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Dear Secretary

**COMMENTS BY THE NATIONAL HOUSE OF TRADITIONAL LEADERS ON
THE RECOGNITION OF CUSTOMARY MARRIAGES BILL, 2019**

Kindly find attached, comments by the National House of Traditional Leaders on the Recognition of Customary Marriages Bill.

Kind regards


Ikosi SE Mahlangu
Chairperson: NHTL

Date: 31/10/2019



INPUTS ON THE RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT BILL, [B 12-2019]

1. Introduction

The Secretary to Parliament has send the Recognition of Customary Marriages Bill, 2019, to the National House of Traditional Leaders for inputs, in terms of section 18 of the Traditional Leadership and Governance Framework Act, 2003. The National House of Traditional Leaders was given thirty days from the time of the referral of the Bill, to submit written comments to Parliament.

This submission is made by the National House of Traditional Leaders, a statutory body, established in terms of the National House of Traditional Leaders Act, 2009 (Act No. 22 of 2009). The role of the House is amongst others to promote the role of traditional leadership within a democratic constitutional dispensation. Its main objective is to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law.

COMMENTS

Section 3A: Appointment of registering officers

Section 3A (1) provides for the Minister or an officer authorised by the Minister to appoint any person as a registering officer for the purposes of this Act.

The National House of Traditional Leaders is of the view that traditional Leaders should participate in the registration of any customary marriage, and it is therefore recommended that traditional leaders be appointed as registering officers.

Section 4: Registration of Customary marriages

Section 4(2) states that both spouses must together apply to the registering officer for the registration of their customary marriage.

The National House of Traditional Leaders is of the view that this section may disadvantage spouses in case the other spouse refuses to register a customary marriage. It is therefore the recommendation of the House that the original section 4(2) be retained, that either spouse may apply for the registration of his or her customary marriage.

Section 7: Proprietary consequences of customary marriages and contractual capacity of spouses

The proposed amendments to section 7(1)(a) are that the proprietary consequences of a customary marriage, whether polygamous or not, entered into before the commencement of this Act, are that the spouses in such a marriage have a joint and equal ownership and other rights, and the rights of management and control over marital property. That is, a husband and his wives in pre-Act polygamous customary marriages must

share equally in the right of ownership of, and other rights attaching to family property, including the right of management and control of family property, and a husband and each of his wives. In each of the marriages constituting the pre-Act polygamous customary marriages must have similar rights in respect of house property.

It is the submission of the National House of Traditional Leaders that customarily, when the husband marries the wife, there is a consensual agreement between the two families with respect to the two individuals who are to marry and lobola is paid. Customary marriage is a matter of family, rather than the individual concerned. There will be a transfer of the bride by her family group to the family of the husband. It is the family that "lobola" the wife, the wife is getting married to the husband's family, meaning that she belongs to the family, including the assets. According to customary law, a homestead consists of a number of houses, Family property / marital property and house property. A family property is a communal property consisting of family members, that is the parents, siblings etc, and ownership of the property belongs to the parents and the House property and marital property belongs to the parties as they might have contributed and they will not own it if the property is in the homestead and in the same village as they do not own the land. Therefore, spouses in a customary marriage cannot have joint and equal ownership and the rights of management and control over marital property.

Customarily, before the parties can divorce, a reconciliation process is encouraged wherein the parties are brought together by the elders who negotiated lobola trying to resolve the matter. It is therefore the recommendation of the National House of Traditional Leaders that before the court can grant a decree of divorce, the court must obtain an affidavit from the people who were involved in the lobola negotiations confirming

that they mediated over the matter and confirming that the parties are divorcing.

Section 8: Dissolution of Customary Marriages

Section 8(1) states that a customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

Traditional Leaders are of the view that the same process that took place during the lobola negotiation, must take place even when the parties are divorcing. Before the customary marriage is dissolved by a court, the court must obtain an affidavit from the parties who negotiated lobola to the effect that there is no prospect of the restoration of a normal marriage relationship between the husband and wife.

Section 8(5) provides for a role by a traditional leader in the mediation, in accordance with customary law of any dispute arising prior to the dissolution of a customary marriage by a court.

Traditional Leaders applaud the department for recognising the role that traditional leaders play in the mediation of disputes arising prior to the dissolution of a customary marriage by a court.

Section 11: Regulations

It is the recommendation of the National House of Traditional Leaders that when making regulations, the Minister of Justice must consult the National House of Traditional Leaders.