

Understanding **CUSTOMARY MARRIAGES IN SOUTH AFRICA**

Honoring Tradition.
Protecting Women's Rights



WOMEN'S LEGAL CENTRE

Why **THIS GUIDE MATTERS**

Customary marriages are legally recognised in South Africa. Yet many women continue to face uncertainty, exclusion, and injustice, particularly when a relationship breaks down or a spouse passes away.

Getting married is one of the most important decisions you will make. While customary marriages are rooted in culture, family and tradition, they also have significant legal and financial consequences. The type of marriage you enter into can affect your rights to property, finances and legal protection. It may determine what happens to assets you owned before the marriage, property acquired during the marriage, and how your estate is dealt with if the marriage ends through divorce or the death of a spouse.

Many women only become aware of these legal consequences when they experience challenges such as separation, inheritance disputes or financial difficulties. Understanding your rights before entering into a customary marriage can help you make informed decisions and better protect your interests in the future.

Whether you are planning to get married, are already married, or simply want to better understand your rights, this guide aims to provide practical legal information to help you make informed decisions and protect your future.

THIS GUIDE IS DESIGNED TO HELP YOU:

- Understand your legal rights
- Make informed decisions about marriage
- Protect yourself from financial and legal vulnerability
- Challenge harmful misconceptions about customary marriages

KEY TERMS

Before exploring your rights, it is helpful to understand some of the legal terms used throughout this guide.

01

Customary law

The customs and usages traditionally observed among the indigenous African peoples of South Africa that form part of the culture of those peoples.

Customary marriage

A marriage concluded in accordance with customary law. The Recognition of Customary Marriages Act (RCMA) recognises both monogamous and polygynous customary marriages.

Recognition of Customary Marriages Act (RCMA)

The South African law that recognises customary marriages and sets out the legal requirements for a valid customary marriage, as well as the rights and responsibilities of spouses.

Matrimonial property system

The legal system that determines how property, assets and debts are owned and managed during a marriage and what happens to them if the marriage ends through divorce or death.

Estate

Everything a person owns and owes at the time of their death, including their property, money, investments and debts.

Lobolo

Property, whether in cash or in kind, that is given or agreed to be given by a prospective husband or the head of his family to the head of the prospective wife's family as part of the customary marriage process. It may be known by different names, including **lobolo**, **bogadi**, **bohalu**, **xuma**, **lumalo**, **thaka**, **ikhazi**, **magadi** and **embabheka**, depending on the relevant culture.

IMPORTANT: Lobolo forms an important part of many customary marriages, but it does not, on its own, create a valid customary marriage.

REQUIREMENTS OF A VALID CUSTOMARY MARRIAGE

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One of the most common misconceptions about customary marriages is that the payment of lobolo, whether in part or in full, automatically creates a valid customary marriage. This is not correct. While lobolo negotiations form an important part of customary law, payment of lobolo alone is not enough to establish a valid customary marriage. The Recognition of Customary Marriages Act (RCMA) sets out specific legal requirements that must be met for a customary marriage to be concluded.

Understanding these requirements is essential to protecting your rights.

What does the law require?

In terms of section 3 of the Recognition of Customary Marriages Act, a customary marriage entered into after the commencement of the Act is valid if:

- Both prospective spouses are over the age of 18 years;
- Both prospective spouses must freely and voluntarily consent to be married to each other under customary law. Neither person may be forced or coerced into the marriage; and
- The marriage is negotiated and entered into or celebrated in accordance with customary law.

What does this mean in practice?

The marriage must meet the requirements of the RCMA. This means that the marriage must be negotiated, entered into, or celebrated in accordance with the customary law and traditions of the parties and their families. Depending on the applicable customs, this may include lobolo negotiations and other customary marriage practices. However, full payment of lobolo is not a strict legal requirement, unless it is required by the relevant custom. Importantly, lobolo negotiations alone do not automatically mean that a valid customary marriage has been concluded.

South African court judgements have confirmed that customary law allows flexibility. This means that the customs and rituals associated with a customary marriage may differ between cultural groups and evolve over time to reflect living customary law. Depending on the applicable customs, this may include the full or partial payment of lobolo, the handing over of the bride, and other recognised customary practices.

IMPORTANT: A valid customary marriage has significant legal and financial consequences. Understanding your matrimonial property system before marriage is an important step in protecting your rights.

CUSTOMARY MARRIAGES AND ANTENUPTIAL CONTRACTS

03

The type of marriage you enter into affects your rights to property, finances and protection under the law.

Before entering into any marriage, it is important for you and your partner to obtain legal advice. Consulting an attorney will help you understand the different matrimonial property systems, the legal consequences of each, and enable you to make an informed decision together.

The default matrimonial property system for customary marriages is in community of property. Simply put, what is mine is yours, and what is yours is mine, including all assets and debt.

If you and your partner wish to marry out of community of property, you must conclude an antenuptial contract (ANC) before the marriage is concluded. Simply put, what is mine remains mine, and what is yours remains yours before the marriage, during the marriage and if the marriage ends through divorce or death. This includes each spouse's assets and debt. An ANC allows you to choose whether your marriage will be:

- Out of community of property with accrual, or
- Out of community of property without accrual.

If you are planning to marry in terms of customary law, it is advisable to conclude an ANC before any lobolo negotiations take place. This is because, if one partner passes away before the customary marriage process has been finalised or the celebration with family has taken place, the surviving partner may approach the High Court to be recognised as a surviving spouse in a valid customary marriage, provided the requirements of section 3 of the Recognition of Customary Marriages Act have been met.

Important: If you do not conclude an antenuptial contract before your marriage, your customary marriage will automatically be in community of property.

