

# Tipping the Scales in Favour of Old Customary Marriages – A Critical Analysis of the Patrimonial Consequences of the Recognition of Customary Marriages Act

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## SUMMARY

The purpose of the Recognition of Customary Marriages Act 120 of 1998 is, *inter alia*, to ensure that all spouses in customary marriages are treated equally and have the capacity to regulate the patrimonial consequences of their marriages. Despite such aims, this Act differentiated between spouses married before and after the Act came into effect. This Act also provided more favourable matrimonial property consequences for spouses in monogamous customary marriages, thereby discriminating against spouses in polygamous customary marriages. It is, therefore, not surprising that this Act has been the subject of litigation in numerous court cases. The Constitutional Court, in the cases of *Gumede v President of the Republic of South Africa* and *Ramuhovhi v President of the Republic of South Africa*, declared section 7(1) and (2) of the Recognition of Customary Marriages Act unconstitutional. This resulted in the enactment of the Recognition of Customary Marriages Amendment Act 1 of 2021. The failure by the legislature to reconcile the changes introduced by the 2021 Amendment Act with the rest of section 7 of the Recognition of Customary Marriages Act has resulted in the Act providing for more favourable matrimonial property consequences for marriages concluded prior to its enactment, tipping the scales in favour of such marriages. This article focuses on section 7 of the Recognition Act, and specifically the requirements for changing a matrimonial property regime.

## 1 INTRODUCTION

The purpose of the Recognition of Customary Marriages Act<sup>1</sup> (Recognition Act) is, *inter alia*, to ensure that all spouses in customary marriages are treated equally and have the capacity to regulate the patrimonial consequences of their marriages. Despite such aims, various legal scholars

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<sup>1</sup> 120 of 1998.

have argued that this Act remains a paper law, being inaccessible to people who are subject to customary practices.<sup>2</sup> These arguments are supported by the fact that this Act has been the subject of litigation in numerous court cases for failing adequately to protect women's rights. The Constitutional Court in the cases of *Gumede v President of the Republic of South Africa*<sup>3</sup> and *Ramuhovhi v President of the Republic of South Africa*<sup>4</sup> found section 7(2) and (1) of the Recognition Act to be unconstitutional for, *inter alia*, unfairly discriminating against women who concluded their customary marriages before the enactment of this Act. In light of these findings, the Recognition of Customary Marriages Amendment Act<sup>5</sup> (2021 Amendment Act) was promulgated with the aim of bringing the Recognition of Customary Marriages Act in line with the Constitution of the Republic of South Africa, 1996 (the Constitution).

This article agrees with Osman, who stated that the 2021 Amendment Act is a mere replica of the *Gumede* and *Ramuhovhi* court orders, and that it fails to align the changes that it introduced with the rest of section 7 of the Recognition Act.<sup>6</sup> This article focuses on the procedure to change a matrimonial property regime, and submits that this Act continues to differentiate between spouses married before and after the Act was promulgated. The aim of the legislature, through the enactment of the 2021 Amendment Act, was to come to the aid of women who concluded their customary marriages prior to the Recognition Act. However, the failure by the legislature to reconcile the changes introduced by the 2021 Amendment Act with the rest of section 7 of the Recognition Act has resulted in the Recognition Act providing for more favourable conditions for marriages concluded prior to the enactment of the Recognition Act, thus tipping the scales in favour of such marriages.<sup>7</sup>

The arguments of this article are advanced in five sections. Following this introduction, the second section discusses the proprietary consequences of customary marriages, as regulated by the Recognition Act. This section provides a brief background to the circumstances that led to the amendment of sections 7(1) and (2) of the Recognition Act by the 2021 Amendment Act. The third section is a critical analysis of the patrimonial consequences of the recognition of customary marriages, both for monogamous customary marriages and polygamous customary marriages. The focus of this section is the impact of the amendments made by the Amendment Act on the rest of section 7 of the Recognition Act. The fourth section makes

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<sup>2</sup> Himonga "The Advancement of Women's Rights in the First Decade of Democracy in South Africa: The Reform of Customary Law of Marriage and Succession" 2005 1 *Acta Juridica* 82 83; Osman "The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage" 2019 22 *PER/PELJ* 2 6.

<sup>3</sup> 2009 (3) SA 152 (CC).

<sup>4</sup> 2018 (2) SA 1 (CC).

<sup>5</sup> 1 of 2021.

<sup>6</sup> Osman "The Recognition of Customary Marriages Bill: Much Ado About Nothing" 2020 137 *SALJ* 389 390.

<sup>7</sup> Osman 2020 *SALJ* 390.

recommendations intending to bring equality between spouses married in terms of customary law. The fifth section concludes the article.

