IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT50/08

In the matter between:

ELIZABETH GUMEDE (born **SHANGE**)	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
PREMIER OF KWAZULU NATAL	Third Respondent
KWAZULU NATAL MEC FOR TRADITIONAL AND LOCAL GOVERNMENT	Fourth Respondent
AMOS GUMEDE	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
WOMEN'S LEGAL CENTRE TRUST	*Amicus Curiae*

SUBMISSIONS BY *AMICUS CURIAE*

A. INTRODUCTION

1. The Women's Legal Centre Trust ('the Trust') thanks the Constitutional Court for the opportunity to make these submissions.[1]

[1] The Trust was admitted to the proceedings as *amicus curiae* in terms of the Chief Justice's Directions dated 28 August 2008. Its institutional interest in these proceedings and the nature of the work that it does

2. This case concerns the proprietary consequences of marriages for women living under customary law and more particularly their ownership, access to and control over property during their marriages and upon their dissolution.

3. Under the official customary law,[2] a husband controls marital property, irrespective of whether it was acquired or earned by the wife. In KwaZulu- Natal, this rule is recorded in section 20 of the KwaZulu-Natal Codes, which vests *ownership* of family property and charge, custody and control of house property in a husband.[3] In other parts of the country, the official customary law treats marital property as subject to a husband's control and property (other than personal property) vests in the husband.[4] Though the marital assets vest in the husband, he is subject to a general obligation to use property for the good of the members of a house.[5]

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in respect of women living under customary law is set out in the affidavit of Noluthando Ntlokwana filed in support of the application to intervene as *amicus curiae.*

[2] In these submissions, we recognise that official customary law does not always accord with the living customary law for the reasons articulated in *Bhe v Magistrate, Khayelitsha* 2005(1) SA 580 (CC), (which we refer to the *Bhe* case) at paras 33, 81-83 and 86.

[3] Section 20 of KwaZulu Act on the Code of Zulu Law 16 of 1985 and section 20 of the Natal Code of Zulu Law, Proclamation R151 of 1987 are in the same terms. We refer to these collectively as "the KwaZulu - Natal Codes". The genesis, relationship between the two codes and their differences are helpfully explained by Bennett and Pillay in "The Natal and KwaZulu Codes: the Case for repeal" (2003) 19 *SAJHR* 217.

[4] Bennett *Customary Law in South Africa* 2007 *255.* It is probably not accurate to describe the nature of the right that vests as "ownership" and (irrespective of the true nature of the right at customary law) it stands to reason that the nature of any right in land will vary in view of the history of land tenure in South Africa.

[5] Bennett *Customary Law in South Africa* 2007 257. See generally, the *Bhe* case at para 76.

4. Historically, what underlies this is the principle that women did not have the capacity to own or administer property at customary law. That principle, fundamentally offensive to the dignity and equality of women, was remedied by section 6 of the Recognition of Customary Marriages Act 120 of 1998 ('the Recognition Act') for all married women. Section 6, entitled "*Equal status and capacity of spouses*" provides as follows:

> "*A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."*

5. The difficulty that arises in the present case arises from the fact that the rights conferred upon a wife in a customary marriage are 'subject to the matrimonial property system governing the marriage.' As appears above, the *capacity* to acquire and dispose of assets is virtually meaningless in circumstances where the right to control and manage property and rights in the property vest in the husband.

6. This is not a problem for women in marriages concluded after 15 November 2000, i.e. the date that the Recognition Act came into force. The Recognition Act creates a new regime for marriages concluded after that date, which we refer to as 'new marriages'. The default position for new marriages, as provided for in section 7(2) of the Recognition Act, will be that they are 'in community of

property'.[6] The marital power formerly enjoyed by husbands in customary marriages in terms of the KwaZulu Natal Codes has been repealed by the Recognition Act. There is thus no further impediment to women in new marriages to acquire, control, own and dispose of property during the marriage.

7. Customary law will however continue to govern the proprietal rights of women in customary marriages concluded before 15 November 2000, which we refer to as 'pre-Act marriages'**.** The Applicant falls into that class. Thus although section 6 gives her the *capacity* to acquire and dispose of assets, her marital property regime precludes her from doing so. Rather, her husband will own and control most marital property.

8. The Applicant seeks an order that will have the effect of declaring unconstitutional and invalid the customary law applicable to pre-Act marriages in KwaZulu-Natal, declaring section 7(1) invalid and extending the default 'in community of property' regime that applies to new marriages to pre-Act marriages.

