The Diverse Marital Regimes of South Africa and how these Impact on People’s Rights to Succeed.

Varsha Sewlal
Master of the Kwazulu–Natal High Court Durban
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

Index:

1. Types of Matrimonial Property Systems in terms of the Matrimonial Property Act, 88 of 1984

1(a) Marriages in Community of Property
1(b) Marriages out of community of property
   i) with accrual
   ii) without accrual

2. Customary Marriages
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed.

3. Marriages concluded in terms of Religious Rites.

3.1 Muslim marriages

3.2 Hindu Marriages

4. Marriages and unions concluded in terms of the Civil Union Act 17 of 2006

5. The position of cohabiting partners
   a) same-sex cohabitation
   b) Heterosexual cohabitation

6. Foreign Marriages
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

Types of Matrimonial Property Systems in terms of the Matrimonial Property Act, 88 of 1984

a) Marriages in Community of Property

Default marital system in South Africa. One joint estate that belongs to the spouses in equal undivided shares

b) Marriages out of community of property

An ante nuptial contract is registered.

- With accrual (net assets accrued by spouses are shared equally on dissolution of marriage either by death or divorce.
- Without accrual
Exclusion:
Civil black marriages under the Black Administration Act 38 of 1927 were automatically out of cop unless a joint declaration was made for in cop before a magistrate, commissioner or marriage officer.

The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

2. CUSTOMARY MARRIAGES

- The Recognition of Customary Marriages Act 120 of 1998 (RCMA) came into operation on 15 November 2000, and gives full legal recognition to customary marriages for the first time in the history of South Africa.

- Section 1 of the Act defines a ‘customary marriage’ to mean

  “a marriage concluded in accordance with customary law”.

  ‘Customary Law’ is defined as

  “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those people”.


<table>
<thead>
<tr>
<th>Before 15.11.2000</th>
<th>Polygamous Customary Marriages</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Monogamous Customary Marriages</strong></td>
<td><strong>Polygamous Customary Marriages</strong></td>
</tr>
<tr>
<td><strong>Requirements:</strong> 1. Valid and in accordance with customary law, S 2(1)RCMA 2. Existed on 15.11.2000</td>
<td><strong>Requirements:</strong> 1. Valid and in accordance with customary law, S 2(1)RCMA 2. Existed on 15.11.2000</td>
</tr>
<tr>
<td><strong>Matrimonial Property System</strong>  In community of property after the decision <em>Gumede v President of RSA and Others</em> CCT50/08 ZACC23 Section 7(1) of RCMA unconstitutional</td>
<td><strong>Matrimonial Property System</strong>  Out of community of property <em>Gumede v President of RSA and Others</em> CCT50/08 ZACC23</td>
</tr>
<tr>
<td><strong>Requirements of proof for Succession purposes:</strong> 1. Marriage certificate/proof of registration from Home Affairs, S 4(8) 2. Court order confirming existence, S 4(7)(a) 3. Minutes of family meeting held by the Master where CM is not registered (MBU16)</td>
<td><strong>Requirements of proof for Succession purposes:</strong> 1. Marriage certificate/proof of registration from Home Affairs, S 4(8) 2. Court order confirming existence, S 4(7)(a) 3. Minutes of family meeting held by the Master, where CM is not registered (MBU16)</td>
</tr>
</tbody>
</table>
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed.

<table>
<thead>
<tr>
<th>CUSTOMARY MARRIAGES AFTER 15.11.2000</th>
<th>Polygamous Customary Marriages</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Monogamous Customary Marriages</strong></td>
<td><strong>Requirements for Recognition</strong></td>
</tr>
<tr>
<td><strong>Requirements for Recognition</strong></td>
<td>1. Prospective spouses must be over 18 and consent to marry each other by CM</td>
</tr>
<tr>
<td></td>
<td>2. Marriage must be in accordance with Customary Law <strong>S3(1)</strong></td>
</tr>
<tr>
<td><strong>Polygamous Customary Marriages</strong></td>
<td><strong>Requirements for Recognition</strong></td>
</tr>
<tr>
<td></td>
<td>1. Prospective spouses must be over 18 and consent to marry each other by CM</td>
</tr>
<tr>
<td></td>
<td>2. Marriage must be in accordance with Customary Law <strong>S3(1)</strong></td>
</tr>
</tbody>
</table>
|                                      | 3. Consent by the first spouse in subsisting customary marriage for husband to enter into a further customary marriage [Mayelane v Ngwenyama and Others CCT57/12 (2013) ZACC14, (AFTER 30TH May 2013)]
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

<table>
<thead>
<tr>
<th>CUSTOMARY MARRIAGES AFTER 15.11.2000</th>
<th>Polygamous Customary Marriages</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Monogamous Customary Marriages</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Matrimonial Property System</strong></td>
<td><strong>Matrimonial Property System</strong></td>
</tr>
</tbody>
</table>
| In community of property by default unless parties have entered into an Ante-nuptial contract [7(2)]. | 1. If s7(6) has been complied with (written contract approved by court regulating matrimonial property system of all husband’s customary marriages) the systems determined in the contract will apply.  
2. If s7(6) has not been complied with, first marriage retains it’s existing matrimonial property system, but 2nd marriage will automatically be out of community of property.  
[Mayelane CC decision] |

