

THE RIGHTS OF WOMEN IN CUSTOMARY MARRIAGES

Category: Administrative and Procurement Law, Commercial Law, Dispute Resolution
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The Recognition of Customary Marriages Act, 120 of 1998 ("**the Act**") prescribes the formalities that need to be complied with in order for a customary marriage to be valid. Section 4(3) of the Act provides for customary marriages to be registered within a stipulated time period. However, failure to register a customary marriage does not affect its validity. Many customary marriages, to date, remain unregistered.

Formalities of a customary marriage

Section 3 of the Act provides that a customary marriage entered into after the commencement of the Act will be valid when it complies with the following –

- the prospective spouses –
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
 - (iii) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

Case law

Many cases look into the validity of the customary marriage where one of the requirements of a custom have not been complied with.

The handing over of a bride

In *Ngwenyama v Mayelane and Another* the court held that the Act does not specify the requirements for the celebration of a customary marriage. This requirement is fulfilled when the celebrations are generally in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence.

In *Mabuza v Mbatha* the court stated that African customary law has evolved and was always flexible in application. There is thus no doubt that the siSwati custom of ukumekeza (i.e. the formal integration of the bride into the family of the bridegroom, the custom being one of the three requirements for a valid marriage according in siSwati customary law), like so many other customs, has somehow evolved so much that it is probably practised differently from what it was centuries ago. It is inconceivable that ukumekeza has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.

Dispute as to the validity of a customary marriage

If a dispute arises as to the validity of a customary marriage, the case will turn on the 'bride or bridegroom's' tangible evidence in the form of a lobola agreement, supporting affidavits, photographs of the celebration etc. Any document on which either party referred to the other party as his or her spouse may assist in strengthening either party's case, although this is not absolute.

Recognition of the rights

The rights of women in customary marriages should be on par with those of spouses married in terms of the Marriages Act, 25 of 1961. Unfortunately, these rights are not always upheld and are generally infringed upon as it is challenging to argue the validity of the customary marriage, if unregistered, even if such customary marriage subsists/exists.

Legal remedy

Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

A woman in a customary marriage whose rights have been infringed upon has the right to access the courts and have her rights upheld.

A customary marriage, even if unregistered, remains valid if it complies with section 3 of the Act, until proven otherwise.