## 2 THE PROPRIETARY CONSEQUENCES OF CUSTOMARY MARRIAGES

The proprietary consequences of customary marriages are regulated by section 7 of the Recognition Act. Section 7(1) of the unamended Recognition Act provided that customary marriages entered into prior to the commencement of the Act will continue to be governed by customary law in existence at the time that the marriage was concluded. In terms of official customary law, the husband was the family head and family property was under his control.<sup>8</sup> In effect, a wife's capacity was severely limited as she could only acquire property through her husband.<sup>9</sup> On the other hand, section 7(2) provided that the default matrimonial property regime for monogamous customary marriages concluded after the commencement of the Act (new customary marriages) is a marriage in community of property and of profit and loss between the spouses, unless the spouses exclude these consequences by concluding an antenuptial contract.<sup>10</sup>

The impact of these provisions was that they treated spouses who concluded monogamous customary marriages before the enactment of the Recognition Act differently from those who concluded their marriages after the enactment of the Recognition Act. It also resulted in the unequal treatment of spouses in polygamous customary marriages. The proprietary consequences for spouses who concluded their polygamous marriages before the enactment of the Recognition Act continued to be governed by customary law, while those who entered into their customary marriages after the enactment of the Recognition Act could conclude a court-approved written contract to regulate their matrimonial property system.<sup>11</sup>

The constitutionality of section 7(1) of the Recognition Act was challenged in *Gumede v President of the Republic of South Africa*.<sup>12</sup> In this case, Mrs Gumede had entered into a monogamous customary marriage with her

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<sup>8</sup> Johnson "The Active Role of South Africa's Constitutional Court in Advancing Women's Rights and Proprietary Interests in the Customary Law of Marriage" 2023 46 *Acta Juridica* 46 50. Examples of official versions of customary law include s 20 of the repealed KwaZulu Act, and s 20 of the repealed Natal Code. These provisions provided that a family head is the owner of family property and has exclusive control over such property. Section 22 of the Natal Code also provided that all family members are under the control of the family head, and owe obedience to the family head. These official versions of customary law did not consider that while the husband controlled family property, such property was owned communally by the family (see *Gumede v President of the Republic of South Africa supra* par 26).

<sup>9</sup> Johnson 2023 *Acta Juridica* 50; Khon "Ramuhovhi v President of the Republic of South Africa: A Bittersweet Victory for Women in 'Old' Polygamous Customary Marriages" 2017 33(1) *SAJHR* 120 120.

<sup>10</sup> S 7(2) of the Recognition Act.

<sup>11</sup> S 7(6) of the Recognition Act.

<sup>12</sup> *Supra*.

husband in 1968.<sup>13</sup> Because her marriage was concluded before the promulgation of the Recognition Act, customary law governed her matrimonial property regime.<sup>14</sup> The relevant customary-law provisions were codified in the KwaZulu Act and the Natal Code, respectively.<sup>15</sup> These Acts provided that the husband is the head of the family and owns all family property. This resulted in women like Mrs Gumede, who were married in terms of customary law, having no rights in marital property.<sup>16</sup> Mrs Gumede sought confirmation of the High Court order, which had found section 7(1) and (2) of the Recognition Act, section 20 of the KwaZulu Act and section 20 of the Natal Code unconstitutional and invalid.<sup>17</sup>

The Constitutional Court found that section 7(1) and (2) differentiated between monogamous customary marriages concluded before and after the commencement of the Recognition Act.<sup>18</sup> Such discrimination was on a listed ground (gender) and was therefore unfair.<sup>19</sup> The court held that there was no justification for the discrimination found in the aforementioned provisions, and it confirmed the order of the High Court.<sup>20</sup> This order, effectively, made “in community of property” the default matrimonial property regime for all monogamous customary marriages.<sup>21</sup> The court limited its order of invalidity in relation to section 7(1) of the Constitution to monogamous marriages.<sup>22</sup> The court found that the proprietary consequences of polygamous customary marriages will continue to be regulated by customary law until Parliament intervenes.<sup>23</sup>

The court’s decision to limit its declaration of the unconstitutionality of section 7(1) of the Recognition Act to monogamous customary marriages has been criticised because the Recognition Act continues to discriminate against women in polygamous customary marriages.<sup>24</sup> Although the court has provided the legislature with an opportunity to amend the Recognition Act, the legislature has failed timeously to address the discriminatory effects of this provision.<sup>25</sup> It is, therefore, not surprising that, almost a decade later, the issue of the discriminatory implications of section 7(1) for polygamous customary marriages resurfaced in the Constitutional Court case of *Ramuhovhi v President of the Republic of South Africa*.<sup>26</sup> The applicants in

<sup>13</sup> *Gumede v President of the Republic of South Africa supra* par 6.

<sup>14</sup> *Gumede v President of the Republic of South Africa supra* par 10.

<sup>15</sup> *Gumede v President of the Republic of South Africa supra* par 11. See KwaZulu Act on the Code of Zulu Law 16 of 1985 and Natal Code of Zulu Law published in Proclamation R151 in GG 10966 of 1987.

<sup>16</sup> Osman 2020 SALJ 391.

