



**Submission on the Proposed Amendments to the
Recognition of Customary Marriages Act, 1998 (Act No.
120 of 1998):**

Submission prepared by the Women's Legal Centre

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INTRODUCTION

1. The Women’s Legal Centre welcomes the invitation by the Department of Justice and Constitutional Development to make submissions regarding the proposed draft Recognition of Customary Marriages Amendment Bill, 2018 in terms of Notice 188 of 2018. The Women’s Legal Centre is an African feminist legal centre that advances women’s rights and equality through strategic litigation, advocacy, and education and training. The Centre has a vision of women in South Africa who enjoy equal and substantive access to their rights; to be free from violence, empowered to ensure their own sexual health and reproductive rights, free to own their own share of property and resources, having a safe place to stay, and access to work in a safe and equitable environment. The Centre was founded in 1998 and remains uniquely placed as the only dedicated women’s rights legal centre of its kind in South Africa. Our programmatic focus areas are shaped by the needs of the women who seek assistance from us. These submissions fall into our programmatic work on relationship rights and are line with our submissions made to the Constitutional Court as an *amicus curiae* in the case of *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC).
2. Section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 (‘the Act’) was first declared invalid in the case of *Gumede v President of the RSA*¹ insofar as it related to monogamous customary marriages entered into before the commencement of the Act. In addition, the words “entered into after the commencement of this Act” in section 7(2) were declared inconsistent with the Constitution and invalid. These words were to be severed from the section. This meant that spouses in monogamous customary marriages that were entered into before the commencement of the Act were protected by the Act – their marriages were considered to be in community of property, thereby affording a level of protection to women who had entered into such marriages. However, this was not the case for polygamous customary marriages entered into before the Act. Women who

¹ 2009(2) SA 152 (CC).



were spouses in pre-Act polygamous marriages continued to fall outside the protections of the Act, and were instead subject to the rules of customary law.

3. The women that have been affected by this lack of protection are a particularly vulnerable group of women. They are most likely older women who live in both urban and rural areas. They all live according to customary law, and many will be indigent. The section as it stands, negatively impacts on women who fall into this category as 'it imports customary law rules that preclude women from owning or holding rights in property and managing and controlling property equally with their husbands.'²

THE CURRENT READING OF THE DRAFT BILL - COMMENTS

4. The Women's Legal Centre ('WLC') welcomes the speedy resolution (post the Constitutional Court ruling) to correct the lacuna in our law that has historically affected a vulnerable group of women. This lacuna remained despite the Constitutional Court encouraging the Legislature to fill this gap in the judgment of *Gumede*. Unfortunately, nothing was done to rectify the discriminatory state of affairs until the judgment of *Ramuhovhi and Others v President of the Republic of South Africa and Others* required same. This state of affairs has perpetuated the vulnerable circumstances of women in pre-Act polygamous customary marriages for over 10 years.
5. Consequently, the WLC is in agreement with the Court's remarks in *Ramuhovhi*, that Parliament is enjoined by the foundational values of the Constitution, of equality and human dignity, to amend the law to create a default position that allows for the rights of women in pre-Act polygamous customary marriages to prevail. In doing so, the Legislature must remedy a situation that has discriminated against these women on the basis of gender and marital status, and infringed their right to dignity.
6. As it currently reads, the Draft Bill is in keeping with the Constitutional Court's order as regards the interim relief granted in *Ramuhovhi*. We are in agreement with the

² *Amicus Curiae* Heads of Argument, Constitutional Court: *Ramuhovhi and Others v President of the Republic of South Africa and Others* (CCT194/16) [2017] ZACC 41; 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) (30 November 2017).



wording of the amendment. It accurately captures the essence of the Court's findings, and the purposes of the interim relief that was ordered. The Court found that the Act as it stood differentiated between pre-Act polygamous customary marriages and new customary marriages. The Court quoted *Gumede*³ in explaining the purposes of the Act.⁴ It stated that the Act sought to reform customary law in a number of important ways – critically, the Act seeks to correct gendered inequality within customary marriages, and to ensure 'the equal status and capacity of spouses.'⁵ The Court in *Ramuhovhi* found that section 7(1) currently leaves wives in pre-Act polygamous marriages 'at the mercy of their husbands.'⁶

7. The interim relief, and in turn the proposed Amendment Bill which follows the wording of the interim relief in *Ramuhovhi*, seeks to fulfil the purposes of the Act, and to ensure that wives in customary marriages are treated the same, irrespective of when they entered into their marriage and whether their marriage is monogamous or polygamous. The proposed amendment will:

- 5.1 Place female spouses in pre-Act polygamous customary marriages in an equal position to women in post-Act polygamous and monogamous marriages. All women in customary marriages will have joint and equal rights in the marital property with that of their husbands. This will cure the discrimination on the basis of marital status.