9. The Applicant's case raises questions of fundamental public interest and affects a wide group of African women, i.e. those in pre-Act customary law marriages. It is not only women in KwaZulu Natal who are affected by the order sought in respect of section 7(1) and 7(2), but those around the country.

[6] Parties to the marriage can specifically exclude such consequences by antenuptial contract.

10. Importantly, the group of women affected will tend (though not invariably) to be older women as, it stands to reason, that it is they who are more likely to be in marriages that were concluded before 15 November 2000. Though customary law is applied in both rural and urban areas, it has a particularly important place in rural areas and thus rural women are particularly affected. It hardly needs mention that the group of women affected constitutes a vulnerable and marginalized group of women, who have historically and systematically been subjected to discrimination on various intersecting grounds.

B. SUMMARY OF THE AMICUS CURIAE'S SUBMISSIONS

11. In broad terms, the Trust aligns itself with the Applicant's submissions. The Trust agrees, firstly, with the Applicant's central submission that the customary law rules that govern the proprietary consequences of her marriage that are applicable to her, i.e. those contained in section 20 of the KwaZulu-Natal Codes, are unconstitutional because they discriminate against her unfairly and unjustifiably as between husband and wife, as a women and because she is African, or black.[7]

12. The Trust also agrees, secondly, that because section 7(1) of the Recognition Act *perpetuates* the customary law relating to matrimonial property in pre-Act marriages, it too is invalid and unconstitutional.

[7] Applicant's heads of argument, para 30.

13. These two contentions are central to the Applicant's case. In respect of these central contentions, we make the following submissions, elaborated on below.

Firstly, the customary law rules are in direct conflict with values and principles recognised under international law, including African regional human rights instruments.

Secondly, the particular vulnerability and position of the class of women affected by section 7(1) must be considered in the evaluation of the fairness of the discrimination both at customary law and as perpetuated by section 7(1). We highlight considerations relevant to the position of the affected women below.

14. Once it is accepted that section 7(1) perpetuates unfairly and unjustifiably discriminatory customary law rules, it must be declared invalid and set aside. We submit that it would be an appropriate, just and equitable remedy to extend to pre-Act marriages the remedial measure selected by Parliament, namely that the default position of customary marriages will be that they are in community of property. A different way of getting to the same conclusion is to say that the exclusion of pre-Act marriages from section 7(2) is invalid, as the Applicant submits.

15. In this regard, we do not add to those submissions made by the Applicant insofar as the submissions relate to monogamous marriages. In respect of polygamous marriages, we make the following submissions:

The discrimination perpetuated by section 7(1) on women in polygamous marriages is as unfair and unjustified as it is for women in monogamous marriages.

However, it would be unworkable and potentially inequitable to make pre-Act polygamous marriages in community of property, because at customary law specific property is allocated to the different houses in polygamous marriages and it would be inequitable for wives in each house to become responsible for the debts of the other(s).

Because of the complexities associated with devising a marital property regime for polygamous marriages that stands constitutional scrutiny, we submit that Parliament should be ordered to remedy the invalidity within a reasonable period of time as far as polygamous pre-Act marriages are concerned but that the Court's order should provide interim relief for women in polygamous marriages.[8] We make proposals in that regard.

16. The Applicant does not argue that the differentiation that is drawn in section 7(1) and section 7(2) of the Recognition Act between women in pre-Act marriages and partners in new marriages constitutes unfair discrimination. Indeed, Applicant points out that the State has misconstrued the constitutional attack by conceiving of it in this way.

[8] The need to provide immediate relief to those whose rights are being infringed is well-recognised in this Court's jurisprudence as recognised, in this context, in the Bhe case at paras 107, 108 and 124.

17. This is an important point by the Applicant because section 7(1) is constitutionally invalid irrespective of the provisions of section 7(2). One does not have to compare the position of women in pre-Act marriages with that of partners to new marriages to see that the pre-Act regime is constitutionally invalid. For this reason we submit that the Applicant's contentions can dispose of the matter.

18. However, we contend that the differentiation that is drawn between women in pre-Act marriages and partners in new marriages also constitutes unfair discrimination of an important sort. We submit that what happened when the legislature passed the Recognition Act is that Parliament elected not to address the position of pre-Act marriages not because this was fair or justified but because to do so raises some complicated questions.

