

Improving Compliance with Section 4(1) of the *Recognition of Customary Marriages Act* 120 of 1998: Registration of Customary Marriages

ME Nkuna-Mavutane* and J Jamneck**

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Authors

Eddie Nkuna-Mavutane
Juanita Jamneck

Affiliation

Stellenbosch University,
South Africa
University of South Africa,
South Africa

Email

jamnej@unisa.ac.za

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Abstract

The article investigates the compliance with section 4(1) of the *Recognition of Customary Marriages Act* (hereafter the *RCMA*). The section compels spouses in customary marriages to register their marriages within a stipulated period. From the research, it is clear that there is non-compliance with the duty to register customary marriages within the prescribed ninety days after their conclusion. Furthermore, most registered customary marriages are registered only after their first year of existence. Most alarming is that the number of registered customary marriages is rapidly declining. The following factors were found to be reasons why there is non-compliance with the duty to register customary marriages: non-adherence to registration deadlines; absence of a culture of registering customary marriages; contradictions as to the party or parties responsible for registering a customary marriage; lack of a distinction between the process of registering (customary) and solemnising (civil) marriages; the adoption of a non-punitive approach in dealing with the non-registration; poor legislative drafting; the absence of knowledge of the rights and benefits afforded through the *RCMA*; minimal access to DHA offices and service delivery; the existence of other marriages (*umfazi we phepha*) and a high regard for civil marriages. The research shows the benefits of registering customary marriages and the adverse effects associated with non-registration. Based on the identified problems and adverse effects, recommendations are made on achieving compliance with the duty to register customary marriages. These recommendations include creating a culture of registering customary marriages, amending certain portions of the *RCMA* and its regulations, enhancing the registration process, improving literacy and embarking on education-related initiatives.

Keywords

Department of Home Affairs (DHA); customary marriages; *Recognition of Customary Marriages Act* (the *RCMA*); National Population Register (NPR); indigenous African people; civic services; marriages and divorces; Statistics South Africa; *Kha Ri Gude*; registration of customary marriages; civil marriages (*umfazi we phepha*); marketing.

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1 Introduction

South Africa is a very diverse country¹ with multiple races, often classified as African, White, Coloured, Indian and others. Within the African race one also finds various ethnicities.² This diversity is also evident in the way marriages are celebrated and recognised.

Legally, provision is made for civil marriages, customary marriages and civil unions.³ All these kinds of marriages are recognised in terms of different pieces of legislation. Certain processes describing what constitutes a valid marriage may be found in various Acts.⁴ In relation to civil marriages and civil unions, such marriages are solemnised by marriage officers who are either officials of the Department of Home Affairs (hereafter referred to as the DHA) or any other persons duly delegated by the DHA.⁵ The action of solemnisation brings about certainty that a marriage exists between spouses. The same is not true of customary marriages, however, as they are celebrated only between the parties and their families, and a duty to register them is then placed on either spouse.⁶

* Matthews Eddie Nkuna-Mavutane. B Mil (HOD) BPA (Hons) MPA (US) LLB LLM (UNISA). Former Lecturer in Public and Mercantile Law, Stellenbosch University, South Africa. Email: menkuna@sun.ac.za. ORCID: <https://orcid.org/0000-0002-1710-3159>. The article is derived from research for the LLM mini dissertation, titled *The Effect of the Non-Registration of Customary Marriages on the Dissolution of the Estates of Deceased Persons*. Much appreciation goes to Dr Babalwa Mtshau who was instrumental in putting the figures together.

** Juanita Jamneck. BLC LLB LLD (UP). Professor in Private Law at University of South Africa. Email: jamnej@unisa.ac.za. ORCID: <https://orcid.org/0000-0003-4282-7033>.

¹ *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 (18 July 2012) para 1; Ntlama 2009 *Stell LR* 333-356; Moodley *Customary Law of Intestate Succession* 60-71.

² Over and above recognising the diversity and the various languages spoken in South Africa, the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) recognises the right of various ethnicities to the usage and practices of their culture. See ss 6, 30, 31, 211 of the Constitution.

³ All these marriages are regulated by the *Marriage Act* 25 of 1961, the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the RCMA) and the *Civil Unions Act* 17 of 2006.

⁴ Bakker "Patrimonial Consequences" 61; Heaton and Roos *Family and Law of Succession* 64. In relation to customary marriages, see Himonga *et al African Customary Law* 91; Himonga "Dissolution of a Customary Marriage" 233-236.

⁵ The term "marriage officer" is a broader term. It includes Department of Home Affairs (DHA) officials, appointed office managers, designated persons serving the country in various embassies, consulates and missions, and various individuals or priests who have passed the prescribed examination and have been authorised by the DHA to serve in such positions.

⁶ Heaton and Roos *Family and Law of Succession* 64. Customary marriages also require a number of formalities to be complied with before it can be said that a valid customary marriage was concluded. For a discussion of these requirements, see Nkuna-Mavutane and Jamneck 2023 *PELJ* 4-8.

A customary marriage is defined in section 1 of the *Recognition of Customary Marriages Act* 120 of 1998 (hereafter the *RCMA*) as "a marriage concluded in accordance with customary law". In the same section of the *RCMA*, customary law is defined as "the customs and usages traditionally observed among the Indigenous African people of South Africa and which forms part of the culture of those people".⁷

Ordinarily a marriage certificate is *prima facie* proof that a marriage exists.⁸ In the case of a customary marriage, the non-registration thereof means that no certificate is issued and therefore doubt is cast on the existence of such a marriage. In instances where a customary marriage is unregistered the certificate as evidence is absent. In essence, a customary marriage may exist but the fact that it was not registered will leave either spouse in a vulnerable position as they go about their day-to-day activities and interactions with public and private institutions.⁹

To address the identified loophole and its adverse consequences, the authors will look at the mandate of the DHA in relation to customary marriages, the duty to register a customary marriage, the benefits of having a customary marriage registered, the reasons for failure to register customary marriages, and the adverse consequences associated with the non-registration of customary marriages. This will culminate in recommendations aimed at increasing the incidence of the registration of customary marriages.

2 The mandate of the Department of Home Affairs in relation to customary marriages

The DHA is the custodian of the South African National Population Register (hereafter the NPR) and is the only legal entity through which persons can be registered in the NPR. The NPR contains records of South African

⁷ Section 1 of the *RCMA*. The following authors have aligned themselves with this definition: Osman *Administration of Customary Law* 1; Rammutla *"Official" Version of Customary Law* 14; Moodley *Customary Law of Intestate Succession* 6-7; Wallis *Primogeniture and Ultimogeniture* 7-8; Nhlapo 2017 *SAJHR* 1; Chidoori 2009 *Agenda* 51; Rautenbach 2008 *EJCL* 2; Machedi 2020 *De Rebus* 14.

⁸ Section 4(8) of the *RCMA* states that the certificate issued by the DHA serves as *prima facie* proof of the existence of such a customary marriage. Also see *Road Accident Fund v Mongalo, Nkabinda v Road Accident Fund* 2003 1 All SA 72 (SCA) (hereafter the *Mongalo* case) para 4; Herbst and Du Plessis 2008 *EJCL* 9; Chidoori 2009 *Agenda* 52; Machedi 2020 *De Rebus* 15; De Souza 2013 *Acta Juridica* 243; Sibisi 2023 *Obiter* 521.

⁹ This vulnerability is witnessed mostly when one of the spouses dies. It will be explored in detail in para 7 of this article. In expressing this vulnerability, Sibisi 2023 *Obiter* 516 states: "[t]hey are also worse off compared to their civil-law counterparts who possess a marriage certificate".

citizens' births, adoptions, marriages, and deaths.¹⁰ All these entries are in the domain of what the DHA terms "civic services".¹¹ The records created by the DHA's civic services' officials are essential in the day-to-day lives of ordinary people. Both public and private entities rely on these records when dealing with the public. These records are essential in determining, for example, identity, citizenship, residence, gender, marital status and age.

The DHA serves the population by being present in offices throughout the Republic of South Africa as well as in most foreign countries through 32 embassies and/ or missions headed by the Department of International Relations and Cooperation.¹² Furthermore, the DHA has partnered with some South African banks to expand their availability.¹³ Through all these channels the DHA serves the people of South Africa and all non-nationals who are in the country and outside of its borders.¹⁴

As soon as a record is created in the NPR, an enabling document¹⁵ such as a marriage certificate (for example) is issued. The content of this document gives confidence to public and private institutions in making decisions when dealing with the public.

The DHA is legally mandated to register customary marriages.¹⁶ Trends associated with the registration of customary marriages are illustrated below

¹⁰ Joel 2022 *AJDS* 212. The National Population Register (NPR) records also include updates related to divorces and adoptions.

¹¹ DHA 2022 <http://www.dha.gov.za/images/AnnualReports/DHA-APP-202223-web-compressed.pdf>.

¹² DHA 2022 <http://www.dha.gov.za/images/AnnualReports/DHA-APP-202223-web-compressed.pdf>.

¹³ This is in line with what is commonly referred to as the *Batho Pele* principles. *Batho Pele* in English translates to putting people first. Some of the obligations that the DHA has in terms of these principles include consultation, service standards, courtesy, access to government services, information, openness and transparency, redress and value for money. The presence of the DHA at locations other than their offices promotes access to government services, redress and value for money. For a discussion of these principles, see White Paper on Transforming Public Service Delivery (*Batho Pele* White Paper) in GN R1159 in GG 18340 of 1 October 1997; Ngidi *Impact of Batho Pele Principles* 35-43; Joel 2022 *AJDS* 210; Nkuna-Mavutane *Effect of the Non-Registration* 45-51.

