

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 judgment of the Constitutional Court, which the Court found 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.

3.2 Ad clause 1:

Clause 1 amends the definition of "traditional leader" in section 1 of the Act, to be in line with the definition of "traditional leader" in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

3.3 Ad clause 2:

3.3.1 Clause 2(a) seeks to amend section 7(1) of the Act in order to provide that the proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage which was entered into before the commencement of the Act, are that the spouses in such a marriage have joint and equal—

- (a) ownership and other rights; and
- (b) rights of management and control,

over marital property.

3.3.2 Clause 2(a) also provides that the above-mentioned rights must be exercised—

- (a) 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
- (b) 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.

3.3.3 Clause 2(a) further provides that each spouse retains exclusive rights over his or her personal property and that for purposes of section 7(1) of the Act the terms "marital property", "house property", "family property" and "personal property" have the meaning ascribed to them in customary law.

3.3.4 Clause 2(b) seeks to amend section 7(2) of the Act by the deletion of the words "entered into after the commencement of the Act". This has the effect, in line with the *Gumede* judgment that all monogamous customary marriages, whether they were entered into before or after the commencement of the Act, are in community of profit and loss, unless the spouses specifically determine otherwise by means of an antenuptial contract.

3.4 **Ad clause 3:**

Clause 3 provides for transitional arrangements, based on the interim relief as set out in the *Ramuhovhi* judgment. Clause 3(1) provides that the provisions of clause 2 of

the Bill do not invalidate the winding up of a deceased estate that was finalised, or the transfer of marital property that was effected, before the commencement of the Bill. Clause 3(2) provides that the above-mentioned provisions 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.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

An invitation to comment on the draft Bill was published in the Government Gazette of 20 April 2018. The following stakeholders were specifically consulted by letters of invitation:

- (a) African Gender Institute;
- (b) ANC Women's League;
- (c) Black Sash;
- (d) Centre for Applied Legal Studies (CALS);
- (e) Commission on Gender Equality;
- (f) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
- (g) Department of Arts and Culture;
- (h) Department of Co-operative Governance;
- (i) Department of Rural Development and Land Reform;
- (j) Department of Women;
- (k) Department of Home Affairs;
- (l) Human Rights Institute of South Africa;
- (m) Law Society of South Africa;

- (n) National Association of Democratic Lawyers (NADEL) Human Rights;
- (o) Public Protector;
- (p) National Movement on Rural women;
- (q) SA Human Rights Commission;
- (r) Section 27;
- (s) Women's Legal Centre;
- (t) Women's Net; and
- (u) National House of Traditional Leaders.

The Bill was adapted in accordance with the comments received, where necessary.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

6.1 The Constitution of the Republic of South Africa, 1996 ("Constitution") regulates the manner in which legislation may be enacted by Parliament and prescribes the different procedures to be followed for such enactment. Section 76 of the Constitution provides for the parliamentary procedure for ordinary Bills affecting the provinces. In terms of section 76(3) a Bill must be dealt with in accordance with the procedure established by either section 76(1) or section 76(2) if that Bill provides for legislation envisaged in section 76(3)(a) to (f) or if it falls within a functional area listed in Schedule 4.

6.2 In *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*¹ ("*Tongoane* judgment"), the CC confirmed and upheld the test for tagging that was formulated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*², where the CC held that—

"the heading of section 76, namely, 'Ordinary Bills affecting provinces' provides a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76."

6.3 At paragraph 50 of the *Tongoane* judgment the CC held that the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect the functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.

6.4 The CC stated the following at paragraph 58 of the *Tongoane* judgment:

"What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill 'in substantial measure fall within a functional area listed in Schedule 4'."

6.5 The CC further held that the test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the purpose concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces.

¹ CCT 100/09 [2010] ZACC 10.

² [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1(CC).

The more it affects the interest, concerns and capacities of the provinces, the more say the provinces should have on its content.³

6.6 To determine whether the provisions of the Bill in substantial measure fall within a functional area listed in Schedule 4, the Bill ought to be considered against the provisions of the Constitution relating to the tagging of Bills as well as against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.

6.7 The test compels the consideration of the substance, purpose and effect of the subject matter of the Bill. The Bill deals with "cultural matters" and "indigenous and customary law" which are matters listed in Part A of Schedule 4 to the Constitution. Part A lists the functional areas of concurrent national and provincial legislative competence. The Bill is an ordinary Bill affecting provinces and should therefore be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution.

6.8 The State Law Advisers are of the opinion that it is necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions pertaining to customary law or customs of traditional communities.

³ Paragraph 60 of the Tongoane judgment.