

Customary Marriage and Divorce, how does it work and what is required?

Introduction:

A customary marriage is one where the spouses are married in terms of custom as opposed to the laws of a country, usually referred to as civil marriage. Civil marriages are registered with home affairs and usually the couple are provided with a marriage certificate. Civil marriages are not the only types of marriages recognised in our law in South Africa customary marriages are also given recognition provided certain requirements are met with.

Requirements for entering into a customary marriage:

The Recognition of Customary Marriages Act 120 of 1998, came into operation on November 15, 2000¹, and set certain legal requirements for a valid customary marriage.

1. Capacity to enter into a customary marriage:

The parties must both be over the age of 18 years, if not, special written consent from the Minister of Home Affairs must be obtained². Men are allowed to have more than one wife but woman are not allowed to have more than one husband.

2. Consent of the bridegroom and bride:

The consent of the bridegroom and bride to enter into a marriage under customary law, is necessary. This consent does not have to³ be given formally but can be implied from their conduct.

¹ Proclamation R.66, 2000 dated 1 November 2000

² Section 3(3) and (5)

³ Mwambene L, Family Law Service, Customary Family Law, Issue 61, 22

3. Consent of the father (or guardian) of the bride:

The consent of the father of the bride is essential, although this requirement is not expressly stated in the Act, it can however be read into s 3(1)(b) which states that: “*the marriage has to be negotiated and entered into in accordance with customary law*”. In the case of *Mabena v Letsoalo*⁴ where the father of the bride has abandoned the family, the consent of the mother held to be sufficient. It was also decided in the same case that the consent of the parents of the bridegroom was not necessary.⁵

4. Payment of Ikhazi / Lobolo:

The general rule is that payment of Lobolo is an essential requirement in concluding a customary union. Payment is made to the bride’s father or the head of the household. There are certain exceptions to this rule.⁶ For example where the marriage is scheduled to take place during a period of mourning for a deceased Head of a tribe.⁷

In modern and urban circumstances the Ikhazi or Lobolo (*translate this*) is not paid in cattle, but the monetary equivalent of the cattle, i.e. money.

5. The handing over of the bride:

The bride must be handed over to the bridegroom by her family or a designated member.

⁴ 1998 (2) SA 1068 (T) and fn 2 ibid

⁵ 1072B – 1073C

⁶ Tribes practising teleka and the position in Zulu law

⁷ Fn 2 ibid, page 23

Where a second marriage is being entered into, is consent from a first wife required?

In customary marriages men are allowed to have more than one wife which is not the same for women who are limited to marrying one husband.

In the case of *Mayelane v Ngweyama*⁸, the Constitutional Court decided that under Tsonga customary law, the consent of the first wife for the valid consummation of the second marriage was required.

What is not necessary for a valid customary marriage?

Contrary to popular belief the law does not require the *ukutyis amasi ceremony* (the drinking of the sour milk), nor the slaughtering of a beast for the valid consummation of the marriage.⁹

Termination of a customary marriage after 20 November 2000:

The Act imposes a duty on spouses in a customary marriage to register the marriage with 3 months after the marriage (as proof of the marriage) at Home Affairs.

It is important to note that non registration does not make the marriage invalid,¹⁰ and there is no penalty for non-registration.

⁸ CCT 57/12 [2013] ZACC 14

⁹ Mwambene L, Family Law Service, Customary Family Law, Issue 61, 25

¹⁰ S 4(9)

Once the marriage is valid and in existence, the marriage can only be dissolved by a court through a decree of divorce on the grounds of an irretrievable breakdown of the marriage, same as that of a civil marriage, as per section 8(1) of the Act.¹¹

A further important point to note is that in terms of section 7 of the Act,¹² all customary marriages are in community of property, unless such consequences are specifically excluded in terms of an antenuptial contract.

CONCLUSION:

A lot of uncertainty still exists especially amongst the different tribal customs, but the law is dynamic, ever growing and developing and the contribution yet to be made by all the above customs which makes the practice of matrimonial law one of the most exciting and interesting areas of law.

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¹¹ Recognition of Customary Marriages Act 120 of 1998

¹² Fn 11 ibid