THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 474/2011
Reportable

In the matter between:

M M N	**Appellant**
and	
M F M	**First Respondent**
MINISTER OF HOME AFFAIRS	**Second Respondent**

Neutral citation: *Ngwenyama v Mayelane & another* (474/11) [2012] ZASCA 94 (1 June 2012)

Coram: **MTHIYANE DP, PONNAN JA et NDITA AJA**

Heard: **14 May 2012**

Delivered: **1 June 2012**

Summary: Customary marriages – polygamy- Interpretation- s 7(6) of the Recognition of Customary Marriages Act 120 of 1998- whether failure by the husband to enter into a contract regulating matrimonial property renders subsequent customary marriage invalid – provisions of s 7(6) not intended to invalidate subsequent customary marriage.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bertelsmann J sitting as court of first instance):

1 The appeal succeeds partially to the extent that the order of the court below is set aside and replaced with the following:

'(a) Prayer (a) of the notice of motion (declaring a customary marriage between Hlengani Dyson Moyana (the deceased) and the First Respondent null and void ab initio) is dismissed.

(b) Prayer (b) (directing the Second Respondent to register the marriage between the applicant and the deceased Hlengani Dyson Moyana nin: 5701085803086) is granted.

(c) Each party is ordered to pay its own costs.'

2. There is no order as to costs.

JUDGMENT

NDITA AJA (MTHIYANE DP, PONNAN JA concurring)

Introduction

[1] This appeal concerns the interpretation of s 7(6) of the Recognition of Customary Marriages Act[1] (the Act). The section regulates the proprietary consequences of a customary marriage in circumstances where the husband wishes to enter into a second customary marriage. The appeal comes before

1 Recognition of Customary Marriages Act 120 of 1998.

us with the leave of the court a quo.

[2] The first respondent, Ms M F M, as applicant, instituted motion proceedings against the appellant, Ms M M N, in the North Gauteng High Court in which she sought an order (a) declaring the customary marriage contracted between the appellant and Hlengani Dyson Moyana (the deceased) null and void *ab initio*; (b) directing the second respondent to register the customary marriage between the first respondent and the deceased and (c) costs. Bertelsmann J granted the application. The second respondent, Minister of Home Affairs, filed a notice to abide the decision of the and consequently does not feature any further in this appeal. Any reference to the respondent should be understood to refer to the first respondent. The judgment in the court a quo is reported as *MM v MN & another* 2010 (4) SA 286 (GNP).

The Facts

[3] The facts and circumstances relating to this appeal are as follows: The respondent was married to the deceased, according to customary law and tradition at Nkovani Village, Limpopo, on 1 January 1984. Three children, all now majors, were born out of the union. The marriage was not registered. The deceased died on 28 February 2009 and the marriage was still subsisting. When the respondent sought to register the customary union at the Department of Home Affairs after the death of the deceased, she was advised that the appellant had also sought to register a customary marriage allegedly contracted between her and the deceased on 26 January 2008. The respondent asserts that the purported marriage between the deceased and the appellant was null and void *ab initio* as she had not been consulted before it was concluded and the deceased had failed to comply with s 7(6) the Act of which provides that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman must apply to the court to approve a written contract governing the proprietary consequences of the marriages.

[4] The deceased's elder brother, Mr Mzamani Temson Moyana, deposed to an affidavit confirming the respondent's marriage to the deceased. In addition, he stated that in terms of their custom and tradition, the first wife must be consulted before a second customary marriage is concluded, and such a marriage should be witnessed by the husband's blood relatives.

Section 7(6)

[5] Section 7(6) provides as follows:

A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.'

[6] It is common cause that the marriage contracted between the appellant and the deceased was not preceded by an application for an order approving a contract regulating the future matrimonial system of both marriages.

