

Proving the existence of unregistered
customary marriages in deceased estates:
challenges posed by the MBU 16 form

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ABSTRACT

Post-apartheid South Africa has seen the recognition of polygamous and monogamous customary marriages through the enactment of the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009*. However, proving the existence of an unregistered customary marriage is a challenge, particularly when a partner dies intestate. Directive 2 of the High Court provides that if a spouse dies before registration of the marriage, the MBU 16 form is used for purposes such as to provide proof of unregistered marriages by requiring the deceased's spouse and family members to complete the form as witnesses of the marriage. Despite its effectiveness thus far, many challenges still arise when using this MBU 16 form to prove a customary marriage which may result in non-recognition, thus depriving the surviving spouse and her children of the benefits of the deceased's estate, and protection thereof. This study aimed to explore the challenges posed by the MBU 16 form, comparing it with the finalisation of deceased estates and the implications of the requirements to complete the prescribed MBU 16 form to prove the existence of customary marriages in intestate deceased estates. The results show that most challenges emanate from families who refuse to validate or recognise the marriage in question leaving the Master's office with no choice but to dismiss the marriage claims. The study concludes that the lack of knowledge of customary marriage rights and registration leads to the delay or non-registration of these marriages, leaving the surviving spouse in a predicament. In light of these challenges, the study recommends that people in rural areas, be educated about the essence of registering their customary marriages. Furthermore, it is recommended that people register their marriages to avoid complications should either spouse die.

Keywords: Customary Marriages; MBU 16 FORM; Unregistered; Deceased Estate; Intestate Succession.

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LIST OF ABBREVIATIONS

CC	Constitutional Court
EA	Estates Act
KZN	KwaZulu Natal
PEAS	Paperless Estate Administration Systems
RMCA	Recognition of Customary Marriages Act 120 of 1998
SCA	Supreme Court of Appeal

CHAPTER 1: INTRODUCTION

1.1 Background

The recognition of customary unions in South Africa has been controversial in the past because of their polygynous nature.¹In customary polygynous marriages, the husband may have more than one wife rather than the gender-neutral practice of polygamy, of a partner having more than one spouse.²However, the evolution of the South African legal structure since 1994 and constitutional recognition of equality, culture and customary law led to the acknowledgement of customary unions as a reality in South African society. As much as the legal framework recognises customary marriages, there remains a challenge regarding unregistered customary marriages when one of the spouses, especially the man, dies intestate. To reduce the burden of courts trying to prove the existence of a customary marriage and assist the surviving spouse, a directive was issued by the Master of High Court in 2015 to deal with the administration of intestate deceased estates.³The directive introduced the MBU 16 form which can prove the existence of a customary marriage between the deceased and the surviving spouse.⁴ However, the MBU 16 form does not entirely solve the present challenges of proving the existence of an unregistered customary marriage. There are still loopholes in using the MBU 16 form as far as proving the existence of customary marriages where intestate deceased estates are concerned.

The *Recognition of Customary Marriages Act* (the *Recognition Act*)⁵ was introduced in 1999 and commenced in 2000. According to the *Recognition Act*, a customary marriage refers to:

A union that is negotiated, celebrated or concluded according to indigenous African customary law which exist in South Africa.⁶

¹ De Souza 2013 *Acta Juridica* 240.

² Kaganas and Murray 1991 *Acta Juridica* 116.

³ Circular 56 of 2015 dated 3 August 2015.

⁴ Chief Master's Directive 2 of 2015.

⁵ 120 of 1998.

Prior to the *Recognition Act*, customary marriages were not acknowledged in South Africa and were denoted as “unions” instead of “marriages.”⁷ However, in KwaZulu-Natal, it seems as if the state acknowledged these marriages more than in other parts of the country, as was in the *KwaZulu Act on the Code of Zulu Law*.⁸ In other provinces, customary marriages were not recognised as they conflicted with civil marriages, which only allowed a monogamous marriage which was registered by the state. The government could not endorse such customary marriages as they were observed as immoral due to their polygynous nature and the paying of *lobola*.⁹ As a result, the state could not provide any legal status to customary marriages up until the introduction of the *Recognition Act*.

The *Recognition Act* acknowledges South Africa's commitment to equality for all marriages. The Act's purpose is to recognise customary marriages, specify and regulate their requirements. However, the Act has been subjected to several constitutional attacks and has been altered considerably by the judiciary. The judicial decisions do not fall within the scope of this study, but a few are discussed.¹⁰ The foregoing discussion is guided by the recognition of all monogamous and polygamous customary marriages entered into prior to and post the commencement of the Act.¹¹ The *Recognition Act* seeks to ensure equality between all women married in accordance with civil and customary rites. To validate customary marriages, the *Recognition Act* makes provision for several practical aspects. Among these aspects are the requirement of registration, the proprietary consequences, the capacity of spouses and the financial implications upon the dissolution of these customary marriages.¹² In harmony with the broad purpose

⁶ Department of Home Affairs 2022 <http://www.dha.gov.za/index.php/civic-services/marriage-certificates#:~:text=In%20South%20Africa%2C%20the%20definition,Muslim%20or%20other%20religious%20rites.>

⁷ De Souza 2013 *Acta Juridica* 2.

⁸ *KwaZulu Act on the Code of Zulu Law* 16 of 1985.

⁹ Kaganas and Murray 1991 *Acta Juridica* 135.

¹⁰ Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 45-57.

¹¹ Mwambene 2017 *African Human Rights Law Journal* 17.

¹² Sections 4, 6, 7 and 8 of the *Recognition Act*.

of the *Recognition Act*, section 7(6) endeavours to safeguard the spouses' estate by ensuring fair distribution of property in the case of death and other circumstances.¹³

With specific regard to registration, spouses are required to register their customary marriages with Home Affairs within three months of the conclusion of a valid customary marriage.¹⁴ In addition, the *Recognition Act* requires all unregistered customary marriages concluded before the commencement of this *Act* to be registered within one year after the commencement of the *Act* or within any other period as prescribed by the Minister by notice in the government gazette.¹⁵ These registration periods were extended numerous times up until the end of 2010. However, non-registration of a customary marriage does not refute its existence, nor does it invite penalties.

For example, the non-registration of a marriage may not lead to invalidity, but it creates considerable difficulties. The deceased estates of persons married by customary rites, as the case is for persons married by civil rights, must be managed in terms of the *Administration of Estates Act* (the *Estate Act*).¹⁶ Nevertheless, as already indicated above, non-registration of customary marriages does not make the customary marriage invalid. This position often leads to challenges in proving the existence of such marriages while administering the estates. This challenge usually comes into the picture when a surviving spouse to an unregistered customary marriage approaches the Master's office to claim an inheritance from an intestate deceased estate.

In order to overcome this challenge, the Master's officials are guided by a directive of the Master. The directive was issued on 3 August 2015 and is known as the "*Chief Master's Directive 2 of 2015 – Appointment in Deceased Estates*".¹⁷ This directive, amongst other things, prescribes the use of an MBU 16 form to ascertain and validate an

¹³ Van Niekerk 2013 *Southern African Public Law* 28.

¹⁴ See *Recognition Act* s 4(3) (a).

¹⁵ See *Recognition Act* s 4(3) (b).

¹⁶ 66 of 1965.

¹⁷ Circular 56 of 2015 dated 3 August 2015. Hereinafter referred to as the *Chief Masters' Directive 2 of 2015*.

alleged customary marriage or marriages. However, the use of the MBU 16 form (also referred to as the customary marriage document), as required by the *Chief Master's Directive 2* of 2015, gives rise to logistical and administrative problems explored in this study.

In practice, it appears that there is a delay in the finalisation of intestate estates of persons married by customary rites due to the requirement that the form must be completed before an estate can be finalised.¹⁸ One of the challenges often encountered by the Master's officials incompleting the MBU 16 form for purposes of confirming the existence of a customary marriage between the deceased and the surviving spouse is non-participation by family members who are necessary to validate the customary marriage.¹⁹ Non-participation seems to be a factor that directly impacts the speed of completion of the form and consequently, the finalisation of the estate. From the viewpoint of the deceased's family members,²⁰ the completion of the form creates an unnecessary step in the estate's finalisation because the marriage's existence might be undisputed in terms of living customary law.²¹ The MBU 16 form is a fairly new phenomenon in the Master's office, and it would be worthwhile to explore its challenges and successes after being operational for seven years.

1.2 Problem statement

Despite the legal recognition of customary marriages, these marriages still impose legal and administrative challenges to legal practitioners, in particular where the administration of intestate estates involving a deceased who was married customarily is concerned.²² As already indicated above, although the *Recognition Act* requires spouses to register their customary marriage, whether entered into before or after the

¹⁸ It must be noted that this research focuses on intestate succession matters.

¹⁹ Curran and Bonthuys 2005 (eds) *South African Journal of Human Rights* 607.

²⁰ Bennett *Customary Law in South Africa* 233.

²¹ Living customary law refers to the usages and the old or original customs which have over time developed because of the changing needs of society; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 29-31.

²² Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 18.

commencement of this *Act*, registration is not a requirement for the validity of a customary marriage as it is quite common for spouses not to have their marriage registered.²³ It is, therefore, a mammoth task to prove the existence of an unregistered customary marriage for purposes of administering deceased estates, especially when the deceased was a spouse to an unregistered customary marriage and, most importantly, when the surviving spouse needs to be appointed as an executor, or he/she is a beneficiary in an intestate estate.²⁴ According to the latest data published by Statistics South Africa,²⁵ around 1357 civil marriages and 3 978 customary marriages were registered in 2017. Little has been reported on the use of the MBU16 form in the administration of deceased estates. In practice, it appears that there are often delays in the finalisation of an intestate deceased estate involving spouses who were married customarily as discussed above.²⁶ This research, therefore, explores the challenges posed by the MBU 16 form, for finalisation of intestate deceased estates as well as the implications of the requirement to complete the prescribed MBU 16 form to verify the customary marriage in deceased estates.

1.3 *Research question*

In light of the background above, the question to be answered in this research is as follows: "What are the implications of the requirement to complete the prescribed MBU 16 form (customary marriage document) to prove the existence of a customary marriage or marriages in intestate deceased estates?"

1.4 *Aims of the study*

To answer the research question stated above, this study seeks to explore the challenges posed by the MBU 16 form, in the finalisation of intestate deceased estates as well as the implications of the requirements to complete the prescribed MBU 16 form to prove the existence of customary marriage in intestate deceased estates.

²³ See *Recognition Acts* 4.

²⁴ Weeks 2020 *Acta Juridica* 216.

²⁵ Statistics South Africa 2013 <http://www.statssa.gov.za/publications/P0307/P03072013.pdf>.

²⁶ Weeks 2020 *Acta Juridica* 216.

Additional aims of this study are to:

- investigate the extent of the use of the MBU 16 form in the finalisation of intestate deceased estates;²⁷
- assess the attitudes of users of the MBU 16 form;²⁸
- establish the link between the delay in the finalisation of intestate deceased estates and the use of the MBU 16 form;²⁹and
- explore factors that impede the use of the MBU 16 form, thus causing delays in the finalisation of intestate deceased estates.³⁰

1.5 Research methodology

1.5.1 General

The first part of the research is a desktop analysis of literature, such as textbooks, case law and legislation. The second part of the research is qualitative.³¹ Focused interviews were conducted to investigate what is happening in practice. The objective of the interview was to elicit the feelings and perceptions of the participants on the efficiency and effectiveness of the MBU 16 form as required by the Master of the High Court and its impact on the timely completion of the administration process.

The focus of this study was the Thohoyandou High Court in the Vhembe District, Limpopo Province, South Africa. This Court services the Malamulele and Thohoyandou areas. Non-probability purposive strata sampling method was implemented to select the participants for this study.³² Purposive sampling is used when the participants are already known. The targeted respondents were divided into different groups, including

²⁷ See Chapter 6.

²⁸ See Chapter 6.

²⁹ See Chapter 6.

³⁰ See Chapter 6.

³¹ See Chapter 5.

³² This is a non-probability sampling technique wherein participants are grouped according to certain characteristics.

the estate controller (first level) and four legal practitioners (second level). In addition, interviews were conducted with the users of the form in their workplace, namely the two officials at the office of the Master of the High Court, Thohoyandou and four legal practitioners in the Thohoyandou area. These participants were typical users of the MBU 16 form.³³

The thematic analytical approach was used to analyse the collected data.³⁴A thematic approach is a way of analysing interview data by grouping responses into common themes but involves interpretation in selecting codes and constructing themes.³⁵The researcher went through the audiotaped records and then transcribed the recordings verbatim. These transcriptions were then read and re-read to become familiar with the data. Each transcript was then picked haphazardly and analysed through coding. The coded transcripts with related topics were then grouped into themes, and subthemes were identified. After that, the results were used in the study.

1.5.2 Ethical considerations

The principle of confidentiality is central to the research, and it is applied to all participants' questions and answers. Access to Master's officials is canvassed through the research ethics committee of the Ministry of Justice and Constitutional Development, including the ethical committee of the Faculty of Law, North West University (Ethical Clearance Number: 2018-0028). Ethical considerations concern themselves with the following, which is the cornerstone of this research:

- a) The voluntary participation of participants is imperative. The research ensured the free will of all participants and the right to withdraw without any prejudice from the study at any stage of the research.

- b) The participants' informed consent was obtained.

³³ See chapter 5 para 5.2.

³⁴ Clarke and Braun *Thematic Analysis*78.

³⁵ Kumar *Research Methodology*26.

- c) The participants were given sufficient and accurate facts about the research to allow them to decide on participation before giving consent. Sufficient and accurate information includes the following: the purpose of the research, potential risk, benefits, discomforts and precautions of the study.
- d) The research does not inflict any harm on the participants. On the contrary, the safety and well-being of the participants were of utmost importance and were ensured at all times during the data collection, analysis and presentation of findings.
- e) The anonymity of participants was safeguarded. The identity of the participants remains anonymous during and after the research. They were allocated numbers as identification. The nature of this research enables the researcher and the study supervisor to know the identity of the participants. However, they were always committed to safeguarding participants' anonymity.
- f) The participants' responses were confidential. The information gathered during this research was always kept confidential, and confidentiality was maintained during and after the research. The information collected was strictly used for this research only. This information was recorded and stored in the candidate's password-protected electronic document. Access to this information can only be obtained from the candidate.

1.5.3 Limitations of the study

Identifiable limitations of the study included time management, budgetary constraints and the geographical spread of the research population. To mitigate these, the research was conducted during working hours and by scheduled appointments. The geographically closely related participants were consulted during the same time frame. Travelling to the research participants is self-funded. The research area was the Thohoyandou High Court in the Thulamela district, as reflected in the map below.



Figure 1: Limpopo Map³⁶

1.5.4 Relevance for the Research Unit

This research aims to augment the North-West University's drive to attain a leading role in addressing socio-economic challenges as set out in the statement of the Research unit of the Faculty of Law, North-West University:

The Research Unit for Law, Justice and Sustainability addresses developmental and legal challenges in South Africa. The various projects in the unit deal with cutting-edge and cross-cutting issues pertaining to both the public and private sector. Examples are trade and development, land issues, poverty alleviation, environmental governance, the realisation of socio-economic rights, religion and culture.

This study relates the use of the MBU 16 form and the impact it has in the finalisation of intestate deceased estates where the *Recognition Act* is relevant. The study deals with a marginalised part of society; in effect, it will form part of "vulnerable societies", one of the themes of the Research Unit.

Customary marriages constitute a significant proportion of South Africa, and the existence thereof is an important aspect. The finalisation of intestate deceased estates in customary marriages presents an area of inequity between registered and unregistered customary marriages. The perceptions around the tool (MBU16 form) that is used in the

³⁶ Anon 2009 <http://info@municipalities.co.za>.

finalisation of intestate estates of a deceased person who was married customarily must be congruent with the intent of the tool. It is in this light that the research finds relevance.

1.6 Outline of the dissertation

The study is divided into six chapters as follows:

Chapter 1: The current chapter consists of the introduction to the research, problem statement, research question, aims, research methodology, limitations of the study, ethical considerations, relevance of the research unit and outline of the dissertation.

Chapter 2: This chapter focuses on the scope and application of customary marriages in South Africa.

Chapter 3: This chapter investigates the administration of deceased estates in customary South Africa.

Chapter 4: This chapter assesses the scope and application of the MBU 16 form.

Chapter 5: The second last chapter entails the results of the empirical survey.

Chapter 6: The last chapter contains the conclusion and recommendations.

CHAPTER 2: SCOPE AND APPLICATION OF CUSTOMARY MARRIAGES

2.1 Introduction

As explained in Chapter 1, the overall aim of this dissertation is to investigate the successes and challenges of the MBU 16 form, comparing it with the finalisation of deceased intestate estates. This study assesses the implications of the requirement to complete the prescribed MBU 16 form to prove the existence of customary marriages in deceased estates. The aim of this research cannot be attained effectively without understanding the scope and application of customary marriages in South Africa. Against this background, this chapter provides a synopsis of customary marriages in South Africa.

In discussing the scope and application of customary marriages, the focus is predominantly on the *Recognition Act* and understanding the *Recognition Act*, which currently regulates customary marriages in South Africa. This chapter also offers an overview of the *Act*, engages briefly with the judicial clarification and application of the *Recognition Act*, discusses certain controversial provisions of the *Recognition Act*, sets out the requirements for a valid customary marriage and concludes with recent legislative developments relevant to customary marriages.

2.2 Understanding the Recognition Act

2.2.1 Background

The *Recognition Act* is the primary statute that regulates customary marriages in South Africa. The enactment of this *Act* was partly introduced to address the history of gender inequality pertaining to the treatment of women in customary marriages. Notably, previously, African women were treated as perpetual minors and consequently had no rights to own property or carry out any juristic act without a male guardian's supervision.³⁷ Customarily, African women had the legal status of children, regardless of age. The suffering of women was exacerbated by marital regulations that put women

³⁷ *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 78.

under the control of their husbands and declared them the onlyholders and regulators of assets in the marriage.³⁸

Chapter 12 of the Constitution provides for the recognition of, and role of, traditional leaders, in particular, section 211 (3) thereof, which provides that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".³⁹As a result, The *Recognition Act* was introduced to eradicate the suffering African women married customarily faced by formally acknowledging all South African customary marriages.⁴⁰The *Recognition Act* gives women in customary law marriages equal status and protection as women in civil law marriages. The *Recognition Act* also introduces equality between spouses in a customary marriage relationship.⁴¹The *Recognition Act* further recognises the existence of monogamous and polygamous customary marriages.⁴²Effectively the *Recognition Act* brought customary law in line with the provisions of the Constitution, such as sections 9, 15, 25, 30 and 31, but the Act did not address the challenges of unregistered customary marriages.

