IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No :CCT 50/08

In the matter between:

ELIZABETH GUMEDE (born SHANGE)	**Applicant**
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	**Second Respondent**
PREMIER OF KWAZULU-NATAL	**Third Respondent**
KWAZULU-NATAL MEC FOR TRADITIONAL & LOCAL GOVERNMENT AFFAIRS	**Fourth Respondent**
AMOS GUMEDE	**Fifth Respondent**
MINISTER OF HOME AFFAIRS	**Sixth Respondent**

APPLICANT'S HEADS OF ARGUMENT

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THE ISSUE

1. On 29 May 1968 the applicant and the fifth respondent entered into a customary marriage. The marriage relationship has irretrievably broken down, and a divorce action is pending in the North-Eastern Divorce Court.

2. The issue in this case is the proprietary consequences of the customary marriage, and particularly in the context of the pending divorce action.

3. The applicant's primary complaint arises from the customary law. It is that the matrimonial property regime to which she is subject, discriminates against her because she is a woman, and because she is an African. The nub of her complaint is the following:

> *" ... the law discriminates between my husband and me. It makes him the sole owner of all of the property acquired during our marriage. It creates a default situation in which, upon divorce, he will remain the owner of all of that property, without having to make any showing as to why that should be the case. I will be the owner of none of the property, and will remain property-less, unless I am able to persuade the divorce court to order the transfer of some of 'his' property to me, or the forfeiture of the patrimonial benefits of the marriage."*[1]

[1] Gumede para 10 Vol 1 p 136

4. The applicant's secondary complaint is that while the Recognition of Customary Marriages Act 120 of 1998 ("the Recognition Act") recognises the discriminatory nature of this provision of the customary law, and rectifies the discrimination[2] in respect of customary marriages entered into after the commencement of the Recognition Act (15 November 2000), it perpetuates the discrimination in other customary marriages. It is under-inclusive.

5. It is not however the Recognition Act which is the primary cause of the discrimination. The discrimination is caused by the customary law in its various manifestations, including the statutory forms which are the subject of this application. If the Recognition Act had never been enacted, this matter would still be before this Court, because it is the customary law which is the underlying cause of the discrimination.

6. These heads of argument address the following matters:

   6.1. The facts

   6.2. The unfair discrimination

   6.3. The Divorce Act

   6.4. Ripeness

   6.5. Justification and retrospectivity

[2] This is one of the purposes of the Recognition Act: Gumede para 74 Record p 29; not disputed by the government: Chavalala para 55 Vol 2 p 116

THE PROCEEDINGS IN THE COURT A QUO

7. In the Court a quo, the applicant sought and obtained an order[3] declaring that:

7.1. *section 7(1) of the Recognition Act is inconsistent with the Constitution and invalid.* (Section 7(1) provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.)[4]

7.2. *the inclusion of the words "entered into after the commencement of this Act" in section 7(2) of the Recognition Act is inconsistent with the Constitution and invalid.* (Section 7(2) provides that a customary marriage "entered into after the commencement" of the Recognition Act is a marriage in community of property, subject to certain exceptions which are not relevant here.)

7.3. *section 20 of the KwaZulu Act on the Code of Zulu Law No. 16 of 1985 is inconsistent with the Constitution and invalid.* (Section 20 provides that the family head is the owner of and has control of all family property in the family home.)

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[3] Judgment Vol 2 159-160.

[4] Although the underlying problem is the customary law, the issue would not be resolved by simply declaring the relevant provisions of the customary law invalid. That would leave unanswered the question of what proprietary regime applies to pre-Recognition Act customary marriages. The answer lies in the application of the Recognition Act, which provides that customary marriages are marriages in community of property.

7.4. *section 20 of the Natal Code of Zulu Law Proclamation R151 of 1987 is inconsistent with the Constitution and invalid.* (Section 20 provides that the family head is the owner of and has control of all family property in the family home.)

7.5. *section 22 of the Natal Code of Zulu Law Proclamation R151 of 1987 is inconsistent with the Constitution and invalid.* (Section 22 provides that the "inmates" of a kraal are in respect of all family matters under the control of and owe obedience to the family head.)