In the high court

[7] Bertelsmann J, considered the equal status and capacity afforded to spouses in a customary marriage and came to the conclusion that s 7(6) is aimed at protecting the proprietary interests of both the existing and prospective spouse. He emphasised the prejudice likely to be suffered by the existing spouse where the second marriage has not been disclosed, dealt with by the contract and sanctioned by the court and held thus:

'The failure to comply with the mandatory provisions of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect. Cronje and Heaton argue in *South African Family Law* 2ed at 204, that the court's intervention would be rendered superfluous - which the legislature could not have intended - if invalidity did not result from a failure to observe ss (6).'

However, he found that the failure of the husband to comply with the

provisions of s 7(6) rendered the second customary marriage null and void ab initio as the provisions of the section are peremptory.

The learned judge continued at para 25:

'A further argument, that failure to comply with the subsection leads to invalidity of the subsequent further customary marriage, arises from the peremptory language of the provision: the word 'must', read with the provisions of subsection (7)(b)(iii), empowering the court to refuse to register a proposed contract, indicates that the legislature intended non-compliance to lead to voidness of a marriage in conflict with the provision.'

The issues

[8] The core issue in this appeal turns on whether the failure by the husband to make an application to court to approve a written contract regulating the matrimonial property system of both the first and second marriages, as envisaged in s 7(6) of the Act, invalidates the subsequent customary marriages from inception, in the absence of an express provision in the Act to that effect.

In this court

[9] At the hearing of this appeal, counsel for the appellant submitted that the conclusion arrived at by the court below as to the consequences of non-compliance with s 7(6) is incorrect because the section is not peremptory. Moreover, it could not have been the intention of the legislature, said counsel to effect so fundamental a change to the customary law of polygamy by subjecting the validity of a second marriage to prior consent by a court, which could withhold it. Relying on two decisions of the Constitutional Court in *Hassam v Jacobs NO* [2] and *Gumede v President of the Republic of South Africa*[3] counsel for the appellant further argued that the interpretation accorded to the section by the court a quo is in conflict with s 39(2) of the

2 *Hassam v Jacobs NO & others* 2009 (5) SA 572 (CC).
3 *Gumede v President of the Republic of South Africa & others* 2009 (3) SA 152 (CC).

Constitution.[4]

[10] The Women's Legal Trust was admitted as amicus curiae. Counsel for the amicus aligned herself with the appellant's submissions and added, basing her argument on *Brink v Kitshoff NO,*[5] that the court a quo, in interpreting the provisions of s 7(6) was enjoined to consider historical inequalities based on race, gender, marital status and class, as well the realities of women married under customary law generally and women in polygamous marriages, in particular. She further contended that an interpretation that renders the second customary marriage invalid undermines the subsequent wife's right to dignity and equality. The amicus outlined the harsh impact of invalidating an otherwise valid customary marriage in three stages: viz divorce, death and succession as well as social standing of the second wife and her children. According to the amicus, the interpretation accorded to s 7(6) by the court a quo gives priority to the rights of the first wife and in so doing defeats the purpose of the Act to protect all wives in polygamous marriages by creating a mechanism for a certain and equitable matrimonial property regime. Such an interpretation is, so went the argument, at odds with the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ratified without reservation by the Republic of South Africa in 1996.

[11] The respondent's counsel in his turn argued that the appellant, on the facts presented failed to establish that her customary marriage to the deceased was valid. Although this issue was debated in court, I must at the outset state that this court need not decide it as there is no cross-appeal challenging the finding of the court a quo on its acceptance of the validity of the second customary marriage. It was further submitted on behalf of the respondent that s 7 (6) was aimed at protecting the interests of the existing wife, it is for that reason that she must be joined in the proceedings

4The Constitution of the Republic of South Africa, 1996.
5 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 44.

determining the proposed contract regulating the matrimonial property. I deal with this issue in my conclusion.

Discussion

[12] The stated purpose of the Act is:

'To make provisions for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages.'

In short, the Act marks a significant break from the past when customary, and more particularly polygamous marriages were considered repugnant to public policy. In so doing it seeks to protect and advance the rights of women married in accordance with customary law and tradition. To this end, the Constitutional Court in *Gumede v President of the Republic of South Africa*[6] restated the purpose of the Act as follows:

'The Recognition Act is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes. It is also necessitated by our country's international treaty obligations, which require member states to do away with all laws and practices that discriminate against women …'

What is clear is that s 7(6) is intended to protect matrimonial property rights of the spouses by ensuring a fair distribution of the matrimonial property in circumstances where a husband is desirous of entering into a further customary marriage.

