# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**CC CASE NO: 50/08**

In the matter between:

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| **ELIZABETH GUMEDE (born SHANGE)** | **Applicant** |
| and | |
| **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** | **1st Respondent** |
| **MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** | **2nd Respondent** |
| **PREMIER OF KWAZULU-NATAL** | **3rd Respondent** |
| **KWAZULU-NATAL MEC FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS** | **4th Respondent** |
| **AMOS GUMEDE** | **5TH Respondent** |
| **MINISTER OF HOME AFFAIRS** | **6th Respondent** |

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## INTRODUCTION

1. Ideally, South Africa should have a single code that unifies our law of marriage. However, any attempt to realise that goal immediately would entail the assimilation and possible loss of customary law. Whilst the ideal of a single, unified code cannot be achieved at this stage, *the process of the reformation* of our law of marriage must nevertheless begin now. And, the focus of the process of reformation must be on *the need to solve common social problems* rather than abstract debate.

2. These are among the conclusions reached by the South African Law Commission ("the Law Commission") in it first post-apartheid report on customary marriages. The Report was published just more than a decade ago. It proposed a number of far-reaching reforms to the law applicable to customary marriages. Not surprisingly, given the status of the body making the proposals, they were accepted almost in their entirety by the Executive and thereafter Parliament and have been incorporated as part of the new resultant statute governing customary marriages, namely, the Recognition of Customary Marriages Act[1] ("the Recognition Act").

[1] No 120 of 1998

3. These reforms to the law of customary marriages may be commendable, says the Applicant. However, she complains, they do not go far enough. They assist persons who marry after the commencement of the Recognition Act, but not persons like herself who married before that date. The essence of her complaint is that the Recognition Act did not declare that her marriage, which is seemingly out of community of property, is in community of property. In order to remedy the position for her, she asked that sections 7(1) and (2) of the Recognition Act, s 20 of the KwaZulu Act on the Code of Zulu Law[2] ("the Code"); and s 20 of the Natal Code of Zulu Law[3] ("the Natal Code") be declared unconstitutional. The latter two provisions do not allow her to own property during the marriage.

4. Significantly, when crafting the first step in the process of the reformation of customary marriages, the Law Commission considered whether the reformed law should say what the Applicant now asks for. After agonising over the matter, the Law Commission decided that it should not. That would be unnecessary, it found. This is because the statutory matrix that would govern customary marriages and their termination after the Recognition Act was passed would in essence grant persons in the position of the Applicant the very "protection" that she sought and secured from the High Court.

[2] No 16 of 1985
[3] Proclamation 151 of 1987

5. In most cases, the legal issues that arise from applications that challenge the constitutional validity of legislation focus on whether or not the provisions in question infringe fundamental rights. Here, however, the complaint is that the remedial provisions do not go far enough. In addition, the Applicant's complaint is that although it is contended that one of the purposes of the new scheme is to grant her the protection that she seeks though the application, on a proper interpretation of the applicable statutory provisions, that purpose is not achieved.

6. The topics that will be addressed in these Heads flow from what has been set out above. They are as follows. First, the factual background against which the application was brought. Second, the statutory framework that was based on the Law Commission's Report. Third, the Applicant's criticisms of the statutory provisions. Fourth, the basis on which the application was opposed. Fifth, the reasoning and decisions of the Court *a quo*. Sixth, whey the impugned provisions are not unconstitutional.

**THE FACTUAL MATRIX**

7. Applicant and Fifth Respondent are Zulu. They entered into a customary marriage on 29 May 1968. There are no minor children. The parties have not lived together since February 2001. The Fifth Respondent is the owner of House AA 521, Umlazi ("the Umlazi house"). He receives a monthly pension from Sanlam. On 27 January 2003, Fifth Respondent instituted divorce proceedings in the North Eastern Divorce Court ("the Divorce Court").[4] Applicant has asked that the divorce action be stayed until the determination of her application to the High Court to declare unconstitutional the impugned provisions of the three statutes.[5] None of the above issues appears to be in dispute.

8. Unfortunately, the factual position in respect of certain other matters is not entirely clear. This is because Fifth Respondent did not file any affidavits when the application for constitutional invalidity was made to the High Court. However, he did file an affidavit in an application that Applicant made for similar relief when she instituted proceedings in the Equality Court. The effect of that affidavit is to challenge Applicant's allegations about the properties that Fifth Respondent acquired and also her entitlement to maintenance and a share of the pension.