2.2.2 Recognition Act and its regulation and the role of traditional leaders: general comments

The *Recognition Act* aims to eliminate the subordinate status of women. Section 6 of the *Recognition Act* explicitly states that women in customary marriages are equal to their husbands in status and capacity.⁴³However, despite the intent of the *Recognition Act*,

³⁸ Herbst and Du Plessis 2008 *Journal of Comparative Law*, See also *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) para 89.

³⁹ *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution)

⁴⁰ University of Cape Town 2012 https://law.uct.ac.za/sites/default/files/content_migration/law_uct_ac_za/1149/files/CLS_RCMA_Factsheet.

⁴¹ See s 6 of the *Recognition Act*; See also University of Cape Town 2012 https://law.uct.ac.za/sites/default/files/content_migration/law_uct_ac_za/1149/files/CLS_RCMA_Factsheet.

⁴² University of Cape Town 2012 https://law.uct.ac.za/sites/default/files/content_migration/law_uct_ac_za/1149/files/CLS_RCMA_Factsheet.

⁴³ *Recognition Act* s 6.

there are still contradictions and uncertainties about the place of women in customary marriages.

Section 11 of the *Recognition Act* empowers the Minister of Justice, in consultation with the Minister of Home Affairs, to make regulations regarding customary marriage registration requirements.⁴⁴ The registry must ascertain with certainty the information provided by the parties to a customary marriage to support the registration of a customary marriage and the existence or validity of such a customary marriage.⁴⁵

The *Recognition Act* further provides that: any matter that is required or permitted to be prescribed in terms of the *Act* must comply with the prescribed *Act*.⁴⁶ However, the *Recognition Act* provides that the regulation dealing with the registration of customary marriages and any other necessary matters must provide for the effective administration of such marriages.⁴⁷ The *Recognition Act* also prescribes fees for the registration of customary marriage and the issuing of any certificate in respect thereof.⁴⁸ Moreover, the *Recognition Act* further provides that any regulation made must be submitted to Parliament before publication.⁴⁹ However, these regulations may have financial implications for the state and require that the Minister of Finance be consulted under the circumstances.⁵⁰ Finally, the *Recognition Act* further provides for the regulations to make provisions for impositions of penalty measures against anyone who contravenes or fails to comply with the *Act*.⁵¹ According to the *Recognition Act*, any person found to have contravened the *Act's* provisions should be found guilty of an offence.⁵² The convicted

⁴⁴ Section 11(1)(a)(i) of the *Recognition Act*.

⁴⁵ Section 11(1)(a)(ii) of the *Recognition Act*; See also Heaton *South African Family Law* 335.

⁴⁶ Section 11(1)(a)(vi) of the *Recognition Act*.

⁴⁷ Section 11(1)(a)(vii) of the *Recognition Act*.

⁴⁸ Section 11(1)(b) of the *Recognition Act*.

⁴⁹ Section 11(2) of the *Recognition Act*.

⁵⁰ Section 11(3) of the *Recognition Act*.

⁵¹ Section 11(4) of the *Recognition Act*.

⁵² Section 11(4) of the *Recognition Act*.

person should be eligible for a fine or imprisonment for a period not exceeding one year.⁵³

Customary marriages, in terms of the *Recognition Act*, may only be dissolved by a court of law.⁵⁴ Traditional leaders, and other customary institutions have no power to grant a divorce.⁵⁵ Customarily, traditional leaders play a pivotal role in the conclusion of and proving the existence of and registration of customary marriages are concerned.⁵⁶ This is probably because customarily traditional leaders are usually notified of customary marriages concluded within their territorial jurisdiction. By virtue of their office, traditional leaders are essential particularly when it comes to disputes relating to unregistered marriages. Their role cannot be ignored as far as intestate estate matters are concerned.

For example, if a party dies without registering their marriage, the surviving spouse must administer the estate of the deceased spouse. Customarily, the surviving spouse may approach the relevant traditional leader for proof that they were customarily married to the deceased. This approach was adopted in the *Nhlapo v Mahlangu*⁵⁷ case as there was a dispute as to whom the customary legal wife of the deceased was, amongst other things that the court had to decide on. The deceased died before registering his customary marriages. During his lifetime, the deceased had entered into a customary marriage with the applicant, a civil and later customary marriage with the first respondent. The court accepted evidence from expert witnesses that, according to the Ndebele culture: when a man wants to enter into a second customary marriage, he must have the first wife's approval.⁵⁸ Therefore, the Court nullified the civil marriage

⁵³ Section 11(4) of the *Recognition Act*; See also Curran and Bonthuys 2005 *South African Journal of Human Rights* 607.

⁵⁴ See s 8 (1) of *Recognition Act*.

⁵⁵ See s 5 (2) (b) of *Traditional Courts Bill* [B1-2012].

⁵⁶ Section 11(1)(a)(iii) of the *Recognition Act*.

⁵⁷ *Nhlapo v Mahlangu* (59900/14) [2015] ZAGPPHC 142 (20 March 2015) para 9.

⁵⁸ Mwambene 2017 *African Human Rights Law Journal* 35.

between the respondent and the deceased as null and void. However, the customary marriage between the respondent and the deceased was valid.

2.3 Judicial interpretation of the Recognition Act

Since its commencement, the *Recognition Act* has been the subject of withering criticism for its failure to deliver on its promise of advancing equality for historically marginalised women. According to s 7(2) of the *Act*:

...a customary marriage entered into after the commencement of this Act 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.

According to Olivier,⁵⁹ this rule applies unless the spouses specifically exclude such consequences in an antenuptial contract. However, according to section 7(1) of the *Recognition Act*, there is an express exclusion of spouses married by customary law from automatically benefiting from the community of property. Therefore, these categories of marriages continued to be governed by customary law, which excluded community of profit and loss, thereby depriving spouses, particularly women of the benefits and protection of the *Recognition Act*.

The application of Section 7(1) and (2) results in a clear prejudicial distinction between customary law spouses married before and after the commencement of the *Act* in that, besides applying the same matrimonial regime, the benefit of in community of property is only enjoyed by parties who married post the commencement of the *Act*.

The landmark case of *Gumede v President of the Republic of South Africa*⁶⁰ abolished the prejudicial application of the customary law regarding the benefit of in community of property. As a result of this case, spouses are in the same legal position and enjoy the benefit of in community of property regardless of the era of their marriages. The judgement on the aforementioned case indicated unfairness in gender and race

⁵⁹ Olivier 2018 *De Rebus* 1; See also Nhlapo 1991 *Acta Juridica* 137.

⁶⁰ 2009 3 SA 152 (CC).

discrimination in relation to women who are monogamously married under customary law as codified in KwaZulu-Natal. The Constitutional Court was faced with an application for confirmation of a declaratory order by the High Court, in which the Court declared sections 7(1) and (2) of the *Recognition Act* constitutionally invalid, consequently rendering traditional monogamous marriages to be of the same status as new monogamous marriage which is deemed automatically to be in the community of property unless expressly excluded by an antenuptial contract.

Olivier⁶¹ added that it took 18 years for the court to definitively settle the status issue in a polygamous marriage. The case of *Ramuhovhi v President of the Republic of South Africa*⁶² provided practitioners with clarification on the matrimonial regime applicable to customary polygamous marriages entered into before the commencement of the Act, and the effect thereof on matrimonial property. Consequently, the Court issued orders that would establish equitable ownership and rights for both husbands and wives in customary unions. Within the framework of these orders, husbands and wives entering into polygynous customary marriages would have joint ownership and equal rights over property that has to be exercised as follows:

- (a) In respect of all house property by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
- (b) In respect of all family property by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
- (c) Each spouse retains exclusive rights to her or his personal property.

⁶¹ Section 11(2) of the *Recognition Act*; See also Olivier 2018 *De Rebus* 2.

⁶² *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) para 71.

The order is not without problems, particularly regarding the family property, as one might be excused from foreseeing the possibility of disputes between families if they all have equal rights of management and control over family property.

Thus, if a family member with equal rights of management and control over the property has an interest in such property, and a dispute arises as to who should manage the family property, then such a member might be removed from managing the property.

The provisions of section 5 of the *Reform of Customary Law of Succession and Regulation of Related Matters Act*⁶³ authorises the Master of the High Court to make a just and equitable determination to resolve a dispute regarding the devolution of family property as far the administration of the deceased estate is concerned.⁶⁴

Another clause that is in contention is section 7(6) of the *Recognition Act*, which 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.

This clause was meant to protect the matrimonial property rights of the first spouse; however, it also created doubt as to the status and legality of the subsequent marriages that would be entered into by the husband who failed to comply with these provisions. The landmark case that addressed the uncertainties and put the matter to rest was the case of *MN v MM*.⁶⁵ The Court found that non-fulfilment with section 7(6) did not render the succeeding marriage void, only that the successive marriage would be out of the community of property. This decision ensured that the first spouse's proprietary rights

⁶³ 11 of 2009.

⁶⁴ See s 5(1)(c) of *Reform Act*.

⁶⁵ *MN v MM* 2012 4 SA 527 (SCA).

were and would continue to be protected. The highest court in the land, the Constitutional Court, endorsed this in the case of *Mayelane v Ngwenyama*.⁶⁶

2.4 The requirements for a valid customary marriage

2.4.1 Introduction

Section 3 of the *Recognition Act* prescribes several requirements for a valid customary marriage, and the requirements are summarily discussed below.

2.4.2 Age

For a prospective spouse to be able to conduct a valid customary marriage, both parties must be over 18 years of age.⁶⁷ In other words, the *Recognition Act* requires both spouses to have all the necessary capacity to act. According to Reuter,⁶⁸ the custom is that the father of a family, not the specific individual, has the right to arrange the marriage of his children. The author argues that, if the head of a family chooses a boy or a girl as a suitable life partner, there will be no fixed rules governing the age or capacity of the prospective spouse. This is because rules such as that would weaken the power of parents to do as they see fit.⁶⁹ One of the main purposes of marriage is to have children, and the minimum requirement is that the couple should have passed puberty.⁷⁰ The age of puberty is different for each person. In societies where age cannot be precisely determined, it is common practice to wait until a spouse is physically mature.⁷¹

Customarily, for men, full maturity is associated with the ability to carry out the responsibilities of a new family unit. The ability to fulfil family responsibilities will depend on several factors, including physical and intellectual maturity and a certain degree of

⁶⁶ 2013 4 SA 415 (CC) para 41; See also Maithufi and Bekker 2009 *Tydskrif vir Hedendaagse Romeins-Hollands Reg* 169.

⁶⁷ Section 3(1)(a)(i) of *Recognition Act*.

⁶⁸ Reuter *Native Marriages in South Africa* 105-10

⁶⁹ Reuter *Native Marriages in South Africa* 105-10.

⁷⁰ Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 99-101.

⁷¹ Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 99-101.

economic autonomy.⁷²In most cultures, the transition from childhood to adulthood is preceded by an initiation ceremony.⁷³However, the custom of initiation in some cultures is no longer practised,⁷⁴and in other tribes, the practice has been transformed into a prerequisite for young men to work in the mines or towns.⁷⁵

The pragmatic approach of customary law regarding age or legal capacity suggests that, although it was required of spouses to show the general capability to sustain a marital relationship. However, the primary requirement was the puberty stage.⁷⁶ Unfortunately, the puberty requirement often resulted in a risk of allowing unscrupulous guardians to manipulate children to enter into marriages while very young and unable to sustain marriages.⁷⁷ In some cases, consent would be unreasonably withheld. In this regard, women were on the end of the risk continuum. Women were never deemed adults in the legal sense. Consequently, women had to obtain their guardians' consent for them to marry.⁷⁸

As an exception to the 18 years requirement of the *Recognition Act*, the South African law requires parental or guardian consent for a person under 18 years who wishes to get married.⁷⁹ Where parental consent cannot be obtained, then that person can obtain consent from a Judge of the High Court through an application.⁸⁰ The Judge's consent is given only in circumstances where parental consent is unreasonably refused, or is clear that getting married is not in the minor's best interest. The Minister of Home Affairs or any authorised public service official may also grant written permission to persons under the age of 18 if the said Minister or official considers such marriage desirable or it is in

⁷² Bekker *Seymour's Customary Law in Southern Africa* 46.

⁷³ Kaganas and Murray 1991 *Acta Juridica* 116.

⁷⁴ Uzodike 1990 *International Journal Law and the Family* 88.

⁷⁵ Cathi and Beth 1998 *South African Journal on Human Rights* 248.

⁷⁶ Kaganas and Murray 1994 *Acta Juridica* 120.

⁷⁷ Bennett *A Source book for Customary Law for Southern Africa* 233; See also Chanock *The Making of South African Legal Culture* 134.

⁷⁸ *Black Administration Act* 38 of 1927.

⁷⁹ Section 3(3)(a) of the *Recognition Act*.

⁸⁰ *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC).

the parties' interest to do so.⁸¹ However, the MBU 16 form does not address the issue of the age of the partners.

2.4.3 Consent

Consent is another requirement for a valid customary marriage made after the *Recognition Act* came into effect. It requires future spouses to agree to marriage according to customary law. Therefore, conjugal consent is a non-negotiable requirement for all customary marriages. Consensus in marriage is said to have originated in 18th-century Europe, where marriage was considered a consensual union approved by the church or state. South African case law has also confirmed that the validity of a customary marriage depends on the consent of the principal parties, namely the bride, the groom and the bride's guardian.

Almost all modern legal systems are said to have consent as one of the most basic requirements for determining marriage, allowing an individual to decide when and with whom to marry.⁸² Spousal agreement is, therefore, a non-negotiable requirement for all customary marriages. South African case law has also confirmed that the validity of a customary marriage depends on the consent of the principal parties, namely the bride, the groom and the bride's guardian.⁸³ In this instance, the MBU16 form is critical because the drafting of the minutes is connected to consent.

2.4.4 Negotiated and celebrated in terms of customary law

Another non-negotiable requirement for a valid customary marriage in terms of the *Recognition Act* is that customary marriages "must be negotiated and entered into or celebrated in accordance with customary law."⁸⁴ Celebration of customary marriages usually differs from culture to culture; though *lobolo* is not a prerequisite for a valid customary marriage, it is recognised as an integral part of African custom. Celebration

⁸¹ Section 3(4) of the *Recognition Act*.

⁸² Section 3 (1) (b) *Recognition Act*.

⁸³ *Thembisile v Thembisile* 2002 2 SA 209 (T).

⁸⁴ Section 3(1)(b) of the *Recognition Act*.

often includes handing over the bride to the groom's family. However, where the bride and the groom already live together at the time of the marriage, the handing over requirement is automatically waived.⁸⁵In the case of *Seleme v Department of Home Affairs* the applicant placed his reliance on the case of *Sengadiv Tsambo*, which quoted the work of Professor Bennet,⁸⁶ who stated as follows: "Long cohabitation raises a strong suspicion of marriage especially when the woman's father does not take steps indicating he does not regard it." The court was of the view that customary practice had not been adhered to, and cohabitation does not insinuate the fact there was customary marriage entered into.

The Supreme Court of Appeal (SCA) in *Mbungela v Mkabi*⁸⁷ had to decide whether the custom of handing over a bride is a requirement for the conclusion of a valid customary marriage. The SCA held in this regard that: "it is important to bear in mind that the ritual of handing over of a bride is simply a means of introducing a bride to her new family and signifies the start of the marital consortium."⁸⁸It is argued that the handing over process needs not be formal.⁸⁹ Instead, proof of cohabitation alone is enough for one to presume the existence of a marriage, especially if the bride's family is aware and has no objection to the couple's living arrangement.⁹⁰This can be stated on the MBU 16 form.

2.4.5 Registration form marriage

Registration is not a prerequisite for a valid customary marriage. However, the *Recognition Act* creates an obligation for spouses to a customary marriage to register the marriage as prescribed.⁹¹The *Recognition Act* prescribes that spouses married after the commencement of the *Recognition Act* register their customary marriages within

⁸⁵ *Seleme v Department of Home Affairs*(2020/28304) [2022] ZAGPJHC 902 (18 November 2022)para 11.

⁸⁶ BennettA Sourcebook of African Customary Law for Southern Africa 54-55

⁸⁷ *Sengadi v Tsambo*2020 1 SA 41 (SCA) para 9.

⁸⁸ *Mbungela v Mkabi* 20201 SA 41 (SCA) para 25.

⁸⁹ Bekker *Seymour's Customary Law in Southern Africa* 108-109.

⁹⁰ Bekker *Seymour's Customary Law in Southern Africa* 116-120.

⁹¹ Section 4 (1) of the *Recognition Act*.

three months of concluding the marriage.⁹² Nevertheless, failure to register a customary marriage does not render the marriage invalid.⁹³ These marriages can be registered at the Department of Home Affairs or through a designated traditional leader in areas without Home Affairs offices.⁹⁴

The registration of customary marriage requires the spouses to present themselves to the registering authority.⁹⁵ Form A is used in the registration of customary marriage, and either spouse may request registration of their marriage by submitting the said form, completed by both spouses, wherein they confirm their consent to their customary marriage and declare that they are not a party to a subsisting civil marriage and that the man confirms all previous customary marriages and details of the *lobola* arrangement are provided.⁹⁶

The non-registration of customary marriages often results in family disputes about its existence and validity. In this instance, courts are the most preferred dispute resolution methods and are a method of last resort. For instance, in the *Sengadi v Tsambo*⁹⁷ case, the court had to decide the existence of the marriage between the Applicant and the deceased. The applicant, who is the surviving spouse of the deceased, argued that despite the non-registration of her customary marriage, she was the customary law wife of the deceased in that her customary marriage complied with all the validity requirements.

