

## LEGISLATION AS A CRITICAL TOOL IN ADDRESSING SOCIAL CHANGE IN SOUTH AFRICA: LESSONS FROM *MAYELANE V NGWENYAMA*

RN Ozoemena\*

### SUMMARY

Several changes have occurred in South Africa within the customary law system to ensure gender justice, including the enactment of the *Recognition of Customary Marriages Act* 120 of 1998. The purpose of the *Recognition Act* is to recognise customary marriages as valid in law with equal status and capacity within the marriage for the parties to the marriage, and to regulate customary marriages. This has brought about changes to this social institution in an arena that is steeped in tradition and deep-rooted cultural practice. In 2013 the Constitutional Court in the *Mayelane* case developed the Xitsonga customary law to include the requirement of the consent of the first wife prior to her husband's taking another wife. This case yet again highlighted the difficulties that surround the practicalities of balancing the tripartite scheme of statutory, constitutional and living law. It remains a challenge for the Courts to determine the norms of African people. Hence the need for proper and much more vigorous engagement with the living law of the people.

**KEYWORDS:** living law; consent; legislation; social change; customary law; gender justice; customary marriages; traditional institution.

---

\* Rita N Ozoemena. LLB LLM (Rhodes), LLD (Pretoria). Post-Doctoral Research Fellow, South African Institute for Advanced Constitutional, Human Rights, Public and International Law (SAIFAC), a Centre of the University of Johannesburg. Email: ritao@uj.ac.za. I am hugely indebted to David Bilchitz for his earlier comments and I am very grateful to the two anonymous referees for their insightful comments.