<sup>17</sup> *Gumede v President of the Republic of South Africa supra* par 11.

<sup>18</sup> *Gumede v President of the Republic of South Africa supra* par 33.

<sup>19</sup> *Gumede v President of the Republic of South Africa supra* par 34.

<sup>20</sup> *Gumede v President of the Republic of South Africa supra* par 58.

<sup>21</sup> *Gumede v President of the Republic of South Africa supra* par 51.

<sup>22</sup> *Gumede v President of the Republic of South Africa supra* par 58.

<sup>23</sup> *Ibid.*

<sup>24</sup> Johnson 2023 *Acta Juridica* 50. This judgment has been described as a lost opportunity to provide relief for women in polygamous customary marriages. See Khon 2017 *SAJHR* 126.

<sup>25</sup> *Ramuhovhi v President of the Republic of South Africa supra* par 3.

<sup>26</sup> *Supra.*

this case were two daughters of Mr Netshituka.<sup>27</sup> During his lifetime, Mr Netshituka entered into three polygamous customary marriages (with Mmes T Netshituka, M Netshituka and D Netshituka, respectively) and two civil marriages (with Mmes MM Netshituka and MJ Netshituka, respectively).<sup>28</sup> His civil marriage with Mrs MM Netshituka was terminated by divorce in 1984, and his civil marriage with Mrs MJ Netshituka (fourth respondent) was declared null and void by the Supreme Court of Appeal in 2011.<sup>29</sup> The fourth respondent claimed that she subsequently concluded a customary marriage with the deceased.

The deceased left a will identifying the fourth respondent as his wife in community of property and appointed her as the executrix of the joint estate.<sup>30</sup> The consequences of a marriage “in community of property” with the fourth defendant were that all the children and surviving spouses of Mr Netshituka were only entitled to receive certain benefits from the deceased’s half share of the “joint estate”.<sup>31</sup> The applicants disputed the fourth respondent’s ownership of the half share and challenged the validity of section 7(1) of the Recognition Act.<sup>32</sup> In the court *a quo*, the parties agreed that in Venda customary law, ownership and control over marital property are reserved solely for husbands.<sup>33</sup> The Constitutional Court found that section 7(1) was discriminatory on two listed grounds, namely gender and marital status.<sup>34</sup> Such discrimination limits the right to dignity and the right not to be unfairly discriminated against.<sup>35</sup> The court also found that such a limitation could not be justified and, it therefore confirmed the High Court’s declaration.<sup>36</sup> The court left it to Parliament to determine the appropriate matrimonial property regime for polygynous customary marriages concluded before the enactment of the Recognition Act.<sup>37</sup> In the interim, the declaration of invalidity was suspended for 24 months to allow the legislature an opportunity to correct the defect of section 7(1) of the Recognition Act.<sup>38</sup> The court granted the following interim relief:

- “(a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows:
  - (i) in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and

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<sup>27</sup> *Ramuhovhi v President of the Republic of South Africa supra* par 5.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ramuhovhi v President of the RSA supra* par 6.

<sup>30</sup> *Ramuhovhi v President of the RSA supra* par 7.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ramuhovhi v President of the RSA supra* par 8.

<sup>33</sup> *Ramuhovhi v President of the RSA supra* par 9.

<sup>34</sup> *Ramuhovhi v President of the RSA supra* par 36–37.

<sup>35</sup> *Ramuhovhi v President of the RSA supra* par 43.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ramuhovhi v President of the RSA supra* par 50.

<sup>38</sup> *Ramuhovhi v President of the RSA supra* par 71.

- (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
- (b) Each spouse retains exclusive rights to her or his personal property.<sup>39</sup>

The court also ordered that in the event that the legislature fails to amend the Recognition Act within 24 months to bring it in line with the Constitution, the aforementioned remedy will continue to apply until the legislature intervenes.<sup>40</sup>

More than a decade after the Constitutional Court handed down its judgment in the *Gumede* matter, the legislature enacted the 2021 Amendment Act. This Act amended section 7(1) and (2) of the Recognition Act. The amended section 7(1) deals exclusively with polygamous customary marriages concluded before the enactment of the Recognition Act – that is, it does not concern polygamous customary marriages concluded after the enactment of the Recognition Act.<sup>41</sup> Section 7(1) does not prescribe a matrimonial property regime for polygynous customary marriages.<sup>42</sup> The legislature appears to have adopted the approach followed by the Constitutional Court in the *Ramuhovhi* matter. This section provides that the spouses in a polygamous marriage concluded before commencement of the Act have joint and equal ownership, management, control and other rights over marital property (property rights).<sup>43</sup> Such marital property is divided into three categories – namely, family property, house property and personal property.<sup>44</sup> With regards to house property, the Act states that the husband and the wife of a specific house shall have joint and equal ownership, management, control and other rights, taking the interests of the entire family into account.<sup>45</sup> The husband and all the wives have joint and equal ownership, control, management and other rights over family property, taking the interests of the entire family into account.<sup>46</sup> Lastly, each spouse has exclusive rights over their personal property.<sup>47</sup>

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> S 7(1)(a) of the Recognition Act, as amended.

