

Fiduciary Matters

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Customary marriage - registration is important



Marriage rules and laws

Marriages are considered sacred in many societies, and especially so in the tradition-steeped continent of Africa. African weddings usually involve not just the coming together of the couple in question, but their extended families and sometimes entire communities.

Customary marriage is an age-old institution deeply respected and embedded in the social cultural fabric of all indigenous people of South Africa. During the apartheid era, it became an object of serious distortions and consequently there is a pervasive and serious confusion regarding the true nature of customary marriage. The enacting of The Recognition of Customary Marriages Act 120 of 1998 was an important milestone, especially for Africans (indigenous people of South Africa). The act was passed in an attempt to clarify the legal status of customary marriages.

In terms of the Act, a customary marriage is a marriage negotiated, celebrated or concluded according to any of the systems of indigenous African customary law which exist in South Africa (excluding marriages concluded in accordance with Hindu, Muslim or other religious rites).

Requirements for a marriage to be recognised as a customary marriage include but are not limited to: -

1. A customary marriage entered into before 15 November 2000 must only be valid at customary law. However, if entered into from 15 November 2000 onwards it must comply with certain requirements, one of them being:

- The marriage must be negotiated, entered into or celebrated in accordance with customary law.

The Act also directs such marriages to be registered according to two main categories:-

1. Those entered into before implementation of the Act (15 November 2000) must be registered within 12 months of implementation of the Act.

2. Those entered into after implementation of the Act must be registered within three months of entering into the marriage.

The courts have been inundated with queries and disputes around the interpretation and application of "celebrated in accordance with customary law." In the recent case of PSC v LPM & others (2013) JOL 29847 (GNP), the applicant sought a declaratory order that she was the legitimate wife of a deceased and an

order directing the Department of Home Affairs to issue a marriage certificate in that regard, posthumously. The applicant also sought a declaration of invalidity in respect of a marriage certificate issued by the Department of Home Affairs to the first respondent.

This case is a typical scenario which we face most of the time in practice where:

1. A certain person claims to have been married in terms of customary marriage to the deceased;
2. Marriage has not been registered with the Department of Home Affairs;
3. There is a dispute (conflicting views) within the family as to whether the marriage was concluded or not;
4. There is another partner who claims to have been married to the deceased as well.

According to the applicant, she and the deceased entered into a customary marriage in August 1999. The deceased was killed in an accident in February 2008. The applicant's relationship with the family of the deceased deteriorated after his death, and she learnt that the first respondent was claiming to be the wife of the deceased.

The court found that the applicant had proved that she had entered into a customary marriage with the deceased as the lobola negotiations and handover of the bride to the groom's family had been observed. A declaratory order to that effect was issued, and the Department of Home Affairs was directed to register the marriage. Failure to have the marriage

registered in terms of the Act does not render it invalid but poses challenges when a dispute arises. The court was unable to grant the order cancelling the first respondent's marriage certificate, as it had to be presented with proper evidence of fraud or corruption by the relevant parties, which was absent in this case. Nevertheless, the court expressed suspicion about the validity of the existence of a marriage between the first respondent and the deceased. Since in terms of customary law and the act, polygamy is legally allowed, this matter also demonstrated that the court would not easily annul a customary marriage already registered with the Department of Home Affairs unless an act of fraud or corruption has been established to the satisfaction of the court.

Though in law, failure to register marriage does not render it invalid, registration is still one of the important pillars in determining whether the parties were married or not. Due to the diversity of customary law practices, and serious distortions around the matter, it is highly recommended that parties register their marriages within the prescribed times in order to minimise disputes later, especially if one of the parties is deceased.

This article was written by Mthokozisi Bhengu, a FISA member and Gauteng Provincial Manager, at Standard Executors & Trustees, a subsidiary of Standard Bank Group. FISA is a non-profit organisation that represents practitioners in the fiduciary industry and sets high minimum standards to protect the public's interests. Activities of FISA members include but are not restricted to the drafting of wills, administration of trusts, beneficiary funds and estates, tax and financial advice and the management of client funds. FISA has around 700 individual members who collectively manage in excess of R250 billion. Membership is open to any professional who meets the membership criteria.

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