¹⁴ Joel 2022 *AJDS* 212.

¹⁵ Documents issued by the DHA include birth certificates, identity documents, passports, marriage certificates, residence permits, visas and death certificates. Some of these documents have a temporary version. Furthermore, the validity of temporary documents and certain documents are time-specific.

¹⁶ DHA 2022 <http://www.dha.gov.za/images/AnnualReports/DHA-APP-202223-web-compressed.pdf>; Mamashela 2004 *SAJHR* 616; Herbst and Du Plessis 2008 *EJCL* 9; Mwambene and Kruuse 2015 *IJLPF* 238; Chidoori 2009 *Agenda* 52; De Souza 2013 *Acta Juridica* 243; West 2002 *De Rebus* 47.

in Figure 1.¹⁷ These trends are further broken down in other figures. Figure 2 shows the number of marriages registered per province between 2017 and 2021 and Figure 3 shows the data of marriages concluded outside South Africa and those where the area of conclusion was unclassified (unspecified or unknown). Figure 4 shows a broader picture of these figures by distributing the number of registered customary marriages by the year and place of registration.

After registering such a marriage the DHA must issue a marriage certificate which serves as *prima facie* evidence of the existence of the customary marriage and brings about legal certainty that a customary marriage was duly concluded.¹⁸ In the absence of proven fraud in acquiring such a marriage certificate or that the certificate is not a recorded on the NPR, such a certificate is accepted as a legal document that protects the interests of either spouse, should the validity of a customary marriage be contested by third parties.¹⁹

¹⁷ These statistics are based on Statistics South Africa Statistic releases PO307, Marriages and Divorces, of 2008, 2010, 2015 and 2020. Extracted from the following: Stats SA 2009 <https://www.statssa.gov.za/publications/P0307/P03072008.pdf>; Stats SA 2011 <https://www.statssa.gov.za/publications/P0307/P03072010.pdf>; Stats SA 2017 <https://www.statssa.gov.za/publications/P0307/P03072015.pdf>; Stats SA 2022 <https://www.statssa.gov.za/publications/P0307/P03072020.pdf>.

¹⁸ Van Niekerk 2014 *SAPL* 495. This remains the case until it is proven that the marriage certificate was acquired through fraud. See the *Mongalo* case para 20; *Chali v Rasello* (683/2011) [2011] ZAFSHC 121 (4 August 2011) para 33.

¹⁹ See *Mgenge v Mokoena* 2023 2 All SA 513 (GJ) (hereafter the *Mgenge* case); *Mmutle v Thinda* (20949/2007) [2008] ZAGPHC 352 (23 July 2008) (hereafter the *Mmutle* case). In both these cases the widows received legal protection and recognition. As already stated, the only way that the issued marriage certificate could be discredited was if it was fraudulently created or obtained. See the *Mongalo* case para 20; *Chali v Rasello* (683/2011) [2011] ZAFSHC 121 (4 August 2011) para 33; Sibisi 2023 *Obiter* 521.

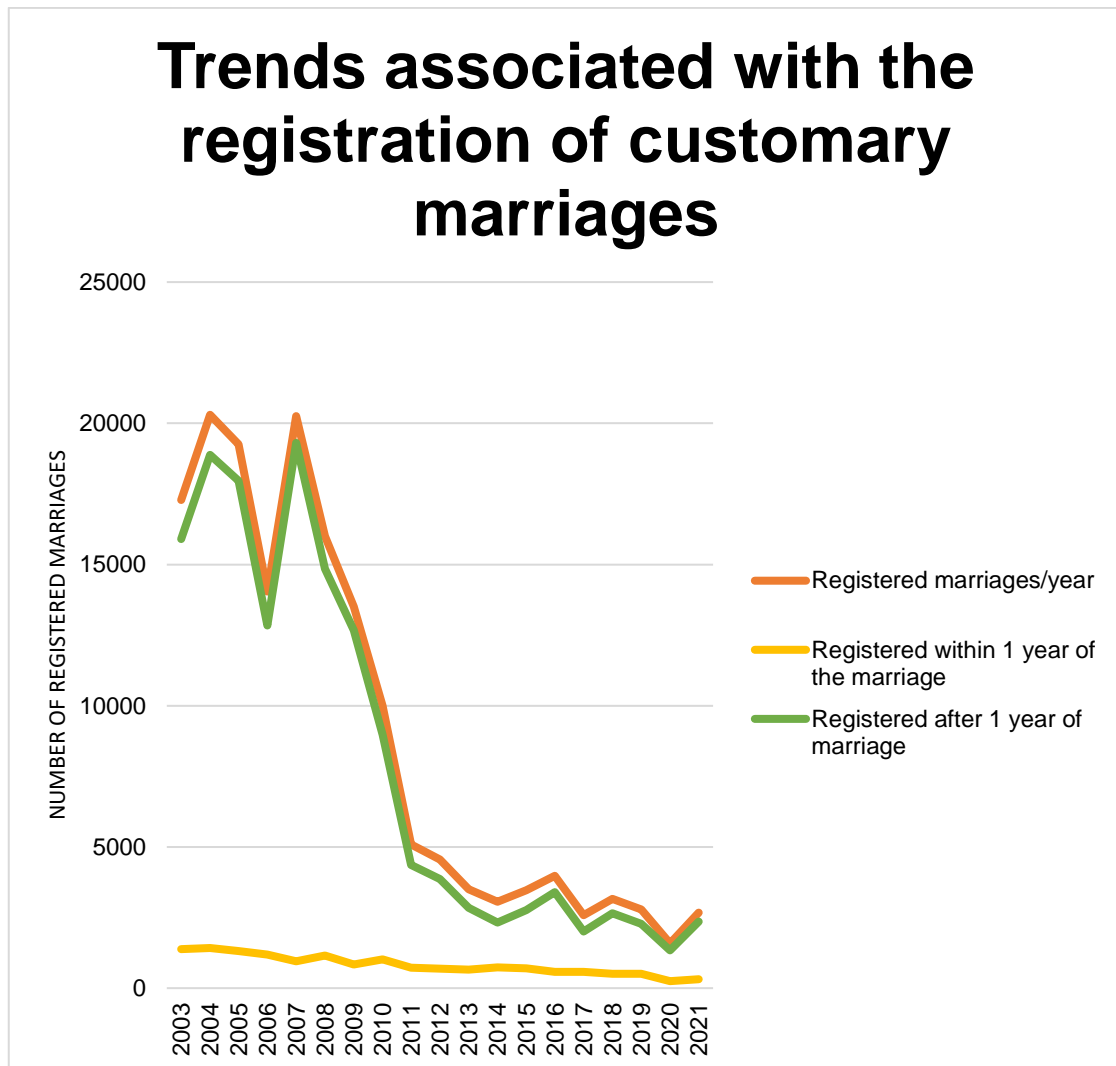


Figure 1: Trends associated with the registration of customary marriages

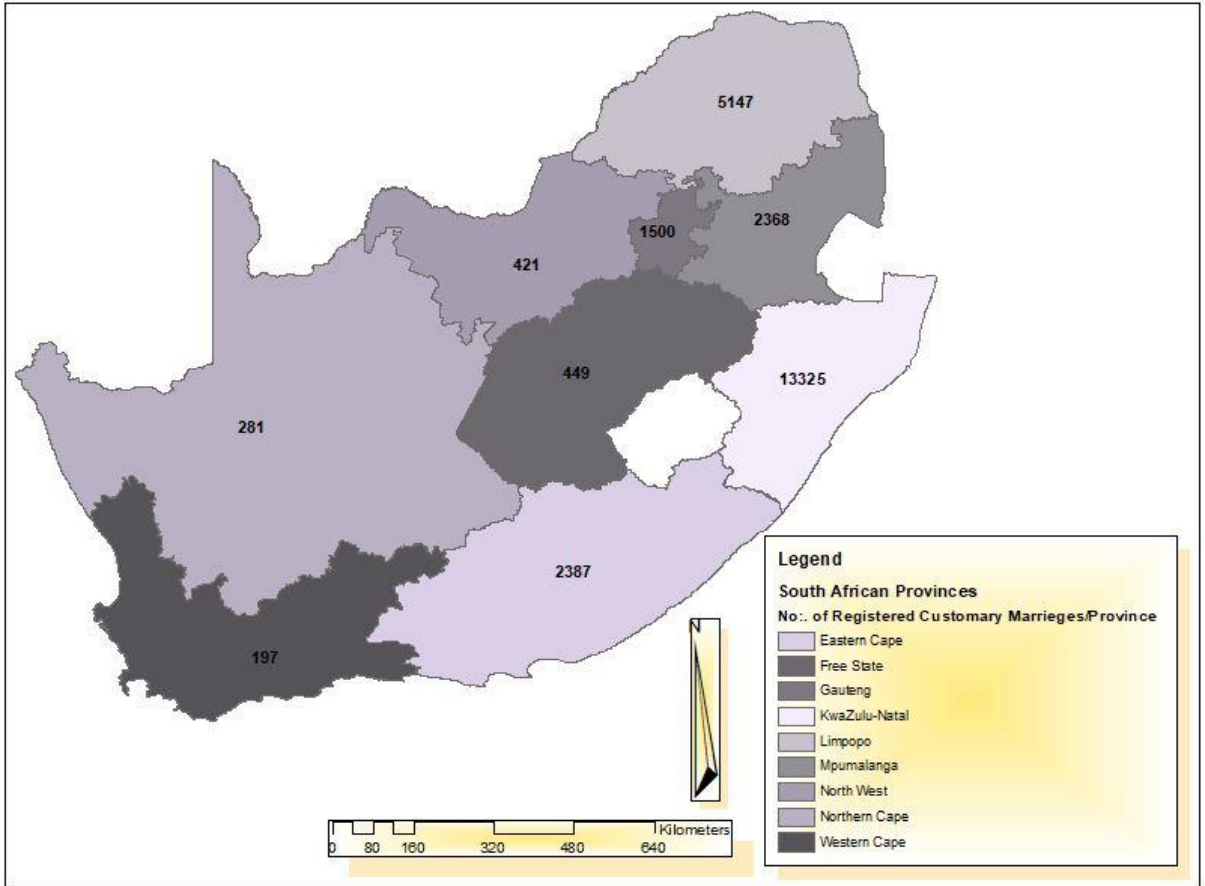


Figure 2: Number of customary marriages registered per province between 2017 and 2021

