

MARRIAGE BILL

[B43-2023]

OFFICE OF THE CHIEF STATE LAW ADVISER

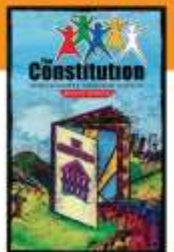
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Women's Legal Centre Trust v President of the Republic of South Africa and Others [2022] ZACC 23

This judgment was decided on by the Constitutional Court on 28 June 2022

1. The Constitutional Court declared the Divorce Act, 1979 (Act No. 70 of 1979) and the Marriage Act, 1961 (Act No. 25 of 1961) to be inconsistent with-
 - (a) the following sections of the Constitution of the Republic of South Africa, 1996:
Section 9 - Equality;
section 10 - Human dignity;
section 28 - Children; and
section 34 - Access to courts; and
 - (b) the common law definition of marriage as inconsistent and invalid to the extent that it excludes Muslim marriages.
2. The declarations of invalidity were suspended for a period of 24 months until 27 June 2024 and extended to 27 June 2026 to enable the President and Cabinet, together with Parliament, to remedy the foregoing defects by either amending existing legislation, or initiating and passing new legislation, in order to ensure the recognition of Muslim marriages as valid marriages for all purposes in South Africa.
3. As a result of this judgment, the Marriage Bill [B43-2023] was introduced in Parliament on 13 December 2023.



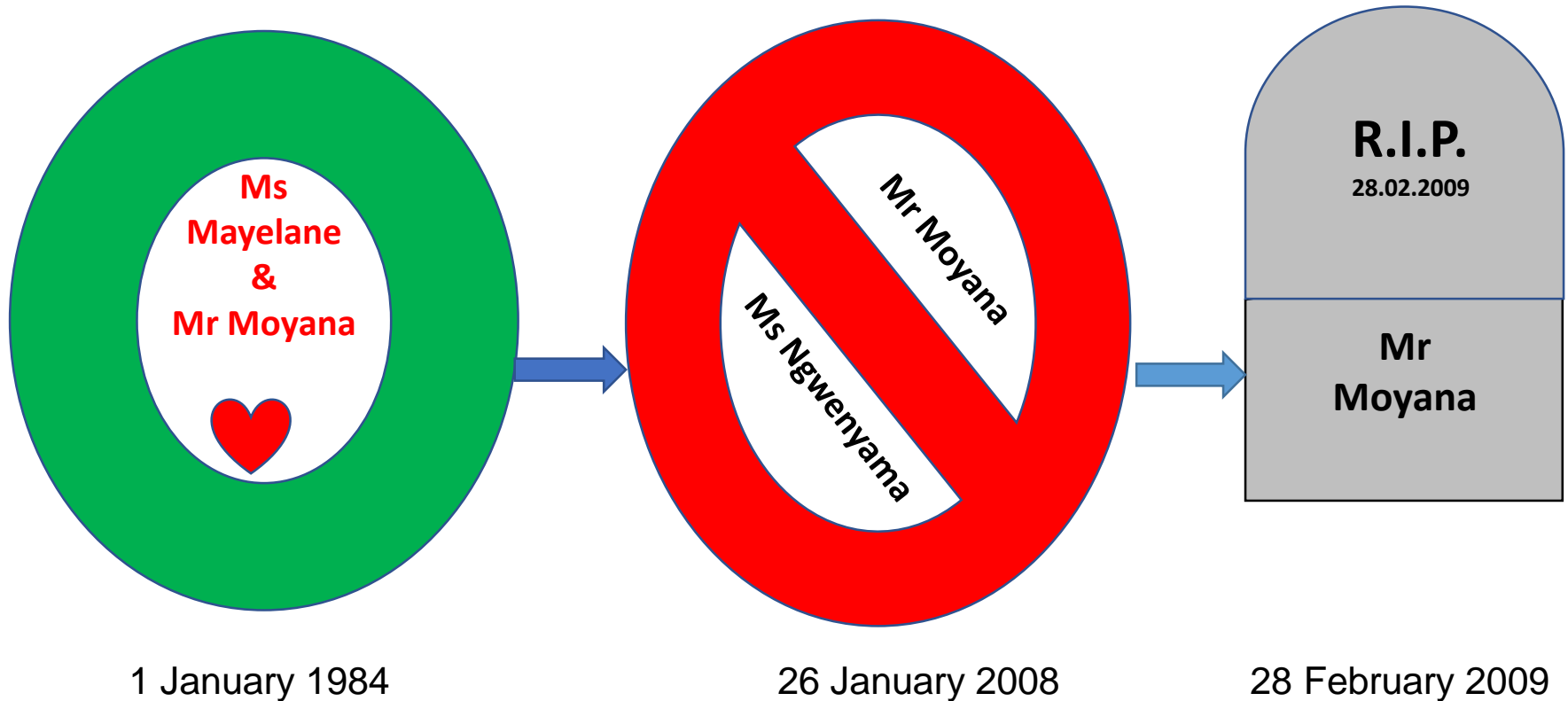
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BACKGROUND



Customary marriage

Customary marriage –
no consent from Ms Mayelane
i.r.o. customary marriage
between
Mr Moyana & Ms Ngwenyama



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CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Chapter 2 of the Constitution of the Republic of South Africa, 1996 (“Constitution”) provides for the Bill of Rights.

