indicates that the application of the accrual system is problematic in the context of discussing the matrimonial property systems that the s 7(6) contract can provide for.

⁶⁷ *Intestate Succession Act* 81 of 1987.

⁶⁸ Jamneck *et al Law of Succession* 36.

in a divorce setting) for a court to "make any equitable order that it deems just"⁶⁹ given the duration, support etc of each wife. One could argue that an unfair position could be ameliorated by the fact that the children are able to claim maintenance against the estate, and that one (or both) wives may use the *Maintenance of Surviving Spouses Act* for a claim for maintenance.⁷⁰ Any claim under the latter Act has to be settled before the estate is divided among the heirs, and shares the same order of preference as a claim of a dependent child.⁷¹ So it may be that there is competition between the wives for the half share of the deceased's estate which could be reduced dramatically with maintenance claims. In terms of implementation, there is also the issue of when the out of community of property marriage regime commenced: it seems that it would have to be at the date of the marriage, but given jurisprudence about retrospective application in terms of section 21 of the *Matrimonial Property Act*,⁷² this is yet another difficulty to contemplate if one is a third party creditor.⁷³

The practical implementation issues relate to the bigger issue: under a joint property regime such as community of property and automatic sharing, substantive equality simply cannot be attained where more than one marriage subsists at the same time. The regime is predicated on no more than two parties to a marriage. Van Heerden and Sloth-Nielsen predict that this fact is going to lead to ongoing litigation in the customary law sphere, as the concept of equality is "blurred at the edges".⁷⁴

⁶⁹ This order is possible following s 8(4)(a) of the *RCMA*, which allows a court to redistribute assets of any customary marriage regardless of when they were concluded and regardless of what matrimonial property system was operational.

⁷⁰ *Maintenance of Surviving Spouses Act* 27 of 1990.

⁷¹ S 2(3)(b) of the *Maintenance of Surviving Spouses Act* 27 of 1990.

⁷² *Matrimonial Property Act* 88 of 1984. S 21 provides for an application to court by the parties to a marriage for leave to change the matrimonial property system which applies to their marriage, irrespective of whether the marriage is in or out of community of property.

⁷³ *Ex Parte Krös* 1986 1 SA 642 (NC), which applied the change of regime retrospectively. See *Ex parte Oosthuizen* 1990 4 SA 15 (E), which held that the court had no discretion to alter the matrimonial property regime with retrospective effect. See also *Ex parte Coertzen* 1986 2 SA 108 (O) and *Ex Parte Burger* 1995 1 SA 140 (D).

⁷⁴ Sloth-Nielsen and Van Heerden 2014 *Int'l J L Pol'y & Fam* (forthcoming).

3.5 *Prospectivity versus retrospectivity: the bell tolls for some*⁷⁵

It is trite that the Constitutional Court has emphasised the need for effective remedies.⁷⁶ The purpose then of a constitutional remedy is to grant effective relief to the litigants before the court and to similarly situated people.⁷⁷ Given this principle, we believe that there is an internal clash of logic inherent in the court's view that the consent of the first wife will be required for the validity of Vatsonga marriages, but only for marriages concluded after the date of publication of the judgment, ie prospectively.⁷⁸ The court expressly premises this on the inequity that may result for women who entered into a customary marriage without knowing that consent was a requirement for validity. This is then the only time that the court contemplates the position of the second "wife", and not in relation to Ms Ngenyama. The court expressed the opinion that it would be unfair "to deprive wives in a further marriage of the protection that recognition of the validity of their marriage under the Recognition Act would bring".⁷⁹ How then does this not apply to Ms Ngwenyama, we ask? Further, although the court purports to "develop" the customary validity requirements of Vatsonga marriages, the court is equally at pains to point out that "even before its development in this judgment", customary law required that the first wife be informed of her husband's impending subsequent marriage as if the requirement was there all along. The court, at para 43, makes the point that this would be the first time that the court has had to engage in the incremental development of customary law as envisaged in section 39(2) of the *Constitution*. But surely this begs the question: if the customary practice was already as definitive as the court finds it was, what then was there for the Court to develop? The ambiguity of courts' approaches to their role in developing customary law remains patent.⁸⁰

⁷⁵ In the *National Coalition* case, the Court noted (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 82) that in constitutional cases, there is "a wider public dimension. The bell tolls for everyone."

