

**NELSON MANDELA**  
UNIVERSITY



**IN, OUT, OR SOMETHING IN-BETWEEN?  
FISA Eastern Cape Regional Meeting, 20 November 2025**

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## **CASE STUDY**

**Mmes Olwethu and Babalwa Kondile were parties to polygamous customary marriages concluded before 2000, that ended upon the death of their husband, Akhona, in 2025. They were rendered vulnerable after their husband had bequeathed the entire estate to his eldest son, Dumisa. This included the homes that Olwethu and Babalwa resided in for many years.**

## **CASE STUDY (cont.)**

**Neither wife had a professional career. Instead, they fed the family, reared the children and tended to the vegetable gardens and livestock to ensure the survival of the family. Despite spending their lives increasing the value of the family property, they were easily cast out upon the death of their husband.**

# RELEVANCE

- **Thousands of people conclude customary marriages, thousands in customary marriages die and many get divorced**
- **Case study illustrates the importance of knowledge of the patrimonial/proprietary consequences of customary marriages during marriage, at death or divorce**
- **Has implications for financial planning, legal advice, drafting of wills and administration of a deceased estate**

# APPLICABLE LAW

- **Recognition of Customary Marriages Act 120 of 1998**
- **Recognition of Customary Marriages Amendment Act 1 of 2021, incorporated into the RCMA**
- **Selected provisions of the Matrimonial Property Act 88 of 1984**

## APPLICABLE LAW (cont.)

- ***Gumede v President of RSA* 2009 3 SA 152 (CC)**
- ***Ramuhovhi v President of RSA* 2018 2 BCLR 217 (CC)**
- **Customary law**

# MAIN TOPIC

## Proprietary consequences of

- **Marriages concluded before RCMA**
- **Marriages concluded after RCMA**
  - ◇ **Monogamous marriages**
  - ◇ **Polygamous marriages**

# PROPRIETARY CONSEQUENCES

## TRADITIONAL CUSTOMARY LAW

- **House system applied**
- **Different forms of property**
  - ◇ **House property**
  - ◇ **Family property**
- **Family head had control over property; wife had fewer opportunities to earn income**
- **In conflict with s 6 of RCMA**

**S 6 reads as follows:**

**“A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.”**

# PROPRIETARY CONSEQUENCES (cont.)

## RECOGNITION OF CUSTOMARY MARRIAGES ACT

- **Monogamous marriages concluded before the Act**
  - ◇ S 7(1) provided customary law applied
  - ◇ Declared unconstitutional in *Gumede v President of the Republic of South Africa*
  - ◇ Now in community of property unless parties concluded an ANC
  - ◇ Imported provisions of Matrimonial Property Act

# PROPRIETARY CONSEQUENCES (cont.)

- **Monogamous marriages concluded after the Act**
  - ◇ **Automatically in community of property**
  - ◇ **Unless excluded by ANC**
  - ◇ **Question is whether accrual system is the default system?**
  - ◇ **Imported provisions of Matrimonial Property Act**

## PROPRIETARY CONSEQUENCES (cont.)

- **Polygamous marriages concluded before the Act**
  - ◇ **Initially regulated by customary law ito s 7(1) of RCMA**
  - ◇ **Declared unconstitutional by *Ramuhovhi v President of the Republic of South Africa***
  - ◇ **Now regulated by Recognition of Customary Marriages Amendment Act (incorporated into Recognition of Customary Marriages Act)**

# PROPRIETARY CONSEQUENCES (cont.)

**“Section 7 of the principal Act is hereby amended— (a) by the substitution for subsection (1) of the following subsection: “(1) (a) The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act, are that the spouses in such a marriage have joint and equal— (i) ownership and other rights; and (ii) rights of management and control, over marital property. (b) The rights contemplated in paragraph (a) must be exercised— (i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.”**

## **PROPRIETARY CONSEQUENCES (cont.)**

- **Polygamous marriages concluded after the Act**
  - ◇ **It s 7(6), husband has to draft a contract approved by court to regulate future proprietary consequences**
  - ◇ **Court must terminate existing system and distribute property between spouses equitably**
  - ◇ **All spouses and prospective spouse must be joined in proceedings**

# PROPRIETARY CONSEQUENCES (cont.)

- ◇ **Consequences of non-compliance? Act is silent**
- ◇ **Dealt with by *Mayelane v Ngwenyama* 2010 4 SA 286 (GNP) and *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA)**
- ◇ **HC: second marriage is void in case of failure to comply with mandatory provisions of s 7(6)**
- ◇ **SCA: overturned decision of HC. Purposive interpretation to realise right to equality. S 7(6) not a requirement for validity**

# PROPRIETARY CONSEQUENCES (cont.)

- ◇ In separate judgment second marriage was declared to be out of community of property
- ◇ Ponnann JA did not pronounce on proprietary system of first marriage – in community of property?
- ◇ Questions as to what type of out of community system applies for second marriage? Accrual? Post-nuptial contract?

# PROPRIETARY CONSEQUENCES (cont.)

- ◇ Appeal to CC in *Mayelane v Ngwenyama (MM v MN)* 2013 4 SA 415 (CC)
- ◇ CC: Second marriage void based on Tsonga custom that first wife has to consent to subsequent marriage/s which is different basis to basis used in HC and SCA
- ◇ Authors submit that SCA decision serves as precedent that second marriage is valid and out of community of property

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