

# Neglected rights

MATLHODI LETEANE

**I**t is acknowledged that black women who were or are married in terms of African Customary Law are often at a disadvantage compared with women married in terms of the Marriages Act (1961), particularly when two or more women are married to the same man.

It was for this reason that the Recognition of Customary Marriages Act (120 of 1998) was enacted. However, in comparison with women married to the same husband in civil marriages, this Act does not adequately deal with the status of women in customary marriages. Sadly, therefore, enforcing the rights of women married in customary law is left to the courts, as was the case in a recent Appeal Court judgement of *Murabi v Murabi* 2014 ZASCA 49.

In this case the court had to determine two questions of law, namely

whether the customary marriage entered into in 1979 by the deceased with the appellant was valid and secondly whether the civil marriage entered into in 1995 by the deceased and the first respondent was valid.

The facts are briefly this: In 1975, the deceased married the first respondent in accordance with Venda customs and in 1979 entered into a customary marriage with the appellant. The deceased concluded a civil marriage with the first respondent in 1995. Following her husband's death in April 2011, the appellant reported the death at the offices of the Master of the High Court, as required in terms of s7(1) of the Administration of Estates Act (66 of 1965). It was then that she learnt that the death had already been reported and that the first respondent had been appointed as executrix of the deceased estate. The first respondent had also claimed to be sole surviving spouse.

It was necessary for the court to determine whether the deceased was competent to contract a civil marriage with the first respondent during the subsistence of a customary union with the appellant.

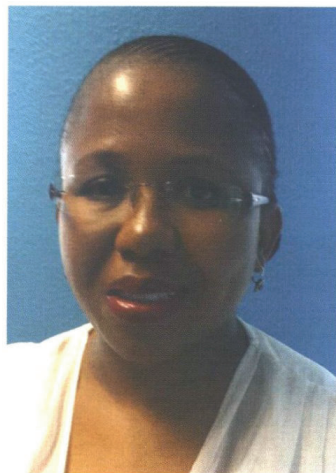
## Human rights law

The court considered the provisions of s22 of the Black Administration Act (38 of 1927) as well as s1 of the Marriage and Matrimonial Property Law Amendment Act (3 of 1988).

Section 22(1) of the Black Administration Act provides that:

*"No male (African) shall, during the subsistence of any customary union between him and any woman contract a marriage with any other woman unless he has first declared upon oath, before the magistrate or native commissioner of the district in which he is domiciled, the name of every such first-mentioned woman, the name of every child of any such customary union, the nature and amount of the movable property (if any) allotted by him to each such woman or house under native custom, and such other information relating to any such union as the official may require."*

Section 1 of the Marriage and Matrimonial Property Law Amendment Act stated that (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 and (2) subject to subsection (1) no person who is a partner in a customary union shall be



Leteane

*competent to contract a marriage during the subsistence of that union."*

The court found that the deceased's civil marriage to the first respondent in 1995 was null and void from the outset as a result of the prohibition of s1(2) which states that no person who is a partner in a customary union shall be competent to contract a further marriage during the subsistence of that customary union. It is important to note that s22 of the Black Administration Act does not prevent a man from concluding a subsequent customary union with another woman but certain requirements would have to be satisfied.

The court held that both the appellant and the first respondent were the deceased's surviving spouses in terms of customary law. Whereas the existence of a civil marriage between a man and woman seemed to negate the existence of an earlier customary marriage entered into by the same man with another woman, this recent ruling follows the same path of similar rulings in which the rights of women married in terms of customary law to the same man who later entered into a civil marriage with another woman, were trampled upon.

It is my opinion that the legislator should seriously consider passing the necessary amendments to the Act in order to deal adequately with situations such as the one described. Unfortunately, until the necessary legislative enactments are in place, many women will have to go through the courts to protect and enforce their rights.

The court procedures are frequently out of reach for most of these women due to the legal costs, leading to highly undesirable circumstances. ♦

Leteane is a FISA member and Head: Governance at FNB Trust.