

Dual Customary and Civil Marriages under the Recognition of Customary Marriages Act: A Critical Analysis of *Sedinyane v Malatji* (10756/2023) [2024] ZALMPPHC 88 (8 August 2024)

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Abstract

The co-existence of civil and customary marriages continues to present significant legal challenges within the pluralistic legal framework of South Africa. The judgment in *Sedinyane v Malatji* (10756/2023) [2024] ZALMPPHC 88 (8 August 2024), a judgment of the Limpopo High Court, provides a compelling example of the legal tensions that arise when parties engage in overlapping marital systems. This case note analyses the implications of the ruling, particularly in relation to the dissolution of customary marriages, the legal vulnerability of spouses in invalid civil marriages, and the problematic framing of "civil" marriage in legal terminology. It also briefly reflects on how the pending *Marriage Bill* [B43-2023] might offer a long-awaited resolution to these systemic tensions and situates the judgment within ongoing law reform initiatives, including the South African Law Reform Commission's Project 144.

Keywords

Customary marriage; civil marriage; Recognition of Customary Marriages Act; RCMA; dissolution; putative marriage; legal pluralism; desertion; Marriage Bill.

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1 Introduction

The intersection of customary and civil marriages in South Africa presents a complex and evolving legal landscape shaped by the country's historical and cultural diversity.¹ Before 1994 the legal system primarily recognised civil marriages governed by the *Marriage Act* (the *Marriage Act*),² while customary marriages were largely marginalised.³ The post-apartheid legal system sought to remedy the historically unequal treatment of customary marriages through the *Recognition of Customary Marriages Act*⁴ (the *RCMA*), which granted them full legal recognition and equality with civil marriages.⁵ Despite its progressive intent, the implementation of the *RCMA* has faced persistent challenges, particularly in determining whether customary marriages have been concluded "in accordance with customary law"⁶ and in resolving disputes arising from the interaction between civil and customary marriage regimes, especially where overlapping marital

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¹ Rautenbach "Families and Legal Pluralism in South Africa" 61-79.

² *Marriage Act* 25 of 1961. The Act has been in operation since 1 January 1961.

³ Rautenbach and Du Plessis 2012 *McGill LJ* 752-753.

⁴ *Recognition of Customary Marriages Act* 120 of 1998 (*RCMA*). The Act commenced on 15 November 2000.

⁵ Although customary marriages were recognised under pre-constitutional law, their proprietary consequences and legal status were unequal and often discriminatory; see *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) paras 16-25.

⁶ Section 1 of the *RCMA* defines a "customary marriage" as "a marriage concluded in accordance with customary law". In turn, "customary law" refers to "the customs and usages traditionally observed among the indigenous African peoples of South Africa, which form part of their culture". In *Mathaba v Minister of Home Affairs* 2013 JDR 2327 (GNP) para 17, the Court stated the following: "It should also not escape our minds that African rites are made up of varied indigenous, cultural and heritage practices, that are evolving as people's lifestyles, socio-economic conditions and inspirations change. It is therefore of utmost importance for the factual finding to be based on what was agreed upon by the two families in their negotiations, preceded by the consent of the couple." A customary marriage typically involves the delivery of *lobolo*, which s 1 of the *RCMA* defines as property, either in cash or in kind, that a prospective husband or the head of his family agrees to provide to the head of the prospective wife's family in consideration of the marriage. Also see Rautenbach *Introduction to Legal Pluralism* 99-101 for examples of the types of legal disputes and their implications.

relationships are alleged. These complexities have led to extensive litigation and multiple statutory amendments over the years.⁷

The recent judgment of *Sedinyane v Malatji*⁸ (hereafter *Sedinyane*) exemplifies some of the challenges, particularly the complexities arising from the co-existence of different types of marriages, customary and civil, and their dissolution. Although the case reaffirmed the equal status of customary marriages alongside civil marriages, ensuring that spouses in customary unions enjoy the same legal rights and protections, particularly in matters of inheritance and estate administration, it also highlights the ongoing tensions between different types of marriages in South Africa's pluralistic legal system.

We argue that *Sedinyane* exposes a persistent source of legal uncertainty within South Africa's plural marriage system: while the *RCMA* secures the formal legal status of customary marriages, strict adherence to formal dissolution requirements may produce unintended consequences when the legal continuity of a customary union diverges from the social reality of long-terminated relationships, particularly where subsequent civil marriages are concluded in good faith. The discussion proceeds doctrinally but situates the judgment within the broader framework of South African legal pluralism.

