

REPUBLIC OF SOUTH AFRICA

RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill published in Government Gazette No. 42622 of 8 August 2019)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 12—2019]

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GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
 - _____ Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Recognition of Customary Marriages Act, 1998, so as to further regulate the proprietary consequences of customary marriages entered into before the commencement of the said Act; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 1 of Act 120 of 1998, as amended by section 19 of Act 42 of 2001 and section 10 of Act 31 of 2008

1. Section 1 of the Recognition of Customary Marriages Act, 1998 (hereinafter referred to as the principal Act), is hereby amended by the substitution for the definition of “traditional leader” of the following definition:

“**“traditional leader”** means [any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy] a traditional leader contemplated in section 1 of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).”

Amendment of section 7 of Act 120 of 1998

2. Section 7 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) (a) The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act, [continue to be governed by customary law] are that the spouses in such a marriage have joint and equal—

- (i) ownership and other rights; and
- (ii) rights of management and control, over marital property.

(b) The rights contemplated in paragraph (a) must be exercised—

- (i) in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
- (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(c) Each spouse retains exclusive rights over his or her personal property.

(d) For purposes of this subsection, “marital property”, “house property”, “family property” and “personal property” have the meaning ascribed to them in customary law.”; and

(b) by the substitution for subsection (2) of the following subsection:

“(2) A customary marriage [**entered into after the commencement of this Act**] in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.”.

Transitional provisions

3. (1) The provisions of section 2 of this Act do not invalidate—

(a) the winding up of a deceased estate that was finalised; or

(b) the transfer of marital property that was effected, before the commencement of this Act.

(2) The provisions of subsection (1) do not apply to the transfer of marital property where, at the time of such transfer, the person to whom the marital property was to be transferred, was aware that the marital property in question was subject to a legal challenge.

Short title

4. This Act is called the Recognition of Customary Marriages Amendment Act, 2019.

MEMORANDUM ON THE OBJECTS OF THE RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT BILL, 2019

1. PURPOSE OF BILL

The primary aim of the Recognition of Customary Marriages Amendment Bill, 2019 (“the Bill”), is to amend the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) (“the Act”). The Bill seeks to amend the Act by further regulating the proprietary consequences of customary marriages entered into before the commencement of the Act so as to bring the provisions of the Act in line with judgments of the Constitutional Court, (which the Court found the provisions to be constitutionally invalid because they discriminate unfairly against certain women in customary marriages).

2. BACKGROUND

2.1 On 30 November 2017 the Constitutional Court handed down judgment in *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41 (the *Ramuhovhi*-case). The declaration of constitutional invalidity of section 7(1) of the Act by the High Court of South Africa, Limpopo Local Division, Thohoyandou, was confirmed by the Constitutional Court. The Constitutional Court held that section 7(1) of the Act is inconsistent with the Constitution and invalid in that it discriminates unfairly against women in polygamous customary marriages entered into before the commencement of the Act (pre-Act marriages), on the basis of gender, race and ethnic or social origin. Section 7(1) of the Act provides that the proprietary consequences of customary marriages entered into before the commencement of the Act continue to be governed by customary law, in terms of which wives have no right of ownership and control over marital property, which right is reserved solely for husbands. The declaration of constitutional invalidity was suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity. Failure by Parliament to correct the defect within the time set, that is by 30 November 2019, will result in the interim order of the court becoming final. The Court considered the appropriate relief to be a suspension of the declaration of invalidity accompanied by interim relief. The Court found that this twin relief has the effect of granting immediate assistance to the vulnerable group of wives in pre-Act polygamous customary marriages, whilst also giving due deference to Parliament. The interim relief, in broad terms, is that a husband and his wives in pre-Act polygamous customary marriages must share equally in the right of ownership of, and other rights attaching to, family property, including the right of management and control of family property; and a husband and each of his wives in each of the marriages constituting the pre-Act polygamous customary marriages must have similar rights in respect of house property.

2.2 In *Gumede v President of the Republic of South Africa*, [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC), (the *Gumede*-case), the Constitutional Court declared section 7(1) of the Act to be constitutionally invalid insofar as it relates to *de facto* monogamous customary marriages, but left open the question whether section 7(1) was constitutionally valid insofar as it applies to polygamous customary marriages. Section 7(2) was also declared to be constitutionally invalid and it was ordered that the words “entered into after the commencement of the Act” be severed from the subsection.

3. OBJECTS OF BILL

3.1 The object of the Bill is to give effect to these two judgments of the Constitutional Court. The interim relief contained in the *Ramuhovhi* matter, as set out in paragraph 5 of the judgment, is used in the Bill to determine the proprietary consequences of polygamous customary marriages entered into before the commencement of the Act.