<sup>42</sup> Sibisi “Applying the Provisions of Forfeiture of Patrimonial Benefits to Polygynous Customary Marriages” 2023 44 *Obiter* 737 741.

<sup>43</sup> S 7(1)(a) of the Recognition Act, as amended.

<sup>44</sup> S 7(1)(b) of the Recognition Act, as amended.

<sup>45</sup> S 7(1)(b)(i) of the Recognition Act, as amended.

<sup>46</sup> S 7(1)(b)(ii) of the Recognition Act, as amended.

<sup>47</sup> S 7(1)(c) of the Recognition Act, as amended. S 7(1) of the Recognition Act, as amended, has been criticised for not explaining concepts such as “joint estate”, “family property”, “house property” and “personal property” (see Johnson 2023 *Acta Juridica* 66). Instead, this section provides that “[f]or purposes of this subsection, ‘marital property’, ‘house property’, ‘family property’ and ‘personal property’ have the meaning ascribed to them in customary law”. While this section may be commended for defining the various categories of property in terms of customary law (which is flexible and ever-changing), the meaning of these categories of property remains uncertain. Furthermore, official versions of customary law have outdated definitions of the various categories of property (see Osman 2020 *SALJ* 396–399). Family property is defined as property that has not been allocated to a specific house. It consists of property that was inherited by the family head from his mother’s house, property acquired by the family head through his efforts and labour, and land that has been

The amended section 7(2) of the Recognition Act applies to all monogamous customary marriages, whether concluded before or after commencement of the Recognition Act.<sup>48</sup> This subsection provides that the default matrimonial property regime is in community of property and of profit and loss between the spouses, unless the spouses conclude an antenuptial contract that specifically changes this default system.<sup>49</sup>

### 3 A CRITICAL ANALYSIS OF THE PROPRIETARY CONSEQUENCES OF CUSTOMARY MARRIAGES

As previously mentioned, the 2021 Amendment Act is a replica of the *Gumede* and *Ramuhovhi* judgments.<sup>50</sup> On the face of it, there is no harm in the legislature adopting the interim relief offered by the Constitutional Court in the aforementioned court cases; but the legislature failed to synthesise the amended section 7(1) and (2) of the Recognition Act with the rest of section 7 of the Act.<sup>51</sup> The legislature's focus on the discrimination faced by spouses who concluded their customary marriages before the promulgation of the Recognition Act has resulted in less favourable consequences for spouses who concluded their customary marriages after the commencement of the Recognition Act.<sup>52</sup>

#### 3.1 The effect of the 2021 Amendment Act on monogamous customary marriages

In relation to monogamous customary marriages, one must applaud the Constitutional Court and, subsequently, the legislature, for coming to the aid of women, like Mrs Gumede, who were precluded from sharing in their matrimonial property.<sup>53</sup> As previously mentioned, section 7(2) of the Recognition Act, as amended, provides that the default matrimonial property

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allotted to the family by traditional leaders. The family head is the nominal owner of family property, which he controls for the benefit of the entire family. House property is property that accrues to a specific house, and which is used for the benefit of a wife and her children. Examples of family property include earnings of members of the house, compensation received for delicts committed against members of the family, the wife's agricultural produce, and products that are produced by members of a specific house. Personal property is owned exclusively by a family member and includes personal items such as clothing and jewellery (see Rautenbach "Introduction to Legal Pluralism in South Africa" in Rautenbach (ed) *Law of Property* (2021) 126).

<sup>48</sup> S 7(2) of the Recognition Act, as amended.

<sup>49</sup> *Ibid.*

<sup>50</sup> Osman 2020 SALJ 396.

<sup>51</sup> Osman 2020 SALJ 390.

<sup>52</sup> It is interesting to note that the legislature does not refer to the issue of equality as one of the objectives of the 2021 Amendment Act. Instead, the long title of the Act provides that the purpose of the Amendment Act is to further regulate the proprietary consequences of customary marriages concluded before the commencement of the Recognition Act. It does not come as a surprise, therefore, that the legislature tipped the scales in favour of such marriages, by paying no attention to the patrimonial consequences of customary marriages concluded after the enactment of the Recognition Act.