On the contrary, the respondents (Tsambo family), on behalf of the deceased's estate, opposed that the applicant was not a customary law wife of the deceased as the marriage between the deceased and the applicant had not met all the requirements for a valid customary marriage. Furthermore, they contended that there was no formal

⁹² Section 4(3)(b) of the *Recognition Act*; Kaganas and Murray 1999 *Sociology* 14.

⁹³ Heaton *South African Family Law* 215.

⁹⁴ *Black Administration Act and Amendment of Certain Laws Act* 28 of 2005.

⁹⁵ Kerr 2009 *South African Law Journal* 684.

⁹⁶ Department of Home Affairs.

⁹⁷ *Sengadi v Tsambo* 2019 4 SA 50 (GJ).

handover of the bride to the deceased family as part of integrating her into the family. Despite the respondent's contentions, the Court ruled in favour of the applicant. In its reasoning, the Court found that the handing over custom as relied upon by the respondent is not viewed as an essential requirement in terms of the *Recognition Act* in that it is gender discriminatory and that it infringes upon the applicant's right to dignity.⁹⁸

The court held that handing over of the bride is not a lawful requirement for the existence of a customary marriage where the marriage was concluded in compliance with Section 3 (1) (b) of the *Recognition Act*. Consequently, the applicant, was declared a legally married spouse in terms of customary law. Such a position was confirmed on appeal in the Supreme Court of Appeals.⁹⁹ This judgement marks a progressive step in the jurisprudence of customary law and that the courts have recognised that customary law is not static but vibrant and dynamic in the communities practising it and that the legislation dealing with customary law must reflect the reality of how customary law is practised today.

The judgement is in line with the "*Draft Marriages Amendment Bill*" developed by the Department of Home Affairs.¹⁰⁰ The aim of the "*Draft Marriage Amendment Bill*" is to enable South Africans of different sexual orientations, religious and cultural persuasions to conclude legal marriages that will accord the doctrine of equality, non-discrimination and dignity as encapsulated in the Constitution¹⁰¹

⁹⁸ *Sengadi v Tsambo* 2019 4 SA 50 (GJ).

⁹⁹ *Sengadi v Tsambo* 2019 4 SA 50 (GJ).

¹⁰⁰ Mwambene and Sloth-Nielsen 2010 *Law in Context* 30.

¹⁰¹ *Sengadi v Tsambo* 2019 4 SA 50 (GJ).

2.5 Legal developments relevant to customary marriages

The *Recognition of Customary Marriages Amendment Act*¹⁰² was introduced by the South African government to amend the *Recognition Act* and to provide equality for women in customary polygynous marriages. The amendment purposes to give women who entered into a customary marriage entitlement to a share of the joint estate on either the death of their spouse or when they divorce.¹⁰³ This means that both men and women will have exclusive proprietary rights over marital property, thus reducing the detrimental effect it had on women and consequently benefitting children who will inherit from the mother as well.

Except polygynous marriages, most customary marriages are now considered to be in a community of property unless the spouses expressly exclude such proprietary consequences in an antenuptial contract regulating the proprietary implications of their marriage.¹⁰⁴ Therefore, all assets and debts before the marriage period are divided according to the common estate between the spouses because their separate properties are combined, and each spouse loses the right to dispose of the property if he or she finds suitable or acquires debt without the others' knowledge and consent. However, a prenuptial agreement must be signed before the ceremony if the couple wants to get married outside of the community of property. Alternatively, they will have to apply to the High Court for a post-nuptial to be concluded.

2.6. Conclusion

In sum, this chapter dealt with the scope and application of customary marriages in South Africa, specifically referring to the *Recognition Act*. As indicated in this chapter, South African customary marriages are statutorily regulated by the *Recognition Act*. The chapter has shown that women were previously treated as minors regardless of age. As indicated above, women had no right to own property or perform any juristic without

¹⁰² *Recognition of Customary Marriages Amendment Act* 1 of 2021.

¹⁰³ Section 2 (a) of the *Recognition Act*

¹⁰⁴ Section 7(2) of the *Recognition Act*.

the assistance of a male guardian. In essence, the *Recognition Act* eradicated discrimination against women married customarily by officially recognising all customary marriages in South Africa. This brought about equal status and protection for women in customary marriages with those women in civil law marriages.

The chapter has further shown that a competent court of law can only dissolve customary marriages. Not even traditional leaders have the power to issue customary marriage certificates or dissolve customary marriages. Nevertheless, traditional leaders play a pivotal role in the conclusion of and solving disputes regarding the existence of customary marriages. The courts are guided by the meeting minutes, which are stated in the MBU16 form, to solve such disputes.

However, the *Recognition Act* had its downside as it discriminated against marriages entered into before the *Act's* commencement and those entered after the commencement of the *Act* until the *Gumede v President of the Republic of South Africa* case.¹⁰⁵ The *Recognition Act*, as shown above, deemed all customary marriages entered into after the commencement of the *Act* to be in the community of property unless an antenuptial contract expressly excluded those consequences. This was not the case for customary marriage entered into before the *Recognition Act*, as those marriages were deemed out of the community of property. This prevailing inconsistency created uncertainty and distinguished between customary marriages based on the era in which the marriage was concluded. This confusion could not have been the intention of the lawmakers as it is inconsistent with the founding principles of the *Recognition Act* of equality by addressing gender inequality between spouses in customary marriages, and the new statute changed it.

¹⁰⁵ *Gumede v President of the Republic of South Africa (CCT 50/08) [2009] (3) SA 152 (CC).*

The *Recognition Act* empowers the Master of the High Court to decide where a dispute exists regarding the devolution of family property in the administration of deceased estate processes. The requirements for a valid customary marriage were discussed in this chapter. As shown above, age is one of the requirements for a valid customary marriage. Accordingly, a prospective party to a customary marriage must be 18 years and above to conclude a valid customary marriage unless the party has been properly exempted as provided by the *Recognition Act*. Furthermore, it requires that parties to a customary marriage must agree to marry each other customarily.

Lastly the *Recognition Act* requires a valid customary marriage to be negotiated and celebrated in terms of customary law. It has also been demonstrated that registration of a customary marriage is not a validity requirement. However, the next chapter discusses how non-registration of customary marriages affects the administration of estates, particularly intestate estates of persons married by customary rites.

The foregoing discussion unravelled the nitty-gritties of customary marriages in South Africa. While the recognition of customary marriages is now an accepted reality, there remains a challenge when customary marriages are not registered in polygynous marriages when one of the spouses is deceased intestate. In particular, proving the existence of a customary marriage continues to be problematic. Therefore, the MBU 16 form is essential for proving the existence of a customary polygynous marriage. Although the MBU 16 form is important for assisting the surviving spouses, there are some challenges surrounding its use. The challenges of using the MBU 16 form are discussed in the next chapter, which deals with administering deceased estates in customary marriages.

CHAPTER 3:ADMINISTRATION OF DECEASED ESTATES IN CUSTOMARY MARRIAGES

3.1 Introduction

Having discussed the scope and nature of customary marriages in South Africa, a context has been set for discussing the administration of estates in customary marriages. The discussion starts with a basic discussion on the meaning of the notion "administration of estates" and its application to customary marriages, and particularly within the context of intestate succession. In this chapter, I analyse the notion of the administration of estates, administration of an estate and customary marriages and then conclude. The main aim is to explore the role of the MBU 16 form in the administration of deceased intestate estates.

3.2 General comments on the administration of estates

The administration of estates is governed by the *Administration of Estates Act*.¹⁰⁶ The administration of estates entails managing a person's affairs post-death. When a person dies his or her assets must be transferred to their beneficiaries, and outstanding liabilities settled. The person responsible for managing or administering the estate is an executor.¹⁰⁷ An estate can devolve either in terms of testate succession,¹⁰⁸ i.e., the wishes of the deceased as expressed in the will. An estate can also devolve wholly intestate, i.e. in terms of the *Intestate Succession Act*,¹⁰⁹ the closest beneficiaries are likely to benefit from the estate of a deceased.¹¹⁰

¹⁰⁶ 66 of 1965. Hereafter the *Estate Act*.

¹⁰⁷ Section 1 of the *Estate Act* defines an executor as "any person who is authorized to act under letters of executorship granted or signed and sealed by the Master, or under an endorsement made under section fifteen."

¹⁰⁸ The law of intestate succession comprises the legal rules or legal norms that determine how succession should take place in cases where a testator fails to regulate succession on death by way of a valid will or a pactum successorium contained in an antenuptial contract; Jamneck *et al* *The Law of Succession in South Africa* 34-58.

¹⁰⁹ 81 of 1987. Hereafter the *Intestate Act*.

¹¹⁰ See s 1 of the *Intestate Act*.

An estate can also devolve partially testate and intestate, therefore, in terms of testate and intestate succession. In all legal systems, two universal requirements must be met for testate and intestate to become operative.¹¹¹ Firstly, there must be a deceased person, and secondly, the beneficiaries of the deceased must be alive at the time of the deceased's death,¹¹² as the estate only falls open and rights vest upon the death of a person.¹¹³

In general, proving the existence of a customary marriage can also be relevant in the testate law of succession. For example, when a testator disinherited his wife, she can claim maintenance under the *Maintenance of Surviving Spouses Act*.¹¹⁴ However, for this chapter and research, I will focus on intestate estates of persons married by customary rites. As explained in the previous chapter, a customary marriage is in its nature in a community of property unless the parties have entered into an antenuptial contract to the envisaged customary marriage. Non-registration of a customary marriage does not affect its validity; however, where a person dies intestate and has not registered his or her customary marriage, there is no proof that the deceased was married. Thus, the surviving spouse has the burden of proving that she was indeed married to the deceased to have any claim on the deceased's estate.

Although a surviving spouse could be the man or wife, this study focuses on the deceased's wife. For a very long time, the surviving spouse was powerless and could not prove her marriage to the deceased. However, the Master's directive that recognised surviving spouses of people married by customary rites changed the position somewhat.¹¹⁵ The need to recognise them increased since the *Recognition Act* came into effect to afford them equal recognition and protection in law.

¹¹¹ Boezaart *The Law of Persons* 189.

¹¹² See *Ex parte*; Himonga and Pope 2013 *Acta Juridica* 318.

¹¹³ Hofmeyr and Paleka *The Law of Succession in South Africa* 122.

¹¹⁴ *Maintenance of Surviving Spouses Act* 27 of 1990.

¹¹⁵ Chief Masters Directive 2 of 2015.

The Master, in terms of the directive, must convene a meeting with the executor(s) of the deceased estate to determine whether a customary marriage existed between the deceased and the "surviving spouse". The Master completes the MBU 16 form during this meeting.¹¹⁶

In cases where the MBU 16 form is not successful in proving the existence of the marriage, the aggrieved parties have an option of approaching the court for a remedy. Challenges with the MBU 16 form are discussed in the next chapter.

Administration of estates and customary marriages

The administration of estates of the deceased under customary marriages has caused considerable challenges in the administration of justice. This is mainly because of the inequalities that made women in customary marriages vulnerable as they had limited legal status. Previously, all customary marriages were not recognised at the deeds office, and the deceased's properties were administered by the deceased's family members, and women were not entitled to any of the remaining properties. For example, The *Intestate Succession Act* specifically excluded the estates of Black South Africans, which meant that the *Black Administration Act*¹¹⁷ was still the legislation used for succession in customary unions that ended with death and where there was no valid will. In 2005, in the Constitutional Court (CC) in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*, the provisions of *Black Administration Act* was successfully challenged. Until then, only black men could inherit from estates,¹¹⁸ and the *Bhe v Magistrate, Khayelitsha* case was based on the unfair discrimination of the deceased's two daughters and spouse in a customary union

¹¹⁶ See addendum 1

¹¹⁷ *Black Administration Act* 38 of 1927; See also *Shibi v Sithole* (CCT 69/03) 2005 (1) SA 580 (CC); *South African Human Rights Commission v President of the Republic of South Africa* (CCT 50/03) 2005 (1) SA 580 (CC).

¹¹⁸ Maunatlala and Maimela 2020 *De Jure Law Journal* 43

who were not allowed to inherit because they were female.¹¹⁹ The CC held that in the case of no dispute to inheritance, the family had to decide whether indigenous laws of succession or the *Intestate Succession Act* would apply. Where there is a dispute, such a dispute would have to be decided by the Magistrate's Court.

As of 2015, a new practice regarding the administration of the estate of the deceased under customary marriages through the office of the Master of the High Court was instituted. The Master of the High Court now accepts the minutes of a family meeting validating the existence of a customary marriage. Using the MBU16 form, the minutes are accepted as proof of marriage between the deceased and the existing spouse. As a relief measure for unregistered customary marriages, the MBU 16 form provides an entry point for addressing the challenges of administration of intestate deceased estates.

Service points

Most small estates fall under the jurisdiction of service points designated at the Magistrate's courts across all provinces in South Africa.¹²⁰ The service points are managed by appointed persons who must exercise the powers and perform duties delegated to them on behalf of and under the direction of the Master. Service points are authorised to administer all intestate estates up to the value of R100000 or R250000, depending on the circumstances and subject to certain limitations.¹²¹ The latest value has been set at R100000 in terms of Circular Notice 17/2014 issued by the Director-General of Justice and Constitutional Development and applies to new estates reported on or after 2 December 2014.¹²²

¹¹⁹ Weeks Acta Juridica 216.

¹²⁰ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 18

¹²¹ The process of winding up estates where no will is in place requires access to data on the next of kin who stand to inherit in line with the laws of intestate succession.

¹²² <http://www.justice.gov/master/deceased.html>.

Previously, this value was R50000. The same circular notice increased the jurisdiction of service points, where the paperless estate administration system (PEAS) had been implemented to R250000 in respect of new estates reported on or after 2 December 2014. Service points must refer all cases to the Master of the High Court, where (a) the deceased left a will; (b) the value of the estate, before any debts are paid, or other deductions are made, exceeds or appears to exceed R100000 or R250000 (depending on the circumstances); (c) one of the assets in the estate is cash to the value of more than R20000, and one or more of the beneficiaries are minors, and/or (d) the estate is or may be insolvent.¹²³

Service points are also critical for dealing with administering small estates of deceased intestate. Through Directive 2 of the Chief Master of the High Court, the persons delegated with powers at service points can instruct spouses of the deceased persons intestate to use the MBU 16 form to prove the existence of their customary marriage.¹²⁴ The vitality of the MBU 16 form is that it is used to prove the existence of a customary marriage regardless of the size of the deceased's estate. The importance of service points is that it allows the existing spouse to prove the existence of her customary marriage to the deceased who died intestate. This helps a spouse start processes to benefit from the deceased's estate. However, due diligence must be exercised because the MBU 16 form has considerable challenges that must be discussed.¹²⁵

3.5 Conclusion

In practice, anyone involved in the administration of estates may be confronted with proving the existence of a marriage or marriage-like relationship. Generally, all marriages concluded under the *Marriage Act*¹²⁶ and *Civil Union Act*¹²⁷ must be registered and do not present problems. As illustrated, customary law marriages must also be

¹²³ Department of Justice 2015 <http://www.justice.gov/master/deceased.html>.

¹²⁴ Master's Directive 2 of 2015.

¹²⁵ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 18.

¹²⁶ *Marriage Act* 25 of 1961.

¹²⁷ *Civil Union Act* 17 of 2006.

registered under the *Recognition Act*, but several of them are creating uncertainty.¹²⁸ To overcome this problem, the Master has developed a uniform procedure to assist the Masters' offices in determining whether a customary marriage exists. For example, suppose a registration certificate does not exist, and there is no dispute regarding the existence of the customary marriage. In that case, the Master should convene a family meeting to confirm the marriage's existence.¹²⁹ For this purpose, the Master must use an MBU 16 form.¹³⁰ The MBU 16 form makes it possible to help the surviving spouse to prove that she was indeed married to the deceased. The next chapter deals with the scope and application of this form.

¹²⁸ Master's Directive 2015, para 7.2.

¹²⁹ Master's Directive 2015, para 7.2.

¹³⁰ Master's Directive 2015, para 7.2(c).

CHAPTER 4: SCOPE AND APPLICATION OF THE MBU 16 FORM

4.1 Introduction

On 3 August 2015, the Chief Master of the Department of Justice and Constitutional Development circulated the Chief Master's Directive 2 of 2015 (hereafter, Master's Directive 2015).¹³¹ It came into effect on 1 August 2015.¹³² According to its title, the Master's Directive 2015 deals with the "Appointment of Executors and/or Master's Representatives in Deceased Estates by the Master".¹³³ The executor refers to someone authorised by the Master under a letter of executorship.¹³⁴ The executor is responsible for identifying and collecting the assets of the estate, safeguarding and investing those assets pending distribution to beneficiaries, paying debts and liabilities owed by the estate, and filing appropriate tax returns for the deceased.¹³⁵ A Master's representative is someone appointed "to represent and administer the estate in terms of Section 18(3)" of the *Administration of Estates Act*.¹³⁶ Section 18(3) allows the Master to dispense with the appointment of an executor when the value of the estate is less than R250 000. This method is generally more cost and time effective.

As explained by the directive, its purpose is to "direct all Masters in the performance of their functions".¹³⁷ In addition, it is evident from other clauses of the directive that it also intends to "ensure uniformity" in all Masters' offices.¹³⁸ The directive explains its scope as addressing "the appointment of executors and Master's Representatives". It gives a long list of documents needed when an appointment needs to be made.¹³⁹ One

¹³¹ The Chief Master is empowered by s 2 of the *Administration of Estates Act* 66 to "exercise control, direction and supervision over all the Masters" under its jurisdiction.

¹³² Master's Directive 2015, para 9.

¹³³ See the title and para 3 of Master's Directive 2015.

¹³⁴ *Administration of Estates Act* 66 of 1965, s 1.

¹³⁵ Master's Directive 2015, para 5.5.

¹³⁶ *Administration of Estates Act* 66 of 1965

¹³⁷ Master's Directive 2015, para 2.1.

¹³⁸ For example, see para 1.3 of Master's Directive 2015.

