ALL OUTFITS LEADING TO THE DEATH OF POLYGYNY? REFLECTIONS ON THE RECOGNITION OF CUSTOMARY MARRIAGES ACT 120 OF 1998 AND MAYELANE V NGWENYAMA & ANOTHER 2013 4 SA 415 (CC)

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1 Introduction

This article critically analyses the Recognition of Customary Marriages Act 1 (the Act) and the Mayelane v Ngweyama (Mayelane) 2 Constitutional Court (CC) decision in their approach to the African customary law institution of polygyny 3 using “the choice” and “gender neutrality” paradigms as expounded by Higgins et al. 4 According to Higgins, “gender neutrality” is the idea that the law and institutions sanctioned or constituted by it should be gender neutral. In order to reflect commitment to gender equality, “the concept of gender neutrality must be substantive, not merely formal”. Thus, a law that permits polygyny only but not polyandry might violate substantive equality. 5 The “choice” or consent based approach is premised on the idea that individuals may structure their lives in ways that are not gender neutral, so long as the decision to do so is made freely and independently. So,

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1 The Recognition of Customary Marriages Act 120 of 1998. The Act aims to make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith.

2 Mayelane v Ngwenyama 2013 4 SA 415 (CC).

3 Polygyny is a customary practice whereby only a man is allowed to marry more than one wife. It should, however, be noted that in the literature ‘polygamy’ which basically means plurality of husbands or wives is used interchangeably with polygyny. In this paper, the term ‘polygyny’ is preferred.


polygyny would not be problematic under this choice hypothesis so long as parties in such a marriage were a product of choice.6

As rightly observed by Higgins, in its recognition and regulation of polygynous marriages, the Act adopts neither the “choice” nor “gender neutral” paradigms.7 The CC in Mayelane embraced a “choice” paradigm.8 The Act and Mayelane have both been welcomed as positive developments in equal protection of women found in these marriages.9 Both these approaches, however, can lead to an outcome that is prejudicial to women. For a number of reasons, polygyny provides a challenging starting point for the examination of equality of spouses in these marriages. Firstly, it is widely understood to be fundamentally incompatible with the constitutional principles of equality10 and dignity,11 more specifically, to be discriminatory against “women’s rights” because only a man is allowed to have multiple spouses.12 Secondly, it is difficult, if not impossible to afford polygynous marriages the same type of constitutional protection that monogamous marriages enjoy,13 leading to suggestions that a polygynous marriage is automatically out of community of property.14 Lastly, through this analysis, we might also be drawn to reflect on ‘how civil marriage structures misdirect us to the goal of according all women’15 in a polygynous customary marriage equal rights and

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8 Mayelane para 73.
10 Section 9 of the Constitution.
11 Section 10 of the Constitution.
13 See similar discussion by Kaganas & Murray “Law, Women and the Family: The Question of Polygyny in a new South Africa” 1991 Acta Juridica 116-134, 126, who observed as far back as 1991 that “equality and freedom of discrimination that deserve universal application can be difficult to apply” in the context of polygynous marriages.
status, disregarding the fact that under living customary law,\textsuperscript{16} there is already a recognised hierarchical structure of women’s status that exists in a polygynous marriage, which is not discriminatory.\textsuperscript{17}

The paper is divided into five parts, the first is the introduction. The second part looks at the brief historical context of polygyny as practised by indigenous communities in South Africa. The aim is to highlight living customary rules of polygyny and show how they protect equal rights to property that survived different political regimes, leading to its official recognition under the Act. This part also discusses how polygyny is recognised and regulated by the Act and Mayelane. Part three analyses the approach adopted by the Act and the Mayelane case within “the choice” and “gender neutrality” paradigms with the aim of evaluating their effectiveness in advancing the rights of women in polygynous customary marriages. Part four concludes by arguing that both approaches fail to consider the socio-structural inequalities of women in these marriages which reduce them to “paper laws”.\textsuperscript{18} At best, they challenge the very social objective of providing for equal protection of spouses (emphasis added) found in polygynous customary marriages, an approach that I argue, will only lead to the death of official version of polygyny.

