IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD IN BRAAMFONTEIN

Case No: CCT 23/20
KZN High Court case D12515/2018

In the matter between:

AGNES SITHOLE	First Applicant
COMMISSION FOR GENDER EQUALITY	Second Applicant
and	
GIDEON SITHOLE	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent

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INTRODUCTION

1. This case is the third in a trilogy of cases dealing with the position of African women who married in terms of matrimonial laws which discriminated against them in respect of property rights.

2. In each case, legislation was introduced to remove that discrimination. But in each case, the law that removed the discrimination did not apply to the property rights of African women who were already married at the time when the law commenced. The consequence was that these women continued to be subject to the repealed discriminatory laws. The purpose of each case has been to put an end to this continuing discrimination.

3. The first case was *Gumede*.[1] Ms Gumede and her husband had entered into a customary marriage in 1968. The marriage was subject to the KwaZulu Act on the Code of Zulu Law (Act 16 of 1985) and the Natal Code of Zulu Law (Proclamation R151 of 1987). As this Court explained, the effect of these laws was that Ms Gumede had no right to the family property either during or upon the dissolution of the marriage.

4. In 1998, the Recognition of Customary Marriages Act 120 of 1998 was enacted. It removed the discrimination, by providing that the default

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[1] *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

position for customary marriages would henceforth be marriage in community of property (unless there was an antenuptial contract).

5. But the Recognition Act applied only to customary marriages concluded after the commencement of the Recognition Act. It did not assist Ms Gumede or others similarly placed. They remained subject to the now repealed discriminatory property law of customary marriage.

6. This Court held that the pre-Recognition Act position was discriminatory – it held that the provisions *"obviously discriminated unfairly against women"*. The continuing discrimination against women married before the commencement of the Recognition Act was constitutionally impermissible. And so the Court struck down the words *"entered into after the commencement of this Act"* from the Recognition Act. The result was to bring about equality between women and men in customary marriages, and between women who entered into customary marriages before and after the commencement of the Recognition Act.

7. However, the *Gumede* decision applied only to monogamous customary marriages. The Court did not decide what the position was with regard to polygamous customary marriages.

8. The second case was *Ramuhovhi*.[2] Ms Ramuhovhi and her husband had entered into a polygamous customary marriage before the commencement of the Recognition Act.

9. This Court held that the *Gumede* principle also applied to polygamous customary marriages. It declared that the exclusion of pre-Recognition Act polygamous customary marriages from the changes introduced by that Act was inconsistent with the Constitution.

10. The present case is the third in the trilogy. It deals with the property rights of African women who are married in civil marriages.

11. Ms Sithole's marriage was and still is governed by section 22(6) of the notorious Black Administration Act 38 of 1927 (the **BAA**).

12. Section 22(6) of the BAA disadvantaged Black women by providing that except in limited circumstances, their marriages would be out of community of property.

13. The Marriage and Matrimonial Property Law Amendment Act 3 of 1988 repealed section 22(6). However, this repeal was only prospective. Marriage out of community remained the default position for those who had married before section 22(6) was repealed.

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2 *Ramuhovhi v President of the Republic of South Africa* 2018 (2) SA 1 (CC).

14. This was the result of sections 21(1) and 21(2)(a) of the Matrimonial Property Act (**MPA**), as amended by the 1988 Amendment Act.

15. The 1988 Amendment Act created limited mechanisms for Black women to escape this disadvantage, but those mechanisms were and are inadequate.

16. The result is that the discrimination created by section 22(6) of the BAA continues to operate against African women such as Ms Sithole, who entered into civil marriages before that repeal.

17. The KwaZulu-Natal High Court declared sections 21(1) and 21(2)(a) of the Matrimonial Property Act invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the BAA. It declared further that the marriages of black persons entered into under section 22(6) of the BAA before 1988 are in community of property. The order provided for transitional measures in this regard, and measures to enable a spouse to apply to a court to reverse this default position.

18. This is an application for confirmation of that declaration of invalidity in terms of s 172(2)(a) of the Constitution, read with rule 16 (2) of the Rules of this Court.

FACTUAL BACKGROUND

19. The first applicant is Ms Sithole, is a 72-year-old housewife.

20. Ms Sithole brings this application in her personal interest and in the interest of other women who are similarly situated.