19. But the Constitution, and its protection of equality, demands more from us, as does international law. To say to women in pre-Act marriages, these being black, mainly rural women who will tend to be older, that all other people (whether married under civil law or new customary marriages) deserve the protection of the Constitution and the right to equality, but they do not, fundamentally violates their dignity.

20. These submissions are structured under the following headings:

International law standards

The vulnerability and position of the class of women affected

Polygamous marriages

The differentiation in section 7(1) and 7(2) between pre – Act and new marriages constitutes unfair discrimination.

C. INTERNATIONAL LAW VALUES AND STANDARDS

21. We now deal with the principles in both international and regional African human rights' instruments to which South Africa has committed itself. We do so in light of the well recognised principle that this Court will have regard thereto in interpreting the Bill of Rights.[9]

22. We submit that there are at least five principles and values which are found in international law which are relevant to the issues before the Court. These are:

Women's right to equality must be protected even where communities are governed by customary laws. (This principle is, of course, enshrined in the South African Constitution.)

[9] Section 39(1)(c) provides that the Court, when interpreting the Bill of Rights "must consider international law."

The family is regarded as the natural unit and basis of society, which must be protected by the State, which is obliged to remove measures that are discriminatory against women in marriage.

Men and women shall enjoy the same rights and responsibilities *during marriage* and at its dissolution.

Married women are to enjoy equal rights to conclude contracts, administer property, own, manage, enjoy and dispose of property.

Upon divorce, spouses are to have equitable shares of property acquired during their relationship.

23. We now deal briefly with each in turn.

Women's right to equality and customary law

24. That international law recognizes women's right to equality is well documented and we do not deal with that proposition further.[10]

[10] See the *Bhe* case at para 41 – 44 for the applicable references to international instruments. There are others that are relevant including regional African instruments. See for eg Article 6(2) of the SADC Treaty

25. What we emphasise rather is the principle that while customary law has a special place in our Constitution, like all other law, it is subject to the Bill of Rights and women's right to equality.[11] What is significant is that this principle has recently found expression in the recently adopted SADC Protocol on Gender and Development ('the SADC Protocol').[12] Indeed, member states are required, by 2015, to ensure that the provisions in their Constitutions enshrining gender equality will take precedence over the customary, religious and other laws.[13]

The family as the natural unit and basis of society and the duty to remove discrimination in family law

26. We submit that the position of women within customary marriages must be understood in light of the central place that the family is accorded in society and

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which *i.a.* imposes an obligation on member states not to discriminate against any person on the grounds of sex or gender.

[11] Sections 31(2) and 211(3) of the Constitution; see too the *Bhe* case at para 41; *Alexkor Ltd and another v the Richtersveld Community and others* 2004(5) SA 460 (CC) at para 51.

[12] The SADC Protocol was adopted at the Heads of State and government meeting in Johannesburg on 16 and 17August 2008. It is the result of a process that started in 2005 with the audit of SADC's Declaration on Gender and Development and its addendum on Preventing and Eradicating Gender-Based Violence. Its genesis is the duty of SADC member states in Article 6(2) of the SADC treaty not to discriminate on grounds of gender and the Declaration on Gender and Development adopted in Blantyre on 8 September 1997. In Article 8 of the Declaration, SADC members committed themselves to "*promoting women's full access to, and control over productive resources such as land, livestock, markets, credit, modern technology … in order to reduce the level of poverty amongst women.*"

[13] Article 4(1) of the SADC Protocol.

in particular the important role that a family plays in the provision of economic and social security.

27. Both at international law and under the South African Constitution, the family is regarded as the natural unit and basis of society.

Article 18(1) of the African Charter on Human and Peoples' Rights, 1981 ('the African Charter') provides as follows: *"The family shall be natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health."*

Article 23(1) of the *International Convention on Civil and Political Rights* provides as follows: *"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State"*.

28. These principles were adopted by the Constitutional Court in *Dawood v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), where this Court recognised the importance of marriage and the State's obligation to protect the family both under international human rights' law and the South African Constitution.[14] The Court also recognized that "*the institutions of marriage and the family are important social institutions that provide for the <u>security</u>, <u>support</u> and*

[14] At paras 28-29 and 34-37.

companionship of members of our society and bear an important role in the rearing of children…" [15]

29. Significantly, international law also recognizes the importance of removing discrimination against women in matters relating to marriage and family relations.

Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') requires states to: '… *take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.'*

Article 18(3) of the African Charter places an obligation upon states to "*ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.*"

This obligation is elaborated upon in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa[16] ('the Protocol on the Rights of Women in Africa') which describes discrimination against women to include "*any distinction, exclusion or restriction or any differential treatment based on sex and whose objective or effects compromise or destroy the recognition, enjoyment or the exercise by*

[15] Id at para 31.

[16] The Protocol on the Rights of Women in Africa was adopted in 2000 and came into force in 2005.

women, regardless of their marital status, of human rights and fundamental freedoms on all spheres of life."[17]

Article 6 of the Protocol on the Rights of Women in Africa (entitled 'Marriage') obliges state parties to enact '*appropriate national legislative measures to guarantee that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.*'

The need to remove discrimination in marriage is also expressly identified in the Nairobi Strategies, 1985.[18]

Men and women shall enjoy the same rights and responsibilities during marriage and at its dissolution.

30. International law recognizes the principle that men and women shall enjoy the same rights and responsibilities both during marriage and at its dissolution.

[17] Article 1.

[18] Part A, para 50.

Article 18(3) of the African Charter provides: *"The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights for the woman and the child as stipulated in international declarations and conventions"*.

Article 6 of the Protocol on the Rights of Women in Africa provides: *"State parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage"*.

Article 8(1) of the recent SADC Protocol (entitled 'Marriage & Family Rights') provides that: *"State parties shall enact and adopt appropriate legislative, administrative and other measures to ensure that women and men enjoy equal rights in marriage and are regarded as equal partners in marriage"*.

Article 23(4) of the International Convention on Civil and Political Rights provides: *"State parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution…"*.

Article 16(1)(c) of CEDAW provides: *"The State parties shall take all appropriate measures to eliminate discrimination against women on all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women … the same rights and responsibilities during marriage and at its dissolution"*.

At a more general level, the Nairobi Strategies contemplate that women must be enabled to participate on an equal footing with men in all spheres of social and economic life.[19]

Married women are to enjoy equal rights to conclude contracts, administer property, own, manage, enjoy and dispose of property.

31. International law eschews the notion that married women should not have control over property.

Article 15(2) of CEDAW provides that: *"State parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular they shall give women equal rights to conclude contracts and to administer property …"*:

Article 16(1)(h) of CEDAW provides that: *"State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women … the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and dispossession of property, …"*.

[19] Par 14.

Article 6(j) of the Protocol on the Rights of Women in Africa provides that: *"State parties … shall enact appropriate national legislative measures to guarantee that … during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely"*.

Article 7(b) of the SADC Protocol (entitled 'Marriage') provides that: *"State parties shall (adopt legislative and other measures) to ensure …equal legal status and capacity in civil law, including, amongst other things, full contractual rights; the rights to acquire and hold rights in property, the rights to equal inheritance, succession and the rights to secure credit"*.

See too, the Nairobi Strategies, 1985 which read: *"The right of all women, in particular married women, to own, administer, sell or buy property independently should be guaranteed as an aspect of their equality and freedom under the law…."*[20] The Beijing Strategies, 1995 contemplate state action to give women full and equal access to economic resources including the right to ownership of land and other property.[21]

Upon divorce, spouses are to have equitable shares of property acquired during their relationship.

32. International law recognizes the principle that upon the dissolution of a marriage, a women is entitled to an equitable share of property acquired during a

[20] Part B, para 74.

[21] Par 63.

relationship. Importantly, the principle is couched in peremptory language, it is not something a women must apply for in a judicial process.

Article 8(3) of the SADC Protocol provides: *State parties shall enact and adopt appropriate legislative and other measures to ensure that where spouses separate, divorce or have their marriage annulled …they shall have equitable shares of property acquired during their relationship unless otherwise stated in a pre-nuptial agreement"*.

Article 7 of the Protocol on the Rights of Women in Africa, (entitled 'Separation, Divorce and Annulment of Marriage'), provides: *"State parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in the case of separation, divorce or annulment of marriage. In this regard they shall ensure that …women and men shall have the **right** to an equitable sharing of the joint property deriving on the marriage"*.

33. We submit that these values and principles support the Applicant's submissions that it is unfairly discriminatory and a violation of women's dignity to subject her to a matrimonial property regime that deprives her of rights in property and control over property during her marriage.