2 Polygyny in South Africa

Polygyny is a customary marriage practice whereby only a man is allowed to marry more than one wife.\textsuperscript{19} Bennett rightly observes that ‘although all men are equally entitled to the marry more than one wife, the practice on the ground is that only those of high rank or have achieved material and political success realise this right’.\textsuperscript{20} Moreover, lobolo, as an essential requirement of a valid customary marriage can only be met if the man is in a position to do so for each of his wives.\textsuperscript{21}

\begin{footnotesize}
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\item \textsuperscript{16} Rautenbach & Bekker \textit{Introduction to Legal Pluralism} 2014, 30 define ‘living customary law’ as “the original customs and usages that are in constant development [in that as] communities change and so do their rules”.
\item \textsuperscript{17} See generally discussion by Bennett, \textit{Customary Law in South Africa}, 243-245 on how various women are ranked in a polygynous marriage and the effects that it has on rules regulating property and succession under customary laws.
\item \textsuperscript{18} Himonga “The advancement of women’s rights in the first decade of democracy in South Africa: The reform of the Customary Law of Marriage and Succession” 2005 \textit{Acta Juridica} 82-107, 82.
\item \textsuperscript{19} Bennett, 243.
\item \textsuperscript{20} Bennett, 243.
\item \textsuperscript{21} All authorities agree that that there cannot be a customary marriage if the lobolo requirement has not been met. See generally \textit{Fanti v Boto} [2008] 2 All SA 533(C); 2008 (5) SA 405 (C), and \textit{Motsoatsoa v Roro} [2011] 2 All SA 324 (GSJ).
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In a polygynous customary marriage, recognised under living customary law, each wife and her children establish a separate autonomous house. These autonomous houses ‘not only contain dwellings, kitchens and granaries, but also livestock and arable fields allocated by the husband’. The ranking and status of each wife is according to the date of marriage. In order to preserve the intra-familial relations and the integrity of each of the houses, a husband is not permitted, without consulting the wife of a particular house, to move assets from one house to another. Where assets have been so moved, an inter-house debt is created between the houses. In addition, in terms of the customary rules of inheritance, children inherit property from their respective mothers’ houses. This position, arguably, created an equitable distribution of property between the wives in a polygynous marriage; a position that I argue was not discriminatory.

Historically, in the South African legal system, as Moosa rightly observes, ‘polygyny was generally not illegal provided it was practised by Black Africans in the context of a customary marriage’. However, polygynous marriages were legally void in South Africa, even though special courts were giving effect to consequences of a polygynous customary marriage. The historical accounts of polygynous marriages in the South African legal system and reasons for non-recognition have been well documented by many writers. Therefore, it is not necessary to repeat them. It is however important to underscore the fact that such non-recognition led to several hardships on women and children in polygynous unions. For example, in the former Transvaal, while government was prepared to apply laws