We examine *Sedinyane* as a case study of the tensions produced by South Africa's plural marriage regime under the *RCMA*. After briefly introducing the facts of the case, the analysis proceeds on three interconnected levels. First, we undertake a doctrinal examination of the legal requirements governing the continued validity and dissolution of customary marriages, particularly where prolonged separation precedes a subsequent civil marriage.⁹ Secondly, we evaluate the legal consequences that arise for parties to overlapping marital relationships, focusing on the precarious position of a later spouse whose marriage is declared a nullity.¹⁰ Thirdly, and as an ancillary reflection rather than a doctrinal inquiry, we consider the judgment's critique of the term "civil marriage", illustrating how legal terminology may shape perceptions of hierarchy within a plural legal order.¹¹ Together, these strands demonstrate that *Sedinyane* exposes not merely evidentiary disputes but deeper structural tensions between legal certainty, social reality, and equality within South Africa's evolving system of legal pluralism.

⁷ See Rautenbach *Introduction to Legal Pluralism* ch 5 for a discussion of some of the legislation and judgments.

⁸ *Sedinyane v Malatji* (10756/2023) [2024] ZALMPPHC 88 (8 August 2024) (hereafter *Sedinyane*).

⁹ See 3.1.

¹⁰ See 3.2.

¹¹ See 4.

2 The facts in *Sedinyane* in brief

In 1988 Hilda Sedinyane (the applicant) and Seabela Malatji (the deceased) entered into a customary marriage, evidenced by the conclusion of a lobolo agreement and further affirmed by the birth of four children. At the time, registration of customary marriages was not required because they were not recognised by law. Consequently the marriage was never registered with the Department of Home Affairs.¹² In 1992 the deceased left the matrimonial home, but the judgment indicates that the marriage was never formally dissolved under either customary law or subsequent legislative requirements.¹³

In 2014, more than two decades after the conclusion of the customary marriage and in the absence of any formal dissolution, the deceased entered into a civil marriage with Anare Malatji (the first respondent).¹⁴ After his death in 2021, the applicant sought posthumous recognition of her customary marriage and the nullification of the first respondent's civil marriage. Among the relief sought were orders setting aside the first respondent's appointment as executrix and directing that letters of executorship be issued to the applicant.¹⁵

In opposing the application, the first respondent argued that the customary marriage had been dissolved and, alternatively, that it could not be recognised under the *RCMA* because it predated the Act, which came into operation in 2000.¹⁶ Acting Judge Monene rejected these arguments and ruled in favour of the applicant, declaring the civil marriage null and void while affirming the validity of the customary marriage.¹⁷ In reaching this conclusion the Court relied on earlier authority, notably *Netshituka v Netshituka* (hereafter *Netshituka*),¹⁸ which established that a civil marriage concluded while a customary marriage subsists is null and void. We return to this authority later to consider how it informed the Court's reasoning on concurrent marital relationships.¹⁹

¹² The registration requirement became effective only upon the commencement of the *RCMA*; see s 4 of the *RCMA*.

¹³ *Sedinyane* para 11.

¹⁴ *Sedinyane* paras 10-12.

¹⁵ *Sedinyane* para 3.

¹⁶ *Sedinyane* para 4.

¹⁷ *Sedinyane* para 31.

¹⁸ *Netshituka v Netshituka* 2011 5 SA 453 (SCA) (hereafter *Netshituka*) para 12; applied in *Sedinyane* paras 8 and 22. The Court also referred to *Thembisile v Thembisile* 2002 2 SA 209 (T), where it was held that a civil marriage contracted while a customary marriage was still in existence is invalid, and also to *Monyepao v Ledwaba* (368/18) [2020] ZASCA 54 (27 May 2020), where the Court reaffirmed that a civil marriage cannot override a subsisting customary marriage.

¹⁹ See discussion at 3.1.

In addition to resolving the dispute before it, the Court engaged in broader reflections on legal terminology. Judge Monene questioned the continued use of the term "civil marriage", placing the word "civil" in quotation marks throughout the judgment to signal his discomfort with its connotations. He suggested that the terminology may imply that customary marriages are inferior within inherited legal discourse,²⁰ which introduces a broader debate on the relationship between legal language, cultural recognition and equality within South Africa's plural legal system. The implications of this linguistic critique are considered later in the analysis of the Court's reasoning.²¹

In his ruling Judge Monene declared the civil marriage between the deceased and the first respondent null and void *ab initio*, as it had been concluded in contravention of section 10(1) of the *RCMA*, which prohibits a spouse in a subsisting customary marriage from entering into a civil marriage with another person.²² The Court recognised and ordered the issuance of a marriage certificate in her name. Additionally, the Court set aside the letters of executorship previously granted to the first respondent and ruled that she was not entitled to administer the deceased's estate.

