

# REGISTRATION OF CUSTOMARY MARRIAGES IN SOUTH AFRICA: A CASE FOR MANDATORY REGISTRATION\*

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## SUMMARY

Despite the enactment of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act), many customary marriages remain unregistered. There are many reasons for non-registration. Since marriage certificates are associated with spousal benefits, people who do not expect such spousal benefits have no reason to register their marriage. These include the elderly and the widowed. The registration process is another reason for non-registration. Nevertheless, the difficulties that arise when a spouse does not have a registration certificate cannot be sustained. This article is motivation for mandatory registration of customary marriages. It briefly discusses the history of registration of customary marriages. It also studies the provisions of the Recognition Act in this regard. The difficulties that arise in the absence of a marriage certificate are also discussed. It recommends the use of traditional leaders, who receive a state salary, to facilitate the instantaneous registration of customary marriages. The benefits of involving traditional leaders are also discussed.

## 1 INTRODUCTION

The countless number of cases involving unregistered customary marriages that continue to land before our courts bears testimony to the need for something to be done about the registration of customary marriages in South Africa.<sup>1</sup> Although these unregistered marriages are valid<sup>2</sup> (provided that they

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<sup>1</sup> Kovacs, Ndashe and Williams ("Twelve Years Later: How the Recognition of Customary Marriages Act of 1998 is Failing Women in South Africa" 2013 *Acta Juridica* 273 275) submit that, as at 2008, only 10 per cent of marriages were registered in the year in which they were entered into. A decade later, the 2019 statistics show that only 2 789 customary marriages were registered for this year. See May and Mudarikwa "Why Customary Marriage Registration Matters in South Africa" (30 August 2021) <https://mg.co.za/opinion/2021-08-30->

were entered into in accordance with customary law or recognised as such under customary law), without a certificate of registration, parties to such marriages are in a similar or worse-off position compared to those who have never married.<sup>3</sup> They are also worse off compared to their civil-law counterparts who possess a marriage certificate.<sup>4</sup> It must be added that it is mostly women who find themselves in desperate need to prove their marriages in order to gain access to some spousal benefits or remedies.<sup>5</sup> These benefits include pension funds, spousal maintenance and intestate succession benefits.<sup>6</sup> Institutions like government departments, the Master's Office and other private institutions require a marriage certificate for these benefits to be conferred.<sup>7</sup>

Because of the support that civil marriages receive from the State, civil marriages are registered instantly or within a reasonable time after solemnisation.<sup>8</sup> The duty to oversee the registration of civil marriages rests with officials who solemnise these marriages.<sup>9</sup> In turn, a party to a civil marriage has a certificate readily available and this gives them a head start in accessing any spousal benefits they may wish to access. On the other hand, parties to customary marriages do not enjoy a similar head start. They have personally to oversee the registration process.<sup>10</sup> It is submitted that, because of this, many customary marriages remain unregistered.<sup>11</sup> In turn, it is more common than not for parties to customary marriages not to have a certificate readily available to prove the existence of their customary marriage. Logically, this inhibits quick access to some benefits that come with being married.<sup>12</sup> Besides lack of access to spousal benefits, some of the consequences of being a party to an unregistered marriage may erode a person's dignity.<sup>13</sup> The author is aware of this through the experience of his late great-grandmother. Despite having an identity document bearing her marital surname, when she passed on in 2020 after nearly 75 years of

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why-customary-marriage-registration-matters-in-south-africa/ (accessed 2022-06-08). Another reason for the low number of registered customary marriages is dual marriages, in which case only the civil marriage is usually registered. Regardless of this issue, the number of registered customary marriages is too low.

<sup>2</sup> See *Kambule v The Master* 2007 (3) SA 403 (E) 409–410.

<sup>3</sup> *Mgenge v Mokoena* (GJ) (unreported) 2021-04-21 Case no 4888/2020 par 12.

<sup>4</sup> *Ibid.*

<sup>5</sup> Kohn "Ramuhovhi v President of the Republic of South Africa: A Bittersweet Victory for Women in Old Polygamous Customary Marriages" 2017 *SAJHR* 120 129 and Osman "Comment on the Single Marriage Statute: Implications for Customary Marriages, Polygynous Marriages and Life Partnerships" 2021 *PELJ* 1 12.

<sup>6</sup> De Sousa "When Non-Registration Becomes Non-Recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa" 2013 *Acta Juridica* 239 244.

<sup>7</sup> Rautenbach *Introduction to Legal Pluralism in South Africa* 5ed (2018) 95.

<sup>8</sup> For instance, in terms of s 2(1) of the Marriage Act 25 of 1961, every magistrate or additional magistrate is a marriage officer. In addition, some ministers of religion are recognised as marriage officers for civil marriages. See s 7 of the Marriage Act.

<sup>9</sup> Simons "Customary Unions in a Changing Society" 1958 *Acta Juridica* 320 324.

<sup>10</sup> De Sousa 2013 *Acta Juridica* 244.

<sup>11</sup> Kovacs *et al* 2013 *Acta Juridica* 275.

<sup>12</sup> De Sousa 2013 *Acta Juridica* 244.

<sup>13</sup> In *MG v BM* 2012 (2) SA 253 (GSJ) par 10, Moshidi J points out that some of the reasons for the almost non-existent registration of customary marriages were owing to negative attitudes towards customary law.

marriage (solemnised as both church and customary weddings), her death certificate indicated “never married”.

This article aims to make a case in favour of the compulsory registration of customary marriages. It starts with a discussion of a historical overview of the registration of customary marriages in South Africa. This overview aims to assist with understanding the current jurisprudence relating to the registration of customary marriages. It then critically discusses the provision in the Recognition of Customary Marriages Act<sup>14</sup> (Recognition Act) relating to the registration of customary marriages. The causes of non-registration are also discussed, as are the problems that arise when a marriage is unregistered. These problems are substantiated with a discussion of cases that have dealt with these problems. Following these discussions, a case for mandatory registration of customary marriages is made. The challenge of old customary marriages that remain unregistered is also addressed. The article concludes by recommending that the registration of customary marriages be made mandatory, and that the registration process should be enhanced through the use of traditional leaders and other designated persons as envisaged by the regulations in terms of the Recognition Act.

## 2 A BRIEF HISTORICAL OVERVIEW OF THE REGISTRATION OF CUSTOMARY MARRIAGES IN SOUTH AFRICA

The history of customary law lies in orality.<sup>15</sup> Rules have been passed down from generation to generation through storytelling since time immemorial.<sup>16</sup> A customary law rule or practice drew its validity from communal acceptance and general observance and not necessarily from being written down.<sup>17</sup> As such, marriages drew their validity from being entered into or celebrated in the open with the knowledge of the community.<sup>18</sup> The only known spousal benefits were those derived from customary law, being the only system of law at the time. Since the community knew about the marriages, spousal benefits were not difficult to access; although some women had to accept accessing benefits through a male relative.<sup>19</sup> These benefits included accessing land for residential and agricultural purposes, cattle and other livestock.<sup>20</sup>

Up until the year 2000, customary marriages were not fully recognised. Although they were generally frowned upon, in Natal there was some degree of tolerance.<sup>21</sup> In the Cape, there was a lack of tolerance.<sup>22</sup> The primary

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<sup>14</sup> 120 of 1998.

