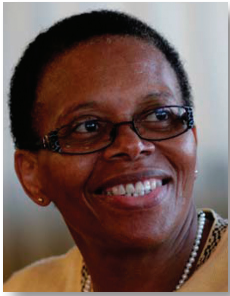


UNDERSTANDING THE COMPLEXITIES OF CUSTOMARY MARRIAGES



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Decisions around the distribution of a deceased member's death benefit can be a challenging task for any trustee. There are various complexities that can arise, such as establishing whether a customary marriage has been concluded.

When the Recognition of Customary Marriages Act (RCMA) 120 of 1998, came into operation on 15 November 2000, it gave full legal recognition to customary marriages for the first time in the history of South Africa.

In this country, a customary marriage is one that is negotiated and entered into or celebrated according to any of the systems of indigenous African customary law that exist in South Africa.

What this means is that, for all intents and purposes, the RCMA has ensured that a customary marriage, which complies with the RCMA, is recognised as a valid marriage in South Africa. By implication, the parties who have entered into that marriage have the same rights as those who have entered into a civil legal marriage.

While this is undoubtedly a fair precedent, it can also be open to potential abuse, and poses a number of challenges when trustees have to decide on the distribution of death benefits.

A case in point

A recent case between MJ Maake ("complainant") vs Old Mutual SuperFund Provident Fund ("first respondent") and Old Mutual Life Assurance Company (South Africa) Limited ("second respondent") that came before the Pension Funds Adjudicator highlighted these challenges. On the death of a fund member, the board of trustees determined that he had seven dependents, three of whom were his biological children. The four other dependents were a woman who claimed to be the member's customary wife and her three children, whom she claimed were born from this customary marriage.

The board of trustees paid out the benefit proportionally to all seven dependents. However, a complaint was subsequently received from the deceased member's sister. She questioned the validity of the customary marriage and also whether the alleged customary wife and the deceased member had had children from their relationship. The complainant wanted the benefit to be reallocated to exclude the supposed customary wife and her children and to include the deceased's sister who was now looking after his biological children.

After investigating the complaint, the Adjudicator found in favour of the complainant. The benefit allocation was removed from the woman who claimed she was a customary wife of the deceased.

The main reason behind the Adjudicator's decision to put aside the benefit allocation by the board of trustees was the fact that the woman could not provide irrefutable proof, other than an affidavit, that she was the wife of the deceased via customary marriage. As such, on a balance of probabilities she could not dispute the complainant's claim that there was no customary marriage, which means that she had no claim on the deceased member's death benefit.

The importance of proof

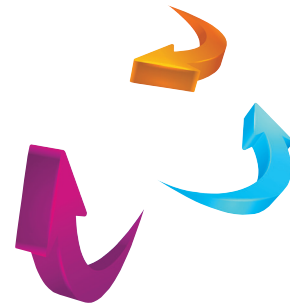
Irrespective of the truth of any of the claims made by the various parties, this determination by the office of the Pension Funds Adjudicator emphasises its requirement to thoroughly investigate a claim of a customary marriage being in existence. It also throws an intense spotlight on the importance of the partners in a customary marriage ensuring that they can prove their marital status if required to do so.

This proof can take various forms. Customary marriages entered into before 15 November 2000 (the commencement of the Act) are automatically recognised as valid marriages, provided the partner can offer proof of the marriage if required to do so.

This burden of proof is especially important if the claim of customary marriage is disputed by the deceased member's family, as was the case in the example mentioned earlier.

Importantly, in this instance, the payment of lobola is not automatically considered to be acceptable proof. In fact, it is only one of the essential requirements, and even if its payment can be proved, this alone might not make a relationship a valid customary marriage.

The other essential requirement is proof of transfer of the bride by her family group to the family of the man. This usually involves a lot of well-known rituals and ceremonies involving both families, and there should be credible witnesses or photographic proof of this event.



Registration of customary marriages after 15 November 2000

Since the introduction of the Act, the spouses to such a marriage have a duty to register the marriage in terms of the Act within three months of the marriage occurring. However, failure to register the marriage does not render the marriage non-existent. Registration can be done at any office of the Department of Home Affairs or through a designated traditional leader in areas where there are no Home Affairs offices.

The registration can only take place if the following people present themselves to the registering authority:

- Either spouse may request registration of their marriage by submitting the Form A, which has been completed by both spouses, wherein they confirm their consent to their customary marriage and that they are not subject to a civil marriage, the man confirms all previous customary marriages, lists all previous and that they are not a party to a civil marriage, and details of the lobola arrangement are provided; and
- At least one witness and/or representative from each of the bride's and groom's families must also complete a declaration on the Form A.

Also, in terms of section 4 of the Act, all customary marriages entered into after 15 November 2000 must comply with the following to be valid customary marriages:

- The marriage must be negotiated and entered into or celebrated in accordance with customary law;
- The prospective spouses must be older than 18 years old when entering into the marriage; but if a minor, such child's parents or guardian must consent to the customary marriage; and
- Both spouses must have consented to the marriage.

Some other important considerations for trustees:

1. Since the definition of "customary law" is limited to the customs of the indigenous African people of South Africa, the RCMA does not apply to customary marriages concluded by people outside of South Africa.
2. Religious marriages concluded in terms of Hindu and Muslim rites do not fall under the Act. These religious marriages are only legally binding if the parties also entered into a marriage in terms of the Marriage Act 25 of 1961 or the Civil Unions Act 17 of 2006. Although, for purposes of distributing a death benefit, the Pension Funds Act does provide that a partner in either of these religious marriages is regarded as a spouse.
3. A certificate of customary marriage serves as prima facie proof of the existence of that marriage – i.e. it would be difficult to dispute that there is no such marriage. The importance of obtaining such a certificate of customary marriage cannot be overstated, and should be clearly communicated to all members.
4. While the registration of a customary marriage is provided for in terms of the Act, according to section 4(9), a failure to register a customary marriage does not render that marriage invalid. Claimants may therefore still have recourse if they can otherwise prove their customary marriage.
5. The Act does not allow for the registration of customary marriages to take place after the death of one of the partners. This could adversely affect surviving partners who have no proof that a valid customary marriage existed and could result in them losing their benefit claims if these are opposed by other family members of the deceased. The fund would then need to consider whether such person was factually dependent on the deceased member.