[4] Record: Annexure "G12": Particulars of Claim in the Divorce Court: pp 121-122
[5] Record: Founding Affidavit: p 13, para 16

9. Applicant's approach to the absence of an affidavit from the Fifth Respondent, in the High Court application, is as follows. The only version available to the High Court is Applicant's version. Whatever has been said by the Fifth Respondent, in his particulars of claim in the divorce action or in his affidavit in the Equality Court application, must be ignored. With respect, that is a somewhat technical and formalistic approach. It is submitted that the appropriate stance is to keep in mind that doubts have been raised about the allegations made by Applicant in respect of those matters. In this connection, it must be emphasised that the Fourth and Sixth Respondents are not in a position to furnish information. Where such information exists, it ought not to be simply ignored.

10. It is submitted that Applicant's insistence that the constitutional issues must be determined in a contextual vacuum must be rejected. Otherwise, if it is afterwards found that Fifth Respondent's allegations are correct, Applicant gains an unfair advantage in the Divorce Court. This is because she would already have succeeded in having her marriage, which was contracted out of community of property, declared to be in community of property. She would then be automatically entitled to half the joint estate.

11. Using all the information that is available, it is submitted that the following emerges. The essence of the dispute in the divorce proceedings concerns the property or properties in the name of, or owned by, the Fifth Respondent and the Applicant's entitlement thereto.[6] The following appear to be the main particulars of the dispute. First, whether the Applicant alone is entitled to the Umlazi house. Second, whether the Fifth Respondent also owns a house in Adam's Mission. Third, the value of the furnishings and appliances in that house. Fourth, the amount of the pension the Fifth Respondent receives from Sanlam. Fifth, whether the Fifth Respondent is obliged to pay maintenance to the Applicant.

12. It is necessary now to consider the statutory regime created by the Recognition Act. In the course of dealing with that issue, the Law Commission's analysis of the fundamental issues that must be addressed when dealing with the law of customary marriages and its general approach to such issues will also be addressed. So will its rationale for recommending the provisions, despite its constitutional concerns.

[6] Applicant's Founding Affidavit:

## THE STATUTORY FRAMEWORK

13. One of the principal aims of the Recognition Act is to remove elements of discrimination against customary legal tradition. In doing so, the Act gives expression to two constitutional principles. The one is to pass legislation that is contemplated in s 15(3) of the Constitution. The other is to give effect to the cultural pluralism that is guaranteed by sections 30 and 31 of the Constitution.[7] In addition, the Recognition Act strives to reconcile the preservation of the African cultural tradition with the competing claim posed by the constitutional requirement to establish norms of equal treatment and non-discrimination. To that end, the Law Commission, whilst recommending the repeal of certain measures, did not recommend the repeal of s 20 of the Code or s 20 of the Natal Code.

14. Insofar as the impugned provisions are concerned, the Recognition Act is for, for all purposes that are relevant to this matter, based on a Draft Bill that accompanied the Law Commission's Report on Customary Marriages. A copy of the full Report will be made available prior to the hearing of this matter.

[7] On the importance of these matters, see generally *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC)

15. In the Report, the Law Commission explains why the statutory matrix that would be created by the Recognition Act ought to govern all aspects of customary marriages. The Fourth and Sixth Respondents, who were the only Respondents who opposed the application in the High Court and now oppose the application for confirmation, accept the validity of the explanation. They also point out that to the extent that the right to equality might be infringed by that statutory matrix, for the reasons given by the Law Commission such limitation is justified in terms of s 36 of the Constitution.[8] The Answering Affidavit makes it clear that the Government's defence of the new statutory regime that was introduced is based on the reasons that the Law Commission gives for its proposals. In the circumstances, it will be helpful to highlight certain aspects of the Report and in particular the Law Commission's justification for its proposals.

16. It is worth stressing at the outset that the Report was compiled by a group of experts only after extensive consultations and research. Among the categories of persons and organisations with whom consultations were held were the following: non-governmental organisations, women's groups, traditional leaders, the legal profession, State Departments and the religious community. In addition, comments on its initial proposals were received from other

[8] Record: p 112, Answering Affidavit: paras 45 and 46

interested parties. The Commission's final recommendations took into account all views that were expressed.