<sup>15</sup> Rautenbach “Oral Law in Litigation in South Africa: An Evidential Nightmare?” 2017 *PELJ* 1.

<sup>16</sup> Dlamini “The Role of Customary Law in Meeting Social Needs” 1991 *Acta Juridica* 71 72.

<sup>17</sup> Dlamini 1991 *Acta Juridica* 72.

<sup>18</sup> Maithufi and Moloi “The Need for the Protection of Rights of Partners to Invalid Marital Relationships: A Revisit of the Discarded Spouse Debate” 2005 38(1) *De Jure* 144 152.

<sup>19</sup> Mamashela “New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act” 2004 *SAJHR* 616 618.

<sup>20</sup> Mamashela 2004 *SAJHR* 621.

<sup>21</sup> Dlamini *A Juridical Analysis and Critical Evaluation of ilobolo in Changing Zulu Society* (unpublished LLD thesis, University of Zululand) 1983 85.

reasons for non-recognition were the practice of *ilobolo* and the potentially polygamous nature of customary law.<sup>23</sup> The missionaries advocated for a westernised gospel that favoured civil marriages. Converts were encouraged to shun African practices, which were seen as a pagan way of life. For instance, converts were encouraged not to demand *ilobolo* for the marriage of their daughters. Most resisted this and simply incorporated African practices into Christianity.<sup>24</sup>

The Natal Code on Zulu Law of 1891 was the first notable statute to attempt to provide for the registration of customary marriages.<sup>25</sup> Earlier attempts had failed as few or no marriages had been registered.<sup>26</sup> However, the 1891 Code only applied in the Natal province and, ultimately, the KwaZulu homeland.<sup>27</sup> Despite this code, customary marriages remained largely unregistered in Natal.<sup>28</sup> The first meaningful enactment to provide for the registration of customary marriages was the Natal Code of Zulu Law of 1932.<sup>29</sup> Earlier enactments had failed to garner significant support and were thus withdrawn.<sup>30</sup> On the strength of the 1932 Code, customary marriages could be registered before a commissioner of Bantu affairs.<sup>31</sup> They could also be registered before a magistrate. However, failure to register a customary marriage did not invalidate a marriage.<sup>32</sup> Outside of Natal and KwaZulu, the registration of customary marriages was non-existent prior to the year 2000.<sup>33</sup> Despite all of the above, a majority of customary marriages were not registered.<sup>34</sup>

In 1927, the Black Administration Act<sup>35</sup> (BAA) was passed. The aim of this Act was to achieve uniformity among the different ethnic groups for the whole country. Section 22 empowered the commissioner to promulgate regulations for, among other things, the registration of customary marriages.

<sup>22</sup> Dlamini *A Juridical Analysis and Critical Evaluation of ilobolo in Changing Zulu Society* 106.

<sup>23</sup> Horn and Janse van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *JJS* 54 55.

<sup>24</sup> Dlamini *A Juridical Analysis and Critical Evaluation of ilobolo in Changing Zulu Society* 91.

<sup>25</sup> Bennet and Pillay "The Natal and KwaZulu Codes: The Case for Repeal" 2003 *SAJHR* 217 219.

<sup>26</sup> Bennet and Pillay 2003 *SAJHR* 219. Other attempts at codifying customary law and providing for a mechanism to register customary marriages were also made in the Transkeian Territories; however, these attempts were fruitless. See Simons 1958 *Acta Juridica* 339.

<sup>27</sup> Maithufi and Bekker "The Existence and Proof of Customary Marriages for Purposes of Road Accident Fund Claims" 2009 *Obiter* 164 172. In KwaZulu, further codes were subsequently promulgated – namely, the KwaZulu Act on the Code of Zulu Law 16 of 1985, and the Natal Code of Zulu Law Proc R151 of 1987. These had similar provisions on the registration of customary marriages.

<sup>28</sup> Maithufi and Bekker 2009 *Obiter* 172.

<sup>29</sup> Proclamation 168 of 1932.

<sup>30</sup> Simons 1958 *Acta Juridica* 339.

<sup>31</sup> Maithufi and Bekker 2009 *Obiter* 166.

<sup>32</sup> See generally Simons 1958 *Acta Juridica* 321.

<sup>33</sup> *MG v BM supra* par 10.

<sup>34</sup> Simons 1958 *Acta Juridica* 339.

<sup>35</sup> 38 of 1927. The original name of the BAA is the Native Administration Act 38 of 1927. The Act underwent various amendments, one of which was a change of name to the BAA.

On the strength of this, regulations were promulgated.<sup>36</sup> However, these regulations were never implemented, and a proper registration process did not see the light of day.<sup>37</sup> It must be added that the Recognition Act has repealed parts of section 22 of the BAA.<sup>38</sup> As stated above, a registration certificate was a gateway to accessing certain benefits; parties in customary marriages required a registration certificate to access certain benefits. An example of a benefit that could be derived through a registered marriage appeared in section 31 of the Black Laws Amendment Act.<sup>39</sup> This section provided for a claim for loss of support against a person who caused the death of a “partner” in a “customary union”.<sup>40</sup> However, the claim could not be enforced unless the claimant produced a marriage certificate issued by a commissioner of Bantu affairs.<sup>41</sup> Section 31 of the Black Laws Amendment Act is an example of the piecemeal recognition of customary marriages.

It is clear from the above that since customary marriages were not fully recognised, a registration process was not properly developed. Besides non-recognition, other factors influenced non-registration. Preliteracy, as opposed to illiteracy, is one such factor. Preliteracy refers to a period where few or no persons were literate.<sup>42</sup> African people did not write things down. As the years went by, African men concluded civil marriages simply in order to derive some benefits and without knowing the legal impact that they had on existing customary marriages. Housing is an example of benefits to be derived during the twentieth century. Council housing could only be allocated to a married couple. The quickest way to access council housing was to conclude a civil marriage with another woman. These civil marriages were rarely entered into with existing customary wives, who were left in the rural areas to look after the family. Instead, these civil marriages were with other women whom they met in the cities.<sup>43</sup> Unlike customary marriages, the civil marriages could be entered into easily, without the involvement of the family.