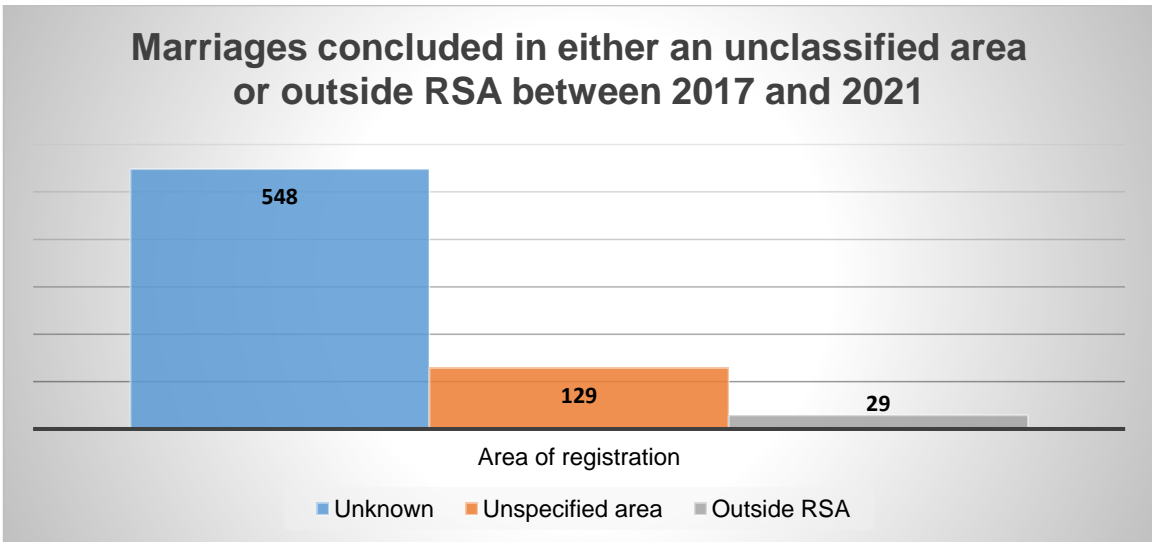


Figure 3: Marriages concluded in either an unclassified area or outside RSA between 2017 and 2021

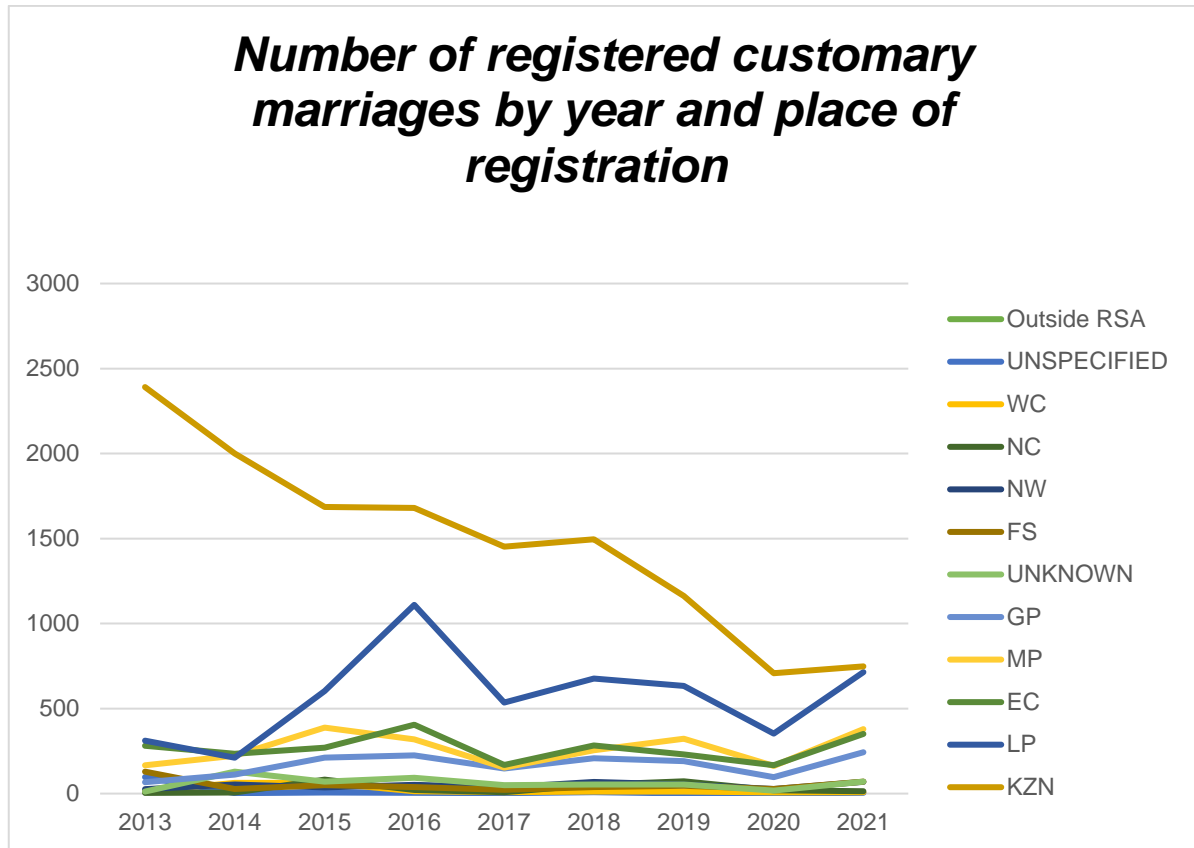


Figure 4: Number of registered customary marriages by year and place of registration

3 Contextualisation of the data presented *re* the mandate of the Department of Home Affairs in relation to customary marriages

The data presented above need to be contextualised in the light of the population to be served, the personnel capacity of the DHA, trends associated with the registration of customary marriages and reasons advanced for the non-registration of customary marriages. The last two items will be discussed as independent items since they are central to the research (paragraph 4 and 6).

In July 2021 it was estimated that there were 60 142 979 people in South Africa.²⁰ At one point or another, all these people will come into contact with the DHA offices - be it for civic services (birth registration, application for an

²⁰ Stats SA 2022 <https://www.statssa.gov.za/publications/P0302/P03022021.pdf>. The Census of 2022 put the current population at 62 027 503 - see Stats SA 2022 <https://census.statssa.gov.za/#/>. Note that the statistics do not distinguish between citizens and residents. Furthermore, in relation to residents no distinction is made between illegal (undocumented) and legal (documented) residents.

identity document, getting married, or the registration of a death) or immigration services (applying for a temporary residence visa, entering or leaving the country, applying for a permanent residence permit or seeking refuge in the country). Over and above this estimated population, the DHA must also serve South Africans living abroad and non-nationals seeking to visit South Africa.

Statistics South Africa has estimated that 80.9% of this population is made up of indigenous Africans.²¹ This entails that the demand for the registration of customary marriages may be quite large because of the following factors:

- At any point, any person within the noted 80% of the population estimate may be a party to a customary marriage.
- There may be interracial marriages. If one of the parties is an indigenous African person, such a marriage may be in terms of customary law.

As already stated, customary marriages must be registered by DHA personnel. As such, it is vital that the numbers of employees of the DHA are considered, as it in turn indicates the sheer volume of registrations and other duties they may have to deal with. As of 31 March 2021 the DHA had 8 541 employees. This represents 41.8% of its approved capacity of 20 430. In relation to services, there is an average of 38.28% of the approved structure on the ground.²² It is clear from the population estimates and available number of employees that there is an imbalance. The population to be served in South Africa on average grows by 1% per annum,²³ which infers that there are and will be fewer and fewer hands to serve the population if this imbalance is not addressed.

At the heart of the current research is the issue of the number of non-registered customary marriages and the reasons advanced for the non-registration of such marriages. These issues (among others) will be discussed in the next paragraphs, which discussion will assist in conveying an understanding the lack of compliance with the *RCMA*.

²¹ Stats SA 2022 <https://www.statssa.gov.za/publications/P0302/P03022021.pdf>.

²² DHA 2022 <http://www.dha.gov.za/images/AnnualReports/DHA-APP-202223-web-compressed.pdf>; Joel 2022 *AJDS* 215.

²³ Stats SA 2022 <https://www.statssa.gov.za/publications/P0302/P03022021.pdf>.

