



The Continued Struggle of Customary Law Wives for Recognition of Their Inheritance Rights in South Africa

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Abstract

Twenty years after the landmark Constitutional Court's judgment in *Bhe and Others v Khayelitsha Magistrate and Others*, which declared the exclusion of women from inheritance under customary law unconstitutional, women married under customary law in South Africa continue to face systemic discrimination. Drawing on the experiences of attorneys at the Women's Legal Centre, this paper explores how patriarchal norms persist in shaping living customary law, particularly in the context of inheritance. Despite legislative reforms such as the Recognition of Customary Marriages Act 120 of 1998, women often encounter legal and bureaucratic barriers when asserting their inheritance rights following the death of a spouse. The registration requirements under the Act have placed a disproportionate burden on women, especially in proving the existence of a valid marriage. This paper critically examines how the codification of living customary law has contributed to ongoing gendered discrimination, and

how jurisprudence and policy frameworks have failed to fully realise the constitutional promise of equality and dignity. It argues for legislative reform and an intersectional feminist approach to ensure substantive equality for women in customary marriages and to dismantle the legacy of male primogeniture.

Keywords

African Black Women – discrimination – custom – succession – intersectionality – substantive equality – bureaucracy

1 Introduction

Twenty years ago, the South African Constitutional Court ended the exclusion of women and girls from their right to intestate inheritance under the Black Administration Act, which codified aspects of customary succession law and entrenched patriarchal norms that subordinated women to their male relatives.¹ This article explores how, despite the Constitutional Court's decision in *Bhe and Others v Khayelitsha Magistrate and Others (Bhe)*,² women married according to customary law continue to struggle for recognition of their right to inherit from their deceased spouse or life partner. Amendments to the Intestate Succession Act³ and Maintenance of Surviving Spouses Act,⁴ alongside constitutional guarantees of equality⁵ and dignity,⁶ have not translated into substantive change for women living in terms of customary law within their homes, families, and communities. We draw on our experiences as legal practitioners at the Women's Legal Centre, a public interest law clinic, to identify recurring patterns of discrimination in interpersonal relationships in South Africa. Our analysis is therefore grounded in the lived experiences of marginalised women informed by our engagement with law reform processes and the strategic litigation we have undertaken.

First, the article examines how the codification of living customary law through the Recognition of Customary Marriages Act⁷ has exacerbated the

1 Black Administration Act 38 of 1927.

2 *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

3 81 of 1987.

4 27 of 1990.

5 Constitution of the Republic of South Africa, 1996 (the Constitution), s 9.

6 *ibid*, s 10.

7 120 of 1998 (the RCMA).

discrimination faced by married Black African women married according to customary law. We do this by reflecting on some of the collective challenges reported to the Women's Legal Centre. Secondly, we analyse how South African courts have interpreted the legislative framework and the rights of women under living customary law, seeking to advance constitutional rights despite the limitations of this legal framework. We identify the root of ongoing discrimination in the policy stance on the recognition of customary marriages as being the registration process and its implementation by officials in the Department of Home Affairs. Thirdly, we present a regional and international human rights framework and apply an intersectional feminist lens to address the current policy and legislative shortcomings. Without such an approach, legal reforms and court judgments risk being rendered meaningless. Finally, we assess the current legislative development process led by the Department of Home Affairs and consider whether the proposed reforms will enable substantive rights enjoyment for women in customary marriages.

2 The Codification of Living Customary Law

2.1 *Contextualising Our Discussion*

Prior to the adoption of the Constitution, customary practices and laws systematically deprived women in customary marriages of patrimonial benefits upon divorce or the death of a spouse.⁸ For example, *ukungenwa*, practiced by the Nguni tribes, involved encouraging a widow to take a consort from her late husband's family to maintain familial ties.⁹ The aim of the practice was ostensibly intended to preserve and protect the family's wealth, including both movable and immovable property.¹⁰ However, in practice, such customs reinforce patriarchal norms, undermining women's autonomy and agency. Women who resist these practices may face sanctions from their families, including eviction from the marital home and denial of access to marital assets.¹¹

8 Christina Beninger, 'Know Your Rights: Women's Property Rights Under Customary Law' (*Women's Legal Centre*, 2010) <<https://wlce.co.za/wp-content/uploads/2017/02/Womens-Property-Rights-Under-Customary-Law.pdf>> accessed 8 September 2025.

9 Bulelwa Magudu and Lieketseng Mohlakoana-Motopi, 'Womenhood and Vulnerability: The Right to Gender Equality for Widows in South Africa. Policy Brief No. 3' (*Commission for Gender Equality*, 2013) <<https://cge.org.za/wp-content/uploads/2021/01/widowhood-and-vulnerability.pdf>> accessed 26 October 2025 revealed that the practice is common in many rural communities across parts of South Africa, but particularly in those areas under the authority of traditional leaders.

10 D S Koyana, *Customary Law in a Changing Society* (Juta 1980) 81.

11 Magudu and Mohlakoana-Motopi (n 9).

Widows are particularly vulnerable to various forms of abuse, such as socioeconomic, religious, cultural, sexual, physical and emotional abuse, both within their families and in broader society.¹² This vulnerability must inform the interpretation of the state's constitutional obligations under section 7(2) of the Constitution, which requires the realisation of rights in the Bill of Rights through the development and adoption of legislation.