34. They also illustrate that it is wholly inadequate only to afford a woman property rights upon divorce and then only in the exercise of judicial discretion. [Indeed, it might in an appropriate case be arguable that the Recognition Act falls short of

international human rights standards in its provisions dealing with rights upon divorce.]

D. THE VULNERABILITY AND POSITION OF WOMEN AFFECTED BY THIS APPLICATION

35. We have described above the class of women who are affected by the provisions of section 7(1) and have emphasized that they will tend to be older women in both urban and rural areas, who are all black and many probably poor. The effect of section 7(1) of the Recognition Act is that although a woman is deemed to be capable (in terms of section 6) to acquire and own property, her husband will continue to exercise control and be able to manage her estate.[22] More-over the property that she acquires, including her salary, will become his (subject of course to the customary law duties that his position in the family entails.[23]

[22] Bennett *Customary Law in South Africa 262*

[23] Bennett *Customary Law in South Africa* 255

36. We have also emphasized that it is not only women in KwaZulu-Natal who will be affected but women all over the country, who are also subject to the iniquitous marital property regimes that official customary law, perpetuated in section 7(1), imposes.

37. In this regard we are mindful, as this Court was in the Bhe case that the official customary does not necessarily reflect the true values and practices of the communities who are governed by it, nor may it have kept pace with the living customary law.[24] We are also mindful that there may be customs and practices developing that reveal a shift in practices towards the position of women. However as this Court held in the Bhe case[25]:

> *"the problem with adaptions is that they are ad hoc and not uniform (and) magistrates and the courts responsible for the administration of intestate estates continue to adhere to the rules of official customary, with the consequent anomalies and hardship as a result of changes which have occurred in society."*

38. We submit that the same considerations arise in context of marital property.

39. The Applicant has illustrated many of the hardships that the group of women affected by the order suffer under the marital property regime imposed by the official customary law. These considerations are, of course, relevant to the

[24] See for example, paras 81et seq.

[25] At para 87.

determination of whether the discrimination complained of is unfair and unjustified.

40. These considerations are also important because, as Jajbhay J said in *Nzimande v Nzimande and another:*[26] "*(t)he values indelibly imprinted in our Constitution require that we seriously and consciously consider the lives that women have been compelled to lead by law and legally-backed social practices.*"

If one accepts that in reality the person in control of the family property also exerts a degree of control within a family,[27] the effect of the Recognition Act is to give the husband substantial control over both his wife and his family. This undermines the objective of the Recognition Act to "provide for the equal status and capacity of spouses in customary marriages."

As recognized by this Court in *Daniels v Campbell NO and others*[28], women often hold a position of dependence and when faced with the loss of a husband, by desertion or dissolution of a marriage, potential homelessness: "*The reality has been and still, in large measures, continues to be that, in our patriarchal culture, men find it easier than women to receive income and acquire property*". The same principles hold true for women under customary law.

[26] 2005(1) SA 83 (W) at para 63
[27] Jansen RM 'The Recognition of Customary Marriages Act' 2002 *Journal for Juridical Science* 27(2) 115-8.

[28] 2004(5) SA 331 (CC) at para 22

For most families living under customary law, the main items of property, (namely, land, cattle, and the residential house) 'belong' to the husband during marriage at least in the sense that arable and residential land is allocated to a married man. As a result, when a marriage ends either in desertion or 'divorce'[29] the husband keeps the property. Property acquired from a wife's earnings during the subsistence of the marriage remain with the husband and formed part of his estate.[30]

It is widely understood that control of property is the key to social empowerment.[31] Studies have shown that whenever women have been important producers and managers of property, their family decision-making capacity has been comparatively enhanced,[32] which is not the case in the marriages contemplated in section 7(1).

Customary law texts point out that historically, it was understood that after divorce women return to their natal homes and children would stay at the family home. However it stands to reason that circumstances have changed in context of the migrant labour

[29] Although section 8(1) the Recognition of Customary Marriages Act provides that "A customary marriage may only be dissolved by a Court by a decree of divorce …", (which is what the international instruments require) it is well recognised that in practice, courts are rarely approached. So many people are, as under customary law, divorcing without approaching a court. See in this regard Mothokoa Mamashela 'New Families, New Property, New Laws: the practical effect of the Recognition of Customary Marriages Act 2004) 20 SAJHR 635 et seq.