[13] I have indicated earlier in this judgment that the court below based its finding that the second marriage was null and void on the peremptory language of s 7(6). The section states in plain language that a husband 'must' prior to contracting the further marriage enter into a contract regulating the future marital property system of his marriages which must be approved

6 *Gumede v President of the Republic of South Africa* fn 3 supra para 21.

by the court. There is however no sanction for the failure to comply with s 7(6) because none was intended.

[14] The court a quo concluded that the use of the word 'must' indicates that the legislature intended non-compliance with s 7(6) to invalidate a subsequent customary marriage. It is trite that the primary rule in the construction of a statutory provision is to ascertain the intention of the legislature by giving words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity the legislature could not have contemplated. The language used is but one of the ways of determining the intention of the legislature, so is the aim and purpose of that particular provision. Whilst words must be given their ordinary meaning a contextual and purposive reading of the statute is also important. This is more so in the circumstances of the instant matter, where it is alleged that the interpretation accorded by the court below offends some of the rights enshrined in the Constitution. Ngcobo J in *Bato Star*[7] explains the importance of context in statutory interpretation as follows:

'Certainly no less important than the oft-repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context" as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limit, its background.'

[15] Counsel for the appellant emphasised that when regard is had to the purpose and object of the Act, the court a quo ought to have considered the provisions of s 39(2) of the Constitution which state that:

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7 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC), para 89 citing *Jaga v Dönges* 1950 (4) SA 653 (A).

'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

The Constitutional Court in *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd*[8] with reference to s 39(2) said:

'The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution.'

This court has also repeatedly stressed the necessity to interpret legislation and statutory provisions purposively.[9] The objective set out in the preamble of the Act can be best achieved by giving effect to s 39(2) of the Constitution.

The purpose of s 7(6)

[16] There are divergent views regarding the purpose and interpretation of s 7(6) and its impact on customary marriages. As earlier alluded to, the court a quo reasoned that the fact that s 7(7)(*b*)(iii)[10] empowers the court to refuse to register a proposed contract indicates that the legislature intended non-compliance to be visited with nullity. Citing Cronje and Heaton, *South African Family Law* 2 ed at 204, the court further held that if a customary marriage were to remain valid in the face of non-compliance, the court's intervention would be rendered superfluous and that could not have been the intention of the legislature. According to the learned authors referred to by the court a quo, the husband's capacity to enter into a further customary marriage

8 *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) para 22

9 *Standard Bank Investment Corporation Ltd v Competition Commission & others; Liberty Life Association of Africa Ltd v Competition Commssion & others* 2000 (2) SA 797 (SCA) paras 16-22.

10 Section 7*(b*) (iii) provides that when considering the application in terms in terms of subsection 6 the court must refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.

depends upon the approval of the contract by the court. A different view is, however, espoused by I P Maithufi and G M B Moloi[11] and the authors conclude as follows:

'It is further submitted that non-compliance with this requirement in these circumstances will not lead to the nullity of the marriage and that such marriages will be regarded as out of community of profit and loss. The main purpose of the requirement is to avoid unnecessary litigation concerning property brought into the marriage and property that may be acquired during the subsistence of the marriage.'

Similarly, Pieter Bakker[12] argues that:

'The second marriage should therefore be valid even when the requirements of section 7(6) have been disregarded. Non-compliance with section 7(6) will not affect the first wife negatively where she was married out of community of property with the exclusion of the accrual system. Where the first wife was married out of community of property, the property system will continue after her spouse marries his second wife. The only contract that can be drafted is an agreement to continue with the marriage out of community of property. Therefore non-compliance will have no effect on the first wife if the first marriage is out of community of property.'