8. The applicant also sought an order declaring that a customary marriage in which a spouse is not a partner in any other existing customary marriage, produces the legal consequences of a marriage in community of property. This addresses the content of the customary law outside the statutory versions. The Court a quo did not make an order to this effect. We accept that such an order is not necessary if the first two orders are confirmed.

9. The applicant now seeks confirmation of the orders made by the Court a quo. She also seeks an order for costs against those respondents which have opposed this application, namely the first, second, third, fourth and sixth respondents.[5] For the sake of convenience we refer to them as the government or the government respondents.

[5] The fifth respondent has not participated in these proceedings at all.

THE FACTS

10. The principal facts in this case are those set out in the applicant's founding and replying affidavits.

11. The fifth respondent has not denied any of those allegations. The government respondents plainly do not have, and do not profess, any knowledge of the circumstances of the applicant and her husband.

12. The government respondents have produced a somewhat equivocal affidavit which the fifth respondent made in other proceedings.[6] In the nature of things it is not directly responsive to the key factual matters raised in this application. Where it does traverse those matters, it does so in a manner which raises more questions than it answers.[7]

13. It may be that in the divorce action which is to follow, the fifth respondent will allege and prove facts other than those alleged by the applicant in this case. But this application has to be decided on the facts which have been alleged and proved in this case. It is submitted that the consequence is that this application has to be decided on the basis of the facts alleged by the applicant, unless they are plainly not credible.

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[6] Annexure G13 to the affidavit of Mr Chavalala: Vol 123

[7] For example the description by Mr Gumede of "(t)he property I know of" (para 4) p 124, which excludes any reference to either the house where he lives, or the movables at that property.

14. The applicant and the fifth respondent were married on 29 May 1968.[8]

15. During the course of the marriage, the fifth respondent has acquired in his name the following property:[9]

15.1. an immovable property at Umlazi Township (AA521), where the applicant lives;

15.2. an immovable property at Adams Mission, where he lives;

15.3. a pension which he receives as a result of his employment with Rennies Cargo, latterly as a foreman, until his retirement in April 2000;

15.4. furniture and appliances at the house in Umlazi, the estimated value of which is R40 000; and

15.5. furniture and appliances at the house at Adams Mission, which is probably of about the same value.

16. Under the customary law and its codified forms, the fifth respondent is the owner of all of this property.

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[8] Gumede para 11 Vol 1 p 12

[9] Gumede para 18-32 Vol 1 p 13-16

17. During the marriage, the fifth respondent did not permit the applicant to work. Accordingly she was not in a position to make a direct monetary contribution towards the purchase of the house.[10]

18. She did however perform all the requisite tasks to look after and maintain this home as the family home for the fifth respondent, herself and their four children. She was the primary care-giver for the children. She performed numerous functions and tasks of a family and domestic nature.[11]

19. Even if the applicant had purchased AA 521 Umlazi, under the law then applicable it would still have been registered in the name of, and would have become the legal property of, the fifth respondent.[12]

20. AA 521 Umlazi contains furniture and appliances acquired by the applicant with a value which she estimates at about R40 000. A schedule setting out the details of these furnishings and appliances is annexure C to her founding affidavit.[13]

21. AA 521 Umlazi is the applicant's home. She has no other residence or family home.[14]

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[10] Gumede para 22 Vol 1 p 14

[11] Gumede para 23 Vol 1 p 14

[12] Gumede para 24 Vol 1 p 15

[13] Gumede para 25 Vol 1 p 15; Annexure C p 36

[14] Gumede para 26 Vol 1 p 15

22. The applicant's father died in 1985, and her mother died in 1994. At the time of their deaths, they lived on her father's employer's farm, which has since been sold. The applicant does do not have any living brothers. Her sisters are domestic workers who have insufficient means to care for her.[15]

23. It is essential to the applicant that she is able to remain living in AA521. She has literally nowhere else to live.[16]

24. The applicant is an old-age pensioner. She lives off her pension and support which she receives from her children.[17] She receives no maintenance from the fifth respondent.[18]

25. In the divorce action, the fifth respondent seeks an order of divorce. If that order is granted, the applicant will be left property-less and homeless.[19]

26. The fifth respondent has offered to allow the property at AA521 Umlazi to be sold and the proceeds to be divided equally.[20] If the divorce is ordered on this basis, the consequence of this will be:

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[15] Gumede para 27 Vol 1 p 15

[16] Gumede para 28 Vol 1 p 15

[17] Gumede para 35 Vol 1 p 17

[18] Gumede para 34 Vol 1 p 17

[19] G12 Vol 2 p 119; Gumede para 10 Vol 2 p 136

[20] G13 para 8 Vol 2 p 125

26.1. The applicant will receive the value of approximately one quarter of the properties held by the fifth respondent, namely one half of one of the two properties;

26.2. This will not be enough to enable her to buy another house.

26.3. The fifth respondent will have the sole benefit of the pension.

26.4. The fifth respondent will own the furnishings and appliances at AA521 Umlazi.

26.5. The fifth respondent will own the furnishings and appliances at Adams Mission.[21]

27. Quite remarkably in the circumstances, Mr Chavalala on behalf of the government asserts that the fifth respondent has tendered a half share of the matrimonial property.[22]

28. The government respondents apparently feel that this would be a fair and reasonable outcome of a marriage of nearly forty years. This view can only be justified on the basis of the very matter of which the applicant complains, namely an assumption that all of the property in the marriage belongs to her husband.

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[21] Gumede para 22-23 Vol 2 p 139-140

[22] Chavalala para 49 Vol 2 p113

THE UNFAIR DISCRIMINATION

29. It is not in dispute that the customary law in its various manifestations has the result that the fifth respondent is the owner of all of the property which was acquired during the course of the marriage:

29.1. the immovable property at AA 521 Umlazi Township;

29.2. the immovable property at Adams Mission;

29.3. the pension which the fifth respondent receives as a result of his employment during the marriage;

29.4. furniture and appliances at the house in Umlazi, which the applicant purchased; and

29.5. furniture and appliances at the house at Adams Mission.

30. It is submitted that this is self-evidently discriminatory:

30.1. it is discriminatory as between wife and husband;

30.2. only women are subjected by the law to such consequences;

30.3. only Africans are subjected by the law to such consequences.

31. The discrimination is on two of the prohibited grounds listed in section 9(3) of the Constitution: gender and race. The discrimination is accordingly unfair unless it is established that it is fair: section 9(5).

Women as holders of property under customary law

32. In the *Bhe* case,[23] Langa DCJ (as he then was) pointed out that the customary law of succession needs to be understood in its context. That context has changed – but the customary law has not kept pace, because it has been captured in legislation, in textbooks, in the writings of experts and in court decisions without allowing for the dynamism of customary law in the face of changing circumstances.[24]

33. The customary law has been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones. Langa DCJ quoted with approval what was said by Prof Nhlapo in this regard:

> *Although African law and custom has always had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young. . . . Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a social and legal sense….*

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[23] Bhe and others v Magistrate Khayelitsha and Others 2005 (1) SA 309 (CC)

[24] At [75], [80], [82]

The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became "outlaws".[25]

34. Langa DCJ referred to Prof Nhlapo's conclusion that it is imperative to protect people from distortions masquerading as custom, especially for those whom they disadvantage so gravely, namely women and children.[26] He held further

At a time when the patriarchal features of Roman-Dutch law were progressively being removed by legislation, customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus

[25] At [89], citing Nhlapo 'African Customary Law in the Interim Constitution' in Liebenberg (ed) The Constitution of South Africa from a Gender Perspective (Community Law Centre, University of the Western Cape in association with David Philip, Cape Town, 1995) at 162.

[26] At [89]

> *customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner.*[27]

35. Langa DCJ held that the principles of primogeniture violated the right of women to human dignity because "it implies that women are not fit or competent to own and administer property". The dignity of women is further affronted by "the fact that, as women, they are also ... denied the right ... to be holders of, and to control property".[28]

36. We submit that this is the clearest statement of the values which underlie the rules of formal customary law which are challenged in this application, and of why those rules are incompatible with the Constitution.

37. Prof Bennett points out that in traditional society, on divorce a woman returned to her family and to the care of her father, and the children remained the responsibility of the father.[29] The impact of her inability to own property during the marriage and to retain a portion of the estate was thus mitigated. However in contemporary society, while this context has

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[27] At [90]

[28] At [92]

[29] T W Bennett *Customary Law in South Africa* (2004) 279.

changed,[30] the legal rule has remained unchanged. This case illustrates the stark injustice which can result: the woman whose marriage has ended is left property-less and homeless.