¹³⁹ Master's Directive 2015, para 2.1.

of the documents involves proof of an alleged marriage.¹⁴⁰ As already explained, a registered marriage can be proven by a marriage certificate or a confirmation of registration issued by the Department of Home Affairs.¹⁴¹ If such proof cannot be provided, a family meeting minuted on an MBU 16 form is the next step.¹⁴²

This chapter deals with the scope and application of the MBU 16 form during the administration process.

4.2 *The MBU 16 Form: Scope and application*

The Department of Justice and Constitutional Development of the Republic of South Africa announced a circular¹⁴³ of the Master. The circular was effective from August 2015 and was implemented as such by the Chief Master as *ChiefMasters Directive*.¹⁴⁴ This circular introduced the MBU 16 form. It contains the preamble, purpose, scope and objectives on how estates should be administered and stipulates formal procedures that all appointed administrators and executors should follow. It is used to provide proof of unregistered marriages, protect the deceased partner's spouse and children, reduce court costs, and require the deceased's spouse and family members to complete the form. These various purposes are elaborated in the following sub-sections.

The directive was primarily aimed at equipping all Masters Officials in dealing with matters concerning estates involving parties to customary marriages, as there was no tool in place that provided guidance to Masters Officials about their functions relating to the administration of customary marriages that came about because of the *Recognition Act*.¹⁴⁵ The Master's tasks in this regard had to comply with the provisions of the *Promotion of Administrative Justice Act*¹⁴⁶ to ensure transparency in the functions of the

¹⁴⁰ Master's Directive 2015, para 7.2.

¹⁴¹ 56 of 2015

¹⁴² Master's Directive 2015, para 7.2.

¹⁴³ 56 of 2015.

¹⁴⁴ 2 of 2015.

¹⁴⁵ Weeks 2020 *Acta Juridica* 220.

¹⁴⁶ 3 of 2000.

Master's office and to ensure uniform, fair and transparent executors and or Master's representative - appointment procedures to avoid corruption.

The directive did not replace the *Administration of Estate Act*; it is only meant to provide guidance and implement recommended measures to the Master's officials when dealing with estates of parties to a customary marriage.

The MBU 16 form may be completed in the following circumstances:

- (a) There should be no dispute to the existence of the customary marriage;
- (b) There should be a family meeting convened to confirm the existence of the alleged customary marriage;
- (c) An MBU 16 form should be used to capture the minutes of the family meeting;
- (d) There should be acceptance by the Master of the minutes of the meeting as sufficient proof of the existence of the marriage.¹⁴⁷

The purpose of completing the form is to assist "the surviving spouse(s) where late registration of the [customary] marriage which has already been dissolved [or terminated] by death of one of the parties will delay the process of administration of estate".¹⁴⁸

4.3 Challenges of the MBU 16 form

Directive 2015 expressly states the following:

Note that the Master's acceptance of the minutes of the meeting as sufficient proof of the existence of the marriage in this instance is not a declaration on the validity of the marriage, or an order to register the marriage, but should rather be viewed as assistance to the surviving spouse(s) where the late registration of the marriage

¹⁴⁷ Chief Master's Directive 2 of 2015.

¹⁴⁸ See para 7(2)(c) of the Chief Master's Directive 2 of 2015.

which has already been dissolved by the death of one of the parties will delay the administration of the estate.¹⁴⁹

While the introduction of the MBU 16 form is a legal step that seeks to positively assist in the administration of small estates, particularly under customary marriages, it is marred with several practical challenges.¹⁵⁰ One of the challenges is the flexibility of service points to effectively deliver equitable justice systems to the intended users or beneficiaries. It was noted that the service of the Master is located far away from the beneficiaries.¹⁵¹ Moreover, they do not serve the poor, disabled and children who are supposedly beneficiaries of such a service. The location issue makes it difficult for people in rural communities where customary marriages are widespread, and the demand for MBU 16 form is high. Therefore, it is argued that the MBU 16 form is available but does not reach its users, resembling its non-existence.

While the Master of the High Court has the sole mandate to give a directive of using the MBU 16 form, it was noted that these officers lack appropriate training to deal with the administration of the estate of the deceased under customary marriages.¹⁵² The challenges end up creating more gaps considering the MBU 16 form is a discretionary document. Therefore, the MBU 16 form must be supported by other processes or documents supporting the validation of customary marriages.

The court process is regarded as cumbersome, costly and inaccessible to most.¹⁵³ As it stands, the Master's decision can only be challenged through courts.¹⁵⁴ However, the litigation route is said to be costly and time-consuming for people with legitimate

¹⁴⁹ 66 of 65; See Anon 2015 <http://www.justice.gov.za/master/deceased.html>. See also Anon 2019 <http://blog.mhilaw.co.za/?p=742>.

¹⁵⁰ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 4.

¹⁵¹ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 9

¹⁵² Department of Justice and Correctional Services.

¹⁵³ De Souza 2013 *Acta Juridica* 23

¹⁵⁴ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 4.

claims.¹⁵⁵ To avert some of these challenges, there should be an introduction of a less cumbersome and more accessible procedure in estate administration.¹⁵⁶

As already explained, the MBU 16 form can only be used where the existence of a customary marriage is not in dispute.¹⁵⁷ However, suppose the existence of a marriage is in dispute; the only recourse will be litigation, which is an expensive and time-consuming process.¹⁵⁸

4.4 The legal hurdles resulting from the requirements of the MBU 16 form

As soon as a customary marriage dissolved by death is confirmed, the administration process is initiated.¹⁵⁹ However, where a customary marriage cannot be confirmed, the surviving spouse must approach the court for an appropriate remedy. Most often, the litigation route is very expensive and time-consuming. Therefore, to avoid the hurdles explained herein, the MBU 16 form route is preferred as it is cheaper, faster and more convenient.

The initial requirement of finding the relatives of the deceased and convene a meeting whereby the MBU 16 form will be used seem to be difficult for the surviving spouse. It depends on the nature of the relationship existed between the family members of the deceased and the surviving spouse. If the relations were not good it is difficult to convene such meetings. Even though the meeting is convened, it is difficult to ascertain whether the family members exercise their obligations in good faith. It is important to also consider the chances of disputes that may arise during such meetings which may lead to failure to resolve the case. While the MBU 16 form offers the best opportunity for the surviving spouse to prove the existence of an unregistered customary marriage with the deceased intestate, the government needs to eliminate the existing hurdles.

¹⁵⁵ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 4.

¹⁵⁶ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 4.

¹⁵⁷ Chief Master's Directive 2 para 7. 2.

¹⁵⁸ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 4.

¹⁵⁹ Chief Master's Directive 2 para 7.2 (c).

4.5 Last resort: litigation

It is a common cause that a significant number of South Africans die intestate.¹⁶⁰ The majority of these people who die intestate are from poor family backgrounds and reside in rural areas¹⁶¹. This situation leaves the surviving family members vulnerable as they lack knowledge of the legal processes involved following the death of their loved ones, and this places an enormous responsibility on the Master's officials who have to assist them in administering the deceased estate.

In *Nhlapo v Mahlangu*,¹⁶² the applicant, the rightful wife of the deceased and the only surviving customary law spouse, had to approach the court as a method of last resort to get what was due to her. In brief, the deceased and the applicant commenced their customary marriage in 1986. The customary marriage was later concluded on the 29th of April 2000; however, the marriage was never registered with the Department of Home Affairs.

As a result of work, the deceased migrated to Gauteng and left the applicant with his mother in their hometown. Whilst in Gauteng, the deceased met the first respondent, and married customarily and by civil rights in 2005. The applicant was not notified of the marriage between the deceased and the first respondent, specifically regarding the customary marriage wherein she would be required to give consent for the marriage to be valid. Until the deceased's death, the applicant was labouring under the impression that she was the only customary law wife. I will not say much about civil marriage as that would have been impossible in customary law.¹⁶³ The applicant discovered after the deceased's death when she wanted to register her customary marriage and execute her late husband's estate, that the deceased was also married to the first respondent.

¹⁶⁰ Statistics South Africa 2016 www.statsa.gov.za.

¹⁶¹ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 4.

¹⁶² *Nhlapo v Mahlangu*(59900/14) [2015] ZAGPPHC 142 (20 March 2015) para 9.

¹⁶³ Section 11(3) *Recognition Act*.

As alluded to above, the only way the applicant could obtain what was due to her was by exercising the expensive route of approaching the courts for relief. It was canvassed in a court proceeding by the customary law experts that the marriage between the deceased and the first respondent is not in terms of customary law, and as such, the court must find that it is null and void.¹⁶⁴ The court indeed determined that the marriage between the applicant and the first respondent was null and void and ordered the Master of the High Court (third respondent) to withdraw the appointment granted to the first respondent to administer the estate of the deceased. The order by the court to remove the first respondent as executrix alone delays the administration of the estate in that what the first respondent had started doing in the estate had to stop, and certain transactions were reversed.¹⁶⁵ The Master has to start the appointment process afresh. The appointment could have been avoided by registration of the customary marriage between the deceased and the applicant.

The court also had to determine the validity and/or legality of the appointment of one of the executors where the deceased was married customarily and failed to register his marriage. This is the case of *Monyepao v Ledwaba*,¹⁶⁶ the deceased married Monyepao and Ledwaba customarily. Of importance and for purposes of this research, I will focus on two disputed issues. In making a determination, the SCA concluded that the relief sought by the appellant could not be granted, meaning that there was no change in the appointment made by the Master. The court process caused a delay in the estate's administration in that the process had to be halted pending determination by the court. The determination in its entirety challenged the decision of appointment by the Master. This case also clearly demonstrates that failure to register customary marriages delays the administration of intestate deceased estates in that, in case of a decision, the matter ends up resolved in court. This court procedure could have been prevented had the parties registered their customary marriage.

¹⁶⁴ *Nhlapo v Mahlangu*(59900/14) [2015] ZAGPPHC 142 (20 March 2015) para 25

¹⁶⁵ *Monyepao v Ledwaba* (1368/18) [2020] ZASCA 54 (27 May 2020) para 1.

¹⁶⁶ *Monyepao v Ledwaba* (1368/18) [2020] ZASCA 54 (27 May 2020)para 1.

Executors must be appointed from the surviving family members, and the Master's officials are often uncertain as to whom should be appointed as executor between the alleged surviving spouse(s) and the deceased's close family members. The deceased's marriage, in the case of *Mahlala v Nkombombini*,¹⁶⁷ was not registered and consequently, the deceased's mother was nominated as the executrix.

The *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009* plays an important role in solving disputes regarding the customary marriages, based on section 5, which provides that in the event of any dispute or uncertainty concerning the status of or any claim by any person regarding an estate which must devolve intestate or partly intestate.¹⁶⁸ Accordingly, the Master may resolve such a dispute or uncertainty and make a just and equitable determination. Moreover, Section 5 empowers the Master, before making any determination, to direct a Magistrate or a traditional leader within the Master's area of jurisdiction to hold an inquiry into the matter of the marital status of the deceased and the surviving spouse(s).¹⁶⁹

However, there are challenges to this inquiry process by the Master in that it can be time-consuming, and as a result, assets of the deceased may be lost in the process pending the finalisation and/or outcome of the inquiry. For example, if the deceased had an outstanding mortgage bond against his or her immovable property at the time of death, and the inquiry is taking a long time to be finalised, the bank as a mortgage bondholder may execute against the immovable property of the estate in a situation wherein the estate is in default regarding repayment of the mortgage bond. Consequently, this may result in the loss of the immovable property, something that the executor of the deceased estate could have avoided if there was a timely appointment. The consequences are detrimental and unfair to the rightful heirs and beneficiaries of the estate. In short, the non-registration of customary marriages restricts the full enjoyment of the heir's and or beneficiaries' rights.

¹⁶⁷ *Mahlala v Nkombombini* 2006 5 SA 524 (SE).

¹⁶⁸ Bekker *Seymour's Customary Law in Southern Africa* 66-67.

¹⁶⁹ Section 5(4) of the *Reform Act*.

It is unfortunate that little is being done to educate communities on the importance of registration of customary marriages. Public awareness through radio, television and traditional leadership platforms should be utilised to inform and educate the community about the importance of registration of customary marriages. Although registration is not a prerequisite for a valid customary marriage, it is the view of the researcher that having registration as a requirement might not be as unfair and prejudicial as the current consequence of non-registration, as registration could prevent the current delays and complications experienced resulting from unregistered customary marriages. Furthermore, registration of customary marriages creates transparency and legal certainty in marriages.

It must be noted that where the MBU 16 form process discussed above fails; the surviving spouse may approach the court in the same way as the plaintiff in a disputed matter with two living parties would. The obvious difference is that he/she is approaching the court as a surviving spouse.

4.6 Conclusion

This chapter's focus was on the MBU 16 form. It started with particular emphasis on its background, requirements, and the effects that these requirements have on the rights of the surviving spouses in terms of administration of the estate.

As indicated above, the MBU 16 form was introduced by the Department of Justice and Constitutional Development in 2015 to address the implications of unregistered customary marriages, as per the *Recognition Act*, for the administration of deceased estates and/or succession purposes. It is clear that the MBU 16 form is used in situations wherein there is no dispute regarding the existence of a customary marriage despite the marriage being unregistered. In case there is a dispute about the existence of a customary marriage, the matter must be resolved in court. However, as illustrated in this chapter, the litigation process is time-consuming and expensive.

The process of proving the validity of a customary marriage by litigation delays and prejudices the vulnerable groups, i.e. the surviving women and children. Moreover, this problem is exacerbated by the fact that many South Africans die intestate, including those married by customary rites. For that reason, it is proposed in this chapter that public awareness is encouraged to educate members of the community about the registration of customary marriages for legal purposes, legal certainty and transparency. The following chapter reveals a data survey of the participants who administer deceased estates and use the MBU 16 form.

CHAPTER 5: EMPIRICAL SURVEY AND DISCUSSION

5.1 Introduction

This chapter presents the results of a small-scale survey I did from 2018-2022. A qualitative approach was used to collect and analyse data. The study setting was the Thohoyandou High Court, situated in the Vhembe district, Limpopo province, South Africa. This court services the Malamulele and Thohoyandou areas. The purpose of this survey was to explore the factors and challenges of the MBU 16 form, comparing it with the finalisation of intestate deceased estates as well as the implications of the requirement to complete the prescribed MBU 16 form to prove the existence of a customary marriage in deceased estates. The participants were chosen by means of purposive sampling. Purposive sampling was used as the researcher was looking for specific people in the best position to provide the required information. The total number of participants selected was six (male and female), and they suited the inclusion criteria as they worked in the Master's office. Focused interviews were then conducted to investigate what was happening in practice. These interviews were done to elicit the feelings and perceptions of the participants on the usability of the MBU 16 form required by the Master of the High Court and its impact on the successful completion of the administration process.

5.2 Demography of participants

Participants included the following strata, the assistant master (first level), and estate legal practitioners (second level). Information regarding the participants was received from the Master's office. The categories were chosen because they are typical users of the MBU 16 form. Interviews were conducted with the users at their workplace, namely the two officials at the office of the Master of the High Court, Thohoyandou, and four legal practitioners working with the Master's office in the Thohoyandou area.

5.3 The results of the survey

The results of the survey are presented according to themes developed as follows:

Theme 1: The use of the MBU 16 form in the finalisation of intestate deceased estates.

Theme 2: Challenges in administering the MBU 16 form.

Theme 3: Experiences working with the MBU 16 form.

Theme 4: Perceptions on MBU 16 form.

These themes will be presented and discussed in more detail below.

5.3.1 Theme 1: The use of the MBU 16 form in the finalisation of intestate deceased estates

The subthemes which emerged on this theme are discussed below:

5.3.1.1 Subtheme: Providing proof for unregistered marriages

Results revealed that all participants unanimously indicated that the MBU 16 form was introduced to provide proof of marriage in cases where marriages were not registered before one partner passed on. Below are some of their remarks on this issue:

Ya, the purpose of this form is to assist the surviving spouse by confirming the marriage, that there an existence of the marriage but not to declare the marriage valid. A2-Legal Practitioner...

That form assists us mostly if the wife has not yet registered a customary marriage. Most of the time people will just pay lobola and then they will just sit together and not do anything about formalising their marriage so most of the time we will complete that form so that the wife can be able to have locus standi to can be the executrix of her late husband's estate and then after we complete it the Master will just have to verify especially with two or three families from the deceased side and also from the wife side to make sure that they are registering the correct person so that is what the MBU form stand for. A4-Legal practitioner.

My understanding of the MBU 16 form it is the form that is used at the Masters office when one of the spouses have died and there is supposed to be a registration of the estate on cases whereby a customary marriage is not registered in that process the family of the deceased together with the family of surviving spouse have to appear before the Master and the Master must conduct an inquiry with them in proving the existence of the customary marriage they are given this form which they have to provide an information which is in compliance

with the requirements provided for in Section 3 Act 120 of 1998 as amended in proving all the requirements of the customary marriage. A1-Legal Practitioner.

The results regarding the difficulties of proving the existence of a customary marriage between a surviving spouse and a deceased intestate indicate the ease with which the MBU 16 form simplifies the burden. The use of an MBU 16 form does not only help the surviving spouse but the administrators when faced with such cases. It was noted that the burden of proving the existence of a customary marriage.

5.3.1.2 Subtheme: Protect deceased partner, spouse and children

Results also revealed that most participants believed that the MBU 16 form was meant to protect the interest of the deceased partner's spouse and children. Below are the verbatim words of some of the participants who highlighted this fact:

The reason why this MBU 16 Form was formulated was due to the fact that, it came to the attention of the Chief Master at the time that most marriages were unregistered and most of the spouses are being taken advantage of by members of the family so they decided to formulate this MBU 16 form to protect the vulnerable and when they created this it was in line with the RCMA in that none registration of customary marriage in terms of section 4 subsection 9 does not invalidate it so hence it was agreed that if family resolution could be accepted than it will assist the surviving spouse and the children of the deceased in this matter. M2-Estate Controller.

The purpose of the form is to be able to assist deceased's spouse who before the marriage, their customary marriage was not actually registered so now here they are, and the other spouse is deceased. A2-Legal Practitioner.