[17] Judicial decisions are also disharmonious with regard to the effect of non-compliance with s 7(6) on a customary marriage. In *MG v BM*[13] Moshidi J had occasion to consider whether there was a valid customary marriage between the deceased and the applicant. The learned judge concluded that the marriage remained valid despite failure to comply with s 7(6) the deceased husband, and declined to follow the decision of the court a quo, in the instant matter. Moshidi J correctly stated that once there is a valid subsequent customary marriage, the second wife also acquires certain rights. He further questioned why the second wife should be penalised or prejudiced on account of the failure of the husband to comply with the requirements of s 7(6), more so when the Act does not contain an express

11 *The current legal status of customary marriages in South Africa*, 2002 TSAR at 599
12 *The New Unofficial Customary Marriage: Application of Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998* 2007 (70) THRHR 482.
13 *MG v BM & others* 2012 (2) SA 253 (GSJ)

provision invalidating customary marriages contracted without compliance with the section. He held that the section could not be interpreted as invalidating an otherwise valid customary marriage.

[18] The respondent relied on the judgment of Dlodlo J in *Mrapukana v Master of the High Court*[14] wherein the court stated, albeit obiter, that a man who seeks to enter into a further customary marriage must first enter into a written agreement that will set out the manner in which the material possession and wealth of the family will be managed. Stated differently, the contract is a prerequisite for the validity of the further customary marriage. This statement is no more than a restatement of the section as Dlodlo J understood it. Dlodlo J did not consider the impact of s 7(6) as it was not an issue before him. Any reliance on this judgment is therefore misplaced.

Conclusion

[19] The purpose of the section must be determined in the light of the legislative scheme which guided its promulgation. At the heart of the Act, is the intention to advance the rights of women married according customary law in order that they acquire rights to matrimonial property they did not have before the enactment of the Act. Effectively, the Act seeks to realise the right to equality envisaged in the Bill of Rights. With this in mind, it becomes difficult to reason that s 7 (6) could be intended solely for the protection of the wife in an existing marriage. The court a quo correctly considered and acknowledged the equal status and capacity afforded to spouses in a customary marriage and came to the conclusion that s 7(6) is aimed at protecting the proprietary interests of both the existing and prospective spouses, but failed to afford a purposive interpretation to the section so that second wife is equally protected. Properly construed s 7(6) is for the benefit women in both monogamous and polygamous customary marriages. This much is obvious from the wording of s 2(3) which provides:

'If a person is a spouse in more than one customary marriage, all valid customary

14 *Mrapukana v Master of the High Court & another* [2008] JOL 22875 (C).

marriages entered into before the commencements of this Act are for all purposes recognised as marriages.'

It follows that whatever protection is afforded to women married according to customary law equally applies to women in polygamous marriages. I am fortified in this view by the dictum in *Hassam v Jacobs NO*[15] where Nkabinde J said:

'By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights.

The purpose of the Act would clearly be frustrated rather than furthered if widows to polygynous Muslim marriages were excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The constitutional goal of achieving substantive equality will not be fulfilled by that exclusion. These women, as was the case with the applicant, often do not have any power over the decisions by their husbands whether to marry a second or a third wife.

It follows therefore that the exclusion of widows in polygynous Muslim marriages from the protection of the Act is constitutionally unacceptable because it excludes them simply on the prohibited grounds. In any event, it would be unjust to grant a widow in a monogamous Muslim marriage the protection offered by the Act and to deny the same protection to a widow or widows of a polygynous Muslim marriage.'

[20] Although the above was stated in the context of polygynous Muslim marriages, by parity of reasoning, it equally applies to polygynous marriages concluded in accordance with customary law. It will be recalled that the Act was promulgated in response to constitutional values and human rights, more specifically the right to equality and non-discrimination. If this court were to uphold the interpretation of s 7(6) adopted by the court a quo, it would be

15 Fn 2 supra paras 37-39.

seriously undermining the very equality that the Act seeks to uphold.