[Mayelane CC decision]
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

<table>
<thead>
<tr>
<th>CUSTOM ARY MARRIAGES</th>
<th>AFTER 15.11.2000</th>
<th>Monogamous Customary Marriages</th>
<th>Polygamous Customary Marriages</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Requirements of proof of existence for purposes of succession</th>
<th>Requirements of proof of existence for purposes of succession</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Marriage certificate; or</td>
<td>1. Marriage certificates; or</td>
</tr>
<tr>
<td>2. Proof of registration of customary marriage from Home Affairs [s4(8)]; or</td>
<td>2. Proof of registration of customary marriages from Home Affairs [s4(8)]; or</td>
</tr>
<tr>
<td>3. Court order confirming existence of marriage and authorizing registration of the customary marriage [4(7)(a)]; or</td>
<td>3. Court order confirming existence of marriages and authorizing registration of the customary marriage [4(7)(a)]; or</td>
</tr>
<tr>
<td>4. Minutes of family meeting held by the Master confirming existence of customary marriage where same has not been registered (MBU16)</td>
<td>ent.</td>
</tr>
</tbody>
</table>
Customary Marriages After 15.11.2000

<table>
<thead>
<tr>
<th>Monogamous Customary Marriages</th>
<th>Polygamous Customary Marriages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>4. Minutes of family meeting held by the Master confirming existence of customary marriages where same has not been registered (MBU16). The written consent to the second customary marriage by the first customary spouse should form part of the records of the meeting; or</td>
</tr>
<tr>
<td></td>
<td>5. Where section 7(6) has been complied with, copy of the court approved agreement</td>
</tr>
</tbody>
</table>

The diverse marital regimes of South Africa and how these impact on people’s rights to succeed
<table>
<thead>
<tr>
<th>Subsequent civil marriage by the spouse of a subsisting customary union to a third person: Situation between 1929 and 1.12.1988 (Areas outside the Transkei)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Only civil marriages were deemed valid marriages.</td>
<td>5. On death of husband, status of discarded customary wife/wives and children were revived and deemed equal to that of civil-law spouse and children.</td>
</tr>
<tr>
<td>2. A civil marriage automatically superseded and extinguished subsisting customary unions entered into prior to the civil marriage.</td>
<td>6. Both customary wife and civil-law wife will be deemed spouses for purposes of intestate succession.</td>
</tr>
<tr>
<td>3. Customary wife/wives known as discarded wife/wives.</td>
<td></td>
</tr>
<tr>
<td>4. Sec 22(7) of Black Administration Act, 38/1927 provided some measure of protection to discarded spouses and their children.</td>
<td></td>
</tr>
</tbody>
</table>
Subsequent civil marriage by the spouse of a subsisting customary union to a third person: Situation between 2.12.1988 and 15.11.2000 (Areas outside the Transkei)

2. Partners in a customary union may marry one another by civil rites.
3. Partners in a customary union may not marry a third person by civil rites during the subsistence of the customary marriage.
4. Customary marriage must first be dissolved before a partner may enter into a valid civil marriage to another person.
5. Should a partner in a customary union purport to enter into a civil marriage without first dissolving the customary union, the civil marriage would be invalid [Thembisile and Another v Thembisile and Another 2002 (2) SA 209 (T)].
**Relationship between civil and customary marriages after 15 November 2000 – all areas in South Africa.**

1. Sections 22(1) &(5) of the Black Administration Act and the Transkei Marriage Act 21/78 revoked.
2. A man and woman in a customary marriage may marry each other by civil law, but may not marry a third person in terms of civil law [Sec 10(1) of the Recognition of Customary Marriages Act].
3. No spouse in a civil marriage may enter into any other marriage, albeit civil or customary, during the subsistence of the civil marriage [Sec 10(4) of the Recognition of Customary Marriages Act].
### Dual marriages in Transkei between the period 1978 and 15.11.2000

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Section 39 of the former Transkei Marriage Act 21/78 applicable.</td>
</tr>
<tr>
<td>2.</td>
<td>A husband in a subsisting customary union could during the subsistence of such union validly contract a civil marriage with a third person, provided the civil marriage was out of community of property.</td>
</tr>
<tr>
<td>3.</td>
<td>A husband in a subsisting civil marriage could validly enter into a customary union with a third person, provided the subsisting civil marriage was out of community of property.</td>
</tr>
<tr>
<td>4.</td>
<td>The wives of both the civil marriage and the customary union enjoy equal status</td>
</tr>
</tbody>
</table>
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

3. Marriages concluded in terms of Religious Rites:

3.1 Muslim Marriages

- South African law does not recognise Muslim marriages as valid marriages unless the spouses register a civil marriage as well.

- Some Muslim marriages are polygamous.