17. The following considerations informed the Law Commission's eventual proposals. First, no single legal system can offer the perfect model for reform because family law is everywhere in turmoil, in a state of flux and conceptual disarray. Second, *it was necessary to eschew abstract debate and focus on the need to solve common social problems*: spousal violence, disputes about custody and about financial support. Third, the means must offend neither the aim of a unified law of marriage nor that of cultural pluralism.[9] Fourth, it was necessary to establish a set of minimum requirements for contracting a valid marriage and uniform consequences for all marriages, while allowing distinctively African traditions to continue.[10] Fifth, *a single code of marriage law would entail the assimilation and possible loss of customary law*.[11] Sixth, the proposals contained in the Report were only the first steps in the process of reform. However, this did not mean that the ideal of unification has been permanently abandoned.[12]

[9] Ibid, para 2.1.24
[10] Ibid, para 2.1.25

[11] Ibid, para 2.1.27

[12] Ibid, para 2.1.18

18. It is perhaps important to stress that the Law Commission concluded that, although a unified marriage law was the ideal, a measure of dualism was inevitable, at this stage of our history at any rate. This is because of the following: cultural pluralism is guaranteed by sections 30 and 31 of the Constitution and there is a need to eradicate former prejudices against African cultural institutions.[13] The Law Commission noted that this conclusion was reinforced by what had happened to the north of our borders.[14]

19. It noted in addition that research had shown that regardless of how desirable the political and social goals of legal unification might be, reforms will become *paper law* if they do not fall into a receptive community.[15] It is for this reason, for example, that it did not recommend a legal prohibition of polygyny.[16] The Law Commission also accepted that *family law is an area notoriously resistant to outside interference*. Reforms are acted upon only when the intended beneficiaries are educated and capable of asserting their rights.[17]

20. *The limits inherent in what the law can do to uplift and protect vulnerable parties in marriage suggested to the Commission that it*

[13] Commission's Report: para 2.1.11
[14] Ibid, paras 2.1.12-2.1.18
[15] Ibid, para 2.1.18
[16] Ibid, para 6.1.19
[17] Ibid, para 2.1.19

*would be inadvisable to ignore customary institutions.*[18] Conversely, the respect now due to the African legal tradition demands serious consideration of customary law.[19]

21. In drawing up its proposals the Commission took into account the overriding requirements of the Bill of Rights and to South Africa's obligation to implement the international human rights conventions it has ratified.[20] Among the requirements of the Bill of Rights are the principles of equality and non-discrimination.[21] The international conventions included the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Law Commission noted that our domestic law must be adjusted accordingly.[22]

22. It also pointed out that s 211(3) of the Constitution provides: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." However, to interpret s 211(3) literally would suggest that any rule of customary law in conflict with the Bill of Rights must automatically give way to the Bill of Rights. Tellingly, it is submitted, the

[18] Ibid, para 2.1.21
[19] Ibid, para 2.1.22
[20] Ibid, para 2.1.30

[21] Ibid, para 2.3.2
[22] Ibid, para 2.3.3

Law Commission points out: *"Testing the constitutional validity of rules of private law, however, involves a more flexible approach."*[23]

*23.* As a result, *applying the Bill of Rights horizontally should be done with circumspection and only after considering the extent to which the state should intervene in domestic relations*. This requires that the right to equal treatment must be weighed against the right to culture. *However, if recognition of customary law is to be something more than an empty gesture towards the African cultural tradition, application of the Bill of Rights must be construed in such a way that a set of western values does not become dominant, merely by reason of the fact that the customary rule is different.*

24. And, the Law Commission warns: "We have a forbidding precedent from the colonial era of customary law being all but eliminated in the cause of western moral standards."[24] No one wishes this fate on customary law. But the state cannot abdicate its responsibility to protect its citizens and to improve their lots in life. A balance has to be struck between an over-zealous, interfering state and domestic privacy. *In a society of many cultures and religions, the freedom to pursue a culture or belief of choice in the home must be respected, and the dominant ideology must be one of tolerance.* Indeed, most

[23] Ibid, para 2.3.5
[24] Ibid, para 2.3.10

plural societies generally refrain from expressing a common morality. They confine themselves "to defining the current outer limits of permissible diversity … while leaving maximum room for choice and … individual liberty".[25]

25. The Commission also cautioned that it is unsafe to assume that a kind of hegemonic western orthodoxy will prevail over African customs which do not fit comfortably within the dominant cultural frame. More seems to be needed, namely that the custom in question must, on a cold, objective assessment, fail all the tests set out in the Constitution.