Importantly for this discussion are the constitutional rights to equality, dignity, freedom of religion and culture.¹³ These rights intersect in complex ways, especially in the context of marriage. The Constitution imposes a positive obligation on the states to enact legislation that promotes equality while respecting cultural and religious practices. In this respect, the RCMA endeavours to, amongst others, address the discriminatory and unequal treatment of women in customary marriages and to place customary marriages on equal footing with civil marriages.¹⁴ Notably, the RCMA confers upon women in customary marriages the same status and legal protection in law as women married in terms of the Marriage Act 25 of 1961.¹⁵

However, many women experience the RCMA's framework as discriminatory due to their social positioning within families and communities that continue to uphold patriarchal customs. For example, when a customary marriage is not registered, women are often required to prove the existence and validity of the marriage through evidence.¹⁶ This requirement arises particularly at the end of the marriage, whether by death or divorce, when reporting a deceased estate to the Master of the High Court or initiating court proceedings for a divorce. This creates a complex situation because the RCMA does not explicitly require registration for a customary marriage to be valid, even though the provision for such registration is made and set out in the legislation and its regulations.¹⁷ Thus, unregistered customary marriages are valid marriages that confer marital rights upon parties. But the practical implementation tells a different story. In our experience, the burden of proving the validity and existence of marriage

12 United Nations, 'Widowhood: Invisible Women, Secluded or Excluded' (*UN Division for the Advancement of Women, Department of Economic & Social Affairs*, 2001) <www.unwomen.org/en/digital-library/publications/2001/12/women2000-widowhood-invisible-women-secluded-or-excluded> accessed 4 April 2025.

13 Provided for in terms of the Constitution, ss 9, 10, 15, 30 and 31.

14 *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) para 23; provided for in terms of the RCMA, preamble.

15 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) para 46.

16 *BS v PM* (A3096–2022) [2024] ZAGPJHC 508 (17 May 2024) para 18.

17 *Gumede* (n 14) para 23.

falls disproportionately on women. Many women report facing challenges in accessing housing, land and property rights arising from marriage after their spouse's death or during divorce, especially when their spouse or in-laws deny the existence of the customary marriage. The denial is often a strategic move to avoid sharing marital assets, undermining the RCMA's promise of equality.

The Women's Legal Centre has collected data over the past four years from women seeking legal advice in asserting their rights under the RCMA. A clear pattern has emerged: the burden of proving a valid customary marriage, particularly in the absence of registration, significantly impedes women's ability to access their rights to housing, land and property acquired during the customary marriage.

2.2 *Registration as a Requirement*

South Africa has an estimated population of 60.6 million people.¹⁸ Women constitute 51.5% of the total population, which translates to over 31 million people, while men comprise 48.5%. Black Africans remain the largest population group, accounting for 81.4% of the population.¹⁹ Statistics South Africa found that in 2022, 4 376 customary marriages were registered with the Department of Home Affairs in terms of the RCMA, indicating an increase of 63.5% from 2 676 customary marriages registered in 2021. It also noted that although the number of registered customary marriages fluctuated between 2013 and 2020, there was an increase between 2021 and 2022. The highest number of registered customary marriages was recorded for the year 2022 (4 376), whilst the lowest number was recorded in 2020 (1 585).²⁰ The lower number may be attributed to the impact of the COVID-19 pandemic, but this conclusion or analysis was not dealt with in the data reporting and recording.

Given the size of the Black African population in South Africa, the number of registered customary marriages is likely not a reliable reflection of the actual prevalence of these marriages. The data from the Department of Home Affairs only accounts for marriages that are formally registered in terms of the RCMA, whereas many customary marriages remain unregistered due to cultural practices, lack of awareness, or administrative barriers, which are discussed later in this article. As such, while the statistics provide insight into trends in

18 Statistics South Africa, 'Mid-year Population Estimates' (2022) <www.statssa.gov.za/?p=15601> accessed 12 November 2022.

19 South African Government, 'People of South Africa' (2024) <www.gov.za/about-sa/south-africas-people> accessed 12 November 2022.

20 Statistics South Africa, 'Statistical Release p0307: Marriages and Divorces' (2022) <www.statssa.gov.za/publications/P0307/P03072022.pdf> accessed 12 November 2022.

registration, they should not be understood as an accurate measure of the total number of customary marriages taking place in the country.

Section 4(9) of the RCMA explicitly states that the failure to register a customary marriage does not affect its validity.²¹ The result is that registration is not required for the conclusion of a valid customary marriage. However, in practice, legal proceedings such as divorce, maintenance claims, and inheritance disputes often require proof of a legally recognised marriage, typically in the form of a marriage certificate. This requirement illustrates the disjuncture between the law, bureaucratic processes, and the lived realities of women in customary marriages.

A recent case, *Khashane v Minister of Home Affairs and Others*, illustrates the complexities and challenges faced by surviving spouses in proving the validity of unregistered customary marriages. Even with documentary evidence, the Master declined to assist the applicant, forcing her to institute legal proceedings against both the Department of Home Affairs and the Department of Justice and Constitutional Development in order to compel the recognition of her marriage. The high cost of litigation in South Africa means that litigating is a privilege available only to those with access to resources and patience.²² The majority of the cases that we have examined over the past four years indicate this worrying trend where in the absence of registration or a valid marriage certificate women are compelled to approach courts to resolve their challenges despite the Master having the discretion to conduct an inquiry into the existence of a customary marriage under section 5(1) of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

The case highlighted the intricate interplay between living customary practices and statutory requirements.²³ Khwinana AJ held that denying the applicant recognition of her customary marriage, simply because her husband passed away before the administrative act of registration, would not only be punitive but would also undermine the very essence and objectives of the Act.²⁴ *Khashane* further addressed important questions with respect to the legal implications of unregistered customary marriages upon the death of a spouse.²⁵ The applicant, unaware of the registration requirement, had not registered her marriage before her husband's death,²⁶ This clearly illustrates a

21 *Kambule v Master of the High Court and Others* 2007 (3) SA 403 (E).