[21] The discriminatory interpretation of s 7(6) excluding women in polygamous marriages, validly married according to customary law, and recognised as such in their communities is deeply injurious to women in such marriages as it affects them negatively. Such women would be adversely affected in the areas of, inter alia, succession, death and social standing. It constitutes a gross and fundamental infringement of their right to dignity, right to equal status in marriage as well as the rights to physical and emotional integrity. The effect extends to children born of such a marriage, who would, by virtue of the interpretation accorded to s 7(6) by the court *a quo*, be instantly rendered illegitimate. The harsh consequences of such a declaration on the children are unthinkable. Furthermore, such an interpretation would be in stark contrast with the manner in which the people affected live their lives. For example, if all the requirements of a customary marriage have been complied with and the wife is for all intents and purposes socially recognised as a wife, and non-compliance with the section renders her unmarried, that would be out of step with the living customary law. The very purpose for which the Act was intended, equality of recognition and spouses of customary marriages, would be defeated. An interpretation that renders a polygamous customary marriage recognised in customary law invalid, is clearly untenable and could not have been intended by the legislature. In line with the purposive approach outlined in *Hyundai*, that courts must prefer an interpretation of legislation that falls within the constitutional bounds over that which does not, if such an interpretation can be reasonably ascribed to the section, it follows that the decision of the court a quo cannot be confirmed.

[22] The section of the Act dealing with validity of a customary marriage (s 3) is not by any means related or linked to s 7(6). In striking a balance between the text and context of the Act, the preamble states the purpose the Act seeks to achieve and specifically refers to the validity of customary

marriages. The requirements for validity of a customary marriage in s 3(1) are simply that:

(i) the spouses must be above the age of 18 years; and

(ii) both must 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.

[23] The Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when the customary law 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. Notwithstanding the absence of a sanction for non-compliance with s 7(6) the scheme of the Act and the broader context of the statute compels a conclusion that the section could never have been intended to have any impact on the validity of the second marriage. This scheme of the Act amply demonstrates that the main purpose of the s 7(6) is to determine and regulate proprietary consequences and does not seek to invalidate an otherwise valid polygamous customary marriage, which complies with s 3. The underlying theme of the whole of s 7 is fairness and equity in dealing with the matrimonial property and not the validity of a customary marriage. To this end s 7(7) provides that:

'When considering the application in terms of subsection 6–

a) the court must–

i) in the case of a marriage in community of property or which is subject to the accrual system–

(*aa*) terminate the matrimonial property system which is applicable to the

marriage; and

(*bb*) effect a division of the matrimonial property; and

ii) ensure an equitable distribution of the property; and

iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;

b) the court may–

i) allow further amendments to the terms of the contract;

ii) grant the order subject to any condition it may deem just; or

iii) refuse the application if in its opinion the interests of any of the parties involved would be not be sufficiently safeguarded by means of the proposed contract.'

Section 7(8) on the other hand entitles all persons having sufficient interest in the matter, and in particular the applicant's existing spouse or spouses and his prospective spouse, to be joined in the proceedings instituted in terms of subsection (6). The joinder of spouses and prospective spouses shows that the legislature intended to protect the rights of both wives. The duty to act in compliance with s 7(6) is placed on the husband. It would be unjust to invalidate an otherwise valid marriage on the basis of the husband's failure when no duty was placed on the wife.

[24] On the interpretation advanced on behalf of the respondent, the requirements of s 7(6) must precede the conclusion of a further customary marriage; otherwise, the marriage is invalid. This submission must be considered in the historical context of customary marriages as articulated by Masoneke DCJ in *Gumede*[16]as follows:

'Before I confront the equality claim, it may be helpful to discuss up-front the operative statutory arrangements. The Recognition Act was assented to and took

16 Supra fn 6 para 16

effect well within our new constitutional dispensation. It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary "unions".'

The learned judge continues at paragraph 24:

'I revert to consider the main and other purposes of the Recognition Act. Without a doubt, the chief purpose of the legislation is to reform customary law in several important ways. The facial extent of the reform is apparent from the extended title of the Recognition Act. The legislation makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses. It specifies essential requirements for a valid customary marriage and the registration of marriages. In this way, it introduces certainty and uniformity to the legal validity of customary marriages throughout the country.'