4 The duty to register a customary marriage versus the reality

Section 4(1) of the *RCMA* makes it mandatory for customary marriages to be registered with the DHA. Section 4(3) of the *RCMA* imposes two sets of dates for such registration, namely:

- Spouses who concluded their customary marriages before the *RCMA* came into effect (15 November 2000) were initially given 12 months to register their marriages.
- Spouses who concluded their customary marriages after the *RCMA* came into effect were (or are) given three months from the day of their marriage to register their marriages with the DHA.²⁴

The *RCMA* made provision for the Minister of Home Affairs to set new dates for the registration of customary marriages (i.e. to give extensions) and several extensions have been approved since the *RCMA* came into effect.²⁵ These extensions, however, come with their own problems. The constant changing of the due dates for registration does not foster a culture of registration and can be viewed as one of the reasons for the low compliance rate (as seen in Figure 1).²⁶

The stipulated deadlines in the *RCMA* are hardly ever complied with (see Figure 1) and most customary marriages are registered long after their first year of existence. Linked to this non-compliance with the *RCMA* is the fact that the number of registered customary marriages is rapidly declining. Since 2003 the highest record was set at 20301 registered marriages in 2004. This record number may be attributed to some extent to the high demand for registration from persons who were customarily married prior to the *RCMA*. The lowest number recorded was 1558 in 2020. The decline may be linked to any of the following: the already stated peak in numbers when the *RCMA* came into effect, a lack of knowledge of the avenues for posthumous registration, spouses opting to convert their marriages into civil

²⁴ Section 4 of the *RCMA*; *Banda v General Public Service Sectoral Bargaining Council* (JR3273/2009) [2014] ZALCJHB 71 (26 February 2014) (hereafter the *Banda* case) para 15; Mwambene and Kruuse 2015 *IJLPF* 242-243; Chidoori 2009 *Agenda* 52; De Souza 2013 *Acta Juridica* 243; Van Niekerk 2014 *SAPL* 497.

²⁵ De Souza 2013 *Acta Juridica* 249-253; Machedi 2020 *De Rebus* 14-15. According to Mwambene and Kruuse 2015 *IJLPF* 243, one of the previous due dates was 31 December 2010. According to Machedi 2020 *De Rebus* 14-15 and GN 1045 in GG 42622 of 8 August 2019, the most recent deadline is 30 June 2024.

²⁶ Sibisi 2023 *Obiter* 523 contends that, because of the fact that these extensions are proclaimed in a Government Gazette, those who should be informed about them are often left in the dark. This can be added to the reasons for the non-compliance with s 4(1) of the *RCMA*.

marriages without registering the customary marriages, and the Covid-19 pandemic. Despite these noted possible reasons for failing to register customary marriages, Figure 1 shows that most customary marriages are registered after one year of their existence and as such, this shows that getting customary marriages registered timeously is problematic.²⁷

The data on the various Statistic South Africa P0307 reports cover customary marriages registered in South Africa (per province) and outside the country. A specific mention needs to be made of the two provinces that are ahead in terms of the registration of customary marriages.

Kwa-Zulu Natal has always led in terms of the number of customary marriages registered in the *RCMA* era (see Figures 2 and 4). This can be attributed to the fact that the *Natal Code of Zulu Law* (commonly referred to as the Zulu code) made provision for the registration of Zulu customary marriages.²⁸ The introduction of registration by the *RCMA* was merely a continuation of a custom that the Zulu-speaking people were already practising in their native province.²⁹ Limpopo has been consistent in following in the footsteps of Kwa-Zulu Natal. Other provinces, however, have struggled to register more than 500 customary marriages per annum, or even cumulatively between 2017 and 2021 (see Figures 2 and 4 in this regard).³⁰

²⁷ Section 4(3) of the *RCMA* states that customary marriages concluded after the coming into operation of the *RCMA* must be registered within three months of their conclusion. Statistics South Africa, however, does not use this period - it uses one year as a cut-off duration.

²⁸ Section 46 of the *Natal Code of Zulu Law*, Proc R151 in GG 10966 of 9 October 1987. Also see De Souza 2013 *Acta Juridica* 239-240, who states that prior to the *RCMA*, customary marriages in Kwa-Zulu Natal were registered at either DHA offices or at Magistrates' offices. She also relays the difficulty faced by husbands who were already in polygamous customary marriages prior to the *RCMA*. Such husbands are unable to register their new wives as they do not have a court approved contract as required by s 7(6) of the *RCMA*. This increases the number of unregistered customary marriages. The provision of registration was applicable in the Transkei, but in comparison to (Kwa-Zulu) Natal, the Transkei was never a province – it was a homeland. See s 33 of the *Transkei Marriage Act* 21 of 1978; *Kambule v Master of the High Court* 2007 3 SA 403 (E); Bekker *Seymour's Customary Law* 123; Maithufi 2009 *De Jure* 193.

²⁹ This may be attributed to the vast number of people in the province. The latest figures from Statistics South Africa indicate that the province has 12 423 907 residents. It is only exceeded by Gauteng with about 2 600 000 people. See Stats SA 2022 <https://census.statssa.gov.za/#/province/5/2>.

³⁰ This may be attributed to a variety of reasons such as the racial makeup of provinces, the high regard for civil marriages, the distance between DHA offices and people's residences, migrant labour and the absence of access to DHA offices on weekends. Some of these reasons are unpacked further in para 6.

A discrepancy is noted in relation to the above-mentioned reports. Certain recorded marriages are termed as unclassified in terms of place of registration (see Figure 3). The Statistics South Africa Statistic releases P0307 Marriages and Divorces of 2017 to 2021 reports do not elaborate on the reasons for this abnormality, but they may be attributed to the incorrect completion of the application for registration (the BI-1699), and/or the absence of certain geographic areas on the NPR.³¹

Section 4(2) of the *RCMA* states that either spouse can register a customary marriage. This entails that either spouse can approach any DHA office to affect this obligation.³² However, this is not the reality. Regulations made in terms of the *RCMA* require both spouses to be present for the registration to be performed.³³ This is further coupled with the need for the presence of a witness from both families of the spouses.³⁴ It is often insisted that such witnesses must have been a party to the *lobolo*³⁵ negotiations.

The regulations equate the registration of a customary marriage to the solemnisation of a civil marriage by requiring both spouses to be present with witnesses (from each family).³⁶ This is further entrenched by the fact that, should either spouse or both spouses visit a DHA office to get their customary marriage registered, they will often be given a future date on which their customary marriage will be registered instead of getting their request granted instantly.³⁷ This creates hardship as the parties have to incur additional costs to return to the offices, and in worst case scenarios one party may refuse to return on that date or even die before that date arrives.

³¹ See the *Banda* case paras 16 and 17. In this case the appellant inserted the word "unavailable" multiple times in the BI-1699. This is further explained in Van Niekerk 2014 *SAPL* 502.

³² Section 4(2) of the *RCMA*; *Ntsukunyane v Moleko* (16595/2013) [2013] ZAGPJHC 170 (11 June 2013) (hereafter the *Ntsukunyane* case) para 43; De Souza 2013 *Acta Juridica* 249-253; Van Niekerk 2014 *SAPL* 496.

³³ Form A of GN R1101 in GG 21700 of 1 November 2000; De Souza 2013 *Acta Juridica* 249-253; Van Niekerk 2014 *SAPL* 499. This was confirmed in the *Banda* case para 11.

³⁴ Form A of GN R1101 in GG 21700 of 1 November 2000.

³⁵ Section 1 of the *RCMA* defines *lobolo* as "the property in cash or in kind ... which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a marriage".

³⁶ For a similarity between requirements found in Form A of GN R1101 in GG 21700 of 1 November 2000, see DHA Date unknown <http://www.dha.gov.za/index.php/civic-services/marriage-certificates>.

³⁷ This is based on the personal experience of the first author. While visiting four offices in the Tshwane region he received the same information, that one needs to book a date for the registration of a customary marriage.

Section 4(5) of the *RCMA* also makes it possible for a person with "sufficient interest" to have the marriage registered.³⁸ This possibility, however, does not appear in the *RCMA* regulations and as a result creates a discrepancy with the further consequence that a clear demarcation as to who has "sufficient interest" in the registration of a customary marriage should be established.

Section 4(9) of the *RCMA* states that non-registration does not affect the validity of a customary marriage.³⁹ This is regarded as a shortcoming, as shown in paragraph 7 of this article, which deals with the consequences of not registering a customary marriage. By not taking a punitive approach towards non-registration, the *RCMA* fails those whom it was meant to protect.⁴⁰ *Kambule v Master of the High Court*⁴¹ may be cited to prove this assertion. It took over five years for the applicants' rights and interests to be confirmed by the courts. This shows that if a person in an unregistered customary marriage has neither knowledge nor financial resources,⁴² that person's rights and interests from such a marriage are likely to be adversely affected.

³⁸ Van Niekerk 2014 *SAPL* 496.

³⁹ *Mrapukana v Master of the High Court* (6567/2007) [2008] ZAWCHC 113 (21 November 2008) (hereafter the *Mrapukana* case) para 31; Herbst and Du Plessis 2008 *EJCL* 9; Chidoori 2009 *Agenda* 52; De Souza 2013 *Acta Juridica* 243. See *ND v MM* (18404/2018) [2020] ZAGPJHC 113 (12 May 2020) para 10.

⁴⁰ This is not a new issue. The South African Law Commission (SALC) dealt with the matter prior to the promulgation of the *RCMA* - see *SALC Project 90* viii, 66-69. It did not recommend that the failure to register a customary marriage should have any punitive effects. On the contrary, it recommended that registration should not be compulsory. It expressed the opinion that making registration compulsory is causing hardship to those who fail to register their marriages. Despite reaching such a conclusion, the report recognises that the possession of a marriage certificate is desirable for individuals and the entities they deal with. In the discussion the report postulates that in the absence of a marriage certificate, parties must be able to produce other "readily ascertainable proof". This may include proof of cohabitation and general repute. These two terms are not discussed any further in the report. Despite this suggestion, the report goes on to acknowledge that a marriage certificate will outweigh any "readily ascertainable proof". The report further acknowledges that this is a complex matter and that it was not within its mandate to find the answers to it. Also see De Souza 2013 *Acta Juridica* 243-244; Mwambene and Kruuse 2015 *IJLPF* 237-238. This view is further reinforced by s 8(1) of the *RCMA*, which states that a customary marriage can be dissolved by a court only on the grounds of an irretrievable breakdown of the marriage. Note that, as in the case of all other kinds of marriage, death does bring such a marriage to an end.