22 S Sibisi, 'Registration of Customary Marriages in South Africa: A Case for Mandatory Registration' (2023) 44 *Obiter* 527.

23 *Khashane v Minister of Home Affairs and Others* 2024 (5) SA 242 (GP) para 24.

24 *ibid*, para 25.

25 *ibid*, para 18.

26 *ibid*, para 9.

lack of knowledge about the law. The court, per Khwinana AJ, held that, 'one would anticipate a harmonious collaboration between the Department of Home Affairs and the Department of Justice and Constitutional Development. If such synergy is lacking, it is imperative to cultivate it to better assist individuals, such as the applicant'.²⁷

The implementation of the RCMA by the Department of Home Affairs remains deeply flawed. Our clients, too, have reported that officials lack understanding of their role in registering customary marriages. For example, NM approached the Women's Legal Centre legal advice unit and informed us that when she attended Home Affairs with her witnesses to register her customary marriage, she was informed that her brother-in-law, who was aged 33, was too young to be a valid witness for the purposes of confirming that the marriage in fact took place. This example illustrates how officials at the Department of Home Affairs may misapply the RCMA by introducing unofficial requirements based on personal interpretations of customary practices, such as *lobolo*, thereby creating unnecessary barriers for women seeking to register their marriages. Another client, BS, was advised to register her customary marriage in the jurisdiction where it was concluded. The Home Affairs official, a white woman who acknowledged her unfamiliarity with the client's customary practices, expressed her discomfort in accepting the client's witnesses' account of the marriage without further verification. In both of these cases, the Home Affairs officials approached the registration process not merely as administrative, but as investigative, which is not envisaged by the regulations or the RCMA.

As Khwinana AJ reaffirmed, the inconsistencies in how the Department of Home Affairs and the Master of the High Court implement the RCMA not only jeopardise the rights of women and children but also erode the credibility of these institutions, which are constitutionally obligated to realise rights.²⁸ A standardised and transparent approach is crucial to prevent potential future discrepancies and injustices.²⁹ It is unacceptable that women who approach Home Affairs to register their customary marriages, or the Master's office to initiate an inquiry into the validity of such marriages, are often denied written reasons when their requests are rejected, and that no internal review mechanisms exist to ensure administrative justice.

In addition, structural barriers such as the distance to Home Affairs offices, the cost of travel, procedural complexity, and cultural perceptions of registration as unnecessary further hinder the registration process. As a result, many

27 *ibid*, para 29.

28 *ibid*, para 31.

29 *ibid*.

customary marriages remain unregistered, not by choice, but because the registration system itself is inaccessible or misaligned with customary practice. Unfortunately, institutions often require registration as proof of a marriage's existence, essentially making it a requirement for recognising a customary marriage. Mwambene and Kruuse argue that the state and courts often adopt an overly formalistic approach, prioritising the legal form of a registered marriage over the substantive reality of marital relationships.³⁰ The rigid application of standard operating procedures fails to accommodate the flexibility necessary to achieve the substantive equality envisioned by the RCMA.

Women married in terms of customary law, unfortunately, find themselves in a worse position than women who have never married or those married in terms of the Marriage Act.³¹ For example, although non-registration does not invalidate the customary marriage in terms of the RCMA, women may find themselves as victims of men who secretly marry and register the subsequent marriage in terms of the Marriage Act,³² thereby frustrating their rights as customary law wives. The following section unpacks this gendered burden, examining how registration requirements and patriarchal family structures intersect to frustrate women's access to marital rights and protections.

2.3 *Unpacking the Gendered Burden in the RCMA*

Historically, the requirement to register a customary marriage was limited to specific regions such as KwaZulu-Natal and the Transkei. The KwaZulu Law on the Code of Zulu Law 16 of 1985 and the Transkei Marriage Act 21 of 1978 provided for the registration of a customary marriage, but non-registration did not invalidate the marriage in law.³³ This approach mirrors the current legal framework under the RCMA, which does not make registration a prerequisite for the validity of a customary marriage. Nevertheless, the RCMA now establishes a national marriage register maintained by the Department of Home Affairs.³⁴ Registration provides the parties with *prima facie* proof of their marriage and certainty in the form of a marriage certificate and records the marriage in the national population and marriage register.³⁵ Unfortunately, the absence of a marriage certificate hampers women in asserting their marital rights. The burden of proof shifts disproportionately onto women, who must demonstrate

30 Lea Mwambene and Helen Kruuse, 'Form Over Function? The Practical Application of the Recognition of Customary Marriages Act 1998 in South Africa' [2013] *Acta Juridica* 292.

31 Sibisi (n 22) 561.

32 Sibisi (n 22) 526.

33 KwaZulu Law on the Code of Zulu Law 16 of 1985; Transkei Marriage Act 21 of 1978.

34 RCMA, s 4(9).

35 RCMA, s 4(3).

the validity of their marriage, often in the face of denial or obstruction by their spouse's relatives.