<sup>53</sup> Albertyn "The Stubborn Persistence of Patriarchy? Gender Equality and Cultural Diversity in South Africa" 2009 2 *Constitutional Court Review* 165 199.

regime for such marriages is a marriage in community of property and of profit and loss between the spouses, unless the spouses conclude an antenuptial contract excluding community of property. The Act also allows for spouses in monogamous customary marriages to change their matrimonial property regime. Interestingly, however, spouses wishing to change their matrimonial property regime are subject to different pieces of legislation. Spouses who entered into customary marriages before the Act are subject to the provisions of section 7(4)(a) of the Recognition Act, while those who entered into monogamous customary marriages after the Act are subject to section 21 of the Matrimonial Property Act (MPA).<sup>54</sup> Seeing that the 2021 Amendment Act created equality between spouses who concluded their monogamous customary marriages before and after the commencement of the Act, it is absurd that the process to change a matrimonial property regime is regulated by different pieces of legislation.<sup>55</sup>

Section 7(4)(a) of the Recognition Act applies to spouses whose matrimonial property regime is subject to customary law. It makes provision for spouses who concluded their customary marriages prior to the enactment of the Recognition Act to make a joint application to the court to change the matrimonial property regime regulating their marriage.<sup>56</sup> The court may grant such an order if it is satisfied: first, that there are sound reasons for requesting the change in matrimonial property regime; secondly, that all creditors of the spouses for amounts exceeding R500, or an amount determined by the Minister of Justice, have been given sufficient written notice of the proposed change; and, thirdly, that third parties will not be prejudiced by the proposed change.<sup>57</sup> If satisfied, the court may dissolve the existing matrimonial property regime and permit the parties to enter into a written contract that will regulate their future matrimonial property system. It is worth noting that although this provision previously applied to spouses whose matrimonial property regime was subject to customary law, the changes introduced by the 2021 Amendment Act have resulted in cessation of customary law as the matrimonial property regime for such spouses.

On the other hand, section 7(5) of the Recognition Act specifically provides that section 21 of the MPA is applicable to monogamous customary marriages concluded after commencement of the Act.<sup>58</sup> Section 21 of the MPA provides that spouses married before or after the commencement of the MPA may make a joint application to the court to change their matrimonial property system.<sup>59</sup> The court may allow spouses to amend their matrimonial property system if satisfied that: first, there are sound reasons for the proposed change; secondly, sufficient notice has been given to all creditors; and, lastly, that no other person will be prejudiced by the proposed change.<sup>60</sup> If the court is satisfied that the aforementioned requirements have

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<sup>54</sup> S 7(5) of the Recognition Act.

<sup>55</sup> S 2(5) of the Recognition of Customary Marriages Amendment Act.

<sup>56</sup> S 7(4)(a) of the Recognition Act.

<sup>57</sup> S 7(4)(a) of the Recognition Act.

<sup>58</sup> S 7(5) of the Recognition Act.

<sup>59</sup> S 21 of the MPA.

<sup>60</sup> *Ibid.*

been met, the court may authorise the spouses to enter into a notarial contract that will regulate their future matrimonial property regime.<sup>61</sup> In the unamended Recognition Act, section 7(5) applied to monogamous customary marriages whose default matrimonial property regime was a marriage in community of property and of profit and loss between the spouses.

There are three notable differences between section 21 of the MPA and section 7(4)(a) of the Recognition Act. The first is that the MPA does not prescribe a minimum claim amount for creditors to be notified, while the Recognition Act requires only creditors who are owed amounts exceeding R500 to be notified. The second difference is that the MPA does not require the notice to creditors to be in writing, while the Recognition Act requires such a notice to be in writing. The third difference is that the MPA provides that the courts may authorise the parties to enter into a notarial contract that will regulate their future matrimonial property system, while the Recognition Act merely requires the spouses to conclude a written contract.<sup>62</sup> While the first two differences might not have a prejudicial effect on the spouses themselves, these provisions provide different rights to creditors of spouses married before and after the commencement of the Recognition Act. The third difference is particularly prejudicial to spouses who concluded their monogamous marriages after the commencement of the Recognition Act, as they would have to approach a notary and incur financial expenses, while spouses who concluded their monogamous customary marriages before the commencement of the Recognition Act merely have to conclude a written contract to change their matrimonial property system. Seeing that the default matrimonial property regime for all monogamous customary marriages is now a marriage in community of property, it does not make sense to have two separate sections regulating the amendment of this regime. The differences in these provisions confirm that, in enacting the 2021 Amendment Act, the legislature failed to reconcile changes to the Recognition Act with the rest of the Recognition Act.<sup>63</sup>

### **3 2 The effect of the 2021 Amendment Act on polygamous customary marriages**

It has been established in this article that the matrimonial property system for polygamous customary marriages concluded before the Act is neither in community of property nor out of community of property.<sup>64</sup> Section 7(1) provides that this category of spouse has joint and equal ownership, management and control over marital property.<sup>65</sup> Section 7(4)(a) of the

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Osman 2020 SALJ 390.

<sup>64</sup> Sibisi 2023 *Obiter* 741.