Any pre-existing customary marriage was dissolved by the civil marriage. A civil marriage and a customary marriage could not co-exist; the civil marriage trumped the customary marriage. The customary marriage spouse was considered to be discarded – that is, in the eyes of the law of the time, the customary marriage ceased to exist. The wife could not even enjoy any of the piecemeal benefits that parties to customary marriages could access at the time. A customary marriage was subservient to a civil marriage.<sup>44</sup> However, on 2 December 1988, the Marriage and Matrimonial Property Law

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<sup>36</sup> Regulation 1970 was promulgated on 25 October 1968. See Maithufi and Bekker 2009 *Obiter* 1972.

<sup>37</sup> Maithufi and Bekker 2009 *Obiter* 172.

<sup>38</sup> See s 13 of the Recognition Act together with its repeal-of-laws schedule. S 22(1)–(5) of the BAA was repealed by s 13.

<sup>39</sup> 76 of 1963.

<sup>40</sup> S 31(1) of the Black Laws Amendment Act.

<sup>41</sup> S 31(2)(a) of the Black Laws Amendment Act.

<sup>42</sup> Van Niekerk “Orality in African Customary – and Roman Law of Contract: A Comparative Perspective” 2011 *De Jure* 364.

<sup>43</sup> De Sousa 2013 *Acta Juridica* 246.

<sup>44</sup> Nkosi “A Note on *Mandela v Executors, Estate Nelson Mandela* 2018 (4) SA 86 (SCA) and the Conundrum Around the Customary Marriage Between Nelson and Winnie Mandela” 2019 *SAPL* 1 10.

Amendment Act<sup>45</sup> was passed into law. In terms of section 1(b) of this Act, which amended s 22(2) of the BAA, a subsequent civil marriage could no longer dissolve a pre-existing customary marriage. Instead, the civil marriage was void.

In the Transkei, the position was different compared to that in Natal Province, the KwaZulu homeland and the rest of the country. The Transkei Marriage Act<sup>46</sup> governed both customary marriages and civil marriages. It also catered for the registration of both civil and customary marriages. However, non-registration of customary marriages did not invalidate the marriages.<sup>47</sup> In terms of section 3 of the Act, a man could be a party to both a civil marriage and a customary marriage with different women at the same time. A civil marriage did not dissolve a customary marriage. A civil marriage was also not a bar to a customary marriage.<sup>48</sup> The Recognition Act has repealed section 3 of the Transkei Marriage Act, together with other provisions of this Act.<sup>49</sup> The remaining provisions continue to govern existing marriages under the Act.<sup>50</sup>

### **3 REGISTRATION OF CUSTOMARY MARRIAGES IN TERMS OF THE RECOGNITION OF CUSTOMARY MARRIAGES ACT**

Section 4 of the Recognition Act provides for the registration of customary marriages. It must be read with the regulations<sup>51</sup> made under the Recognition Act. The regulations outline the process of registration.<sup>52</sup> It is the duty of both spouses to ensure that their customary marriage is registered.<sup>53</sup> However, section 4(2) of the Recognition Act makes it possible for either spouse to approach the nearest Home Affairs office and register their marriage. Provided that all the prescribed particulars are furnished together with any additional information to satisfy a registering officer that a customary marriage was entered into, spouses do not require each other's cooperation in order to register a customary marriage.<sup>54</sup> While this is commendable in cases of recalcitrant spouses, it also opens up opportunities for abuse.<sup>55</sup> An unscrupulous person may be tempted to falsify documents and register a fraudulent marriage. Be that as it may, Kovacs, Ndashe and Williams submit that in practice, the registration of customary marriages requires the participation of both spouses. Based on empirical

<sup>45</sup> 3 of 1988.

<sup>46</sup> 21 of 1978.

<sup>47</sup> Horn and Janse van Rensburg 2002 *JJS* 59.

<sup>48</sup> West and Bekker "Possible Consequences of Declaring Civil and Customary Marriages Void" 2012 *Obiter* 351 356.

<sup>49</sup> See s 13 of the Recognition Act together with its repeal-of-laws schedule.

<sup>50</sup> West and Bekker 2012 *Obiter* 356.

<sup>51</sup> Regulations in terms of the Recognition of Customary Marriages Act 120 of 1998 GN R1101 in GG 21700 of 2000-11-01.

<sup>52</sup> Regulation 2.

<sup>53</sup> S 4(1) of the Recognition Act.

<sup>54</sup> S 4(2) of the Recognition Act.

<sup>55</sup> Van Niekerk "The Registration of Customary Marriages: *Banda v General Public Service Sectoral Bargaining Council* (JR3273/2009) (26 February 2014)" 2014 *SAPL* 494 496.

research, they submit that registering officers refuse to register customary marriages where only one spouse is present, despite the provisions of section 4(2) of the Recognition Act.<sup>56</sup> A customary marriage entered into after the commencement of the Act must be registered within three months of being entered into.<sup>57</sup> De Sousa submits that, because of the hardships involved in the registration of customary marriages, such as transport fees for the spouses and the witnesses, three months is a short period.<sup>58</sup> The time frames for registration of customary marriages entered into prior to the Act are discussed below.

The Recognition Act is not explicit about what other particulars or additional information is required for the registration of customary marriages. It simply provides that if the registering officer is satisfied that the spouses concluded a customary marriage, he or she must register the customary marriage by recording the identity of the spouses, the date of the marriage, any *ilobolo* agreed to and any other particulars.<sup>59</sup> The officer must then issue a certificate of registration bearing the prescribed particulars.<sup>60</sup> While there is utility in open-ended provisions in a society that accommodates different practices, proof is a universal concept. The legislature should have specified the type of proof that is required to register a customary marriage. This could include proof of *ilobolo*, proof that the bride was handed over to her new family, or that both the parties and their families agreed to waive the handing-over of the bride.

Section 4(8) of the Recognition Act provides that the certificate of registration serves as *prima facie* proof of a customary marriage. It provides the public with certainty regarding a person's marital status.<sup>61</sup> However, the certificate is not conclusive proof of a customary marriage. The validity of a certificate procured through fraudulent efforts may be challenged. The person who alleges fraud must prove it. A certificate will remain valid if the plaintiff fails to prove fraud. In *Road Accident Fund v Mongalo, Nkabinde v Road Accident Fund*,<sup>62</sup> the RAF rejected claims for loss of support on the ground that the marriage certificates had been procured through fraud. However, the RAF failed to lead evidence to prove fraud. The court held that the claimants were entitled to judgment against the RAF for loss of support.<sup>63</sup> In *Mgenge v Mokoena*, the mother of the deceased was able to bring an application in terms of section 4(8) to challenge the marriage of her son. On paper, the court could not establish whether a valid customary marriage had been entered into between the parties. The court referred the matter for oral evidence. Although the court was not specific on this, the

<sup>56</sup> Kovacs *et al* 2013 *Acta Juridica* 281. See also Van Niekerk 2014 *SAPL* 499–500.

<sup>57</sup> S 4(3)(a) of the Recognition Act.