As discussed previously, women are frequently required to provide evidence of their marriage when reporting a deceased spouse's estate to the Master of the High Court.³⁶ This may be problematic when male relatives, who are often central to the customary marriage process,³⁷ deny the existence of the customary marriage or refuse to act as witnesses. These same relatives may have participated in the lobola negotiations or other customary rituals, but later deny any involvement to prevent the widow from accessing marital assets. This illustrates how the patriarchal dynamics often present in customary law exacerbate challenges in proving the existence of a marriage. Male relatives may exploit the lack of registration to deny a widow's status or rights, thereby taking control of property or benefits that would otherwise belong to her. The absence of registration can become a tool of economic and social exclusion, stripping women of their dignity, autonomy, and financial security.

The absence of a marriage certificate has far-reaching consequences. Women may be denied access to housing, land, pensions, inheritance and insurance benefits.³⁸ This is because institutions such as pension funds, employers and insurance companies typically require formal proof of marriage to process claims.³⁹ Furthermore, as part of divorce proceedings, parties must present evidence to satisfy the court that a valid marriage existed. In a recent judgment, the court had to determine whether a valid customary marriage had been concluded, or if the civil marriage the parties entered into after their traditional wedding, along with an antenuptial contract, was the only legally recognised marriage.⁴⁰ This highlights the reality that some couples do not consider themselves to be legally married under customary law until they have a 'white wedding' and formally register a civil marriage in terms of the Marriage Act.⁴¹

36 Department of Justice & Constitutional Development, 'Deceased Estates: How to Report' <www.justice.gov.za/master/deceased-how.html> accessed 1 February 2024.

37 These practices vary based on custom and tradition but often include the negotiation of *lobolo* and introduction of the potential groom and bride to the respective families.

38 P B N Mawila, 'Proving the Existence of Unregistered Customary Marriages in Deceased Estates: Challenges of the MBU 16 Form' (LLM thesis, North-West University 2023) 31–33.

39 Monica de Souza, 'When Non-registration Becomes Non-recognition: Examining the Law and Practice of Customary Marriage Registration in South Africa' [2013] *Acta Juridica* 239, 251.

40 *MM v NIM* (034446/19) [2025] ZAGPJHC 918 (10 October 2025).

41 *ibid*, para 180.

A husband's denial of the marriage creates legal complications and unnecessary delays in the processing of the divorce. Evidence must be led as to the existence of the marriage, such as by the calling of witnesses to substantiate the existence of the marriage. This delays proceedings and increases the costs of legal proceedings.⁴² Thus, women married in terms of customary law who wish to terminate their marriages legally find that access to their rights in accordance with the Divorce Act 70 of 1979 is frustrated and delayed.⁴³

Women, in particular, bear the brunt of its legal and social consequences. We analysed 106 cases in which Black African women sought legal advice regarding customary marriages. In the majority of these cases, the women approached the Women's Legal Centre following the death of a spouse, seeking recognition of their customary marriage. This highlights the gendered burden to prove that a valid customary marriage in terms of the RCMA exists because, without a marriage certificate, women risk losing spousal benefits and remedies.⁴⁴ However, they were informed, through bureaucratic processes, that a marriage certificate was required to establish their legal status as spouses. In the absence of such documentation, they were denied access to housing, land, and property rights arising from the marriage. None of the women had registered their marriages prior to the death of their spouse, either due to a lack of awareness of the RCMA or because they were unable to meet the registration requirements. Many were unable to persuade their spouses to complete the registration process while they were alive. In numerous cases, husbands were unwilling to register the marriage and frequently failed to attend scheduled appointments. Additionally, couples often struggled to convince relatives who had witnessed the marriage ceremony to accompany them to the Department of Home Affairs, as required by the RCMA regulations. Women reported feeling trapped by their own families, compelled to compensate male relatives, particularly for travel and accommodation costs, to secure their cooperation. This burden was exacerbated in rural areas where Home Affairs offices are located far from their communities.

Women also report that their in-laws, upon recognising the legal implications of registering a customary marriage, often obstruct the process by denying the existence of the marriage or claiming that essential customary requirements were not fulfilled. In some cases, there is a widespread belief that a customary marriage only becomes valid after a 'white wedding', being a religious ceremony where the bride traditionally wears a white dress. This

42 Mwambene and Kruuse (n 30) 297–294.

43 *MBM v JPM* (63162/2020) [2022] ZAGPPHC 912 (23 November 2022).

44 Sibisi (n 22) 516.

misconception leads to the assumption that a marriage certificate can only be issued following such a ceremony. These experiences underscore the gendered burden imposed by the RCMA and its regulations. Without the active cooperation of their husbands and male relatives, women are frequently unable to access the legal recognition and protections promised by the legislation. In the absence of registration, women are often asked to produce a certificate of marriage issued by a traditional leader, a document that may be impossible to obtain without male cooperation.

The South Gauteng High Court in Johannesburg recently held that ‘the system whereby customary marriages can be registered and the proprietary consequences flowing therefrom approved by a Court (in the case of further contemplated customary marriages) enhances certainty, transparency and the availability of a public record of the important information about the conclusion of customary marriages’.⁴⁵ While this is legally sound, it overlooks the lived reality that many women lack the financial means, legal support, or access to courts necessary to have their rights recognised and confirmed under the RCMA.

3 Evolving Jurisprudence on Gender and Customary Marriages

3.1 *Recognition of Diversity*

Jurisprudence in South Africa has increasingly acknowledged the discrimination faced by Black African women in customary marriages. Courts have played a pivotal role in addressing these injustices, often stepping in where legislative and policy frameworks have failed to harmonise with constitutional values and the lived realities of women.⁴⁶

Despite the landmark judgment in *Bhe v Khayelitsha Magistrate*, handed down in 2004, substantive equality for women under customary law remains elusive. South Africa’s transition to democracy did not automatically dismantle the sexist and racist legal frameworks of the past. The legacy of apartheid and colonialism continues to shape the recognition of interpersonal relationships, particularly those involving Black South Africans. Historically, marriages and relationships outside Christian norms, such as customary marriages and those

45 *BS v PM* (n 16) para 22.