26. In a traditional system of customary law, a man's position as head of a family would have entailed weighty responsibilities to care for those under his control. But these responsibilities were played down in the official version, which represents some of the worst features of "invented tradition". However, living law is both nebulous and contradictory. But this is because marriage generates various vague expectations and responsibilities of a social or moral nature which are not readily amenable to legal regulation.[26]

27. The Commission acknowledged that reform is needed to bring customary law governing spousal relations into line with socio-

[25] Ibid, paras 2.3.6-2.3.12
[26] Ibid, paras 6.2.1.2-6.2.1.3

economic changes in South African society and to give effect to the principle of equal treatment in s 9 and CEDAW.[27] However, before any attempt is made to create a more equitable marital relationship, the general legal status of women must be upgraded. According to the "official" version of customary law, women have no capacity to hold and dispose of property, to contract and to sue or to be sued in court.[28] The Commission accepted that provisions should be introduced that ensure that men and women will enjoy the same legal capacities. Once this is done the way is clear for establishing equality within the marital relationship.[29]

28. The Commission felt that all wives, regardless of the form of marriage, should have powers and rights equal to those of their husbands. This involved a substantial break with African patriarchal tradition.[30] It recommended that, in compliance with our obligations under CEDAW and the Constitution, legislation should be passed to provide that spouses have equal capacities and powers of decision-making. To this end, it recommended the repeal of sections 22 and 27(3) of the Code and the Natal Code.

[27] Ibid, para 6.2.1.7
[28] Ibid, para 6.2.2.1
[29] Ibid, para 6.2.2.18
[30] Ibid, para 6.2.2.21 and 6.2.2.22

29. It noted that in terms of customary law, all the assets in a house estate fell under the husband's overall control, to be administered for the common good.[31] Nothing has been done in South Africa to adjust customary law to changes in the economic relationships of family members.[32] The Commission had to resist the accusation that it was forcing customary law into conformity with western values, but accepted that to allow customary law to persist in its present form is to ignore social realities and to invite constitutional challenges. It proposed that an individual's full ownership in his or her acquisitions should now be recognised.[33]

30. In respect of the proprietary consequences of marriage, the Report says the following. In former times, an individual's economic welfare would have depended on the support of kinfolk and to a lesser extent neighbours and traditional leaders. Women in particular were always dependent on men. But today most people are responsible for their own livelihoods.[34]

31. Problems in the spouses' proprietary relations surface on divorce. During marriage, both partners work jointly to support the family, but if the marriage breaks down the remnant family faces a drastic fall in

[31] Ibid, para 6.3.1.8
[32] Ibid, para 6.3.1.11
[33] Ibid, para 6.3.1.14
[34] Ibid, para 6.3.4.1

income relative to its needs. The burden of satisfying these needs falls on the less qualified and poorly paid spouse: the former wife.[35]

32. Because customary law is based on the understanding that an individual's primary source of support is the extended family, the maintenance of wives and children is of little consequence. Both in law and common perception, women are supposed to rely on men, who therefore carry full responsibility for supporting them. Reality, however, seldom corresponds to the law or popular belief.[36]

33. On the break-up of marriage, women are likely to find themselves at a serious disadvantage.[37] When confronted with a similar problem, western legal systems introduced two innovations: extending the husband's liability to maintain his wife and children beyond the termination of the marriage (prospective); and giving the wife a share of the matrimonial estate (retrospective), founded on proprietary rights established automatically (or by contract) at the time of the marriage.[38]

34. Far-reaching changes are necessary to the present regime of customary law to make provision for the financial needs of wives and

[35] Ibid, para 6.3.4.2
[36] Ibid, para 6.3.4.3
[37] Ibid, para 6.3.4.4
[38] Ibid, para 6.3.4.5

children.[39] The first step towards creating a fairer proprietary regime in marriage would be to give wives full proprietary capacity, thereby entitling women to acquiring property in their own name and deciding a matrimonial proprietary regime.[40]

35. However, *in practice, the nature of the property system is of little account during an harmonious marriage, since problems tend to emerge only when the union is dissolved. Hence, the Commission's main goal was to ensure an equitable distribution of assets on break-up of the marriage*.[41] The Commission felt that it was immaterial whether estates were held separately or in community during marriage, provided that the economically weaker spouse was suitably protected on divorce. Protection is already available for civil marriages.[42]

36. In the case of African marriages, the tendency in the past was to assume that spouses would be more likely to accept a separation of estates. The Commission's initial position was that that should continue.[43] But due to intense opposition to that view, the Commission recommended that community of property be the automatic proprietary regime.[44]

[39] Ibid, para 6.3.4.6
[40] Ibid, para 6.3.4.8
[41] Ibid, para 6.3.4.9
[42] Ibid, para 6.3.4.10
[43] Ibid, para 6.3.4.11
[44] Ibid, para 6.3.4.13

