

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT50/08

ALISON RACHELLE TILLEY

HAPPY MASONDO

MARY SUSAN CAESAR

LEBOGANG TEMPERANCE MALEPE

SHEREEN MILLS

SHAAMELA CASSIEM

acting in their capacity as

TRUSTEES OF THE

WOMEN'S LEGAL CENTRE TRUST

Applicant for admission as *amicus curiae*

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

FOUNDING AFFIDAVIT

I, the undersigned:

NOLUTHANDO NTLOKWANA

do hereby make oath and state that:

1. I am a duly admitted attorney employed by the Women's Legal Centre (*"the WLC"*) in Cape Town.
2. The facts contained in this affidavit are true and correct and, save where the context indicates to the contrary, are within my personal knowledge.
3. This is an application brought in terms of Rule 10 of the Rules of the Constitutional Court on behalf of the Women's Legal Centre Trust (*"the Trust"*) to seek leave to intervene in the above proceedings as *amicus curiae*.
4. The Trust was admitted as an *amicus curiae* in the proceedings in the Durban and Coast Local Division. In those proceedings, it made written submissions and presented oral argument.

THE INTEREST OF THE WOMEN'S LEGAL CENTRE TRUST IN THESE PROCEEDINGS

5. The Trust is a juristic person created in terms of the Trust instrument dated 3 August 1998. The Trust Deed as amended (Annexure “**NN1**”) authorises the Trust to conduct litigation in its own name. A copy of the Master’s Certificate authorising the present Trustees to act on behalf of the Trust is annexed as “**NN2**”.
6. The Trustees have duly resolved to institute these proceedings in furtherance of the objectives of the Trust and has authorised me to make this affidavit and to bring this application on its behalf. A copy of the resolution is annexed marked “**NN3**”.
7. The detailed objectives of the Trust are set out in clause 4 of the Trust Deed. A core objective of the Trust is to advance and protect the human rights of all women and girls in South Africa, particularly black women who suffer many intersecting forms of disadvantage and in so doing to contribute to redressing systematic discrimination and disadvantage.
8. 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 that concern women’s rights and gender equality. To this end the Trust established the Women’s Legal Centre (“the WLC”) in order to conduct

public interest litigation including constitutional litigation to advance the human rights of women. Since its inception, the WLC has represented and participated, as *amicus curiae*, in numerous cases concerning the rights of women, including in the above Honourable Court. A list of the cases that the WLC has participated in is annexed as '**NN4**'.

9. The WLC has, over the years, often been approached for legal advice about the impact of the customary law on women and children, and in some instances has, on behalf of clients, litigated cases in that regard. These cases have highlighted the vulnerability of black women and children when married under customary law, when marriages are dissolved or upon death of a spouse. Much of the vulnerability can be understood in light of the fact that customary law does not, at least in its official form, accord married women rights to own and control marital property.
10. The Gumede application concerns such a case, concerning as it does the position of a woman married under customary law and the disadvantage suffered, especially by poor women, as a result of the marital property regime to which she is subject. There are however many women who are similarly placed to Mrs Gumede, and who do not have any legal protection, and it is the position of the broader class of women to which Mrs Gumede belongs that the Trust's submissions will address. The application raises matters of important public interest

affecting a large number of women who are married under customary law.

11. The position of women under customary law is one of the focus areas of the work of the Trust. In the past, the Trust has intervened in cases dealing with the rights of parties arising out of marriages including customary marriages. For example, the Women's Legal Centre represented the applicants in the case of *Bhe v The Magistrate of Khayelitsha and Others* 2005 (1) SA 580 (CC), which concerned the inheritance rights of girl children under customary law and was instituted on behalf of two girl children who sought to inherit their father's deceased estate. The Women's Legal Centre was, together with the South African Human Rights Commission, an applicant in the matter of SAHRC and WLC v The President of the Republic South Africa, which was heard and decided simultaneously with the *Bhe* matter and dealt with related matters.
12. The Women's Legal Centre also represented the applicants in the matter of *Gcwabe v Gcwabe and Others* Case No: 713/05, which concerns a claim for the return of lobola between parties married under customary law on the basis that the defendant's daughter deserted her husband maliciously.
13. More recently, the Trust was requested to make submissions as *amicus curiae* by the Supreme Court of Appeal in the recent case of *Gaza v The Road Accident Fund and Others* Appeal case no:

579/2006, which was heard on 27 August 2007 and 19 November 2007. That case concerned the rights of women married under customary law, where there is a prior civil marriage, to claim for loss of support from the Road Accident Fund.

