

**Case no: 4225/2006**

In the matter between:

**ELIZABETH GUMEDE**

**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**

In the application to be admitted as *amicus curiae* of:

Yasmin Carrim

Happy Masondo

Lebogang Malepe

Alison Tilley

Shameela Cassiem

acting in their capacity as

Trustees of the Women's Legal Centre Trust

("the Applicant")

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## FOUNDING AFFIDAVIT

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I, the undersigned,

**SIBONGILE NDASHE**

do hereby make oath and state that:

1. I am an attorney at the Women's Legal Centre ("the Centre"), Cape Town and am an admitted attorney in the High Court of South Africa. I am duly authorised by the Women's Legal Centre Trust ("the Trust") to make this Affidavit and to bring this application on behalf of the Trust to be admitted as an *amicus curiae* in terms of a Resolution of the Trustees.
2. The facts contained herein are to the best of my knowledge true and correct unless otherwise stated or indicated by the context.
3. This is an application brought in terms of Rule 16A of the Uniform Rules of Court for the admission of the Trust to intervene as an *amicus curiae* in the above matter for the purposes of making submissions to the Court concerning the Applicants application to have section 7(1) of the Recognition of Customary Marriages Act No. 120 of 1998 ("the Recognition Act"), unconstitutional and invalid to the extent of its inconsistency ("the application").

Declaring that 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;

Declaring that the inclusion of the words “entered into after the commencement of this Act in section 7(5) of the Recognition Act is inconsistent with the constitution and invalid;

Declaring that section 20 of the KwaZulu Act on the Code of Zulu Law No. 16 of 1985 is inconsistent with the Constitution and invalid;

Declaring that section 20 of the Natal Code of KwaZulu Law Proclamation R151 of 1987 is inconsistent with the Constitution and invalid;

Declaring that section 22 of the Natal Code of KwaZulu Law Proclamation R151 of 1987 is inconsistent with the Constitution and Invalid.

Declaring that a customary marriage, in which a spouse is not a partner in any of the existing customary marriage, produces the legal consequences of a marriage in community of property.

Declaring that a spouse in a customary marriage is entitled, on divorce, to claim maintenance from the other spouse.

Ordering those respondents who oppose this application to pay the costs, jointly and severally, the one paying, the other to be absolved.

Referring this order to the Constitutional Court for confirmation

**THE INTEREST OF THE WOMEN’S LEGAL CENTRE TRUST IN THESE PROCEEDINGS**

4. The Trust is a juristic person created in terms of a Trust instrument dated 3 August 1998. A copy of the Trust Deed as amended is annexed hereto marked Annexure 'SN1.' The Master's Certificate authorising the present Trustees to act on behalf of the Trust are annexed hereto marked Annexure 'SN2'. A copy of the resolution of the Trust, authorising me to act on the Trust's behalf marked Annexure 'SN3'. Clause 15 of the Deed of Trust provides that the Trust has legal personality and may sue or be sued in its own name.
5. The Trust was established in Cape Town in terms of the Deed of Trust and accredited as a Law Centre with the Law Society of the Cape of Good Hope on 22 February 1999.
6. The objectives of the Trust are set out in clause 2 and Annexure A of the Trust Deed. In broad outline, the main object of the Trust is to promote and protect the human rights and interests of women and in particular to represent women or the interests of women in litigation involving the constitutional and other legal rights of women. Its other activities include the conducting of legal research and producing publications on issues of consequence to the rights of women, advocacy, policy and legal intervention other than litigation and conducting training, workshops and seminars on issues of relevance to the rights of women.