37. The position at that stage, the Commission pointed out, was that since 2 December 1988, all civil and Christian marriages between Africans are automatically in community of property and profit and loss. For those already married out of community of property, the divorce court has a measure of discretion to distribute property equitably.[45] The Commission however pointed out the problems that would arise in polygynous marriages.[46]

38. A critical question relating to any reform of proprietary regimes is whether the legislation should operate prospectively or whether it should include the estates of spouses already married under the old regime.[47] Two competing considerations were considered. First, prospective law reform might constitute unfair discrimination against spouses of earlier marriages. Second, retrospective law reform will upset rights acquired under existing marriages. The outcome of its consideration is reflected in its proposed sections 7(1) and 7(2) of its draft bill. However, express provision is made to permit spouses to change the proprietary regime of their marriage.

39. The challenges confronted by the Law Commission and how it met them form a useful backdrop against which to consider the complaints

[45] Ibid, para 6.3.4.14
[46] Ibid, para 6.3.4.15-6.3.4.17

that the Applicant levels against the statutory dispensation that the Commission proposed, and which were accepted, in respect of customary marriages.

**THE THRUST OF APPLICANT'S COMPLAINTS**

40. The Applicant makes a number of observations about the propriety consequences of customary marriages concluded prior to the commencement of the Recognition Act. These consequences, she says, operate unfairly against women like herself. She alleges that, under the applicable statutory matrix – consisting of the Recognition Act, customary law, the Code and the Natal Code – the Divorce Court would be required to deny her a share of the disputed assets and maintenance from the Fifth Respondent. The consequence is that she will be left homeless. In the circumstances, the only means available to her to protect her financial and proprietary rights and interests is to secure an order declaring the impugned provisions unconstitutional and invalid. The Divorce Court does not have the power to make such a declaration. Hence he approach to High Court for the declaration of constitutional invalidity.

41. Certainly, the picture that the Applicant paints about what her fate would be if the relief she seeks is not granted must evoke sympathy, if

[47] Ibid, para 6.3.4.18

it is consistent with a proper construction of the applicable statutory provisions. The question, however, is whether she has fairly and accurately reflected the proper legal position.

42. It must be stressed that, having regard to all the facts and the nature of her complaint, it is clear that Applicant wishes to protect her position at the time that the divorce is granted.

43. The application was opposed by the Fourth and Sixth Respondents. What the basis of that opposition was is considered hereunder.

**BASIS OF OPPOSITION**

44. In the High Court, the Fourth and Sixth Respondents opposed the relief sought on the following grounds. First, there are sharp disputes of fact relating to the divorce that ought first to be resolved by the Divorce Court. Second, the decision of the Divorce Court might render the constitutional and declaratory orders that were sought purely academic, for the purposes of the resolution of the dispute, which was essentially a personal one between her and Fifth Respondent. Third, the impugned provisions are in any case not unconstitutional.

45. The High Court rejected all three of the contentions advanced on behalf the Fourth and Sixth Respondents. It will be helpful to consider the validity of such rejection. However, in view of the High Court's finding of unconstitutionality, the main focus of the remainder of these Heads will be on that issue.

**THE JUDGMENT OF THE COURT *A QUO***

46. It is worth stressing that the following matters ought to have been properly considered by the High Court. Had it done so, it would have concluded that it ought not to decide the constitutional matters that the Applicant had raised.

47. First, there were sharp disputes of fact relating to the merits of Applicant's propriety claims in the pending divorce action. Until these were resolved, the constitutional and declaratory orders that were sought were of a purely academic nature for the purposes of determining the proprietary disputes between Applicant and Fifth Respondents. The Court *a quo* accordingly erred in even considering the question of the constitutionality of the impugned provisions.

48. Second, in view of the fact that the parties had been living apart for many years and there was no prospect that Applicant would be an

inmate of the Fifth Respondent's family home, the question of the constitutionality of s 20 of the Code and s 20 of the Natal Code does not arise at all in this case. Accordingly, the Court *a quo* erred in considering that question and in thereafter declaring s 20 of the Code and s 20 of the Natal Code it to be unconstitutional.