46 *Gumede* (n 14); *Rahube v Rahube and Others* 2019 (2) SA 54 (CC); *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC).

involving gender-diverse individuals, were excluded from legal recognition.⁴⁷ Today, women continue to bear the burden of litigation to assert their rights, as seen in *Bwanya v Master of the High Court*.⁴⁸ Bwanya confirmed that people in permanent life partnerships with reciprocal duties of support can be considered a 'spouse' as per the definition found in the Intestate Succession Act and the Maintenance of Surviving Spouses Act.⁴⁹ These cases underscore the reality that progress in recognising diverse family structures has largely been driven by the courage of women who challenge discriminatory norms through the courts.⁵⁰

To address this, the state must adopt an intersectional lens that reflects the diversity of South African society.⁵¹ Women are not a homogeneous group; they experience discrimination in multifaceted ways based on race, gender, class, age, and other intersecting identities. A uniform legal approach is insufficient to address these layered realities. In *G v Minister of Home Affairs* ('Greyling'), the court accepted expert evidence that even decades after democracy, intersecting inequalities continue to prevent many women from accessing and realising their rights.⁵² Intersectionality allows for a nuanced understanding of how systems of oppression, such as patriarchy, racism, and economic exclusion, interact in the lives of women. It demands that courts and policymakers consider not only the formal legal status of women but also the social, cultural, and economic contexts that shape their lived experiences. Without this approach, legal reforms risk remaining symbolic and failing to deliver substantive justice.

South Africa continues to grapple with the enduring legacy of apartheid and colonialism, particularly in the realm of family law and customary practices. The judiciary has played a pivotal role in advancing legal recognition of diverse relationships, as reflected in the judgments discussed above. These decisions underscore the courts' capacity to shape constitutional rights and contribute to the evolution of African customary law. However, a closer examination of this jurisprudence reveals that judicial interpretations have not always consistently promoted gender equality or provided legal certainty. This tension between progressive rulings and formalistic approaches becomes especially

47 Republic of South Africa, 'National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance' (2019) <www.gov.za/sites/default/files/gcis_document/201903/national-action-plan.pdf> accessed 26 October 2025.

48 *Bwanya v Master of the High Court, Cape Town* 2022 (3) SA 250 (CC).

49 Intestate Succession Act 81 of 1987; Maintenance of Surviving Spouses Act 27 of 1990.

50 *Women's Legal Centre Trust* (n 15) para 44.

51 Puleng Segalo, 'Gender, Social Cohesion and Everyday Struggles in South Africa' (2015) 49 *Psychology in Society* 70.

52 *Greyling v Minister of Home Affairs and Others* 2022 (5) SA 478 (GP) para 13.

evident when considering the gendered burden placed on women in customary marriages, a theme explored in the following section.

3.2 *Courts and the RCMA*

South African courts have played a central role in interpreting and shaping the RCMA, particularly in defining what constitutes a valid customary marriage. The courts have defined what it means for a customary marriage to be ‘negotiated and entered into or celebrated in accordance with customary law’ and, in so doing, articulated the requirements of a marriage and whether the requirements may be waived.⁵³ This judicial engagement has been necessary due to the RCMA’s deliberate openness, which allows for flexibility in recognising diverse customary practices. However, courts have not always adopted consistent approaches. Some decisions have inadvertently entrenched formalistic interpretations that undermine the Act’s transformative potential, as judgments are often treated as precedents binding future courts.⁵⁴

A key area of judicial interpretation has been the requirements for a valid customary marriage, specifically, the payment of *lobolo* and the handing over of the bride. These practices, while rooted in tradition, have been treated variably by courts. The payment of *lobolo* has long been regarded as a key element of customary marriage, symbolising the union between two families and legitimising any children born of the marriage.⁵⁵ However, judicial interpretations of this requirement have varied. In *Mthembu v Letsela*, the Supreme Court of Appeal adopted a strict approach, stating that full payment of *lobolo* was essential for the conclusion of a valid customary marriage.⁵⁶ The appellant claimed she was the customary wife of the deceased and provided evidence of the first instalment of R900 towards her R2 000 *lobolo*.⁵⁷ Although the deceased died before paying the amount in full, the appellant argued that, as there had been an agreement between the appellant and the deceased, as well as partial payment, a valid customary marriage existed.⁵⁸ The court rejected this argument, ruling that partial payment could not fulfil the requirement. This rigid

53 *Mbungela and Another v Mkabi and Others* 2020 (1) SA 41 (SCA) para 17.

54 Chuma Himonga and Craig Bosch, ‘The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?’ (2000) 117 SALJ 306.

55 George Seruwagi, ‘South African Law on Lobola’ (Gawie le Roux Institute of Law, 8 October 2024) <www.gawieleroux.co.za/af/node/1688> accessed 16 October 2025.

56 *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) para 17.

57 *ibid*, para 5.

58 K Morgan, ‘Examining the Role of the Legislature and Judiciary in the Context of Traditional and Religious Personal and Family Law Systems in South Africa’ (LLM dissertation, University of Cape Town 2024) 40–42.

interpretation not only adhered closely to traditional practice but also emphasised the formal completion of customary rituals as a condition for legal recognition.