The proper context of the Act is elucidated above. Clearly the determination of s 7(6) must be in a manner that is consistent with the Constitution. An interpretation which holds that s 7(6) affects the validity of a subsequent marriage relegates customary marriages, once again, to the very status the Act sought to elevate it from as, based on it, there would be no second customary marriage without the approval of the court. Concerns about proprietary interests are sufficiently addressed in the Act as courts have been given a wide discretion to determine what is just and equitable in a given case. I have in this judgment already stated that a purposive interpretation of this section compels a conclusion that the legislature did not intend non-compliance to invalidate a valid customary marriage.

[25] The amicus curiae drew the attention of the court to human rights instruments pointing to the vulnerability of women generally, and women in polygamous marriages in particular. Article 16 of CEDAW obliges the country to take all appropriate measures to eliminate discrimination against women in

all matters relating to marriage and family relations. Similarly, Article 6(b) of the Protocol to the African Charter on Human and People's Rights in Africa to which the country is a signatory obliges state parties to enact appropriate national legislative measures to guarantee that the rights of women in marriage and family, including polygamous marital relationships are promoted and protected.

The above human rights instruments support the purpose of the Act. In my view, by addressing the relevant clauses of the Act, the issue of equality and polygamous marriage has been adequately addressed.

Costs

[26`] It is trite that generally, costs follow the result. However in *Biowatch*[17] the court considered the impact of an award of costs on litigants wishing to vindicate their rights under the Bill of Rights where the litigation is not frivolous or vexatious. The rule is that the losing party is not mulcted in costs. The rights the unsuccessful respondent sought to vindicate are neither frivolous nor vexatious. In the circumstances the appropriate approach is to make no order as to costs.

[27] It remains to mention that I have had the privilege to read the concurring judgment of Ponnan JA and I find nothing different from what I have already said. It is substantially a repetition of what I have said except for what is contained in paragraph 5 and 10. For that reason, I concur in it.

[28] In the result the following order is made:

Order

1. The appeal succeeds partially to the extent that the order of the court below is set aside and replaced with the following:

17 *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) at 245C-249E.

'(a) Prayer (a) of the notice of motion (declaring a customary marriage between Hlengani Dyson Moyana (the deceased) and the First Respondent null and void *ab initio*) is dismissed.

(b) Prayer (b) (directing the Second Respondent to register the marriage between the applicant and the deceased Hlengani Dyson Moyana nin: 5701085803086) is granted.

(c) Each party is ordered to pay its own costs.'

2. There is no order as to costs.

T NDITA
ACTING JUDGE OF APPEAL

PONNAN JA

[29] Is a further customary marriage entered into without compliance with the provisions of s 7(6) of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act) null and void ab initio? That is the crisp yet rather vexing question that confronts us. The high court (per Bertelsmann J) held that it was. It is the correctness of that conclusion that forms the subject of this appeal. Ndita AJA has reached a contrary conclusion to that of the high court – a conclusion with which I am in respectful agreement. Given the complexity of the matter, however, as also its importance to a particularly vulnerable class of persons who, more often than not, are victims of deep patterns of disadvantage, I prefer to articulate separately the considerations that impelled me to that conclusion.

[30] The Recognition Act is inspired by the dignity and equality rights that the Constitution entrenches and the normative value system it establishes (*Gumede v President of Republic of South Africa & others* 2009 (3) SA 152 (CC) para 21). According to Moseneke DCJ (*Gumede* para 16):
'It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary "unions".'

[31] The chief purpose of the Recognition Act is to reform customary law in several important ways. As Moseneke DCJ (*Gumede* para 24) put it:
'The facial extent of the reform is apparent from the extended title of the Recognition Act. The legislation makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses. It specifies the essential requirements for a valid customary marriage and regulates the registration of marriages. In this way, it introduces certainty and uniformity to the legal validity of customary marriages throughout the country. The Recognition Act regulates proprietary consequences and the capacity of spouses and governs the dissolution of the marriages, which now must occur under judicial supervision. An additional and significant benefit of this legislative reform is that it seeks to salvage the indigenous law of marriage from the stagnation of official codes and the inscrutable jurisprudence of colonial "native" divorce and appeal courts.'

