Abstract

Land rights change on date of marriage. This has far-reaching consequences for the land tenure debate, the extent of which is generally overlooked. The recording of personal co-habiting status and the recording of diagrams cover similar conceptual areas, indicating that current legal debates surrounding marital status could benefit from a pooling of ideas from the field of geomatics. In order to facilitate this, an overview will be given of the South African law on the following: The manner in which rights vest on date of marriage; the difference between a marriage in community of property and out of community of property; the effect of pre-nuptial agreements and lobola agreements; the effect on land rights if a couple converts their marital system to a different one after their marriage; the consequences of death, divorce and insolvency on the loss of land; the role of the conveyancer in identifying and entrenching rights vesting by marriage; the cost of pre-nuptial agreements and the process for registering them; access to justice for the poor who need pre-nuptial contracts to protect their rights, the impact on vulnerable men, women and children when pre-nuptial contracts are not available to the poor, and the potential for cell-phone technology to be used to record marital status.

1 Introduction

It may be asked: “What do marriage and mapping have in common?” What they have in common is that they are both professional tools used to give shape to a physical reality that needs to be converted into a documentary record, with legal results. Once the marriage concept and the diagram concept are reduced to paper, they are also both incorporated in documents lodged in the South African Deeds Registry office. Increasingly research shows that the administrative processes surrounding marriage are having a wide reaching effect on the validity and usefulness of marriage as a protective structure. Amongst the most important rights married couples need protected are their individual and combined land rights, with land surveyors participating in the administrative processes surrounding registration of land.

Many delegates to an African geomatics conference are likely to be highly skilled in thinking spatially. The background of the author of this paper is law, and its aim is to draw to the attention of the geomatics community the correlations between land mapping and the mapping of marital rights and obligations. You will no doubt all be familiar with the concept of co-ownership and an undivided half share of immovable property. An undivided half share means that legally and on paper you only own half of the property, but spatially you can use the whole of it, together with the
other co-owner (who is also legally on paper only the owner of half of the property, but spatially can use the whole of it). Consider for a moment how you draw a land surveyor’s diagram for one piece of property that will be co-owned. Then consider Rodin’s famous statue ‘The Kiss’.

Legally Rodin’s lovers can either be considered as two separate subjects with legal rights and duties, or as one subject with consolidated rights and duties. Since land surveyors know the difference between single erven (parcels) and a consolidated erf (parcel), it is not necessary to explain the analogy further. A geomatics audience is an absolute gift to a lawyer, as there is no need to explain how the imagery of a single erf that has been consolidated, which must later be sub-divided once more, is similar to marriage imagery, with such new ‘erven maps and boundaries’ requiring registration at the Deeds Office. Nor is it necessary to explain why this next sub-division need not necessarily take the same form as the first sub-division. The diagram process is exactly the same conceptually as what occurs with personal relationships.

When marriage is being ‘mapped’ by lawyers, marriage is either like two erven situated beside one another (a couple married out of community of property), or a consolidated erf (a couple married in community of property). Using this conceptual imagery, legal ‘sub-divisions’ of ‘consolidated erven’ are triggered by death, divorce, disposals or insolvency, with the immovable property outcomes often entirely different than those established on the date of marriage.

Historically, and for centuries, women were regarded as chattels, namely property possessed by men. This is still reflected in some legal language. African French speakers are probably familiar with the legal term ‘droit de jouissance’ - used for the right of possession - with jouissance also having a sexual connotation. Apart from this linguistic history, land law itself still has residues of thinking that originate in marriage, or in the perception of sexual relations as casual or committed. It is therefore important for geomatics practitioners to grasp the concepts that underpin marriage as a socio-legal contract, and how the legal profession has tried to identify the point at which a lover becomes a spouse, as opposed to a second lover being seen as a mistress. Land specialists need to work in tandem with the legal profession to ensure that registered tenure constructs influenced by committed relationships adequately reflect the constitutional norms of dignity, equality and freedom we have pledged ourselves to as South Africans. A simple summary of South African marriage law will now be given, hopefully made less tedious by Rodin’s visual spatial introduction.
2 Statutes governing marriage

The South African Constitution protects diversity and this is reflected in marriage law. Couples can choose whether they wish to marry under the Marriage Act 25 of 1961, the Recognition of Customary Marriages Act 120 of 1998, or the Civil Union Act 17 of 2006. More statutes are underway in order to cover a wider range of marital norms. The existing statutes already cover a range of types of marriage, from heterosexual, to same-sex, to polygynous, as well as covering ground that is religious, customary and secular. Details of spousal consent to various contracts that have land consequences are dealt with under the Matrimonial Property Act 88 of 1984.