By contrast, in *Mkabe v Minister of Home Affairs*, the High Court recognised that *lobolo* need not be paid in full for a marriage to be valid.⁵⁹ *Lobolo* was agreed at R12 000, but only R9 000 had been paid before the wife's death.⁶⁰ The court acknowledged that customary law is evolving and that partial payment or an agreement to pay *lobolo* may suffice, provided other customary requirements are met.⁶¹ Similarly, the court rejected the notion that the handing over of the bride is an indispensable requirement, noting the financial and logistical barriers that often prevent its fulfilment.⁶²

This divergence in judicial reasoning reflects a broader tension between formalism and flexibility. This is also evident in the judicial treatment of the handing over of the bride, a practice traditionally understood as symbolising the transfer of the bride into the groom's family and the unification of the two families. While some judgments, such as *Mxiki v Mbatha*, have treated the handing over of the bride as the most crucial element of a valid marriage,⁶³ others, like *Sengadi v Tsambo*, have questioned the constitutionality of rigid adherence to such practices.⁶⁴ The court reasoned that a rigid insistence on this practice could unjustly deny legal recognition to marriages that are substantively concluded but lack a single customary formality, thereby undermining constitutional principles such as equality, dignity, and the dynamic nature of customary law.⁶⁵

The courts have also recognised the dynamic nature of living customary law. In *Moropane v Southon*, the Supreme Court of Appeal emphasised that the legislature did not define what constitutes the content and substance of the marriage, being *lobolo* negotiations and the associated celebrations in terms of the customary law.⁶⁶ The Supreme Court explained that 'this is understandable as customary law is as diverse as the number of ethnic groups we have in this beautiful country, and even then, there may be varying beliefs and practices that are unique based on families and location. Although Africans in general

59 *Mkabe v Minister of Home Affairs and Others* (2014/84704) [2016] ZAGPPHC 460 (9 June 2016) para 35.

60 *ibid*, para 24.

61 *ibid*, para 35.

62 *ibid*, paras 36–38.

63 *Mxiki v Mbata* (A844/2012) [2014] ZAGPPHC 825 (23 October 2014) para 11.

64 *Sengadi v Tsambo* 2019 (4) SA 50 (GJ).

65 *ibid*, para 34.

66 *Moropane v Southon* (755/2012) [2014] ZASCA 76 (29 May 2014) para 35.

share most of the same customs, rituals and cultures, there are some subtle differences which, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, VhaVenda and the Vatsonga. This is due to the pluralistic and rich nature of African societies'.⁶⁷ The court further explained that 'the most salutary approach to ascertaining the real meaning of this requirement is by examining the current cultural practices and customary law of that particular ethnic group'.⁶⁸ This approach aligns with the constitutional recognition of customary law as a living system, capable of adapting to contemporary realities.

Despite these progressive developments, the lack of a coherent and uniform judicial approach has created legal uncertainty. The validity of a customary marriage often hinges on the discretion of individual judges, leading to unpredictable outcomes. This undermines the RCMA's goal of promoting equality and dignity for women in customary marriages and highlights the urgent need for legislative clarity and policy reform. For example, in *Mavimbela v Minister of Home Affairs and Others*⁶⁹ the court found the incomplete payment of *lobolo* to be of no importance and instead prioritised the handing over of the bride to her new family as the key moment in the conclusion of a customary marriage:

If all the requirements are met, then a valid customary marriage exists. The applicant admitted that she was not handed over to the respondent's family. This is an essential requirement in a valid customary marriage. The fact that Ms Mothibe and Mr Dhladhla lived together for a long period, does not validate the relationship between them as a valid customary marriage. At most the applicant and the third respondent were cohabitantes. I am satisfied that the applicant has not, on the evidence before me, shown that a valid customary marriage was entered into between herself and the third respondent.⁷⁰

At one end of the spectrum, cases such as *Mthembu* and *Mxiki* exhibit a formalistic and strict interpretation and adherence to customary practices, which then translates them into absolute requirements, emphasising the completion of *lobolo* payment or the handing over ceremony as prerequisites for legal validity. Key moments in time are used as symbolic of absolute proof of the conclusion of the marriage. Where they are absent or only partially fulfilled,

67 *ibid*, para 35.

68 *ibid*, para 35.

69 *Mavimbela v Minister of Home Affairs and Others* (49613/14) [2016] ZAGPPHC 889 (30 May 2016).

70 *ibid*, paras 10–11.

courts that adopt a rigid approach may find that there is no valid marriage. If the court judgment is then interpreted to mean that the custom must contain specific requirements, it effectively changes and develops the custom through the judiciary, rather than by the people who practice it. Conversely, decisions like *Mkabe* and *Sengadi* embody a more flexible, context-sensitive, and constitutionally informed approach, recognising that customary law is a living system capable of evolving alongside contemporary social and economic realities and that not all practices or moments in time are necessary.

As customary law is inherently dynamic and context-specific, establishing a consistent legal standard remains challenging. The ongoing debate over which practice, *lobolo* or the handing over of the bride, whether in part or in full, constitutes conclusive proof of a customary marriage exemplifies this difficulty. While the judiciary's recognition of living customary law represents a significant advancement in South African jurisprudence, the absence of a coherent and uniform legislative and policy framework continues to foster legal uncertainty. Without such clarity, the validity of African customary marriages will likely remain subject to the discretion of individual judges and courts, undermining predictability and equitable access to justice.

4 Achieving Substantive Equality for Women in Customary Marriage

4.1 *International, Regional and Constitutional Obligations*

South Africa's obligations under international law and the Constitution require the elimination of gender-based discrimination, particularly in marriage and family relations. Instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁷¹ and the Protocol to the African Charter on the Rights of Women in Africa⁷² mandate equality in both marriage and divorce. These frameworks address not only material inequalities but also the social norms that perpetuate gender discrimination.