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22 Olivier, Bekker, Olivier & Olivier, Indigenous law, 1995, 40.
23 Bennett, 243;
24 This position was entrenched in the the KwaZulu Law on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987. As cited by Olivier et al, 41, section 68 KwaZulu and Natal Codes provided that “whenever a customary marriage is contracted by the family head, a house, which, subject to the provisions of paragraphs (b) and (c), is either a senior or an affiliated house, shall be established for the wife of the marriage.”
27 Olivier 1995, 149.
29 Moosa PER/PELJ 70
and customs of the African population, it deemed polygyny uncivilised leading to courts bastardising children, depriving fathers of guardianship of their children. This also led to the destruction of equitable claim to property.\textsuperscript{31} Such children could only inherit through their mother’s family.\textsuperscript{32} Another consequence was the privileged position enjoyed by civil unions in that State policy was based on an understanding that only a “voluntary union for life of one woman and one man to the exclusion of all others” was a true marriage because customary marriages were potentially polygynous, they could therefore not be classified as marriages.\textsuperscript{33} The church’s approach to a convert who was in a polygamous marriage was to only consider only the first marriage as valid and disregarded the rest.\textsuperscript{34} In addition, a subsequent Christian or civil marriage nullified the existing customary marriage.\textsuperscript{35} The discarded customary wife also faced more difficulties in the justice system. For example, if a spouse of a customary union brought an action for damages in a magistrate court, the union would not be recognised, and so the claim would fail.\textsuperscript{36} The unfortunate part was that most of these women would only become aware of this reality after the husband had passed.\textsuperscript{37} Section 1 of the Marriage and Matrimonial Property Law Amendment Act,\textsuperscript{38} however, amended corrected this position. It provided that a spouse should first dissolve his or her customary marriage before entering into a civil law marriage.\textsuperscript{39} But even then, there was no obligation on the husband to pay maintenance to his customary wives.\textsuperscript{40} This position affected the proprietary consequences of the pre-existing customary marriages that were concluded between 1929 and 1988 and not marriages concluded before 2 December 1988.\textsuperscript{41} After 2 December 1988, a subsequent civil marriage would no longer have the effect of superseding an existing customary union.\textsuperscript{42}

\textsuperscript{31} Meesadoosa \textit{v} Links 1915 TPD 357 361 as cited by Project 90 paras 2.3.10.

\textsuperscript{32} These children, however, had no preferential inheritance rights even in their mother’s family.

\textsuperscript{33} \textit{Hyde v Hyde \& Another} 1866 RR1PD 130 accepted in South Africa law by \textit{Seedat’s Executors v The Master (Natal)} 1917 AD 302 as cited by Project 90 para 1.4.5


\textsuperscript{35} See also Bennett, 2004, 190.

\textsuperscript{36} \textit{Mokwena v Lamb} 1943 (2) PH K64 (W) as cited by Bennett, 2004, 191. See also Henriques http://hdl.handle.net/10500/9970.

\textsuperscript{37} Henriques http://hdl.handle.net/10500/9970.

\textsuperscript{38} 3 of 1988.

\textsuperscript{39} Section 22 (2) of the Black Administration Act of 1927 as amended by Act 3 of 1988.

\textsuperscript{40} Herbst \& Du Plessis 2008 \textit{Electronic Journal of Comparative Law} 9.

\textsuperscript{41} Bennett, 2004, 265.

\textsuperscript{42} Bennett, 2004, 196.
In order to address these disadvantages, customary marriages are now recognised as valid by the Act.\textsuperscript{43} The Act was passed with the aims, among other things, of taking away from a customary marriage features that discriminated against women and creating an equitable marital relationship for men and women in these marriages.\textsuperscript{44} In the context of polygynous marriages, this aim was achieved by creating a new marriage that is contracted according to the Act\textsuperscript{45} and by extending certain provisions to marriages concluded before it came into force, which would otherwise have been governed by customary law.\textsuperscript{46}

The Constitutional recognition of polygynous marriages can, arguably, be based on sections 30 and 31 of the Constitution that provides for the right to culture. This recognition, it is submitted, is in compliance with sections 9(3) and (4),\textsuperscript{47} and 15(3)(a),\textsuperscript{48} which recognised marriages concluded according to custom without discrimination.\textsuperscript{49} Sections 15(3) (a), 30 and 31 of the Constitution, it can be argued, recognise cultures that exist and do not provide for the creation of non-existent cultures. According to these provisions, it can be argued that, no woman who can prove an existing culture of polyandry can be denied to practise it.\textsuperscript{50} Polygyny in South Africa is a cultural practice which has existed before the Constitution and can, therefore, be argued to be part of the customs to which African men have a right of enjoyment in a customary marriage.\textsuperscript{51} Further recognition of polygyny is found in the Act.\textsuperscript{52} It gives full legal recognition to all polygynous customary marriages concluded before and after the Act came into effect.\textsuperscript{53} This is a departure from the previous official position where

\textsuperscript{43} The Act was passed in 1998 and came into force on 15 November 2000.

\textsuperscript{44} See Preamble to the Act.