[32] Section 7(6) must be interpreted in the context of the scheme of the Recognition Act as a whole. The Recognition Act defines a customary marriage as 'a marriage concluded in accordance with customary law'. And customary law 'means the customs and usages traditionally observed among the indigenous African peoples of South Africa and which forms part of the

culture of those people'. Section 2(2) provides that:

'A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage.'

And s 2(4) reads:

'If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.'

Section 3 headed 'Requirements for validity of customary marriages', provides:

'(1) For a customary marriage entered into after the commencement of this Act to be valid —

(a) 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

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.'

[33] In terms of s 3(5) of the Act, s 24A of the Marriage Act 25 of 1961 is rendered applicable to the marriage of a minor entered into without the necessary consent. According to the latter provision a marriage between persons of whom one or both are minors shall not be void merely because the person whose consent is by law required for the entering into of a marriage did not consent to the marriage, but may be dissolved by a competent court on the ground of want of consent if application is made to it. Even then a court shall not grant the application unless it is satisfied that the dissolution of the marriage is in the interests of the minor or minors. A valid customary marriage must be registered in terms of s 4 of the Act. Section 4(9) makes it clear though that failure to register a customary marriage does not per se affect the validity of that marriage.

[34] Section 6, which appears to 'usher in a remedial regime of equal worth and capacity of spouses in customary marriages' (*Gumede* para 25), provides:

'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.'

And finally, s 7(6), which applies to marriages concluded after the Act came into force and which is located in that part of the Act headed: 'Proprietary consequences of customary marriages and contractual capacity of spouses', provides:

'A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.'

[35] The Recognition Act has to be interpreted in a manner that promotes the spirit, purport and objects of our Bill of Rights. This duty is one in respect of which 'no court has a discretion' (*Phumelela Gaming and Leisure Ltd v Grünlingh and others* 2007 (6) SA 350 (CC) para 26 and 27). In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 44, O'Regan J had this to say:

'Although in our society discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution. The preamble states the need to create a new order in "which there is equality between men and women" as well as equality between "people of all races".'

[36] Viewing the scheme of the Recognition Act as a whole therefore, it is

plain that s 7(6) of the Act does not purport to regulate the validity of polygnous customary marriages. That is sought to be achieved by s 3. Section 7(6) appears on the face of it to regulate the proprietary consequences of such a marriage. The Act itself does not contain an express provision to the effect that non-compliance with s 7(6) results, without more, in invalidity of the second customary marriage. The court below, however, appeared to reason that the use of the word 'must' in the subsection means that the section is peremptory and that invalidity must follow as a natural consequence of non-compliance. There are strong indications and reasons why non-compliance with s 7(6) ought not to result in the second customary marriage being a nullity.

[37] First, when determining an application in terms of s 7(6), a court is required by s 7(7) to terminate the existing matrimonial property system if the earlier marriage was in community of property or subject to the accrual system and to effect a division of the matrimonial property. The consequence of a failure to comply with the provisions of the section therefore is that the matrimonial property system existing before the conclusion of the second customary marriage continues in existence and is not terminated by the conclusion of the second marriage. This ought to adequately protect the rights of the first spouse whilst leaving in place and valid the subsequent customary marriage, with all of the attendant consequences and advantages of marriage. Second, a nullity means that a court is not entitled at all, irrespective of the particular circumstances of a case, to condone non-compliance with the provisions of s 7(6) of the Act. The effect of non-compliance will thus be that all subsequent marriages, irrespective of the circumstances, would be null and void ab initio. Such a harsh and indiscriminate result could hardly have been intended by the legislature. Nor, it seems to me, can it be countenanced by our Constitution. Third, although no obligation is imposed on either the first or subsequent wife by the legislature (the obligation to apply to court being placed solely upon the husband), the potential hardship is visited on the wife of the subsequent marriage. The potential hardships include the potential for the alteration of the status of: a woman, who may since the inception of her