1. **Section 7 of the Constitution** states the following on the rights of all people:

“Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”.



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CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

2. **Sections 9 and 10 of the Constitution** emphasise the constitutional rights of a person to equality and human dignity and reads as follows:

“Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Human dignity

10. Everyone has inherent dignity and the right to have their dignity respected and protected.”.



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CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

3. **Section 15 of the Constitution** provides for freedom of religion, belief and opinion and reads as follows:

“Freedom of religion, belief and opinion

15. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that—
- (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising—
- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.”.



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4. **Section 39 of the Constitution** provides for the interpretation of the Bill of Rights and reads as follows:

“Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum—
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”.



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CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

5. **Section 211 of the Constitution** provides for the recognition of traditional leaders and section 211(3) reads as follows:

“Recognition

211. ...

- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”.

The application of customary law is therefore subject to the Constitution and the development of customary law must promote the spirit, purport and objects of the Bill of Rights.



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Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)

1. **Section 3 of the Recognition of Customary Marriages Act, 1998** provides for the requirements for the validity of customary marriages and section 3(1) reads as follows:

“Requirements for validity of customary marriages

3. (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.

....”

The validity of a customary marriage therefore also requires prospective spouses to consent to be married to each other under customary law and that the marriage is negotiated and entered into or celebrated in accordance with customary law.



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Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)

2. **Section 6 of the Recognition of Customary Marriages Act, 1998** provides for the equal status and capacity of spouses and reads as follows:

“Equal status and capacity of spouses

6. A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.”.

3. Section 7 of the Recognition of Customary Marriages Act, 1998 provides for the proprietary consequences of customary marriages and contractual capacity of spouses and section 7(6) reads as follows:

“Proprietary consequences of customary marriages and contractual capacity of spouses

7. ...

(6) 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.”.



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Mayelane v Ngwenyama & another [2010] JOL 25422 (GNP)

This judgment was decided on by the **High Court** on 24 March 2010

1. The High Court declared-
 - (a) that the customary marriage between Ms Mayelane and Mr Moyana was valid and that Ms Mayelane was entitled to have her marriage to Mr Moyana registered; and
 - (b) that the purported marriage between Ms Ngwenyama and Mr Moyana was void.
2. The High Court interpreted section 7(6) of the Recognition of Customary Marriages Act, 1998 as an obligatory requirement for the validity of a subsequent customary marriage and held that the purported marriage between Ms Ngwenyama and Mr Moyana was void as the purported marriage was not preceded by the conclusion of a contract as envisaged in section 7(6) of the Recognition of Customary Marriages Act, 1998.
3. Ms Ngwenyama then took the matter on appeal.



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Ngwenyama v Mayelane & another 2012 (10) BCLR 1071 (SCA)

This judgment was delivered by the **Supreme Court of Appeal** on 1 June 2012

1. The Supreme Court of Appeal ordered-
 - (a) that the customary marriage between Ms Mayelane and Mr Moyana which is valid must be registered;
 - (b) that the subsequent customary marriage between Ms Ngwenyama and Mr Moyana is valid, but out of community of property.
2. The Supreme Court of Appeal therefore disagreed with the High Court and held that the validity of a customary marriage is in section 3 and not section 7(6) of the Recognition of Customary Marriages Act, 1998 which provides for proprietary consequences and that the consequence of non-compliance was adequately met by treating subsequent customary marriages as being valid, but out of community of property.

Ms Mayelane then took the matter to the Constitutional Court.



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Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC)

This judgment was decided on by the **Constitutional Court** on 30 May 2013

1. The Constitutional Court at paragraph [21] stated the following regarding the conclusions reached by the High Court and Supreme Court of Appeal:

“[21] ..the different conclusions reached by the High Court and the Supreme Court of Appeal regarding the interpretation of the Recognition Act indicate that a measure of authoritative certainty is appropriate and desirable...”

2. The Constitutional Court at paragraphs [71] and [76], stated the following regarding customary law and referred herein to ***Gumede (Born Shange) v President of the RSA & Others [2008] JOL 22879 (CC)***:

“[71] Are the first wife’s rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that “even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children”. While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution.

[76] ...When section 3(1)(b) thus speaks of customary law marriages, it necessarily speaks of marriages in accordance with human dignity and fundamental equality rights upon which our Constitution is based...”



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Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC)

This judgment was decided on by the Constitutional Court on 30 May 2013

3. The Constitutional Court, at paragraphs [68], [72], [73] and [74] stated the following regarding the right to equality and dignity:

“[68] The right to dignity, together with the right to life, has been held by this Court to be ‘the most important of all human rights, and the source of all other personal rights’ in the Bill of Rights ... dignity is not merely a value, but a ‘justiciable and enforceable right that must be respected and protected.

[72] ...where subsequent customary marriages are entered into without the knowledge or consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possible adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife’s equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent.



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[73] ...the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity. However, a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent. Respect for human dignity requires that her husband be obliged to seek her consent and that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage.