\textsuperscript{45} Section 7 (6) of the Act requires a husband have an equitable matrimonial property system that will regulate his existing and future marriages.

\textsuperscript{46} Section 6 on the equal legal capacity of spouses in customary marriages applies to both monogamous and polygynous.

\textsuperscript{47} Section 9(3) lists culture as a basis on which discrimination is not allowed.

\textsuperscript{48} Section 15(3) indirectly recognizes marriages concluded according to custom.

\textsuperscript{49} Mwambene & Kruuse (2015) 238.

\textsuperscript{50} Polyandry is a practice where a woman is allowed to have multiple husbands. Starkweather Katie, ‘A preliminary survey of lesser-known polyandrous societies’ accessed at http://digitalcommons.unl.edu/nebanthro/50?utm_source=digitalcommons.unl.edu%2Fnebanthro%2F50&utm_medium=PDF&utm_campaign=PDFCoverPages, on 31/08/15, show that the Igwewe society in Northern Nigeria of Jos Plateau and the Lele tribes in the Western Congo practice polyandry in Africa.

\textsuperscript{51} See similar arguments raised by Bennett Customary Law in South Africa (2004) 78 who has generally argued that the recognition and application of customary law in South Africa rests on the right to culture as provided in sections 30 and 31 of the Constitution.

\textsuperscript{52} In compliance with section 15(3) of the Constitution, the Act was passed in 1998.

\textsuperscript{53} Section 2(3) provides that if a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages. Section 2(4) provides that if a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.
polygynous marriages were regarded as void marriages leading to the observation that the Act has “marked the acceptance of polygamy into the mainstream South African legislation”\(^{54}\). In addition, unlike in the past where, according to official customary laws, matrimonial property was controlled by the husband\(^{55}\), the Act gives equal status and capacity to both husband and wife/wives in a customary marriage to acquire and dispose of property.\(^{56}\) In addition, the Act also requires a husband to join the existing spouse[s] in the application for leave to change the matrimonial system;\(^ {57}\) by regulating the future matrimonial system of further marriages that are to be concluded by the husband.\(^ {58}\) In addition, as rightly noted by Higgins \textit{et al.}, the Act does also attempt to protect the property interest of the existing wife/wives by specifying a change in property regime and division of existing property.\(^ {59}\) More importantly, the Act provides judicial oversight, requiring a determination by the court that the interests of all parties will be protected in a subsequent marriage by the husband.\(^ {60}\)

In the conclusion of a further marriage by the husband, however, consent of the existing wife/wives is not a requirement under the Act.\(^ {61}\) The question on the validity of a marriage concluded without complying with section 7(6) of the Act was addressed in the \textit{Mayelane} case. The brief facts of the case are as follows. On 1 January 1984, the first respondent, Ms Mdjadi Florah Mayelane, was married to the deceased, Hlengani Dyson Moyana according to customary law and tradition at Nkovani Village, Limpopo. Three children were born out of the union. The marriage was not registered. The deceased died on 28 February 2009 and the marriage was still subsisting. When the first respondent sought to register the customary union at the Department of Home Affairs after the death of the deceased, she was advised

\(^{54}\) Henriques http://hdl.handle.net/10500/9970.
\(^{55}\) Section 11(3) of the Black Administration Act, 1927 provided that a wife was a perpetual minor under the guardianship of the husband.
\(^{56}\) This position is contrasted to section 11 (3) of the Black Administration Act, 1927. Section 6 of the Act provides that “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.”
\(^{57}\) Section 7(4)(b) provides that “in the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant’s existing spouse or spouses, must be joined in the proceedings.”
\(^{58}\) Section 7(6) provides that “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.”
\(^{59}\) Section 7 (7) of the Act as discussed by Higgins \textit{et al.}.
\(^{60}\) See generally Higgins \textit{et al} in the discussion of section 7(7) of the Act.
\(^{61}\) See section 3(1) (a) and (b), as read with section 7 of the Act.
that the appellant, Ms Mphephu Maria Ngwenyama had also sought to register a customary marriage allegedly contracted between her and the deceased on 26 January 2008. 62