⁴¹ *Kambule v Master of the High Court* 2007 3 SA 403 (E).

⁴² Sibisi 2023 *Obiter* 523.

5 Benefits of the registration of a customary marriage

The registration of a customary marriage benefits the spouses, public entities and private entities in a number of ways.⁴³ As already stated, the registration is coupled with having a marriage certificate issued and the certificate is accepted as *prima facie* evidence of the existence of the customary marriage.⁴⁴

On a personal level, either spouse will have an easier task should he or she wish to divorce, as he or she would not have to prove the existence of a customary marriage prior to getting a divorce and having the assets of the marriage divided in line with the prescribed matrimonial property system.⁴⁵ The registration of a customary marriage also makes it easier to deal with disputes about spousal and children's maintenance.

In relation to dealing with the affairs of a deceased person, it is easier to prove that the deceased was married to the surviving spouse (the claimant or beneficiary). Insurance and pension claims are also simplified as public and private institutions know who they need to deal with when their client has deceased.⁴⁶

6 Reasons for the non-registration of customary marriages

Factors that have been found as reasons for the non-registration of customary marriages are shown in Figure 5 and explained below:

⁴³ Herbst and Du Plessis 2008 *EJCL* 9; Chidoori 2009 *Agenda* 52; Machedi 2020 *De Rebus* 15; De Souza 2013 *Acta Juridica* 243.

⁴⁴ *FM v NR* (CA04/2020; 6254/2018) [2020] ZAECMHC 22 (17 June 2020) para 11; s 4(8) of the RCMA.

⁴⁵ See *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 (18 July 2012); *LNM v MMM* (2020/11024) [2021] ZAGPJHC 563 (11 June 2021). In both these cases the female spouses had to endure a lengthy contested divorce due to their husbands disputing that there was a valid customary marriage.

⁴⁶ Van Niekerk 2014 *SAPL* 495; Herbst and Du Plessis 2008 *EJCL* 9; Chidoori 2009 *Agenda* 52; Machedi 2020 *De Rebus* 15; De Souza 2013 *Acta Juridica* 243.

Reasons for the non-registration of customary marriages

Absence of a culture of registering customary marriages.

Poor legislative drafting.

Absence of knowledge of the rights and benefits afforded through the *RCMA*.

Minimised access to DHA offices and service delivery-related matters.

Presence of another marriage (*umfazi we phepha*).

High regard for civil marriages.

Figure 5: Reasons for the non-registration of customary marriages⁴⁷

6.1 A lack of a culture of registering customary marriages

There is a lack of a culture of registering customary marriages as is shown by the fact that most marriages are not registered in the first year of existence. If this were not the case, there would be a constant number of registered marriages per annum.

6.2 Poor legislative drafting

This paragraph addresses the regulatory contradiction about the person responsible for registering a customary marriage and section 4(9) of the *RCMA*.

A regulatory contradiction exists as to who can register a customary marriage because the *RCMA* itself states that either spouse can register a

⁴⁷ See Nkuna-Mavutane *Effect of the Non-Registration* 108-125. Though not using the same headings, Sibisi 2023 *Obiter* 523-524 gives more or less the same reasons. He notes access to DHA services and offices, the situation of spouses (mostly in rural areas), the increased need to register if there is a material benefit, issues with the regulatory framework, an absence of knowledge about registration, and the confusing of registration with solemnisation.

marriage while its regulations, on the other hand, state that both spouses need to present themselves at a DHA office. The *RCMA* further mentions that a person with a "sufficient interest" in such a marriage may register it, but it fails to outline who such a person may be.⁴⁸ The regulations could and should have been used to further expand on this matter but do not do so and this shortfall should be addressed by the legislature. These regulatory discrepancies have an impact on the number of registered marriages.

Furthermore, because section 4(9) of the *RCMA* provides that a customary marriage is valid despite its non-registration, a reluctance to comply with the registration provision in section 4(1) of the *RCMA* is caused indirectly. People are less likely to register their customary marriages because the lack of its registration has no effect on its validity.⁴⁹

6.3 Illiteracy and a lack of access to information

Illiteracy is still a challenge in South Africa.⁵⁰ As a consequence, access to information and knowledge relating to the benefits the legal system or legislative framework affords people are also compromised. For instance, people do not know that the *RCMA* affords them a status and that such a status ought to be respected and promoted by public and private institutions. Had the level of literacy been adequate, spouses in unregistered customary marriages would be willing to take on those who encroach on the rights and benefits they accrued from the marriage.

⁴⁸ It is suggested that a person with "sufficient interest" may include blood relatives in line with the kinship of the spouses, which may include their children (major), parents and siblings, those who headed or led the *lobolo* negotiations. It may even include parties in the private sector such as creditors in instances where the spouses have acknowledged to creditors that they are married.

⁴⁹ Sibisi 2023 *Obiter* 523-524. This is evident in cases concerning the division of an estate and/or the posthumous registration of customary marriages. In the *Mgenge* case para 2 "[t]he First Respondent ... had belatedly procured the marriage certificate a few weeks after the ... death [of Mr Siphwe Mgenge]". Though not stated directly, this put the respondent in the prime position when it came to the liquidation of the deceased's estate. Also see *Mrapukana* case; *Nhlapo v Mahlangu* (59900/14) [2015] ZAGPPHC 142 (20 March 2015) (hereafter the *Nhlapo* case); *Mbungela v Mkabi* 2020 1 All SA 42 (SCA) (hereafter the *Mbungela* case); and *Tsambo v Sengadi* [2020] JOL 47138 (SCA) (hereafter the *Tsambo* case).

⁵⁰ This is acknowledged in the National Development Plan 2030 (South African Government 2013 <https://www.gov.za/documents/national-development-plan-2030-our-future-make-it-work>) (hereafter NDP) 322. Also see Osman *Administration of Customary Law* 52, 178, who deals with the issue in relation to the usage of documents provided by the Masters' Office. The *Adult Education and Training Act* 52 of 2000, previously referred to as the *Adult Basic Education and Training Act*, was supposed to address this matter. Osman's findings may be seen as *prima facie* evidence that the Department of Basic Education and Department of Higher Education must still increase its efforts to get more South Africans literate. Also see Mlambo, Ndebele and Zubane 2019 *Journal of Public Administration* 710.

6.4 Access to the DHA offices

Access to the DHA offices is a challenge known to most of the population of South Africa.⁵¹ Besides the distances to these offices from people's residences, one of the reasons for this challenge is that most customary marriages are conducted over weekends while the DHA offices are closed. This means that most customary marriages are entered into without an official to officiate at them and it is also not possible to effect registration immediately. The resultant delay then most often culminates in the marriage never being registered.

Coupled with the non-distinction between solemnisation and registration are service-related matters. It is not always possible for all DHA offices to operate at one hundred per cent in relation to human resources, telecommunication lines and information communication technology. This also has an impact on the number of customary marriages that are eventually registered.⁵²

Over and above these noted challenges, not all people are located within a ten-kilometre radius of a DHA office. The Northern Cape is a prime example, as the offices are scattered over a vast area of land (see Figure 6). This means that the majority of South Africans must travel long distances to access DHA services. More pressure is added to this by the so-called "triple challenges" South Africans are facing, namely "unemployment, inequality, and poverty".⁵³ For some, the choice between buying food and spending whatever little money they have to travel and acquire the DHA's services would not be a choice - they would opt for the former.⁵⁴

⁵¹ De Souza 2013 *Acta Juridica* 244, 247, 252; Joel 2022 *AJDS* 214; Sibisi 2023 *Obiter* 523-524.

⁵² Joel 2022 *AJDS* 214.

⁵³ These challenges are acknowledged by Mlambo, Ndebele and Zubane 2019 *Journal of Public Administration* 694; Sikwela, Tshuma and Tshabalala 2018 *Journal of Public Administration* 475.

⁵⁴ De Souza 2013 *Acta Juridica* 244; Sibisi 2023 *Obiter* 523-524.

