



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: D3120/2025

In the *ex parte* application of:

B[...] **M[...]** **M[...]**

First Applicant

S[...] **D[...]** **B[...]** **M[...]**

Second Applicant

N[...] **C[...]** **C[...]**

Third Applicant

ORDER

The following order shall issue:

1. The antenuptial contract entered into by the first, second and third applicants to regulate the proprietary consequences of their polygamous customary marriage, a copy of which is attached to the notice of motion under case number D3120/2025 and marked "A", is hereby approved for registration by the Registrar of Deeds, KwaZulu-Natal.
2. The first applicant is directed to deliver the original contract, with its amendments as reflected in annexure "A" approved by this Court in terms of paragraph 1 hereof, to the Registrar of Deeds, KwaZulu-Natal for registration against the names of the first, second and third applicants.
3. The registrar of this Court is directed to furnish each of the applicants with a

certified copy of the contract and shall cause this order and the certified copy of the contract to be sent to the Registrar of Deeds, KwaZulu-Natal.

4. The Registrar of Deeds is directed, upon production of the copy of this court order and the contract marked annexure "A", to register the contract provided it complies with all the internal requirements of the deeds office, failing which, the Registrar of Deeds must assist the applicants to ensure that the document is compliant for registration.
5. There shall be no order as to costs.

JUDGMENT

NOTYESI AJ

Introduction

[1] The first applicant is a prospective husband of the second and third applicants in an intended polygamous customary marriage which is to be celebrated by the parties in due course. This is an *ex parte* application instituted by the three applicants, jointly, for the endorsement of their agreement regarding the proprietary consequences in respect of the aforesaid polygamous marital relationship.

[2] In the notice of motion, the applicants set out the relief sought from this Court as follows:

- '1. The antenuptial contract entered into by the First, Second and Third Applicant to regulate the proprietary consequences of their polygamous customary marriage, annexed to this Notice of Motion as "A", is hereby approved.
2. The First Applicant is ordered, within 30 days of the date of granting of this order, to deliver the agreement in annexure "A" approved by this Court, as amended, to the Deeds Registry Office against the names of the parties.
3. There shall be no order as to costs of this application.
4. Further/or alternative relief is granted insofar this may be deemed appropriate.'

[3] Prior to concluding the agreement regarding their customary marriages, the

first and second applicants were spouses in a civil marriage in community of property. That marriage was dissolved by a decree of divorce. The first and second applicants agreed to remarry after the divorce according to customary law. Indeed, following the decree of divorce, the first and second applicants purported to remarry in terms of the Recognition of Customary Marriages Act 120 of 1998 (the Act). The second applicant had granted permission for the first applicant to enter into a customary marriage with the third applicant as a second wife. That consent would bring into existence a polygamous marriage. The contract sought by the applicants is intended to govern the proprietary consequences of that prospective polygamous marriage. Pending the granting of the relief sought in these proceedings, the marriage of the third applicant has not been celebrated.

The Applicants' Case

[4] According to the first applicant, on 10 July 2004, he entered into a civil marriage in community of property with the second applicant. The first applicant alleges that their civil marriage was preceded with formalities of a customary marriage. In this regard, the first applicant had alleged that they followed the Zulu customs relating to marriage, such as negotiations conducted by the nominated family representatives (*abakhongi*), the payment of *lobola*, the exchange of gifts and the celebration of the customary marriage. For the reasons that both the first and second applicants desired to have a marriage certificate, they agreed to conclude a civil marriage. It was the marriage that was concluded on 10 July 2004, after the customary marriage had been concluded between the first and second applicants.

[5] On or about 2018, the first applicant approached the second applicant seeking her consent to marry a second wife. Following their discussions, the second applicant consented to the first applicant marrying a second wife. The first applicant had intended to marry the third applicant as a second wife. Based on the agreement between the first and second applicant regarding the second marriage, the families were advised accordingly. The negotiations with the third applicant's family were accordingly commenced as the consent had been given by the second applicant. The third applicant had also consented to marry the first applicant in terms of customary law as a second wife.

[6] During this period of negotiations, the first applicant was advised that as he is already a spouse in a civil marriage, he is not legally permitted to enter into another marriage. He was accordingly advised that he would have to first terminate the civil marriage with the second applicant.

[7] On or about 22 May 2022, both the first and second applicants approached the attorney, Ms Nosabelo Mkhize for legal advice relating to their civil marriage and the intended second marriage. They were advised that there was no legal dispensation for the change of a civil marriage which is in community of property to a customary marriage and that they must just obtain a decree of divorce. Indeed, they gave instructions for the attorney to institute divorce proceedings in respect of the civil marriage. The divorce proceedings were instituted before the Regional Court, Durban, under case number 1279/2022. As part of those divorce proceedings, the first and second applicants entered into a settlement agreement as the divorce was not the true intention. The deed of settlement mainly regulates the distribution of their properties and the maintenance of the family by the first applicant. A decree of divorce was granted on 29 October 2024.