The first respondent challenged that the purported marriage between the deceased and the appellant was null and void ab initio on two grounds. First, that she had not been consulted before it was concluded and second, because the deceased had failed to comply with section 7(6) of the RCMA. 63 In the court of first instance, 64 the Judge considered the equal status and capacity afforded to spouses in a customary marriage and came to the conclusion that section 7(6) is aimed at protecting the proprietary interests of both the existing and prospective spouse. 65 He, however, held that: “the failure to comply with the mandatory provisions of this subsection cannot but lead to the invalidity of a subsequent customary marriage, even though the Act does not contain an express provision to that effect”. 66 Put differently, the High Court ruled that because there was no court approved contract, the second marriage was void. This led Ms Ngwenyama and her children wanting of legal protection.

When the matter went for appeal in the Supreme Court of Appeal (SCA), Ndita AJA in setting aside the order by the High Court stated that the purpose of section 7(6) of the Act must be determined in the light of the legislative scheme which guided its promulgation. 67 The Judge said:

“That at the heart of the Act, is the intention to advance the rights of women married according to customary law in order that they acquire rights to matrimonial property they did not have before the enactment of the Act”. 68

With this in mind, Ndita AJA opined “that it is difficult to reason that section 7(6) could be intended solely for the protection of the wife in an existing marriage”. 69 In disagreeing with the interpretation that was adopted by the court a quo, the Judge opined that such a position

62 Mayelane para 4.
63 Mayelane para 4.
64 MM v MN 2010 (4) SA 286 (GNP).
65 MM v MN para 13.
66 In Mrapukana v Master of the High Court [2008] JOL 22875 (C) the Judge stated that a man who seeks to enter into a further customary marriage must first enter into a written agreement that will set out the manner in which the material possession and wealth of the family will be managed, which is a prerequisite for the validity of the further customary marriage.
68 Ngwenyama para 19.
69 Ngwenyama para 19.
would be seriously undermining the very equality that the Act seeks to uphold and consequently held that the second marriage was valid.

On 30 May 2013, however, the CC disagreed with the SCA and decided that under Tsonga customary law, the first wife must consent to her husband taking an additional wife in order for the subsequent marriage to be valid. The CC invalidated the subsequent marriage on the basis that consent from the first wife had not been obtained. The Court arrived at this decision after, among others, applying the constitutional principles of equality and dignity as they relate to the first wife and the husband. Allowing her husband to marry another woman without her consent, the CC opined, would not be compatible with the protection of these rights of the first wife that are protected by the Bill of Rights.

3 Analysis of the Act & Mayelane

In analysing the approaches adopted by both the Act and Mayelane case in the context of polygyny, the starting point is the South African Constitution (Constitution). The Constitution recognises both the right to equality and the right to culture. This position has, obviously set up a potential conflict in the context of polygynous customary marriages. Given the fact that polygyny only allows men to have multiple wives, legal recognition must, therefore, ensure that the practice complies with principles of equality. The Constitution provides that ‘the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including sex and gender’. Women in polygynous customary marriages are thus protected under the Constitution on the basis of express grounds upon which discrimination is prohibited. In addition, the recognition and application of customary law under the Constitution is subject to the Constitution and the Bill of Rights.

Indeed, the general principles of equality of spouses in a customary marriage, and non-discrimination, have been at the center of the debate around the customary practice of

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70 Ngwenyama para 20.
71 Ngwenyama para 24.
72 Mayelane para 87.
73 The subsequent marriage did not also comply with the basic requirements of customary law marriage which is the holding of negotiations for the payment of lobolo.
74 Mayelane para 83.
75 Mayelane para 83.
76 Sections 9, 30 and 31 of the Constitution.
77 Section 9 (3) of the Constitution.
78 Section 211 (3) of the Constitution.
polygyny and the call for its prohibition. However, those who support polygyny generally see that it facilitates the enjoyment of rights of those women and children in these marriages. In this debate, it is also important to note the difference between formal and substantive equality. Formal equality refers to sameness of treatment of individuals in similar circumstance. Substantive equality is concerned with the outcome. It is thus clear that women in a polygynous customary marriage would need to be afforded substantive equality as opposed to formal equality because, as discussed, living customary law allows men to have multiple wives and therefore formal equality cannot be achieved by affording a woman equal opportunity to have multiple husbands.