The purpose is to make sure that this wife who is now remaining or the surviving spouses if it is two because most of the time you will find that its two women or three so they have to complete in so that they will have the locus standi to become the executrixes of their late husband's estate because now if they cannot register it, they can complete the form it means that the children will have to be the executor or the executrix so if ever the children come in it means that most of the time you will find that the wife will be neglected and she may misuse the property of the husband. A4-Legal Practitioner.

The form provides alternative proof for unregistered marriages, allowing spouses and children to claim from the deceased partner's estate. In the absence of this form, spouses from unregistered marriages cannot claim or officially inherit the deceased partner's estate. In most cases, the estate will be inherited by close relatives of the

deceased, thus leaving the spouse and children without anything from the deceased estate. Therefore, the MBU 16 form officiates the marriage, giving the surviving spouse and her children rights over the deceased's estate.

5.3.1.3 Subtheme: Completion of the MBU 16 by the deceased partner's spouse and family witnesses

Some participants reported that the MBU 16 form was supposed to be completed by the remaining spouse's family and the deceased partner's family.¹⁷⁰ They explain this below:

The surviving spouse of the deceased the one who has been married customarily, most of the time by paying lobola or the family going to the other family to have lobola negotiations and actually pay lobola, even if it is not paid in full but normally they are considered married. So most of the time it is for those people who did not register their customary union because if you have registered you will have a certificate just like any other civil marriages but if you have not you have anything to prove that you're actually the surviving spouse. Participant A4.

The purpose of the form is to be able to assist deceased's spouse who before the marriage, their customary marriage was not actually registered so now here they are, the other spouse is deceased, let us say for example now the wife is remaining they are approaching that office what they do, they take the information from the spouse herself, were you married to the deceased? Yes true, if you were married right, can we have all the details regards your marriage. That means they need to see in the formalities of the marriage existed the marriage but of very important is the approval or the knowledge of the marriage from the family of the husband and the family of the wife. Questions such as was *lobola* paid, will be asked? How much was that *lobola* for? Was in there any celebration? Sometimes even though there is no celebration for as long as they are satisfied that *lobola* was paid and both families, the family of the husband and the family of the wife are aware or of full knowledge of the marriage then they will record the information as such and later on recognise the marriage. It is different when there is one family, maybe the family of the wife in the absence of the family of the husband then they have got serious problems or when there is only family, that is the family of the husband confirming a marriage to a wife whose own family is not there to support her, in other words when the family of the wife is not there. So it should not be single handed information. It should be information that can be confirmed by both sides, and then the third scenario is when you find out that actually, there is another wife so in means forms must be completed for both wives. It is not a requirement that a wife should acknowledge another wife for as long as the family of the husband still recognise the second wife there is nothing that the other wife can do, except she can challenge that if

¹⁷⁰ See 4.3.

she feels that such a marriage never existed. So the likelihood on this form is that you are likely to have three to four marriages as long as the husband's family is confirming the same. Participants A3.

As stipulated above, the role of the deceased partner's family is to confirm the existence of a marriage after the deceased's death. As such, the family of the deceased plays a significant part in the finalisation of the deceased partner's estate in that the family's cooperation in completing the form determines the speed and smoothness of the transfer of ownership of the deceased partner's estate.

5.3.1.4 Subtheme: Reduce court cost

As explained by one participant, the MBU 16 form was meant to reduce the cost of processing the transfer of ownership of the deceased's estate. Below are some remarks on that:

I think for me I have got two opinions. First is that it is helpful for those spouses that does not have money because you must understand that if you do not have money you will just complete the form and have the family members to confirm that you indeed the customary wife, but for those who have money and can approach the Court of law if much better because it will help you to even register it with the Home Affairs, because when you go to Court you are going to involve the Master and also Home Affairs which means that no other person will come in the future and fight you about your property or fight you about your status as the surviving spouse or the widow of the deceased. So it is helpful for those that does not have money, but if you have money I think it is much better to just approach the Court of law, because you may find that you were the only wife and everybody knows that you are the only wife but at the end you will find another wife coming with her own MBU 16 form saying she is the customary spouse of the deceased so that is where the problem comes in, but if we go to Court it means that this other spouse whose saying she is the wife she will have to prove that indeed she is the wife. A4-Legal Practitioner.

Normally, verification of marriages and settling disputes regarding deceased estate transfers to a spouse through courts require the involvement of expensive legal practitioners. As such, some families could not afford the cost, and in the past, they would likely not benefit from the estate. On the other hand, the MBU 16 form is simple and is not costly as it only requires family witnesses for confirmation of the existence of the marriage. Therefore, it is regarded as a cheap and efficient way of settling deceased estate inheritance issues for surviving spouses.

5.3.1.5 Subtheme: Legislation behind the MBU 16 form

It was also necessary to probe the legislation behind the MBU 16 to determine if the participants were aware of it. Most participants (5) highlighted that the form is used to assist the spouses of the deceased who died without a will under customary marriage and it covers the loopholes of the existing legislation. Below are their responses to that:

On the legislation am not so sure because I only heard about it on the Master's directive. A2-Legal Practitioner.

5.3.2 Theme: Challenges in administering the MBU 16 form

The study also set out to identify the challenges associated with administering the MBU 16 form.

5.3.2.1 Subtheme: Lack of witness cooperation

It is clear from the findings above that one of the major challenges was the lack of witness cooperation. Below are some of the participant's remarks mentioned on this subtheme:

The challenges are with regard to securing the witnesses, like I said the deceased's spouse relatives or.

Siblings usually are reluctant to make such confirmation because they realise now that the person (you know according to our African believes and everything if the husband passed on than they turn to think the wife is behind that) than there are tensions that usually develop in the process of burying the deceased than they start to be divided than that when we start to have problems because we need to secure witnesses from the husband's side so if they don't come how do you proceed that's the challenge we face as the Master's office and that is when you realise that the only people available are those were born after the married was concluded so they cannot attest that so that's the challenge we face as the officer of the court. M1-Estate Controller.

Like I have indicated earlier that we faced a challenge, where we were calling in the members of the deceased family and they were not willing to cooperate that is where the family of the surviving spouse could face some challenge hence I indicated that one of the surviving spouses even called another family to come confirm on the behalf of the rightful family of the deceased. M2-Estate Controller.

The challenges that may arise for example it would be where a person cannot procure witnesses or the families are no longer agreeing with each other because now there is money and properties involved and everyone wants a share of that property. A2-Legal Practitioner.

The responses above show that in some cases, the deceased partner's family refuses to confirm that there is an unregistered marriage after the deceased's death. In such a case, it is challenging to complete the MBU 16 form as the family members are the only ones allowed to help/provide the Master's official with the relevant information required to completing the form.¹⁷¹ Moreover, most of these disputes are a result of family members having interests in the deceased's estate; hence they might deny knowing the surviving spouse to acquire the estate for themselves.

5.3.2.2 Subtheme: Disregard for customary marriages

Another challenge is that, in some cases, the MBU 16 form might be disregarded by the court.

Is when you find that sometimes the former wife, the customary wife actually, the husband has now married in civil marriage and there is a marriage that had existed prior the civil marriage now and then you find that if she goes and say yes I want to complete the form and all that now there is a civil marriage, now the Master does not want to recognise the customary marriage because there is a civil marriage. They say to the women you go to Court and challenge the subsequent marriage, the civil marriage now. They do not actually recognise the customary marriage, they are not even prepared to complete this MBU 16 form, and they are not because there is a marriage before them. That marriage is stopping them. Funny enough that marriage, the alleged date of the marriage is after the customary marriage but their predicament is clear because they are not attorneys for the customary wife, they are just there as administrators, they implement what is there. Now their challenge is if she is a customary wife who came first now there a civil marriage, they cannot deal with this predicament she must appoint an attorney who approaches the Court to deal with these predicaments but this are serious challenges that are always there. A3-Legal Practitioner.

As stated above, if two wives intend to inherit from the deceased partner's estate. One of them has a registered civil marriage certificate, then the Master's official may only

¹⁷¹ Müller-Van der Westhuizen and Nhlapo 2017 *Journal for Juridical Science* 9.

consider the civil marriage and disregard the customary marriage for lack of documentary proof, but the official will advise the wife with the unregistered customary marriage to approach the court for a resolution. For this reason, there is a challenge in trying to make sure that the MBU 16 form can be comprehensively applied to benefit all those who are in unregistered marriages.

5.3.2.3 Subtheme: Fraudulent activities

The results also illustrate that the MBU 16 form is susceptible to fraudulent activities. These include the provision of false information by the family witnesses. For instance, it was highlighted that some spouses may hire people sharing the deceased partner's surname to confirm the existence of a customary marriage to claim from the deceased's estate when there was no marriage before the death of the deceased. Below are some of the participant's remarks:

The challenges that I have encountered but I've only encountered it once is that I remember it was in 2016, in one of the estate due to the fact that the surviving spouse was no longer in good relationship with the family members she had to call in other people with same surname to come and confirm the marriage between her and the late husband and it was later on proved that those were not even the relatives of the deceased they were just using the same surname and they don't even know each other but it was later on resolved and even the other family even agreed yes indeed we know her that she is the wife of the deceased. M2-Estate Controller.

Fraudulent activities are also committed in situations where the family of the deceased refuses to confirm the existence of a customary marriage because of grudges with the spouse or greediness. Below is the narration on that:

Ya! they have faced a lot of challenges because you find that immediately when the spouse die or the husband die some of the family members will reject the spouses they may even say they do not know the spouse even though the person has been living with the deceased for the past twenty to thirty years. So most of the time they will say no we do not know them that means that the form will not be helpful to the surviving spouse who been rejected. A4-Legal practitioner.

The results mean that they will have to go to Court and prove that indeed they are the spouse wherein they produce *lobola* minutes and the *lobola* money which was paid

through letters written and signed by the people that actually attended the *lobola* negotiations.

5.3.2.4 Subtheme: Delays due to disputes among deceased partner wives

The findings also revealed that in cases where the deceased had more than one wife, it was difficult to identify the spouse who was customarily married and recognised by the family. Below are some of the remarks:

The challenges are with regard to securing the witnesses, like I said the deceased's spouse relatives or siblings usually are reluctant to make such confirmation because they realise now that the person (you know according to our African believes and everything if the husband passed on than they turn to think the wife is behind that) than there are tensions that usually develop in the process of burying the deceased than they start to be divided than that when we start to have problems because we need to secure witnesses from the husband's side so if they don't come how do you proceed that's the challenge. M1-Estate Controller

In many cases, disputes might erupt and delay the processing of the deceased's estate until a resolution is reached.

5.3.3 Theme: Experiences working with the MBU 16 form

This section focuses on understanding the experiences of Estate Controllers in working with the MBU 16 form.

5.3.3.1 Subtheme: Time spent using the MBU 16 form

In terms of the duration that the Estate Controllers had of using the MBU 16 form, one indicated that she started using the form in 2015 while the other indicated that she started during the same year. Below are their verbatim quotes:

We have been using this form since 2015. M1-Estate Controller.

Since 2015, since it was introduced in 2015 by Chief Masters' directive tools of 2015. M2-Estate Controller.

5.3.3.2 Subtheme: Training for using the MBU 16 form.

Regarding training, all participants reported that they had received adequate training from the Justice College and at their workplace. Below are their quotes on that:

Yes, we were adequately trained on that one. There were people who were brought to our office, we were trained in the office, there were people brought in the office from national office who gave us adequate training on how to utilise that form, actually we were adequately trained. M1- Estate Controller.

The training that we received, we received it from the Justice College and we were trained how to conduct such family meetings in our offices in that we have to call two members from groom side and two family members from the bride side for them to concur that indeed the marriage did take place and was recognised and also to find out whether such was done or the women was married as a seed raiser or as a spouse because there is a difference between a seed raiser and a spouse. M2-Estate Controller.

As stated above, the training received was mainly focused on administering the MBU 16 form and interviewing the witnesses. This includes identifying the authentic family members of the spouse and the deceased partner's family members, soliciting answers for the form, and maintaining peace and cooperation throughout the process.

5.3.4 Theme: Perceptions on MBU 16 form

Results also showed various perceptions and feelings regarding the MBU 16 form and its use.

5.3.4.1 Subtheme: Structure of the form

The results show that the participants discussed the complexity and usefulness of the form. Below are some of their remarks on that:

It is not complex as such, because it only deal with the issue were you need to give the background. M1-Estate Controller.

Firstly up there you note down the date, time, place, who is the facilitator, who the person taking notes when you come down you need to outline who are the parties involved the deceased and spouse (the name and the ID) Then who are the parties presents on behalf of the deceased spouse and the ID numbers than after that its than that you give the background depending on what they are telling you, whether the married was celebrated? How much was paid? Whether there was any celebration to that effect and you go to the other portion were you tick because there must be proof from the (head man) to say indeed they

must write a letter or an affidavit to say this people were married that you tick it off than they sign and initial each and every page the parties involved to give a proof that indeed they are confirming that this people were married. M1-Estate Controller.

The structure of the form is very simple and straight forward. It is easy to use in that all the questions that are there in the MBU 16 are plain and straight forward. M2-Estate Controller.

Most participants indicated that the MBU 16 form had a simple structure and was easy to administer. The form also contained useful information allowing users to capture all the required information.

5.3.4.2 Subtheme: Effectiveness of the MBU 16 form

In terms of the form's reliability in resolving the deceased partner's estate issues, most of the participants echoed that the form was effective. Below are their remarks on that:

There is nothing wrong about it. I think it is a perfect thing because remember in terms of the Recognition of the Customary Marriages Act number 120 of 1998, came to operation in 2000, the fact that a customary marriage has not been registered does not render it invalid so MBU 16 form says okay that marriage which was not registered from the onset am here am available to address that administration to deal with that party. A3-Legal Practitioner.

It is useful in that only those who are supposed to inherit from the deceased (the rightful beneficiaries) will be identified under the MBU 16 form...remember the deeds office when they do this transfer of properties , they need valid marriage certificates and as such injustice is being done because the surviving spouse(s) of the deceased could not transfer the property into their names without the valid marriage certificate or court order but when this MBU 16 form meeting is conducted and the surviving spouse is recognised by both members of the family at the Masters office when we fill in the inventory and the next of kin affidavit we indicate in the next of kin affidavit that this women is the surviving spouse of the deceased, which also assist in the deeds office that indeed this is the surviving spouse of the deceased and that helps the surviving spouse to get what is rightful hers, after the finalisation of the estate by dealing with the transfer of properties and everything like that and alsofor her to get her own share as the surviving spouse because you will remember if she is not being counted as the surviving spouse it means she will never inherit a cent from her husband which is also an injustice on the part of the surviving spouse. M2-Estate Controller.

As stated above, the form efficiently facilitates property transfer from a deceased partner to the spouse in unregistered customary marriages. The form was also ideal for identifying the correct beneficiary in resolving the deceased person/partner's estate.¹⁷² Finally, due to its simplicity, the form allows for the speedy resolution of estate disputes among families. Below are some of the comments on that:

Ya, I think it is necessary to be used to confirm the marriage because you may find that going to register a marriage which has already been dissolved by death will take a lot of time and it will delay the process of the administration of the estate. A3-Legal Practitioner

It makes it easier and quicker because we don't have any hassles we know who is the surviving spouse, who are the children of the deceased and who is supposed to inherit what. M2-Estate Controller.

However, despite the positive responses regarding the form by most participants, a minority lamented that the form could not be applied in some situations, and thus its use was limited. For instance, in cases where there was an existing civil marriage registered for another wife, the wife who was not registered may not be allowed to claim the estate using the form. The exclusion is because there is an already existing civil marriage unless that spouse can prove that the customary marriage was concluded before the civil marriage of the other wife.

5.4 Conclusion

This chapter captures the outcome of the qualitative survey regarding the challenges of the MBU 16 form concerning the finalisation of intestate deceased estates as well as the implications of the requirement to complete the prescribed MBU 16 form to prove the existence of customary marriage in deceased estates. In this chapter, background information was sought from the participants who work closely with the MBU 16 form. It was gathered in this chapter that the MBU 16 form was established to provide proof of

unregistered marriages, protect the deceased partner's spouse and children, and reduce court costs by requiring the deceased's spouse and family members to complete the form.

Most of survey participants believe that the MBU 16 form is meant to protect the interest of the deceased partner's spouse and children in the deceased estate. Once a customary marriage has been proven, the surviving spouse can claim from the deceased partner's estate. The survey has also shown that the MBU 16 form is regarded as a simple, cheap and cost-effective method of settling deceased estate inheritance disputes as opposed to the normal court processes, as it only requires family witnesses to confirm the existence of the marriage.

However, as indicated in this chapter, the MBU 16 form processes had their own challenges. The findings show that one of the major challenges in this regard was the lack of cooperation from the deceased family members. For example, it is shown above that in some cases, the deceased partner's family members refused to confirm that there was an unregistered marriage after the death of the deceased. Their refusal made it difficult to complete the MBU 16 form as the family members were the only ones allowed to help/provide the Master's official with the relevant information required to complete the form.

Another challenge often associated with the MBU 16 form processes was fraudulent activities. This is so because it is possible for family members to provide false information to frustrate the processes due to family greed and grudges amongst family members. However, the overall perception regarding the MBU 16 form was that it is a useful and easy process.

CHAPTER 6: CONCLUSION

6.1 Introduction

This chapter provides a summary of findings, conclusion and recommendations. This study aimed to explore the challenges posed by the MBU16 form regarding the finalisation of the intestate deceased estates and the implications of the requirements to complete the prescribed MBU 16 form to prove the existence of customary marriage in intestate deceased estates.

Additional aims of this study were to:

- investigate the extent of the use of the MBU 16 form in the finalisation of intestate deceased estates;
- to assess the attitudes of users of the MBU 16 form;
- establish the link between the delay in the finalisation of intestate deceased estates and the use of the MBU 16 form; and
- explore factors that impede the use of the MBU 16 form, thus causing delays in the finalisation of intestate deceased estates.

To achieve the above objectives, primary and secondary data was used and presented in four chapters. A summary of these is discussed in the following section.