The Court's ruling had significant legal consequences for the civil law wife, the first respondent. By declaring her marriage void from the outset, the judgment effectively stripped her of any legal status as the deceased's spouse. This meant she lost any rights she had as the deceased's legal wife, such as inheritance rights under the intestate law of succession²³ or a claim for maintenance as a surviving spouse.²⁴ In addition, her appointment as the executor of the estate was set aside and she was ordered to pay the costs of the litigation.²⁵

The ruling in *Sedinyane* underscores the legal complexities of reconciling customary law with common law, particularly when the two systems intersect. Despite administrative challenges, such as the non-registration with the Department of Home Affairs, the judgment reaffirms that such marriages remain legally valid under the *RCMA* unless dissolved by a competent court through a decree of divorce in terms of section 8 of the Act, as separation or abandonment does not terminate a customary marriage.²⁶ While the judgment reaffirms the legal standing of customary marriages, it

²⁰ *Sedinyane* para 26.

²¹ See discussion at 4.

²² *Sedinyane* paras 22, 31.

²³ Under the *Intestate Succession Act* 81 of 1987.

²⁴ Under the *Maintenance of Surviving Spouses Act* 27 of 1990.

²⁵ The Court stated that since the civil marriage is declared a nullity, all benefits or rights flowing from that marriage, including the appointment of the first respondent as executrix, should "fall victim to the same sword" – see *Sedinyane* paras 22 and 31.

²⁶ See *Sedinyane* paras 19-21.

also highlights practical challenges in applying the *RCMA* and underscores the persistent tension between customary and civil law. The case raises questions about the dissolution of customary marriages because the Court rejected separation as a mode of termination, about legal terminology through its critique of the label "civil marriage", and about the recognition of competing marital regimes where overlapping unions produce conflicting claims to spousal status

The following analysis critically evaluates the reasoning of the Court and explores the implications of *Sedinyane* for dissolution, marital classification, and the regulation of overlapping marriage systems in South African law.

3 Reflections on the judicial reasoning in *Sedinyane*

As argued in the introduction, the *Sedinyane* judgment illustrates how competing marriage regimes generate uncertainty when legal and social understandings of marriage diverge. It provides a lens through which to examine how South African law mediates the interaction between customary and civil marriage regimes within a plural legal order. As outlined above, the central question before the Court was whether prolonged separation could terminate a customary marriage and thereby validate a subsequent civil union. The case thus provides a useful lens through which to examine how South African law mediates the interaction between customary and civil marriage regimes within a single legal order.

The judgment raises three interrelated pluralist tensions: first, the regulation of dissolution where customary law practices intersect with statutory divorce requirements; secondly, the status and protection of parties to overlapping marital relationships governed by different legal systems; and thirdly, the conceptual framing of marriage within a legal order historically shaped by hierarchical classifications of legal traditions. Although a decision of a single High Court does not bind other courts under the doctrine of *stare decisis*,²⁷ *Sedinyane* remains jurisprudentially significant as persuasive authority because it applies and develops principles articulated by the Supreme Court of Appeal in *Netshituka* regarding the invalidity of a civil marriage concluded during the subsistence of a customary marriage. Against this background, the Court's reasoning illustrates how legal pluralism operates in practice. The judgment reaffirmed that mere separation does not dissolve a customary marriage, thus confirming that customary unions are subject to statutory dissolution requirements under the *RCMA*. This finding highlights a central tension in the regulation of plural marriages. While customary

²⁷ See Devenish 2007 *Obiter* 1-22 for an explanation of hierarchy and the binding effect of precedent.

relationships may evolve socially through separation or abandonment, their legal termination depends on formal judicial processes.

Significantly, the Court also engaged with the broader conceptual framework of South African marriage law by questioning the continued use of the term "civil marriage",²⁸ saying that the terminology may implicitly position customary marriages as inferior, exposing the enduring influence of colonial legal classifications within a plural legal system. The judgment thus links linguistic classification to broader questions of recognition and equality between co-existing legal traditions. Furthermore, the case exposes the human consequences of overlapping marriage regimes. Though the Court correctly applied precedent in declaring the second marriage a nullity, it did not extensively address the practical consequences for the common-law spouse who entered the marriage in apparent good faith. This omission illustrates a recurring dilemma of legal pluralism: legal coherence may secure equality between legal systems while simultaneously generating hardship for individuals navigating their intersection.

The analysis that follows examines these pluralist tensions in greater detail, focusing on the dissolution of customary marriages, the implications of legal terminology, and the precarious position of a second spouse whose union is declared void. In doing so, it situates *Sedinyane* within broader debates about reconciling tradition, equality and legal certainty in South Africa's evolving marriage law.

3.1 *Dissolution of a customary marriage through desertion or abandonment*

The first strand of analysis concerns the doctrinal question identified in the introduction: Does prolonged separation affect the continued legal validity of a customary marriage under South African law?