14. Similarly, the Trust has been involved in law reform initiatives and has made substantive submissions to the South African Law Commission regarding the customary law of succession.
15. The WLC has also hosted annual provincial workshops on the Recognition of Customary Marriages Act ('the Recognition Act') since the legislation came into force, these being in Limpopo, Eastern Cape, Kwa-Zulu Natal, North West, Northern Cape, Gauteng and Mpumalanga. It has also made submissions to the various project committees of the South African Law Commission on various aspects of customary law and worked closely with the Department of Justice on proposed amendments to the Recognition Act in light of problems that are being encountered in practice in communities.
16. In addition to its work on the Recognition Act, the WLC has made submissions on the Traditional Courts Bill and the Reform of the Customary Law of Succession Bill.
17. The Applicant contends that in light of its history of assisting, advising and representing women who are married under customary law and in participating in the broader policy and legislative debates, it is well

placed to make submissions that will assist the Court in its deliberations in the above proceedings.

18. In the circumstances, it is submitted that the Trust has a sufficient interest in the subject matter of the application.

COMPLIANCE WITH THE PROVISIONS OF RULE 10

19. Directions in these proceedings were issued on or about 6 August 2008 by the Chief Justice. In terms of paragraph 6, any party which seeks to intervene as *amicus curiae* was directed to do so in accordance with the Rules of the Constitutional Court.
20. On 8 August I sent a fax to the attorneys for the applicant and the State Attorney (representing the First to Fourth and Sixth Respondents) requesting their consent to the Trust being admitted as an *amicus curiae* in these proceedings. Copies of these faxes are annexed as **NN5** and **NN6**.
21. On 12 August 2008 Sharita Samuel of the Legal Resources confirmed that the applicant had no objection to the Trust's intervention. I refer to Annexure **NN7**.

22. On 12 August state attorney advised that they are taking instructions from their clients. Because I did not receive a response by 14 August 2008, which was the date by which I had requested a response, I called Ms. Hlophe, who is the attorney dealing with this matter, and was advised that she is on sick leave and that a Mr. P. Kevan is dealing with the matter in her absence. However, although I tried, I could not get hold of him telephonically. In the circumstances, and on 19 August 2008, I sent a further letter requesting a response before close of business on 20 August 2008. A copy of the fax is annexed as “**NN 8**”. No response was forthcoming by close of business on that day notwithstanding that I made a further telephone call to the State Attorney’s office during the course of that afternoon. I was advised by a Mr Mohamed that he was now handling the matter, that the correspondence had been received and sent to the relevant state departments but that no response had yet been forthcoming.
23. I point out that in the High Court proceedings the State Respondents did consent to the admission of the Trust as *amicus curiae*.
24. On 8 August 2008 my secretary, Ingrid Johnson, faxed the letter to Mr. Gumede requesting his consent, to our correspondent attorneys Zubeda K Seedat and Co in order for them to request the Sheriff in Mbumbulu to serve it on Mr. Gumede, which they did. A copy of the letter is annexed as “**NN 9**”. According to the records held by the Women’s Legal Centre, there are no attorneys on record representing Mr Gumede at this stage of the proceedings. To the best of our

knowledge and belief, Mr Gumede lives in the KwaMakhuta Area near the KwaKhanyile Store, Adams Mission which is in rural KwaZulu Natal.

25. Johnson contacted the Sheriff on 15 August 2008 and again on 20 August 2008 to ascertain whether the letter had been served on Mr Gumede. She was told that the Sheriff had attempted both to contact Mr Gumede through his daughter, telephonically, and to find him at his residence, but had not managed to do so. In the circumstances, no response has been forthcoming from Mr Gumede.

26. On 20 August 2008, Johnson contacted the offices of Mbele Dube and Partners who appear as attorneys for Mr Gumede on the Court Directions but Johnson was unable to make contact with any-one who had knowledge of the matter. There is however no record at the offices of the Women's Legal Centre, that Mbele Dube and Partners are on record as attorneys for Mr Gumede. On 21 August 2008, Johnson again contacted the offices of Mbele Dube and Partners and spoke to Mr Mbele. When she attempted to ascertain whether they had authority to receive service of either the letter requesting consent or this application, Mr Mbele told her that he was too busy to take the call at that time and that the query should be made in writing. In addition to requesting the sheriff to serve the letter of consent, a letter of consent was also faxed to Mbele Dube and Partners but only on 20 August 2008. I too have attempted on several occasions to get through

to the offices of Mbele Dube and Partners to no avail and the phone is constantly engaged.

27. In the circumstances, on-going efforts are being made to effect service of the letter of consent on Mr Gumede and to ascertain whether Mbele Dube and Partners have authority to receive service of this application on Mr Gumede's behalf. The Sheriff has in any event agreed to try to serve this application on Mr Gumede personally if at all possible.
28. The Court will be informed of any further developments but in view of the lapse of time and the date of the hearing of this application, Applicant respectfully requests condonation insofar as it has been unable properly to effect service of the letter of request or of this application on Mr Gumede at the time of attempting to lodge this application with the Registrar.
29. Further correspondence was sent to the Legal Resources Centre on 14 August 2008 and on 18 August 2008 to the State Attorney and Mr. Gumede (again through the sheriff) seeking agreement as to the terms and conditions on which the Trust might be admitted. In particular consent was requested for the Trust to present both oral and written submissions, which were proposed to be filed on 3 September 2008 so as to avoid any duplication of submissions with the Applicant.
30. To date no response has been received from any of the parties. The Trust is, of course, willing to file its submissions at an earlier date,

should the Chief Justice so direct. Copies of these letters are annexed as **NN10 to NN12**.