<sup>58</sup> De Sousa 2013 *Acta Juridica* 252.

<sup>59</sup> S 4(4)(a) of the Recognition Act. See also Horn and Janse van Rensburg ("Non-Recognition? *Lobolo* as a Requirement for a Valid Customary Marriage" 2002 *JJS* 170 174–175) who submit that the fact that *ilobolo* is one of the particulars that a registering officer must consider in order to determine if there is a valid customary marriage is a pointer to the fact that *ilobolo* is an essential requirement for a customary marriage.

<sup>60</sup> S 4(4)(b) of the Recognition Act.

<sup>61</sup> *Mgenge v Mokoena supra* par 12.

<sup>62</sup> [2002] ZASCA 158; [2003] 1 All SA 72 (SCA).

<sup>63</sup> *RAF v Mongalo, Nkabinde v RAF supra* 127.

operation of the certificate of registration was suspended.<sup>64</sup> At the time of writing this article, the author is not aware of whether the oral evidence has been heard by the court. The impact of section 4(8), as discussed above, is welcome.

The Recognition Act also provides for the registration of those customary marriages that were not registered before the Act's commencement date.<sup>65</sup> These are the "old" customary marriages. These marriages were to be registered within twelve months of the commencement of the Act or within such longer period as may be prescribed by the Minister.<sup>66</sup> After more than two decades since the implementation of the Recognition Act on 15 November 2000, there are still too many unregistered customary marriages.<sup>67</sup> Following the decision in *Mankanyi v Minister of Home Affairs*,<sup>68</sup> the deadline for registration of customary marriages was extended to 30 June 2024.<sup>69</sup> Section 4(3)(b) refers specifically to new customary marriages. This extension applies to customary marriages entered into after the commencement of the Act. As pointed out above, new customary marriages must be registered within three months of conclusion or within such longer period prescribed by the Minister from time to time. The present legal position is that parties who fail to register new customary marriages within three months have until 30 June 2024 to register these marriages.

Section 4(9) provides that failure to register a customary marriage does not affect its validity. This provision is not novel to the Recognition Act since the various homeland enactments mentioned above had similar provisions.<sup>70</sup> It has been submitted that this provision was designed to protect women in unregistered customary marriages. It is an assurance that if they show proof of a customary marriage, the law will assist them by registering the marriage.<sup>71</sup> De Sousa points to the absence of a sanction in case of non-registration.<sup>72</sup> With reference to the South African Law Commission report on customary marriages,<sup>73</sup> De Sousa also points out that declaring an unregistered marriage void would have led to hardships for women in these marriages. In addition, this would have deprived existing marriages of legal

<sup>64</sup> *Mgenge v Mokoena supra* par 42.2.

<sup>65</sup> S 4(3)(a) of the Recognition Act.

<sup>66</sup> *Ibid.* The first extension lasted until 15 November 2002. Thereafter, the date of registration has been extended several times. The latest extension will last until 30 June 2024.

<sup>67</sup> Kovacs *et al* (2013 *Acta Juridica* 275) submit that as at 2008, an average of only 10 per cent of customary marriages were registered in the year in which they were concluded.

<sup>68</sup> KZP (unreported) 2021-07-02 Case no 3146/2020P.

<sup>69</sup> SA News "Registration of Customary Marriages With Home Affairs Extended" (30 September 2021) <https://www.sanews.gov.za/south-africa/registration-customary-marriages-home-affairs-extended> (accessed 2022-07-07).

<sup>70</sup> Horn and Janse van Rensburg "Practical Implications of the Recognition of Customary Marriages" 2002 *JJS* 54 59.

<sup>71</sup> Singh "Woman Know Your Rights: The Recognition of Customary Marriages Act: Traditional Practices and the Right to Equal Treatment" 1999 *De Jure* 314 317.

<sup>72</sup> De Sousa 2013 *Acta Juridica* 243–244. De Sousa also points out that the absence of a sanction for non-registration may be in conflict with South Africa's international law obligation in terms of article 16.2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

<sup>73</sup> South African Law Commission *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998).

validity.<sup>74</sup> While this protection is welcome, it is submitted that it comes at a cost. With the exception of new marriages (less than three months old), parties in unregistered marriages will have to approach a court for an order directing the Department of Home Affairs to register their marriage in terms of section 4(7)(a). De Sousa submits that the idea of having to approach a court before a marriage may be registered is, on its own, a form of sanction.<sup>75</sup> Unfortunately, not everyone can afford the costs of bringing such an application before court,<sup>76</sup> leaving many people vulnerable.<sup>77</sup> Furthermore, any extension of the registration period is usually communicated by notice in the *Government Gazette*; unless care is taken to inform the public, parties to unregistered customary marriages may not become aware of the extension. In essence, if a spouse in an unregistered customary marriage does not approach a court for an order declaring a marriage valid and directing the Department of Home Affairs to register the marriage and issue a marriage certificate, section 4(9) of the Recognition Act is nothing more than cold comfort.

#### 4 THE POSSIBLE REASONS FOR NON-REGISTRATION OF CUSTOMARY MARRIAGES

As stated above, many customary marriages remain unregistered. There are various reasons for this. Any South African who has been to any of the various offices of the Department of Home Affairs will confirm the difficulty involved in trying to access any services at these offices. Typically, one has to sacrifice a whole day. Offices of the South African Department of Home Affairs are infamous for their long queues.<sup>78</sup> In addition, it should be noted that the majority of people who get married according to customary law live in rural areas<sup>79</sup> and the cost of going to the nearest Department of Home Affairs office is not always affordable.<sup>80</sup> It should be noted that old marriages often involve the elderly and those who are widowed.<sup>81</sup> Unless these people need to access some benefit that requires the production of a marriage certificate, they will not register the marriage.<sup>82</sup> In most instances, the costs of registration outweigh the benefits of possessing a registration certificate, especially for older and widowed persons.<sup>83</sup>

<sup>74</sup> De Sousa 2013 *Acta Juridica* 243.

<sup>75</sup> De Sousa 2013 *Acta Juridica* 251.

<sup>76</sup> West and Bekker 2012 *Obiter* 353.

<sup>77</sup> Kovacs *et al* 2013 *Acta Juridica* 281.

<sup>78</sup> Kretzmann "Queue, the Beloved Country – Welcome to Aaron Motsoaledi's Dysfunctional Department of Home Affairs" (14 May 2022) <https://www.dailymaverick.co.za/article/2022-05-14-queue-the-beloved-country-welcome-to-aaron-motsoaledis-dysfunctional-department-of-home-affairs/> (accessed 2022-10-14).

<sup>79</sup> Manthwa "Lobolo, Consent as Requirements for the Validity of a Customary Marriage and the Proprietary Consequences of a Customary Marriage: *N v D* (2011/3726) [2016] ZAGPJHC 163" 2017 *Obiter* 438 444.