⁷⁶ Currie and de Waal *Bill of Rights Handbook* 181. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 65, 81-82.

⁷⁷ Currie and De Waal *Bill of Rights Handbook* 182.

⁷⁸ *Mayelane* para 86.

⁷⁹ *Mayelane* para 86.

⁸⁰ Mwambene and Sloth-Nielsen 2012 *Law in Context* 27.

Another interesting issue that arises in the context of the remedy given is that there is some ambiguity as to whether the order applies to all customary marriages, or only to Vatsonga customary marriages. This has obvious implications for discerning who are the very "similarly situated people" discussed above. While the Court implies that its order applies to all customary marriages systems in its statement at para 86: "Our order makes it clear that the general requirement of consent operates only prospectively, to customary marriages entered into after this judgment has been published...", this implication is put into question by its preceding statement that the court "is not able to determine what the position in customary law systems other than XiTsonga system is". Himonga and Pope believe that the Court ruling applies uniformly to all customary law "in a sense".⁸¹ We find that, on a literal reading of para 86, this appears to be the case. However, the Court makes it clear in paras 21, 75, para 85 (the order), and annexure A (summary of the order to be disseminated to the Minister of Home Affairs and the Houses of Traditional Leaders) that it is Vatsonga customary marriages only to which the order applies. This is so because the court has made it clear in earlier cases that its remedial powers are limited to the parties before the court and the facts of the instant matter.⁸² However, and as Himonga and Pope point out, as a result of this decision, all customary law systems will need to ensure that their principles of consent either meet, or are developed to meet, the constitutional principles of equality and dignity for the first wife, husband, and prospective or existing subsequent wives.⁸³ This task results in uncertainty for wives in customary marriages as to their status. It also begs the question as to what the situation might be (as is increasingly possible in urban settings) where a man takes a first wife who is, for example, Xhosa and then a second wife who is Tsonga? Which custom applies then? Common sense might dictate that it is the customary law regime of the husband that determines the applicable choice of law question, but then again, equality concerns that subjugate the answer to a policy of "male preference" militate substantially against such a position.

⁸¹ See Himonga and Pope 2013 *Acta Juridica* 322-323.

⁸² See, for example, *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC) and a critique of this and other cases in Woolman 2007 *SALJ* 762-794.

⁸³ Himonga and Pope 2013 *Acta Juridica* 323.

4 Conclusions

In analysing the course the court charted, we applaud the judges for making it through to the other side largely unscathed. As noted by Himonga and Pope, the Court's approach represents a good attempt to close the gap in customary law jurisprudence, specifically related to determining the content of customary law.⁸⁴ However, it should be more readily acknowledged that compromises had to be made, and that "sailors" were lost along the way, to return to the metaphor with which we started. A more honest approach would have been to put aside the fiction that the judges do no more than "speak to the law",⁸⁵ and to acknowledge that a privileged position was to be accorded the first wife by the Court and not necessarily by the actual custom.

A related conclusion is that, while section 3(1) of the RCMA is laudable in its conception and its attempt to be flexible enough to adapt to living law, the *Mayelane* case shows how courts have had to enter the law-making arena in the family domain where the current environment (legislation is but one form) provides inadequate direction. While we can accept that this does and must happen in a constitutional democracy operating in a plural system, it is better that these matters should be subject to democratic deliberation and dealt with in a holistic way. We cannot forget that the courts have to make decisions ("law") on the narrow facts before them. While it may be appropriate in many instances for courts to make decisions affecting more than just the parties before them (as the *Constitution* may require)⁸⁶, the *Mayelane* order (especially if it is read to apply to all customary marriages from the date of the court's order)⁸⁷ is problematic. The court was put in the unenviable position of making a decision which deals with complex issues going far beyond the two parties or the immediate community at issue.⁸⁸ The court therefore did not (and

⁸⁴ Himonga and Pope 2013 *Acta Juridica* 338.