Although the existence of a valid customary marriage between the applicant and the deceased was ultimately not disputed in *Sedinyane*, the legal controversy concerned whether that marriage had effectively ended through prolonged desertion before the deceased entered into a subsequent civil marriage.

The first respondent argued that the departure of the deceased from the matrimonial home in 1992 constituted a *de facto* dissolution of the customary marriage, particularly because the separation occurred prior to the enactment of the *RCMA*.²⁹ The Court rejected this argument, holding

²⁸ See *Sedinyane* para 25.

²⁹ *Sedinyane* para 17.

that mere separation does not terminate a customary marriage.³⁰ In doing so, Judge Monene reaffirmed a foundational principle of South African customary marriage law: dissolution requires a recognised legal process and cannot occur automatically through abandonment or lapse of time.

The Court drew an explicit distinction between desertion as a *ground for divorce* and the *legal dissolution* of a marriage itself. Desertion may justify initiating divorce proceedings, but it does not itself terminate the marital relationship. Consequently, the deceased remained legally bound by the customary marriage when he concluded the subsequent civil marriage, rendering that marriage a nullity.³¹

In reaching its conclusion, the Court relied primarily on *Netshituka*, where the Supreme Court of Appeal held that a civil marriage contracted during the subsistence of a customary marriage is null and void.³² However, reliance on *Netshituka* is not without its difficulties. The factual matrix differs significantly. In *Netshituka*, the deceased continued cohabiting with his customary wives, and the Court grappled with the possible revival of customary marriages following the termination of a civil marriage.³³ By contrast, in *Sedinyane* the parties had lived apart for more than two decades, with no evidence of continued marital interaction or reconciliation.

The distinction is important for pluralism analysis. Whereas *Netshituka* concerned the coexistence and potential revival of multiple marital regimes, *Sedinyane* concerned whether prolonged abandonment could signal the functional end of a customary marriage despite the absence of formal dissolution.

The ruling in *Netshituka* that the deceased's customary marriages were revived after his civil divorce from Martha raises significant conceptual, legal and practical concerns. As Buchner-Eveleigh observes, had the 1984 civil marriage with Martha been valid, positive law at the time would have required the automatic dissolution of all prior customary marriages.³⁴ Subsequently there would have been no legal impediment to the deceased's entering into a later valid civil marriage despite the existing customary marriages.³⁵

Furthermore, the Court in *Netshituka* relied on the customary principles of reconciliation (*phuthuma*, literally meaning fetch) to justify the continuation of the marriages. However, *phuthuma* generally applies when a woman

³⁰ *Sedinyane* paras 18-22.

³¹ *Sedinyane* para 19.

³² *Sedinyane* para 19.

³³ See discussion in Rautenbach "Families and Legal Pluralism in South Africa" 83.

³⁴ Buchner-Eveleigh 2012 *De Jure* 598-600.

³⁵ Buchner-Eveleigh 2012 *De Jure* 601.

leaves the marital home and the husband attempts to bring her back. In this case the customary wives never left after the civil marriage, meaning no reconciliation process was formally initiated. The judgment fails to establish a clear basis for revival under customary law, relying on a general understanding of customary reconciliation rather than legal precedent or legislative authority. Furthermore, the Court did not comprehensively analyse whether the *RCMA* applies retroactively to revive customary marriages previously terminated by civil marriages.³⁶

This brings us to the following issue in *Sedinyane*. While the first respondent did not dispute the validity of the customary marriage between the deceased and applicant, she contended that it had been dissolved long before the *RCMA* came into effect, citing the 22-year separation before the deceased entered into his civil marriage with the first respondent.³⁷ A notable aspect of the Court's reasoning is that it appears to have placed the onus on the first respondent to prove that the customary marriage had been properly dissolved.³⁸ The Court firmly rejected the notion that prolonged separation, regardless of its duration, amounts to dissolution, reinforcing that customary marriages remain valid until formally dissolved under customary law.³⁹

The Court's approach in *Sedinyane* raises important legal and practical questions. One such question is whether an individual in the position of the first respondent, who entered into a civil marriage seemingly in good faith, should bear the burden of proving that a prior customary marriage had been dissolved. Equally relevant, though not addressed in the judgment, is the question of why the applicant did not attempt to register the customary marriage during the deceased's lifetime. The *RCMA* expressly allows either spouse to apply for registration by submitting the prescribed form and the required information to a registering officer, who may request further details to verify the existence of the marriage. The fact that the applicant asserted her spousal status only after the death of the deceased invites scrutiny and raises questions about the evidentiary challenges and motivations that can emerge in posthumous claims of a customary marriage.

