

CHIEF REGISTRAR'S CIRCULAR NO. 4 OF 2009

THE RECOGNITION OF CUSTOMARY MARRIAGES ACT, 1998 (ACT NO. 120 OF 1998)

1. Purpose of this Circular

- 1.1. Certain provisions of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (hereinafter referred to as "the Act") have been discussed in Circular No. 15 of 2000.
- 1.2. Section 7(1) and part of section 7(2) of the Act have been declared unconstitutional and invalid in *Gumede v President of the Republic of South Africa and Others (CCT50/08 (2008) ZACC 23 (8 December 2008))*. The effect of the ruling in the Gumede case, as far as it relates to the deeds registration procedures, is herein explained.
- 1.3. Circular No. 15 of 2000 is hereby withdrawn and substituted with this Circular.

2. Gumede v President of the Republic of South Africa and Others

In *Gumede v President of the Republic of South Africa and Others*, Moseneke DCJ makes the following ruling with regard to the Act:

- Section 7(1) of the Act is inconsistent with the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and invalid to the extent that its provisions relate to monogamous customary marriages.
- The inclusion of the words "entered into after the commencement of this Act", in section 7(2) of the Act, is declared inconsistent with the Constitution and invalid.

3. Commencement of the Act

The Act came into operation on 15 November 2000. In this regard see Proclamation No. R.66 of 2000, dated 1 November 2000.

4. Purpose of the Act

The purpose of the Act is, *inter alia*, to make provision for the recognition of customary marriages concluded in terms of customary law which is defined in section 1 of the Act as the customs and usages traditionally observed among the indigenous peoples of South Africa and to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages.

5. Impact of certain provisions of the Act on deeds registration procedures

5.1. Recognition of customary marriages

In terms of section 2 of the Act all customary marriages, entered into before or after the commencement of the Act, which are valid marriages under customary law and which comply with the requirements of the Act, are for all purposes recognised as marriages, irrespective of whether a person is a spouse in more than one customary marriage.

5.2. Contractual capacity of spouses

Spouses in a customary marriage have, on the basis of equality and subject to the matrimonial property system governing the marriage, full capacity, including the capacity to acquire assets and to dispose thereof (section 6). The contractual capacity of the spouses in a customary marriage will depend on the matrimonial property system governing the said marriage, that is, whether the marriage is in or out of community of property.

5.3. Proprietary consequences of customary marriages

5.3.1. Marriages in community of property:

In terms of section 7 (2) of the Act, a customary marriage in which a spouse is not a partner in any other existing customary marriage (monogamous customary marriage), is a marriage in community of property and of profit and loss. Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) apply in respect of these marriages.

Spouses will be described as follows:

Peter Khumalo
Identity No. 631024 5094 089
and
Esther Khumalo
Identity No. 680111 5062 087
Married in community of property to one another

5.3.2. Marriages out of community of property

A customary marriage in which a spouse is not a partner in any other existing customary marriage, may have the proprietary consequences of a marriage out of community of property. This will be the case where

spouses elected to enter into an antenuptial contract prior to the conclusion of the marriage (section 7(2)).

Spouses who have entered into an antenuptial contract, will be described in deeds and documents as follows:

Anna Fatyela
 Identity No. 540121 5093 087
 Married out of community of property

5.3.3. Polygamous customary marriages

A customary marriage in which a spouse is also a partner in another existing customary marriage (polygamous customary marriage), which marriages were entered into before the commencement of the Act, will continue to be governed by customary law (section 7(1) of the Act). Spouses have full capacity and therefore no assistance by other spouses is necessary for the acquisition, disposal or alienation of immovable property. The description of such a person in a deed or document to be registered, must conform with section 17 (2) (b) of the Deeds Registries Act, 1937 (Act No. 47 of 1937), namely:

Peter Nkosi
 Identity No. 631023 5095 087
 Married, which matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act No. 120 of 1998.

5.3.4. Changes to the matrimonial property system and further customary marriages subsequent to the commencement of the Act

- 5.3.4.1. In terms of section 7 (4) spouses in a customary marriage, entered into prior to the commencement of the Act, may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages.
- 5.3.4.2. In terms of section 7 (6) a husband in a customary marriage may, after the commencement of the Act, enter into a further customary marriage (polygamous customary marriage). The husband must, however, make an application to court for the approval of a written contract which will govern the proprietary consequences of his marriages.
- 5.3.4.3. Where the Court grants an application as contemplated in sections 7(4) and or 7(6), such order of court, together with a certified copy of the contract, will be sent to all Registrars of Deeds.

The court order and certified copy of the contract must be recorded as an interdict against the names of the parties concerned.

Where a husband enters into a third or a further marriage he must once again apply to court for the approval of a contract that will govern the proprietary consequences of his marriages. The said contract will supersede the previous contract and it must once again be noted as an interdict against the names of the parties concerned. The interdict that was previously recorded must, naturally, be uplifted as it is superseded by the new one.

- 5.3.4.4 The description of a person in a deed or document to be registered must conform with section 17 (2) of Act No. 47 of 1937, namely:

Simon Tsabalala

Identity No. 540108 0003 089

Married, which marriage the proprietary consequences thereof are governed by an order of court issued in terms of the Recognition of Customary Marriages Act No. 120 of 1998.

5.4. Endorsement of deeds in terms of section 45 of Act No. 47 of 1937

Subsequent to the recording of the order of the court and the contract, no immovable property belonging to the parties which formed an asset in a joint estate, may be dealt with until such time as the provisions of section 45*bis* (1) (b) or section 45*bis* (1A) (b) of Act No. 47 of 1937 have been complied with.

5.5. Updating of deeds office records regarding new status

- 5.5.1. A party may invoke the provisions of section 17 of Act No. 47 of 1937 in order to effect the change in status or to update any deed registered or filed in a deeds registry with regard to a change in status.

- 5.5.2. The application must be accompanied by -:

- The deeds to be updated.
- Proof of the change of status.
- Court Order where applicable.



CHIEF REGISTRAR OF DEEDS

DATE: 28 JANUARY 2009

REFERENCE: A. 6/2/P AND A.1/3/1/108
RINGBINDER 68

CHIEF REGISTRAR OF DEEDS

REGISTRARS OF DEEDS

THE CHIEF: JUSTICE TRAINING

DIRECTOR: LAW SOCIETY OF SOUTH AFRICA : PRETORIA

MANAGER: BUTTERWORTHS PUBLICATIONS : DURBAN

CHAIRPERSON: PROPERTY LAW COMMITTEE : PRETORIA