49. In addition, the question of the constitutionality of the impugned provisions would arise only if the court hearing the divorce action interpreted s 7 of the Divorce Act[48] in a manner that did not take into account the following. First, by virtue of s 20 of the Code and s 20 of the Natal Code, the family head becomes the owner of all family property. Second, s 7 of the Divorce Act requires the Divorce Court to consider whether it should order that any of the assets of the Fifth Respondent should be transferred to the Applicant. On a proper interpretation of s 7, and viewing it through the prism of the Constitution as one must, in addition to the factors mentioned in s 7(3), the Divorce Court would also have to consider whether the Fifth Respondent had acquired the assets by virtue of s 20 of the Code or s 20 of the Natal Code. Consequently, the Court *a quo* erred in holding that the "default position" would have unfair consequences for women at the time of divorce.

[48] No 70 of 1979

50. The Court *a quo* recognised that the Recognition Act was remedial legislation and that the complaint was not its provisions were the source of discrimination. It was that the remedies it provided did not go far enough. However, both the Law Commission and Parliament had considered the social implications of the remedy chosen by the Court *a quo*. After balancing all the competing interests and rights involved, they had, having regard to the factors mentioned in s 36 of the Constitution, eschewed that remedy. They considered that the measures introduced passed constitutional muster. They do. The Court *a quo* accordingly erred in holding that the limitations on the right to equality, seen within the scheme of all applicable legislation, are not justifiable under s 36 of the Constitution.

51. The Court *a quo* accepted that the Recognition Act was based on proposals for reform that had been made by the Law Commission. It said, however, that South Africa had ratified CEDAW. As such, in terms of Article 3, South Africa had a duty to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental rights and fundamental freedoms on a basis of equality with men". To the extent that the Recognition Act permitted those measures to remain as part of our law, it did not go far enough. With respect, the test for

constitutionality of legislation is s 36 not international conventions. These would however play a role in the interpretation of domestic statutory provisions.

52. It is clear from the Law Commission's Report that it had made the recommendation only after anxious consideration. Parliament had accepted that recommendation. The Court *a quo* erred in substituting its views, on policy matters, for those of Parliament.

53. What has been set out above represents obvious criticisms of the approach and findings of the Court *a quo*. It is submitted that they constitute compelling reasons for not confirming the orders of constitutional invalidity that were made by the Court *a quo*. However, it is submitted that in addition to what has been set out above, there are other reasons why the declarations of constitutional invalidity ought not to be confirmed. They are considered hereunder.

**WHY THE SCHEME IS NOT UNCONSTITUTIONAL**

54. The question of whether or not the provisions are unconstitutional must ultimately depend on how the Divorce Court is required to interpret them. If the provisions, properly considered, lend themselves to an interpretation that does not in effect violate Applicant's fundamental

rights, there would be no basis to have them declared unconstitutional. The thrust of what follows is that the provisions can, and must be so interpreted, despite the formal inequality that the statutory scheme countenances during the course of marriages entered into prior to the commencement of the Recognition Act.

55. This is because of the following. Whatever the position was prior to the commencement of the Recognition Act, the position now insofar as the proprietary consequences on divorce are concerned may be summarized as follows. In terms of s 8(4)(a) of the Recognition Act, a court dissolving a customary marriage has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act.

56. The result is as follows. The dissolution of customary marriages is now dealt with on the same basis as the dissolution by the High Court of a civil marriage: all divorce courts now have the same powers. Those powers are as follows. Where parties were married out of community, the court may, in the absence of an agreement between the parties and on application of a party, order that the assets of the other party be transferred to the applicant party.[49]

[49] Section 7(3). Section 7(4) and (5) set out the considerations that must be taken into account when such an order is made.

57. The Applicant's complaint about the impugned provisions of the Recognition Act is as follows. They unfairly discriminate against women who entered into customary marriages prior to the commencement of the Recognition Act. It might be pointed out, however, that the thrust of the complaint can only be that the Recognition Act does not declare that those marriages are also in community of property.

58. The reasons that the Applicant gives for seeking the declarations of constitutional invalidity is that unless such relief is granted her constitutional rights will be violated. However, the Report points out the following. First, problems in the spouses' proprietary relations usually surface on divorce. As a result, the proposed new Act must ensure that the economically weaker spouse was suitably protected at the time of divorce. Second, such protection existed under the Divorce Act. Consequently, the provisions of the Divorce Act that relate to protection for women who had concluded civil marriages should be extended to women who have concluded customary marriages. That is precisely what s 8(4)(a) of the Recognition Act does.

