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**VALIDITY OF CUSTOMARY MARRAIGES**

*"MARRIAGE IS REALLY TOUGH BECAUSE YOU HAVE TO DEAL WITH FEELINGS...AND LAWYERS" –  
RICHARD PRYOR*

Throughout the South African Constitutional dispensation, the judiciary has been called upon to decide on and develop customary law. In particular, our Courts have been called upon to deliberate on the validity of customary marriages on numerous occasions. In a recent judgment handed down on 7 February 2025 ("The Case"), the Court reinforced the application of the Recognition of customary marriages Act 120 of 1998 ("The Act") and affirmed that adherence to all traditional rituals is not necessary for a valid customary marriage.

A marriage under the Act is automatically in community of property unless an ante nuptial contract has been executed to regulate the matrimonial property system of the marriage. This means that one would need to be certain that the marital status of sellers and purchasers is correctly recorded to avoid potential legal disputes which may affect the property transaction as a whole. Let's take a look at the case.

**Brief summary - Facts of the Case:**

- **Ms VM**, a Tswana major woman, instituted divorce proceedings against **Mr SD**, a Sotho major man. VM submitted that she entered into a customary marriage with SD however SD contested the divorce on the basis that no marriage relationship had existed between them.
- Lobola negotiations were held and the agreement reduced to writing which was signed on behalf of VM and by SD's father on his behalf.
- VM was taken to Lesotho by SD where a ceremony was held and in respect of which she was dressed in traditional Shweshwe. VM was told that it is the makoti dress. However, SD denied that he proposed to VM.
- SD's family went to VM's family on two occasions and on the second occasion R5000 was paid by SD's delegation. SD submitted that this was not a payment in respect of lobola but for a cleansing ceremony. SD further alleged that their marriage customs were not followed.

**The Legal question:**

- The question for the Court was whether or not a valid customary marriage was entered into.
- Whether the provisions of section 3(1)(b) of the Act had been met.

**Section 3(1)** of the Act sets the ingredients for a valid customary marriage namely that:

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



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**HELD:**

- Having considered the evidence as well as the witness testimonies, the Court concluded that:
  - VM was dressed in traditional makoti dress, a sheep was slaughtered and welcoming celebrations held. It would be improbable that such a welcome would be given to someone who was introduced as a person whose studies SD would be paying for. The Court concluded that arrangements had been made for lobola negotiations.
  - Lobola negotiations took place and R5000 paid was towards the lobola.
  - Bearing in mind the changing nature of customary law; VM being welcomed into SD's family and being given a name with the relevant celebrations even before lobola has been paid as well as VM visiting SD's family, there can be no doubt that VM was integrated into SD's family. Since VM and SD were living together after the lobola was paid, constructive delivery is present.
- A valid customary marriage was concluded between the parties.

**In conclusion**

The case confirms that written lobola agreements, partial lobola payments and cultural integration are sufficient in establishing a valid customary marriage under the Act.

**It is important to note the prescripts of section 4(9) of the Act which dictate that failure to register a customary marriage does not affect the validity of that marriage.** This means that if the customary marriage is not registered with Home Affairs it is still valid. In the case, documentary evidence was crucial for the Court's consideration of whether a valid marriage was concluded. As such it is imperative to keep accurate records and an accurate account of the customs and traditions followed. Hence we recommend that the spouses attend to the registration of their customary marriage as this will ease the burden of proof should the validity of the marriage be called into question.

As agents, be reminded that a spouse cannot alienate property forming part of the joint estate without the written consent of the other spouse. As such ensure to ask the relevant questions bearing in mind the Court's considerations in respect of customary marriages. However, when in doubt, contact your lawyers at Stupel and Berman incorporated for comprehensive legal advice.

DISCLAIMER: The above does not constitute legal advice and is a brief summary on the recent decision handed down on 7 FEBRUARY 2025. For more information and exhaustive legal advice, please contact Stupel & Berman Incorporated

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