CHANGING YOUR MATRIMONIAL PROPERTY SYSTEM

It is possible to change your matrimonial property system after you are married, but the process is neither simple nor automatic.

To change your matrimonial property system from in community of property to out of community of property, with or without accrual, you and your spouse must bring a joint application to the High Court in terms of section 21 of the Matrimonial Property Act. You will need to provide valid reasons for the change and show that creditors will not be prejudiced.

IMPORTANT: Changing your matrimonial property system requires a High Court application and is generally a complex and costly legal process.

What is the difference between marriages in community of property and out of community of property?

The matrimonial property system you choose determines how property, assets and debt are dealt with during your marriage and if your marriage ends through divorce or the death of a spouse.

1. In Community of Property

If you and your partner do not sign an antenuptial contract before your marriage, your customary marriage will automatically be **in community of property**.

This means that:

- All assets and debt belonging to both spouses become part of one joint estate.
- Each spouse owns an equal (50/50) share of the joint estate.
- Both spouses are jointly responsible for the debt of the joint estate.

What does this mean in practice?

If your marriage ends through divorce or the death of a spouse, both spouses remain responsible for the joint debt.

For example, if your spouse is unemployed or unable to pay child maintenance for a child they fathered outside your marriage, you may also be held responsible for paying it because you are married in community of property.





2. Out of Community Of Property:

If you and your partner conclude an antenuptial contract before your marriage, you may choose to marry out of community of property.

This means that each spouse keeps their own separate estate. Property and debt owned before the marriage, as well as those acquired during the marriage, generally remain separate. Each spouse manages their own finances independently and has full control over their own property and debt.

There are two types of marriages out of community of property.

- **Out of Community of Property, with accrual**

Each spouse keeps their own property and is responsible for their own debt during the marriage. However, when the marriage ends through divorce or death, the spouses share in the wealth accumulated of their respective estates during the marriage.

Accrual refers to the increase in the value of a spouse's estate during the marriage.

If one spouse's estate has grown more than the other's, the spouse whose estate has grown less may have a claim to share in that growth.

- **Out of Community of Property, without accrual**

Each spouse's property and debt remain completely separate throughout the marriage. When the marriage ends either by divorce or death, neither spouse shares in the other's assets or debt, regardless of whether they were acquired before or during the marriage. Therefore each spouse may make independent financial decisions and enter into contracts without the consent of the other.

IMPORTANT: Section 21 of the Matrimonial Property Act 88 of 1984, allows spouses to change their matrimonial property system, including altering their marital regime, such as from in community to out of community of property. It requires a joint court application, sound reasons for the change, and proof that creditors are not prejudiced.

REGISTRATION OF A CUSTOMARY MARRIAGE

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Non-registration of a customary marriage does not invalidate the marriage. However, registering your marriage is important because it provides official proof of your marriage in the form of a marriage certificate, making it easier to:

- Prove that your marriage exists.
- Access inheritance and maintenance.
- Assert your rights in court.

You can register your customary marriage at any Department of Home Affairs office.

How to register a customary marriage

To register a customary marriage, the following people should attend a Home Affairs office:

- Both spouses, together with their valid identity documents and, if available, a lobolo agreement.
- At least one witness from the bride's family.
- At least one witness from the groom's family.
- Alternatively, a representative from each family may attend.

Important: Failure to register a customary marriage does not invalidate the marriage.

Registering a customary marriage after the death of a spouse (Posthumous registration)

If one spouse has passed away before the marriage was registered, it is still possible to apply for registration.

You will generally need to:

- A completed Form BI-1699.
- Provide supporting affidavits (sworn statements) from the surviving spouse and two witnesses (such as family elders) confirming the marriage.
- Provide evidence of the marriage, such as a lobolo agreement, proof of payment or photographs.
- Submit the deceased spouse's death certificate, identity document and a Next-of-Kin Affidavit (Form J192).

IMPORTANT: If Home Affairs refuses to register the marriage because one spouse has passed away, you may approach a court for a declaratory order in terms of section 4(7)(a) of the Recognition of Customary Marriages Act confirming the existence of the marriage. Marriages Act) to confirm the marriage.

TERMINATION OF A
CUSTOMARY MARRIAGE

06

In terms of section 8 of the Recognition of Customary Marriages Act, a valid customary marriage can only be terminated by the death of a spouse or by a court granting a decree of divorce.

What if you want a divorce but your customary marriage was never registered?

Many people believe that an unregistered customary marriage can simply be ended through a family meeting. This is not true.

If your customary marriage has not been registered, you can still approach the court to institute divorce proceedings.

Because there is no marriage certificate, the court may first need to determine whether a valid customary marriage existed. This may require evidence from witnesses or family members before the court grants a decree of divorce.

Important: A family meeting or agreement between families does not legally end a valid customary marriage. Only a court may grant a decree of divorce.

MYTH	REALITY
Lobolo = marriage	Not necessarily
Registration creates the marriage	It only records it
Women have no say	It records the marriage and provides proof
Customary law is fixed	It is living and evolving

You **ARE NOT ALONE**

Understanding your rights is the first step towards protecting yourself and your future. If you need legal advice, support is available.

LEGAL SUPPORT SERVICES

WOMEN'S LEGAL CENTRE:
2nd Floor, 5 St Georges St Georges Mall
Cape Town

WHATAPP:
079 421 8197

TEL:
021 424 5660

EMAIL:
info@wlce.co.za

STATE RESOURCES

LEGAL AID SOUTH AFRICA:
To find offices in your area follow the following link for an office near you: <https://legal-aid.co.za/find-us/>

FAMILY COURTS:
You can visit your nearest family court to seek legal help in divorce and maintenance (spousal and child); and

MASTER OF THE HIGH COURT:
You can visit your nearest Master's office to seek assistance with deceased estates.