<sup>80</sup> Kovacs *et al* 2013 *Acta Juridica* 279.

<sup>81</sup> Kohn 2017 *SAJHR* 130.

<sup>82</sup> Kovacs *et al* 2013 *Acta Juridica* 278.

<sup>83</sup> De Sousa 2013 *Acta Juridica* 269.

Horn and Janse van Rensburg submit that the fact that a customary marriage can always be registered at a later stage may be one of the reasons for the initial non-registration of a customary marriage.<sup>84</sup> Van Niekerk submits that, in general, the Recognition Act does not inspire compliance, as non-compliance does not result in the invalidation of a customary marriage.<sup>85</sup> It is submitted that while non-registration does not amount to invalidation of a marriage, what the parties may not be aware of is that they may have trouble in trying to register a marriage at a later stage. As stated above, applicants have to approach a court for an order in terms of section 4(7)(a) directing Home Affairs to register their customary marriage. Unless they succeed at this, the unregistered marriage is similar to an invalid marriage in certain circumstances.<sup>86</sup>

Another reason for non-registration of customary marriages is that registration is often associated with civil marriage.<sup>87</sup> Some individuals living under customary law are not aware that it is now possible to register customary marriages and that they have to register theirs. Osman submits that dual marriages also have an impact on the registration of customary marriages.<sup>88</sup> Dual marriages are concluded when the same people conclude both a civil and customary marriage with each other. Section 10(1) of the Recognition Act permits monogamous dual marriages. Osman submits that a dual marriage is celebrated as a customary marriage and registered as a civil marriage.<sup>89</sup>

## 5 THE PROBLEMS THAT ARISE IN UNREGISTERED CUSTOMARY MARRIAGES

Many problems may arise when a customary marriage is not registered. Some of these have already been alluded to. The reasons for non-registration of old customary marriages are understandable since, when these marriages were concluded, a registration process was almost non-existent. Now that the Recognition Act provides for registration of these old marriages, it is not practical to expect all parties to existing customary marriages to flock to the offices of the Department of Home Affairs to register their customary marriages. Be that as it may, parties to unregistered old customary marriages are still susceptible to the same disadvantages as parties to new unregistered customary marriages. For this reason, this article recommends ways to address registration of both new and old marriages below.

<sup>84</sup> Horn and Janse van Rensburg 2002 *JJS* 60.

<sup>85</sup> Van Niekerk "The Courts Revisit Polygyny and the Recognition of Customary Marriages Act 120 of 1998" 2013 *SAPL* 469 478–479. The author cites non-compliance with s 4 (registration) and s 7(6) (a prior court-approved contract for a subsequent customary marriage) of the Act as examples of non-compliance situations that do not result in the invalidation of a customary marriage.

<sup>86</sup> Kovacs *et al* 2013 *Acta Juridica* 279 and Van Niekerk 2014 *SAPL* 495.

<sup>87</sup> Osman "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" 2019 *PELJ* 1 9.

<sup>88</sup> Osman 2019 *PELJ* 9.

<sup>89</sup> *Ibid.*

The fact that a customary marriage may still be registered after the fact makes it possible to manipulate facts. This is worse when one party to the marriage is no longer around to dispute some of the alleged facts, as in the case of *Mgenge v Mokoena supra*. As a result, spousal benefits such as pension, maintenance and other intestate benefits may end up in the wrong hands. For instance, in the light of decisions that have held that the physical handing-over of the bride is optional, it has become very easy to convince a court that a customary marriage existed where some *ilobolo* negotiations took place followed by informal cohabitation. Maithufi and Bekker raised the alarm about this practice and approach. They submit that problems regarding proof of existence of a customary marriage cannot be solved by bringing domestic partnerships into the picture because, if the parties cohabited, a marriage will be said to exist.<sup>90</sup> Bapela and Monyamane submit that the controversial approach of the courts to proving the existence of customary marriages will continue to breed opportunistic litigants with ulterior motives unless the courts close the revolving door of the requirements of a customary marriage.<sup>91</sup>

## 5.1 Hurdles in divorce proceedings

The most odious of the problems arises when a person who is validly married in terms of customary law has to approach a court to prove that they are married, because the marriage was not registered immediately after it was entered into. This often happens when one spouse has died or when divorce is sought. The absence of a marriage certificate could have an impact on burial rights. Although a surviving spouse, in the absence of a testamentary provision, does not have an automatic right to bury a deceased spouse, the spouse as heir will have a right to bury the deceased. Without a marriage certificate, the surviving spouse will be in a weaker position against any detractors. The only way to get the marriage registered urgently may be through an urgent court application. As indicated, many people cannot afford the costs of litigation.<sup>92</sup> In any event, the money may be needed for the burial of the deceased and all related costs.

In the absence of a marriage certificate, a person may experience problems in obtaining a divorce decree and accessing patrimonial benefits. Although section 8 of the Recognition Act provides that a customary marriage may only be dissolved by a decree of divorce on the ground of the irretrievable breakdown of the marriage relationship, this section does not draw a distinction between registered and unregistered customary marriages. The requirement of a decree of divorce to access patrimonial benefits is absurd when the marriage was not registered in the first place. Osman submits that this requirement is a trap for unsophisticated individuals who are unaware of the law.<sup>93</sup> She also points out that, in practice, families negotiate divorces and settlements between couples married in terms of

<sup>90</sup> Bekker and Maithufi 2009 *Obiter* 173.

<sup>91</sup> Bapela and Monyamane "The 'Revolving Door' of Requirements for Validity of Customary Marriages in Action" 2021 *Obiter* 186 192–193.

<sup>92</sup> Kovacs *et al* 2013 *Acta Juridica* 279.

<sup>93</sup> Osman 2021 *PELJ* 13.

customary law.<sup>94</sup> Considering that both parties in a customary marriage are represented by their families, the chances of these negotiations being unfair are very slim. The wife, who often occupies a vulnerable position, has the benefit of her family's support. Another benefit of a divorce negotiated in terms of customary law is that it is cost effective. Nevertheless, divorces negotiated by customary law are not recognised in the Recognition Act.<sup>95</sup>

In divorce proceedings, a party to a civil marriage only has to allude to the marriage and support this by producing a marriage certificate as proof. Beyond that, he or she does not have to prove the existence of a civil marriage. The marriage certificate serves as *prima facie* proof of the marriage. The same is not the case for unregistered customary marriages. In addition to alluding to a marriage, a party to an unregistered customary marriage must prove the existence of the marriage. In some cases, the facts may be such that the court has to refer the matter for oral evidence. This means more court appearances and more costs. This may be a humiliating task for someone who, at all times, has always regarded herself or himself as married. The humiliation may be less reprehensible if no customary marriage in fact existed in the first place, such as where the bride had not been integrated.