⁸⁵ For criticisms of the *Shilubana* decision as ostensibly relying on living customary law, see Bekker and Boonzaaier 2008 *CILSA* 448, and Mailula 2008 *SAPL* 215.

⁸⁶ See s 3.5 above, where it is noted that a court's order must not only afford effective relief to the parties before it, but also to all similarly situated people.

⁸⁷ See s 3.5 above.

⁸⁸ Cass Sunstein is well known for his preference for "incompletely theorised" decisions for certain situations (Sunstein *One Case at a Time* 9). Sunstein offers two broad reasons for preferring narrow, minimalist judgments in certain circumstances, which appear to be applicable here: first,

could not) benefit from a more holistic, contextual view of the customary marriage and family law domain, and the proprietary implications which impact severely on women's lives.⁸⁹ As a consequence, women are left uncertain where the narrow facts do not fit their situation. Where the facts do fit their case, but within the greater context (viz to multiple wives, or wives across types of marriage, or wives in a different customary setting⁹⁰), it is clear that they suffer inequalities which have to be subsequently litigated on in order to achieve certainty, and even then they may face additional hurdles.⁹¹

With regard to the consequences of *Mayelane* for equality, the resultant non-validity of the marriage of the second wife (whose husband failed to inform the first wife of his intention to marry) ironically puts the second wife as dependent on the vagaries of male behaviour to determine her standing as under any formal system of patriarchy. This is an invidious position indeed.

he argues that certain forms of minimalism can be "democracy-promoting" in that it ensures that certain important decisions are made by democratically accountable actors (Sunstein *One Case at a Time* 5). Second, he argues that – especially in a pluralistic society – courts should be making minimalist decisions when dealing with complex issues about which people feel deeply and on which there is disagreement (Sunstein *One Case at a Time* 5).

⁸⁹ As opposed to Parliament who will have time, researchers and drafters over a long period putting legislation together.

⁹⁰ See s 3.5 above.

⁹¹ *Viz* access to justice issues discussed above. It is not just wives who will be uncertain. Pension fund administrators, administrators of estates, the Master and so forth are all implicated too.

BIBLIOGRAPHY*Literature*

Bekker and Boonzaaier 2008 *CILSA*

Bekker JC and Boonzaaier CC "Succession of Women to Traditional Leadership: Judgment in *Shilubana v Nwamitwa* Based on Questionable Premises" 2008 *CILSA* 448-461

Bekker and Koyana 2012 *De Jure*

Bekker JC and Koyana DS "The Judicial and Legislative Reform of the Customary Law of Succession" 2012 *De Jure* 56-584

Bekker and Van der Merwe 2011 *SAPL*

Bekker JC and Van der Merwe IA "Proof and Ascertainment of Customary Law" 2011 *SAPL* 115-127

Bekker and Van Niekerk 2010 *THRHR*

Bekker JC and Van Niekerk GJ "Broadening the Divide between Official and Living Customary Law: *Mayelane v Ngwenyama & Another* 2010 (4) SA 286 (GNP); [2010] JOL 25422 (GNP)" 2010 *THRHR* 679-689

Bennett 2009 *Am J Comp L*

Bennett TW "Re-introducing African Customary Law to the South African Legal System" 2009 *Am J Comp L* 1-32

Bonthuys 2007 *SAJHR*

Bonthuys E "Race and Gender in the Civil Union Act" 2007 *SAJHR* 526-542

Currie and De Waal *Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Claremont 2013)

Galanter "Modernization of Law"

Galanter M "The Modernization of Law" in Weiner M (ed) *Modernization: The Dynamics of Growth* (Basic Books New York 1966) 153-165

Galanter 1981 *JLP*

Galanter M "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" 1981 *JLP* 537-556

Galanter 1992 *MLR*

Galanter M "Law Abounding: Legalisation Around the North Atlantic" 1992 *MLR* 1-24

Griffiths *In the Shadow of Marriage*

Griffiths A *In the Shadow of Marriage: Gender and Justice in an African Community* (University of Chicago Press Chicago 1997)

Gumede 2009 *Speculum Juris*

Gumede P "Woman to Woman Marriages Among the Lovedu: The Need for Official Recognition" 2009 *Speculum Juris* 112-122