[30] SALC *Report on Customary Marriages* : *Project 90 The Harmonisation of the Common Law and the Indigenous Law* August 1998 at 122; Jansen, supra 122

[31] SALC *Report on Customary Marriages* : *Project 90 The Harmonisation of the Common Law and the Indigenous Law* August 1998 at 102; See also Jansen RM supra at 120

[32] Akinnusi A 2000, "The consequences of customary marriages in South Africa: Would the Recognition of Customary Marriages Act, 1998 make any difference?" (2000)*Journal for Juridical Science* 25(2): 143 at 147

system, poverty and unemployment, urbanization and the breakdown of the extended family.[33] It also stands to reason that women now will be vulnerable to eviction and homelessness,[34] will often be left to care for children[35] and remain in a position where finding employment and acquiring property is comparatively difficult.

These detrimental consequences are, indeed, obvious, but we point out that they are especially harsh for older women who were further disadvantaged by apartheid restrictions on their education and freedom of movement.[36]

41. We point out too that the strategies that have been developed under the auspices of the United Nations to deal with gender equality, and particularly the Beijing Strategies, 1995, proceed from the recognition that the number of women living in poverty has increased disproportionately to the number of men, especially in developing countries, a phenomenon known as the feminization of poverty.[37] More pertinently, it is recognized that women's poverty is directly related *i.a.* to women's lack of access to land ownership and economic resources.[38]

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[33] These phenomena were remarked upon in the *Bhe* case.

[34] A Claassen '*Women, customary law and discrimination: the impact of the communal Land Rights Act*' *Women, customary law and discrimination'* at 48.

[35] See Mothokoa Mamashela "New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act" (2004) 20 *SAJHR* 616 at 620

[36] Bonthuys E 2001, Labours of love: Child custody and the division of matrimonial property at divorce. *THRHR* (64) 192 at 211

[37] Par 50.

[38] Par 53, Beijing Strategies.

42. We now proceed to deal with the position of women in polygynous marriages.

E POLYGYNOUS MARRIAGES

43. The position of women in polygynous marriages requires special consideration as they too are affected by the discriminatory regime perpetuated by section 7(1) of the Recognition Act.

44. Polygyny is expressly recognized under the KwaZulu Natal Codes[39] as well as under customary law generally. More pertinently, it is recognised as an institution in terms of the Recognition Act.[40] Although the South African Law Commission considered its abolition, it recommended the retention of the institution for several reasons: "*the most important of which are the difficulty of enforcing a prohibition and the fact that polygyny appears to be obsolescent*."[41] The expense involved in having more than one wife in circumstances where communities are very poor was regarded as one of the reasons for this.

[39] See section 36(2) of each Code.

[40] As recognised by this Court in the *Bhe* case at para 124, the question of the constitutional validity of polygynous unions has not, to date, been pronounced upon. That question raises difficult issues as recognized by the South African Law Commission Project 90 "The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages" August 1998 at pp 84-92.

[41] SALC Project 90 "The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages" August 1998 at x.

45. Indeed it would seem that polygyny is not widely practised in South Africa.[42] According to Mbatha et al:[43]

> *"Despite its prominence as a reason for denying legal recognition to Muslim and customary marriages, the practice of polygyny is actually rare in contemporary South Africa. The 2001 census indicates that out of a population of more than 30 million people over the age of 15, only 26 651 Africans 1 444 coloured and 484 Indian or Asian people were involved in polygynous marriages. This translates into 0.1 percent of the population over the age of 15."*

46. The marital property regimes of new polygynous marriages are governed by section 7(6) of the Recognition Act. Where a husband in a customary marriage wants to enter into a further customary marriage with another woman after the commencement of the Act, he must make an application to court to approve a written contract which will regulate the future matrimonial property system of his marriages. Where a first marriage is in community of property or subject to accrual, a court will terminate the matrimonial property system and effect a division of the matrimonial property.[44]

47. It is easy to see why it would in many cases probably be both unworkable and unjust to subject polygynous marriages to a community of property regime and thus why a separate regime has been created for new polygynous marriages. [This is not to say that there is no place for an in community regime in context of

[42] See SALC Report Project 90 *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* paras 6.1.1; 6.1.25

[43] 'Culture and Religion' *Gender Law and Justice* p. 177

[44] Section 7(6)

polygynous marriages, just that equitable provision must be made for the separation of estates between marriages.]

48. By parity of reasoning, it is difficult to see how the remedy that the Applicant seeks can work equitably, or indeed work at all, in context of pre-Act polygynous marriages, at least without further elaboration. For this reason we believe that a different remedy must be crafted by the Court for women in pre-Act polygynous marriages.

