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Negotiated, Celebrated - or Both?

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The Unresolved Dilemma of Section 3(1)(b) of the Recognition of Customary Marriages Act

INTRODUCTION

Although the Recognition of Customary Marriages Act 120 of 1998 ("**RCMA**") was a significant milestone in affirming the legal status of African customary marriages, nearly three decades later, section 3(1)(b) (which requires a marriage to be "*negotiated and entered into or celebrated in accordance with customary law*") remains a source of confusion and legal conflict.

This article assesses the ongoing challenges associated with the RCMA, with specific focus on how section 3(1)(b) is interpreted and applied.

A CLASH OF CUSTOM AND CIVIL FORMALITY

In *Malatjie v Sekgobela*,[1] both the Applicant and First Respondent had concluded customary marriages with the deceased.[2] In this case, the Applicant maintained that she had entered into a civil marriage with the deceased on **18 October 2011** and requested an Order declaring the marriage to be valid. The fact that a civil marriage had been concluded between the Applicant and the deceased was not in dispute (by virtue of the Marriage Certificate issued by the Department of Home Affairs) however, the First Respondent challenged the validity of this civil marriage, alleging that she and the deceased had already concluded a customary marriage on **06 December 2004**. The dispute between the Applicant and First Respondent arose when the Applicant attempted to claim spousal maintenance from the GEPF following the death of the deceased. Upon approaching the GEPF, the Applicant was informed that she was not eligible to receive spousal maintenance, as the marriage between the deceased and the First Respondent was still valid. The Applicant submitted that she had no knowledge of the marriage between the deceased and the First Respondent and challenged the First Respondent to provide proof of the marriage. The First Respondent accordingly provided proof of *lobola* having been paid, as well as a *lobola* letter duly witnessed by four witnesses.

The First Respondent further referred the Court to a "*National Treasury: Pensions Administration: NOMINATION OF BENEFICIARIES*" form, in which the First Respondent was duly nominated as the beneficiary, in her capacity as the deceased's wife. The Applicant challenged the proof provided by the First Respondent, stating that the lobola letter was not sufficient proof of the customary marriage, as the marriage had not been celebrated in accordance with custom.[3] The Court applied the Plascon-Evans Rule, and found that even though there was a dispute of fact, the facts as stated by the First Respondent together with the admitted facts in the Applicant's affidavits justified that the facts as stated by the First Respondent should be accepted. The First Respondent was accordingly successful in her opposition to the relief claimed by the Applicant.

WHAT CONSTITUTES A *"CELEBRATION"*?

Section 3(1)(b) is often criticised for its vagueness, as the definition of "*celebration*" may vary between communities. This opens doors to disputes, especially when some aspects of the marriage processes are informal or not fully observed.

The High Court in *Tsambo v Sengadi*[4] recognised that strict ceremonial compliance is not always necessary.[5] In this case, the Court was required to decide whether pursuant to the conclusion of the lobola negotiations, a handing over of the bride ensued in satisfaction of the requirement that the marriage be negotiated and entered into or celebrated in accordance with customary law in terms of section 3(1)(b) of the RCMA. The Applicant (the deceased's customary law wife) launched an urgent application in the High Court to have the marriage declared as valid.

The Application was opposed by the deceased's father, who argued that "*at best for the deceased, the necessary customs, rituals and procedures required for the conclusion of a customary marriage may have commenced but were not proceeded with or completed*" averring that the meeting that took place on 28 February 2016 was confined to *lobola* negotiations and what happened thereafter merely constituted a

celebration of the successful conclusion of the *lobola* negotiations.[6] With regards to what constitutes a "celebration", he also averred that the two families would have had to agree on the formalities and the date on which the bride would be "handed over" to the deceased's family. He asserted that, according to custom, following the initial payment of *lobola*, a specific date is arranged for the bride's family to hand her over to the groom's family. Upon her arrival, a lamb or goat is slaughtered, and its bile is used in a cleansing ritual for the couple. He maintained that the performance of this ritual signifies the union of the couple and the joining of their respective families. This ritual is then followed by a celebration, during which the slaughtered animal is shared and consumed. The deceased's father argued that, because this ritual was not performed, the handing over of the bride (which he regarded as the most essential element of a customary marriage) did not occur. Accordingly, it was contended that no customary marriage came into existence.