On the one hand, the judgment reflects a commitment to upholding the integrity of customary law, which requires specific procedures, such as a

³⁶ As Buchner-Everleigh 2012 *De Jure* 603 points out: "The effect of this rule is that should a particular factual situation exist, the dissolved customary marriage will now be regarded as so-called latent (suspended) marriages which may be revived if the civil marriage is terminated by divorce (or death) of the civil law wife. This is clearly contrary to positive law, which does not recognise latent (suspended) marriages. This would also produce intractable legal problems as far as the property rights of the women are concerned."

³⁷ *Sedinyane* para 1.

³⁸ *Sedinyane* para 19.

³⁹ *Sedinyane* para 19.

customary divorce ceremony or formal acknowledgement of dissolution by the families, to bring a marriage to an end. This approach protects the rights of customary spouses, particularly women, by ensuring that one party cannot unilaterally abandon the marriage without legal consequences.

However, strict adherence to this principle, without accounting for the realities of long-term separation, can create practical difficulties, particularly when there is no intention of resuming the marital relationship. The idea that a husband can *phuthuma* (fetch) his wife after any length of absence, as suggested in *Bobotyane v Jack*,⁴⁰ seems inconsistent with contemporary understandings of marital autonomy and individual agency. A more balanced approach might consider whether prolonged separation, combined with clear conduct indicating the intent to end the marriage, should at least be a relevant factor in determining whether a customary union has been dissolved.

In *Sedinyane* the deceased walked out of the marital home in 1992 and made his intention not to return clear when he married the first respondent 22 years later. There is no evidence that the deceased or the applicant attempted to reconcile during this period. In contrast, the deceased's actions suggest that he disavowed the applicant with the clear intent to dissolve their marriage, particularly when he entered into a civil marriage with the first respondent.

The Court's reasoning in *Sedinyane* highlights the tension between legal certainty and social realities, especially in cases where customary spouses have lived separate lives for decades. Although the Court reinforced formalistic adherence to customary law dissolution processes, it remains debatable whether this approach fully aligns with the evolving nature of customary marriages in modern South Africa.

Olivier *et al*⁴¹ observe that customary law acknowledges that a marriage can be terminated through abandonment by the husband, but only when the abandonment is unequivocal and prolonged, leaving no doubt that the husband intended to dissolve the union. Applying this perspective to *Sedinyane*, it is arguable that the deceased's departure from the matrimonial home in 1992, coupled with his lack of any attempt to reconcile with the applicant over the past 22 years, meets the threshold for

⁴⁰ *Bobotyane v Jack* 1944 NAC (C & O) 9. The Court in *Sedinyane* endorsed the reasoning in *Netshituka*, which relied on the earlier decision in *Bobotyane*, where it was held that under customary law a marriage is not dissolved by mere desertion, abandonment, or even bare repudiation. These scenarios are considered part of the contingencies accounted for by the *lobolo* arrangement: a husband may at any time "*phuthuma*" (fetch) his wife after a prolonged absence, and similarly, a wife may return to her husband's kraal and resume her prior status as his spouse.

⁴¹ Olivier *et al* *Indigenous Law* 68.

unquestionable and prolonged abandonment, as suggested by Olivier *et al.* The deceased's conduct left no doubt that he no longer regarded himself as married to the applicant, particularly when he entered into a civil marriage with the first respondent in 2014.

The Court's finding in *Sedinyane* reinforces the principle that customary marriages cannot be dissolved through mere abandonment by the husband. This ruling has several important legal and practical implications. First, it reaffirms that under South African law a marriage remains valid unless it is formally dissolved by a court. This means that even if a husband abandons his wife for decades, the marriage remains intact unless a formal customary or legal process is followed.

Secondly, the ruling protects customary law wives by holding that abandonment does not automatically terminate a marriage, thereby ensuring that a wife retains her legal status, including associated rights such as inheritance rights, maintenance claims and protection against a subsequent unlawful civil marriage entered into by the husband. Although the judgment upholds the procedural integrity of customary law, it also creates practical challenges in cases of long-term separation. If a husband abandons his wife, starts a new family, and lives separately for decades, but never formally dissolves the customary marriage, the legal fiction of a marriage persists, even though the parties have completely severed their marital relationship.

Nowhere in the judgment does it say that the applicant attempted to assert the existence of the marriage during the deceased's lifetime, tried to register it, enforce her spousal rights, or object to the civil marriage when it occurred in 2014. That is a 30-year silence (from 1992 to 2023), with no indication of any assertion of marital rights while the deceased was alive. This raises important questions about the applicant's own understanding of the status of the marriage and whether the prolonged inaction could be interpreted, at least evidentially, as acceptance of its dissolution. However, this question was not addressed in the judgment.