49. We point out that this was a difficulty that was identified by the South African Law Commission in its deliberations on pre-Act marriages and on the "in community regime" for customary marriages.[45]

50. However, it cannot be that because this raises certain practical difficulties that women in pre-Act polygynous marriages must continue to be subjected to an unconstitutional marital property regime. The need to protect the rights of women in polygamous marital relationship is specifically referred to in Article 6(c) of the Protocol on the Rights of Women in Africa which provides that : "*State parties must also enact appropriate national legislative measures to guarantee that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected*." The Constitution demands this too and the legislature ought to have devised an equitable solution.

[45] SALC Report p. 115, para 6.3.4.11

51. The difficulty that this Court is now presented with is the question whether it can devise an equitable remedy for women in pre-Act polygynous marriages bearing in mind its obligation to forge innovative remedies should this be required in the circumstances of a case[46] and bearing in mind too that it has not heard those affected directly.[47] What should, of course, be avoided, as in the *Bhe case*, is "prolonging the inequalities suffered" by those subject to an unconstitutional marital property regime and an attempt must, we submit, be made to craft an order "that best fits the circumstances …. to protect rights."[48]

52. We submit that it would be appropriate, just and equitable for this court to direct Parliament to remedy the defect within a reasonable time but in the interim to protect the interests of women in polygynous marriages. This may, but does not necessarily require the suspension of the order of invalidity of section 7(1) in respect of polygynous marriages. We propose that an order with the following effect will protect the interests of women in polygynous marriages in the interim.

53. At the very least, the right of all women in pre-Act polygamous marriages to own, manage and control marital property should be recognized in the interim. Accordingly, the references in section 6 and 7(1) to any matrimonial property

[46] *National Coaltition for Gay and Lesbian Equality and another v Minister of Home Affairs* 2000(2) SA 1 (CC) at para 27; the *Bhe* case at para 102.

[47] The *Bhe* case at para 123

[48] Id at para 123.

system at customary law must be interpreted in a manner consistent therewith and any rule of customary law preventing a woman to do so must not be applied.

54. The Court direct that, upon the termination or dissolution of a polygamous customary marriage (and in the absence of an agreement to the contrary as contemplated by section 7(4) of the Recognition Act), a court and the parties must apply the following principles:

The property acquired by the parties until a second marriage was concluded be regarded as the joint property of the parties as if the marriage was in community of property.

The property acquired after a second or subsequent marriage is concluded is to be divided in proportion to the respective contributions (both monetary and non-monetary) of the spouses to the respective marriage in a manner that is deemed by a court to be just and equitable taking into account, amongst other relevant considerations, the factors referred to in section 7(7) of the Recognition Act.

F. UNFAIR DISCRIMINATION: WOMEN IN PRE-ACT MARRIAGES AND OTHERS

55. We have submitted above that the primary discrimination that women in pre-Act marriages suffer is suffered as a result of the customary law, and that that discrimination is perpetuated in section 7(1) of the Recognition Act.

56. However, we submit that the class of women to which the Applicant belongs also suffers unfair discrimination by virtue of their exclusion from the protective mechanisms of the law, where women in new marriages are protected by a regime selected by Parliament as the appropriate regime.

57. We submit that the differentiation drawn between women in pre-Act and partners in new marriages constitutes discrimination. Only partners in new marriages are afforded the benefit of remedial measures adopted by the Recognition Act, which as the Respondents recognize, was enacted *i.e.* to bring the customary law of marriage in line with the Constitution.

58. The test for whether a differentiation amounts to discrimination was set out in *Harksen v Lane NO and others* 1998(1) SA 300 (CC) at par 54:

> "*[D]oes the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.*"

59. We submit that the differentiation that is drawn is on various grounds, some specified and some unspecified, and that, in any case, it amounts to discrimination:

Directly, it is drawn simply on the date on which a woman was married. Women in pre-Act marriages are deprived of the protection of the Constitution where all other women are not. Although this is not a specified ground, this ground of differentiation has the capacity to impair the dignity of women in pre-Act marriages as it tells them that they are less worthy of the protection of law than others. It says to those women who married during the pre-Constitutional era, under oppressive laws and in a period when customary law was "*lamentably marginalized and allowed to degenerate into a vitrified set of norms alienated from its roots in the community*"[49] that the law will not come to her aid.