<sup>65</sup> S 7(1)(a) of the Recognition Act, as amended. As previously noted in this article, marital property is divided into family property, house property and personal property. The husband and wife of a specific house shall have joint and equal ownership, management and control, taking the interests of the entire family into account, over house property. The husband and all the wives have joint and equal ownership, control and management of family property,

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Recognition Act provides that spouses who concluded polygamous customary marriages before the commencement of the Recognition Act may make a joint application to the court to change their matrimonial property system. Section 7(4)(b) further states that everyone who has a sufficient interest in the matter, especially the existing spouse or spouses, must be included in the matter. This provision is welcomed as it provides spouses in polygamous customary marriages with an opportunity to change their matrimonial property regime, should they wish to do so. The provision is also inclusive, as it allows all spouses the opportunity to make an application to change their matrimonial property regime.

In contrast, the Recognition Act does not prescribe any matrimonial property system for polygamous customary marriages concluded after the commencement of the Recognition Act. It also does not provide such spouses with an option to change their matrimonial property system. Instead, section 7(6) of this Act provides that a husband in a customary marriage who wants to enter into a further customary marriage with another spouse must apply to the court to approve a written contract that will regulate the matrimonial property system of his marriages.<sup>66</sup> Section 7(8) provides that all persons with sufficient interest in the matter, including the husband's existing spouse/s and subsequent spouse, must be joined in the application contemplated in section 7(6).

In practice, the consequences of section 7(6) are that a man who gets married in terms of customary law after the commencement of the Recognition Act, without excluding community of property, is initially married in community of property.<sup>67</sup> If he decides to convert his monogamous customary marriage into a polygamous customary marriage, he must conclude a written contract that will regulate the future matrimonial property of his marriages.<sup>68</sup> In this instance, the court must terminate the matrimonial property regime between him and his first wife and effect a division of the matrimonial property. It is worth noting that the Recognition Act requires such an application to be made by the husband, and not by the wife or wives. Although section 7(8) provides that his current spouse/s and prospective spouse should be joined in the proceedings, they do not have the capacity to approach the court in instances where the husband refuses to approach the court. Therefore, the current wife or wives have little to no control over this process, even though it has severe consequences on their future financial position.<sup>69</sup>

While the purpose of section 7(6) is to protect women's rights, this provision has been reduced to mere words on paper, with very few men

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taking the interests of the entire family into account. Each spouse has exclusive rights over their personal property.

<sup>66</sup> S 7(6) of the Recognition Act. Also see Bakker "Gender Equality in Customary Marriages: Is the Deregulation of Customary Marriages the Solution?" 2023 *Acta Juridica* 152 165.

<sup>67</sup> S 7(2) of the Recognition Act provides that the default matrimonial property regime for a monogamous customary marriage is a marriage in community of property.

<sup>68</sup> S 7(6) of the Recognition Act.

<sup>69</sup> Bakker 2023 *Acta Juridica* 165.

initiating the process of drafting a court-approved contract.<sup>70</sup> As early as 2005, Himonga criticised the Recognition Act for being inaccessible and having no real benefit for women married in accordance with customary law.<sup>71</sup> Himonga's submissions were confirmed by the Women's Legal Centre in 2010, more than a decade after the enactment of the Recognition Act, when the Centre reported that only three contracts had been registered.<sup>72</sup> Some of the reasons that husbands fail to conclude court-approved contracts could be a lack of knowledge and the costs associated with registrations (such as travel costs).<sup>73</sup> The Constitutional Court case of *Mayelane v Ngwenyama*<sup>74</sup> finds relevance as it determined the consequences of the failure by a husband to conclude a written contract as required by section 7(6). In this case, Ms Mayelane (hereinafter referred to as the appellant) argued, *inter alia*, that the customary marriage between Ms Ngwenyama (hereinafter referred to as the respondent) and her deceased husband was invalid because, in concluding a customary marriage with the respondent, her deceased husband did not conclude a written contract to regulate the matrimonial property system of his future marriages as required by section 7(6) of the Recognition Act.<sup>75</sup>

In addressing this argument, the Constitutional Court endorsed the findings of the Supreme Court of Appeal,<sup>76</sup> which held that the requirements for the validity of a customary marriage are to be found in section 3(1) of the Recognition Act. This section provides that for a customary marriage to be valid, the prospective spouses must be over the age of 18, they must consent to be married in terms of customary law, and lastly, the marriage must be negotiated or celebrated in terms of customary law. In this regard, the Constitutional Court found that section 7(6) does not deal with the validity requirements for a subsequent customary marriage and, instead, deals with the applicable matrimonial property system.<sup>77</sup> The failure of the husband to conclude a written contract regulating the patrimonial consequences of his marriage results in his subsequent marriage being regarded as a marriage out of community of property. This approach was also adopted by the Constitutional Court in *Ramuhovhi*.<sup>78</sup>

Considering that the legislature adopted the approach followed by the Constitutional Court in *Gumede* and *Ramuhovhi*, it is disappointing to note that the 2021 Amendment Act did not address the consequences of a husband failing to conclude a written contract as required by section 7(6).<sup>79</sup> In this regard, the approach followed by the Constitutional Court in *Mayelane*

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<sup>70</sup> Osman 2019 *PER/PELJ* 1 5.