59. Having regard to the concerns that the Applicant raises about her plight after the marriage is dissolved, it is necessary to stress that the Divorce Act, which the Recognition Act make applicable to all

customary marriages, whether concluded before or after the commencement of the Recognition Act, gives her a total remedy. Applicant will be entitled to apply for maintenance,[50] the transfer of the assets from the Fifth Respondent to her if that is deemed just[51] and for her share of any pension payment made to Fifth Respondent.[52] In the circumstances, at the time of divorce, the protection that is now provided to a spouse who has concluded a customary marriage, either before or after the commencement of the Recognition Act, is no different from that provided to a spouse who has concluded a civil marriage.

60. Perhaps most significantly for the purposes of this case, the protection given to a spouse who had concluded a customary marriage prior to the Recognition Act is not inferior to that granted to a spouse of such a marriage concluded after the Recognition Act. In addition, the protection applies in respect of all customary marriages – whether in or out of community of property. It is submitted that the Applicant is not disadvantaged, provided that the Divorce Act is interpreted through the prism of the Constitution, as it must be. It is further submitted that should there be any doubt or dispute about what was intended by the Recognition Act, the Applicant would be able to rely on the Report of the Law Commission in support of that contention.

[50] Under s 7(2)
[51] Under s 7(3)

61. The net result is, it is submitted, that Applicant is not disadvantaged, in substance, by the distinction that the Recognition Act draws between the proprietary consequences of marriages that were concluded before the commencement of the Recognition Act and those that were concluded after such commencement.

62. In any case, the Law Commission considered whether or not all customary marriages, whether concluded before or after the coming into force of the Recognition Act, ought to be held, in the absence of an antenuptial contract, to be in community of property. It took into account that the rights of third parties may be affected. So will the rights of spouses to existing customary marriages. It perhaps should also have noted that if the Recognition Act applied retrospectively, Parliament would by statute be varying contracts concluded by parties who might not have entered into such contracts had they been aware that the marriage would be in community of property.

63. It must be accepted that the Recognition Act creates two categories of spouses: those married before its commencement and those married thereafter. The Law Commission accepted that those belonging to the latter category are at an advantage, being married in community of community. But it felt that such a differentiation was justifiable. It

[52] Under s 7(7)

allowed for the continuation of customary law but nevertheless from the inception protected women at the time it mattered, at divorce. In that sense, even if the differentiation constituted unfair discrimination, because it was on a specified ground, it was of the view that it was justifiable.

64. In determining whether the provisions are justifiable in terms of s 36 of the Constitution, account must be taken of the following. The position prior to the Recognition Act was that the proprietary consequences of *all* customary marriages were governed by customary law. Now, however, the default position in respect of monogamous customary marriages entered into after the Recognition Act is that they are in community of property. The position of those who were already married remains the same. What the Recognition Act does is to improve the default position of women who marry after its commencement. It leaves intact the position of those who had already entered into customary marriages, but makes it possible for them voluntarily to change the propriety regime of their marriages.[53]

65. There can be little doubt that equality is a right that is foundational to our new constitutional dispensation. But it, too, may be limited in certain circumstances.

66. One reason why the Law Commission's approach is justifiable is that to have decreed that *all* customary marriages, even those which had been entered into decades earlier, are in community of property would result in a retrospective change of marriage contracts. This would be unfair to those who did not wish to change the proprietary regime of their marriage. Some might challenge the constitutionality of such an approach, on the following basis. First, they would not have contracted a marriage in community of property. Second, marriage, as pointed out by the Law Commission, is a private matter. Consequently, changing their marriage contracts, without their consent, constitutes an unwarranted intrusion which causes prejudice not only to unwilling spouses but also to third parties as well. Third, retrospective changes constitute a violation of the principle of legality and the rule of law. By contrast, the fact that changes would be prospective ensures respect for the principle of legality and the rule of law.[54]

67. In addition, the effect of the differentiation effected is not fixed. First, those not falling under the new default position may vary the proprietary consequences of previously concluded customary marriages, even during the subsistence of the marriage. Second, at the time of divorce the spouse of a customary marriage now has the same rights in respect of property and finances as the spouse of a civil

[53] See s 7(4) of the Recognition Act

marriage. As pointed out by the Law Commission, this is when most questions relating to property and financial matters surface. It is submitted that the flexibility of the system and the protection that it affords to women at the time of divorce constitute a safety net that ensures that the provisions as a whole operate fairly.[55]

68. It must also be borne in mind that marriage is a contract that is concluded voluntarily. Certainly, the Applicant does not say that that did not apply in her case. In fact, hers was a written contract. It is submitted that in this case, any adverse impact on the Applicant was in the past. Now the Divorce Court will be in a position to address all her concerns, if they are legitimate. The Divorce Court will be required to deal with her case in exactly the same manner that it finalises the matters of all spouses against whom divorce proceedings have been instituted or who institute such proceedings.

