The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?

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Abstract

In 2016 the Eastern Cape Local Division in Mthata heard a claim by Mrs Winnie Madikezela-Mandela that, amongst other things, her customary marriage to former President Nelson Mandela continued to exist until his death, despite the dissolution of their civil marriage. Not long thereafter, in 2017, former President Jacob Zuma's daughter made headlines by claiming half of her soon-to-be-ex-husband's multimillion-rand estate despite the couple's having entered into a valid ante-nuptial contract. The claim was that her preceding customary marriage had not been accompanied by an ante-nuptial contract, and therefore the marriage was in community of property. These high-profile cases raise the fundamental legal question: what effect does a civil marriage between parties have on the parties' customary marriage to each other?

Historically the subsequent civil marriage terminated the customary marriage, as such marriages were not legally recognised in South Africa. The *Recognition of Customary Marriages Act* 120 of 1998 allows for such dual marriages without specifying the consequences thereof. Most commentators have interpreted the provisions to perpetuate the historical position; the civil marriage terminates the customary marriage. While this appears distasteful, the rationale is legal certainty and accords with the recommendations of the South African Law Commission. Furthermore, alternative customary dispute resolution mechanisms are still available to the parties, who are unlikely to suffer prejudice under the interpretation. In addition, given the social reality in which dual marriages are conducted and how they are perceived by parties, parties should be allowed to conclude an ante-nuptial contract after their customary marriage but before their civil marriage to regulate the proprietary consequences of their marriage.

Keywords

Customary marriage; *Recognition of Customary Marriages Act*; ante-nuptial contract; dual marriage; converted marriage.

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1 Introduction

In 2016 Mrs Winnie Madikezela-Mandela lodged a claim in the Eastern Cape Local Division in Mthata against the estate of the late Mr Nelson Mandela.[1] Mrs Madikezela-Mandela claimed, amongst other things, that her customary marriage to the late former President continued to exist until his death and that she retained a right of use and occupation of the property under customary law.[2] The parties' civil divorce in 1996 was alleged to have terminated their civil marriage but not their customary marriage, which had been concluded prior to the civil marriage.[3] The case was dismissed by the High Court and the dismissal upheld by the Supreme Court of Appeal[4] due to there having been an unreasonable delay in bringing the case, with the result that the merits of the case were not authoritatively addressed.[5]

In 2017 the issue of these dual civil and customary marriages surfaced yet again. In another high-profile case, former President Jacob Zuma's daughter made headlines when she claimed half of her soon-to-be-ex-husband's multimillion rand estate despite the couple’s having entered into a valid ante-nuptial contract.[6] The claim was that her preceding customary marriage had not been accompanied by an ante-nuptial contract and had therefore been in community of property. The intimation was that the parties could not subsequent to the customary marriage enter into an ante-nuptial contract accompanying their civil marriage to change the proprietary consequences of their marriage. The matter has yet to go to court, but the claim highlights the uncertainty surrounding the consequences of dual marriages in South Africa today.

The combination of a civil and a customary marriage is common in South Africa and is referred to as a "dual marriage".[7] There are numerous varieties of these marriages: individuals may celebrate their customary and civil marriage on the same day or there may be a lapse of time varying from days to years between the two marriages with no fixed order in which the

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1 *Mandela v Executors Estate Late Nelson Rolihlahla Mandela* 2016 2 All SA 833 (ECM) (hereafter the *Mandela* case).

2 *Mandela* case para 11.

3 *Mandela* case para 11.

4 *Mandela v Executors Estate Late Nelson Rolihlahla Mandela* 2018 4 SA 86 (SCA).

5 *Mandela* case para 34.

6 Citizen Reporter 2017 https://citizen.co.za/lifestyle/1396615/zumas-daughter-unhappy-divorce-settlement-wants-half-hubbys-estate/.

7 Bennett *Customary Law* 236.

marriages may be concluded. Despite the prevalence of these dual marriages in South Africa, they are shrouded in legal uncertainty. This article examines the effect of the parties' civil marriages on their customary marriages, and the proprietary consequences of the marriages.

First, the article examines the historical treatment of dual marriages. Secondly, it analyses the provisions of the *Recognition of Customary Marriages Act*[8] to determine how the current legal dispensation addresses the questions of the validity and proprietary consequences of a dual marriage. Finally, it argues that in the light of the canons of legal interpretation, the interests of legal certainty and the current social reality, both Mrs Madikezela-Mandela and President Zuma's daughter's claims should rightfully be dismissed.

2 Historical perspective

During the colonial and apartheid eras customary law marriages were not recognised as valid marriages in South Africa.[9] Fuelled by a distaste for *lobolo* and the potential polygamous nature of these marriages, courts considered customary marriages contrary to the principles of public policy and natural justice.[10] The *Black Administration Act*,[11] the state's central tool in regulating the affairs of Black individuals in the country, referred to a marriage in accordance with customary law as a "customary union".[12] Over time the legislature and courts extended *ad hoc* protection to parties in customary marriages for the purposes of tax, maintenance and a dependent's action in the unlawful killing of a breadwinner[13] but stopped short of recognising customary marriages as valid marriages.[14]

Initially the *Black Administration Act* was silent regarding whether partners in a customary law marriage could enter into a civil law marriage with each

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8 *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the *Recognition Act*).