3.2 The civil marriage as a nullity: what becomes of the first respondent?

As we have seen, the Court in *Sedinyane* ruled against the first respondent by declaring her civil marriage to the deceased null and void.⁴² This finding had several implications for her legal status and rights. Since her civil marriage was invalid, the first respondent lost any claims that she might

⁴² *Sedinyane* para 22.

have had as a wife, including inheritance rights under South Africa's intestate succession laws⁴³ or a right to claim spousal maintenance.⁴⁴

The judgment suggests that her legal counsel's shortcomings may have compounded the first respondent's precarious legal position. The Court's language strongly disapproves of how her case was argued, describing the opposing submissions as "inelegantly" framed,⁴⁵ lacking "cogency",⁴⁶ and advanced in a "blunt, vacuous, and flailing manner".⁴⁷ The Court was particularly scathing in its rejection of the argument that desertion amounted to a dissolution of marriage, calling it an "inexplicable quantum leap in logic".⁴⁸ While this critique may be justified on legal grounds, it raises broader concerns about the uneven quality of legal representation in matters involving complex intersections between customary and civil law. The first respondent, like many litigants in family law disputes, may have relied entirely on the advice of her legal team, but bore the full consequences of a poorly constructed defence. The strict stance of the Court, although legally sound, arguably lacks a degree of empathy for the practical realities faced by individuals who navigate plural legal systems without sufficient legal knowledge or access to specialised counsel. This underscores the importance of allowing legal practitioners to handle culturally and legally nuanced matters and ensuring that litigants are not unduly prejudiced by ineffective representation in areas of law where the stakes, such as inheritance, dignity and spousal status, are profoundly personal and far-reaching.

The first respondent's legal team could have pursued alternative claims or defences that might have provided her with legal protection or financial relief, despite the nullification of her civil marriage. Although the marriage was declared void *ab initio*, she may still have had a potential claim for maintenance from the deceased's estate under the *Maintenance of Surviving Spouses Act*.⁴⁹ The *Maintenance of Surviving Spouses Act* entitles a surviving spouse to claim reasonable maintenance from the deceased's estate if they were financially dependent on the deceased at the time of death. Notably, the *Maintenance of Surviving Spouses Act* was amended by the *Judicial Matters Amendment Act*,⁵⁰ which came into effect

⁴³ She will not be regarded as a spouse under the *Intestate Succession Act* 81 of 1987.

⁴⁴ She will not be regarded as a survivor under the *Maintenance of Surviving Spouses Act* 27 of 1990.

⁴⁵ *Sedinyane* para 4.

⁴⁶ *Sedinyane* para 18.

⁴⁷ *Sedinyane* para 19.

⁴⁸ *Sedinyane* para 19.

⁴⁹ *Maintenance of Surviving Spouses Act* 27 of 1990.

⁵⁰ *Judicial Matters Amendment Act* 15 of 2023.

on 3 April 2024 (more than a month before the case was heard),⁵¹ to include in its definitions of "marriage", "survivor" and "spouse" a permanent life partnership in which the partners undertake reciprocal duties of support. In the case of the first respondent, although her civil marriage was declared legally invalid, her legal representatives could have argued that she had lived with the deceased for many years in a relationship marked by mutual support and financial interdependence. On this basis she might have qualified as a surviving partner under the amended Act and could have been eligible to claim maintenance from the deceased's estate.

Secondly, had the first respondent contributed financially to the household, assisted in running a family business, or helped build the deceased's estate, she could have advanced a claim for unjust enrichment. The central principle underlying such a claim is that no person should be allowed to unjustly benefit at the expense of another.⁵² In South African law an unjust enrichment claim requires proof that the defendant was enriched; the plaintiff was impoverished; the enrichment was at the expense of the plaintiff; and the enrichment was without legal justification.⁵³ If the first respondent had made substantial contributions, tangible or otherwise, such as home improvements, homemaking, caregiving or labour in a joint enterprise, that directly benefited the deceased or increased the value of his estate, she could have sought compensation on the basis of enrichment without cause. Courts have recognised the possibility that non-financial contributions, particularly within intimate partnerships, may also give rise to enrichment claims if they can be linked to measurable benefits or savings for the estate.⁵⁴

Although enrichment claims are not easy to establish, especially in the context of personal relationships, they remain an important legal remedy for individuals, particularly women, who contribute significantly to a household or estate without the protection of a legally valid marriage.

Thirdly, South African law recognises universal partnerships, in which two people live together, maintain a joint household, share expenses, and work together for mutual financial benefit, even if they are not legally married.⁵⁵ A compelling early authority for the viability of a universal partnership claim outside the context of a valid marriage is *Mograbi v Mograbi*.⁵⁶ In that case

⁵¹ The case was heard on 17 May 2024, and judgment was delivered on 8 August 2024.

⁵² The requirements for unjust enrichment were reiterated in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA).

⁵³ *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 3 SA 482 (SCA) paras 8-10; *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 5 SA 193 (SCA) para 17.