## 5 2 Spouse can easily enter into a secret marriage with another

Because customary marriages are not registered, a spouse to a subsisting customary marriage can easily conclude another customary marriage or a civil marriage with another person without having dissolved the initial customary marriage. Without registration, there is no way of ascertaining if a person is party to an existing customary marriage. The provisions of section 10 of the Recognition Act are apposite. It is not competent for a person who is a party to a subsisting customary marriage to conclude a civil marriage with another person.<sup>96</sup> Although the Recognition Act is silent on the validity of the subsequent marriage, courts have held that the subsequent marriage will be invalid.<sup>97</sup> More often than not, it is not the man who suffers; it is women who find themselves in the cold with an invalid marriage. The Recognition Act does not provide any protection for these women.

In *Ngcwabe-Sobekwa v Sithela*,<sup>98</sup> the deceased had entered into a civil marriage with the applicant in 1996 during the subsistence of a customary marriage between himself and the first respondent.<sup>99</sup> The customary marriage had been concluded in 1998 but was never registered.<sup>100</sup> It is interesting to note that it was not the first time that the deceased had contracted a civil marriage during the subsistence of a customary marriage.

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> S 10(1) of the Recognition Act.

<sup>97</sup> The latest of these decisions includes *Ledwaba v Monyepao* [2018] ZALMPPHC 61 and *Ndlovu obo Ndlovu v Monama* [2021] ZAGPJHC 810.

<sup>98</sup> *Ngcwabe-Sobekwa v Sitela* [2020] ZAECMHC 49.

<sup>99</sup> *Ngcwabe-Sobekwa v Sitela supra* par 26.

<sup>100</sup> *Ngcwabe-Sobekwa v Sitela supra* par 8.

The applicant's civil marriage was the deceased's second civil marriage.<sup>101</sup> It appears that the earlier one had been dissolved through divorce. The court held that the conclusion of two civil marriages by the deceased did not detract from the existence of a valid customary marriage.<sup>102</sup> Although the civil marriages were invalid because they contravened section 10(3) of the Recognition Act, the court observed that in such a situation, a party to the invalid civil marriage would be in a stronger position, being in possession of a *prima facie* valid marriage certificate – something that a party to an unregistered customary marriage did not enjoy.<sup>103</sup>

The problem of husbands entering into secret marriages is the same with old civil marriages under the BAA that were not properly registered. Recently, the Limpopo Division heard a matter involving a deceased man who, during his lifetime, had managed to enter into at least three secret civil marriages with different women.<sup>104</sup> The first two marriages were entered into during apartheid; the plaintiff's marriage was included in these marriages. The last marriage was entered into in the year 2000.<sup>105</sup> The question before the court was which of the three civil marriages was valid. While it was not in dispute that one of the three civil marriages had been dissolved by divorce, it was not clear when that marriage had been entered into.<sup>106</sup> This information was essential for determining which of the three women claiming to be the surviving widow married the deceased first. The plaintiff could not prove when she got married to the deceased.<sup>107</sup> The court therefore absolved itself from the instance.<sup>108</sup>

Non-registration of customary marriage is not the sole factor making it possible for a person to enter into a civil or customary marriage with another person during the subsistence of an initial marriage. The current system that requires customary marriages to be dissolved by a divorce decree is also a contributing factor.<sup>109</sup> This is not a problem in cases of registered marriages; however, it does pose a hurdle in unregistered marriages. For an unsophisticated person, it is difficult to comprehend the need to approach a court to dissolve a marriage that was never registered in the first place. As stated above, such persons simply negotiate divorce settlements. They also go on to conclude marriages with other persons. In *Monyepao v Ledwaba*,<sup>110</sup> the appellant and the deceased had entered into a customary marriage. When the marriage soured, the deceased left the matrimonial home. The appellant entered into a civil marriage with another man shortly thereafter.<sup>111</sup> The deceased also subsequently concluded a customary marriage with the respondent. The appellant only became aware that her civil marriage was invalid and that her customary marriage to the deceased subsisted after the

<sup>101</sup> *Ngcwabe-Sobekwa v Sitela supra* par 16.

<sup>102</sup> *Ngcwabe-Sobekwa v Sitela supra* par 17.

<sup>103</sup> *Ngcwabe-Sobekwa v Sitela supra* par 28.

<sup>104</sup> *Mkhari v Minister of the Department of Home Affairs* [2022] ZALMPPHC 32.

<sup>105</sup> *Mkhari v Minister of the Department of Home Affairs supra* par 1.

<sup>106</sup> *Mkhari v Minister of the Department of Home Affairs supra* par 11 read with par 31.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> S 8(1) of the Recognition Act can only be dissolved by a decree of divorce.

<sup>110</sup> *Monyepao v Ledwaba* [2020] ZASCA 54.

<sup>111</sup> *Monyepao v Ledwaba supra* par 19.

death of the latter.<sup>112</sup> It is submitted that there are many other people who are faced with similar situations and who are not aware of the legal position pertaining to their marriages.

Despite the prohibition in section 10, the practice of concluding customary marriages during the subsistence of civil marriages and *vice versa* is rife.<sup>113</sup> Maithufi and Bekker question the continued existence of the prohibition in light of the full recognition of customary marriages.<sup>114</sup> They argue that failure to legalise the coexistence of civil and customary marriages would inevitably lead to harsh results despite the expectations of all the parties to the polygamous marriage that their marriages are valid.<sup>115</sup> Indeed, this came to pass in *Zulu v Mathe*.<sup>116</sup> In this case, the applicant, the first wife of the late *Isilo* Goodwill Zwelithini, approached the court for a declaratory order stating that by virtue of her civil marriage to the King, she was entitled to half of *Isilo's* estate.<sup>117</sup> The King had concluded subsequent customary marriages during the subsistence of the civil marriage. Initially, the applicant did not wish to challenge the validity of the customary marriages. She had at all times accepted them as valid. It was only at a later stage that attempts were made to challenge these marriages from the bar. The court did not allow this because the matter was not properly brought before the court. In addition, the respondents did not have the opportunity to formulate proper arguments in defence.<sup>118</sup>

### 5.3 Impact of non-registration on claims for loss of support

The non-registration of customary marriages also has an impact on other areas of law. For instance, it may have an impact on claims against the Road Accident Fund (RAF) in cases of negligent causation of death of a breadwinner. The RAF can simply reject a spousal claim for loss of support on the ground that the applicant was not a spouse. As noted above, a party cannot easily approach the Department of Home Affairs and register a customary marriage. A court application as envisaged by section 4(7)(a) is necessary. This protracts proceedings while the surviving spouse has no remedies. In *TZ obo Minors v RAF*,<sup>119</sup> the plaintiff had lost her husband in a motor vehicle accident. They had four minor children.<sup>120</sup> The plaintiff filed a claim for loss of support for herself and her minor children against the defendant, the RAF. The RAF argued that the deceased did not have a duty to support the plaintiff. The latter was unable to produce a marriage certificate because the customary marriage was not registered.<sup>121</sup> She had to litigate against the RAF. The court had first to determine if a valid

<sup>112</sup> *Monyepao v Ledwaba supra* par 23.