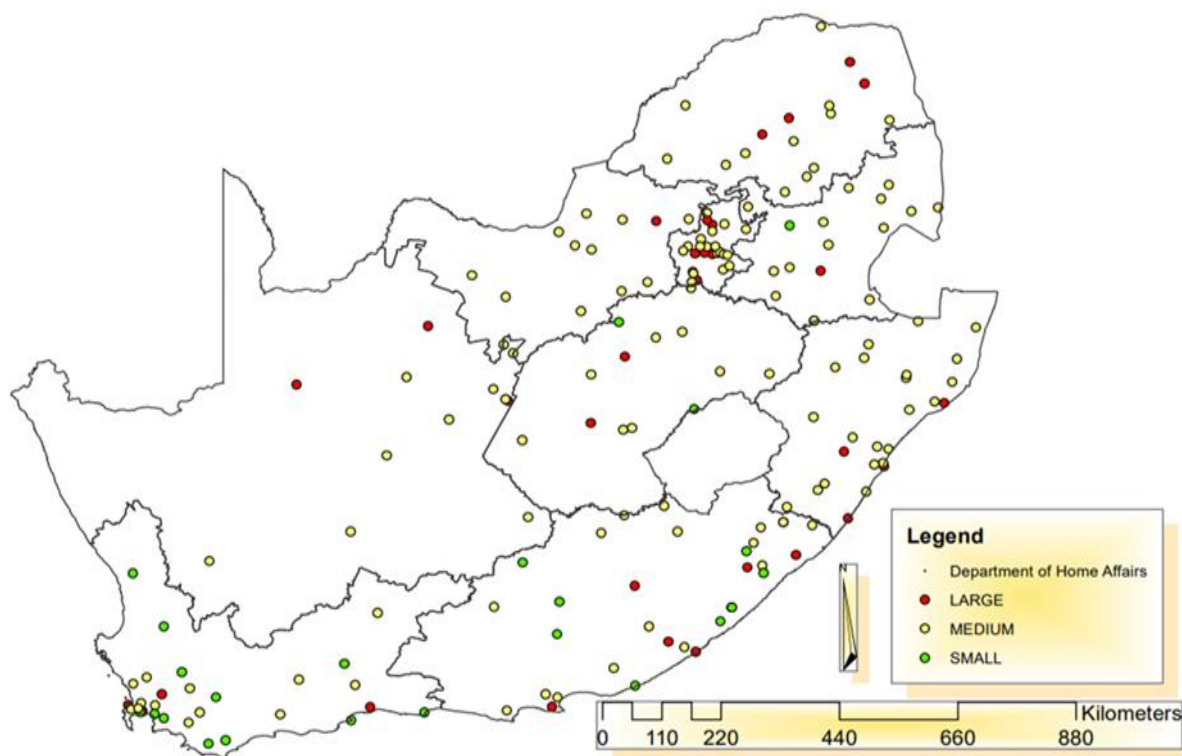


Figure 6: DHA footprint through the Republic of South Africa⁵⁵

6.5 The phenomenon of *umfazi we phepha*

The phenomenon called *umfazi we phepha* (the wife with a marriage certificate) occurs when a husband had a customary wife and, at a later stage, married another wife in terms of civil rites.⁵⁶ This phenomenon is associated with migrant labour, where husbands leave their wife/wives and go into the economic hubs of South Africa.⁵⁷ As they spend most of their time at work, they would commence setting up new families, which would lead to civil marriages. Although this is usually the prevalent form of a subsequent marriage, other scenarios are possible. A husband may be a party to a civil marriage and at a later stage be a party to a customary marriage with another person.⁵⁸ All these scenarios may also be presented in the opposite, with the person entering multiple and different marriages

⁵⁵ <http://www.dha.gov.za/index.php/contact-us/bank-branches>. This Uniform Resource Locator can be used to navigate the DHA offices by province.

⁵⁶ This occurred in the *Nhlapo* and *Mrapukana* cases.

⁵⁷ Mwambene and Kruuse 2015 *JLPPF* 249; De Souza 2013 *Acta Juridica* 246.

⁵⁸ *Ntsukunyane* case; *None v Tshabalala* (15549/2011) [2013] ZAGPJHC 100 (3 May 2013); *K v P* (09/41473) [2010] ZAGPJHC 93 (15 October 2010).

being the female spouse. This is, however, not a common position in case law relating to the indigenous law of succession.⁵⁹

6.6 High regard for civil marriages

The phenomenon of *umfazi we phepha* is testament to the high regard held for civil marriages. The conclusion of a civil marriage has been used by some spouses to avoid the hardships and challenges mentioned in paragraph 7. Most people married in terms of customary law convert or change their marriage system from a customary to a civil marriage.⁶⁰

This position is now entrenched in legislation. Section 10 of the *RCMA* makes such a conversion possible. Some spouses may opt for this conversion to avoid being party to a polygamous marriage. The inconvertibility of civil marriages and the legislative entrenchment of the convertibility of customary marriages make the conclusion of a civil marriage more desirable to some (or most) indigenous African spouses.

7 Adverse consequences of the non-registration of customary marriages

The following discussion deals with the adverse consequences of the non-registration of a customary marriage. Figure 7 below summarises these consequences.

⁵⁹ Chidoori 2009 *Agenda* 54; Mwambene and Kruuse 2015 *IJLPF* 249; De Souza 2013 *Acta Juridica* 246. In the *Nhlapo* case, a subsequent civil marriage was concluded without the applicant's knowledge or approval. This also occurred in the *Mrapukana* case. For a succession-related matter where the wife, despite having a customary marriage, married another man in terms of civil rites, see *Ledwaba v Monyepao* (HCAA06-2017) [2018] ZALMPPHC 61 (25 April 2018).

⁶⁰ *Ntsukunyane* case; Bakker "Patrimonial Consequences" 72; De Souza 2013 *Acta Juridica* 246; Bennet *Customary Law* 236-239; Himonga *et al African Customary Law* 85-86.

Adverse consequences of the non-registration of customary marriages

- Inability to register a child in its father's surname.
- Negative psychological bearing on children (rejection by the in-laws).
- Need to prove paternity before claiming an inheritance or maintenance.
- Need to prove the existence of a customary marriage before claiming an inheritance or maintenance.
- Possibility of losing a share of the estate to in-laws.
- Property grabbing (seizures).

*Figure 7: Adverse consequences of the non-registration of customary marriages*⁶¹

It has been shown that there is a pressing need to have customary marriages registered and that most of the time there is non-adherence to this prescription in the *RCMA*. It has been argued in literature and case law that the people most negatively affected by customary practices relating to marriage and succession are women and children.⁶² This can also be attributed to the non-registration of customary marriages. The following consequences of non-registration may be identified:

7.1 Consequences related to birth registrations and surnames

The hardships for a wife in a customary marriage and her offspring often commence with the registration of the birth. Such registration will be affected in the mother's (maiden) surname because the child cannot be registered in his/her father's surname in the absence of his father from the DHA's

⁶¹ Nkuna-Mavutane *Effect of the Non-Registration* 18-26. Though not using the same headings, Sibisi 2023 *Obiter* 523-524 gives more or less the same effects. He notes incorrect patrimonial benefits that may accrue to incorrect persons, unnecessary or opportunistic litigation, secret marriages, and struggles in proving claims of loss of support against third parties.

⁶² Weeks 2015 *Acta Juridica* 215; Osman 2019 *PELJ* 17; Burman, Carmody and Hoffman-Wanderer 2008 *SALJ* 146. Also see *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* 2005 1 SA 580 (CC) (hereafter the *Bhe* case); *Mthembu v Letsela* 2000 3 All SA 219 (A) (hereafter the *Mthembu* case); *Zondi v President of the Republic of South Africa* 2000 2 SA 49 (N) (hereafter the *Zondi* case).

offices.⁶³ This may have an adverse psychological bearing on the child's mental growth and his acceptability to the entire indigenous African community.⁶⁴

If there are no attempts to rectify this shortcoming this may cause issues in succession, especially if paternity is disputed. When searches are done in the NPR, such a child will not appear as the child of a deceased male spouse, and this would entail further processes to prove paternity. This means that the child's chances of inheriting intestate from his or her father without further investigations, tests and court processes are slim. The result of such non-registration of the marriage is that, if a claim is made for an intestate share or maintenance from the deceased's estate, the paternity of such a child will need to be proven prior to any claim succeeding.⁶⁵ This reality applies equally to female surviving spouses, who will need to prove the existence of the marriage in the absence of a marriage certificate. Subsequent claims in similar situations may be unsuccessful because it may be difficult to prove the marriage.

7.2 Illegal marriages

A further difficulty associated with the non-registration of customary marriages is that either spouse in such a marriage can conclude a subsequent marriage with a third person. These subsequent marriages are often concluded in terms of civil rites. In rare instances they may also take the form of (registered) customary marriages. As a result, such a spouse with a marriage certificate can claim burial rights and is often given

⁶³ De Souza 2013 *Acta Juridica* 243; Bennet *Customary Law* 308-309. Ss 9 and 10 of the *Births and Deaths Registrations Act* 51 of 1992 affirm the position on the use of the mother's surname. In the recently reported case of *Centre for Child Law v Director General: Department of Home Affairs* 2022 2 SA 131 (CC), ss 9 and 10 of the *Births and Deaths Registrations Act* 51 of 1992 were confirmed to be constitutionally invalid as a result of discrimination on the basis of marital status, sex and gender. The court also held that the discrimination violates s 28(2) of the Constitution, in that it failed to put the best interests of the child first. The court has made provision for fathers to be able to register their children in the absence of their mothers. This is noted, but it will not change the status quo. Women in unregistered customary marriages will still be unable to register their children under their spouses' surnames. From a jurisprudence and gender equality perspective, the ability of fathers to register children is a huge development and a step in the right direction. However, due to the existence of a culture of non-registration of customary marriages, it is less likely that fathers in unregistered customary marriages will make use of the development and register their children under their surnames. Previously such children were regarded as born out of wedlock - see the *Mrapukana* case para 21.

⁶⁴ De Souza 2013 *Acta Juridica* 246-249.

⁶⁵ Chidoori 2009 *Agenda* 52.

recognition by third parties over a spouse without a marriage certificate.⁶⁶ If a subsequent marriage is challenged, there is always a possibility that the estate of the deceased is no longer in the same form or of the same value as it was when the deceased perished by the time the dispute is settled in court.⁶⁷ This may be due to the abuse, wear or consumption of the estate.