- 5.2 The amended section puts an end to the perpetuation of inequality between husbands and wives in existing pre-Act polygamous customary marriages, and upholds the Constitutional right to dignity of these women in recognising that they have a right to deal jointly and equally with the marital property.

PROPOSED AMENDMENTS TO THE DRAFT BILL

The WLC notes that there are two distinct aspects that need to be addressed by, and as a result of the amendment.

³ *Gumede* supra (n 1) para 23.

⁴ *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC).

⁵ *Ibid* para 33.

⁶ *Ramuhovhi* supra (n 4) para 42.



Implementing the Constitutional Court's findings in Gumedede

8. This is an opportune time to enact an amendment in line with the finding of the Court in *Gumedede*, especially in light of inaction by Parliament since the Court's judgment. The Court made the following order as regards the Recognition of Customary Marriages Act:

- (a) 'Section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 is declared inconsistent with the Constitution and invalid to the extent that its provisions relate to monogamous customary marriages.
- (b) The inclusion of the words "entered into after the commencement of this Act" in section 7(2) of the Recognition of Customary Marriages Act 120 of 1998 is declared inconsistent with the Constitution and invalid. These words are severed from section 7(2) of the Recognition of Customary Marriages Act 120 of 1998.⁷

9. We recognise that section 7(1) will be amended to reflect the above position, as well as the position in *Ramuhovhi*, however section 7(2) remains unchanged since the Court's order in 2008. The words "entered into after the commencement of this Act" were never in fact severed from section 7(2) of the Act. Ten years since the order, the Act still contains these words. The Bill should therefore go further to amend section 7(2) to read as follows:

(2) A customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.

[The words "entered into after the commencement of this Act" have been deleted in line with the Constitutional Court's judgment in *Gumedede (born Shange) v President of the Republic of South Africa and Others* (CCT 50/08).]

10. It is necessary for the legislation to reflect the current and accurate position of the law where the Constitutional Court has found that the words stated above were

⁷ *Gumedede* supra (n 1) para 59.



inconsistent with the Constitution and invalid. The Legislature must publish the law once the necessary amendments have been made in the interests of informing the general public of the applicable laws in South Africa.

Informing the public of the amendments

11. The WLC recognises, and made submissions to the Court regarding the vulnerable position of the women to whom the Court order applies. To reiterate, these women are primarily older women, residing in both urban and rural areas, who live by African customary law, and most will likely be indigent. As stated in our heads of argument in the Constitutional Court, the Court in *Bhe*⁸ recognised the vulnerable nature of African women and children in our society. In addition, women in polygamous marriages have been recognised by our Constitutional Court as being particularly vulnerable.⁹ As was remarked by the Constitutional Court in *Ramuhovhi* in relation to the hollow protection provided by section 7(4) of the Act, which seeks to entitle spouses to pre-Act customary marriages to apply to a court to change the matrimonial property regime applicable to their marriage, ‘it does not require rocket science to realise that some – if not most – wives in these marriages may not even be aware of the existence of the provisions of section 7(4)’.¹⁰ Thus, in the absence of resources, with limited access to justice, and without adequate knowledge of the advances made by both case law and statute, this class of women will continue to not reap the benefits of the protections provided by the proposed Amendment Bill.

12. It is therefore evident that more than an enactment is required for the positions of these women to change in reality. It is imperative that they be informed of their statutory rights. The Legislature must put measures in place to ensure that when the law comes into force the women directly affected by it are informed of its existence, and consequences in their lives. It will not be sufficient merely to publish the amendment in the Government Gazette. The Legislature must ensure that knowledge of the publication actually reaches the areas in which customary law is practiced, and most importantly that it reaches the women in these marriages.

⁸ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) para 32.

⁹ *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC) paras 41, 49.

¹⁰ *Ramuhovhi* supra (n 4) paras 41- 42.



13. A manner in which this may be done is the use of different forms of media. Parliament may issue a press statement on its website, release a comment or article to a number of newspaper publications, and inform television news media of the amendment. It is important that people are made aware of their rights so that they may assert them when necessary.

CONCLUSION

14. The WLC commends Parliament for its commitment to taking the first steps towards implementing the changes to the law brought about by the decision of the Constitutional Court in *Ramuhovhi*. These amendments will alleviate the infringement of the constitutional rights to equality and human dignity of those women who have been in a historically vulnerable position. Previously, the law offered them little to no protection as regards their rights to the marital property. Now, the Legislature is taking a step in the right direction in its efforts to cure this longstanding position of inequality. In doing so, the WLC recognises that it is necessary that in enacting this Amendment Bill, Parliament needs to go further to present a position reflective of the law as it currently stands. This will require that the Draft Bill include an amendment to section 7(2) of the Act, and that Parliament put the necessary measures in place to ensure that when enacted the amendment is widely publicised so as to ensure that the affected women will be made aware of their rights.

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