38. Prof Bennett points out that in situations of chronic poverty and weakening family ties, divorced woman are unlikely to find a welcome in their natal families.[31] This case illustrates the fact that in some cases there will not be a natal family at all, except of a most distant kind.

39. It must follow that the discrimination in customary law is inconsistent with the Constitution.

40. The government seeks to justify the differentiation in the Recognition Act by reference to the consequences on divorce. That does not address the underlying discrimination in the customary law.[32] We submit however that even on its own terms, that defence must fail. We now turn to that subject.

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[30] Bhe at [80]; Bennett 279.

[31] Bennett 279

[32] It is noteworthy that in civil marriages the default position is community of property. The primary purpose of this is to protect the financially weaker spouse, usually the woman: Gumede para 73 p 29; not disputed by the government: Chavalala para 55 Vol 2 p 116

THE IMPACT OF THE DIVORCE ACT

41. The Divorce Act 70 of 1979 amended the substantive law relating to divorce.[33]

42. Section 8(4)(a) of the Recognition Act provides that a court granting a decree for the dissolution of a customary marriage *"has the powers contemplated in sections, 7, 8 and 9 of the Divorce Act, 1979 and section 24(1) of the Matrimonial Property Act, 1984".*

43. The question which arises is whether this provision

43.1. addresses only the powers of the court granting a decree of a divorce in respect of a customary marriage – in other words, is only jurisdictional; or also

43.2. changes the substantive law of divorce with regard to customary marriages.

44. The government assumes that the latter interpretation is correct.[34]

45. The difficulty with that interpretation is that the sections of the Divorce Act on which the government relies - sections 7(3), (4), (5) and (6) - apply to

[33] See the preamble to the Act.

[34] Chavalala para 16-19 Vol 2 p100-101.

marriages out of community of property. Customary law does not produce a marriage out of community of property.[35]

46. Two of the leading texts have the following to say in this regard:

46.1. Professors Cronje and Heaton[36] contend that a divorce court does have the power to apply section 7(3) to customary marriages, even though they are not out of community of property, by virtue of section 8(4)(a) of the Recognition Act;

46.2. Prof Bennett[37] asserts that this would require "an adventurous interpretation" of section 8(4)(a), albeit one which would be "in line with the general policy underlying" the Recognition Act.

47. The matter does not appear to have been determined by the courts.

48. To the extent that section 8(4)(a) of the Recognition Act is ambiguous, it must be interpreted in the light of section 39(2) of the Constitution, which provides a guide to statutory interpretation under the constitutional order. It states:

> *"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights."*

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[35] Bennett 281

[36] DSP Cronje & J Heaton *South African Family Law* (2nd ed 2004) 195-6

[37] Bennett 282

49. As this Court has explained:

> *"This means that all statutes must be interpreted through the prism of the Bill of Rights ... the Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values."*[38]

50. An interpretation which applies the substantive provisions of the Divorce Act to customary marriages would promote the achievement of the constitutional value of equality and the right to equality.

51. We submit however that it is not necessary to decide this matter in this case, because even if section 7(3), (4), (5) and (6) of the Divorce Act are applicable to customary marriages, the proprietary regime created by the customary law is inconsistent with the Constitution. We submit that this is so both during the marriage, and at the time of the divorce.

The position during the marriage

52. Section 20 of the Natal Code and the KwaZulu Act both provide in terms that the family head is the *"owner"* of all family property. He has *"charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants or necessities, or for general family purposes or for the entertainment of visitors."*

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[38] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) at [21] to [22].

53. The result is that all of the assets are his. The customary wife is precluded from dealing with the assets, even if she actually earned them herself. What is hers becomes his, and only his.

54. This is patently discriminatory and inconsistent with the Constitution.

The position on divorce

55. Section 7(3) of the Divorce Act provides that the court may on divorce, on application by one of the parties, order that assets of one party be transferred to the other. This power is subject to, inter alia, section 7(4).

56. Section 7(4) states that an order under section 7(3) *"shall not be granted unless the court is satisfied that it is equitable and just"* by reference to various factors.