9 Bennett *Customary Law* 188-190; Maithufi and Moloi 2002 *TSAR* 600-601.

10 Himonga and Nhlapo *African Customary Law* 93; Bakker and Heaton 2012 *TSAR* 586; Dlamini 1989 *TSAR* 410; Burman 1991 *Acta Juridica* 37; Kaganas and Murray 1991 *Acta Juridica* 119-120; Herbst and Du Plessis 2008 *EJCL* 109.

11 *Black Administration Act* 38 of 1927 (hereafter the *Black Administration Act*). A customary union was defined as a conjugal relationship according to Black law and custom where neither partner was party to a subsisting marriage.

12 Section 22 of the *Black Administration Act*.

13 Himonga and Nhlapo *African Customary Law* 93-94; De Koker 2001 *TSAR* 261-262.

14 Dlamini 1989 *TSAR* 408 refers to a range of cases in which the Appellate Division refused to recognise customary marriages as valid marriages. Simons 1961 *Acta Juridica* 17 aptly describes South Africa as exhibiting a "reluctant tolerance" towards African customary marriages.

other.[15] Where parties in a customary marriage did so, the civil law marriage was generally considered to have superseded the customary law marriage.[16] The customary law marriage was extinguished and the civil law marriage operated retrospectively to determine the status and rights of the spouses and children.[17] The presumption was that the Western form of marriage indicated that the spouses were aligning themselves with the Western form of culture and the position to a larger degree reflected the superior status enjoyed by Christian and civil law marriages at the time.[18]

The case of *Kumalo v Jonas*[19] is an anomalous decision in this regard as it conflicted with the general position stated above that the civil marriage superseded the customary marriage. The parties entered into a customary marriage subsequent to which the defendant committed adultery. Thereafter the parties entered into a civil marriage and the plaintiff then instituted a claim for damages for the said adultery. The trial court rejected the claim on the basis that the customary law marriage had automatically been dissolved by the civil law marriage. On appeal, the court held that as there had been no statutory enactment terminating the customary marriage, the continued validity of the customary marriage had to be determined from a customary law perspective.[20] In terms of customary law, the conclusion of

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15 This is distinguishable from the situation where a man in a customary union entered into a civil marriage with another woman, not being the customary law wife. Initially, s 22 of the *Black Administration Act* provided that a man in a customary union who wanted to enter a civil law marriage with somebody other than his customary law partner had to make a declaration stating the names of all his customary partners and the children born from such marriages. The Act made it an offence to enter into such a marriage without a declaration but was silent on the validity of a civil marriage concluded without the declaration. The courts tended to treat the civil marriage as valid and to have terminated the customary law marriage. See *Nkambula v Linda* 1951 1 SA 377 (A) and *Kumalo v Kumalo* 1954 NAC (S) 54. For a discussion of this see Burman 1991 *Acta Juridica* 37; Kaganas and Murray 1991 *Acta Juridica* 122. In 1988 the *Black Administration Act* was amended by the *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988 (hereafter the *Matrimonial Property Act*) to provide: "(1) A man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman. (2) Subject to ss (1), no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union." This was generally interpreted to mean that a civil marriage contracted in contravention of this was invalid, though there was some opinion that it was merely voidable; Bonthuys and Sibanda 2003 *SALJ* 787; Dlamini 1989 *TSAR* 409.

16 Bekker *Seymour's Customary Law* 270; Letsika 2005 *Botswana LJ* 84; Simons 1961 *Acta Juridica* 28 and the case law cited in fn 57; Bennett *Customary Law* 236-237; Bakker and Heaton 2012 *TSAR* 587.

17 Simons 1961 *Acta Juridica* 28.

18 Bennett *Customary Law* 237; SALC *Project 90 – Paper 74* 48.

19 *Kumalo v Jonas* 1982 AHK 111 (S).

20 *Kumalo v Jonas* 1982 AHK 111 (S) 114.

a civil marriage would not terminate the customary law marriage.[21] The court suggested that the marriage relationship between the parties continued in two different forms but then contradictorily intimated that the civil marriage superseded the customary marriage.[22] The causes of action that arose from the customary union were held to not automatically lapse, and the court allowed the claim for damages.[23]

Prinsloo[24] commented on the case and commended it for approaching the issue from a customary law perspective as opposed to a common law one. While it is laudable that the court gave consideration to the customary point of view, it is questionable whether this would have been given any substantial weight or been followed, given the pre-eminence the courts afforded common law marriages at the time.[25] Commenting on the decision Bekker[26] expresses the opinion that the decision merely allowed the claim for damages for adultery but did not alter the position that the civil marriage superseded the civil marriage. This most likely represents the position at the time, with *Kumalo v Jonas* intimating that the conclusion of the civil marriage does not terminate the claims arising from the customary marriage.