Where a land surveyor might use a boundary post to determine a physical position identified after consideration of a complex set of facts, a lawyer must analyse an equally complex set of facts to determine the legal boundaries of co-habitation. There are two approaches to this legal marital mapping. This is most easily explained with reference to the map of Namibia and its border with South Africa. The decision-makers at the time may have saved cartographers a considerable amount of trouble by drawing the eastern boundary with a ruler, but this no doubt caused considerable trouble for the people who lived on either side of this straight line. The southern border, on the other hand, followed the natural topography of the riverbed and its contours. In South Africa today there are many marriages that follow the natural topography and contours of personal marital culture, without reference to the straight lines of statutory recognition. Like the course of a river, marital culture has its own ebb and flow, resulting in changes of direction and new tributaries. Thus the legal fraternity faces similar challenges to those in geomatics in respect of the many unregistered customary marriages and the relationships of the more Western co-habitating partners. These informal arrangements share in common that they are not reduced to paper, in other words they are not formally ‘mapped’ and usually cannot therefore serve as the basis for entrenching legal rights to land.

This lack of formal ‘mapping’ of these relationships is playing out in different ways in customary marriage law and civil marriage law. In the customary environment natural relationship boundaries try to re-assert themselves through what is known as the ‘living law’. This law includes informal participatory processes that play out at community level, often beneath the radar of more formal customary law. In civil marriage law, the natural relationship boundaries of co-habiting partners has
triggered a debate in legal thinking on the need for universal partnership agreements to determine property rights for committed couples who do not wish to marry.

3 How rights vest on date of marriage

Legal research on marital rights is highlighting a pending crisis for the legal system due to lower court decisions prioritizing the administrative process of registering marriage, above the reality of whether the couple is in fact married or not. This is equivalent to someone saying that land cannot be owned because no diagram has been drawn up, as opposed to saying that land cannot be owned because it does not exist.

In South Africa right-holders become owners when their ownership is registered at the Deeds Office, after which they are given a formal title deed with details about the size, geographic position and details of the previous owner and the new owner. There are however certain situations whereby, in law, other rights have priority over the Deeds Office title, such as with insolvency and prescription. Marriage is another such case. In law we speak of ‘vesting’ as the moment when a right is formally conferred on a right holder. Marriage results in the vesting of certain rights. If you marry in community of property, you become a co-owner immediately upon the date of your marriage. In a court dispute about the land ownership, it would be sufficient to show the title deed in the name of the one spouse, and the marriage certificate in the name of both spouses, to prove your prima facie claim to the land. The absence of a marriage certificate, however, is in most instances likely to result in a finding that there are no land rights capable of being entrenched as a result of the couple’s relationship status.

4 Marriage in community of property and out of community of property

In South Africa, irrespective of which of the statutes a couple marries under, the property consequences of their marriage will be either be in community of property or out of community of property. This is often translated into other official languages by describing community of property as: ‘what’s his is hers, what’s hers is his’, with marriages out of community of property being described as: ‘what’s his is his, what’s hers is hers’.

If you marry without an ante-nuptial contract you are automatically married in community of property, in other words: ‘what’s his is hers, what’s hers is his.’ If you marry with an ante-nuptial contract while the marriage is defined as out of community of property, it is the contract itself that decides who will own what in the marriage. If all rights are kept separate it could be accurately translated as: ‘what’s his is his, what’s hers is hers.’ However, an ante-nuptial contract that uses the default accrual system could not be translated like this. These contracts create a hybrid situation leading to some consequences from the community of property regime, and some from the out of community of property regime. The most accurate translation would be: “Property from before the marriage stays what’s his is his and what’s hers is hers, and during the marriage what’s his remains
his and what’s hers remains hers. However, on dissolution of the marriage due to death or divorce, property acquired during the marriage becomes what’s his is hers and what’s hers is his.”