7.3 Estate-related consequences

A problem associated with the non-registration of a customary marriage which is often found with regard to property left by a deceased is the so-called "property grabbing". Himonga explains that property grabbing occurs when

the deceased's relatives or customary-law claimants seek to inherit the deceased's property and actually take it away without at the same time accepting the collateral customary-law duty and responsibility associated with the deceased's role as husband and father and breadwinner of his household. Thus the deceased's relatives are said to 'grab' the property from the spouse and children and other dependents who almost certainly need it for their support. The term also signifies the often disorderly and violent manner in which the deceased's relatives conduct themselves towards the widows when taking away the deceased's property.⁶⁸

The description of property grabbing provided by Himonga should be seen against the background of an era when the principle of male primogeniture was applied. In terms of this principle, women were ineligible to inherit in terms of intestate succession. If a deceased male was survived only by a widow and daughters, his estate devolved to another male person such as the deceased's father, or if the father was predeceased the deceased's brother was next in line to succeed to such an estate.⁶⁹

In principle there was nothing wrong with the system of male primogeniture. The successor was to take care of the family of the deceased and continue with his responsibilities to the family. However, the principle lost the character of being collective and became individualistic and those who succeeded no longer took care of the survivors.⁷⁰ The abuse of the system

⁶⁶ In relation to these challenges, see the *Mrapukana*, *Nhlapo*, *Mbungela*, *Ntsukunyane*, *Mmutle*, and *Tsambo* cases as well as *Fanti v Boto* 2008 2 All SA 533 (C).

⁶⁷ Mwambene and Kruuse 2015 *IJLPF* 249; De Souza 2013 *Acta Juridica* 246.

⁶⁸ Himonga 1989 *IJLPF* 167. Also see Burman, Carmody and Hoffman-Wanderer 2008 *SALJ* 134; Osman *Administration of Customary Law* 199. Burman, Carmody and Hoffman-Wanderer 2008 *SALJ* 134 used the term "seizures" interchangeably with "property grabbing".

⁶⁹ Wallis *Primogeniture and Ultimogeniture* 13-14; Venter and Nel 2005 *TSAR* 87-88; Nhlapo 2017 *SAJHR* 7; Weeks 2015 *Acta Juridica* 215.

⁷⁰ Venter and Nel 2005 *TSAR* 87-88. The notion advanced prior to the constitutional era was that the widow, children and extended family members would be protected, provided for and cared for by whoever inherits. A similar point is found in the

of male primogeniture is well documented in case law. The principle has been declared unconstitutional and invalid on the basis that it violates the right to equality and human dignity of indigenous African women.⁷¹

With the evolution of time, the concept of property grabbing no longer depends on gender, as it did when Himonga described it. In the absence of the registration of a customary marriage the estate is likely to be grabbed by the in-laws of the deceased to the detriment of surviving spouses and their children or dependents. This often goes unchallenged due to issues associated with poverty and the lack of knowledge of the benefits granted by the legislative framework.⁷²

8 Recommendations aimed at increasing the incidence of registrations of customary marriages

Thus far it has been established that the DHA has a mandate to deliver civic and immigration services to the population and any other clients who might seek their services and must render services that enable people to register their customary marriages. These services are vital to the daily lives of indigenous African people and their dealings with various institutions.

The following shortcomings have been noted in relation to the registration of customary marriages: the number of registered customary marriages is declining, most of the registered customary marriages are registered after the three months required by the *RCMA*, and few marriages are registered within the first year of the existence of the customary marriage. The fact that timelines are also constantly changed is not beneficial to this situation. Furthermore, there are other legislative or regulatory hurdles in the registration mandate. The non-registration negatively affects the spouse(s) and children of such marriages.

It is clear from this summation that there is a need for more to be done to ensure that customary marriages are registered. With this in mind, problem-orientated recommendations are discussed below:

8.1 Creating a culture of the registration of customary marriages

The decline in the number of registered customary marriages shows that there is a lack of a culture of registering customary marriages. Issues such as the lack of knowledge about one's obligations in terms of the *RCMA*,

Mthembu case para 8; Weeks 2015 *Acta Juridica* 215-216; Moodley *Customary Law of Intestate Succession* 10.

⁷¹ The *Bhe* case; the *Mthembu* case; the *Zondi* case.

⁷² Burman, Carmody and Hoffman-Wanderer 2008 *SALJ* 136; Chidoori 2009 *Agenda* 52.

access to the DHA's services, an inadequate usage of the information communication technology available on the market, and a decline in the number of staff at the DHA may be attributed to this lack.

If these issues were to be addressed there would (hopefully) be an improvement in the number of registered customary marriages. The DHA needs to invest more in education and in the marketing of its customary marriage mandate. These two processes are intertwined - the success of one depends on the other.

From a legislative perspective, it is accepted that once a Bill becomes legislation, it has undergone public participation and the nation was duly informed of the existence of the law through the Government Gazette. But most South Africans do not read the Government Gazette. The DHA, as the main custodian of the *RCMA*, must educate the nation about the *RCMA*. This may be done through marketing initiatives such as television, radio, the internet, and cell phone communication. A mixed approach is required to yield positive outcomes.

The target market must be identified, and the most appropriate channel must be used to reach the target market. In order to reach the target market, the language used and the content created must be appealing. From the use of the identified marketing platforms (television, radio, the internet, and cell phone communication), the DHA can have a database that identifies spouses who are eligible to register their customary marriages. The DHA office managers could verify the data per region by searching the NPR and contacting those persons who need to be assisted with the registration of their customary marriages.

Presently, the education and marketing performed are not adequate to change the culture of non-registration. The DHA must take its services to the people. In other words, it must use what is termed *izimbizo*. As previously stated, this concept is related to the *Batho Pele* principles or "putting the people first" principles,⁷³ which were introduced by the national government with the aim of improving the standard of service in the public domain.⁷⁴

⁷³ For a breakdown of these concepts see the *Batho Pele* White Paper (GN R1159 in GG 18340 of 1 October 1997); Ngidi *Impact of Batho Pele Principles* 35-43; Joel 2022 *AJDS* 210.

⁷⁴ White Paper on Transforming Public Service Delivery (*Batho Pele* White Paper) GNR 1159 GG 18340 of 1 October 1997; Ngidi *Impact of Batho Pele Principles* 35-43; Joel 2022 *AJDS* 210; Nkuna-Mavutane *Effect of the Non-Registration* 45-51.

It is further acknowledged that the displacement of indigenous Africans for various reasons such as their engagement in migrant labour has had a dire effect on their access to government services and the quality of the services received. The DHA could take its services to the people by participating in *izimbizo*. It could use venues such as community halls, tribal offices, and mobile offices as routine service points to have a maximum impact through its *izimbizos*.

The internet could also play a vital role in changing the culture of non-registration. The DHA should take advantage of its availability as part of the solution. The social media are very freely used today, as the traditional usage of letters and phone calls has decreased. The DHA should immerse itself in the social media in order to further educate and assist with follow-ups on the registration of customary marriages.

In order to assist in this mission, the DHA should make its webpage zero-rated, which would increase its accessibility, even when potential users have no airtime or data bundles. This, in turn, would increase their access to information. Armed with knowledge, people would be able to initiate their requests to have their customary marriages registered on the internet in a fashion similar to that in which it is already possible to re-apply for identity documents and apply for passports for citizens who are 16 years and older. The platform currently used for these documents is called eHomeAffairs,⁷⁵ and it could easily be expanded to cater for the registration of customary marriages.

The DHA needs to attend to all the above initiatives and therefore the dwindling number of officials also needs to be addressed, or alternative methods need to be incorporated into the day-to-day operations of the DHA.

8.2 Enhancing the registration process

There is a need for the entire registration process to be enhanced by providing more access and simplifying the process. The DHA already has strategic partnerships with some members of certain religions, hospitals and banks in the country. This partnership promotes the principles contained in section 195 of the Constitution⁷⁶ and, for example, gives the DHA's employees a space to work inside banks in a rent-free set-up. This currently allows them to work in the same way as eHomeAffairs, the internet-based

⁷⁵ DHA Date unknown <https://ehome.dha.gov.za/ehomeaffairsv3>.

⁷⁶ Section 195(1)(b) of the Constitution states that "[p]ublic administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: ... [e]fficient, economic and effective use of resources must be promoted".

arm of the department. The mandate of these officials could be expanded to include the registration of customary marriages. As there are banks throughout the country and most are in shopping malls, there is room for this footprint to be expanded.

With regard to the relationship with faith-based communities, the DHA has trained willing priests to be marriage officers for civil marriages. These same officials could be voluntarily trained as designated persons to deal with the registration of customary marriages. The *RCMA* regulations make provision for such persons to be appointed by the Director General (DG) of the DHA. To date, the DG of the DHA has not appointed such persons. As with marriage officers, the DHA could train certain employees in traditional authorities (councils), priests, magistrates, or the like to serve as designated persons and to assist with registrations. Traditional leaders already officiate at customary marriages and if *izinduna* and other members of traditional councils were able to register customary marriages, these marriages could be instantly registered after their conclusion, thereby simplifying the process and ensuring registration.

That being said, priority should be given to persons who are based in areas where customary marriages are the norm, and these designated officials should be available over weekends, when the DHA offices are closed. These officials would bring additional hands to bear at a minimal cost to the DHA and would bring services to the people.

Access to the DHA's offices and services should further be expanded by addressing other external issues such as the installation of backup systems. This includes backup power for individual equipment and working areas as well as ensuring that the departmental internet connection is not always dependent on landlines but rather makes use of routers and satellite lines. This would ensure that even in worst-case scenarios the DHA would be able to serve its clients.

The last-mentioned points could be implemented to simplify the process for citizens and foster the much-needed culture of registration.

All the above efforts would need to be supported by the legislature. Parliament should hold the Minister and the DG of the DHA accountable for the decline in the number of marriages registered as well as for late registrations. These consequences would of course have to be supported by a sufficient budget to deal with the decline and ancillary matters related to the registration of customary marriages. Related to these solutions is the power to make *RCMA* regulations, which power is vested in the Minister of Justice. The *RCMA* should be amended to enable the Minister of Home

Affairs to make these regulations, since matters relating to the *RCMA* are within his/her ambit.