In 1988 the *Black Administration Act* was amended to allow partners in a customary union to enter into a civil marriage with each other. The amendment provided that a man and a woman in a customary union could contract a civil marriage with each other provided that the man was not also partner to a customary union with another woman.[27] The consequences of the civil marriage for the customary marriage were not specified, but commentators interpreted the statutory provisions to mean that the customary union was converted into a civil marriage.[28] The generally prevailing view was that the civil marriage superseded or extinguished the customary marriage, which replicated the position prior to the amendment.[29]

Historically, the legal existence of a dual marriage was foreign in South African law.[30] While they were afforded a degree of legal recognition and protection, customary law marriages were regarded as mere unions and not

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21 *Kumalo v Jonas* 1982 AHK 111 (S) 116.
22 *Kumalo v Jonas* 1982 AHK 111 (S) 118.
23 *Kumalo v Jonas* 1982 AHK 111 (S) 118.
24 Prinsloo 1986 *TSAR*.
25 Dlamini 1989 *TSAR* 411.
26 Bekker *Seymour's Customary Law* 370-371.
27 Sections 22(1) and 2 the *Black Administration Act*.
28 Bakker and Heaton 2012 *TSAR* 587.
29 Bennett *Customary Law* 236-237; Mamashela and Carnelley 2011 *Agenda* 113; Maithufi and Moloi 2002 *TSAR* 602.
30 Church 1978 *CILSA* 82.

marriages.[31] Thus the customary union was generally considered to have been terminated if the parties entered into a civil marriage with each other.[32] While the *Kumalo* case suggested that both marriages continued to exist, it is most likely that the claim for damages for adultery survived and that the civil marriage superseded the customary marriage.

3 Dawn of democracy and the *Recognition Act*

The recognition and status of customary law in South Africa changed drastically with the adoption of the *Constitution*.[33] Not only is customary law recognised in the *Constitution* but courts are mandated to apply customary law where applicable, subject to the *Constitution* and applicable legislation, and to give effect to the spirit, purport and objects of the Bill of Rights when developing customary law.[34] The Constitutional Court has also affirmed the integral nature of customary law in the South African legal system and held that it must be examined in its own setting rather than through the lens of common law.[35] Furthermore, the *Constitution* allows for the recognition of previously unrecognised marriages such as customary and religious marriages.[36] Along with the individual and group right to culture,[37] this provision may be interpreted to place an indirect obligation on the state to recognise customary law marriages on a par with civil law marriages.[38]

In accordance with the newly elevated status of customary law, the *Recognition Act* recognises customary law marriages as valid marriages in South African law today. Along with significant judicial interventions[39] in this

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31 Church 1978 *CILSA* 82.

32 SALC *Project 90 – Paper 74* 48.

33 Bennett *Customary Law* 78; Himonga and Nhlapo *African Customary Law* 17-20; Himonga and Bosch 2000 *SALJ* 309-313; Nhlapo 2017 *SAJHR*.

34 Sections 39(2),(3) and 211(3) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

35 *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC) para 51; *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 148.

36 Section 15(3)(i) of the *Constitution* provides that the section does not preclude legislation recognising marriages concluded under any tradition, or a system of religious, personal or family law.

37 Sections 30 and 31 of the *Constitution*.

38 Herbst and Du Plessis 2008 *EJCL* 107.

39 The *Recognition Act* must be read with the landmark cases of *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC); *MM v MN* 2013 4 SA 415 (CC); *MN v MM* 2012 4 SA 527 (SCA); *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC). The aforementioned cases deal with the proprietary consequences of customary marriages along with the issue of whether the consent of the first wife is required for a subsequent customary marriage. There is also a growing jurisprudence on the living customary law requirements for concluding a customary law marriage; see Himonga and Nhlapo *African Customary Law* 100-102; Osman and Barratt "Customary Marriages" 389-391.

arena, this Act regulates the recognition and consequences of customary marriages.[40]

3.1 Dual marriages under the Recognition Act

The *Recognition Act* allows individuals married according to customary law to marry each other under civil law. Section 10 of the *Recognition Act* provides:

> 10. Change of marriage system
>
> (1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.
>
> (2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.
>
> (3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any marriage which is in community of property as contemplated in subsection (2).
>
> (4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage.

In essence, the section allows spouses in a monogamous customary marriage, who are not married to any other party – either in civil or customary law – to marry each other under civil law. The provision is important because despite the full legal recognition of customary marriages in South African law today, individuals still combine customary and civil marriages.[41]

Most individuals who adhere to an indigenous culture celebrate their marriages in accordance with their culture and conclude a customary law marriage. For many, it will be the only form of marriage socially acceptable within their families and communities and the preferred form of marriage.[42] However, given the historical non-recognition of customary law marriages,

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40 For a general discussion on the *Recognition Act*, see Himonga and Nhlapo *African Customary Law* 94-157; Bennett *Customary Law* 194-236. Also see Barker 2011 *Int JLC* 450, who argues that despite the legal recognition of customary marriages they continue to occupy a subordinate position to civil law marriages.

