

SOUTH AFRICAN LAW COMMISSION

PROJECT 51

MARRIAGES AND CUSTOMARY UNIONS  
OF BLACK PERSONS:

Interim report on problems relating  
to the acquisition of leasehold

April 1985

To the Honourable H J Coetsee, MP, Minister of Justice

I am pleased to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), the Commission's interim report on the marriages and customary unions of Black persons with special reference to problems relating to the acquisition of leasehold.



G VILJOEN

CHAIRMAN

25 April 1985

## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice G Viljoen (Chairman)

The Honourable Mr Justice H J O van Heerden (Vice-Chairman)

Prof J Church (additional member for the purposes of this investigation)

Prof J T Delpont

Prof C R M Dlamini (additional member for the purposes of this investigation)

Mr J E Knoll

Mr P A J Kotzé

Mr P J J Olivier SC

Mr G G Smit

The Secretary is Mr D A Kruger. The Commission's offices are on the 8th Floor, N G Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria.

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HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR

## 1. ORIGIN OF PROJECT

### \* Introduction

1.1 In April 1983 the Minister of Co-operation and Development suggested to the Minister of Justice that the South African Law Commission should be requested to resolve difficulties relating to the contractual capacity of Black females so that they might be enabled to acquire leasehold rights and obtain loans from building societies in respect thereof. It was suggested that the Commission should consider this matter separately from its main inquiry into marriages and customary unions of Black persons so that a solution could be found as soon as possible.

1.2 The Commission considered the request but came to the conclusion that the status and contractual capacity of Black females formed such an integral part of the whole inquiry that it could not properly be considered in isolation. The Minister was informed accordingly.

1.3 In January 1985 the Director-General of the Department of Co-operation and Development requested the Secretary of the Commission to comment on a proposal to repeal sections 11(3)(b) and 23ter (1) of the Black Administration Act, 38 of 1927. It was stated that building societies were reluctant to grant loans to Black female breadwinners in respect of leasehold properties because they felt that their security was at risk in view of the status and contractual capacity of females under customary law. Section 11(3)(b) of the Black Administration Act, 38 of 1927, provides that a Black woman who is a partner in a customary union and who lives with her husband shall be deemed to be a minor and that her husband shall be deemed to be her guardian. Section 23ter (1) of the said Act provides that a marriage officer may not solemnize the marriage of a Black female who is a major (in Natal and the Transvaal) unless the consent in writing of her father or other legal guardian is obtained.

1.4 In his reply the Secretary stated that there was in principle no objection to the proposed repeal of the said provisions. Doubt was however expressed as to whether the repeal of these provisions would resolve all the difficulties in the way of granting loans to Black females.

1.5 In March 1985 the Minister requested the Commission to reconsider its view referred to in paragraph 1.2 above. The Commission conceded to the request and gave attention to the matter of leasehold rights for Black females so that any amending legislation that might be necessary could still be passed by Parliament during its current Session.

\* Problems experienced by Building Societies

1.6 In view of the urgency of the matter, a committee of the Commission and members of the Secretariat held discussions with representatives of the Association of Building Societies of South Africa and with senior officials of the Department of Co-operation and Development. In essence it appeared that building societies were of the opinion that their position was insecure in view of the possible application of customary law to Black females to whom loans had been granted. Their position was stated in a memorandum as follows:

- . Female applicants to building societies for mortgage loans may well describe themselves as "single" or as "widowed", and may well never have entered into or contemplated a customary union.
- . There is no way in which the building societies are able to ascertain whether or not the declaration by a Black woman that she is single or widowed is correct.
- . Even if a false declaration were made by a woman who is a partner in a customary union to the effect that she is not married by customary union, the loan granted would be irrecoverable and the mortgage bond passed would be a nullity because of her lack of status.
- . The mortgagor may further be at any time exposed to the risk of a Black male appearing and alleging that he paid lobolo for the borrower, and that a customary union exists and that she mortgaged the property without his knowledge or consent. The building society concerned would have no way of disproving such an allegation and the borrower would then be free from any

further liability to repay the loan and the mortgage bond would have to be cancelled without payment.