<sup>113</sup> Maithufi and Bekker 2009 *Obiter* 171.

<sup>114</sup> Maithufi and Bekker 2009 *Obiter* 170.

<sup>115</sup> Maithufi and Bekker 2009 *Obiter* 171.

<sup>116</sup> *Zulu v Mathe* [2022] ZAKZPHC 6.

<sup>117</sup> *Zulu v Mathe supra* par 33.

<sup>118</sup> *Zulu v Mathe supra* par 38.

<sup>119</sup> *TZ obo Minors v Road Accident Fund* [2021] ZAGPPHC 367.

<sup>120</sup> *TZ obo Minors v Road Accident Fund supra* par 1–2.

<sup>121</sup> *TZ obo Minors v Road Accident Fund supra* par 15.

customary marriage existed between the deceased and the plaintiff. It was common cause that the marriage had not been celebrated.<sup>122</sup> The court held that the marriage was nevertheless valid as it was not mandatory for a marriage to be celebrated.<sup>123</sup> It also held that a reciprocal duty of support existed between the deceased and the plaintiff.<sup>124</sup>

## 6 THE CASE FOR THE MANDATORY REGISTRATION OF CUSTOMARY MARRIAGES

The rationale for compulsory registration of customary marriage lies in the fact that registration may address the bulk of, if not all, the problems that non-registration may cause. This article submits that customary marriages should be registered immediately after they are concluded or within a reasonable time thereafter.<sup>125</sup> Once registered, marriages will be on the system and a certificate of registration will be readily available. In this way, it will be possible to verify a potential spouse's marital status with a degree of certainty. Parties to customary marriages will have marriage certificates readily available to prove the existence of a customary marriage. This will then also eliminate the need to litigate in order to prove a customary marriage. If a marriage is registered immediately after it is concluded, the practice of alleging that a customary marriage exists when none exists will be dealt with easily.

The immediate registration of customary marriages cannot be approached blindly. Although the aim is to place parties to a customary marriage in the same position as parties to a civil marriage, the process of registering these marriages is not the same. As indicated above, the registration of civil marriages enjoys a lot of support from the State, thus ensuring the immediate registration of civil marriages upon their conclusion. Some religious officers also serve as marriage officers.<sup>126</sup> Magistrates can also marry people.<sup>127</sup> Some Department of Home Affairs officials are also marriage officers.<sup>128</sup> This ensures that civil marriages are registered speedily. Parties to civil marriages do not have to worry about the sophistications of registering the marriage. Someone else does it for them. The same is not the case with customary marriages. Currently, the duty to register customary marriages rests with the spouses. As stated above, some spouses may not be aware that they have to register the marriage. Even if they are aware, they may decide not to register the marriage for various reasons. The process of registration could prove to be too sophisticated for unsophisticated persons, as well as expensive. The fact that a customary marriage is valid regardless of registration may contribute to non-registration. Since a marriage certificate is associated with benefits, in the absence of potential benefits, a party can just decide not to register the

<sup>122</sup> *TZ obo Minors v Road Accident Fund supra* par 21.

<sup>123</sup> *TZ obo Minors v Road Accident Fund supra* par 26.

<sup>124</sup> *TZ obo Minors v Road Accident Fund supra* par 28.

<sup>125</sup> De Sousa 2013 *Acta Juridica* 244 and Rautenbach *Introduction to Legal Pluralism* 95.

<sup>126</sup> S 7 of the Marriage Act. However, this section must be treated with caution.

<sup>127</sup> S 2(1) of the Marriage Act.

<sup>128</sup> S 2(2) of the Marriage Act.

marriage. This is not to suggest that non-registration should invalidate customary marriages.

For reasons that have been stated above, it is hereby recommended that the process of registering customary marriages should be made mandatory and enhanced. The Recognition Act, read with the regulations in terms thereof, makes it clear that the personnel who are key to the registration of customary marriage are the registering officers and, in certain instances, designated persons.<sup>129</sup> It appears that a designated person may be a traditional leader.<sup>130</sup> Data shows that, as at 2018, there were approximately 844 traditional leaders in South Africa.<sup>131</sup> It is submitted that the government must activate and accordingly train traditional leaders for the purposes of registration of customary marriages.

The recommendation that traditional leaders should facilitate the registration of customary marriages is not new. In its report on customary marriages, the South African Law Commission deliberated on this recommendation. However, the Commission noted that not all areas in South Africa had designated traditional leaders,<sup>132</sup> although this could be resolved by activating traditional leaders for the areas in question.<sup>133</sup> However, the main problem concerned making registration compulsory. This led to the question of the penalty for failure to register a marriage.<sup>134</sup> The Commission considered a penalty necessary.<sup>135</sup> It observed that invalidation for failure to register a marriage could result in undue hardships for parties to these customary marriages, especially widows.<sup>136</sup> For these reasons, the Commission recommended that, although compulsory registration was desirable, unregistered marriages should however not be invalidated.<sup>137</sup> Parties should be allowed to prove the existence of the marriage.<sup>138</sup> The Commission insofar as it reported on the compulsory registration of customary marriages may be criticised for focusing too much on the sanctions. It is submitted that the emphasis should have been on traditional leaders facilitating compulsory registration. This could have been achieved while ensuring that unregistered customary marriages were not invalidated.

Be that as it may, the following should be noted. Traditional leaders have always been part and parcel of traditional weddings and often officiate at

<sup>129</sup> Regulation 2(1) of the Recognition Act.

<sup>130</sup> S 11(1)(a)(iii) of the Recognition Act.

<sup>131</sup> Staff Writer "South Africa Has a Huge Number of Traditional Leaders – Here Is How Much They Get Paid" (2018-08-06) *Business Tech* <https://businesstech.co.za/news/government/263191/south-africa-has-a-huge-number-of-traditional-leaders-heres-how-much-they-get-paid/> (accessed 2022-07-07). This data represents data collected in 2018 and it only accounts for those traditional leaders who are recognised as such and who draw a salary from the State.

<sup>132</sup> South African Law Commission *Harmonisation of Common Law and Indigenous Law: Report on Customary Marriages* 68.

<sup>133</sup> *Ibid.*

<sup>134</sup> South African Law Commission *Harmonisation of Common Law and Indigenous Law: Report on Customary Marriages* 69.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> South African Law Commission *Harmonisation of Common Law and Indigenous Law: Report on Customary Marriages* 70.

