

The Blacks (Urban Areas) Amendment Act 97/1978 makes it possible for a qualified person to register a lease over a property in an approved area for a period of 99 years.

In general the legal capacity of a Black is determined as if he were white (Sect 11 (3) Act 38/1927). However, if the right or matter involved depends on any customary law, the capacity of the Black in relation to such right or matter shall be determined by such customary law and, if not, the capacity of the Black is decided as if he were white.

The Legal Capacity of Black Women

1 A Black woman who is a partner in a CUSTOMARY UNION and who is living with her husband is deemed to be a minor and her husband is her legal guardian (Sect 11(3) (b) Act 38/1927.) (A Black woman is, in Customary law, a perpetual minor and cannot (except in a few instances) sue or be sued unassisted). Consequently such woman has no capacity to acquire a right of leasehold, to borrow money, to mortgage the right of leasehold as security for the borrowing, or to sell the right of leasehold, nor has she the necessary legal status to be sued to recover any debt, nor to be sued on any mortgage bond over the property.

Moreover, where Blacks are married under customary law, there is very clear provision for the creation of a "house" in respect of such union. The "house" is, in fact, a separate estate and all the assets of the wife on entering into such union become assets of the "house". Accordingly, any right of leasehold held by a woman on entering a customary union, becomes the assets of the "house".

The Urban Foundation, in a memorandum to the Minister of Justice, pointed out that since the registration of customary union is not compulsory, it is impossible for any person dealing with a Black woman who is not married under civil law to ascertain, with any certainty, whether or not the woman has any capacity to conclude a contract, or if she defaults under a bond, if she will have the capacity to be sued, or whether the rights of leasehold with which she purports to be dealing is an asset of a "house" and not her property at all.

It has been ascertained that, except in exceptional circumstances, Societies will not lend to an unmarried, divorced or widowed Black woman because of her disabilities under tribal law.

2 The position of a Black woman married by civil or Christian rights is governed by common law. Therefore, unless the marital power has been excluded by ante-nuptial contract, the husband has the marital power over his wife and she may, with few exceptions, only sue or be sued, duly assisted by him.

ATTITUDE OF BUILDING SOCIETIES

It has been reliably ascertained that the Association of Building Societies has recommended to its members that it would be unsafe to lend money on the security of a mortgage bond to a Black woman unless -

- (a) she could prove she was married by civil law;
- (b) she could prove that her husband was alive and living with her;
- (c) her husband was prepared to sign as surety and co-principal debtor.

The caution of the Association stems from the knowledge that

- (a) should a Black woman, married under civil law become widowed or divorced, or should she then re-marry under customary law, she would revert to the status of a minor;
- (b) in the case of an unmarried woman, it is not possible to establish with certainty whether or not a customary union, with all its attendant problems, has been entered into.

In view of the disabilities of Black women, it is not surprising to learn that a section of a guidebook of the Association of Building Societies records that "Because of the limitations on the contractual capacity of Black women, some Societies propose to confine lending to males". (Perhaps it should be noted that White married women also experience great difficulty in obtaining bonds, and as a rule Building Societies will grant a bond only if the husband's earnings warrant it.)

REPRESENTATIONS TO DEPARTMENT OF CO-OPERATION & DEVELOPMENT AND BUILDING SOCIETIES

It is known that the following representations have been made:

- 1 The Urban Foundation in the memorandum mentioned above, recommended that it is essential that Section 11(3) (b) of the Black Administration Act 38/1927, be qualified by a proviso to the effect that a Black woman who is a partner to a customary union and who is living with her husband shall nevertheless -
 - (a) have capacity; without his assistance, to acquire a right of leasehold in terms of Section 6 A of the Blacks (Urban Areas) Administration Act 97/1978;
 - (b) have capacity to mortgage or otherwise deal with such right of leasehold;
 - (c) have capacity to borrow against the security of a mortgage over such right of leasehold;
 - (d) have the necessary legal standing in all matters relating to such right of leasehold and to any borrowing against the security of a mortgage over such right of leasehold; and
 - (e) retain full title to such right of leasehold, notwithstanding that she is a party to a customary union, and notwithstanding the provisions of any customary law to the contrary.

The Association of Building Societies negotiated with the Department to ascertain whether ways and means could be found to enable Societies to lend to Black women without incurring the risks which flow from marriages by customary union.

The S A Council for Higher Education Trust (SACHED) has been in touch with various Building Societies in connection with the Council's plans to establish a housing scheme for its staff, half of which are Black and most of whom are women. It was reported that in response, the Building Societies had demanded 100% securities for loans and which was beyond the Council's means and, further, that it had proved almost impossible to get loans for its Black female staff, because of the legal provisions for Black women.

It is understood, on reliable information, that the Secretary for Co-Operation and Development has rejected the proposals of the Urban Foundation on the ground that these would effect a change on the family and succession laws of Blacks, with unforeseen consequences.