[8] The first and second applicants continued to live as husband and wife despite the grant of the decree of divorce. The first and second applicants had agreed that the second applicant would retain sole and exclusive ownership of the marital home situated at [...] B[...] Place, Woodlands, Montclair, KwaZulu-Natal, and all the contents in it. The first applicant would retain possession of the motor vehicle as well as interest in his pension held with eThekweni KZN Pension Fund. That arrangement was in accordance with the deed of settlement on the divorce proceedings.

[9] The first applicant thereafter sought and obtained a piece of land to build a house for the third applicant. This house was built for the third applicant at R[...] Road, Bhekulwandle, Dooneside, KwaZulu-Natal.

[10] On 21 November 2024, the first, second and third applicants entered into a written agreement which would regulate the proprietary consequences of their marriage. In terms of that agreement, both the second and third applicants would

retain possession and control of their respective households and contents. There are two children born out of the marriage between the first and second applicants. There are no children in respect of the relationship between the first and third applicants. There are no creditors in respect of the parties.

[11] Essentially, it is that agreement that the parties seek for the court to approve in order for them to conclude their polygamous marital relationship.

[12] The application was heard by this Court on 25 July 2025. On reading of the application, this Court became troubled by the allegations made in the founding affidavit. The relevant part reads as follows:

‘In addition, and since the decree of divorce was granted as only a legal formality to enable me to enter into a polygamous customary marriage with both the Second and Third Applicant, the Second Applicant retains her house and its contents in our homestead at Hlokozi, as my wife.’

[13] The summons and the particulars of claim supporting the divorce action were requested by this Court. On reading of the particulars of claim, it is self-evident that the divorce order was sought on the grounds of the civil marriage having been irretrievably broken down. On the face of those allegations and the averments in the founding affidavit, this Court invited the applicants to file a supplementary affidavit for the explanation of the apparent contradictions. This Court had an impression that, when the divorce was sought the court was misled in granting the decree of divorce.

[14] On 12 August 2025, a supplementary affidavit, together with confirmatory affidavits by all three applicants, was filed. The explanation provided in the supplementary affidavit, is that the applicants had sought and obtained an advice from an attorney. The allegation is that when consulting with the attorney, the first and second applicants had indicated their true intentions, which was to enter into a customary marriage for the first applicant to marry a second wife in terms of customary law. Indeed, this aspect appears in the particulars of claim and is set out as follows:

‘6.5 the Plaintiff had deepened extreme conversations with the Defendant regarding taking a second wife. She first agreed to it, and it was time to make an application to change the

marriage regime, she denied ever speaking about such an agreement. The Plaintiff explained that this was a requirement imposed on him by the ancestors. She continued to disallow him to take a second wife. The Plaintiff has tried reconciliation, but all had been in vain.'

[15] The first applicant alleges that the disagreement at the time regarding the second marriage led to the breakdown of the civil marriage and therefore, the averments in the summons were not misleading. The parties further reconciled and the second applicant consented to the second marriage and the polygamous relationship subsequent to the grant of the divorce.

[16] The parties were requested to file submissions on whether the order sought should be granted. Heads of argument, which were mostly helpful, were delivered on behalf of the applicants.

Issues for Determination

[17] The issues that have fallen for determination by this Court are as follows:

- (a) Whether the civil divorce had overridden the prior customary marriage entered into by the first and second applicants;
- (b) The apparent contradictions between the particulars of claim in the civil divorce and the founding affidavit; and
- (c) Whether the applicants are entitled to an order for the regulation of proprietary consequences of their prospective polygamous customary marriage.

Applicants' submissions

[18] Mr *Mlondo*, counsel for the applicants, had contended that the application is founded on the provisions of ss 6 of s 7 of the Act which provides:

'A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.'

[19] Counsel's contention, as I understand, is that the first and second applicants are already spouses in an existing customary marriage. That marriage was

consumed prior to the civil marriage when all formalities of a customary marriage were complied with and the customary marriage celebrated in terms of s 3(1) of the Act which sets out the requirements for the validity of customary marriages as follows:

‘(1) For a customary marriage entered into after the commencement of this Act to be valid-

(a) the prospective spouses-

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law;
and

(b) the marriage must be negotiated and entered into or celebrated in accordance

with customary law.’