## 2. LEASEHOLD PROPERTY

\* The Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945)

2.1 Leasehold is at present dealt with in sections 6A to 6D of this Act. Section 6A(1)(a) of the Act provides as follows:

Notwithstanding the provisions of this Act or of any other law to the contrary, an administration board may in respect of land acquired by it under section 12 of the Black Affairs Administration Act, 1971 (Act No. 45 of 1971), or of which it is the registered owner, upon application made to it in the prescribed manner and on the conditions prescribed generally or approved by the Minister in any particular case, grant in the prescribed manner in respect of any surveyed site situated on such land, a right of leasehold for a period of ninety-nine years to a qualified person.

In terms of section 1 a "qualified person", in relation to a right of leasehold, means -

a Black referred to in section 10(1)(a) or (b) who is not a Black referred to in section 12(1), and any descendant of such a Black who is a Black referred to in section 10(1)(a) or (b), and includes an association and also any Black who is not a qualified person but falls within a category of Blacks recognized by the Minister by notice in the Gazette as qualified persons for the purpose of sections 6A and 6B and the regulations relating thereto, or who has in any particular case been expressly recognized by the Minister as a qualified person for such purposes, as well as any person who has in general or in any particular case been expressly recognized by the Minister, subject to such conditions as may be determined by the Minister, as a qualified person for the said purposes: Provided that the said conditions may also provide that a person shall be recognized as a qualified person for a particular purpose or for a particular period or until the occurrence of a particular event only;

2.2 Section 6B of this Act provides for the establishment of a registration office at the office of each Chief Commissioner at which the registrar concerned -

- . shall establish and maintain an effective system of registration relating to all the surveyed sites that are situated within the area of jurisdiction of such a commissioner, and shall in particular keep a register as prescribed of such sites; and
- . shall record every transaction, dealing or occurrence relating to a surveyed site, which is required to be, or may be, registered in terms of section 6A or this section or the regulations relating thereto, against the entry of that surveyed site in the register or in the appropriate record relating thereto.

\* The Black Communities Development Act, 1984 (Act 4 of 1984)

2.3 This Act, with the exception of Chapter VI, came into operation on 1 April 1984. When Chapter VI (sections 52 to 57) comes into operation, the relevant provisions of the Blacks (Urban) Areas Consolidation Act, 1945, referred to above, will be repealed. Leasehold will then be regulated by sections 52 to 57 of this Act. Section 52(1) of the Act provides as follows:

A board, local authority or township developer may -

- (i) in the case of a board, in respect of land of which it or the State is the registered owner or which vests in it or the State or which has been made available to such board in terms of the provisions of section 34(9); and
- (ii) in the case of a local authority or township developer, in respect of land made available to such local authority or developer in terms of the provisions of section 34(9),

on application made to it in the prescribed manner and on the conditions prescribed generally or approved by the Minister in any particular case, grant to a competent person in the prescribed manner in respect of any leasehold site situated on such land, a right of leasehold for a period of 99 years calculated as from the date of the granting thereof: Provided that where such a right of leasehold is in terms of this Act transferred to another competent person in terms of this Act, the currency shall be for a like period of 99 years, calculated as from the date of such transfer.

(b) A condition subject to which leasehold is granted in respect of a leasehold site under paragraph (a) may provide that such site shall be used solely by Blacks: Provided that where leasehold in respect of any such site is granted to any competent person who is not a Black, a condition restricting the use of such site to residential purposes for Blacks shall not prohibit such competent person from developing and administering such site for the said purposes.

In terms of section 52(2) of the Act a leasehold may be acquired by -

- . a Black referred to in section 10(1)(a) or (b) of the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945), who is not a Black referred to in section 12(1) of the Act;
- . the wife or partner in a customary union of a person contemplated in the preceding paragraph upon the decease of such person;
- . a person who is a descendant of a person referred to in the first category above who acquired such leasehold by inheritance;
- . a township developer who has been approved by the Minister for the purposes of holding such leasehold;
- . an association or a person who has been approved by the Minister for the holding of such leasehold;
- . a person belonging to a category of persons approved by the Minister by notice in the Gazette.

2.4 In terms of section 53 of the Act registration of a leasehold will be registered in a deeds registry. Chapter VI of the Act has not come into operation pending the transfer of duties from the Chief Commissioners to the deeds registries.

2.5 Nothing in these provisions prevents a Black female from acquiring leasehold rights in her own name, provided that she is a competent person in terms of the provisions of the said enactments.