69. It is submitted that the Law Commission adopted an approach of minimal interference in form but maximum effect in outcome. It crafted a statutory matrix that accommodated all concerns without essentially sacrificing the fundamental rights of anyone. Perhaps most importantly, it opted for a system that would not result in domestic strife even though it might not quite achieve domestic bliss. It is a system, which

[54] See Masiya v DPP, Pretoria and Another 2007(5) SA 30 (CC), at [47]-[58] for the application of these principles in the criminal law context.

the Law Commission accepted is not perfect but at least acknowledges and respects African culture and tradition in circumstances where it does not lead to the irreparable prejudice of its most vulnerable members: women and children. It is a system that represents creative accommodation to achieve real justice between men and women.

70. Having regard to the findings and recommendations of the Law Commission, it is submitted that the impugned provisions of the Recognition Act are not unconstitutional. The Law Commission balanced all competing interests. Its report makes it clear that it took into account all the concerns and issues that the Applicant raises in her application. It balanced these against the rights and interests of society as a whole and against other constitutional provisions.

71. With respect, it cannot be said that it did not apply it mind to all relevant matters. The Law Commission is a statutory body that is charged with, *inter alia*, the task of making recommendations for the development and reform of all branches of the law.[56]

72. Having regard to expertise of the committee that was involved in the compiling of the research and the Report,[57] it is submitted that its recommendations ought to be accepted, unless there are compelling

[55] See *Refugee Women*
[56] See s 4 of the South African Law Reform Commission Act, No 19 of 1973

reason for rejecting them. It is submitted that a reading of the Report confirms that there are no grounds for rejecting the Report or the Law Commission's recommendations. The consequence, it is submitted, is a finding that the statutory measures that it proposed are not unconstitutional.

73. In the circumstances, it is submitted that the declarations of unconstitutionality in respect of the Recognition Act ought not to be confirmed.

74. Perhaps the most compelling reason to allow the differentiation is that it had been expressly proposed by the Law Commission. For Government to have rejected the proposal, purely on the ground that formal equality during the course of the marriage is not required, would constitute a forceful basis to challenge whatever other scheme was put in place, even the scheme created by the Court *a quo*.

75. It is necessary now to consider the validity of the Applicant's attack on the impugned provisions of the Code and the Natal Code.

76. Insofar as these provision are concerned, it is submitted s 20 of the KwaZulu Act and s 20 of the Natal Code are not at issue in this case, especially having regard to the Applicant's express desire to secure

[57] Their names are listed in footnote 1 of the Report

the invalidation of the provisions in order to ensure that her rights are protected at the divorce.

77. The Applicant's complaint about the impugned provisions of the Code and of the Natal Code appears to be as follows. First, under these provisions the husband of a customary marriage is the owner of and has charge, custody and control of all family property in the family home. However, these statutes do not provide for the division of property upon the dissolution of a customary marriage. Therefore, the wife can never lay claim to such property at the time of the divorce. In addition, because no provision is made for payment of maintenance of a spouse after divorce, the wife cannot claim maintenance.

78. However, as contended above, the Recognition Act ensures that at the time of a divorce spouses who have concluded customary marriages are granted the same protection as spouses who have concluded civil marriages. In the circumstances, having regard to the rights and interests that the Applicant alleges that she wishes to protect, she is not disadvantaged, in substance, by the provisions of the Code and the Natal Code that she is seeking to invalidate. The relevant provisions of the Divorce Act are applicable, notwithstanding the impugned provisions of the Code and the Natal Code.

79. In the premises, for the purposes of this application, and having regard to the Applicant's reason for wanting to invalidate the impugned provisions of the Code and the Natal Code, are not unconstitutional.

**CONCLUSION**

80. Taking into account the matters raised above, it is submitted that the limitation of the right to equality brought about by the Recognition Act is justifiable under s 36 of the Constitution. It is consequently not unconstitutional. The same applies to the impugned provisions of the Code and the Natal Code.

81. Finally, it must be stressed that the situation in this case is quite different from that which obtained in *Bhe*. There the legislature had done nothing. Here Parliament took steps to resolve the essential conflicts between customary marriages and the Bill of Rights. It is submitted that, having regard to the deliberations of the Law Commission, it succeeded.

82. In the premises, the declarations of unconstitutionality ought not to be confirmed.

V Soni SC

Fourth and Sixth Respondents' Counsel