⁵⁴ *Volks v Robinson* 2005 5 BCLR 446 (CC) para 126.

⁵⁵ *Volks v Robinson* 2005 5 BCLR 446 (CC) para 125.

⁵⁶ *Mograbi v Mograbi* 1921 AD 274.

the parties cohabited as husband and wife for 15 years after undergoing a religious ceremony, which they both mistakenly believed constituted a valid marriage. During their cohabitation they jointly accumulated a substantial estate. When the relationship ended the woman sought a half share of the estate, asserting that a universal partnership had come into existence and that she had contributed, through her labour and support, at least half of what had been accumulated.

The Appellate Division upheld the finding of the trial court, affirming that even in the absence of a valid marriage, a universal partnership could be established if there was a common intention to share in the profits of a joint undertaking. The Court noted that since marriage typically implies a community of property (unless excluded), such an intention could be inferred where the parties lived together under the belief that they were lawfully married. In addition, the Court accepted that the woman's uncontradicted evidence of her contributions justified an award of half the estate.

This case remains an important precedent in South African law.⁵⁷ It shows that a universal partnership can be recognised in the context of long-term cohabitation, particularly where one partner contributes, whether financially or through domestic and supportive labour, to the accumulation of assets. It is thus directly relevant to situations like that of the first respondent in *Sedinyane*, where a legally invalid marriage or cohabitation might nevertheless give rise to patrimonial claims if mutual intention and contribution can be established.

Fourthly, if the first respondent genuinely believed that she was legally married to the deceased, and that belief was induced by the deceased's failure to disclose his existing customary marriage, she may have had grounds to pursue a delictual claim based on misrepresentation. The central argument would be that she entered into a civil marriage under false pretences, relying on the deceased's implied or explicit representation that he was free to marry her. A similar line of reasoning was pursued in *TGP v WCL*,⁵⁸ where the plaintiff sued her husband for fraudulent misrepresentation that induced her to marry, seeking patrimonial damages under the *lex aquilia* for wedding expenses and non-patrimonial damages under the *actio iniuriarum*.

Although the High Court in *TGP v WCL* ultimately refused to extend the *lex aquilia* to cover such claims for pure economic loss, it did not rule out all delictual consequences. The Court reaffirmed that the *actio iniuriarum* remains available in cases where misrepresentation or deception infringes

⁵⁷ Also see *Butters v Mncora* 2012 2 All SA 485 (SCA).

⁵⁸ *TGP v WCL* 2020 JOL 48669 (GJ).

personality rights, such as dignity or reputation. In the context of *Sedinyane*, the first respondent could potentially have relied on this precedent to claim non-patrimonial damages, or at a minimum, could have used the threat of such a claim as a strategic tool to negotiate a settlement from the estate, particularly if the misrepresentation caused reputational harm, emotional distress or other dignitary injuries. Although proving damages would have presented practical challenges, *TGP v WCL* underscores that courts are increasingly willing to interrogate the moral and legal implications of entering into a marriage under deceptive circumstances.

Finally, it is worth considering whether the civil marriage of the first respondent to the deceased could have qualified as a putative marriage. In South African law a putative marriage arises when the marriage is legally invalid but was entered into in good faith by at least one of the parties. Although such a marriage is void, it may nevertheless give rise to certain legal consequences similar to those of a valid marriage. For example, children born of a putative marriage are regarded as legitimate and afforded full legal status, as affirmed in *Moola v Aulsebrook*.⁵⁹ Earlier case law, such as *Ex Parte Soobiah*,⁶⁰ has also affirmed that the consequences of a putative marriage include patrimonial rights where good faith can be shown.

In the absence of evidence to the contrary, it is likely that the first respondent entered into the civil marriage in good faith, unaware of the existing customary marriage of the deceased. On this basis she could have argued that the marriage met the requirements of a putative marriage and that she should not be prejudiced by the non-disclosure of the deceased. As a party who acted without fault, she might have claimed entitlement to the financial and legal protections ordinarily available to a spouse, including possible patrimonial benefits or maintenance claims. Scholarly commentary further confirms that the doctrine remains a valuable tool in cases where formal validity is lacking but genuine belief and contribution are present.⁶¹

However, from the available facts, it appears that her legal representatives did not explore this line of argument. The failure to consider a putative marriage claim, along with other alternatives such as maintenance, unjust enrichment or misrepresentation, left the first respondent legally vulnerable. Had these avenues been pursued, she may have secured some measure of financial protection. Their omission arguably contributed to her loss of both spousal status and financial security, illustrating the high stakes of an

⁵⁹ *Moola v Aulsebrook* 1983 1 SA 687 (D) 691D-E.

