

Short notes on:

RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT BILL: INTERIM ORDER OF THE CONSTITUTIONAL COURT BECOMES FINAL

Introduction

The 30th November 2019 marked the last day for Parliament to rectify the Recognition of Customary Marriages Act No. 120 1998 (“the RCMA”) in line with the Interim Order handed down by the Constitutional Court (“the CC”) in *Ramuhovhi and Others v President of the Republic of South Africa and Others* (CCT194/16) [2017] ZACC 41 (30 November 2017) (“the Ramuhovhi case”). According to the Recognition of Customary Marriages Amendment Bill (“the Amendment Bill”), failure by Parliament to rectify the Act will result in the Interim Order by the CC being made final, and certain provisions of the RCMA which govern the proprietary consequences in polygynous customary marriages being amended.

The RCMA before the Final Order

The RCMA came into force on 15 November 2000. In terms of Section 7(1), the matrimonial property regime of spouses in customary marriages is governed by Customary Law. In terms of Customary Law, such marriages were regarded as being out community of property excluding the accrual system. In *Gumede vs President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC) (“the Gumede case”), the CC ruled that all monogamous customary marriages are in community of property, unless both spouses agree to a different property regime. This is regardless of whether the marriage was entered into before or after the commencement of the RCMA.

However, the judgment in the *Gumede* case did not address the marital property rights of spouses in polygynous marriages entered into before the commencement of the RCMA. This means that polygynous marriages were still governed by Customary Law. The latter was changed in the Ramuhovhi case. Section 7(2) of the RCMA was declared to be constitutionally invalid, resulting in polygynous customary marriages entered into before or after the commencement of the RCMA being in community of property subject to the accrual system.

Impact of the Final Order or the Bill

Since Parliament failed to rectify the RCMA as ordered by the CC in the *Ramuhovhi* case, the Interim Order became final on 30 November 2019. This means that spouses to monogamous customary

marriages and polygynous marriages entered before the RCMA have equal rights, equal ownership and other rights over the matrimonial property.

What does this mean in practice?

In practice, many women in customary marriages do not know how or find it difficult to enforce their rights to their property. Spouses that are parties to a polygynous customary marriage entered after the commencement of the RCMA must still apply to Court for approval of an agreement which will regulate their future matrimonial property regime.

Conclusion

The CC rulings in the *Gumede* and *Ramuhovhi* cases is a step in the right direction for South Africa in ensuring that our Constitutional ethos and the values in the Bill of Rights since the transition to democracy are entrenched in the moral fibre of our society.

Even though it is important for our laws to recognize the customs practiced in our society, however, a balance has to be established to ensure that the rights of women are protected while doing so.

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