

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

Case No: 4225/2006

In the matter between:

ELIZABETH GUMEDE (born SHANGE)

Applicant

and

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA
MINISTER OF JUSTICE & CONSTITUTIONAL
DEVELOPMENT
PREMIER OF KWAZULU –NATAL
KWAZULU-NATAL MEC FOR TRADITIONAL
AND LOCAL GOVERNMENT AFFAIRS
AMOS GUMEDE
MINISTER OF HOME AFFAIRS**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

APPLICANT'S REPLYING AFFIDAVIT

I the undersigned

ELIZABETH GUMEDE

hereby make oath and say:

1. I am the Applicant in this matter. I wish to reply to the answering affidavits filed on behalf of the First, Second, Third, Fourth and Sixth Respondents. As they are the only Respondents who have filed answering affidavits, I refer to them in this affidavit as “the Respondents”. I refer to the Fifth Respondent as my husband.
2. The facts stated in this affidavit are, unless the context indicates otherwise, within my own personal knowledge, and are to the best of my belief both true and correct.
3. The legal submissions which I make in this affidavit are made on the advice of my legal representatives.
4. I have been advised that for the most part, the affidavits filed on behalf of the Respondents make legal submissions which I am not required to address in this affidavit. These will be dealt with in the submissions made by my legal representatives at the hearing of this matter.
5. Where the Respondents have made statements of facts which are inconsistent with the statements in my founding affidavit, I stand by the statements in my founding affidavit, and I do not repeat them here.

THE AFFIDAVIT OF JOEL CHAVALALA**Ad paragraphs 11 – 20**

6. I have been advised that Mr Chavalala is correct in submitting that a Court which grants a decree for the dissolution of a customary marriage has the power to order that the assets of one party be transferred to the other party, or to make an order for the forfeiture of the patrimonial benefits of marriage. I accept that in the case of my divorce, the divorce court would have the power to make such an order.

7. However, I submit that this does not address my complaint about the unconstitutionality of the provisions of the law which are in issue in this matter.

8. The Recognition Act, the KwaZulu Act on the Code of Zulu Law, the Natal Code of KwaZulu Law and the customary law jointly create the result that all of the property which was acquired during my marriage belongs to my husband, and in fact all of my property except for movable property, is his.

9. Unless I am unable to persuade the divorce court to the contrary, all of the property to which I have referred will remain the property of my husband. My position in this regard is sharply different from that of women who

- entered into customary marriages after the commencement of the Recognition Act. They do not bear any such onus in order to avoid being left property-less and homeless on the termination of their marriages.
10. My legal representatives will at the hearing of this matter make submissions as to the nature of the burden which I will bear in order to be able to persuade the divorce court that property belonging to my husband should be transferred to me, or that my husband should forfeit the patrimonial benefits of the marriage. I submit, however, 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.
 11. I respectfully submit that this is patently unequal treatment, and that it is inconsistent with the Constitution.

Ad paragraphs 21 and 22

12. I am not asking this Court to determine the outcome of the divorce action. I of course accept that this can be decided only by the divorce court, after it has considered all of the facts. What I am asking this Court to do is to rectify the existing unequal position created by the law, in order to “*level the playing field*” in the divorce action.

Ad paragraphs 23 and 24

13. There are no disputes of fact in this case. The Fifth Respondent has chosen not to file an affidavit disputing any of the allegations which I made in my founding affidavit.
14. It may well be that there will be disputes of fact in the divorce case. However, I submit that any disputes of fact that may arise in that case – for example as to the cause of the breakdown of our marriage – are not relevant to this case. The purpose of this case is to determine the law and the proprietary rights which will be in force at the time when the divorce court comes to deal with the divorce and its consequences.
15. I have been advised and respectfully submit that it is improper and inadmissible for the Respondents to seek to adduce as evidence in this

- case, statements in an affidavit which my husband made in another case, when he has not seen fit to repeat them in this case. I can only assume that the reason why he has not seen fit to repeat them in this case is that they are false.
16. Although it is irrelevant to this case, for the sake of completeness I say that there is no truth whatsoever in the assertion that I submitted a fraudulent claim with Sanlam or anyone else, or that I “*instigated the children against*” my husband, or that the conditions were such as to render the living together of my husband and me dangerous in any manner. This is simply without any foundation. I repeat that I did not work during the marriage or have an income of my own. I will of course deal with those matters in the divorce action.
 17. In these proceedings, there is no dispute as to what the assets of my husband are. I have set out in detail what those assets are, to the full extent of the information available to me. The Fifth Respondent has not denied any of these allegations.
 18. For the sake of completeness, I also wish to point out that in the aborted proceedings in the Equality Court, as in this Court, I referred to the fact that my husband’s property includes land and property constituting two homes: the Umlazi property in which I am presently living, and the Adams

Mission property on which he is presently living. In this regard I attach **(E)** a copy of my affidavit in that application.

19. As appears from annexure "JC2" to the affidavit of Mr Chavalala, in the Equality Court proceedings the Fifth Respondent did not directly address the question of the property at Adams Mission. He simply evaded the question of this property. He did not explain on what basis he is occupying the property at Adams Mission, if it does not belong to him.
20. As I pointed out in my founding affidavit, my attorney asked my husband's attorney for the details of the Adams Mission property. My husband's attorney did not reply to this letter.

Ad paragraph 25 to 26

21. It is correct that in the proceedings in the Equality Court, my husband stated that he was prepared to allow the property at Umlazi to be sold, and the proceeds to be divided equally between us.
22. That does however not resolve the problem at all. As I have stated (and my husband has not denied), he owns two properties. If they are of equal value, the offer of half of the proceeds of the sale of one of the properties, means that I will receive one-quarter of the value of the most important

physical assets in the marriage. I am surprised that Mr Chavalala appears to take the view that I should settle for that. This view can only be justified on the basis of the very matter of which I complain, namely an assumption that all of the property in the marriage belongs to my husband.

23. If I accept the tender made by husband, I will be left homeless. All I will have will be half of the proceeds of the sale of the house in Umlazi, which will not be enough to buy another house. My husband will have the house in Adams Mission, half of the proceeds of the sale of the house in Umlazi, the pension, and the furnishings and appliances. Mr Chavalala apparently regards that as a fair and reasonable outcome of a marriage of nearly forty years. I do not.

24. Mr Chavalala again misunderstands the nature of my complaint. It is true that it is my impending divorce which has brought this matter to a head. My complaint, however, is not about the powers of a divorce court: it is about the proprietary regime which the law imposes upon me, which I say is unequal and discriminatory. The consequences of that regime will be very relevant to the outcome of the pending divorce proceedings. I agree with Mr Chavalala that my proprietary and financial rights after the divorce can only be determined by the divorce court. What I ask this Court to determine is what my proprietary and financial rights are at the moment, because that will inevitably affect the outcome of the divorce.

Ad paragraphs 28 to 31

25. I have been advised and respectfully submit that Mr Chavalala's view as to what I should do in order to pursue and enforce my constitutional rights is misconceived. The divorce court will not have the power to declare unconstitutional the various provisions of the law which have the effect that all of the property in my marriage belongs to my husband. It will have to proceed on the assumption that I have no legal right to any of the property concerned, unless and until it is persuaded that it ought to make an order to that effect. If the court proceeds on that assumption, I will not have any grounds for an appeal as the court will have applied the law which is binding on it.

26. I can therefore not raise in the divorce proceedings, the constitutional issues which I am raising in this matter, namely the validity of the laws which create a position in which everything belongs to my husband, and a default position that this will be the outcome on divorce.

Ad paragraph 32 to 35

27. I have to say that I can not understand how Mr Chavalala can take the view that my husband's offer to have the proceeds of the sale of one of the two immovable properties divided between us, could remove the need

- to make any determination of the proprietary consequences of the marriage.
28. I also do not understand on what basis he suggests that my husband “*may well make a similar offer in respect of the moveable property and the pension annuity*”. My husband has not made any such offer, and has never suggested that he would do so. When my attorney asked my husband’s attorney for the details of the pension of retirement annuity benefits (Annexure D to the founding affidavit), his attorney did not even reply. The limited offer which my husband made in the proceedings in the Equality Court clearly implies that he has no intention of making any such offer.
29. I accordingly submit that it is Mr Chavalala who has misconceived the issue. The issue is whether the laws which provide that in a customary marriage entered into before the commencement of the Recognition Act, all of the property belongs to the husband, are consistent with the constitutional requirement of equality. I submit that they clearly are not.
- Ad paragraphs 36 to 46**
30. My primary complaint is not the distinction between customary marriages entered into before and after the commencement of the Recognition Act.

My complaint is that the proprietary regime in my marriage is unequal and discriminatory, in that all of the property belongs to my husband. This unconstitutional situation has been remedied in respect of customary marriages entered into after the commencement of the Recognition Act, but not in respect of customary marriages entered into before the commencement of that Act.

31. I do not dispute that the relevant provisions of the Recognition Act are consistent with the recommendations of the South African Law Commission. However, that is not the question. The question is whether they are consistent with the Constitution.

32. I have been advised and respectfully submit that the Constitution explicitly requires that the legislation contemplated in section 15(3), namely legislation recognising marriages concluded under a tradition, must be consistent with the Constitution. Similarly, the cultural pluralism contemplated in sections 30 and 31 of the Constitution is subject to the provisions of the Bill of Rights. My complaint is that the proprietary consequences of a customary marriage under the pre-constitutional law, which are preserved by the Recognition Act in respect of marriages concluded before the commencement of that Act, are inconsistent with the right to equality and the right to dignity in the Bill of Rights.

33. The Recognition Act draws a distinction between the proprietary rights of women who entered into customary marriages before the commencement of that Act, and those who did so after that commencement. Mr Chavalala appears to suggest that this is a distinction without any difference at all. If that is so, then the distinction is entirely irrational. I submit, however, that it does have a purpose: that purpose is to perpetuate the discriminatory pre-Constitutional law.

Ad paragraph 49

34. It is simply not true that my husband has tendered a half share of the property. I do not understand how Mr Chavalala can make this statement.

Ad paragraph 50

35. My husband has not denied that he owns the property in Adams Mission. In the Equality Court case, he evaded the question of that property, by not dealing with it at all. In this case, the Fifth Respondent has not denied my explicit allegation that he owns that property.

Ad paragraph 53

36. For the reasons stated above, I say that the distinction in the Recognition Act between marriages concluded prior to and after the coming into effect of that Act has very real practical consequences for me.

Ad paragraph 55

37. I submit that at the time of a divorce, my position is very different from that of a woman who has concluded a customary marriage after the Recognition Act came into effect. I am the owner of none of the property acquired during the marriage. That will remain the position on divorce unless I am able to persuade a court to the contrary.

Ad paragraphs 57 to 59

38. I have been advised that the failure to join the Sixth Respondent was in error.
39. However, I submit that as the President was joined as the First Respondent, and he is the head of the national executive, the national government was in fact adequately cited and joined. The national government was given notice of these proceedings, was made a party to

them, and was given an opportunity to participate actively in the matter if it chose to do so. It did so through Mr Chavalala, who makes his affidavit on behalf of the First, Second and Sixth Respondents.

40. I respectfully submit that under the circumstances, the insistence of the Respondents that the Sixth Respondent be separately named and joined was obstructive and unnecessary. It was this which led to the necessity for an application for joinder, in order to avoid further delay in the matter. Under the circumstances, I respectfully submit that the Respondents should pay the costs of the application for joinder.

41. I therefore ask for an order as set out in the Notice of Motion.

ELIZABETH GUMEDE

I certify that:

1. the deponent acknowledged to me that:
 - 1.1 she knows and understands the contents of this declaration;
 - 1.2 she has no objection to taking the prescribed oath;
 - 1.3 she considers the prescribed oath to be binding on her conscience;
2. the deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God";

3. the deponent signed this declaration in my presence at the address set out hereunder on this day of JANUARY 2007.

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COMMISSIONER OF OATHS

Designation and Area
Full Names
Street Address