Indirectly, it is drawn on the basis of age, a specified ground, as women who are in pre-Act marriages are likely to be older than people in other marriages. This we submit amounts to indirect discrimination on the basis of age.[50]

Indirectly, it is drawn also on the basis of gender and marital status, specified grounds, as it is only women in pre-Act customary marriages who are deprived of the remedial measures of the Recognition Act.

[49] *Bhe v Magistrate, Khayelitsha* 2005(1) SA 580 (CC) at para 43.

[50] *Pretoria City Council v Walker* 1998(3) BCLR 257 (CC) at paras 32 and 33.

60. We submit further that the discrimination is palpably unfair. The discrimination on the basis of age, gender and marital status is presumptively unfair.[51] But the discrimination based on the date of a marriage is also unfair.

61. In considering unfairness the Court considers whether the extent to which the discrimination has affected the rights or interests of the complainant and those similarly placed and whether it has led to an impairment of their dignity or constitutes an impairment of a comparably serious nature.[52] Factors relevant to this determination are the position of the complainants in society, whether they have suffered in the past from patterns of disadvantage, whether the discrimination is on a specified ground as well as the nature of the provision and the purpose sought to be achieved by it.

62. Moreover the Court, in considering the unfairness of a measure, looks at patterns of systematic disadvantage.[53] It also recognizes that unfair discrimination frequently has ongoing negative consequences, the continuation of which are not

[51] *Harksen v Lane NO and others* 1998(1) SA 300 (CC) at para 54.

[52] *Harksen v Lane*

[53] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) See O'Regan J's judgment, paras [40]-[42]; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at para [38] and *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) see para [51], [94]-[95]

halted immediately when the initial causes thereof are eliminated and unless remedied, may continue for a substantial time and even indefinitely.[54]

63. It cannot but be said that the women affected by section 7(1) constitute a vulnerable group in society and that they have suffered in the past from systematic and intersecting patterns of disadvantage. The nature of the harm suffered is referred to both by the Applicant and above. If not remedied, these will continue into the future as many women will continue to be subjected to a patriarchal and discriminatory marital property regime.

64. Nor is the unfairness mitigated by any purpose sought to be achieved. Indeed it is difficult to discern a clear purpose. In this regard, the State relies exclusively on the deliberations of the South African Law Commission, but when regard is had to its report, there is no compelling reason why a remedy could not be found for women in pre-Act marriages.

65. It appears that the South African Law Commission was concerned about upsetting rights already acquired under existing marriages when it decided to make the application of the Recognition Act prospective.[55]

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[54] *National Coalition For Gay And Lesbian Equality And Another v Minister Of Justice And Others* 1999 (1) SA 6 (CC) at para [60]

[55] See SALC *Report on Customary Marriages* : *Project 90 The Harmonisation of the Common Law and the Indigenous Law* August 1998 at 6.3.4.20

66. Although the concern is valid and must be addressed, it is not sufficient to trump the rights of those affected by the legislation. As regards the position of third parties we align ourselves with the submissions of the Applicant.

67. Moreover, it is not sufficient that the Recognition Act allows for parties in pre-Act marriages to vary their matrimonial property system as provided for in section 7(4)(a) of the Recognition Act.[56]

Firstly, parties must apply *jointly* and it is obviously difficult for the wife to persuade her husband to relinquish his sole discretion and control of the matrimonial estate in a culture pervaded by patriarchy.

Secondly, the cost factor involved in bringing the application is a major stumbling block.

Thirdly, the lack of information and education makes this option inaccessible for those it was meant to help.

68. In the premises we submit that the differentiation drawn between women in pre-Act marriages and people in other marriages constitutes unfair discrimination.

G CONCLUSION

[56] See Jansen, supra, 121.

69. In conclusion we reiterate our support for the remedy sought by the Applicant subject to appropriate provision being made for women in polygynous pre-Act marriages.

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SUSANNAH COWEN

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NOBAHLE MANGCU-LOCKWOOD

CHAMBERS, CAPE TOWN

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT50/08

ELIZABETH GUMEDE (born **SHANGE**) Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

PREMIER OF KWAZULU NATAL Third Respondent

KWAZULU NATAL MEC FOR TRADITIONAL AND LOCAL GOVERNMENT Fourth Respondent

AMOS GUMEDE Fifth Respondent

MINISTER OF HOME AFFAIRS Sixth Respondent

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