6.2 Summary of findings

As indicated in *chapter one*, the primary purpose of the *Recognition Act* was to bring equality in marriages concluded by civil and customary rites. However, the same chapter indicated that non-registration of a customary marriage does not invalidate the customary marriage. Rather, in cases where a party to a customary marriage dies intestate before his or her customary marriage is registered, the Master is empowered to assist the surviving spouse by using the MBU 16 form to confirm the existence of the customary marriage for purposes of succession only. It follows that the main aim of this research is to investigate the implications of

the requirement to complete the prescribed MBU 16 form to prove the existence of a customary marriage or marriages in intestate deceased estates, particularly considering its successes and challenges. Moreover, in practice, it appears that there is a delay in the finalisation of intestate deceased estates of persons married customarily, even when the MBU 16 Form is used to prove the existence of a customary marriage. The chapter further explains the objectives and methodology used to investigate the challenges of the MBU 16 Form.¹⁷³

In *chapter two*, I focused in detail on customary marriages. It is indicated in chapter one that the *Recognition Act* regulates customary marriages. This chapter emphasises the purpose of enacting the *Recognition Act* is to partly address the historical gender inequalities that existed in customary marriages. An analysis of the requirements of customary marriages according to the *Recognition Act* is done, and it is noted that as long as the registration of customary marriages does not invalidate the customary marriage, there will always be uncertainties and inconsistencies as parties to customary marriages do not and will not have proof that their marriage is valid and exists without calling witnesses to confirm such.

In the same breath, it is again noted with sadness that if registration is made a validity requirement, the past prejudices will continue to prevail and defeat the purpose of the *Recognition Act*. This chapter also demonstrated that the *Recognition Act* explicitly provides that only registration officers may register customary marriages, issue customary marriage certificates and that traditional leaders do not have the powers to issue customary marriage certificates. However, traditional leaders/councils play a pivotal role in the confirmation of customary marriages; see the *Nhlapo v Mahlangu*¹⁷⁴ case referred to in this regard. For this reason, it is recommended that traditional leaders/council assist registering officers to ensure that all customary marriages are registered, are easily accessible by their people, and know all the people within their territorial jurisdiction.

¹⁷³ See chapter 1.

¹⁷⁴ *Nhlapo v Mahlangu*(59900/14) [2015] ZAGPPHC 142 (20 March 2015) para 9.

The *Nhlapo v Mahlangu* case also demonstrates another crucial factor: had a registration of the first customary marriage been done, the deceased would not have been able to enter into a civil marriage with another party. This restriction is expressly provided for in the *Recognition Act*. According to the provision of the *Recognition Act*, a civil marriage is only possible and valid if the same parties conclude it to a customary marriage and provide that the same parties to the customary marriages are not in a customary polygynous marriage. Another noteworthy provision in this chapter is that only a competent court may dissolve a customary marriage.

In the absence of traditional proof of registration of customary marriages, Directive 2 of 15 August 2015 provides an alternative route to prove the existence of a customary marriage through the use of the MBU16 form. The alternative helps to close the gaps in the *Recognition Act*, which is mute when it comes to proving the existence of a customary marriage of a deceased who died intestate. Moreover, the challenges of the MBU 16 Form have not been fully explored within the scope and application of customary marriages in South Africa. The chapter indicated that every customary marriage should satisfy the general requirements of a customary marriage. Such requirements can be applied as the basis for proving the existence of a customary marriage using the MBU 16 form.¹⁷⁵

Chapter three focused on the administration of estates in customary marriages in South Africa. This chapter highlighted that even if a customary marriage is not registered, it is not invalid. However, it was established that unregistered marriages create complications when the deceased has died intestate and was a party to an unregistered customary marriage. The surviving spouse(s) is burdened to prove the existence of such a customary marriage. This is done at service points delegated by the Master to assist surviving spouses of deceased intestate estates. Nonetheless, it was established that the process of corroborating the existence of a customary marriage involves the Master's official(s) who must

¹⁷⁵ See Chapter 2.

convey a meeting with the surviving spouse(s), the family members of the surviving spouse(s) and as well as the family members of the deceased to determine the existence of the customary marriage using the MBU 16 form. It is clear from this chapter that should the meeting convened by the Master yield no positive results or fail, the surviving spouse(s) must approach the court for an appropriate remedy. However, the chapter argued that the court process is often expensive and time-consuming and should be avoided.¹⁷⁶

The process of proving the validity of a customary marriage by litigation delays and prejudices the vulnerable groups, the surviving women and children. Moreover, this problem is exacerbated by the fact that a significant number of South Africans die and intestate, including those married by customary rites. For that reason; it is proposed in this chapter that public awareness is encouraged to educate members of the community about the registration of customary marriages for legal purposes, legal certainty and transparency.

Chapter four covers the scope and application of the MBU 16 form, firstly by giving a background of how it was formed. It further discusses how this form works and how it is used to administer estates of deceased spouses. Next, the requirements of the MBU 16 form and how they should be met are stated. Furthermore, in this chapter, the challenges of the MBU 16 form are stated, and a discussion on the litigation processes is also done.

Chapter 5 presented the qualitative data findings where participants who had experience working with the MBU 16 form discussed their experiences and perceptions towards it. The findings revealed that the MBU 16 form was established to provide proof of unregistered marriages, particularly where marriages were not registered before one partner passed on. The form was also introduced to protect the deceased partner's spouse and children by providing alternative proof for unregistered marriages. The form, in this regard, enables spouses and children to claim from the deceased partner's estate. In the absence

¹⁷⁶ See Chapter 3.

of this form, spouses from unregistered marriages cannot claim or officially inherit the deceased partner's estate. According to the study, this was done to avoid a situation wherein the estate is likely to be inherited by close relatives of the deceased, consequently leaving the spouse and children without anything from the deceased estate.

Furthermore, the study shows that the MBU 16 form was introduced to reduce court costs by requiring the deceased's spouse and family members to complete the form. According to the study, the verification of marriages and settling disputes relating to the deceased through courts require the involvement of legal practitioners, who often come at a great cost which some families cannot afford. For this reason, the MBU 16 form was introduced as it is simple and cost-effective as it only requires family witnesses for confirmation of the existence of the marriage.

Despite the successes of the MBU 16 form, the study also revealed the practical challenges brought by the use of the form. It is clear from the study findings that one of the major practical challenges was the lack of witness cooperation in completing the form. For example, according to the study, some family members often refuse to confirm that there was an unregistered marriage after the deceased's death. Consequently, it is at times difficult sometimes difficult to complete the MBU 16 form as the family members are the only ones allowed to help/provide the Master's official with the relevant information required to complete the form.

The study further revealed that the form is susceptible to corrupt activities. This is because some family witnesses are likely to provide false information for their selfish reasons. For instance, the study has revealed that some spouses may collude with people sharing the deceased surname to confirm the existence of a customary marriage to help the surviving partner claim from the deceased's estate in situations wherein there was no marriage at all. The study also reveals that these fraudulent activities are also committed in cases where the family of the

deceased refuses to confirm the existence of a customary marriage because of family conflicts.

The study also investigated various perceptions and feelings regarding the use and complexity of the MBU 16 form. According to the study, the MBU 16 form has a simple structure and is easy to administer. Moreover, the form contains useful information allowing users to capture all the required information.

On the efficiency of the form, the study further reveals that the form efficiently facilitates the transfer of property from a deceased partner to the spouse in unregistered customary marriages. In addition, due to its simplicity, the form allowed for a speedy resolution of estate disputes among families. However, the study revealed that despite the positive responses regarding the form, a few participants in the survey lamented that the form could not be applied in some situations and, thus, its use was limited. For instance, in cases where there was an existing civil marriage registered for another wife, the wife who was not registered may not be allowed to claim the estate using the form.¹⁷⁷

Research shows that there is a delay in the finalisation of intestate estates of persons married by customary rites and who have not registered their customary marriage as a result of the requirement that the MBU 16 form must be completed before an estate can be finalised. Compared to estates of persons married by civil rites/ those who have registered customary marriages (completion of the MBU 16 form is not a requirement as there is documentary proof of marriage). There is often a link between the use of the MBU 16 form and the delay in the finalisation of intestate estates of persons married by customary rites and who have not registered their customary marriage.¹⁷⁸

Finally, the study showed that in case of disputes, particularly where the MBU 16 form is not useful, interested parties may follow court processes as a last resort for registering their customary marriages even after the death of their partners.

¹⁷⁷ See chapter 5.

¹⁷⁸ See chapter 5.

6.3 Recommendations

Considering the above discussion, the study highly recommends the registration of customary marriages to avoid future marital and estate disputes. In addition, the study recommends the need for campaigns, workshops and all sorts of knowledge dissemination platforms to ensure that the public understands the importance of registering their customary marriages. These could be held in community forums, local radio stations and other platforms where many people can be accessed. Finally, the need to complete the MBU 16 form should be a last resort only to be used in exceptional circumstances where parties failed to register their customary marriage.

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Women's Legal Centre 2011 Recognition of Customary Marriages http://www.wlce.co.za/morph_assets/themelets/explorer/relationship%20rights/general/Recognition%20of%20Customary%20Marriages.pdf accessed 3 November 2011

ADDENDUM

MBU 16 form

MBU 16

MINUTES OF A FAMILY MEETING RE CUSTOMARY MARRIAGE

Minutes of a meeting	Date:	
	Time:	
	Place:	

Estate late:		Reference number:	
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Facilitator: <i>Name & Rank</i>		Note keeper:	
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Attendees:	
1. Surviving Spouse (s):	
(i)	ID no:
(ii)	ID no:
(iii)	ID no:
2. Family Representatives:	
Groom's Family	Bride's Family
Name:	Name:
ID no:	ID no:
Name:	Name:
ID no:	ID no:
3. Other Representatives: (Representative of the Tribal Chief or King) <i>(Specify if any)</i>	
.....	
.....	
.....	

2. Interview Guide

The purpose of this interview guide is to investigate the challenges posed by the MBU 16 form in proving the existence of an unregistered customary marriage. The questions contained herein will be used for this study only. Thank you for your contribution.

Interviewee number.....

QUESTION	FOLLOW UP QUESTIONS	DIRECTED TO
1.Perhaps I can start by asking you to give some background information on the MBU 16 form	(i) Purpose (ii) Legislation behind it	All
2.Tell me about your experience working with the MBU 16 form	(i) So for how long have you been using this form (ii) Do you feel that you are adequately trained to use the form? Can you perhaps give me some details about the training that you received (iii) How would you assess the complexity of the structure of the form (iv) What makes the form easy or difficult to use (v) So in your view, is the information collected through the form useful in making decisions concerning the existence of customary marriages and finalisation of deceased estates	Assistant Master & Estate Controller
3.Please narrate for me any challenges that you might have faced in administering the MBU 16 form as an officer of the Court		Assistant Master & Estate Controller
4.Also narrate for me any incidences wherethe surviving spouses/families of the surviving spouses have faced challenges related to the implementation of the MBU 16 form		All
5.So what are your feelings about the use of the MBU 16 form for verifying the existence of customary marriages	(i)Should the form be modified, if so how? (ii)Should alternative procedures be looked for	All
6. Thank you for the valuable information you		All

have provided. Is there anything else you would like to add before we end		
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- Designation

Assistant Master	Estate Controller	Legal Practitioner

- Gender

Male	Female

2.1 Interview Responses

Respondent: A1

QUESTION 1

Q: Perhaps I can start by asking you to give some background information on the MBU 16 form

A: My understanding of the MBU 16 Form it is the form that is used at the masters office when one of the spouses have died and there is supposed to be a registration of the estate on cases whereby a customary married is not registered in that process the family of the deceased together with the family of surviving spouse have to appear before the Master and the Master must conduct an inquiry with them in proving the existence of the customary marriage they are given this form which they have to provide an information which is in compliance with the requirements provided for in Section 3 Act 120 of 1998 as amended in proving all the requirements of the customary marriage.

(i) Q: So can you clarify for us, what is the purpose of this MBU 16 Form?

(ii) A: The purpose of this MBU 16 form is to give information which confirms the existence of an unregistered customary marriage that existed between the surviving spouse and the deceased.

(iii) Q: So can you explain to us what the Legislation behind it is?

A: The legislation behind it, is the Administration of Deceased Estate Act read together with the Recognition of Customary Marriages Act 120 of 1998.

Q: Anything else that you would like to add?

A: That is all.

QUESTION 2

Q: can you also narrate for me any incidences where the surviving spouses/families of the surviving spouses have faced challenges related to the implementation of the MBU 16 form

A: The challenges that I have experienced is that there are disputes which exists after the deceased has passed away normally the family of the deceased are very reluctant to confirm the existence of the alleged customary married between the surviving spouse and the deceased such it is normally necessitated by I would say greed whereby people are looking at what they stand to benefit in the event the deceased is said to have dead without a spouse or the existence of any valid customary marriage, so those are the challenges that I think they normally happen, the family of the deceased normally do not want to confirm the existence of the alleged customary marriage and as such when we have to look at the requirements provided for in that Act, it is a requirement that the family of the deceased as well must give a consent or a confirmation, confirming the existence of this customary marriage

and without the confirmation from the family of the deceased, it means there no compliance with this MBU 16 form.

Q: Is there anything else that you would like to add?

A: I think that is all that I can say about it.

QUESTION 3

Q: So what are your feelings about the use of the MBU 16 form for verifying the existence of customary marriages?

- I think this form is creating a lot of problems in the application of Act 120 of 1998, in that the Act itself in section 4 it provides for the time frames within which the customary marriage has to be registered, thou the Act goes further to explain that the non-registration of this marriages does not invalidate the customary marriage itself, I would suggest that it would make such sense to me if this form is not used but there be a formal court application for condonation of late registration of a customary marriage and the evidence be provided to the Court for the Court to make a determination at to whether there existed any customary marriage between the deceased and surviving spouse.

(i) Q: But then, would Court proceedings not delay the finalisation of the deceased estate as well as the confirmation process of the marriage?

A: I think courts are taken more serious and obviously the decision of the Court would stand to be binding and final in that when we have to be looking at people or the family of the deceased who are reluctant to give that consent it is still takes us back to the same process of having got to engage court processes of court battles in that without the confirmation of either side there cannot be compliance with this form and such the estate cannot be finalised without it.

(ii) Do you think that the form should be modified?

A: I would suggest so

Q: How so, how should it be modified?

A: I think, the manner which the form has to be modified, there should be a provision whereby by the evidence or the recordings of the lobola proceedings should be attached in amplifying the consent which is given by both the families.

(iii) Q: Ok besides what you have just said now, can you tell us of any alternative procedures that should be looked for?

A: I think what needs to be done is more of an awareness to people entering into customary marriages to make it a point that it becomes compulsory to register this customary marriages when they are entered into so as to avoid this kind of situations after the death of one of the parties.

Q: But then the very same Act, the Recognition of Customary Marriage Act, does render a marriage which has not been registered to be invalid?

A: Yes, it does not but I think a lot of people are not aware of the processes and consequences inclusive of Section 4 which of course stipulates that such marriages should or ought to be registered with the Department of Home Affairs.

Q: Ok, Anything else that you would like to say?

A: No, that is all that I can say.

Thank you for the valuable information you have provided

Q: Is there anything else you would like to add before we end?

A: No

Thank you very much for your participation.

Respondent: A2

QUESTION 1

Q: Perhaps I can start by asking you to give some background information on the MBU 16 form

A: Ok, What I do understand about the MBU 16 form is that it is used where the proof of the registration of a customary marriage it cannot be lodged and then on that particular marriage there no dispute and the families are confirming that there an existence of such a marriage.

(iv) Q: What is the purpose of the MBU 16 Form?

A: Ya, the purpose of this form is to assist the surviving spouse by confirming the marriage, that there an existence of the marriage but not to declare the marriage valid.

Q: When you say not declare it valid, what do you mean may you can add more on that?

A: Ok, for the marriage to be declared valid it has to be registered with home affairs so the MBU 16 form is just to prove that there is an existence of the marriage.

(v) Q: What is the Legislation behind it?

A: On the legislation am not so sure because I only heard about it on the master's directive.

QUESTION 2

Q: Can you narrate for me any incidences where the surviving spouses/families of the surviving spouses have faced challenges related to the implementation of the MBU 16 form

A: The challenges that may arise for example it would be were a person cannot procure witnesses or the families are no longer agreeing with each other because now there is money and properties involved and everyone wants a share of that property.

Q: Any other challenge besides that one of a witnesses?

A: the people will be supposed to come to the Master's office for a meeting which minutes will be taken to support the MBU 16 form and you might find that the people are unable to go there, some because of old age because you might find that the witnesses are older people.

QUESTION 3

Q: So what are your feelings about the use of the MBU 16 form for verifying the existence of customary marriages?

A: Ya, I think it is necessary to be used to confirm the marriage because you may find that going to register a marriage which has already been dissolved by death will take a lot of time and it will delay the process of the administration of the estate.

(iv) Q: Ok so do you think that the form should be modified?

A: as for now No, I think it is simple enough.

Q: Ok, cause my follow up question would be if so how so?

A: No

(v) Q: Should alternative procedures be followed / should be looked for?

A: I could say yes.

Q: What would you suggest?

A: I would suggest that maybe the Master have somebody (a representative) who will maybe go around investigating, like gathering information about such a marriage where all the witnesses cannot afford to go to the Master's office.

QUESTION 4

Thank you for the valuable information you have provided

Q: Is there anything else you would like to add before we end

A: No,I have nothing to add.

Q: Are you sure?

A: I am sure

Thank you

Respondent: A3

QUESTION 1

Q: Perhaps I can start by asking you to give some background information on the MBU 16 form

A: Remember this form is usually completed by the Master and we as practitioners have no much say on the form, the Master is the one who directly takes information from the clients themselves. Remember the deceased's spouses are their clients, they are also our clients but with them they consult with them directly. They do not need intervention from us because they use much more of their discretion so it depends on who gets there with the spouse, if the family of the spouse both husband and wife are there so the Master will be able to assist and complete the form accordingly, so it is usually not completed by us as attorneys.

(vi) Q: So then, what can you say about the purpose of the MBU 16 Form?