8.3 Legislative interventions

The first legislative intervention that needs to be addressed is the amendment of the regulatory contradictions contained in the *RCMA* and its regulations. The *RCMA* states that either spouse can register a customary marriage. The *RCMA* regulations, on the other hand, require both spouses to be present for registration. In line with the guidelines for the interpretation of statutes, regulations must always be informed by the principal legislation. This is not the case here. When one visits the DHA's offices one will be subjected to the *RCMA* regulations, which means that both spouses need to be present to affect such a registration. The authors recommend that regulation 2 be amended to allow either spouse to register a customary marriage.

An issue related to the above-mentioned promulgation of regulations and their vagueness is the provision that states that a person with "sufficient interest" may register a customary marriage - but the *RCMA* regulations do not expand on or explain who such a person might be. The regulations need to be drafted in such a way that they precisely define who has a "sufficient interest" and what process needs to be followed, should such a person wish to exercise this option.

Further legislative interventions to encourage the registration of customary marriages should include making non-compliance with such a duty an offence. Section 4(9) of the *RCMA* should be amended to include fines and/or imprisonment, and such an amendment could be set to come into operation when the extended deadline for the registration of customary marriages expires (currently on 30 June 2024).

8.4 Improving literacy

Initiatives were put in place to improve literacy with the advent of democracy. Programmes such as adult basic education and training (ABET), now referred to as AET, and *Kha Ri Gude Mass Literacy Campaign* (translating to "let us read") are in place. These initiatives have improved the literacy level but they have not yet reached all previously disadvantaged persons.⁷⁷

The effort to establish more widespread literacy must be intensified, and this calls for renewed and strengthened partnerships among employers, the

⁷⁷ See NDP 322-333.

government, the private sector and civil society. For example, initiatives could be subsidised and flexible working conditions could be encouraged in order to help those who still cannot read and write.

8.5 Educating people on the value of customary marriages and the responsibilities imposed by the RCMA

Indigenous knowledge and practices are slowly dying. A matter associated with this worry is the devaluation of customary marriages. There is a need for the conscience of indigenous Africans to be awakened to the reality of their heritage. The Department of Sport, Arts, and Culture (hereafter the DSAC) needs to be required to assist in research related to indigenous knowledge and practices. This, in turn, would lead to a growth in cultural academic work such as books and journals. The department's contributions could be applied in books, plays, movies, and television series and could also be used in academic discourse at school and in the tertiary level of education.

The outcomes of this research could furthermore find their way through sport. Advertising spaces at well-attended sporting events could be used to market the registration of customary marriages. The DHA could collaborate with the DSAC in linking the above initiatives to the status and obligations of the *RCMA*. All the above efforts and initiatives could improve compliance with the requirements and duties imposed by the *RCMA*.

8.6 Dealing with the phenomenon called *umfazi we phepha*

Implementing the above recommendations would assist in stopping the phenomenon of *umfazi we phepha* or the so-called wife with a marriage certificate. This phrase refers to a wife who has a marriage certificate as a result of a subsequent marriage, which the husband entered into with the full knowledge that he was still a party to an existing customary marriage.

As shown in paragraph 6.6, there was and still is a high regard for civil marriages. Up until the late 1980's a civil marriage would prevail whenever there was a conflict with a customary marriage.⁷⁸ The *Marriage and Matrimonial Property Law Amendment Act*⁷⁹ brought an end to this. It prohibited indigenous African people who were party to a customary marriage from concluding civil marriages with persons other than their

⁷⁸ *Linda v Nkambula* 1951 1 SA 377 (A); Himonga *et al African Customary Law* 102-104; s 3(6) of the *RCMA*; Bennet *Customary Law* 207-208.

⁷⁹ *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988.

customary spouses in a monogamous marriage.⁸⁰ This is also the position with civil marriages - once a party enters into a civil marriage, s/he is no longer eligible to enter into a customary marriage while such a marriage exists.⁸¹ From a legal perspective, there is certainty as to which of the two competing types of marriage (customary or civil) will be deemed legal. Legislation now states that whichever form of marriage was concluded first will be found to be the only legal marriage.

Even though the legislature has done its part in bringing legal certainty on the issue of *umfazi we phepha*, it still remains a problem. It is suggested that the recommendations made in this paragraph (paragraph 8) should be used as a solution. More specifically, these efforts should include educating people on what the law requires of them, investing in literacy which will improve compliance and protection of rights, and creating a culture of the registration of customary marriages.

9 Conclusion

The aim of this research was to highlight the need for the registration of customary marriages, to acknowledge and encourage diversity and to offer possible solutions to the problems created by the non-registration of customary marriages. As part of our diversity, customary marriages are recognised by law but are required to be registered to have certain legal consequences. This requirement is hardly ever realised, however.

The registration of customary marriages is part of the mandate of the DHA and the department has an obligation to serve citizens and non-citizens inside as well as outside the country. This means that they have over 60 million clients and service points throughout the country (Civic Service offices and in the banking channels) as well as at various South African embassies and missions. Despite this large footprint, the DHA does not deliver improved services due to the challenges outlined above. A few issues have been noted in relation to the registration of customary marriages, namely that the number of registered customary marriages is decreasing on an annual basis, that most registered customary marriages are registered more than a year after they were concluded, that the DHA offices are inaccessible and that the registration process is tedious.

⁸⁰ Section 1 of the *Marriage and Matrimonial Property Law Amendment Act 3 of 1988*. See also Bennet *Customary Law* 240. This position is reiterated in the *RCMA*, see s 3(2).

⁸¹ *Ntsukunyane* case; *None v Tshabalala* (15549/2011) [2013] ZAGPJHC 100 (3 May 2013); *K v P* (09/41473) [2010] ZAGPJHC 93 (15 October 2010).

It has been shown that the benefits of having registered customary marriages outweigh the challenges experienced by those who fail to register their customary marriages. The benefits include legal certainty for all parties, decreased numbers of disputes about a deceased person's estate, fewer problems for divorcing parties in proving the existence of customary marriages, and easier routes to follow in resolving ancillary matters related to divorce disputes such as maintenance and custody.

Persons who fail to register their customary marriages are likely to experience numerous challenges such as the inability to register a child in the father's surname, negative psychological bearing on children (rejection by the in-laws), the expenses and humiliation associated with proving paternity before claiming an inheritance or maintenance, the need to prove the existence of a customary marriage before claiming an inheritance or maintenance, and the possibility of losing a share of the estate to in-laws and others engaged in property grabbing.

The non-registration of customary marriages, which causes these difficulties, is linked to issues which include a lack of a culture of the registration of customary marriages, poor legislative drafting, the absence of knowledge of the rights and benefits afforded through the *RCMA*, minimal access to the DHA's offices, and service delivery-related matters, as well as the existence of a marriage to a third party (*umfazi we phepha*) and the high regard in which civil marriages are held.

The phenomenon of *umfazi we phepha* was specifically also flagged. If all the suggested avenues are addressed, there would be an increase in the number of timeously registered customary marriages, and this in itself would close off the possibility of this phenomenon recurring over generations.

Problem-specific solutions were suggested for these challenges. These recommendations include an investment in education and the taking of marketing initiatives, taking the services rendered by the DHA to the people, taking advantage of the presence of the internet, increasing the DHA staff numbers at minimal cost, certain legislative efforts, and enhancing the registration process.

Among the solutions suggested, the issue of an alignment between the *RCMA* and its regulations was also discussed. Both these pieces of the regulatory framework need to enable either spouse to register a customary marriage and need to sufficiently address the concept of a person with "sufficient interest", as contained in the principal legislation.

The recommendations also dealt with literacy and, although it is acknowledged that the government has put initiatives in place to improve the literacy rate, these initiatives have not been sufficient as all intended beneficiaries have not been reached. As a result, there is a need for the project managers of education programmes to increase their efforts to engage all stakeholders. Businesses, employers and civil society are vital to the success of such initiatives.

In relation to access to the DHA's offices and services, numerous proposals have been put forward. At the heart of these proposals is a need to adhere to the *Batho Pele* principles and the fact that the DHA needs to get its services to the people through *izimbizo*, the appointment and utilisation of designated persons, by expanding the eHomeAffairs channel, and by the maximum utilisation of available strategic partnerships. Over and above these efforts, all its resources need to be able to function throughout challenges such as power and internet failures, and sufficient backup systems should be in place.

The last aspect that was addressed in the recommendations dealt with the fact that fewer people today have a high regard for customary marriages. This concern falls squarely in the domain of the DSAC, and they should invest money towards research and the publication of customary law-related content.

All the above recommendations and actions have one thing in common: they clearly illustrate that "business as usual" can no longer be the order of the day. The DHA and other government entities have a role to play in educating people and making certain that they are advantaged by the regulatory framework surrounding customary marriages, so that the adverse effects of the non-registration of customary marriages are minimised as far as possible.

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List of Abbreviations

AJDS	African Journal of Development Studies
DG	Director General
DHA	Department of Home Affairs
DSAC	Department of Sport, Arts and Culture
EC	Eastern Cape
EJCL	Electronic Journal of Comparative Law
FS	Free State
GP	Gauteng
IJLPF	International Journal of Law Policy and Family
KZN	Kwa-Zulu Natal
LP	Limpopo
MP	Mpumalanga
NC	Northern Cape
NDP	National Development Plan
NPR	National Population Register
NW	North West
PELJ	Potchefstroom Electronic Law Journal
RCMA	Recognition of Customary Marriages Act 120 of 1998
RSA	Republic of South Africa
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SAPL	Southern African Public Law
Stats SA	Statistics South Africa
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)
WC	Western Cape