⁶⁰ *Ex parte Soobiah* 1966 1 SA 401 (N) 404, where the Court recognised the patrimonial consequences of a putative marriage in the context of a mistaken belief in marital validity.

⁶¹ Smith 2010 *IJLPF* 270-271.

inadequate legal strategy in cases involving overlapping civil and customary marriage regimes.

4 The "Civil" marriage: a question of terminology

As already indicated, an intriguing aspect of *Sedinyane* is the Court's critique of the term "civil marriage". Although not determinative of the doctrinal outcome analysed above, the Court's comments on terminology reflect deeper assumptions about hierarchy within South Africa's plural legal order. In its judgment the High Court placed "civil" in quotation marks, indicating discomfort with the terminology and offering a deconstruction of its meaning.⁶² The Court interpreted "civil" in its ordinary sense, as referring to politeness, courtesy or something associated with citizenship. This analysis led to the view that labelling a marriage governed by the *Marriage Act* as "civil" carried unintended colonial connotations, subtly implying that customary marriages were uncivilised, impolite or legally inferior. The Court further linked this linguistic framework to broader imperialist narratives, suggesting that such terminology contributed to the marginalisation of African customary law and the erosion of cultural self-belief.

Although the judgment offers a thought-provoking critique, its approach arguably overlooks the historical and legal foundations of the term "civil" in South African marriage law. The designation of marriages governed by the *Marriage Act* as "civil marriages" does not stem from an arbitrary value judgment about their propriety or politeness. Instead it reflects their origins in the Western civil law tradition, distinguishing them from religious or customary marriages. The use of "civil" in this context aligns with the broader global classification of legal systems, in which "civil law" refers to a system of codified statutes distinct from common law.

This linguistic debate is not without broader implications. Although it is essential to remain critical of legal terminology that may inadvertently perpetuate colonial biases, the terminology "civil marriage" in South African law serves a functional purpose, distinguishing statutory marriages from those governed by customary or religious traditions. Instead of discarding the term entirely, a more constructive approach may be to ensure that customary marriages receive equal recognition, dignity and enforcement within the legal system.

The *Sedinyane* judgment, in this regard, raises an important question: should South African legal terminology be reconsidered to avoid historical misinterpretations, or does the emphasis on decolonisation risk creating unnecessary semantic disputes? Although the Court's concerns about linguistic bias may be valid, the legal distinction between civil and customary

⁶² *Sedinyane* para 25.

marriages remains essential for clarity in the application of marital laws. Future judicial discussions may need to engage more explicitly with this issue, considering the historical underpinnings of legal terminology and the imperative to promote linguistic justice in post-apartheid South African jurisprudence.

6 Conclusion

Sedinyane illustrates the persistent uncertainty that arises within the South African plural marriage system when the formal legal status of a customary marriage differs from the social reality of the relationship. By confirming that abandonment and prolonged separation do not dissolve a customary marriage, the Court reaffirmed the strong legal protection afforded to customary spouses under the *RCMA*. However, declaring the subsequent civil marriage a nullity demonstrates the difficult consequences that may follow for later partners who enter marriages in good faith while an earlier customary union legally persists.

The judgment exposes a structural tension between protection and legal certainty. Although strict dissolution requirements protect customary spouses against unilateral abandonment, they can simultaneously generate hardship and evidentiary uncertainty within overlapping marital regimes. *Sedinyane* thus highlights the limits of formal recognition as a solution to the challenges of legal pluralism.

The issues highlighted in *Sedinyane* also resonate with the law reform process undertaken by the South African Law Reform Commission under Project 144, which investigated the adoption of a single statute regulating marriages and protected relationships. The project aimed to provide for the recognition of marriages and life partnerships irrespective of religious or cultural affiliation, to establish uniform requirements for their formation and registration, and to clarify the legal consequences flowing from such relationships. Although the Commission completed its final report in June 2022, it was not publicly released at the time of writing. Its eventual publication may contribute significantly to resolving uncertainties arising from overlapping marriage regimes, including disputes such as those illustrated in *Sedinyane*.⁶³

The proposed *Marriage Bill* [B43-2023], which seeks to consolidate South Africa's fragmented marriage legislation into a unified framework, offers a potential avenue to address these tensions. Whether through legislative reform or doctrinal development, the evolving law of marriage must strive to

⁶³ Although the final report is not yet in the public domain, two research papers have seen the light. See SALRC *Issue Paper 35*; SALRC *Discussion Paper 152*.

balance respect for customary practices with clarity and fairness for all parties navigating South Africa's plural legal landscape.

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List of Abbreviations

IJLPF	International Journal of Law, Policy and the Family
McGill LJ	McGill Law Journal
RCMA	Recognition of Customary Marriages Act 120 of 1998
SALRC	South African Law Reform Commission