marriage have conducted herself as a married woman, to that of a concubine; and her children from that of legitimate to illegitimate. In either event the consequential social stigma and legal disability may cause irreparable harm to the woman and her children. Fourth, the considerations as to illiteracy that persuaded the court below to interpret the requirements of s 7(6) to protect the first wife's fundamental rights, apply equally to the second wife. Fifth, it could not have been the intention of the legislature to effect a fundamental change to the customary law incident of polygyny by subjecting the validity of a second marriage effectively to prior consent by a court which could be withheld by it. Sixth, s 7(6) does not appear in that part of the Recognition Act which prescribes the requirements for the validity of customary marriages. Those requirements are to be found in s 3. And as I have already shown, non-compliance with those requirements that the legislature has itself designated as requirements for the validity of a customary marriage does not automatically result in nullity. Why then, it must be asked, would non-compliance with s 7(6). Seventh, an interpretation that visits nullity on a marriage concluded in breach of s 7(6) will perpetuate inequalities and patterns of disadvantage between men and women. It both fails to afford parties married in accordance with African custom, equal protection and benefit of the law and it constitutes discrimination against women in second or subsequent polygynous marriages. Women in polygynous marriages, like the rest of this country’s citizenry, enjoy a right to dignity. They are entitled to equal respect and protection by our society. It would fundamentally violate the right to dignity of a woman in a second or subsequent marriage to nullify her marriage otherwise valid under customary law, because her husband failed either through ignorance or design to obtain a court order under s 7(6) of the Act. It would also violate her right to equality. An interpretation that visits nullity on marriages concluded in breach of s 7(6) differentiates between women in second or subsequent polygynous marriages and those in first marriages. The purpose of the differentiation would, according to the court below, be to protect a first wife. However, the Recognition Act, as I have sought to show is designed to protect all spouses in polygynous marriages not only the first spouse by creating a certain and equitable matrimonial property regime in the polygynous context. Given the purpose of s 7(6), the

differentiation drawn by nullifying marriages concluded in its breach is irrational. It is irrational because it defeats its very purpose. It is also illegitimate because the Constitution requires that both spouses be protected. Important as the interests of the first wife are, it is unfair to protect only her interests given the vulnerability of all female spouses in polygynous marriages and the importance of protecting their rights and interests as well. It is particularly unfair given that the reason for nullity will often flow merely from ignorance of the law (either by the husband or also his spouse) or lack of resources or in some cases, may flow from a husband's deliberate breach of the law. A rule that will punish a second or subsequent wife in good faith cannot be fair. Indeed it is an extraordinarily harsh consequence when one considers that the class of woman affected is least likely to have access to the knowledge and resources required to ensure observance with s 7(6). Finally, failure to recognise a marriage that would at customary law be valid appears to me to be the very antithesis of what the legislature sought to achieve. In my view the purpose of the Recognition Act, as the name suggests, is to afford recognition to customary marriages and thus extend the greatest protection possible to a particularly vulnerable class of persons, namely, female spouses in polygynous marriages.

[38] I accordingly cannot endorse the conclusion of the court below that non-compliance with the requirements of s 7(6) results without more in the second customary marriage being void ab initio. I hold instead that the consequence of such non-compliance is that the subsequent marriage would be valid but that it would be one out of community of property. It plainly cannot be a marriage in community of property as that would imply the existence of two joint estates, which it is clear cannot co-exist. That conclusion, it seems to me, would afford sufficient protection to the wife of the first customary marriage. It, moreover, would accord with the injunction of the Constitutional Court that all legislation be interpreted in accordance with the spirit and purport of the Constitution.

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V PONNAN
JUDGE OF APPEAL

MTHIYANE DP

[39] I have had the privilege of reading the judgments of my colleagues Ndita AJA and Ponnan JA. I concur in both, save for paragraph 27 of the main judgment.

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K K MTHIYANE
DEPUTY PRESIDENT

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