A: The purpose of the form is to be able to assist deceased's spouse who before the marriage, their customary marriage was not actually registered so now here they are, the other spouse is deceased, let us say for example now the wife is remaining they are approaching that office what they do, they take the information from the spouse herself, were you married to the deceased? Yes true, if you were married right, can we have all the details regards your marriage. That means they need to see in the formalities of the marriage existed ---- the marriage but of very important is the approval or the knowledge of the marriage from the family of the husband and the family of the wife. Questions such as was lobola paid, will be asked? How much was that lobola for? Was in there any celebration? Sometimes even though there is no celebration for as long as they are satisfied that lobola was paid and both families, the family of the husband and the family of the wife are aware or of full knowledge of the marriage then they will record the information as such and later on recognise the marriage. It is different when there is one family, maybe the family of the wife in the absence of the family of the husband then they have got serious problems or when there is only family, that is the family of the husband confirming a marriage to a wife whose own family is not there to support her, in other words when the family of the wife is not there. So it should not be single handed information. It should be information that can be confirmed by both sides, and then the third scenario is when you find out that actually, there is another wife so in means forms must be completed for both wives. It is not a requirement that a wife should acknowledge another wife for

as long as the family of the husband still recognise the second wife there is nothing that the other wife can do, except she can challenge that if she feels that such a marriage never existed. So the likelihood on this form is that you are likely to have three to four marriages as long as the husband's family is confirming the same.

(vii) Q: What would you say is the Legislation behind it?

A: it is the Recognition of Customary Act 120 of 1998 but it came into operation in 2000.

QUESTION 2

Q: Also narrate for me any incidences where the surviving spouses/families of the surviving spouses have faced challenges related to the implementation of the MBU 16 form

A: I have had scenarios where two customary wives , the first one was there with children and she was now staying in the previous common house of the marriage but now the husband married another women and moved into another house not in the same area and the latter wife did not have children. Now there the first wife thinks because this women is there and there are no children which were born it means she may not be the customary wife. Now the family of the husband was recognising her despite the fact that she does not even have children. Infactthis women was coming from another marriage this was just a remarriage, so until the family said yes we are recognising her, infact we are recognising her before that one. They went to home affairs and make sure that their marriage is actually done without doing that one of the former wife. So we had to approach Court to say yes, these are our clients has been the former wife, she has children with the deceased yes we cannot say that the latter wife is not

recognised because the family is recognising her so we had to approach Court for that marriage to be registered too so as a result to fact that she was been neglected. So we have had scenarios like this and the Court has granted us the order in our favour.

Q: Any other challenges?

A: Is when you find that sometimes the former wife, the customary wife actually, the husband has now married in civil marriage and there is a marriage that had existed prior the civil marriage now and then you find that if she goes and say yes I want to complete the form and all that now there is a civil marriage, now the master does not want to recognise the customary marriage because there is a civil marriage. They say to the women you go to Court and challenge the subsequent marriage, the civil marriage now. They do not actually recognise the customary marriage, they are not even prepared to complete this MBU 16 Form, and they are not because there is a marriage before them. That marriage is stopping them. Funny enough that marriage, the alleged date of the marriage is after the customary marriage but their predicament is clear because they are not attorneys for the customary wife, they are just there as administrators, they implement what is there. Now their challenge is if she is a customary wife who came first now there a civil marriage, they cannot deal with this predicaments she must appoint an attorney who approaches the Court to deal with this predicaments but this are serious challenges that are always there.

QUESTION 3

Q: So what are your feelings about the use of the MBU 16 form for verifying the existence of customary marriages?

A: There is nothing wrong about it. I think it is a perfect thing because remember in terms of the Recognition of the Customary

Marriages Act number 120 of 1998, came to operation in 2000, the fact that a customary marriage has not been registered does not render it invalid so MBU 16 form says okay that marriage which was not registered from the onset am here am available to address that administration to deal with that party.

(vi) Q: Do you think that the MBU 16 form should be modified?

A: Well I think modification may even bring more complication, because I think modification might open up for fraudulent activities on spouses that are not necessarily spouses as such you know. I appreciate the fact that when there is an issues maybe people should just approach the Court because it puts much more work now on the Master and it becomes risker. It will be an open gate for everybody that thinks, I was married, I was not married and all that. So as it is now I think it addresses the issue.

Q: So it should not be modified?

A: Yes well, to the extent that perhaps when you interview people on the ground they feel that there is this and that, but then I think that it is sufficient that it is there to address the fact that the marriage was not registered from the onsetbut now when you modify it then are your probably saying what if now there is a civil marriage that was subsequent then the form must also address that, so it gets to be much more complicated but I believe this things are regulated by a Court order when either party has approached the court it is far much more better than when you leave it in the administration because it opens up to fraudulent and other activities that we may not know. So if they are subject to say if there is any dispute or issues around the form go to Court, but if we open up, we might open up flood gates for fraudulent marriages.

Q: So were saying no?

A: I think it is sufficient , I do not know somebody else may come to a different opinion, but I believe much more of the fact that should there be any issues why do not we go to Court and deal with this matters , the only challenge is usually customary wives (I don't know for what reasons) but they are not that wife who has the means, that is the only challenge but the Legal Aid is there to assist so I believe that it should be sufficient as it is because there a lot of fraudulent stuff that take place. Imagine now as I said on that scenario, the subsequent wife was the one recorded to be married not the former, who even have children who has justice in that?Where is the consistency now? In fact by virtue of the issue of MBU 16 form, we managed to have a problem, fortunate enough the Court is available for that, hence I say okay fine I believe that the MBU 16 form should end somewhere there. It should not be given much more power to approve these marriages, let us rather stick to what it is now.

(vii) Q: So, alternative procedures that should be looked for?

A:Iwouldnot think of anything, I think the legislator was more creative to come up with that

QUESTION 4

Thank you for the valuable information you have provided

Q: Is there anything else you would like to add before we end

A: Arg, Ok, let me think about that , you see I see MBU 16 form, but you know what we usually come across, couples that are marriage customarily they go again and marry in the civil rites. Do you know that we subsequently actually we have two marriages from there? The customary marriage and the marriage in community of property

but the advantage is the customary marriage if it does not have ANC so it means because the proprietary consequences are still the same there is just still a bit confusion where people are married customarily and still want to wish to marry in civil rites but that is still addressed because of the fact that the proprietary consequences of an ordinary customary marriage and that of in community of property marriage are still the same. The other thing is sometimes parties are not aware when did the customary marriage happen, the date whether it is the celebration date or the whether it is the date late on and all that and sometimes some marriages, sometimes people pay damages and some people assume that payment of damages is sufficient for marriage for a customary marriage to be given an effect so when approach the Master's office for MBU 16 form they are under that impression. So formality of the customary marriages should be quite clear as to when do we even say there is even a customary marriage enough for them to approach the Master's office to complete MBU 16 form for them. So what I believe there should be is there should be an awareness that is done for the public to benefit to understand what is the customary marriage, when do we say you are marriage customarily? Do we say you're married after lobola? What do we say about damages themselves? Can they constitute a real marriage? Is there celebration quite a requirement there to? So what I think should be done on customary marriage, MBU 16 form should not become to effect , if this customary marriages were done right and people were encouraged to go register their marriage the moment they are done with lobola so it should be today we pay lobola tomorrow we go register our marriage , why not that way.

Q: Is it not because, the Act itself does not make it a requirement?

A: Yes, to avoid an issue of saying, remember customary marriages usually they were happening amongst our people and we have got our elder parents who would not even have not even have known about the registration of such marriages. I think the Act itself was merciful enough to accommodate our communities to say okay even if we could have been ignorant we pardon ignorant by saying it will not be a valid or whatever but what would be important is to do awareness of the fact that customary marriage is still a marriage that truly exists in its own right so therefore do not be afraid to carry your customary marriage and go to the Home Affairs and get it registered because when you get there they actually change that marriage.

Respondent: A4

QUESTION 1

Q: Perhaps I can start by asking you to give some background information on the MBU 16 form

A: The MBU 16 form is the form that we usually complete when a wife or wives if they are two they come to my office so that I can assist them to open an estate and then most of the time we take that form to be completed at the master's office but it must be commissioned by the commissioner of oath most of the time it will be the police station, an attorney or at the magistrate office. That form assist us mostly if the wife has not yet registered a customary marriage. Most of the time people will just pay lobola and then they will just sit together and not do anything about formalising their marriage so most of the time we will complete that form so that the wife can be able to have locus standi to can be the executrix of her late husband's estate and then after we complete it the Master will just have to verify especially with two or

three families from the deceased side and also from the wife side to make sure that they are registering the correct person so that is what the MBU form stand for.

(viii) Q: Can you clarify for us, for us who is supposed to complete the form?

A: The surviving spouse of the deceased the one who has been married customarily, most of the time by paying lobola or the family going to the other family to have lobola negotiations and actually pay lobola, even if it is not paid in full but normally they are considered married. So most of the time it is for those people who did not register their customary union because if you have registered you will have a certificate just like any other civil marriages but if you have not you have anything to prove that you're actually the surviving spouse.

Q: And where is this form supposed to be completed?

A: It is completed at the police station, at any commissioner of oath but the form you will get it from the master's office.

(ix) Q: What is the purpose of the MBU 16 Form?

(x) A: The purpose is to make sure that this wife who is now remaining or the surviving spouses if it is two because most of the time you will find that its two women or three so they have to complete in so that they will have the locus standito become the executrixes of their late husband's estate because now if they cannot register it, they can complete the form it means that the children will have to be the executor or the executrix so if ever the children come in it means that most of the time you will find that the wife will be neglected and the may misuse the property of the husband.

(xi) Q: What is the Legislation behind it?

(xii) A: the legislation behind it is the Customary Act, the Recognition of Customary Marriages Act 120 of 1998.

QUESTION 2

Q: Also narrate for me any incidences where the surviving spouses/families of the surviving spouses have faced challenges related to the implementation of the MBU 16 form

A: Ya they have faced a lot of challenges because you find that immediately when the spouse die or the husband die some of the family members will reject the spouses they may even say they do not know the spouse even though the person has been living with the deceased for the past twenty to thirty years. So most of the time they will say no we do not know them that means that the form will not be helpful to the surviving spouse who been rejected, it means that they will have to go to Court and prove that indeed they are the spouse wherein they produce lobola minutes and also produce the lobola money which was paid through letters that were written and signed by the people that actually attended the lobola negotiations.

Q: Any other challenges?

A: The other challenges is that you will find that the family will actually go with a person who was never married to the deceased and they will come and say you know what you go there and sign this form and confirm that you are the wife because the wife and I are not in good terms so make sure that you sign as the surviving spouse so that we will share whatever proceeds of the estate that you are going to get. That is the problem with this form because a person is just completing without you knowing that indeed this is the rightful person who was living with the deceased, that the problem with this thing.

QUESTION 3

Q: So what are your feelings about the use of the MBU 16 form for verifying the existence of customary marriages?

A: I think for me I have got two opinions. First is that it is helpful for those spouses that does not have money because you must understand that if you do not have money you will just complete the form and have the family members to confirm that your indeed the customary wife, but for those who have money and can approach the Court of law if much better because it will help you to even register it with the Home Affairs, because when you go to Court you are going to involve the Master and also Home Affairs which means that no other person will come in the future and fight you about your property or fight you about your status as the surviving spouse or the widow of the deceased. So it is helpful for those that does not have money, but if you have money I think it is much better to just approach the Court of law, because you may find that you were the only wife and everybody knows that you are the only wife but at the end you will find another wife coming with her own MBU 16 form saying she is the customary spouse of the deceased so that is where the problem comes in, but if we go to Court it means that this other spouse whose saying she is the wife she will have to prove that indeed she is the wife.

(ii) Q: Do you think that the form should be modified? If so how?

(iii) A: I think the form can be modified in such a way that the form can be changed in a form that all family member of both parties must come in person at the offices of the Master and actually confirm when and where the lobola was done especially people who were present when these people were married, because most of the time you find that the people who were present at the

negotiations are not there but just a mere family member who they are saying that I am the sister or whatever but the Master is not even sure if this is the sister or even related to the to the deceased but if both parties from the wife and also from the deceased, can come in and I was present, I am the one that received the money so I know this is the wife. That can be helpful.

Q: So in a situation where those people are deceased, what is going to happen?

A: If they are deceased, I believe that there is someone, it cannot happen that all of them are no more there, but even if they are no longer there but there, are elderly people in the family, those elderly people will come in and tell and say that you know what my sister attended this thing and this is what my sister told me and even from the other side from the wife or of the husband. That person can be found and can say I was present or my sister was present or brother was present.

(viii) : Should alternative procedures that should be looked for instead of MBU 16 form?

A: The only procedure that can assist is involving the Courts , that will be assistful because both parties can come and say whatever they want to say, they can give viva voice evidence and say whatever they want to say and the judge will just rule and Home Affairs will register immediately.

Q: The issue of the Court is it not expensive?

A: It is very much so expensive so it will be prejudicial to those who does not have money and it will be prejudicial to those who will be using the estate money because that is the money that the deceased has left for them to can afford for themselves and live longer so it will be a problem.

Q: So a cheap way or less expensive way, what will that be?

A: The cheaper way is to involve both families to be present in person not that someone just sign and say I am the uncle or I am the brother or I am the sister that is not helpful because I believe in these years the Master is registered false or void customary marriages that never existed.

QUESTION 4

Thank you for the valuable information you have provided

Q: Is there anything else you would like to add before we end

A: Ya, I would like to add that I think it is better that my opinion be valued because I have just come across an estate wherein the customary wife could not be registered because the family of her husband rejected her as a wife, so it means that if ever they were present all of them and her family was present the Master could have foreseen that indeed she is the customary wife because you will find that maybe when the husband was still alive they were in good terms but because the husband is no longer there they do not give admin whether they support you or not support you because whoever made them to know you is no longer there.

: Anything else

A: No, I think that's all.

Respondent M1

Q: Perhaps I can start by asking you to give some background information on the MBU 16 form

A: As you know previously those were women who were not married to the/were married to the deceased customarily were not recognised as a wife/as a spouse to the deceased so when that is when they come this MBU 16 form so that they can protect the interest

for those people, after the inception of the Recognition of Customary Law Act. So since that the inception of the Act so those women because initially when we opened the estate will check marital status of the deceased because if you check in terms intestate succession Act the relations, is blood relations and also by marriage how are you related/it is either by marriage or blood relations. So because when we check the deceased's marital status and it indicates that never married, those customary wives were not recognised so they decided after the inception of the Recognition Customary Law Act it is then that they decided to introduce this MBU 16 so that is protect the interest for those spouse so that they can be recognised as a wife.

(i) Q: The purpose

A: It was to protect the interest of those spouse who were married customarily because they were not recognised before.

(ii) Q: Legislation behind it

A: Recognition of Customary Law Act.

QUESTION 2

Q: Tell me about your experience working with the MBU 16 form

A: Since the introduction of MBU 16 Form the problem we experiencing was regard to if let us say the person that passed on is the husband usually the family of husband will be reluctant to come and confirm that indeed they were married because we require their confirmation, we needed two members from the deceased spouse and from the surviving spouse so that they can confirm. The family even but both sides they are also reluctant because they have this thing in mind that if they confirm than that person will inherit the assets of the deceased spouse so they are very reluctant both sides.

(i) Q: So how long have you been using this form / How long having you been working with is form / when was this form introduced?

A: We have been using this form since 2013.

Q: When was the form introduced?

A: Introduced in 2013.

(ii) Q: Do you feel that you are adequately trained to use the form, Can you perhaps give me some details about the training that you received, if you have been trained?

A: The form itself is not a difficult form as such because if you go through the form you need someone who will be taking notes and someone who will be facilitating so basically this people will give you what happened (the background) who was the negotiator during the lobola negotiations ? what was the amount paid ? by whom? It is such a simple form as such.

Q: So you would say you're adequately trained?

A: Yes, we were adequately trained on that one.

Q: How was training was conducted?

A: The were people who were brought to our office, we were trained in the office, there were people brought in the office from national office who gave us adequate training on how to utilise that form, actually we were adequately trained.

(iii) Q: How would you assess the complexity of the structure of the form?

A: It is not complex as such, because it only deal with the issue were you need to give the background.

Firstly up there you notedownthe date, time, place, who is the facilitator, who the person taking notes when you come down you need to outline who are the parties involved the deceased and spouse (the name and the ID) Then who are the parties presents on behalf of the deceased spouse and the ID numbers than after that its than that you give the background depending on what they are telling you, whether the married was celebrated? How much was paid? Whether there was any celebration to that effect and you go to the other portion were you tick because there must be proof from the (head man) to say indeed they must write a letter or an affidavit to say this people were married that you tick it off than they sign and initial each and every page the parties involved to give a proof that indeed they are confirming that this people were married.

(iv) Q: What makes the form easy or difficult to use?

A: Isay to me the form is difficult because it's a matter of answering each and every question there, so if you fill the form as a whole, because the form has some questions you need to follow so you answer all those questions I don't think there anything difficult even if someone is also questioning the validity of the form as such.

I think the only part is to secure the relevant peoplethat were it makes it difficult because the form requires a lot of signatures , because I think it was going to be easily if maybe they were only signing on the last page but you can see they have to initial each and every page if they are making used of thumb print they have to thumb print so sometimes in the process you might skip another one of the witness which turn to invalidate the form because the person did not sign the other page so I would recommend if they can only sign on the last page.

Q: So a follow up on what you have just said the document itself is it difficult or easy?

A: its easy user friendly but the only problem is with the fact that you need to initial or sign each page because if you have so many witnesses you might find that you forget that the other witness must initial and sign that turn to invalidate the form.

Q: So in your view, is the information collected through the form useful in making decisions concerning the existence of customary marriages and finalisation of deceased estate?

A: Yes, the information collected is useful.

But the problem if it is taken to court / if they can challenge the confirmation of that customary marriage than they can challenge it because it is not easy to secure the witnesses who were present because some of them have already passed on so you may find that the person who is suppose to be one of the witnesses there was born after the marriage was concluded since you need to secure two witnesses and also the fact that the family of the deceased spouse now because they have realised that the person is going to inherit than they turn to be reluctant to go ahead to confirm the existence of customary marriage.

So it is useful if not challenged because they can challenge it in court, because this form is only utilised within the masters office but if they can go to court and say we are not aware that this person was married, you know people turn to change because they want to inherit as well from the deceased then they can take it to court so that is where it got some loop holes there.