41 Meyer and Rudolph *Policy and Procedure Manual* 82; SALC *Project 90 – Paper 74* 47. This is also common in Swaziland and Lesotho, where people frequently marry first by custom and later by civil law; Maqutu 1983 *CILSA* 379.

42 Maqutu 1983 *CILSA* 377.

there is scepticism surrounding the validity and legal consequences of these marriages.[43] Civil marriages are perceived to be legally stronger and to confer greater protection and rights than customary marriages.[44] Thus, individuals may register a civil marriage, after concluding a customary marriage, to regulate the proprietary consequences of their marriage.[45]

Despite the conclusion of both a customary and civil marriage, individuals may not view these dual marriages as creating separate and distinct legal marriages. Rather, the intention is often to conclude a marriage which is then celebrated in different forms. In this regard, customary marriages are often described as a "process" rather than a single legal event.[46] The customary law marriage celebrations often culminate in a "white wedding" with a church ceremony and having the marriage registered as a civil marriage.[47] The customary law marriage flows into the church ceremony conducted to grant God's blessing, with many individuals completely unaware of the matrimonial property consequences attaching to each marriage.[48] At the church, the priest may conclude a civil marriage or instruct the parties to later register their marriage.

The *Recognition Act* obliges spouses to register their customary marriages at the Department of Home Affairs.[49] Registration serves as *prima facie* proof of the marriage, but failure to register the marriage does not affect its validity.[50] However, registration is associated with civil marriages, and Himonga and Moore[51] found that individuals were often unaware that they could register a customary marriage. Many individuals who were uncertain about the registration process concluded a customary marriage but subsequently discovered that their marriage had been registered as a civil marriage.[52] These individuals inadvertently find themselves in a dual marriage – a marriage celebrated in accordance with customary law but registered as a civil marriage. It is misleading to portray these individuals as

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43 Himonga and Moore *Reform of Customary Marriage* 114-115.

44 Budlender *et al Women, Land and Customary Law* 37; Himonga and Moore *Reform of Customary Marriage* 114-115.

45 Himonga and Moore *Reform of Customary Marriage* 114-115.

46 Himonga and Moore *Reform of Customary Marriage* 93.

47 Budlender *et al Women, Land and Customary Law* 34; Himonga and Moore *Reform of Customary Marriage* 116-117.

48 Maqutu 1979 *CILSA* 176-177; Himonga and Moore *Reform of Customary Marriage* 114-117.

49 Section 4(1) of the *Recognition Act* – "The spouses of a customary marriage have a duty to ensure that their marriage is registered."

50 Sections 4(8) and (9) of the *Recognition Act*.

51 Himonga and Moore *Reform of Customary Marriage* 112-115.

52 Himonga and Moore *Reform of Customary Marriage* 112-113, 123.

having intended a dual marriage when the situation is merely a result of confusion in the registration process.

Finally, it should be noted that section 10(4) of the *Recognition Act* does not allow parties in a civil marriage to enter into a customary marriage – peculiarly even with each other.[53] This effectively dictates that parties who wish to conclude both a customary and a civil marriage must conclude the civil marriage after the customary marriage. Thus, caution should be exercised in inferring that the parties intended to convert their marriage from a customary marriage into a civil law marriage when the law dictates the order of entering into a dual marriage.

3.2 Does the new civil marriage terminate the customary law marriage?

In the deliberations leading to the enactment of the *Recognition Act*, the South African Law Commission[54] recommended that dual marriages be discouraged and that ideally parties should select the system of law applicable to their marriage.[55] Difficulties arise because most parties fail to do so, or there is a dispute about which system has been selected, or one of the parties' has died or has disappeared.[56] In the absence of such a choice, the Law Commission recommended that the court should look at the spouse's general cultural orientation and lifestyle to determine the applicable system of law.[57] This is admittedly difficult, especially where the individuals' lives reflect both a Western and a traditional lifestyle, thus rendering the lifestyle test meaningless. It also results in distasteful inferences that customary law is applicable where the parties are poor or live in rural areas and that the common law applies where the individuals are wealthy, educated or live in urban areas.[58] Such derogatory inferences are untenable in a constitutional era and it is preferable that the court refrain from such pronouncements.

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53 Maithufi and Moloi 2002 *TSAR* 607; Cronje and Heaton *South African Family Law* 224; Osman and Barratt "Customary Marriages" 391. Clause 9 of the *Recognition of the Customary Marriages Amendment Bill*, 2009 proposes an amendment to the *Recognition Act* to allow parties in a customary marriage to enter into a civil marriage with each other.

54 In 2002 the name of the South African Law Commission was changed to the South African Law Reform Commission by the *Judicial Matters Amendment Act* 55 of 2002 (hereafter referred to as the Law Commission).

55 SALC *Project 90 – Paper 74* 49-50.

56 SALC *Project 90 – Paper 74* 36.

57 SALC *Project 90 – Paper 74* 49; SALC *Project 90 – Report* 37.

58 Himonga and Nhlapo *African Customary Law* 84.

3.2.1 Section 10 of the Recognition Act

The *Recognition Act* does not specify the consequences of a civil marriage on the existing customary marriage, and it will fall to courts to interpret the legal effects of the section.

