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DISSOLVING AN UNREGISTERED CUSTOMARY MARRIAGE

A customary marriage must be registered at the Department of Home Affairs within 3 months after conclusion of the marriage (section 4(1) of the Recognition of Customary Marriage Act). However, failure to register the marriage does not affect its validity in terms of section 4(9) of the Recognition of Customary Marriage Act. Although failure to register the marriage does not render the marriage null and void, what are the implications on the dissolution of such an unregistered customary marriage?

The court confirmed in Netshituka v Netshituka and Others 2011 (5) SA 453 (SCA) that should a spouse to a customary marriage enter into a civil marriage or civil union with another person, the subsequent marriage (civil marriage or civil union) is null and void. A mere separation does not terminate a customary marriage. Only a court of law by a decree of divorce may terminate a customary marriage in terms of section 8(1) of the Recognition of Customary Marriage Act read together with the Divorce Act on the ground of irretrievable breakdown of the marriage.

It is however important to establish with prima facie proof that the customary marriage exists before the said marriage is dissolved through the court. Prima facie proof in most cases is the marriage certificate that is handed to the court on the day of the divorce hearing. It is however not necessary to register the customary marriage first for purposes of obtaining prima facie proof before the marriage gets dissolved.