5 Ante-nuptial agreements

An ante-nuptial contract can only be prepared by a notary. It is an agreement that is entered into by a couple before they get married, in which they agree who – after marriage – will own and control various types of property. Both customary and civil marriages can make use of an ante-nuptial contract. A universal partnership agreement is not an ante-nuptial agreement, as it is not a contract premised on marriage, but comes into force immediately on signature. Ante-nuptial contracts only come into existence on the date of the marriage and a copy of the contract must be sent to the Deeds Office within three months of the marriage. This contract is then a public record. When you marry in community of property the Deeds Office is not advised, but this information must be included in all new documents lodged at the Deeds Office after the marriage. There is, however, an optional right to endorse the details of a new marriage on existing deeds.

One of the main things an ante-nuptial contract is likely to address is who will own immovable property. This makes ante-nuptial contracts a very important aspect of land tenure. Marital status (and its impact on matrimonial property) is therefore extremely important to the deeds registry system. When conveyancers prepare title deeds, they have to include whether the owners are single, married in community of property, married out of community of property, or married under foreign law. It is the conveyancer’s duty to check marital status beforehand and there are very strict verification rules for which the conveyancer must take professional responsibility.

Ante-nuptial contracts are common with civil marriages and compulsory for a subsequent polygynous marriage under customary law. They are allowed in terms of section 7(2) of the Recognition of Customary Marriages Act (120 of 1998) for first or monogamous customary marriages, but at present this provision does not appear to be being used in practice. While notaries often use standard form ante-nuptial contracts, an ante-nuptial contract aims to record an agreement between potential spouses. A couple can therefore adjust their contract to suit their personal financial or customary needs. They may include lobola should they so wish, be it in financial form or the older and more traditional form of cattle.
Accordingly, what’s his or hers, is a decision that is his and hers under civil law. Under customary law, however, the decision might be seen as being not only his and her decision, but also the decision of their family or household.

The Recognition of Customary Marriages Act came into operation in 2000. Before that, customary marriages were not recognized in South African law and such couples were described as unmarried in all documents lodged for registration at the Deeds Office. The Act had retrospective effect, but applies only to indigenous people whose customs and usages accord with the Act in terms of their culture. In other words it does not apply to Muslim or Hindu marriages. The Act recognizes that marital customs differ from region to region, meaning that the law relating to these marriages differs regionally and is locally determined. 2008 statistics from Statistics South Africa indicated that only between 4% and 8% of women in customary marriages had registered their marriage. Research by the Women’s Legal Centre in 2011 held that only two or three polygynous marriages had been registered nationwide, and that at least half of the women in customary marriages define them as monogamous. It is therefore very important to remember that it is those in unregistered customary marriages who require the most urgent legal attention.

Without labouring you with excessive legal history and detail, the current consequence of a formalized customary marriage is that of being in community of property. The use of ante-nuptial contracts is very rare for these marriages, due in part probably to the high expense involved. Despite lobola being very much a customary practice, the Recognition of Customary Marriages Act does not make lobola a requirement for customary marriage. However, the regulations to the Act do have a schedule with provisions for recording the contents of a lobola contract. Unlike ante-nuptial contracts, these contracts are not lodged at the Deeds Office. Ante-nuptial contracts are therefore public documents with all the social protections this affords, but lobola contracts do not have the same publicity benefits. In view of the very low numbers of customary couples registering their marriages under the Act, this approach might not necessarily be mistaken, particularly since lobola is generally paid over time, and often not completed.