Harms 2014 *SALJ*

Harms LTC "The Puisne Judge, the Chaos Theory and the Common Law" 2014 *SALJ* (forthcoming)

Heaton *South African Family Law*

Heaton J *South African Family Law* 3rd ed (LexisNexis Durban 2010)

Himonga and Bosch 2000 *SALJ*

Himonga C and Bosch C "The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?" 2000 *SALJ* 307-341

Himonga and Pope 2013 *Acta Juridica*

Himonga C and Pope A "Mayelane v Ngwenyama and Minister of Home Affairs: A Reflection on Wider Implications" 2013 *Acta Juridica* 318-338

Jamneck *et al Law of Succession*

Jamneck J *et al* (eds) *The Law of Succession in South Africa* 2nd ed (Oxford University Press Cape Town 2012)

Kaganas and Murray 1991 *Acta Juridica*

Kaganas F and Murray C "Law, Women and the Family: The Question of Polygyny in a New South Africa" 1991 *Acta Juridica* 116-134

Lind 2005 *Acta Juridica*

Lind C "Domestic Partnerships and Marital Status Discrimination" 2005 *Acta Juridica* 108-130

Mailula 2008 *SAPL*

Mailula D "Abdication of Judicial Responsibility, Cultural Self-determination and the Development of Customary Law: Lessons from *Shilubana*" 2008 *SAPL* 215-235

Maithufi 2012 *De Jure*

Maithufi IP "MM v MN 2010 (4) SA 286 (GNP)" 2012 *De Jure* 405-412

Mwambene and Sloth-Nielsen 2012 *Law in Context*

Mwambene L and Sloth-Nielsen J "Walking the Walk and Talking the Talk: How can the Development of African Customary Law be Understood?" 2012 *Law in Context* 27-46

Rautenbach *et al Introduction to Legal Pluralism*

Rautenbach et al (eds) *Introduction to Legal Pluralism* 3rd ed (LexisNexis Durban 2011)

Rautenbach and Du Plessis 2012 *McGill L J*

Rautenbach C and Du Plessis W "African Customary Marriages in South Africa and the Intricacies of a Mixed Legal System: Judicial (In)Novatio or Confusio?" 2012 *McGill L J* 749-780

Schafer *Child Law*

Schafer L *Child Law in South Africa: Domestic and International Perspectives* (LexisNexis Durban 2011)

Sloth-Nielsen and Van Heerden 2014 *Int'l J L Pol'y & Fam*

Sloth-Nielsen J and Van Heerden B "The Constitutional Family: Developments in Child and Family Law 2003-2013" 2014 *Int'l J L Pol'y & Fam* (forthcoming)

Sunstein *One Case at a Time*

Sunstein C *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press Cambridge 1999)

Tamanaha 1993 *J Law & Soc*

Tamanaha B "The Folly of the 'Social Scientific' Concept of Legal Pluralism" 1993 *J Law & Soc* 192-217

Van Niekerk 2012 *SUBB Jurisprudentia*

Van Niekerk GJ "Reflections on the Interplay of African Customary Law and State Law in South Africa" 2012 *SUBB Jurisprudentia* 5-20

Woolman 2007 *SALJ*

Woolman S "The Amazing, Vanishing Bill of Rights" 2007 *SALJ* 762-794

Case law

Alexkor Ltd v Richtersveld Community 2004 5 SA 460 (CC)

Bhe v Khayelitsha Magistrate 2005 1 SA 580 (CC)

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 1 SA 256 (CC)

Ex Parte Burger 1995 1 SA 140 (D)

Ex parte Coertzen 1986 2 SA 108 (O)

Ex Parte Krös 1986 1 SA 642 (NC)

Ex parte Oosthuizen 1990 4 SA 15 (E)

Fanti v Boto 2008 5 SA 405 (C)

Gumede v President of the Republic of South Africa 2009 3 SA 152 (CC)

Hlope v Mahlalela 1998 1 SA 449 (T)

Lee v Minister of Correctional Services 2013 2 SA 144 (CC)