<sup>71</sup> Himonga 2005 *Acta Juridica* 83.

<sup>72</sup> Osman 2019 *PER/PELJ* 5.

<sup>73</sup> Kovacks, Ndashe and Williams "Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 Is Failing Women in South Africa" 2013 1 *Acta Juridica* 273 279.

<sup>74</sup> 2013 (4) SA 415 (CC).

<sup>75</sup> *Ngwenyama v Mayelane* 2012 (4) SA 527 (SCA) par 6.

<sup>76</sup> Khon 2017 *SAJHR* 120 131.

<sup>77</sup> *Mayelane v Ngwenyama supra* par 41.

<sup>78</sup> *Ramuhovhi v President of the RSA supra* par 35.

<sup>79</sup> Osman 2020 *SALJ* 404.

v *Ngwenyama* continues to apply after the 2021 Amendment Act.<sup>80</sup> This approach has been criticised by various authors because it provides greater protection for the first wife's interests and places the second and further wives in a vulnerable position.<sup>81</sup> By way of illustration, suppose that Fezeka married Thabo in 2022. Thabo purchased property and a motor vehicle for Fezeka. Unfortunately, Thabo was involved in a motor vehicle accident in May 2024. When Fezeka goes to register her customary marriage at home affairs, she is informed that Thabo also concluded a customary marriage with Mbali in 2015. Thabo's marriage with Mbali is in community of property. Seeing that Fezeka's marriage with Thabo is a subsequent customary marriage, she is married out of community without accrual. Therefore, the house and car that Thabo bought for Fezeka form part of Thabo and Mbali's joint estate.

The majority of customary marriages are not registered: the government estimates the percentage of registered customary marriages to be as low as between 4 and 8 per cent.<sup>82</sup> Experience has also shown that most people only register customary marriages when one of the spouses dies or when the spouses seek to terminate their marriage by divorce.<sup>83</sup> Section 4(9) of the Recognition Act provides that the failure to register a customary marriage will not affect its validity. This provision, therefore, makes it possible for a husband to conclude more than one customary marriage without informing his spouse or spouses.

It is worth noting, that even if a woman who is a second or further spouse in a customary marriage discovers that her husband has concealed the fact that he is married to other women, she does not have the capacity to change her financial future because the Recognition Act does not make provision for spouses who concluded their customary marriages after the Act to change their matrimonial property system. She would, therefore, be trapped in a marriage that is out of community of property; alternatively, she may opt to terminate her customary marriage through divorce. Section 8(4) of the Recognition Act requires a court granting a decree of divorce for a polygamous customary marriage to make an equitable order that it deems just, taking into account any agreement or order made in terms of section 7 of the Recognition Act.<sup>84</sup> While such a provision gives the court wide discretion to divide matrimonial property equitably, such a provision deals with marriages dissolved by divorce and is thus not applicable where a customary marriage is terminated by the death of the spouses.<sup>85</sup>

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<sup>80</sup> *Ibid.*

<sup>81</sup> Osman 2020 *SALJ* 404; Sibisi 2023 *Obiter* 747; Bakker 2023 *Acta Juridica* 165.

<sup>82</sup> Kovacks 2013 *Acta Juridica* 278.

<sup>83</sup> *Ibid.*

<sup>84</sup> S 8 of the Recognition Act.

<sup>85</sup> Van Niekerk "The Courts Revisit Polygyny and the Recognition of Customary Marriages Act 120 of 1998" 2013 28 *SAPL* 469 476.

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## 4 RECOMMENDATIONS

The concern with monogamous customary marriages is that, on the one hand, section 7(4)(a) of the Recognition Act provides that spouses in customary marriages entered into before the Recognition Act, wishing to change their matrimonial property regime, are required to conclude a written contract.<sup>86</sup> On the other hand, section 7(5) requires parties who concluded monogamous customary marriages after the commencement of the Recognition Act to conclude a notarial contract.<sup>87</sup> As previously indicated, the current default matrimonial property regime for monogamous customary marriages is in community of property.<sup>88</sup> It is absurd that spouses have to follow different processes to change their matrimonial property regime. To ensure equality between spouses, it is recommended that the legislature create a single provision regulating the application process to change a matrimonial property regime. The most suitable scenario would be for spouses to be required to conclude a written contract, as opposed to a notarial contract. The requirement of a written contract, as opposed to a notarial contract, would result in the Recognition Act being more accessible.