57. The default position is therefore that the husband retains ownership of all of the property acquired during the marriage. The wife bears an onus to persuade the court that it is equitable and just that she be awarded some of the property.

58. One can test this by a simple question: if no evidence is led at the divorce action, what will the result be? The clear answer is that in that event, the fifth respondent will be the owner of all of the property acquired during the marriage. The applicant will be left homeless and property-less. We submit that this is self-evidently discriminatory.

59. The applicant expresses this as follows:

> *"I submit … that it is quite plain that the law discriminates between my husband and me. It makes him the sole owner of all of the property acquired during our marriage. It creates a default situation in which, upon divorce, he will remain the owner of all of that property, without having to make any showing as to why that should be the case. I will be the owner of none of the property, and will remain property-less, unless I am able to persuade the divorce court to order the transfer of some of 'his' property to me, or the forfeiture of the patrimonial benefits of the marriage."*[39]

60. The attitude of the government is that there is nothing discriminatory in this situation. We submit that it is patently and insupportably discriminatory against black women like the applicant who were married in customary unions before the commencement of the Recognition Act.

61. The position of the applicant in this regard differs sharply from that of women who are not black, or of black women who entered into customary marriages after the commencement of the Recognition Act. They do not bear any onus in order to avoid being left property-less and homeless on the termination of their marriages. However on the applicant's divorce, the fifth respondent will automatically remain the owner of all of the property which has been described above, unless she is able to persuade the court to the contrary.

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[39] Gumede para 10 Vol 2 p 136

62. It follows that even on the generous (or "adventurous") interpretation of the Recognition Act and the Divorce Act, the customary law creates a result which is discriminatory and inconsistent with the Constitution.

63. The Constitution is intended to create rights which are to be exercised by real people in the real world. It is not a set of theoretical constructs. In the real world, as a purely practical matter, most customary law wives will not have the skills or resources to apply to court and persuade the court to make a distribution order. It is discriminatory and inconsistent with the Constitution to require that they do this in order to have any prospect of securing an equitable property outcome.

64. In *Bhe*, this Court recognized the inadequacy of requiring poor and vulnerable people "who are not in a position to ensure that their rights are protected and enforced" to engage in litigation,[40] and that "only those with sufficient resources, knowledge and education or opportunity to make an informed choice will be able to benefit" from such remedies.[41]

65. It is accordingly submitted that whichever of the competing interpretations is given to the Recognition Act and the Divorce Act, it does not cure the discrimination in the customary law.

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[40] At [96]

[41] At [66]

66. The government's contention amounts to this: The proprietary discrimination against women in customary marriages was cured by section 8(4)(a) of the Recognition Act, which applied section 7 of the Divorce Act of 1979.

67. That raises the obvious question: If that is so, then why was it necessary to enact section 7(2) of the Recognition Act?[42] That section was plainly enacted to cure the discrimination against women in customary marriages. But on the government's argument, the result of the enactment of section 8(4)(a) of the Recognition Act was that there was no such discrimination.

68. We respectfully submit that the denial of continuing discrimination is insupportable. The discrimination has now been cured in respect of post-Recognition Act customary marriages. However, it continues against women in pre-Recognition Act customary marriages.

[42] Chavalala acknowledges that "one of the principal aims of the Recognition Act is to ensure that women who had entered into customary marriages are adequately protected, and that their position is not inferior to those who had contracted civil marriages": para 41 Vol 2 pp 109-110

RIPENESS

69. The government contends that this application is not "ripe" in that the divorce court must first hear the evidence with regard to the divorce, and make an order as to the distribution of the matrimonial property. It appears to contend that the applicant can raise these constitutional questions before the divorce court, and may appeal on these grounds if the divorce court finds against her.[43]

70. We submit that this cannot be correct, for two reasons.

71. First, the question which this case raises is what law the divorce court must apply in determining the division (if any) of the matrimonial property. That has to be determined before the divorce court decides what facts are relevant, determines the facts, and applies the law to those facts.

72. Secondly, the divorce court does not have jurisdiction to make an order as to the validity of the laws. Only this Court, the Supreme Court of Appeal, the High Court or a court of equivalent status can do so.[44] A court of lower status may not enquire into or rule on the constitutionality of any legislation.[45] It is therefore not open to the applicant to raise these issues in the divorce court. If she does raise them, the divorce court will be correct to dismiss them, and that will not provide any basis for an appeal.