Q: Ok, just clarify us, it is useful when?

A: Its can only be utilised only within the masters environment only with regards to the administration of estate within the masters office it doesn't go beyond that , you cannot take it to the employer to say

when you claim the pension fund to say this person was married to the deceased here is the proof , the form will only be utilised here so outside the masters office it is still a problem for the spouse to claim their pension benefit and whatever outside the masters office so that is were I think it has got a problem because it doesnot have that power, it is not capacitated enough that why they can go to an extend of taking it to court for review.

Q: With regarded to finalising the deceased estate is it useful there or it does not make any difference?

A: it is useful with the regard to distribution of deceased estate because if we don't do this form which means if the person on the death certificate it indicate that the person was never married which means whose suppose to inherit is the children of the deceased but with the inception of this MBU 16 Form than the wife is recognised as a spouse so before the children inherit than she first get here half by virtue of married than 250 child's shareso it turns to protect the interest of spouse who are married by customarily as compared to the time were we didn't have this form they didn't get anything it was only the children who were allowed to inherit.

QUESTION 3

Q: Please narrate for me any challenges that might have faced in administering the MBU 16 form as an officer of the Court

A: The challenges are with regard to securing the witnesses, like I said the deceased's spouse relatives or siblings usually are reluctant to make such confirmation because they realise now that the person (you know according to our African believes and everythingif the husband passed on than they turn to think the wife is behind that) than there are tensions that usually develop in the process of bearing the deceased than they start to be divided than that when we start

to have problems because we need to secure witnesses from the husband's side so if they don't come how do you proceed that's the challenge we face as the master's office and that is when you realise that the only people available are those were born after the married was concluded so they cannot attest that so that's the challenge we face as the officer of the court.

Q: Any other challenge besides that one?

A: Overall we don't have a challenge besides that one , unless if they can say whatever decision you have taken with regard to the distribution account wherein we are giving the spouse share than they take us to court and to say no this was not the spouse.

QUESTION 4

Q: Also narrate for me any incidences where the surviving spouses/families of the surviving spouse(s) have faced challenges related to the implementation of the MBU 16 form

A: That is the challenge that I have already outline that the families of the spouse are very reluctant in making such confirmation that is the only challenge we have with the form, I do not know how we can deal with that vacuum but it is something that we are failing to close those gaps because I think that is where the form has got a problem we do not know how are we going to correct that because if it goes to an extent of court they can be subpoenaed to come and make such confirmation because if you call them and they do not come we cannot take any actions against them , we cannot force them so if they do not come it becomes a problem even on our side because than we have to proceed as if the deceased was not married because there is no one to confirm that.

QUESTION 5

Q: So what are your feelings about the use of the MBU 16 form for verifying the existence of customary marriages?

A: I think, am of the view that this MBU 16 Form need to be utilised to confirm the existence of customary marriage because initially before the inception of this form we had difficulties because people were coming here because know customarily married to the deceased , when you tell them we require or they must bring along the siblings or children of the deceased than at the end of the day the children or siblings they share the assets she doesn't get anything so it was a very bad, one could feel that this person has been staying with the deceased maybe for 30years at the end of the day people just come and take the assets and go away and then she is left with nothing and usually even the siblings use to chase away the surviving spouse because they know she couldn't rely on anything before the inception of recognition of customary marriage so the form is useful despite the fact that the reluctance on the part of the deceased spouse as witnesses than there is no problem besides only that.

Q: So you are in favour of the use of the MBU 16 Form?

A: Yes, because you know our people from the remote areas due to the isolation from the main stream of law they don't know their rights they just sit there than they look after the husband and most of the husband they are reluctant to go and register their marriages so they will be staying with them , if you say let's go and register they ask why , what do you want because I am here and it is like they think they are plotting to assassinate or to kill them so at the end of the day when the husband passed on they start to have problems because they don't know what their rights are so this one has come to close that gap because customary marriage does not necessarily mean they have to sign and have certificates as long as it can be proved

that this people were indeed married customarily then they are married.

(i) Q: Should the form be modified, the MBU 16 form?

A: Yes , I think it should be modified in the sense that this thing of witnesses from the deceased spouse is a challenge , so it must be modified to such an extent that it also allow other people like relatives / it should be modified to such an extent with regard to the witness the witnesses that they need it's only the must be witnesses that share the same surname with the deceased, so it must go beyond because we have cousins, we other brothers from maternal side who have got knowledge to the effect that they can prove that indeed these people were married so it must also go to an extent of covering those people because in most cases we have difficulties with regard to siblings to confirm that, so those people if they can be allowed to / it can go to an extend of allowing them to make such confirmation , even the neighbours (someone who stays just next door they know these people have been married customarily, because if it only covers the siblings because the siblings you might find that by that time already there is tension between them and the surviving spouse, there is no way that they can confirm these people were married so I think it needs to be modified to that effect even to extent to cousins and other relatives from the maternal and paternal side, neighbours and anyone who has got knowledge of the existence so that they can come and sign to give confirmation that they did witness that these people were married on such and such a date.

(ii) Q: As a follow up question do you think that should alternative procedures be looked for / or looked at?

A: Yes, alternative procedures?

Q: Yes, alternative procedure to MBU 16 Form?

A: Yes, because I think there are a lot of avenue also that they can utilise to confirm , they can even go to court to get declaratory order, they can even approach the High court then the judge in chambers can then give them declaratory order but the processes will also be required,so I think more or less the requirements are more or less the same because even the High court when the go for declaratory order , they need confirmation affidavit from witnesses, from the deceased spouse, so they encounter also the same problem with regard to securing the attendance of those people because they are reluctant to confirm because they also want to inherit aswell.

QUESTION 6

Thank you for the valuable information you have provided.

Q: Is there anything else you would like to add before we end

A: Yes , I think people need also to consider other avenues with regard to the issue of marriages because if they also make sure they register their married that turn to eliminate a lot of problems,disputes and everything because as I have already said this thing is only utilised within the Masters office so they need to get a, when they go out they will experience problems because we will help them here in the Masters office but when they go to claim pension and everything then they will say they need the marriage certificate so if possible they need to secure a marriage certificate so that we eliminate a lot of disputes because usually during those difficult times there is a lot of tension, the families are reluctant to make such confirmation.

(i) Q: As a follow up to thatbecause I heard you talking about registration do you think the fact that the Recognition of Customary Marriages Act does not require that people should register their marriage / the fact that people do not register

their marriages does not invalidate the customary marriage , do you think that contributes to people not registering their marriages

A: I think they do not, but think necessarily they have knowledge but I think it also contributes because when they hear it from the radio and everything, But the problem is one if that thing can be disputed that is why we say to cover that gap it is better for them to register their customary marriage because even if they go to court to the declaratory order so that maybe they can peruse their claim for maybe Road Accident Fund then they need those affidavit or those who are confirming from the deceased spouse's family so if they do not give it to them when they go to court it is not easy for them to prove that, so just to eliminate that I think am of the view that they should go and register their customary marriage because to get someone to make confirmation is not an easy thing.

Okay that concludes are interview

Thank you very much

Respondent: M2

QUESTION 1

Q: Perhaps I can start by asking you to give some background information on the MBU 16 form

A: The reason why this MBU 16 Form was formulated was due to the fact that, it came to the attention of the Chief Master at the time that most marriages were unregistered and most of the spouses are being taken advantage of by members of the family so they decided to formulate this MBU 16 form to protect the vulnerable and when the created this it was in line with the RCMA in that none registration of customary marriage in terms of section 4 subsection 9

does not invalidate it so hence it was agreed that if family resolution could be accepted than it will assist the surviving spouse and the children of the deceased in this matter.

QUESTION 2

Q: Tell me about your experience working with the MBU 16 form

A: Ya, With me, I have been using this since 2015, since it was introduced by the Chief Master's directive tool of 2015 I have using this MBU 16 form since then till to date and to me I find it very much effective in that it leads to speedy winding up of estates and then also in make it easier to recognise who are the beneficiaries of the estate rather than the brothers and sisters

(v) Q: So can you just confirmation for how long have you been using this form? /

A: Since 2015, since it was introduced in 2015 by Chief Masters' directive tools of 2015.

(vi) Q: Do you feel that you are adequately trained to use the form?

A: Yes, I believe so

Q: Can you perhaps give us some details about the training you received

A: The training that we received, we received it from the Justice College and we were trained how to conduct such family meetings in our offices in that we have to call two members from groom side and two family members from the bride side for them to concur that indeed the marriage did take place and was recognised and also to find out whether such was done or the woman was married as a seed raiser or as a spouse because there is a difference between a seed raiser and a spouse.

Comment by interviewer: I will not go into the seedraiser as that is not part of our research.

(vii) : How would you assess the complexity of the structure of the form

A: The structure of the form is very simple and straight forward

(viii) Q: Follow up question to that what makes the form easy or difficult to use?

A: It is easy to use in that all the questions that are there in the MBU 16 are plain and straight forward.

Q: Then what makes it difficult?

A: it is not difficult to use that form.

(ix) Q: So in your view, is the information collected through the form MBU 16 Form useful in making decisions concerning the existence of customary marriages and finalisation of deceased estate

A: It is very much useful.

Q: Can you elaborate

A: it is useful in that only those who are supposed to inherit from the deceased (the rightful beneficiaries) will be identified under the MBU 16 form.

Q: Let me just split this one before you go any further 1. The question requires you to explain whether the information that is collected is useful for making decisions concerning the existence of customary marriages , tell us about that and then after that you will tell us about how is it useful in finalising the deceased estate

A: I could rather start by saying you remember the deeds office when they do this transfer of properties , they need valid marriage certificates and as such injustice is being done because the surviving

spouse(s) of the deceased could not transfer the property into their names without the valid marriage certificate or court order but when this MBU 16 meeting is conducted and the surviving spouse is recognised by both members of the family at the Masters office when we fill in the inventory and the next of kin affidavit we indicate in the next of kin affidavit that this women is the surviving spouse of the deceased, which also assist in the deeds office that indeed this is the surviving spouse of the deceased and that helps the surviving spouse to get what is rightful hers, after the finalisation of the estate by dealing with the transfer of properties and everything like that and alsofor her to get her own share as the surviving spouse because you will remember if she is not being counted as the surviving spouse it means she will never inherit a cent from her husband which is also an injustice on the part of the surviving spouse.

Q: So the existence in making decision regarding the existence of customary marriage, that what was explained above.

Q: With regard to the finalisation of the deceased estate

A: It makes it easier and quicker because we don't have any hassles we know who is the surviving spouse, who are the children of the deceased and who is supposed to inherit what

QUESTION 3

Q: Please narrate for me any challenges that might have faced in administering the MBU 16 form as an officer of the Court

A: The challenges that I have encountered but I've only encountered it once is that I remember it was in 2016 , in one of the estate due to the fact that the surviving spouse was no longer in good relationship with the family members she had to call in other people with same surname to come and confirm the marriage

between her and the late husband and it was later on proved that those were not even the relatives of the deceased they were just using the same surname and they don't even know each other but it was later on resolved and even the other family even agreed yes indeed we know her that she is the wife of the deceased.

Q: So, is that the only challenge?

A: That is the only challenge I have faced so far

Q: So when you wanted the family members, you wanted them and do what?

A: They must come into the office and confirm whether the customary marriage did in fact took place, because the must elaborate everything in terms of customary law that this step and this one was followed until the spouse was finally married into the family of the deceased.

Q: So is it a challenge of securing them as witnesses?

A: no it is not a challenge.

Q: Just to clear this one, when you call them to the office to come and explain what capacity are they explaining

A: They are witnesses of the customary married.

QUESTION 4

Q: Also narrate for me any incidences where the surviving spouses/families of the surviving spouses have faced challenges related to the implementation of the MBU 16 form

A: Like I have indicate earlier that we faced a challenge, where we were calling in the members of the deceased family and they were

not willing to cooperate that is where the family of the surviving spouse could face some challenge hence I indicated that one of the surviving spouses even called another family to come confirm on the behalf of the rightful family of the deceased.

Q: Had the family members not come of someone with a similar surname what could have happened?

A: we couldn't have recognised that women as the surviving spouse.

: Is that the only challenge?

A: yes, when families are not cooperating with each other that is the only challenge that we face.

QUESTION 5

Q: What are your feelings about the use of the MBU 16 form for verifying the existence of customary marriages?

A: I think the form is right, it does not even need to be modified and all the procedures are okay in the MBU 16 Form , the only thing maybe that which be maybe from the Department of Justice and Home Affairs is to encourage people to register their marriages

Q: So but the structure of the form and the procedure you have no problem with that?

A: no problem very simple and straight forward.

Q: Anything else to add on the form?

A: Nothing

QUESTION 6

Thank you for the valuable information that you have provided.

Q: Is there anything else you would like to add before we end

A: I think as we have already indicated that none registration of customary marriages does not invalidate it the only thing that could be improved on the MBU 16 form it could be we maybe as an additional thing or aspect they must just request for today when people get married they do write something down the notes and everything, what the family had agreed upon and everything. I think they should also request all those material facts about the marriages what has happened, what was negotiated about and what they had agreed on and everything like that.

Q: So do you think on the day that they do this things is that going to help them confirm the marriage in future or what is the position?

A: Yes it helps a lot, because just by writing that on such and such a date the family of Vele and Nematswerani met they discussed the main point was the marriage between Vele and Nematswerani and whatever they have agreed upon was R20 000, a deposit of this much was paid and everything like that and it helps, such notes could be of assistance.

Q: What else do you think can be done to improve the rate at which the estates are finalised (I mean estates of people that have been married customary marriage)?

A: I think the only thing that lacks is the knowledge that most of our people do not have and us as the Department are doing less in terms of educating them, we do not have those outreach programs to go out and inform the community about the deceased the estates and everything, in fact all the functions or services that are rendered by the Master of High Court, I think that our office is lacking there because we are doing nothing or less to educate them, the masses.

Q: Anything else?

A: Nothing, I do not have anything to add.

Thank you

Approval letter to the Master's Office

2018 JANUARY

To the gatekeeper

Director General of the Department of Justice and Constitutional Development

Mr Vusi Madonsela

Private Bag X 81

Pretoria

0001

Tel:012 406 4700

Email: VusiMadonsela@justice.gov.za

ETHICAL CLEARANCE TO CONDUCT RESEARCH

PRISCILLA BERNICE NTSAKO MAWILA

STUDENT NUMBER: 29617618

TOPIC: PROVING THE EXISTENCE OF UNREGISTERED CUSTOMARY MARRIAGES IN DECEASED


ESTATES: CHALLENGES OF THE MBU 16 FORM

1. The above bears reference.
2. I am currently busy with my Masters program and as part of my studies, I am required to conduct a research study.
3. The research will have a qualitative approach i.e. focus interviews will be conducted on the research subjects.
4. The interviews will be conducted during working hours in the least disruptive manner.
5. Confidentiality on participants will be respected at all stages of the research process.
6. Hereto attached find a list of questions that will be fielded to the participants.

P.B.N MAWILA

(Signed) Student

3. Ethical Clearance Certificate



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ETHICAL CLEARANCE LETTER OF STUDY

Based on approval by the Ethics Committee of the Faculty of Law (LREC) on 24/04/2018 after being reviewed at the meeting held on 20/04/2018, the North-West University Research Ethics Regulatory Committee (NWU-RERC) hereby approves your project as indicated below. This implies that the NWU-RERC grants its permission that, provided the special conditions specified below are met and pending any other authorisation that may be necessary, the project may be initiated, using the ethics number below.

Project title: Proving the existence of unregistered customary marriages in deceased estates: Challenges of the MBU 16 form.

Project Leader/Supervisor: Prof. Christa Rautenbach
Student: PNB Mawila

Ethics number:

N	W	U	-	H	S	-	2	0	1	8	-	0	0	2	8
Institution						Year			Project						

Subm, S = Submission; K = Re-submission; P = Provisional Authorisation; A = Authorisation

Application Type: Single study
Commencement date: 2018-04-20 **Expiry date:** 2020-04-20 **Risk:** Low

Special conditions of the approval (if applicable):

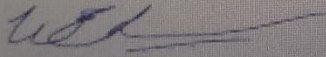
- Translation of the informed consent document to the languages applicable to the study participants should be submitted to the LREC (if applicable).
- Any research at governmental or private institutions, permission must still be obtained from relevant authorities and provided to the LREC. Ethics approval is required BEFORE approval can be obtained from these authorities.

General conditions:
 While this ethics approval is subject to all declarations, undertakings and agreements incorporated and signed in the application form, please note the following:

- The project leader (principle investigator) must report in the prescribed format to the NWU-RERC via LREC:
 - annually (or as otherwise requested) on the progress of the project, and upon completion of the project
 - without any delay in case of any adverse event (or any matter that interrupts sound ethical principles) during the course of the project.
 - Annually a number of projects may be randomly selected for an external audit.
- The approval applies strictly to the protocol as stipulated in the application form. Would any changes to the protocol be deemed necessary during the course of the project, the project leader must apply for approval of these changes at the LREC. Would there be deviations from the project protocol without the necessary approval of such changes, the ethics approval is immediately and automatically forfeited.
- The date of approval indicates the first date that the project may be started. Would the project have to continue after the expiry date, a new application must be made to the NWU-RERC via LREC and new approval received before or on the expiry date.
- In the interest of ethical responsibility the NWU-RERC and LREC retains the right to:
 - request access to any information or data at any time during the course or after completion of the project;
 - to ask further questions, seek additional information, require further modification or monitor the conduct of your research or the informed consent process.
 - withdraw or postpone approval if:
 - any unethical principles or practices of the project are revealed or suspected,
 - it becomes apparent that any relevant information was withheld from the LREC or that information has been false or misrepresented,
 - the required annual report and reporting of adverse events was not done timely and accurately,
 - new institutional rules, national legislation or international conventions deem it necessary.
- LREC can be contacted for further information or any report templates via Fosette.VanDerWalt@nwu.ac.za or 018 299 1996.

The RERC would like to remain at your service as scientist and researcher, and wishes you well with your project. Please do not hesitate to contact the RERC or LREC for any further enquiries or requests for assistance.

Yours sincerely



Prof. Wian Erlank
 Chair NWU Law Research Ethics Committee