A basic rule of statutory interpretation is that the headings of legislation are part of the enactment and may be referred to in establishing the meaning of ambiguous provisions.[59] Section 10 is entitled "Change of marriage system". The word "change" is defined as "something that may be substituted for another thing of the same type".[60] This suggests that the customary law marriage is made into something different, namely a civil marriage. This lends credence to the interpretation that the civil law marriage terminates the customary law marriage, which now becomes a civil marriage.

This interpretation is supported by the drafting history of the *Recognition Act,* in which the Law Commission noted that having two continuing marriages creates legal difficulties and is undesirable.[61] The recognition and enforcement of a dual marriage was described as an "impossibility" due to the conflicting legal consequences, and the Law Commission recommended that one form of marriage be given precedence over the other.[62] Preference based on the date of marriage, however, was acknowledged to be arbitrary.[63] The Law Commission recommended that parties must be able to convert their customary marriage into a civil marriage on the basis that individuals could move from a flexible system to a more restrictive one, and did not allude to the existence of a dual marriage.[64] This recommendation aligns with the interpretation that the civil marriage terminates the customary marriage, as opposed to the marriage continuing in two different forms.

Academic opinion[65] further supports the interpretation that the *Recognition Act* allows for the conversion of the customary marriage into a civil marriage.

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59 *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 24; De Ville *Constitutional and Statutory Interpretation* 157.

60 Oxford English Dictionary 2017 http://www.oed.com/view/Entry/30467?rskey=fAtQjf&result=1#eid.

61 SALC *Project 90 – Paper 74* 48.

62 SALC *Project 90 – Paper 74* 35.

63 SALC *Project 90 – Paper 74* 49.

64 SALC *Project 90 – Report* 39.

65 Bennett *Customary Law* 238; Jansen "Family Law" 118; Maithufi and Moloi 2002 *TSAR* 602. Cronje and Heaton express the opinion that the consequences are that

Bennett acknowledges that the interpretation echoes the pre-*Recognition Act* position and reinforces the historical prejudices against customary law marriages.[66] However, he argues that it promotes certainty, continuity and greater protection for women by favouring the monogamous form of marriage.[67] The approach is further consonant with the draft Muslim Marriages Bill,[68] which recognises Muslim marriages for the first time in this country but does not permit dual marriages. Individuals may not conclude a civil marriage during the subsistence of a Muslim marriage regulated by the Bill.[69]

3.2.2 Re-enforcement of a prejudicial historical position

Perhaps the strongest counter argument to a civil marriage's terminating the customary marriage, as alluded to above, is the re-enforcement of the historical superiority civil marriages enjoyed over customary law marriages. The *Recognition Act* was meant to address the historical non-recognition of customary marriages. An interpretation that entrenches the historical position is problematic and arguably conflicts with the constitutional recognition and status of customary law. The constitutional obligation on courts to interpret legislation to give effect to the object, purport and spirit of the Bill of Rights,[70] and the indirect obligation on the state to recognise customary law marriages[71] arguably militates against such an interpretation.

3.2.3 Circumvention of the provisions of the Recognition Act

A further complicating factor is that such an interpretation may potentially circumvent the provisions of the *Recognition Act*. Section 8(1) of the *Recognition Act* provides that a customary marriage may be dissolved only by an order of court, on the ground of the irretrievable breakdown of the marriage. Allowing the civil marriage to supersede the customary law marriage effectively provides an alternative means to terminate the customary marriage and circumvents section 8 of the *Recognition Act*.[72]

The circumvention of the legal provisions may be condoned, however, if the rationale for the section is understood. Traditionally, under customary law,

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the customary marriage terminates at the date of the civil marriage, but the termination is not retroactive; Cronje and Heaton *South African Family Law* 226-227.

66 Bennett *Customary Law* 237-238.

67 Bennett *Customary Law* 237-238.

68 *Draft Muslim Marriages Bill*, 2011.

69 Clause 5(2).

70 Section 39(2) of the *Constitution*.

71 Herbst and Du Plessis 2008 *EJCL* 107.

72 Bennett *Customary Law* 238 fn 441.

divorce was a private matter negotiated between the spouses and their families, and only in limited instances where the parties could not reach agreement would a third party be involved.[73] Matters such as maintenance, the distribution of the estate and the custody of children were not discussed as the assumption was that wives would return to their families and children would remain with their fathers.[74] In the deliberations preceding the *Recognition Act*, the Law Commission speculated that traditional customary law principles which facilitated satisfactory marriages and divorce settlements were most likely not practised today,[75] the result being that some women stayed in unhappy marriages or received disadvantageous settlements.[76] It concluded that private divorce settlements were most likely disadvantageous to women and children and recommended judicial oversight of customary divorces to protect against such exploitation.[77] Thus, section 8 of the *Recognition Act* requires a court order for the dissolution of a customary marriage. While the termination of the customary marriage and replacement with the civil marriage undeniably circumvents section 8 of the Act, it arguably does not undermine its purpose. An order of court is still required to dissolve the civil marriage, effectively ensuring that the interests of women and children are safeguarded upon termination of the marriage.