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[43] Chavalala para 30 Vol 2 p105

[44] Constitution, sec 172(2)

[45] Constitution, sec 170

73. The government relies on the holding in S v Mhlungu[46] that where it is possible to decide a case without reaching a constitutional issue, that is the course which should be followed.

74. The answers to that proposition are the following.

75. First, it is not possible to decide this case without reaching a constitutional issue. The constitutional issue is the only issue raised in this case (as opposed to the divorce case).

76. Secondly, the fact that the divorce court does not have jurisdiction to enquire into or rule on the constitutionality of any legislation obliges the applicant to raise this issue now, in these separate proceedings.

77. This Court has consistently held that a party who wishes to challenge the constitutionality of a provision in a statute must raise the challenge at the time of the institution of the legal proceedings. A party cannot hope to supplement and make its case on appeal.[47]

78. If the government contends that the applicant should contest the divorce proceedings, and then raise the constitutional questions if she is unsuccessful, then that too is plainly not possible:

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[46] 1995 (3) SA 867 (CC) at [59]

[47] Prince v President, Cape Law Society and others 2001 (2) SA 388 (CC); Zondi v MEC for Traditional and Local Government Affairs and others 2005 (3) SA 589 (CC) at [19]

78.1. she will not be able to raise the constitutional questions in an appeal against the decision of the divorce court, because that court will not have erred in refusing to consider the constitutional questions;

78.2. she will not be able to raise the constitutional questions in new proceedings in this court, because the divorce proceedings will have been concluded. The judgment against her will be *res judicata*.

79. In other words, if the divorce court applies the existing law correctly in terms of its jurisdictional powers, and the result is unfavourable to the applicant, she will be left without any remedy at all.

80. The applicant is therefore compelled to raise the constitutional questions before the divorce court deals with the case, in order to ensure that the divorce court applies the correct law.

81. The government deponent repeatedly asserts that the applicant is asking this court to determine matters which have to be determined by the divorce court. That is not correct. What the applicant asks is that the court *"rectify the existing unequal position created by the law, in order to 'level the playing field' in the divorce action."*[48]

[48] Gumede para 12 Vol 2 p 137

JUSTIFICATION AND RETROSPECTIVITY

82. The burden of justification lies on the government:

> *"[19] It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the Government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the Government wishes to defend the particular enactment, it then has the opportunity - indeed an obligation - to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by Government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment."*[49]

[49] Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as amicus curiae) 2001 (4) SA 491 (CC)

83. The government respondents misconceive the applicant's primary complaint. They appear to understand the primary complaint to be the "differentiation" contained in section 7 of the Recognition Act.[50] But it is not the Recognition Act which creates the discrimination – it is the customary law, in its various manifestations, which does so. The complaint against the Recognition Act is that it is under-inclusive in remedying that discrimination against African women.

84. What the government therefore has to justify is the discrimination in customary law. It has not attempted to do so. We submit that in the light of the decision of this Court in *Bhe*, it is impossible to provide any justification for the discrimination.

85. The government has to some extent sought to justify the discrimination or differentiation in the Recognition Act, by referring to the consequences of retrospective amendment of the property regimes of the people affected. It has done this by way of passing and indirect reference to the report of the South African Law Commission on customary marriages.[51] In the court a quo, the government contended that if section 7(2) of the Recognition Act had also applied to existing customary marriages, the Act would have been vulnerable to constitutional challenge.

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[50] Chavalala para 36 et seq. Vol 2 p 107 Although the deponent states (para 37) that he will address the provisions of the KwaZulu Act and the Natal Code, he does not do so.

[51] Chavalala para 45-46 Vol 2 p112.

Constitutional invalidity of statutory redress of inequality?

86. We submit that the short answer is that such legislation would have been a measure taken in terms of section 9(2) of the Constitution in order to redress past discrimination. The practical effect of section 9(2) is that the institution responsible for a measure "can defend it by showing that it meets the requirements of s 9(2) of the Constitution". It is therefore a "shield" against other rights that are sought to be vindicated against such a measure.[52] Section 9(2) would have shielded the legislation from challenge on the basis of rights allegedly affected by it.