[20] The customary marriage between the first and second applicants was never dissolved. Mr *Mlondo* submitted that a customary marriage cannot be dissolved by a civil marriage divorce. The submission, in essence, is that notwithstanding the decree of divorce between the first and second applicants, the customary marriage still subsist. Accordingly, based on this submission, the first applicant would be entitled to enter into a second customary marriage provided that he obtains the consent of the second applicant. In this case, the consent of the second applicant had been obtained and the third applicant had also consented to be married as a second wife according to customary law. On that basis, the parties are obliged to regulate the consequence of their proprietary system of the marriage. In such circumstances, counsel contended, the court should act in terms of s 7(6) of the Act and approve the contract provided by the parties.

[21] Insofar as there is a suggestion that the first and second applicants were not honest in obtaining their divorce order, counsel submitted that the explanation provided in the supplementary affidavit is sufficient and rational. Counsel maintained that it should be borne in mind that the first and second applicants had obtained legal advice prior to instituting divorce proceedings in respect of their civil marriage. In these circumstances, counsel had contended that the relief sought by the applicants should be granted.

Discussion and Analysis

[22] It is common cause that the first and second applicants had, prior to their civil marriage, concluded a customary marriage. Both the first and second applicants were above the age of 18 years, the customary marriage was negotiated as that is evidence by payment of *lobola* and that marriage was celebrated as that is evidence by the exchange of gifts. It cannot be disputed that a customary marriage was concluded between the first and second applicants.

[23] The central question would be whether the decree of divorce with regard to the civil marriage had automatically terminated the customary marriage. My view is that the civil divorce cannot terminate a customary marriage. The customary marriage was a separate legal act which had specific requirements and formalities. These formalities or consequences could never have been overridden by a subsequent civil marriage or civil divorce. In the absence of a dissolution of the customary marriage, the customary marriage survived the civil divorce. To hold that the civil divorce dissolved the customary marriage would be to invoke the antiquated and highly offensive repugnancy principle which subjugated customary law to civil law. This position was altered immutably when the interim Constitution came into effect and expressly recognised customary law, subject to the Bill of Rights. Section 2(1) of the Act provides that:

‘(1) A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage.’

[24] Based on the above reasons, I accept that the first and second applicants are parties to an existing customary marriage. Accordingly, the second applicant had correctly given her consent for the first applicant to enter into a customary marriage with the third applicant. In the particulars of claim during the civil divorce proceedings, the first applicant had made it clear the true intention of the divorce, which was to enable him to marry a second wife. I have no doubt that the parties, throughout during their divorce proceedings, had never intended for a divorce. It is relevant to refer to the extract from the particulars of claim during the divorce proceedings and I directly quote therefrom:

'6.5 the Plaintiff had deepened extreme conversations with the Defendant regarding taking a second wife. She first agreed to it, and it was time to make an application to change the marriage regime, she denied ever speaking about such an agreement. The Plaintiff explained that this was a requirement imposed on him by the ancestors. She continued to disallow him to take a second wife. The Plaintiff has tried reconciliation, but all had been in vain.'

[25] The first and second applicants may have purported to remarry after the divorce, that does not change the fact that they were already married in terms of customary law, which had remained valid notwithstanding the civil divorce. In *Monyepao v Ledwaba and Others*¹ it was stated-

'[18] There is no factual basis for finding that Ms Ledwaba's customary marriage to Mr Phago was terminated – presumably by divorce – in February 2008. [I]n order for the marriage to have been brought to an end prior to the death of Mr Phago, it would have been necessary for a decree of divorce to have been issued in terms of s 8 of the Recognition of Customary Marriages Act 120 of 1998 (the Act). Section 8(1) provides that a customary marriage 'may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage'.

[26] The parties had made no allegation of a divorce in terms of s 8(1) of the Recognition of Customary Marriages Act, let alone proving that it had occurred. On the facts of the case, it is doubtful that the parties had ever intended to divorce from their customary marriage and therefore, s8(1) was never in their minds.

[27] In these circumstances, I agree with the submission that the application is correctly founded on the provisions of s 7(6) of the Act.

[28] I turn to address the question whether a case had been made by the applicants for the approval of their contract to regulate their marriage system. It is apposite to consider the requirements set out under s 7(7) of the Act regarding factors to be considered by the court when faced with an application under ss 6 of the Act. Subsection 7 of the Act reads:

'(7) When considering the application in terms of subsection 6-

¹ *Monyepao v Ledwaba and Others* [2020] ZASCA 54

- (a) the court must-
 - (i) in the case of a marriage which is in community of property or which is subject to the accrual system-
 - (aa) terminate the matrimonial property system which is applicable to the marriage; and
 - (bb) effect a division of the matrimonial property;
 - (ii) ensure an equitable distribution of the property; and
 - (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted;
- (b) the court may-
 - (i) allow further amendments to the terms of the contract;
 - (ii) grant the order subject to any condition it may deem just; or
 - (iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.'