7. The Trust fulfils its main object by giving legal assistance to women litigants free of charge or by making *amicus curiae* submissions in order to assist Courts in constitutional and public interest matters which concern women's rights and gender equality. In the past, the Trust has intervened in cases dealing with the rights of parties arising out of marriages including customary marriages. The Trust represented the Applicants in the Constitutional Court cases of Bhe v The Magistrate of Khayelitsha and Others 2005 (1) SA 580. The case concerned the inheritance rights of illegitimate girl children under Customary Law and was brought by the Women's Legal Centre on behalf of our clients who sought to inherit their father's deceased estate, Gcwabe v Gcwabe and Others Case number 713/05 this matter is not finalised yet, it concerns the return of Lobola for parties married by Customary Law on the basis of the defendants daughter maliciously deserting him. The Trust has made *amicus curiae* submissions in a number of other Constitutional and Supreme Court of Appeal cases. Most recently it was admitted as an *amicus* and made submissions in Edel v Edel Case number 2005/20966 which challenges the constitutionality of section 7 of the Divorce Act which draws an arbitrary distinction between parties married out of community of property in terms of an ante-nuptial contract before 1 November 1984 and those married out of community of property in terms of an ante-nuptial contract after that date. Similarly the Trust has been involved in law reform initiatives and has made substantive submissions to the South African Law Commission regarding customary law of succession. The Centre has also been

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hosting annual provincial workshops on the Recognition of Customary Marriages since the legislation entered force.

8. The Applicants application raises important issues concerning the rights to gender equality, and human dignity and the inter-relationship between these rights. The application is of particular significance for the rights of women who are one of the most vulnerable segments of our society and who bear the greatest impact of the arbitrary distinction drawn by section 7(1), 7(2), and 7(5) of the Recognition Act between parties married after and before the commencement of the Recognition Act. The Trust whose main purpose it is to advance and protect the rights of women through litigation accordingly has an interest in this application. The Trust is of the view that because of its specialised mandate, it is in a position to make submissions which will be of material assistance to the Court.

**COMPLIANCE WITH THE PROVISIONS OF RULE 16A:**

9. On 15 September 2006 the Applicant lodged a Notice in terms of Rule 16A of the Uniform Rules of Court giving notice that the application involved constitutional issues, and in particular the Constitutionality of Section 7 of the Recognition of the Customary Marriages and the right to equality, and invited interested parties to seek the consent of the parties to be admitted to the proceedings as an *amicus curiae* within 20 days.

10. On 2 October 2006 I wrote to both the Applicant's and the Respondent's attorneys on behalf of the Trust and requested the written consent from all parties for the Trust to intervene in these proceedings as an *amicus curiae* upon such terms and conditions and with such rights and privileges as may be agreed upon. A copy of the abovementioned letters are annexed hereto marked Annexure 'SN4' and 'SN5' respectively.

11. We were however advised by Mr. Ranjit Purshotam the attorney of the Applicant that the 5<sup>th</sup> Respondent cannot be located and as such they, Applicant's attorneys, have instructed a tracing agent to find the 5<sup>th</sup> Respondent. We sent the 5<sup>th</sup> Respondent's letter requesting permission to intervene to the Applicant's attorneys with the understanding that it will be served on the 5<sup>th</sup> Respondent once he has been located.

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12. On 03 October 2006 the Applicant's attorney consented to the Trust intervening as an *amicus curiae* in these proceedings. A copy of the letter of consent received from the Applicant's attorney is annexed hereto marked 'SN6.' On 12 October we received a letter from the attorneys of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and the 6<sup>th</sup> Respondents consenting to the Trust's intervention as *amicus curiae* the letter is annexed hereto marked "SN7"

13. At the time of lodging this affidavit the 5<sup>th</sup> Respondent has been located but has not consented to the Trust being admitted as an *amicus curiae*. We have been communicating with the Applicant's Attorneys who have informed us that they have found a sheriff in Mbumbulu to serve the documents to the 5<sup>th</sup> Respondent who is in the KwaZulu Natal rural areas..

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14. The reasons for this application are therefore two-fold. The first is in order to ask this Honourable court to admit the trust as an *amicus curiae*. Secondly, in order to obtain directions from this Court as to the conditions of any intervention on the Trust's part as the letter granting permission for intervention does not set out the terms and conditions for the *amicus curiae* intervention.

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**SUBMISSIONS THAT WILL BE ADVANCED BY THE WOMEN'S LEGAL CENTRE TRUST IN THE PROCEEDINGS**

15. The Trust seeks to make submissions on the applicability, relevance and implications of various constitutional rights including the right to equality, and the right to human dignity. In making these submissions, the Trust will make reference not only to domestic jurisprudence but also to international and comparative law.