Mabena v Letsoalo 1998 2 SA 1068 (T)

Mabuza v Mbatha 2003 4 SA 218 (C)

Maluleke v Minister of Home Affairs 2008 ZAGPHC 129

Masiya v Director of Public Prosecutions 2007 5 SA 30 (CC)

Mayelane v Ngwenyama 2013 4 SA 415 (CC)

Mbaba v Mbaba 2013 ZASCA 137

MG v BM 2012 2 SA 253 (GSJ)

Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd;

Minister of Environmental Affairs and Tourism v Smith 2004 1 SA 308 (SCA)

MM v MN 2010 4 SA 286 (GNP)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 2 SA
1 (CC)

Ngwenyama v Mayelane 2012 4 SA 527 (SCA)

Phodiclinics (Pty) Ltd v Pinehaven Private Hospital (Pty) Ltd 2011 4 All SA 331 (SCA)

Shilubana v Nwamitwa 2009 2 SA 66 (CC)

Volks v Robinson 2005 5 BCLR 446 (CC)

Legislation

Black Administration Act 38 of 1927

Constitution of the Republic of South Africa, 1996

Intestate Succession Act 81 of 1987

Law of Evidence Amendment Act 45 of 1988

Maintenance of Surviving Spouses Act 27 of 1990

Matrimonial Property Act 88 of 1984

Recognition of Customary Marriages Act 120 of 1998

Traditional Leadership and Governance Framework Act 41 of 2003

Internet sources

De Vos 2013 <http://constitutionallyspeaking.co.za/between-a-rock-and-a-hard-place-for-wives-in-polygynous-marriages/>

De Vos P 2013 *Between a Rock and a Hard Place for Wives in Polygynous Marriages* <http://constitutionallyspeaking.co.za/between-a-rock-and-a-hard-place-for-wives-in-polygynous-marriages/> accessed 15 June 2013

Rautenbach and Matthee 2013 http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=115467&at_id=1584#.UmfJrUpBvGg

Rautenbach C and Matthee J 2013 *Ngwenyama v Mayelane (474/11 ZASCA 94 (1 June 2012): The Supreme Court of Appeal has Spoken on the Requirements of a Valid Polygynous (sic) Customary Marriage*

[http://www.givengain.com/cgi-](http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=115467&at_id=1584#.UmfJrUpBvGg)

[bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=115467&at_id=1584#.UmfJrUpBvGg](http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=115467&at_id=1584#.UmfJrUpBvGg) accessed 15 September 2013

LIST OF ABBREVIATIONS

Am J Comp L	American Journal of Comparative Law
CILSA	Comparative and International Law Journal of Southern Africa
Int'l J L Pol'y & Fam	International Journal on Law, Policy and the Family
J Law & Soc	Journal of Law and Society
JLP	Journal of Legal Pluralism
McGill L J	McGill Law Journal
MLR	Modern Law Review
RCMA	Recognition of Customary Marriage Act
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SUBB	Jurisprudentia Studia Universitatis Babes-Bolyai, Iurisprudentia
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg

SAILING BETWEEN SCYLLA AND CHARYBDIS: *MAYELANE V NGWENYAMA***H KRUUSE*****J SLOTH-NIELSEN******SUMMARY**

Mayelane v Ngwenyama 2013 4 SA 415 (CC) is arguably the most important judgment concerning the recognition of customary marriages in recent times. This article attempts to unpack some of the many issues that arise from the case, namely: (a) the practical difficulties associated with ascertaining living customary law and the problems of identifying legal versus social norms; (b) the meaning of consent as a requirement of a customary marriage; (c) the implications of the case for equality between multiple wives in a customary marriage, and as between wives across customary marriages of different cultural traditions; and (e) the implications of the case for equality considerations more broadly. While the authors sympathise with the court in respect of the complex decision before it, it questions the Court's method and result, specifically for the equality rights of a second (or further) "wife" in a Vatsonga customary marriage. The authors suggest that the issues should be put to democratic deliberation by the legislative arm, rather than leaving courts in the unenviable position of having to decide these matters.

KEYWORDS: Customary marriages; Mayelane; living law; consent; evidence.

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