As mentioned, it is possible to enter into an ante-nuptial contract with a first customary marriage, but this is very rare. It is obligatory to enter into an ante-nuptial contract with polygenous marriages, with the first wife joined in the court proceedings. Despite the Recognition Act’s clear intention to support customary marriages there are very large numbers of couples that choose a civil marriage, due to it being much easier and cheaper to register. Failure to register customary marriages is exacerbated by the fact that customary marriage is a process, unlike civil marriages, and often does not have a clear-cut date upon which the marriage is finalized.
6 Conversion of matrimonial property system after marriage

Spouses are free to apply to court jointly to change their matrimonial property regime. This is so under all the statutes governing all the different types of marriage. In such instances the court will grant the order if there are sound reasons for it, if notice is given of the change and if no other person will be prejudiced by the change. Note this is conversion of the matrimonial property regime between in community of property or marriage by ante-nuptial contract. It is not a change in the type of marriage. If someone in a civil marriage wishes to enter into a customary marriage, or a polygynous marriage, it will be necessary for the couple to divorce before entering into the new marriage. The law does not make provision for a couple to enter into marriage with the view that marriage must be monogamous and later decide they wish to change to a polygynous system. Divorce is the only route. This river has many legal tributaries, as high numbers of customary couples enter into a civil marriage for practical, rather than cultural reasons.

7 Divorce, death and loss of land

On divorce or death the devolution of land depends firstly on the couple’s matrimonial property status and only then can succession laws or wills be taken into account. In other words a person married in community of property can usually only write a will in respect of their half share of land, but if they are married out of community of property they can write a will for the whole of it. In broad terms the land consequences of divorce usually follow the same path, unless the couple jointly agree to a settlement agreement that varies the consequences of the marital property regime.

Unregistered customary marriages and universal partnerships fall largely outside of the ambit of divorce and succession law. For this reason spouses in many customary marriages only apply for registration of their marriage after the other spouse’s death. Alternately they do so if a relationship breaks down leading to a need for formal marriage before being able to access rights on divorce. Formal divorce is rare amongst customary marriages, with relationship disputes and separations playing out in the personal and family sphere. The private and painful wars of the heart in relationships that have not been formalized are beyond the reach of the systems that administer the recording of land rights. A serious consequence of these relationships being ‘unmapped’ by the deeds registry system is that land disputes resulting from relationships that break down must be resolved by the courts, which are notoriously expensive and inaccessible to the poor.

8 Insolvency and loss of land in the marital context

If spouses are married in community of property and one of them goes insolvent, both of them are regarded as insolvent. The joint estate of both spouses vests in the trustee of the insolvent estate. This means that land co-owned in community of property falls into the insolvent estate. This applies even if the property was previously inherited by one spouse, irrespective of whether the spouse who inherited it has made a will indicating that someone else will inherit it in future. This is one of the most serious consequences of being married in community of property without an ante-
nuptial contract. Poor beneficiaries of subsidized housing are at very high risk of insolvency. There are certain checks and balances for spouses married by ante-nuptial contract to ensure an insolvent spouse does not hide their assets in the estate of the solvent spouse. Provided there is no illegality, the solvent spouse’s estate is protected if married out of community of property. The fact that the ante-nuptial legal mechanism is not accessible to the poor therefore requires careful consideration.

9 Conveyancers and the entrenching of rights vesting by marriage

Section 15A of the Deeds Registry Act 47 of 1937 places a duty on the conveyancer to confirm the parties’ marital status. This means the conveyancer must check their marriage certificate and obtain affidavits in which they confirm their status as either single, married in community of property, or out of community of property. If they are married out of community of property it is the conveyancer’s duty to obtain a copy of the ante-nuptial contract and read it. This is not only to confirm whether the couple are married out of community of property, but also to see whether the ante-nuptial contract has any specific contractual provisions relating to the property to be transferred. An ante-nuptial contract accordingly has the capacity to be a very powerful tool for the determining of land rights.