31. In view of the fact that the application has been set down for 11 September and that the time for filing submissions by the parties to the proceedings is fast approaching, the Trust has been advised to proceed to file this application, in the interests of all the parties, notwithstanding that it has not yet received a response from the State Respondents or Mr Gumede in respect of its request to intervene. As appears above, various attempts have been made to obtain consent to no avail. The Trust is also mindful that it might prove difficult to serve this application on Mr Gumede and that condonation in that regard may be necessary.
32. I point out that the State Respondents did furnish their consent in the High Court proceedings. A copy of the relevant letter of consent is annexed as **NN13**. Difficulties were also experienced in those proceedings in locating Mr Gumede. Although the Sheriff did at that stage manage to serve the letter requesting consent, no response was forthcoming.
33. Should any further correspondence be received from any of the parties, indicating their attitude, the Trust will notify the Registrar accordingly.
34. I now proceed to set out the nature of the submissions that the Trust intends to make.

SUBMISSIONS THAT WILL BE ADVANCED BY THE TRUST IN THE PROCEEDINGS AND THE STANCE TO BE ADOPTED

35. The Trust, in general terms, intends to adopt a position that will advance the case for the Applicant and agrees with its submissions. At the heart of the applicant's case are the contentions that the marital property regimes to which women married under customary law in KwaZulu-Natal are subject, as codified in the KwaZulu Natal Codes infringe their rights to dignity and equality and that the Recognition Act is under-inclusive in remedying only the marital property regimes applicable to marriages concluded after the commencement of that Act. The constitutional complaint, however, is focused on the argument that the provisions of the KwaZulu Natal Codes, and the marital property regime that they encompass, violate the rights of women married under customary law to equality and dignity because they deprive such women of any right to own and control property.
36. The Trust's submissions, as presented in the High Court, focus on the separate question whether the differentiation that is drawn in the Recognition Act between women married before the Act commenced and women married after the Act commenced constitutes unfair discrimination between women married before the Act came into force and those married after the Act came into force. The Trust intends to argue in the confirmation proceedings that *that* differentiation constitutes unfair discrimination as well.

37. Moreover, although the Trust agrees with the submissions of the Applicant and does not intend to traverse the same ground, it does wish to make submissions that focus on different aspects of the analysis to be embarked upon in terms of section 9 and 10 of the Constitution to those emphasised by the Applicant.
38. At a general level, the Trust's submissions will focus on the position, disadvantage and vulnerability of the *class* of women to which Mrs Gumede belongs, namely those who were married under customary law before the commencement of the Recognition Act. Moreover, although Mrs Gumede herself was in a monogamous marriage, women in polygamous marriages are also affected by the relief sought, and their position warrants specific consideration.
39. These submissions will also deal with the history of the relevant customary law rules and their codification in the KwaZulu codes, and their relationship with the living customary law. They will also deal with the indirect discrimination that is suffered by many women married under customary law who find themselves in dire financial positions and severe economic vulnerability upon the dissolution of marriages.
40. The Trust also intends to deal with relevant provisions of international human rights instruments, these also being aspects not dealt with to date in the proceedings. In particular, the Trust will refer to the provisions of the Protocol to the African Charter on Human and

Peoples' Rights and the Rights of Women in Africa and the Convention on the Elimination of All Forms of Discrimination Against Women.

41. Finally, the Trust intends to make submissions on the question of remedy and appropriate relief so as to both protect the interests of the broader class of women affected by the Court's order and to cater for the potential practical difficulties that present themselves when making an order that may affect the matrimonial property regime of marriages that have already been concluded, this being inevitable if the Court comes to the assistance of women married before the Recognition Act came into force. The impact of the order on polygamous marriages will also be addressed in the Trust's submissions on remedy.

42. These are not aspects traversed by the Applicant in the High Court. I point out, in this regard, that the proposal that the Trust file its written submissions after the Applicant's submissions are due was made so as to avoid any overlap insofar as the Applicant may expand upon its argument as presented to the High Court in its submissions to the Constitutional Court.

43. In the premises, I submit that the Trust's submissions will assist the Court in determining the issues before it and, accordingly, request that the relief sought in the notice of motion is granted.

NOLUTHANDO NTLOKWANA

I certify that the above affidavit was signed and sworn to at CAPE TOWN before me on this the day of **AUGUST 2008** by the deponent after she declared that she knew and understood the contents of this affidavit, that she had no objection to taking the prescribed oath which she regarded as binding on her conscience, and after she uttered the words: *“I swear that the contents of this affidavit are true, so help me God”*.

COMMISSIONER OF OATHS