87. In Van Heerden, this Court emphasised that the achievement of substantive equality is a central aspect of the Constitution, and that equality:

> *"... is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."*[53]

88. The Court referred to the constitutionally approved method of *"restitutionary measures"* which *"provide for the achievement of full and equal enjoyment of all rights and freedoms"*. Section 9(2) *"authorises legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination"*. The Court described section 9(2)

[52] Currie & De Waal *The New Constitutional & Administrative Law* vol 1 (2001) at 361; Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC) at [38]

[53] Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC) at [22]

as allowing for *"regstellende aksie"*, which is *"consonant with the remedial or restitutionary component of our equality jurisprudence"*.[54]

89. The Court also held that *"[e]quality before the law protection in s 9(1) and measures to promote equality in s 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes"* and that *"our Constitution, ... read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality"*.[55]

90. We submit that the proper analysis of the question of justification is the following:

90.1. There is proprietary discrimination against women married in customary marriages.

90.2. That discrimination is unfair.

90.3. That discrimination persists in pre-Recognition Act customary marriages.

90.4. The government has failed to offer any justification for that discrimination.[56] There is none.

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[54] Van Heerden at [28] and [29]

[55] At [31]

[56] We note that as Farlam J (as he then was) pointed out in S v K 1997 (9) BCLR 1283 (C), it is difficult to see how discrimination that the Constitution characterises as "unfair", because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, can ever be acceptable and "reasonable" in an open and democratic

90.5. The discrimination is accordingly inconsistent with the Constitution, and ought to be corrected.

90.6. It may however be contended that an order ought to be made in terms of section 172(1)(b)(i) of the Constitution, limiting the retrospective effect of the order of invalidity.

91. The government has not contended for an order in terms of section 172(1)(b)(i). If it seeks such an order, the burden is on it to adduce evidence in support of such an order. It has not done so. However, we now address that question.

Limitation of declaration of constitutional invalidity?

92. There are two possible reasons for limiting the retrospective effect of an order: the impact on parties to existing marriages, and the impact on third parties. We deal with each of these in turn.

Impact on parties to existing marriages

93. The common law of marriage discriminated grossly against women. At the heart of that discrimination was the marital power. Chapters II and III of the Matrimonial Property Act 88 of 1984 ended this discrimination. They were the result of "evolving societal notions of gender equality within marriage and the equal worth of spouses". They abolished the "onerous and dated" rules

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society based on human dignity, freedom and equality, and therefore justifiable under section 36 of the Constitution.

of the common law based on "boundless patriarchy in a setting where the husband wielded marital power over the wife and children born of the marriage, and was the exclusive administrator of the joint estate". In this way, the Act "made drastic inroads into the theoretical unity and inviolability of the joint estate and recast the common law of marriage irreversibly".[57] It fundamentally, and at the stroke of a pen, changed the patrimonial consequences of a marriage in community of property.

94. When the Matrimonial Property Act of 1984 was introduced, the abolition of the marital power applied only to marriages contracted after the date of its commencement.

95. However, it was fairly soon recognised that the continued discrimination in pre-1984 marriages was indefensible. In 1993, section 11 of the Act was amended by section 29 of the General Law Fourth Amendment Act 132 of 1993. The result was that section 11(1) and (2) abolished the marital power without regard to the date of marriage. This "drastic inroad" into the unity and inviolability of the joint estate, which "recast the common law of marriage irreversibly", was made completely retrospective. And section 11(3) now provided

[57] Van der Merwe v Road Accident Fund 2006 (4) SA 230 (CC) at [29] – [30]

"The provisions of Chapter III[58] *shall apply to every marriage in community of property irrespective of the date on which such marriage was entered into."*

96. Public policy required Parliament, in the pre-Constitutional era, to legislate with retrospective effect to correct a glaring injustice. We submit that the present case is an a priori situation: now we have a Constitution which makes such glaring injustice impermissible. Constitutional values and public policy require that this glaring injustice be corrected wherever it is manifested.

97. In *Bhe*, this Court recognized the dangers of unqualified retrospectivity of an order of constitutional invalidity. However, it was held that if the "statutory provisions and customary law rules that have been found to be inconsistent with the constitution are so egregious that an order that renders the declaration fully prospective cannot be justified", then retrospectivity is justified.[59] In this case, a purely prospective order would be meaningless, as the Recognition Act already provides for customary marriages since 15 November 2000 to be in community of property.