The High Court held that the handing over of the bride is not a strict requirement for the validity of a customary marriage and may be waived. It found that there had been a tacit waiver of this custom, as a symbolic handing over of the bride to the deceased's family had taken place after the conclusion of the customary marriage. The High Court rejected the argument that the handing over of the bride constitutes the most essential component of a customary marriage and that its absence negated the existence of a valid customary union.[7]

The matter went on appeal before the SCA, and the SCA considered the case of *Ngwenyama v Mayelane and Another*[8] where the SCA had previously held that:

"The Recognition 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."*

The SCA recognized the living nature of customary law, and that the manner in which certain customs are practiced may change over time, and that that strict compliance with rituals has, in the past, been waived.[9]

The SCA accordingly dismissed the appeal and upheld the ruling of the High Court that a valid customary marriage had been concluded in this instance.

This progressive interpretation of what constitutes a "celebration" in ceremonies concerning customary marriages, reflects a more realistic view of living customary law.

CONCLUSION

Cases like *Malatjie*[10] and *Tsambo*[11] illustrate the interpretive challenges that arise from the flexible wording of section 3(1)(b) of the RCMA. The provision was deliberately drafted to accommodate the evolving and living nature of customary law, recognising that customs are not static and may vary between communities or change over time. While this flexibility is necessary and appropriate, it also places the responsibility on courts to interpret and apply customs in diverse contexts, which can sometimes result in inconsistent outcomes. This may lead to uncertainty, particularly in matters involving marital status, inheritance, and spousal rights.

While the RCMA represents a significant advancement in the recognition of customary marriages, the wording of section 3(1)(b) has, in practice, presented interpretive difficulties. Its deliberate openness, which is intended to respect the dynamic and context-specific nature of customary law, can lead to litigation that does not always align with the lived realities of customary practices. As a result, the provision may, at times, complicate rather than clarify the legal recognition of customary marriages.

A key issue lies in the overlooked use of the word "***or***", in section 3(1)(b) which reads:

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

This provision was clearly intended to accommodate the diversity of South African cultures where some marriages may be "negotiated and entered into" without an elaborate "celebration," and vice versa. Yet, legal disputes often ignore this, focusing narrowly on formal elements such as lobola and the handing over of the bride, while disregarding the legal weight that the word "***or***" actually carries.

What is therefore required is not necessarily legislative reform, but rather a context-sensitive judicial interpretation of section 3(1)(b) that gives proper effect to its plain language and to the living, adaptive nature of customary law. This approach reduces legal uncertainty, upholds the rights of those in customary unions, and better reflects the everyday realities the RCMA was enacted to recognise and protect.

Please note: Each matter must be dealt with on a case-case basis, and you should consult an attorney before taking any legal action.

[1]*Malatjie v Sekgobela (unreported case number 053314/2022 [2025] ZAGPPHC 4 (7 January 2025).*
[2]*Ibid at para 6-9 and 14-16.*
[3]*Note 1 above at para 23. Further take note that in terms of section 237 of the Criminal Procedure Act 51 of 1997, it is a criminal offence (referred to as Bigamy) to marry someone while still legally married to someone else. The effect of this is that the subsequent marriage is deemed void.*
[4]*Tsambo v Sengadi (unreported case 244/19 [2020] ZASCA 46 (30 April 2020)).*
[5]*Ibid at para 11-12 and 31.*
[6]*Ibid at para 9*
[7]*Ibid para 11*
[8]*(474/2011) [2012] ZASCA 94; 2012 (4) SA 527 (SCA); 2012 (10) BCLR 1071 (SCA); [2012] 3 All SA 408 (SCA) (1 June 2012)*
[9]*Ibid at para 18*
[10]*Supra note 1*
[11]*Supra note 6*

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