[29] In this case, the three applicants have entered into an agreement regarding proprietary consequences of their customary marriages. The contract had been entered into in respect of each wife. In respect of the second applicant, the terms of the contract are similar and identical to those that were agreed to during the civil divorce settlement. The second applicant will retain control and exclusive ownership of the household. A home has been built for the second wife, and she will have exclusive ownership with regard to that property. I have carefully considered the contract dated 21 November 2024, which is attached to the notice of motion. I am satisfied with the regulation the proprietary consequences of the applicants' intended polygamous marriages. In these circumstances, I am inclined towards granting the relief sought by the applicants.

[30] Section 7(8) of the Act provides that:

'(8) All persons having a sufficient interest in the matter, and in particular the applicants' existing spouse or spouses and his prospective spouse, must be joined in the proceedings instituted in terms of subsection (6).'

[31] Section 7(9) of the Act provides that:

'(9) If a court grants an application contemplated in subsection (4) or (6), the registrar or clerk of the court, as the case may be, must furnish each spouse with an order of the court

including a certified copy of such contract and must cause such order and a certified copy of such contract to be sent to each registrar of deeds of the area in which the court is situated.'

[32] On the facts of this case, this Court would be justified to issue an order sought by the applicants to regulate the proprietary consequences of their polygamous customary marriage. The order and the contract shall be dealt with in terms of ss 9 of s 7 of the Act.

[33] I turn to the contradictions contained in the founding affidavit and the particulars of claim in support of the divorce action. At the outset, I accept the explanation given by the first and second applicants in the supplementary affidavit. In my view, the first and second applicants had intended to change their marriage in order to permit for the first applicant to marry the third applicant. The divorce was never their true intention and instead, it was an idea brought by the legal representative to them.

[34] I do caution legal representatives to properly present the case of their clients in accordance with their instructions. It is self-evident, in these proceedings, that the applicants had always sought to change the marriage. The parties never intended for a divorce. The litigant who approaches a legal representative, do so on an understanding that the legal representative possesses expertise regarding the advice he or she gives. In this case, it was simply incorrect for the attorney to inform the first applicant that he has no option other than to obtain a decree of divorce.

[35] This Court has no doubt that, based on the objective available evidence, the court hearing divorce was informed of the true intention of the parties and the reasons for the divorce. Whether in those circumstances, the court was entitled to issue a decree of divorce, is not a question that this Court had to decide. It is sufficient to sound a caution that courts hearing divorce proceedings should be careful in the analysis of the evidence so as to establish the true intention of the parties on whether they seek divorce or some other remedies.

Conclusion

[36] I am satisfied that the applicants have made out a case for the grant of the

relief sought in the notice of motion. Accordingly, I will grant such relief. This was an *ex parte* application, no order as to costs will be made. I am also satisfied that all persons having sufficient interest in the matter, and in particular the first applicant's existing spouse and the prospective spouse, are aware of these proceedings. They have filed confirmatory affidavits as the second and third applicants. They have also filed confirmatory affidavits in support of the supplementary affidavit. The second applicant had two children and the third applicant had no children. The contract sufficiently provides for each spouse and the circumstances relating to each house of the polygamous marriage.

Order

[37] In the result, the following order shall issue:

1. The antenuptial contract entered into by the first, second and third applicants to regulate the proprietary consequences of their polygamous customary marriage, a copy of which is attached to the notice of motion under case number D3120/2025 and marked "A", is hereby approved for registration by the Registrar of Deeds, KwaZulu-Natal.
2. The first applicant is directed to deliver the original contract, with its amendments as reflected in annexure "A" approved by this Court in terms of paragraph 1 hereof, to the Registrar of Deeds, KwaZulu-Natal for registration against the names of the first, second and third applicants.
3. The registrar of this Court is directed to furnish each of the applicants with a certified copy of the contract and shall cause this order and the certified copy of the contract to be sent to the Registrar of Deeds, KwaZulu-Natal.
4. The Registrar of Deeds is directed, upon production of the copy of this court order and the contract marked annexure "A", to register the contract provided it complies with all the internal requirements of the deeds office, failing which, the Registrar of Deeds must assist the applicants to ensure that the document is compliant for registration.
5. There shall be no order as to costs.

APPEARANCES:

Counsel for the applicants : Mr Mlondo

Attorneys for the applicants : Dlodlu Attorneys
Glenwood

Date Heard : 21 August 2025

Date Delivered : 22 September 2025