### **THE RIGHT TO EQUALITY**

16. The Trust will argue in its submissions:

- 16.1 That section 7(1), 7(2) and 7(5) of the Recognition Act indirectly discriminates against women, because an overwhelming majority of people who face dire financial hardship as a result of the dissolution of marriage and the arbitrary distinction drawn by section 7(1),7(2) and 7(5) of the Recognition Act are women. This is because of historical patterns of disadvantage in our society. It accordingly discriminates against women not only on the basis of sex, gender and or marital status but also on the basis of poverty which is an analogous ground of discrimination in terms of section 9(3) of the Constitution;

- 16.2 That the distinction drawn by section 7(1), 7(2) and 7(5) of the Recognition Act) that marriages entered into before the commencement of the Act are to be governed by customary law which in terms of the KwaZulu Natal Code of Law the husband is

the owner of all property which is acquired during the course of marriage, and that marriages that are entered into after the commencement of the Act are in community of property is arbitrary. This leads to the perpetuation of inequalities and patterns of disadvantage between men and women and denies parties adversely affected by section 7(1) equal protection and benefit of the law.

16.3 That redressing the prevailing inequalities between men and women in our society requires the adoption of measures designed to protect or advance persons disadvantaged by unfair discrimination;

16.4 That the arbitrary distinction drawn by section 7(1) of the Recognition Act deprives those persons adversely affected by the distinction of their right to be protected by law.

#### **THE RIGHT TO DIGNITY:**

17. The Trust will argue:

19.1 That the right to dignity is central to our new Constitutional dispensation;

19.2 That there is a fundamental relationship between the right to equality and the right to dignity. By arbitrarily depriving certain categories of persons, and in particular a vulnerable category of poor women, equal protection of the law, with resultant dire consequences for such persons, section 7(1)) of the Recognition Act materially impacts upon the right to dignity of such affected persons.

## **INTERPRETATION OF THE BILL OF RIGHTS**

20. Section 39 (1)(b) of the Constitution provides that when interpreting the Bill of Rights a Court must consider international law and may consider comparative law. The Trust will make submissions on relevant International Law instruments and the jurisprudence arising there from, with particular reference to:

20.1 The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("the Protocol") which was recently ratified by South Africa, with particular emphasis on Articles 1,2,7 and 8 of the Protocol;

20.2 The Convention on the Elimination of Discrimination against Women ("CEDAW") which has also been ratified by South

Africa, with particular reference to Articles 1,3,13,15 and 16 of the Convention.

21. The Trust will also make submissions concerning relevant comparative law, including the law of Canada, Germany and England, and the learning from comparative systems in relation to the equitable discretion vested in their Courts to redistribute assets on divorce in order to alleviate hardship.

**RELEVANCE OF THESE SUBMISSIONS TO THE PROCEEDINGS, THEIR DIFFERENCE FROM SUBMISSIONS OF OTHER PARTIES AND THEIR ASSISTANCE TO THE COURT:**

22. It is respectfully submitted that the submissions sought to be made by the Trust will materially assist the Court in fully considering all issues relevant and material to the proper resolution of the application.
23. The submissions that will be made by the Trust will differ from and expand on those made by the parties in that, *inter alia*:

- 23.1 They introduce arguments concerning indirect discrimination against poor women on the analogous ground of poverty and the extent to which this infringes upon the right to dignity of such women; the inter-relationship between the right to equality and dignity of which on a perusal of the pleadings are not arguments put forward by the Plaintiff.
- 23.2 They address the question of the distinction made by section 7 (1) which is arbitrary and does not have a basis on customary marriages that were entered into before and after the commencement of the Act.
- 23.3 The Trust will make extensive reference to international and comparative law.
24. I respectfully pray for an Order in the terms set out in the Notice of Motion.

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**SIBONGILE NDASHE**

I certify that:

1. The Deponent acknowledged to me that:

