

**IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION**

Case Number:

In the matter between:

ELIZABETH GUMEDE (born SHANGE)

Applicant

And

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second Respondent

PREMIER OF KWAZULU-NATAL

Third Respondent

**KWA ZULU NATAL MEC FOR TRADITIONAL AND
LOCAL GOVERNMENT AFFAIRS**

Fourth Respondent

AMOS GUMEDE

Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ELIZABETH GUMEDE

hereby make oath and state that:

1. I am an adult female old age pensioner currently residing at AA521 Umlazi, KwaZulu-Natal. I am the applicant in this matter.

2. The facts stated herein are, unless the context indicates otherwise, within my own personal knowledge, and are to the best of my belief both true and correct.

3. Any legal submissions made in this affidavit have been made on the advice of my legal representatives.

4. The first respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**, care of the State Attorney, Smith Street, Durban. He is cited in his official capacity as representative of the national government, which is responsible for the national laws which are the subject of this application.

5. The second respondent is the **MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**, care of the State Attorney, Smith Street, Durban. She is cited in her official capacity as the member of the national executive who is responsible for the administration of the national laws which are the subject of this application.

6. The third respondent is the **PREMIER OF KWAZULU-NATAL**, care of the State Attorney, Smith Street, Durban. He is cited in his capacity as representative of the provincial government of KwaZulu-Natal, which is responsible for the provincial laws which are the subject of this application.

7. The fourth respondent is the **KWAZULU-NATAL MEC FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS**, care of the State Attorney, Smith Street, Durban. He is cited in his official capacity as the member of the provincial executive who is responsible for the administration of the provincial laws which are the subject of this application.

8. The fifth respondent is **AMOS GUMEDE**, who resides at Adams Mission in KwaZulu-Natal. He is a retired adult male. The fifth respondent and I are married in terms of customary law.

PURPOSE OF THIS APPLICATION

9. A divorce action is currently pending in the North Eastern Divorce Court between the fifth respondent and me. The purpose of this application is to obtain an order which will enable me to claim, in that divorce action, a portion of the assets which have accrued to my husband and me during the course of our marriage, and maintenance.

10. In order to achieve this I seek an order:
 - 10.1. declaring that section 7(1) of the Recognition of Customary Marriages Act No. 120 of 1998 (“the Recognition Act”) is inconsistent with the Constitution and accordingly invalid;

 - 10.2. declaring that section 7(2) of the Recognition Act is inconsistent with the Constitution and accordingly invalid to the extent that it excludes from its operation customary marriages entered into before the commencement of that Act;

 - 10.3. declaring that section 7(5) of the Recognition Act is inconsistent with the Constitution and accordingly invalid to the extent that it excludes from its operation customary marriages entered into before the commencement of that Act;

- 10.4. 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;
- 10.5. declaring that sections 20 and 22 of the Natal Code of KwaZulu Law Proclamation R151 of 1987 are inconsistent with the Constitution and invalid.
- 10.6. 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
- 10.7. declaring that a spouse in a customary marriage is entitled, on divorce, to claim maintenance from the other spouse.
- 10.8. for related relief

BACKGROUND TO THIS APPLICATION

11. The fifth respondent and I are both Zulu. We entered into a customary marriage on 29 May 1968. This marriage still subsists. A copy of our marriage certificate is annexed marked "A". KwaMuhle, where we were married, is in Central Durban.

12. The fifth respondent is not, and has never been, a partner to any other customary marriage.
13. There are four children born of our marriage. All of our children have reached the age of majority.
14. During January 2003 the fifth respondent instituted divorce proceedings against me in the North Eastern Divorce Court (which sits in Durban) under case number 161/03.
15. The relief sought by the fifth respondent in those proceedings is as follows:
 - 15.1. a decree of divorce;
 - 15.2. costs of suit.
16. That action is pending. The outcome of those proceedings is dependent on the validity of the laws which are in question in this application. I have accordingly asked that the divorce action be stayed pending the determination of this application.
17. I agree with the fifth respondent that our marriage relationship has irretrievably broken down and that a divorce is the appropriate means of addressing this. The question in issue is what the proprietary consequences of the divorce should be.

THE PROPERTY

18. During the course of our marriage the fifth respondent has acquired in his name two immovable properties, furniture, a pension and other assets described below. I believe that I also have rights to this property.

19. I am defending the divorce action because the effect of an order in the terms sought by the fifth respondent would be to exclude me from any share in that property or from ever obtaining any maintenance from him. It would deprive me of virtually all of my property. I would be left homeless.

The house at AA521 Umlazi

20. One of the two properties I have mentioned is a house situated at AA521 Umlazi Township. It was acquired in October 1979 and is held in the name of the fifth respondent in terms of a Deed of Grant, a copy of which is annexed marked "B".

21. I have lived at AA521 Umlazi since it was acquired in 1979. The fifth respondent has not lived there at all since February 2001, when he deserted our children and me.

22. During our marriage, the fifth respondent did not permit me to work. Accordingly I was not in a position to make a direct monetary contribution towards the purchase of the house.

23. I did however perform all the requisite tasks to look after and maintain this home as the family home for the fifth respondent, myself and our four children. I was the primary care-giver for our four children. I performed numerous functions and tasks of a family and domestic nature.
24. Even if I had purchased AA521, 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. I deal with this further below.
25. AA521 contains furniture and appliances acquired by me with a value which I estimate at about R40 000.00. A schedule giving details of these furnishings and appliances is annexed marked "C".
26. AA521 Umlazi is my home. I have no other residence or family home.
27. My father died in 1985, and my mother died in 1994. At the time of their deaths, they lived on my father's employer's farm, which has since been sold. I do not have any living brothers. My sisters are domestic workers who have insufficient means to care for me.
28. It is essential that I am able to remain living in AA521. I have literally nowhere else to live.

The house at Adams Mission

29. The second property held by the fifth respondent is a plot in Adams Mission, where I believe he currently lives. I have not been able to obtain any information as to the nature of his rights in that property, or as to the value of that property or those rights.
30. I have not recently visited the fifth respondent's house at the Adams Mission, but from what I have gathered from friends and acquaintances, the furnishings and appliances in that home are similar to those in mine, and should have a value roughly similar to those in my home.

The pension

31. The fifth respondent worked for Rennies Cargo at Maydon Wharf, Durban, until he took voluntary retirement in April 2000. At that stage he held the position of a foreman.
32. The fifth respondent has a Sanlam pension registered in his name. As far as I am aware, he receives a monthly pension payment from Sanlam.
33. My attorney has written a letter to the fifth respondent's attorney ("D"), requesting the details of the Adams Mission property and also of the pension or retirement annuity benefits to which he is entitled. The fifth respondent's attorney has not responded to this letter.

Maintenance

34. The fifth respondent provides me with no maintenance at all. He has not done so since he deserted me in 2001. Since then he has also not contributed to the upkeep of the house AA 521.
35. I qualified for an old age pension in 2003. Before then I was supported by my children. They continue to support me by supplementing my old-age pension.
36. I wish in the divorce proceedings to claim maintenance from my husband. I have been advised that for reasons which are set out below, under the law as it is currently understood and applied, I am prevented from asserting a claim for maintenance.
37. I am now at risk of losing everything I have because of the combined effect of the Recognition of Customary Marriages Act, the customary law, the Natal Code of Zulu Law, and the KwaZulu Act on the Code of Zulu Law.

THE NATAL CODE AND THE KWAZULU ACT

38. The Recognition of Customary Marriages Act 120 of 1998 ("the Recognition Act") gives legal recognition to all customary unions.

39. Section 7(1) of the Recognition Act states:

“The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.”

40. The fifth respondent and I were married before the commencement of the Recognition Act, which I am advised was on 15 November 2000. Accordingly the effect of section 7(1) of the Recognition Act is that the proprietary consequences of our marriage *“continue to be governed by customary law.”*

41. “Customary law” is defined in the Recognition Act as *“the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples”*.

42. However, in KwaZulu-Natal, customary law has been codified in:

42.1. the Natal Code of Zulu Law published in Proclamation R. 151 of 1987 dated 9 October 1987 (“the Natal Code”) and

42.2. the KwaZulu Act on the Code of Zulu Law Act 16 of 1985 published in Government Notice 105 of 1986 (“the KwaZulu Act”).

43. I have been advised that the Natal Code exists as regulations made under the Black Administration Act, and that it applies in those parts of the former province of Natal which did not fall under the jurisdiction of the former KwaZulu Legislative Assembly.
44. I have been advised that the KwaZulu Act applies in those areas which previously fell within the jurisdiction of the KwaZulu Legislative Assembly.
45. Both of these codes are still in force by virtue of the provisions of section 2 of Schedule 6 of the Constitution of the Republic of South Africa, 1996.
46. I have been advised that for present purposes, the provisions of the KwaZulu Act and the Natal Code are identical in all material respects.
47. The fifth respondent and I were married in Durban, which was outside the area of the KwaZulu Legislative Assembly. The areas of Umlazi and Adams Mission, where we currently reside, both fell within the area of the KwaZulu Legislative Assembly.
48. I do not know with any certainty whether the KwaZulu Act or the Natal Code applies to my marriage. However, as our marriage took place in the former Natal and we both lived and still live in the former Natal, either the Natal Code or the KwaZulu Act applies to our marriage and creates the statutory framework within which our rights are determined.

49. I accordingly make submissions on the application and unconstitutionality of both the Natal Code and the KwaZulu Act
50. The Natal Code and the KwaZulu Act do not deal explicitly with the proprietary consequences of marriage. They also do not deal explicitly with the proprietary consequences of divorce, except with regard to the question of the return of lobolo on divorce. They do not make any provision for maintenance of a spouse after divorce.
51. The Natal Code and the KwaZulu Act state that the husband is the owner of all family property in the family home. I refer in this regard to section 20 of both the Natal Code and the KwaZulu Act, which state:

“The family head shall be the owner of all family property in his family home. He shall have 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 and necessities, or for general family purposes or for the entertainment of visitors...”

52. Section 22 of the Natal Code states that *“The inmates of a kraal irrespective of sex or age are in respect of all family matters be [sic] under the control of and owe obedience to the family head”*. Section 22 of the KwaZulu Act, to similar effect, was repealed by the Recognition Act.

53. An inmate in relation to a family home is defined in section 1 as *“any person usually residing therein and includes the head of a family resident in a family home, subject to the control of the family head”*.
54. The Natal Code and the KwaZulu Act have two consequences which are relevant in this matter:
- 54.1. The husband is the owner of all property which is acquired during the course of the marriage.
- 54.2. Family or house property is not divided upon the dissolution of a customary marriage. When the marriage is dissolved the woman is supposed to return to her family home of origin without any assets (apart from certain apparel), and resume a position where she is essentially under the guardianship of her father. The property acquired during the marriage “remains” the property of the husband.
55. The attitude of the fifth respondent appears to be that I do not have a right to a share of “his” assets. He has neither
- 55.1. informed me what those assets are nor
- 54.2. made any tender to divide the assets or to transfer any of the assets to me.

56. Sections 20 and 22 of the Natal Code and section 20 of the KwaZulu Act impact directly on me because they do not permit me to leave the customary marriage with any assets, even those for which I have paid myself.

57. I submit that sections 20 and 22 of the Natal Code and section 20 of the KwaZulu Act are inconsistent with the Constitution, and accordingly invalid, because they discriminate against me and against other women who are similarly placed, and because they infringe on our right:

57.1. to equality before the law, to equal protection and benefit of the law, and to the full and equal enjoyment of all rights and freedoms;

57.2. not to be discriminated against on the grounds of race, sex and gender;

57.3. to dignity.

58. I have been advised that sections 20 and 22 of the Natal Code and section 20 of the KwaZulu Act have, in respect of customary marriages entered into after 15 November 2000, been impliedly been repealed by section 6 of the Recognition Act which states that:

“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.”

59. However, this does not apply to my marriage, because it was entered into before the commencement of the Recognition Act.

CUSTOMARY LAW

60. I have been advised that section 211 of the Constitution requires that courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.
61. I have been advised and submit that to the extent that it may be found that customary law (independent of the Natal Code and the KwaZulu Act) applies to my pending divorce, it would be inconsistent with the Constitution for customary law to have the consequence that the fifth respondent becomes the owner of all of the property acquired during the marriage.
62. Under customary law, family or house property is not divided upon the dissolution of a customary marriage. When the marriage is dissolved the woman is supposed to return to her family home of origin without any assets (apart from certain apparel), and resume a position where she is essentially

under the guardianship of her father. The property acquired during the marriage “remains” the property of the husband.

63. I have been advised and submit that under customary law, a spouse is not entitled on divorce to claim maintenance from the other spouse.

64. I submit that the customary law is in these respects inconsistent with the Constitution, because it discriminates against me and against other women who are similarly placed, and because it infringes on our right:

64.1. to equality before the law, to equal protection and benefit of the law, and to the full and equal enjoyment of all rights and freedoms;

64.2. not to be discriminated against on the grounds of race, sex and gender;

64.3. to dignity.

65. I have been advised that this honourable Court is enjoined by section 39(2) of the Constitution to develop customary law in order to promote the spirit, purport and object of the Bill of Rights.

66. I submit that the Constitution requires, in relation to the proprietary consequences of marriage, that:

- 66.1. 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;
- 66.2. women married before 15 November 2000 should be treated equally with men and with each other, irrespective of whether the marriage is a civil marriage or a customary marriage;
- 66.3. a woman married in a customary marriage should be entitled, on divorce, to an equitable share of the property acquired during the marriage.
- 66.4. a woman married in a customary marriage should be entitled, on divorce, to claim maintenance from her husband
67. Accordingly, I submit that the rules of customary law should be developed so that any customary marriage in which a spouse is not a partner in any other customary marriage, should on dissolution be treated as a marriage in community of property and of profit and loss unless such consequences are specifically excluded by the spouses in an ante-nuptial contract.
68. The primary purpose behind the system of marriage in community of property (which is the default position in a civil marriage) is to protect the financially weaker spouse (most often the woman).

69. There is no legally valid reason why the same protection should not be afforded to women married under customary law before the commencement of the Recognition Act. On the contrary, there is every reason why they should be afforded such protection. My own case illustrates why this is so.

THE RECOGNITION ACT

70. Section 7(1) of the Recognition Act states that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

71. Section 7(2) of the Recognition Act provides that the proprietary consequence of a customary law marriage entered into after the commencement of the Act, in which a spouse is not a partner to any other existing customary marriage, is a marriage in community of property and profit and loss between the spouses unless such consequences are specifically excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriage.

72. Section 7(5) of the Recognition Act states that

“Section 21 of the Matrimonial Property Act, 1984 (Act 88 of 1984) is applicable to a customary marriage entered into after the

commencement of this Act in which the husband does not have more than one spouse".

73. The default position in a civil marriage is community of property. The primary purpose of this is to protect the financially weaker spouse (most often the woman).
74. One of the purposes of the Recognition Act is to put an end to the discrimination contained in the customary law of marriage.
75. There is no legally valid reason why women married under customary law before the commencement of the Recognition Act should not receive the same protection as women who have entered into civil marriages. I submit that on the contrary, section 9 of the Constitution requires that women married under customary law before the commencement of the Recognition Act should be afforded the same protection as women in civil marriages.
76. The Recognition Act explicitly perpetuates the unfair and unlawful discrimination which is suffered by women who entered into customary marriages before 15 November 2000. It submit that both on this ground, and because the Act is under-inclusive, the relevant sections of the Recognition Act are inconsistent with the Constitution and invalid.
77. There is furthermore no sound reason why persons married under customary law prior to the commencement of the Recognition Act should not

enjoy the flexibility afforded by section 21 of the Matrimonial Property Act. Again, I submit that section 9 of the Constitution requires that they enjoy such flexibility.

78. I have already described how the Natal Code, the KwaZulu Law and the customary law discriminate against me and women generally.

79. I submit that the under-inclusiveness of the Recognition Act, and its perpetuation of the application of customary law to my marriage and the marriages of women who are similarly placed, is inconsistent with the Constitution, and is accordingly invalid, because it discriminates against us, and because it infringes on our rights:

79.1. to equality before the law, to equal protection and benefit of the law, and to the full and equal enjoyment of all rights and freedoms;

79.2. not to be discriminated against on the grounds of race, sex and gender;

79.3. to dignity.

80. In all the circumstances I submit that the law as it stands cannot be allowed to continue to operate. I ask for an order in terms of the Notice of Motion.

DEPONENT

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit duly signed and sworn to before me at _____ on this day of _____ 2006, the regulations contained in Government Gazette No. R1258 dated 21 July 1972, as amended, having been complied with.