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[58] which deals with various related consequences of marriage in community of property

[59] At [126]

98. The government relies on section 7(4) of the Recognition Act, which provides that the spouses in a pre-Recognition Act customary marriage may jointly apply to a court for a variation of heir matrimonial property system.[60]

99. This proposition amounts to the following: the default position created by the law is stark inequality, but the parties may (with the approval of a court) agree to equality. We submit that in a constitutional order, exactly the opposite should apply: the default position created by the law must be equality, and the parties may (with the approval of a court) agree to inequality.

100. If the order is made with fully retrospective effect, this will be the consequence of section 7(4).

101. To the extent that it might be contended that a wife in a customary marriage has chosen her marital regime, and must live with its consequences, we submit that the answer is provided by the judgment of Moseneke DCJ in the *Van der Merwe* case. On behalf of this Court, he held that "the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or the holders of the rights in issue".[61] The phrase "the conduct of litigants" referred to an argument made in that case that the litigant concerned had chosen a regime of community of

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[60] Chavalala para 54 Vol 2 p115

[61] At [61]

property, and that it was therefore "not open to her to challenge the constitutional validity of the law she opted to marry under".[62]

102. We submit that in any event, it is trite that in patriarchal societies, the gender power relations are such that women find it exceptionally difficult to dictate the terms of their marriages. The argument of "choice" simply does not address the vulnerable situation of women in the real world.

Impact on third parties

103. The Matrimonial Property Act provided safeguards to protect the interests of third parties affected by the changes which it introduced:

103.1. Section 11(4) saved the legal consequences of acts done or omissions or facts existing before the abolition of the marital power.

103.2. Section 15(9)(a) provided protection to a person who enters into a contract contrary to the provisions of the Act which require the consent of both spouses, where the contracting party did not know and could not reasonably have known that the contract was being entered into contrary to those provisions.

103.3. Section 15(9)(b) provided for an appropriate adjustment, in such circumstances, upon the division of the joint estates.

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[62] At [74]

104. Section 7(3) of the Recognition Act makes Chapter III of the Matrimonial Property Act applicable to a customary marriage which is in community of property. To the extent that it may be necessary further to protect third parties, the order of invalidity could also incorporate a provision equivalent to section 11(4) of the Matrimonial Property Act.

105. We accordingly submit that the interests of third parties provide no adequate reason for the perpetuation of the discrimination against women who have entered into pre-Recognition Act customary marriages.

106. The objection to the impact on the interests of third parties is thus no more compelling than it was in the case of the changes brought about by the Matrimonial Property Act.

107. It is in any event not clear how the interests of third parties would be affected detrimentally by the imposition of a community of property regime. In the case of debts incurred by the husband under the customary law regime, these would now become debts of the joint estate, against which a creditor can execute in the event of default, as the spouses are joint debtors.[63] As we have pointed out, section15 (9) of the Matrimonial Property Act provides for deemed consent of the other spouse for transactions with bona fide third parties.

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[63] Du Plessis v Pienaar 2003 (1) SA 671 (SCA).

CONCLUSION

108. The applicant submits that the Constitution requires, in relation to the proprietary consequences of marriage, that:

108.1. women in a customary marriage should be treated equally with men and with each other, irrespective of whether that marriage was entered into before or after the commencement of the Recognition Act;

108.2. women married before 15 November 2000 should be treated equally with men and with each other, irrespective of their race.

109. It is submitted that the impugned provisions of the statutes are accordingly inconsistent with the Constitution, and must therefore be declared invalid.[64]

110. The applicant seeks confirmation of the order made by the High Court, and an order for costs.

I ACKNOWLEDGE RECEIPT OF THIS DOCUMENT, ON BEHALF OF THE STATE ATTORNEY
12h00 2008/08/26
TIME RECEIVED DATE
SIGNATURE

GEOFF BUDLENDER

Applicant's counsel
Chambers
Cape Town

Received copy hereof without prejudice
this 26 day of 08 2008
11h54
ZUBEDA K. SEEDAT & CO.

[64] Constitution, section 172(1)(a)