At an international level, CEDAW requires that states take all appropriate measures to eliminate discrimination against women in all matters related to marriage and family relations, and in particular ensure that women have the

71 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), ratified by South Africa 15 December 1995 and submitted initial report in 1998, three years late.

72 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005), ratified by South Africa 17 December 2004 (<https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf> accessed 26 October 2025).

right to enter into marriage with ‘their free and full consent’.⁷³ Women must also enjoy the same rights and responsibilities as men during marriage and its dissolution.⁷⁴ In General Recommendation 21, the CEDAW Committee dealt specifically with the scope of the obligation to eliminate all discrimination in marriage and family life in the context of marriage and family relations and expressed the following view regarding the duty to regulate the consequences of marriages, including marital property, inheritance, and spousal maintenance:

In most countries, a significant proportion of the women are single or divorced and many have the sole responsibility to support a family. Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman’s practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.⁷⁵

CEDAW requires states ‘to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’.⁷⁶ In addition, CEDAW requires States Parties to ‘take all appropriate measures ... [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.⁷⁷

The requirements in Articles 2(1), 5(a) and 16 of CEDAW for member states to ‘pursue all appropriate means’ and ‘take all appropriate measures’ imposes a positive obligation on South Africa to identify existing laws, regulations,

⁷³ CEDAW (n 71) Art 16(1).

⁷⁴ *ibid*, Art 16(1)(c)–(d).

⁷⁵ UN Committee on the Elimination of Discrimination Against Women, ‘CEDAW General Recommendation 21: Equality in Marriage and Family Relations’ (1994), para 28 <www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> accessed 26 October 2025.

⁷⁶ CEDAW (n 71) Art 2.

⁷⁷ *ibid*, Art 5(a).

customs and practices that have the effect of discriminating against women and, thereafter, to proactively modify or abolish the legislation, practice or customs to remove impediments that prevent the full realisation of equality between men and women.

At a national level, the Constitution places a positive obligation on the state to protect women in customary marriages from discrimination rooted in patriarchal norms.⁷⁸ The purpose of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is to give effect to section 9 of the Constitution, prohibiting unfair discrimination and promoting equality.⁷⁹ One of the prohibited grounds for discrimination is set out in section 8, which states that no person may unfairly discriminate against any person on the ground of gender, including any policy or conduct that unfairly limits access of women to land rights, finance and other resources.⁸⁰ Legislative and policy frameworks must harmonise with international standards to ensure the full realisation of women's rights.

Nonetheless, patriarchy remains deeply entrenched in South African society, influencing how marriages are negotiated and solemnised.⁸¹ An African feminist intersectional lens is essential to unpack the layered discrimination faced by Black African women in customary marriages. Intersectionality, as coined by Kimberlé Crenshaw, highlights how systems of oppression, such as racism, sexism, and classism, interact to shape lived experiences.⁸² Intersectionality states that simply understanding one or both systems of oppression, or even both systems of oppression in parallel, does not explain their connections and how they shape the individuals they affect.⁸³ Instead, Crenshaw urges that it is essential to understand how racism and sexism simultaneously exist. Scholars like Collins⁸⁴ further added to this framework to describe interlocking systems of oppression as not limited to racism and sexism, but including other systems of oppression such as classism, heterosexism, sexuality, nationality,

78 Constitution, s 9.

79 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), s 2.

80 *ibid*, s 8.

81 S Kyei, B Agorkpa, B Benewaa and others, 'Marital Power Play in Patriarchal Society: A Qualitative Study of Ghanaian Religious Wives' Perspectives' (2024) 2 Discover Global Society <<https://doi.org/10.1007/s44282-024-00110-3>> accessed 10 September 2025.

82 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 139, 140.

83 *ibid* 155.

84 Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (2nd edn, Unwin Hyman 1990) 18.

religious beliefs, and so on. Although much of the theoretical work on intersectionality focuses on Black women and other marginalised people due to their being historically and presently oppressed, intersectionality is also used more widely to address the interconnectedness among systems of oppression as they play out for those with any combination of identities, including both privileged and marginalised identities.⁸⁵ This lens reveals that women are not a homogeneous group; their experiences of discrimination vary based on race, gender, class, age, and other intersecting identities.

A feminist approach also recognises that many women lack access to legal knowledge due to historical and systemic exclusion. Their positionality, shaped by race, gender, and class, affects their ability to assert their rights. Policy and law must therefore be designed to dismantle, rather than reinforce, intersecting forms of discrimination. To remedy historical injustices, an intersectional approach is imperative. Legal and policy frameworks must address how apartheid-era distortions of African custom intersect with contemporary gender discrimination. As affirmed in the *Bhe* case, customary law must evolve in line with constitutional values, particularly gender equality. While courts have acknowledged the dynamic nature of customary law in cases like *Mayelane*⁸⁶ and *Mkabi*, intersectionality demands that this 'living' character also reflect the lived experiences of women at the intersections of multiple oppressions. Without this, legal reforms risk being symbolic rather than transformative. We support the Constitutional Court's decision in *Mayelane v Ngwenyama*, which affirmed that the RCMA does not prescribe all aspects of customary marriage.⁸⁷ Instead, it allows communities to shape the requirements for validity based on their evolving customs. This flexible approach respects the pluralistic nature of South African society.