This following section, however, analyses “the choice” and “gender-neutral” paradigms that have been adopted by the South African legal system in resolving the conflict between customary law and women’s right to equality in the context of polygynous customary marriages. As pointed out in the introduction, gender neutrality seeks to achieve substantive equality; and the choice approach seeks to achieve formal equality.

3.1 The Act

As previously noted, the Act neither adopts the “choice” nor “gender neutral” paradigms in its recognition and regulation of polygyny. The recognition and regulation is in the following ways: it recognises polygynous marriages involving multiple wives but not multiple husbands by using terms “husband” and “woman” rather than “spouse” when specifying the regulation of the matrimonial property system of the marriage, which are gendered; matrimonial property in a polygynous customary marriage to continue to be

80 For example, Bennett, 2004, 246 points out support for the practice based on the following: “that women who might otherwise not been married are absorbed into a marriage relationship, who might be tempted to commit adultery, may instead conclude another union.”
82 See also similar views by Kaganas &Murray 1991 Acta Juridica.
84 Section 2(3) of the Act provides that if a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages and section 2(4) of the Act provides that if a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages.
85 See sections 7 (4) (b) and section 7(6) of the Act.
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governed by customary law; and it only requires that the existing wife be notified when her husband wants to marry a subsequent wife, consent of the existing wife is therefore not a requirement. While, section 6 of the Act provides that both parties have equal legal capacity in a customary marriage, the gendered language in both section 7(4) (b) and 7(6) seems to elevate the legal status of a husband and not a wife. An assumption can, therefore, be made that under the Act, only men have legal capacity to acquire and dispose property in a customary marriage hence they should determine the future matrimonial property system to govern their marriages. This position, unfortunately, is a repeat of section 11(3) of the Black Administration Act, 1927 (BAA) that reduced women to perpetual minors with no legal capacity.

In analysing the Act, therefore, the starting point is how the institution of polygyny in South Africa is traditionally practised under living customary law. The practice has always been to allow only men to have multiple wives (emphasis added) and not vice versa. This position, according to sections 9(3), as read with (5) of the Constitution is unfair discrimination based on the fact that it is on the listed grounds. But the question that one can ask is: can this discrimination be justified? In the Harksen case it is stated that:

Where section 8 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1).

Section 7 (1) of the Act as read together with the Gumede in which the CC avoided a ruling in the matter of polygynous marriages, provides that the matrimonial property system of polygynous marriages concluded before the Act continue to be governed by customary law.

See also the CC referring to Professor Carl Bonzaaier, an anthropologist and possibly sole expert on Tsonga customary law as having provided his research material in support of the contention that consent of the first wife is not a requirement.

Under section 11 (3) of the BAA, a wife was regarded as a minor subject to the marital power of the husband.

This position has to be contrasted to the Irigwe society in Northern Nigeria of Jos Plateau and the Lele tribes in the Western Congo that practice polyandry in Africa as reported by Starkweather Katie, ‘A preliminary survey of lesser-known polyandrous societies’ accessed at http://digitalcommons.unl.edu/nebanthro/50?utm_source=digitalcommons.unl.edu%2Fnebanthro%2F50&utm_medium=PDF&utm_campaign=PDPCoverPages, on 31/08/15.

See generally the discussion of Harksen v Lane NO & others, (CCT9/97), para 47.

Harksen para 42.
In terms of sections 15(3)(a), 30 and 31 of the Constitution, recognition is given to the existing cultures, which in this context qualify polygyny as an existing culture. Arguably, the differentiation in the recognition of polygyny in the Act was based on the legitimate government purpose of recognising existing customary practices and not creating new customs. For purposes of this discussion, therefore, it is not surprising that the Act, enacted in terms of section 15(3) of the Constitution only recognises polygyny and not polyandry.