The concerns with polygamous customary marriages relate to section 7(6) of the Recognition Act, which applies to polygamous customary marriages concluded after the commencement of this Act. As previously stated, this provision provides that a husband in a customary marriage, wishing to conclude a further customary marriage with another spouse, must make an application to the court for the approval of a written contract to regulate the matrimonial property system of his marriages.<sup>89</sup> The issues with this provision are threefold. First, the legislature has delegated the task of determining the applicable matrimonial property system solely to the husband, with the assistance of the court.<sup>90</sup> This entails that even if his current spouse/s is/are informed or become/s aware of the husband's intentions to conclude a subsequent customary marriage, she/they do not have the capacity to approach the courts to change the matrimonial property regime.<sup>91</sup> Secondly, a subsequent wife, who finds out that her husband is a party to another customary marriage, does not have the opportunity to approach the courts to change her matrimonial property regime. Instead, the Constitutional Court has determined, in the case of *Mayelane v Ngwenyama*,<sup>92</sup> that the husband's failure to conclude the court-approved contract results in the subsequent customary marriages being out of community of property.<sup>93</sup> Thirdly, the wording of section 7(6) suggests that a husband may only approach the court prior to concluding a customary

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<sup>86</sup> S 7(4)(a) of the Recognition Act.

<sup>87</sup> S 7(5) of the Recognition Act.

<sup>88</sup> S 7(2) of the Recognition Act.

<sup>89</sup> S 7(6) of the Recognition Act.

<sup>90</sup> Bakker 2023 *Acta Juridica* 165.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Supra.*

<sup>93</sup> *Mayelane v Ngwenyama supra* par 41.

marriage.<sup>94</sup> Therefore, this category of spouses may never reverse the consequences of the husband's failure to comply with section 7(6).

Sibisi has also raised concerns with the Constitutional Court's finding that the husband's failure to conclude the court-approved contract results in the subsequent customary marriages being out of community of property.<sup>95</sup> Sibisi submits that the matrimonial property system applicable to polygamous customary marriages concluded before the commencement of the Act, as determined in section 7(1) of the Recognition Act, should apply in instances where a husband failed to conclude a written contract regulating the matrimonial property regime of his subsequent marriage.<sup>96</sup> While this is the ideal scenario for subsequent wives, it is argued that a first wife, who is married in community of property, or out of community with the accrual, will be disadvantaged if she suddenly has to lose a portion of her share to the joint estate because her husband has taken on another wife (with or without her knowledge). This is especially true if she does not have the capacity to approach the courts in her personal capacity.

To address the first and second issues identified above, it is submitted that section 7(6) should be amended to provide that any party to a customary marriage, where the husband wishes to conclude a subsequent customary marriage, including the prospective spouse, may bring an application to court to approve a written contract to regulate their future matrimonial property regime. As provided in section 7(7) of the Recognition Act, if the matrimonial property regime of the current marriage is a marriage in community of property or out of community of property with accrual, the court must terminate the applicable regime. Such a provision will provide an opportunity for a wife who is married in community of property, or out of community of property with accrual, to approach a court to change her matrimonial property regime (before her husband concludes a further customary marriage), thereby securing her share of the current value of the joint estate. It will also empower the prospective wife by providing her with a platform to approach a court for the purpose of determining the matrimonial property consequences of her future marriage. All persons having a sufficient interest in the matter must be joined in this application, as provided for in section 7(8) of the Recognition Act.

To mitigate the prejudice that might be suffered by a wife who discovers that her husband has concluded a further customary marriage without her knowledge, the opportunity to approach the court, for the purposes of terminating the current matrimonial property system, should extend to a defined period after conclusion of the subsequent marriage (to be determined by the legislature). A failure by the husband and his spouse/s to approach the court within the defined period, as recommended above, should then result in the application of section 7(1) of the Recognition Act, as submitted by Sibisi.<sup>97</sup>

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<sup>94</sup> Bakker 2023 *Acta Juridica* 165.

<sup>95</sup> Sibisi 2023 *Obiter* 747.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

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In addressing the third issue, section 7 should include a provision stating that a spouse in a polygamous customary marriage, entered into after the commencement of the Recognition Act, may make an application to the court at any time after the conclusion of a customary marriage, for leave to change the matrimonial property system applicable to their marriage. As discussed earlier in this article, section 7(4) and (5) of the Recognition Act provide that spouses in monogamous customary marriages, as well as those in polygamous customary marriages entered into before the commencement of the Recognition Act, may change their matrimonial property regime at any time after concluding the customary marriage. It is submitted that the legislature's failure to include a similar provision for spouses in polygamous customary marriages concluded after commencement of the Recognition Act results in unfair discrimination against this category of spouses. This omission confirms that the Recognition Act continues to differentiate between customary marriages concluded before and after the commencement of the Recognition Act. It also confirms that the 2021 Amendment Act has tipped the scales in favour of old customary marriages.

## **5 CONCLUSION**

The legislature's decision to amend section 7(1) and (2) of the Recognition Act without reconciling the proposed changes with the rest of the Act has resulted in more favourable matrimonial property consequences for spouses who concluded their customary marriages before the commencement of the Act. This has resulted in the scales being tipped in favour of customary marriages concluded before the commencement of the Act in the context of both monogamous and polygamous customary marriages. These findings are, ironically, opposed to the intention of the legislature, namely, to provide for equal capacity and status of spouses in customary marriages. This article proposes that the Recognition Act should be amended as suggested under heading 4.