3.2.4 Loss of customary dispute resolution mechanisms

A customary marriage is described as a marriage of families rather than only of the respective spouses.[78] While the two parties are important, there is a broader goal of forging an alliance between two families, which may have a community-wide significance.[79] The communal nature of a customary marriage offers individuals significant family support and alternative dispute resolution mechanisms not provided in the formal law.

The question is whether the replacement of the customary marriage with the civil marriage precludes individuals from accessing family support and the alternative dispute resolution mechanisms. Such thinking, however, reflects a superficial understanding of the legal system. The termination of the customary marriage by the civil marriage from a state perspective does

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73 SALC *Project 90 – Paper 74* 119; Himonga and Nhlapo *African Customary Law* 149; Bennett *Customary Law* 266.
74 SALC *Project 90 – Paper 74* 119; Bennett *Customary Law* 266 .
75 SALC *Project 90 – Paper 74* 121-122.
76 SALC *Project 90 – Paper 74* 122.
77 SALC *Project 90 – Paper 74* 122-124.
78 Nhlapo 1991 *Acta Juridica* 137; Campbell 1970 *CILSA* 213.
79 Nhlapo 1991 *Acta Juridica* 137.

not mean that it ceases to exist from an individual and community perspective.

The theory of deep legal pluralism explains that there is a range of normative orderings that regulate people's lives, which do not depend on the state for recognition.[80] The theory acknowledges that non-state norms may regulate people's lives and in some instances even displace state law.[81] Individuals and the community are thus likely, in accordance with notions of deep legal pluralism, to view the customary law marriage as valid, regardless of the state's treatment thereof, and may even reject the idea that the civil marriage supersedes the customary marriage.

The state's non-recognition of the customary marriage is thus unlikely to constitute any real hindrance to parties accessing the support and alternative dispute resolution mechanisms provided in customary law. Historically, this is exemplified by individuals who entered into customary marriages to regulate their relationships despite their non-recognition by the state. This pluralistic reality addresses the objection that the replacement of the customary marriage with the civil marriage precludes parties from accessing the useful and accessible dispute resolution mechanisms available in customary law.

In summation, it appears that the *Recognition Act* is best interpreted to allow parties to convert their customary marriage into a civil marriage and does not permit the co-existence of a dual marriage. A subsequent civil marriage arguably supersedes the customary marriage. This appears distasteful at first glance, because it echoes the pre-democratic position. However, the interpretation is supported by the wording of the provision and by leading scholars in the field. While it accords with the historical position, the motivation is legal certainty and continuity rather than any prejudice towards customary law. In addition, the social reality is that vulnerable parties such as women and children would most likely still have access to alternative dispute resolution mechanisms and have their interests safeguarded by the courts on the termination of the civil marriage. The interpretation further avoids the difficult and complex legal questions posed by dual marriages such as which marriage takes precedence in the event of a conflict and what

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80 Griffiths 1986 *J Legal Plur* 1; Himonga 2010 *Tul Eur & Civ LF* 26. Deep legal pluralism may be contrasted to weak or state legal pluralism, in which the state recognises and administers a plurality of legal orders. Non-state systems are not considered law, as the theory centralises the state in legitimising law, see Himonga and Nhlapo *African Customary Law* 45; Griffiths 1986 *J Legal Plur* 8.

81 Himonga and Nhlapo *African Customary Law* 46-47.

the applicable proprietary regime is. Thus, Mrs Madikezela-Mandela's customary marriage was arguably terminated by her civil marriage and her claim was rightfully dismissed.

3.3 What are the proprietary consequences of the new civil marriage?

The interpretation that the civil marriage replaces the customary marriage negates the possibility of a dual marriage with different proprietary consequences for the two marriages. What remains to be addressed is the proprietary consequences of the new civil marriage. Section 10(2) provides:

> When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.[82]

The reference to "their marriage" in section 10(2) has been the point of contention leading to uncertainty as to when the ante-nuptial contract must have been concluded. Confusion has arisen as to whether "their marriage" refers to the parties' initial customary law marriage or their later civil marriage. If "their marriage" refers to the customary law marriage, then the parties must have lodged the ante-nuptial contract prior to the conclusion of the customary law marriage. Parties could not conclude an ante-nuptial contract after the conclusion of the customary law marriage but prior to the civil marriage to regulate the proprietary consequences of their marriage. This has significant implications for individuals in the same predicament as those in the Zuma matter. Their ante-nuptial contract would be invalid, and they might find themselves unexpectedly by default in an in-community-of-property regime.[83]

3.3.1 Requirement for a court order to vary the matrimonial property system

The interpretation that the ante-nuptial contract must be concluded prior to the conclusion of the customary marriage finds some support in the *Recognition Act*. Section 7 of the *Recognition Act* as read with *Gumede v*

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[82] Underlined for emphasis.

[83] This has important practical implications, as parties in an in-community-of-property marriage share a joint estate and require the consent of their spouses, amongst others, for the alienation of immovable property and the registration of a mortgage bond; see s 15 of the *Matrimonial Property Act*.