### 3. CONTRACTUAL CAPACITY

3.1 From the point of view of building societies the difficulty lies in the extent to which customary law might inhibit the contractual capacity of Black females and their locus standi in judicio with regard to leasehold and



mortgage transactions. Section 11(3) of the Black Administration Act 38 of 1927 provides as follows:

The capacity of a Black to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European: Provided that -

- (a) if the existence or extent of any right held or alleged to be held by a Black or of any obligation resting or alleged to be resting upon a Black depends upon or is governed by any Black law (whether codified or uncodified) the capacity of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law;
- (b) a Black woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.

3.2 Although it is fairly certain that leasehold and related transactions entered into by a Black female would be regulated by the common law the fact remains that such a female who enters into a customary union becomes subject to customary law with regard to her status. Even if section 11(3)(b) should be repealed, she would still be subject to customary law in terms of which she is in a subordinate position and subject to the household authority exercised by her husband which is akin to guardianship. Section 11(3)(b) is merely an expression of her position in accordance with customary law. Furthermore, section 11(3) merely deals with contractual capacity and locus standi in judicio. It is by no means certain that a Black female who acquired property before her customary union may after entering into a customary union exercise any rights in respect thereof. Moreover, the difficulty of the building societies lies in the fact that it might be very difficult to ascertain whether or not a Black female is married in accordance with customary law. Such marriages are, except in Natal, not registered; and even in Natal, where such unions must be registered, failure to register does not make the customary union void.

#### 4. RECOMMENDATIONS

4.1 The Commission intends to deal fully with the recognition of the customary marriage and its legal consequences in its main inquiry. At this stage, and in view of the urgency of the matter, the Commission is

confining itself to finding a workable solution to the problems related to the acquisition of leasehold rights by Black females. These problems, in so far as they in fact exist, arise from the fear that the woman's capacity to engage in certain transactions might be inhibited by her being subject to customary law.

4.2 In order to eliminate all uncertainty the Commission recommends that legislation should be passed to provide that a Black woman, whether she is a partner in a customary union or not, shall -

- (a) have the capacity to acquire or dispose of a right of leasehold without assistance;
- (b) have the capacity to mortgage and otherwise deal with such right of leasehold;
- (c) have the capacity to borrow money against the security of a mortgage over such right of leasehold;
- (d) have locus standi in judicio in all matters relating to such right of leasehold; and
- (e) retain full title to such right of leasehold.

A draft Bill to give effect to these recommendations is attached.

4.3 The Association of Building Societies has indicated that the Bill would solve the difficulties at present encountered by building societies in making loans available to Black females. The Department of Co-operation and Development has also indicated that it supports the proposed provisions. In view of the urgency of the matter, the views of the Black community were not obtained. It appears, however, that very few females who would be affected by the provisions would be involved in customary unions. Moreover, the principle that Blacks may be exempted from Black law and custom, either completely or to a specified extent, is already embodied in legislation - vide section 31 of the Black Administration Act 38 of 1927 and section 28 of the Natal Code of Bantu Law.

4.4 The Commission wishes to emphasize that this measure is an interim solution, pending the outcome of its main inquiry.

BILL

To amend the Black Administration Act, 1927, so as to regulate the powers of Black women with regard to the acquisition of leasehold rights, and to provide for incidental matters.

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Introduced by the Minister of Co-operation and Development

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BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows: -

Insertion of section 11A in Act 38 of 1927.

1. The following section is inserted in the Black Administration Act, 1927 (Act No. 38 of 1927), after section 11:

"Capacity of Black women in respect of leasehold.

11A. Notwithstanding any law affecting the status or contractual capacity of any person by virtue of Black law and custom, the capacity of a Black woman to perform any juristic act with regard to the acquisition by her of a right of leasehold or sectional leasehold under the Blacks (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945), or the Black

Communities Development Act, 1984 (Act No. 4 of 1984), or the disposal of any such right or the borrowing of money on security of such right or the performance of any other juristic act in connection with such right or to enforce or defend her rights in connection with such right in any court of law, shall be determined and any such rights acquired by her shall vest in her and any obligation incurred by her shall be enforceable as if she were not subject to Black law and custom."

Short title.

2. This Act shall be called the Black Administration Amendment Act, 1985.