<sup>138</sup> *Ibid.*

customary weddings.<sup>139</sup> In other words, they are present when the marriage is entered into or celebrated. Their job involves confirming that the family of the bride has received what is due to them and that they have consented to the marriage. They also confirm that the bride has not been coerced into the marriage.<sup>140</sup> A majority of traditional leaders draw a salary from the State. They are no strangers to the exercise of public powers.<sup>141</sup> The role of traditional leaders as designated persons in the process of registration of customary marriages is clearly spelled out in the regulations.<sup>142</sup> They should receive an application for registration from the parties after the marriage is concluded and forward this application to the registering officer for registration.<sup>143</sup> Unfortunately, this role for traditional leaders has not been implemented. Instead, the focus is on parties to a customary marriage directly approaching Home Affairs to register their marriage.

The involvement of traditional leaders has a number of advantages. Since they live under customary law, they will ensure that a marriage complies with the living requirements actually observed by the community in question. They will also ensure that only legally compliant marriages are registered. Form A of the regulations, which is used to register a customary marriage, makes provision for a traditional leader to declare that the marriage in question was entered into in accordance with the customary practices of a particular community. It is doubtful whether this part of Form A plays any role when the parties approach the Department of Home Affairs directly. Some may argue that requiring a traditional leader to declare that the marriage complied with the requirements is tantamount to giving traditional leaders too much power and exposes this process to potential abuse. It is submitted that these arguments are merely speculative, seemingly influenced by a lack of knowledge regarding the role of traditional leaders and a low perception in general. Their counterparts (religious leaders, magistrates and officials of the Department of Home Affairs) have managed the registration of civil marriages without issues of abuse ever arising. The same benefit of the doubt should be afforded to traditional leaders. In addition, there is no need for concern if a marriage is in accordance with living customary law.

The option to approach the Department of Home Affairs directly must be retained. For instance, a considerable number of people in urban areas conclude customary marriages, and a traditional leader or a designated person may not be within reach to assist with the registration of the customary marriage. The parties should thus still be able to approach the Department of Home Affairs to register their customary marriage. In any event, it is submitted that most people who live according to customary law conclude customary marriages in their traditional communities. In most cases, the customary marriage should be registered there.

The involvement of traditional leaders will also ensure that parties who decide to conclude dual marriages have a choice of which marriage they

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<sup>139</sup> De Sousa 2013 *Acta Juridica* 260.

<sup>140</sup> Horn and Janse van Rensburg 2002 *JJS* 66.

<sup>141</sup> Staff Writer <https://businesstech.co.za/news/government/263191/south-africa-has-a-huge-number-of-traditional-leaders-heres-how-much-they-get-paid/>.

<sup>142</sup> Reg 2 of the regulations in terms of the Recognition Act.

<sup>143</sup> Reg 2(2) and (3) of the regulations in terms of the Recognition Act.

want to register. As illustrated above, some people are still not aware that an antenuptial contract may be entered into and registered even when a customary marriage is intended. People often associate an antenuptial contract only with the conclusion of civil marriages. Everything pertaining to registration is associated with a civil marriage. The parties to dual marriages should be given a proper choice whether to register the civil marriage or the customary marriage. If they decide to register their customary marriage, they will also have an opportunity within the three-month window period to execute an antenuptial contract if they choose to do so.<sup>144</sup> In this way, what the parties agree on will be legally protected. In *LNM v MMM*,<sup>145</sup> the parties had agreed to conclude a civil marriage in community of property.<sup>146</sup> They also agreed to comply with all the cultural requirements of a customary marriage, as is customary among many African people in dual marriages. They duly complied with the cultural requirements. Thereafter, in anticipation of the civil marriage, they executed and registered an antenuptial contract.<sup>147</sup> Before the civil marriage could take place, the relationship between the parties soured. In litigation, the court held that a valid customary marriage had been concluded and that it was in community of property. The antenuptial contract was null and void as it was not concluded before the marriage.<sup>148</sup> In this case, the court essentially ignored the true intentions of the parties to conclude a civil marriage despite the glaring evidence before it.

## 7 MARRIAGES ENTERED INTO BEFORE THE RECOGNITION ACT

The old customary marriages that still subsist present a special case. It is submitted that the activation of the role of traditional leaders in facilitating the registration of customary marriages could address some issues relating to the non-registration of old customary marriages. As submitted above, parties to old customary marriages are predominantly the elderly and the widowed. Some may be less sophisticated. The use of traditional leaders who live within the communities would assist in addressing the challenges that such parties face to a certain extent. Issues of proof when the marriage has been of a long duration can best be resolved using knowledge that is available within the community. It is also submitted that traditional leaders could also assist with unregistered old civil marriages, which are also discussed above. The State, through the Department of Home Affairs, could work with traditional leaders in establishing processes for the registration of old marriages. Workshops may be conducted to assist traditional leaders in

<sup>144</sup> S 4(3)(b) of the Recognition Act provides that a customary marriage must be registered within three months of being entered into. This three-month period may be used to execute an antenuptial contract while the parties prepare to register their customary marriage. A traditional leader may be informed of this intention, in which case he will delay the registration of the marriage until registration of the antenuptial contract. It is also interesting that s 87(1) of the Deeds Registries Act 47 of 1937 provides that an antenuptial contract must be registered within three months of execution. Therefore, a lot can be done in the three-month window period.

<sup>145</sup> *LNM v MMM* [2021] ZAGPJHC 563.

<sup>146</sup> *LNM v MMM supra* par 16.

<sup>147</sup> *LNM v MMM supra* par 1.

<sup>148</sup> *LNM v MMM supra* par 39.

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executing their duties in the registration of old customary marriages. These workshops could drive consensus on the different kinds of proof that may be accepted as proof of the existence of an old customary marriage.

## **8 CONCLUSION**

This article has argued for the mandatory registration of customary marriages. It has discussed the historical background of the registration of customary marriages. It has also discussed the process of registration of customary marriages as set out in the Recognition Act. It has shown that the process of registering these marriages is very slow. Possible reasons for this slow registration have been fully discussed. This article has also unpacked the problems that arise when marriages are not registered. These problems include denial of access to benefits such as a spousal claim for loss of support against the RAF, and hurdles with obtaining a divorce, as a party must first prove that a customary marriage was entered into. This has the effect of protracting court proceedings. A spouse to an existing but unregistered customary marriage or an old unregistered civil marriage can easily conclude a marriage with another person.

It is recommended that the process of registering customary marriages should be enhanced. The role of traditional leaders in facilitating the registration of customary marriages must be activated. The benefit of involving traditional leaders is that marriages will be immediately registered upon conclusion, or at least very soon after their conclusion. Because traditional leaders receive a salary from the State, they are in a better position to facilitate the submission of the application for the registration to the relevant Home Affairs office. The elderly and the widowed will benefit from this, as they will not have to deal with the sophisticated process of registering a marriage and to incur all the related expenses associated with this process.