President of the Republic of South Africa[84] provides that the proprietary consequences of all monogamous customary law marriages are:

> … in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

Thus, all monogamous customary law marriages are in community of property from their commencement, unless provided otherwise in an ante-nuptial contract lodged before the conclusion of the marriage. Furthermore, the *Recognition Act* provides that the proprietary consequences of a marriage may be varied only by an order of court.[85] Accordingly, a couple who wish to change their matrimonial property system must apply to court, which may authorise the parties to enter into a notarial contract if the court is satisfied that there are sound reasons for the proposed change, all creditors have been notified, and no other person would be prejudiced by the change.[86] Parties cannot lodge an ante-nuptial contract without such a court application. Allowing parties in a monogamous customary law marriage to simply lodge an ante-nuptial contract to change their property regime after the conclusion of the customary marriage but prior to their civil marriage arguably undermines the requirement for a court application.

Furthermore, allowing individuals to change the matrimonial property consequences of a marriage without due notice and an application to court may cause prejudice to creditors and third parties who were dealing with the couple on the basis that they were in an in-community-of-property marriage.[87] Third parties may have to rely on a claim for misrepresentation or estoppel to protect their rights. It is arguable that to avoid the potential prejudice to third parties, the ante-nuptial contract must be concluded prior to the customary marriage.

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84 *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC). The Constitutional Court in *Gumede* held that all monogamous customary law marriages, regardless of when they are entered into, are in community of property unless provided for otherwise.

85 Section 7(4)(a) of the *Recognition Act*.

86 The *Recognition Act* as read with s 21 of the *Matrimonial Property Act*. *Lourens et Uxor* 1986 2 SA 291 (C) provides detailed guidelines for such applications.

87 The parties would remain jointly liable for debts incurred prior to the change in the proprietary regime, and the potential prejudice is with respect to future debts.

3.3.2 Language of the provision

Vise[88] further supports the argument that the ante-nuptial contract must be concluded prior to the customary marriage with reference to the text of section 10(2) of the *Recognition Act*. He argues that the word "marriage" is used extensively in section 10 of the *Recognition Act* and is used to refer to a marriage under the *Marriage Act*.[89] He notes that when the intention is to refer to a customary marriage, the words "customary marriage" are used.[90] Vise[91] thus argues that as the statutory rule of interpretation provides that the same words in the same enactment bear the same meaning,[92] the words "their marriage" in section 10(2) of the *Recognition Act* should be interpreted to refer to the parties' civil marriage.

This argument, however, is not supported by the *Recognition Act* as a whole, as it uses the terms "marriage" and "customary marriage" interchangeably to refer to the parties' customary marriage. For example, section 3(1)(b) requires that "the marriage must be negotiated and entered into or celebrated in accordance with customary law". This is clearly a requirement for the conclusion of a customary marriage, but the section uses the phrase "the marriage".[93] Thus Vise's argument, which is not supported by the Act as a whole, is not persuasive on the matter.

3.3.3 Social reality

On the converse, a more persuasive argument is found in the social reality in which these dual marriages are conducted. As previously discussed, dual customary and civil marriages are often not viewed by spouses as creating distinct and separate marriages.[94] For many individuals, there is a single marriage entered into in terms of customary law which may have been

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88 Vise 2011 http://www.ghostdigest.com/articles/change-of-marriage-ii/53961.

89 Vise 2011 http://www.ghostdigest.com/articles/change-of-marriage-ii/53961.

90 Vise 2011 http://www.ghostdigest.com/articles/change-of-marriage-ii/53961. When interpreting a provision, consideration must be given to both the ordinary language used and the context of the legislation that the provision is found in; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18.

91 Vise 2011 http://www.ghostdigest.com/articles/change-of-marriage-ii/53961.

92 *Minister of the Interior v Machadorp Investments (Pty) Ltd* 1957 2 SA 395 (A) 404: "Where the Legislature uses the same word … in the same enactment, it may reasonably be supposed that out of a proper concern for the intelligibility of its language, it would intend the word to be understood, where no clear indication to the contrary is given, in the same sense throughout the enactment."

93 Similarly, s 3(3)(a) requires the consent of a minor's parents for the conclusion of a marriage. The word "marriage" is used but refers to a customary marriage.

94 Budlender *et al Women, Land and Customary Law* 34, Himonga and Moore *Reform of Customary Marriage* 116-117.

concluded and/or celebrated at a church and registered as a civil marriage.[95]

Ante-nuptial contracts, which are unknown in customary law, are probably entered into only prior to the civil marriage, as this is the form of marriage with which the regulation of proprietary affairs and the ante-nuptial contract is synonymous.[96] Requiring the ante-nuptial contract to be lodged prior to the customary law marriage would catch many people unawares. This has the consequence that individuals who concluded an ante-nuptial contract prior to their civil marriage – but after their customary marriage – would nonetheless have an in-community-of-property matrimonial regime. The wishes of the parties evinced in the ante-nuptial contract are ignored to safeguard the interests of potential third parties dealing with the couple on the basis that they are married in community of property. This justification is questionable, given that there may be a short period of time between the conclusion of the customary and civil marriages – a matter of days or weeks – and such third parties may not even exist. On the other hand, the consequences are harsh. They include the invalidation of an ante-nuptial contract voluntarily concluded by the parties to regulate their financial affairs. Individuals ultimately pay the price of the vague and unclear drafting of the *Recognition Act*. Given the substantial prejudice to spouses and that the rights of third parties may be adequately protected with a claim of misrepresentation or estoppel, it is argued that the ante-nuptial contract may be lodged prior to the conclusion of the civil marriage to regulate the proprietary consequences of the new civil marriage.