This article illustrates how the current situation has not adequately addressed the lived realities of Black African women in customary marriages. The endurance of structural discrimination, the gendered burden of registration, and the resistance of patriarchal norms within families and communities show that a holistic approach is necessary. Such an approach must be anchored in constitutional values of equality, dignity, and substantive access to justice, while being sensitive to the flexible and living nature of customary law.

85 *ibid* 16–18.

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

87 *Mbungela* (n 53).

5 The Promise of a New Law and Resolution

Since the enactment of the RCMA, the Women's Legal Centre has consistently been approached by women in unregistered customary marriages seeking legal advice and representation. These women often require legal advice on the content and implications of the RCMA, particularly regarding how the legal framework affects their marital rights and protections. This persistent demand for legal support is an indictment of the state, which has a constitutional obligation to ensure that individuals are informed of their rights and empowered to exercise them. Yet, many women remain unaware of the RCMA's provisions and their entitlements under the law. This lack of access to legal knowledge and information leaves women vulnerable, particularly at the termination of their marriage through either death or divorce, when they are most in need of legal recognition and protection.

Currently, there is a process underway by the Portfolio Committee of Home Affairs (the Portfolio Committee) that seeks to unify existing fragmented marriage legislation, namely: (a) the Marriage Act, (b) Civil Union Act,⁸⁸ and the (c) RCMA. In addition, the new legislation is meant to recognise Muslim marriages in compliance with the judgment of the Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa*.⁸⁹ To this end, the Department of Home Affairs has produced a Green Paper on Marriages,⁹⁰ and a White Paper on Marriage in South Africa, which has identified the need for greater cohesion in family law.⁹¹ The new marriage law aims to consolidate all these laws into one comprehensive piece of legislation, promoting equality and consistency.⁹²

The Marriage Bill (B43 of 2023) is before the Portfolio Committee for consideration, deliberation and public engagement.⁹³ The WLC welcomes the attempt to consolidate South Africa's fragmented marriage laws in light of our

88 17 of 2006.

89 *Women's Legal Centre Trust* (n 15). The Constitutional Court ordered Parliament to amend existing legislation or enact new legislation that would serve as a legal framework for the recognition of Muslim marriages in South Africa.

90 Green Paper on Marriages in South Africa: Public Consultation Version – 20 April 2021 (GN 412 in GG 44557 of 11 May 2021).

91 The Marriage Bill (B43 of 2023).

92 *ibid.*

93 Parliamentary Monitoring Group, 'Marriage Bill' <<https://pmg.org.za/call-for-comment/1464/>> accessed 26 October 2025.

previous litigation, namely, *Daniels*,⁹⁴ *Gumede*,⁹⁵ *Mayelane*,⁹⁶ *Ramuhovhi*,⁹⁷ *Bwanya*,⁹⁸ and recently *EW v VH*.⁹⁹ However, this article raises significant concerns about the Marriage Bill, particularly regarding the persistent challenges associated with the registration of customary marriages.

Section 13 of the Marriage Bill appears to make registration of a customary marriage compulsory.¹⁰⁰ This shift from the current legal position overlooks the significant challenges women face in registering customary marriages, as detailed earlier in the article. Imposing a blanket requirement that registration is a condition for the validity of a marriage risks creating punitive consequences rather than enabling access to rights. A more nuanced and inclusive approach is therefore necessary, one that affirms the validity of existing unregistered customary marriages while establishing a supportive framework that encourages registration going forward, including for marriages concluded prior to the enactment of the proposed legislation.

The Marriage Bill presents a historic opportunity to harmonise South Africa's fragmented marriage laws and to affirm the constitutional values of equality, dignity, and freedom. However, unless it directly addresses the systemic challenges outlined above, particularly those affecting the registration of customary marriages, it risks reinforcing existing inequalities rather than dismantling them.

6 Conclusion

Despite the Constitutional Court's landmark decision in *Bhe* and the legislative promise of the RCMA, women married under customary law in South Africa continue to face systemic and intersectional barriers to asserting their inheritance and marital rights. The codification of living customary law, while intended to promote equality, has instead entrenched bureaucratic and patriarchal obstacles, particularly through the burdensome registration process

94 *Daniels v Campbell and Others* 2004 (5) SA 331 (CC).

95 *Gumede* (n 14).

96 *Mayelane* (n 86).

97 *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC).

98 *Bwanya* (n 48).

99 *EW v VH* 2023 (4) SA 123 (WCC).

100 Clause 13 of the Marriage Bill (B43 of 2023) provides: '(1) Spouses must ensure that their marriage is registered with the Department. (2) Marriage officers must, in the prescribed form and manner, keep a record of all marriages solemnised by them.'

that disproportionately affects women. Judicial interpretations of customary marriage requirements have varied widely, creating legal uncertainty and reinforcing formalistic approaches that fail to reflect the lived realities of Black African women. The courts have made strides in recognising the dynamic nature of customary law, yet the absence of a coherent legislative framework continues to undermine substantive equality. International and regional human rights instruments, alongside South Africa's constitutional obligations, demand a more inclusive and transformative approach. The proposed Marriage Bill offers a critical opportunity to unify fragmented marriage laws and to affirm the rights of women in customary marriages. However, unless it directly addresses the gendered burden of registration and the socio-cultural dynamics that impede access to justice, it risks replicating the very inequalities it seeks to dismantle. To achieve meaningful reform, the state must adopt an intersectional feminist lens that centres the experiences of women and dismantles the legacy of male primogeniture. Legal recognition must not be contingent on rigid formalities but grounded in the substantive realities of marital relationships. Only then can South Africa fulfil its constitutional promise of dignity, equality, and justice for all women.