- The Muslim Marriages Bill was developed. The proposed legislation aims at recognising Muslim marriages and regulating the proprietary consequences of such marriages.
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

• The courts have granted Muslim partners in Muslim marriages limited legal recognition for the purposes of intestate succession and maintenance in terms of the *Maintenance of Surviving Spouses Act 27 of 1990*.

• In *Daniels v Campbell NO and Others 2004 (5) SA 331 (CC)* the Constitutional Court held that the word ‘spouse’ as used in the *Intestate Succession Act 81 of 1987* and the word ‘survivor’ as used in the *Maintenance of Surviving Spouses Act 27 of 1990* include the surviving spouse of a monogamous Muslim marriage.
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

- In *Hassam v Jacobs NO and Others (2008) JOL 22098 (C)* the court found no jurisdiction for excluding the widows of polygamous Muslim marriages for the provisions of the Maintenance of Surviving Spouses Act 27 of 1990 and the Intestate Succession Act of 81 of 1987. The court found that excluding the widows would be unfair discrimination and conflict with Section 9 of the Constitution.

- Muslim marriages are generally regarded as being out of community of property. The accrual system does not apply as the law does not recognise Muslim marriages.

- In *Faro v Bingham N.O. and Others 4466/2013 WC* held that the Muslim Judicial Council has no statutory or religious authority to determine whether an Islamic marriage was validly concluded or dissolved. Should objections be lodged the Master has to assess the matter to determine whether the objection be allowed or disallowed. The Master must prevent unnecessary costly litigation.
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

3.2 Hindu Marriages

- Hindu religious marriages are also not recognised as being valid marriages.
- A civil union can be registered simultaneously with the Hindu marriage however the civil registration is recognised and not the religious marriage.
- The courts have granted limited legal recognition for the purposes of succession.
- **Govender v Ragavayah and Others 2009(4) SA 178 (D)**
  - the court ordered that the word ‘spouse’ as used in section 1 of the Intestate Succession Act 81 of 1987 should include the surviving partner to a monogamous Hindu marriage.
- Hindu marriages are regarded as being in community of property.
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

4. Marriages and unions concluded into the Civil Union Act 17 of 2006

- The Civil Unions Act 17 of 2006 came into operation on the 1 December 2006.
- This act gave effect to the order in the Constitutional Court decision *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae);Lesbian and Gay Equality Project v Minister of Home Affairs 2006(1) SA 524 9CC* the court held that the common law definition of “marriage” as being inconsistent with the Constitution and invalid in that it does not permit same sex couples to enjoy the status and benefits accorded to heterosexual couples.
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

• Any person 18 years or older may enter into a civil union into the Act and register their marriage as a marriage or civil partnership.
• Once a civil union is registered one cannot register a marriage under the Marriages Act 25 of 1961 or the Recognition of Customary Marriages Act
• A civil union is one of community of property if an ante nuptial contract is not entered into.
5. Cohabiting Partners

5.1 Same-Sex Cohabitation

- **Gory v Kolver NO and Others 2007(3) BCLR 249 (CC)** The Constitutional Court ruled that that partners in a permanent same-sex life partnership should be regarded as “spouses” for the purposes of Intestate Succession.

- Persons who died before 1 December 2006 and were partners in a same sex partnership at the time of their death should be regarded as spouses for the purposes of Intestate Succession.

- I am of the view that permanent same-sex cohabitation should be treated in the same manner as permanent heterosexual cohabitation.
The diverse marital regimes of South Africa and how these impact on people’s rights to succeed

- It should however be noted that despite the enactment of the Civil Union Act which now allows partners in a permanent same-sex partnership to validly marry, the legislature has failed to amend section 1(1) of the Intestate Succession Act as ordered in the Gory decisions and consequently the ad hoc judicial extension granted by the Constitutional Court in Gory v Kolver No and Others (Starke and Others intervening) 2007 (4) SA 97 (CC) still stands.

- In an unreported decision, Earle v Piek and Others, Case No 19216/07, handed down in the Cape of Good Hope Provincial Division on 19 August 2008, the applicant, being the surviving partner in a permanent same-sex partnership, was held to be the sole intestate heir of the deceased in terms of the provisions of section 1(1)(a) of the Intestate Succession Act 81 of 1987, read with paragraph f(2) of the order granted by the Constitutional Court on 23 November 2006 in Gory v Kolver No and Others (Starke and Others intervening) 2007 (4) SA 97 (CC).
The diverse marital regimes of South Africa and how these impact on peoples rights to succeed

5.2 Heterosexual Cohabitation

- **Volks NO v Robinson and Others 2005 95) BCLR 4467 (CC)** the court held that where no marriage was concluded between the partners the partner could not be regarded as a surviving spouse in terms of the Maintenance of Surviving Spouses Act.
- There was no obligation of support between unmarried persons.
Foreign marriages are deemed valid in South Africa if they meet two requirements:

- The marriage is valid in terms of the law and formalities of the place where the marriage was concluded.
- There is no rule in the South African law which renders it null and void.
- Documentary proof of the matrimonial property regime which governed the marriage of the deceased must be lodged with the Master.

THANK YOU.