In Harksen, it is further proposed that if the discrimination is found to be unfair, it is important to determine whether the provision has impacted on the complainant unfairly. One of the factors to consider is: “the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage”. In the context of this discussion, before the Act, the rights and status of women in polygynous marriages were severely affected because of non-recognition of such marriages. In addition, according to section 11(3) of the Black Administration Act, women in a customary marriage were perpetual minors with no legal capacity. It follows, therefore, that the differentiation on the recognition and regulation of polygyny in the Act cannot be justified because it perpetuates the official previous position. As discussed, living customary law is not discriminatory since each wife has an autonomous house and property. Therefore, an appropriate balance between living customary law and official customary law should have been met in order to address the challenges that women suffered before the Act.

It is also important to note that the CC in Gumede (born Shange) v President of the Republic of South Africa, (Gumede) also avoided making a ruling with regard to the regulation of property of polygynous marriages concluded before the Act, leaving a void in the protection of women found in these marriages. It is, therefore, argued that in failing to include the living customary practice of polygyny, the Act is contributing to the slow death of its official version. Furthermore, incorporating living customary practice of polygyny would have mitigated the harsh consequences that women in these marriages faced under the official version of customary law. At its best, the Act is a repeat of the position of women in a polygynous customary marriage before its full recognition as a valid marriage.

94 Harksen para 50.
95 Gumede (born Shange)v President of the Republic of South Africa, CCT 50/08 [2008] ZACC 23.
96 Gumede para 56 as read with para 58(e)
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3 2  Mayelane
As pointed out in the introduction, the CC in Mayelane embraced “the choice” paradigm, requiring the first wife to consent to her husband taking an additional wife in order for the second or subsequent marriage to be valid. On face value, this decision is welcomed by feminists as a commitment to equality between women and men in a customary marriage. However, the outcome of the case suggests that one should worry about the application of the concept of equality. At its best, the Mayelane decision resonates with what Justice Sachs, as cited by De Vos, had pointed out: “power is diffuse and that we could all potentially be both the beneficiaries and the victims of legal rules which always promote the interests of some to the detriment of others”. The discussion to follow is a theoretical analysis of both approaches.

3 2 1 What is the socio-economic status of a woman in customary setting?
Recent research by Higgins is insightful on the matter. One traditional leader explained:

“He was in the process of marrying a third wife and does not believe that he needs the consent of his other wives because it was not a requirement when he was marrying them”. “Many women interviewed knew about their husband’s intention to marry and felt helpless to do anything about it”.

Another Chief explained that “when the husband wants to marry a second wife, her refusal to consent would not prevent the second marriage, unless the husband is unable to support her”. One interviewee explained: “We have five girlfriends. Men think it is right, but women think it is wrong. But women cannot do anything because they do not work, they are not educated enough to talk for themselves”.

The above interviewees’ responses are a clear reflection of a woman’s disempowered position in a customary marriage. They also show the complex realities of how the Act or the Mayelane case has not been able to address the inequality that is caused by socio-economic factors. Commenting on the provisions of the Act that are aimed at protecting women in polygynous customary marriages, UNO Women observed:

“theoretically, the property rights of the women in these relationships may be protected if the parties abide by the Act, but the unequal bargaining power of women due to their socio-economic or wife status renders this law discriminatory in impact.”

With such reality on the ground, “the choice” paradigm route that the CC took in the *Mayelane* case may obviously be what Himonga calls “paper laws” in the following ways: How does one determine the content of the consent from the first wife; and should there be witnesses when this consent is being made to protect the second wife? Moreover, Nhlapo observed as far back as 1991:

“as wives, African women do not enjoy a great deal of freedom of choice. Their lives, particularly in terms of personal independence and equality of decision making, are subjected to the needs of the family”.