[74] Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent.”.



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Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC)

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4. The Constitutional Court, at paragraphs [78] and [80] stated the following regarding the equal status and capacity of spouses:

“[78] Four things need to be noted from the provisions of section 6 of the Recognition Act. The first is that the section affords ‘full status and capacity’ to a wife ‘in a customary marriage’...that meant a customary marriage based on the consent of both spouses to the marriage. The second is that the wife’s full status and capacity stems from ‘the basis of equality with her husband’. The third is that the basis of equality is subject only to ‘the matrimonial property system governing the marriage’, a system which would either have been consented to by the wife or would have been in community of property and of profit and loss between the spouses by virtue of the law. The fourth is that the full status and capacity of a wife in a customary marriage is not restricted by the wording of the section.

[80] ...the first wife in a customary marriage has a material interest in the matrimonial property system regulating further marriages...section 7(4)(b) and (8) require existing spouses to be joined in proceedings relating to proposed changes flowing from further customary marriages entered into before and after the commencement of the Recognition Act by their husbands.”.



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Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC)

This judgment was decided on by the Constitutional Court on 30 May 2013

5. The Constitutional Court, at paragraphs [85] and [87] found the following regarding the requirement of consent:

“[83] ...A customary marriage where the first wife has consented to the further marriage conforms to the principles of equality and dignity as contained in the Constitution. Where the first wife does not give consent, the subsequent marriage would be invalid for non-compliance with the Constitution.

[85] The finding that the consent of the first wife is a necessary dignity and equality component of a further customary marriage in terms of section 3(1)(b) of the Recognition Act means that, from now on, further customary marriages must comply with that consent requirement. A subsequent marriage will be invalid if consent from the first wife is not obtained...

[87] ...Xitsonga customary law, even before its development in this judgment, required that the first wife be informed of her husband's impending subsequent marriage. There is no evidence to suggest that Ms Mayelane was ever informed of the impending further marriage of Mr Moyana to Ms Ngwenyama. It is therefore clear that the latter marriage is invalid for want of compliance with the requirements of Xitsonga customary law as they existed at the time of the purported marriage.”.



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Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC)

This judgment was decided on by the Constitutional Court on 30 May 2013

6. The Constitutional Court at paragraph [75] concluded that:

“[75] In accordance with this Court’s jurisprudence requiring the determination of living customary law that is consistent with the Constitution, we thus conclude that Xitsonga customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. This conclusion is in accordance with the demands of human dignity and equality...”

7. Therefore, the Constitutional Court at paragraph [89] held that:

“[89] 5. Xitsonga customary law is developed to require the consent of the first wife to a customary marriage for the validity of a subsequent customary marriage entered into by her husband.”



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N.R.M v F.N and Others (943/2023) [2025] ZAMPMBHC 53

This judgment was delivered by the **High Court** on 17 June 2025 and upheld the precedent that was set in *Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC)*

28 January 2017 : Mr L.M and Ms N.R.M entered into a customary marriage according to Bapedi and Swati customary law;
23 November 2020: Mr L.M and Ms F.N entered into a civil marriage;
16 December 2021: Mr L.M and Ms F.N entered into a customary marriage;
6 February 2023 : Mr L.M died.

In this judgment the High Court had to determine—

- (1) if the customary marriage between Mr L.M and Ms N.R.M was valid; and
- (2) whether the marriage between Mr L.M and Ms F.N that was celebrated as both a civil and customary union, was valid.

Ms F.N averred that according to Swati and Bapedi customs, the consent of Ms N.R.M was not required for Mr L.M and Ms F.N to conclude a valid customary marriage.

In this judgment, the High Court referred to and upheld the precedent set in *Mayelane v Ngwenyama and Another 2013 (4) SA 415 (CC)* and held that Mr L.M and Ms N.R.M was not divorced and that Mr L.M did not acquire the consent of Ms N.R.M to marry Ms F.N.

The court ordered that Mr L.M and Ms N.R.M was married and that their marriage must be registered; and that the marriage between Mr L.M and Ms F.N was invalid and unlawful.



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The Marriage Bill [B43-2023]

Clause 6 of the Marriage Bill provides for the requirements for a polygamous marriage and clause 6(2) reads as follows:

“Requirements for polygamous marriage

6. ...

(2) A husband in a marriage who wishes to enter into a further marriage after the commencement of this Act, must—

(a) obtain written consent from his wife or, in the case where there is more than one wife, his wives, as the case may be: Provided that, in the case of a royal family, the consent must be in accordance with the customs and traditions of such family; and

(b) make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.”.

Taking into account the Constitutional Court judgments in *Mayelane v Ngwenyama and Another* (57/12) [2013] ZACC 14 and *Gumede (Born Shange) v President of the RSA & Others* [2008] JOL 22879 (CC) and the High Court judgment in *N.R.M v F.N and Others* (943/2023) [2025] ZAMPMBHC 53, the Office of the Chief State Law Adviser is of the view that the proviso in clause 6(2)(a) of the Bill which seeks to provide an exception to royal families, may not withstand constitutional muster because it is inconsistent with the Constitution.



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