10 Cost of pre-nuptial agreements and the process for registering them

Ante-nuptial contracts cost anything from R1000.00 to R5000.00 upwards, depending on their complexity and they must be prepared by a notary. This is an additional qualification not held by many attorneys. The couple usually come in for a consultation at which the different matrimonial consequences are discussed, together with their financial situation and personal needs. In straightforward situations, such as a young couple marrying with neither of them having many assets, it is usual for the simple accrual contract precedent to be used. In terms of these contracts the couple are regarded for all intents and purposes as being married out of community of property, but on death or divorce they share the financial benefits accrued during their years of marriage. If the couple have complex types of assets, or want to agree to unusual ways of dealing with their property, the cost of the contract will escalate considerably. In other words, it is primarily the size of a couple’s estates that is likely to determine the expense of getting an ante-nuptial contract.

The agreement is generally signed before the marriage and sent to the Deeds Office within 3 months of the marriage. A notary is in effect a mini deeds registry, and must retain duplicate originals of the ante-nuptial contract in their own safe. As a public document, the contract can be accessed by a small fee payable to the Deeds Office by any member of the public.

11 Access to justice for the poor who need pre-nuptial contracts

It is estimated that one in three residential properties in South Africa is a previously subsidized house. Many applicants for housing subsidies define themselves as being in an unregistered customary marriage. It is widely accepted that there are many marriages that are intrinsically valid,
but not registered, to the extent that the Recognition of Customary Marriages Act makes specific provision for this in section 4(9), by providing that a marriage is not necessarily invalid if not registered. Large numbers of customary marriages are monogamous, such that the provisions relating to compulsory ante-nuptial contracts for subsequent polygynous marriages do not apply.

Nevertheless, despite all of this information about unregistered customary marriages being understood and provided for by statute, there is no legal provision making it necessary to provide a flag on title deeds that couples are in an unregistered customary marriage. This is an anomaly, particularly in view of the fact that it has long been recognized that couples in Muslim marriages not yet married by recognized legal processes have the right to indicate on their title deeds they are married by Muslim rites.

With the high numbers of housing beneficiaries who willingly sign affidavits confirming unregistered customary marriage status, such a flag would be of considerable worth for future referrals to a customary body to confirm such married status. Spouses often only apply for a customary marriage to be registered either after the other spouse’s death in order to receive certain benefits, or when a divorce and division of assets is necessary. Such applications can then be the subject of a dispute, with the family claiming that the deceased or divorcing spouse did not intend to marry. Accordingly a flag on a title deed, indicative of a formal affidavit, signed under oath, recording the couple’s mutual perception that they were in a customary marriage, is of considerable relevance. It would be fair to say that proof of unregistered customary marriages is one of the most pressing needs in the South African legal system today, potentially affecting millions of couples.

12 A geomatics approach to mapping marital rights and obligations

Whittal’s recent work on the use of cell-phone technology for deeds registry processes (Whittal, 2011) is imminently suited to record the stages of customary marriage. All legal contracts are based on an offer and an acceptance, with the intention of the parties central to informed consent. The legal processes formalizing marriage are essentially contractual. African customary law is an oral tradition, with very limited written - and often contested - codifications of its norms. This makes audio-recordal of the contractual intention of the parties a very accessible approach to the generation of a database with evidentiary weight.
The development of cell-phone technology to record the stages leading up to the point of formal legal protection could be of great significance for the Deeds Office. The Alienation of Land Act 68 of 1981 requires all land disposals to be in writing. This has resulted in the registry system being heavily invested in written records, at odds with the actual verbal marital practices of many South Africans. Conveyancers require a marriage certificate proving marriage as the basis for preparing transfer of ownership documents, leaving unregistered customary spouses (who are far enough along in the process of customary marriage to be regarded as married) in an invidious position. It is accordingly worth a geomatics approach being explored to determine whether the different stages of customary marriage in customary communities could be identified and recorded, in order to create a public record of the progression of marital rights and duties emerging.

Perhaps the time has come for all those involved with deeds registry administration to re-visit and re-assess the old controversies surrounding the use of the human body and rights to the use of land.

If we are old enough to be wise, we may discover a new African model for recording:

What land of his is uniquely hers,
what land of hers is uniquely his,
what land is uniquely theirs,
and what land of theirs -
is actually their family’s.

13 References
Civil Union Act 17 of 2006
Marriage Act 25 of 1961
Women’s Legal Centre (2011) Recognition of Customary Marriages, online.

14 Bibliography