Indeed most women found in such a situation have no real choice in issues of husband marrying a second wife or not. In some cases they may be pressured to comply with cultural practices and hence consent to the husband marrying a second wife. Indeed, the expert evidence in the *Mayelane* case said,

“The first wife is always expected to agree to a husband taking a second or subsequent wife. If she unreasonably withholds consent she would be sent to her parents homestead to reconsider. If she then returns to her husband but remains unreasonable in refusing co-operation the husband may marry without consent or divorce her”.

The above quote illustrates that the choice paradigm, as adopted by *Mayelane* may indeed be paper law.

### 3.2.2 Does the Act protect women in polygynous marriages?

In 2011, Bundlender *et al* study of polygyny show that the number of women found in formal polygynous unions are very low. This may obviously mean that discrimination of women based on the official version of polygyny is soon going to be history. However, to answer the

103 Himonga 2005 *Acta Juridica* 82.
106 *Mayelane* para 57.
question posed, Ndita AJA’s sentiments on the matter are insightful. In considering whether section 7(6) of the Act affords protection to women married in polygamous customary marriages, the Judge made reference to Hassam v Jacobs 2009 (5) SA 572 (CC) as follows:

“by discriminating against women in polygynous Muslim marriages on grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection …”.108

Although the above case was in the context of Muslim marriages, Ndita AJA opined that it equally applies to polygynous marriages concluded in accordance with customary law.109 Indeed, as many writers have pointed out: “women involved in these polygynous marriages are often poor, rural and illiterate, even though prone to disputes over matrimonial property”.110 In addition to that, research shows that lack of registration of subsequent marriages is in most cases due to the husband’s fault who may not want to involve the first wife into the discussion of property issues.111 Therefore it is indeed “unjust to invalidate an otherwise valid marriage on the basis of the husband’s failure when no duty was placed on the wife”. Moreover, many writers have pointed out: the requirement of section 7(6) makes it impossible for people to register polygynous marriages due to the practical hurdles that need to be met.112

3.2.3 What is the purpose of the equality principle?

The starting point is Kaganas and Murray sentiments:

“the purpose of invoking an argument based on equality is undermined if that argument is used without ensuring that the remedy one chooses is sensitive to the real situation within which those who are discriminated against find themselves in.”113

It is also settled law that discrimination can arise through direct or indirect application of same rule to different situations. Even though the second marriage in the Mayelane case was invalid due to non-compliance with the lobolo requirement, the equality principle, arguably, may have been invoked by the CC merely to provide a new angle for old prejudices against

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108Ngwenyama para 19.
109Ngwenyama para 20.
111Faranaaz (accessed 31-07-2014).
112Himonga 2005 Acta Juridica 82.
113De Vos “Between a rock and a hard place for wives in polygynous marriages” has also expressed that the decision fails to display the same kind of sensitivity towards the way in which power operates in South Africa
the institution of polygyny, using a civil law marriage as a model.\textsuperscript{114} Seeing that the challenge came after the husband was deceased, the challenge to the validity of marriage was clearly about entitlements to the deceased estate. So, instead of providing a remedy to conflicting claims to entitlements to his deceased estate, the case shielded the injustice (inequality between women who were married to one man) with another by indirectly allowing only one woman to inherit the deceased estate. Applying the equality principle in the \textit{Mayelane} case has in a way repeated the history of the unfortunate position where women in polygynous marriages were not legally protected (the second/subsequent wife) through the fault of a deceased husband.

4 Conclusion

The paper has hopefully brought to the fore the superficial approach taken by courts and the legislature to advance the rights of women in the context of polygynous customary marriages. In both approaches, there is a portrayal that substantive equality, in the context of polygyny, can be achieved by formal standards of equality between a man and a woman in a customary marriage. A conclusion reached without taking into account the living customary law that addresses the socio-economic contexts of women found in these marriages, challenges the very social objective of the Act: to provide for equal protection of spouses found in both monogamous and polygynous customary marriages.

\textsuperscript{114} See similar arguments by Mwambene & Kruuse 2013 Acta Juridica 295.