3.3.4 More than changing the matrimonial property system

A more technical argument is that the situation is distinguishable from merely changing the matrimonial consequences of the marriage. The article previously argued that the conclusion of the civil marriage terminates the customary marriage, and thus there is a change to the entire matrimonial regime. The customary marriage is extinguished, and it is for this reason that the parties should arguably be allowed to enter into an ante-nuptial contract to regulate the consequences of their new civil marriage. The provisions requiring a court order to vary the matrimonial consequences of a marriage are not rendered superfluous by this argument. A court application remains necessary where the parties wish to change the

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95 Budlender *et al Women, Land and Customary Law* 34, Himonga and Moore *Reform of Customary Marriage* 116-117.

96 The regulation of matrimonial proprietary consequences is associated with civil marriages; see Budlender *et al Women, Land and Customary Law* 34-35.

matrimonial consequences of their marriage without converting their marriage. This is a technical argument, however, as for all intents and purposes there is a continuous marriage.

In summation, the question regarding the proprietary consequences of the new civil marriage is a complex one. The difficulties presented aptly illustrate why the Law Commission recommended against the continuation of dual marriages. In the absence of clear legislative direction, the matter will fall to the courts to be decided. Courts should arguably allow an ante-nuptial contract to be lodged prior to the civil marriage to govern the proprietary consequences of the marriage. The civil marriage replaces the customary law marriage and on the basis that there is an entirely new marriage and not merely a change in proprietary system, parties should not be required to make an application to court. This approach is arguably more reflective of the social reality and of how individuals view and enter into these dual marriages. Undoubtedly, for third parties dealing with the couple as if they were married in community of property there is a change in the proprietary system without due notice, which is problematic. The parties would remain jointly liable for debts incurred prior to the change in the proprietary system, however, and could be estopped from denying that they are married in community of property, where it would cause prejudice to innocent third parties. This mitigates against disingenuous spouses denying the validity of an ante-nuptial contract to claim a portion of the estate upon death or divorce, and ensures the ante-nuptial contract freely and voluntarily entered into is upheld.

4 Conclusion

For many individuals who live according to customary law, marriage entails a celebration according to customary law coupled with a Christian church ceremony which results in the registration of a civil marriage. The combination of these two forms of marriage is often a result of religious beliefs or a mistaken belief that a customary marriage is not recognised, rather than any real desire to convert their marriage or have both marriages co-exist. These dual marriages raise difficult questions such as what system of law governs the marriage, which is important for determining the proprietary consequences of the marriage and how the marriage may be dissolved. These issues have been highlighted in a few high-profile cases in recent years, but reflect the predicament of many ordinary South Africans.

The historical approach has been to treat the subsequent civil law marriage between parties as superseding their customary law marriage. The

approach leaves a bitter taste in the mouth, as it reflects the general disdain historically displayed towards customary law. Understandably then, under the new democratic dispensation in which customary law is recognised as an integral part of South African law, there have been questions regarding the co-existence of both marriages

Dual marriages are fraught with legal uncertainties and are generally shied away from. In accordance with this approach, it is argued that the current regime pertaining to customary marriages does not permit dual marriages but allows parties to convert their customary law marriages into civil law marriages. This interpretation is supported by the wording of the *Recognition Act*, was advanced by the Law Commission, and ensures legal certainty and continuity in the matter. Had the South African legislature wished to modify the common law position so fundamentally as to allow both marriages to co-exist, it should have done so explicitly.

Furthermore, it is argued that when parties convert their customary law marriage into a civil marriage, they may lodge an ante-nuptial contract prior to the conclusion of the civil marriage to regulate the proprietary consequences of their marriage. While this may result in a change in the proprietary consequences of the marriage without notice to creditors, it most likely gives effect to the parties' views of the marriage as one marriage rather than a conversion. In reality, it is unlikely to prejudice many creditors but would preclude disingenuous parties from exploiting an ambiguity in the *Recognition Act* for their own benefit. Nonetheless, this remains a complex and difficult legal question and failing a legislative amendment, the courts are likely to be called upon in the near future to provide clarity in the matter.

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List of Abbreviations

Botswana LJ	Botswana Law Journal
CILSA	Comparative and International Law Journal of Southern Africa
EJCL	Electronic Journal of Comparative Law
Int JLC	International Journal of Law in Context
J Legal Plur	Journal of Legal Pluralism
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

Tul Eur & Civ LF	Tulane European and Civil Law Forum