21. The second applicant is the Commission for Gender Equality, established in terms of section 187 of the Constitution in order to promote respect for gender equality and the protection, development and attainment of gender equality.

22. Ms Sithole and her husband concluded a civil marriage on 16 December 1972. This marriage still subsists.

23. Ms Sithole states that at the time of marrying, they were advised by the officiating priest that a marriage out of community of property was the only option available to them as Black persons. They knew no better and did not seek legal advice.[3] The marriage was out of community of property by virtue of section 22(6) of the BAA.

24. In 1988 the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 gave Black couples who had married out of community of

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[3] Vol 1 FA Sithole, page 10 para 16 – 17.

property an opportunity to alter their matrimonial property regime. They could achieve this by executing and registering a notarial contract within a two-year period after 2 December 1988; or by applying to a court for an order to that effect.

25. Ms Sithole believed however that the amendment had resulted in her being married in community of property. This belief is illustrated by the fact that in 1990 her husband informed their bank, in her presence, that they were married in community of property. This was recorded in a First National Bank loan agreement signed by both Ms Sithole and her husband.[4]

26. Between 1972 and 1985, Ms Sithole stayed at home and raised their four children, all of whom are now adults. She also ran a home-based business, selling clothing. Her husband was employed as a project manager at an engineering firm. All of Ms Sithole's income was used to pay for the education of their children in private schools, and for family and household expenses. Her contributions to the family and its expenses led directly and indirectly to the increase in the value of her husband's estate.

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4 Vol 1 FA Sithole, page 10 para 20; Annexure B at page 32.

27. In 2000 Ms Sithole and her husband acquired a family home. It is registered in her husband's name.[5]

28. The relationship between Ms Sithole and her husband deteriorated. He engaged in extra-marital affairs and threatened to sell the family home without her consent. In 2018 she brought proceedings in the Pinetown Magistrate's Court for a domestic violence interdict. She then learned, for the first time, that she was married out of community of property and not in community of property as she had believed. She learned that her husband could carry out his threat to sell their family home without her consent.[6]

29. Ms Sithole then applied for, and on 10 August 2018 was granted, an interdict preventing her husband from selling or otherwise alienating her family home, pending the outcome of the present application.[7] She did this in order to prevent him rendering her homeless and depriving her of an asset that, but for the discriminatory laws in place at the time of their marriage, would have been registered jointly in their names or have fallen into their joint estate.

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5 Vol 1 FA Sithole, page 11 para 22 – 24.

6 Vol 1 FA Sithole, page 12 para 27.

7 Vol 1 FA Sithole, page 12 para 28 and 29; Annexure C, page 33.

30. The Divorce Act offers some protection to women who were married out of community of property under the BAA. The divorce court may order what it deems a just distribution of the assets. Ms Sithole however does not wish to divorce her husband, for a number of reasons:

30.1 She is a Roman Catholic. Divorce is discouraged and frowned upon by the Roman Catholic Church.

30.2 Ms Sithole's son passed away during the early part of 2018 and according to her custom, the mourning prayers endure for almost two years. Certain ceremonies and rituals need to be performed and it would be disrespectful to his memory to divorce during this time.

30.3 Ms Sithole is hopeful that she and her husband can reconcile, and that their marriage can be saved.

31. Ms Sithole is not willing to sacrifice her principles and divorce her husband in order to secure an equitable distribution of her assets.

32. The possibility of a redistribution of assets upon divorce in any event does not cure the discrimination which Ms Sithole has to endure during the course of the marriage – as demonstrated by Mr Sithole's power to fritter away assets, to sell the family home, and to make a will excluding Ms Sithole as an heir. And Ms Sithole should in any event not be

required by the law to divorce her husband in the hope that by so doing, she may achieve the equality and equal protection of the law which she is guaranteed by the Constitution.[8]

33. The Commission has conducted research into issues that confront women in relation to land and housing, poverty relief and their realisation of their socio-economic rights. It states that the problem confronting Ms Sithole affects a large number of elderly women, both urban and rural, who are vulnerable as a result of having concluded marriages subject to section 22 (6) of the BAA.[9]

34. The Commission states that it is not a rare occurrence for persons married under the BAA to assume, wrongly, that their marriage is in community of property. That is the default position for all other marriages in South Africa.[10]

The first respondent's version

35. The application to the High Court was set down for hearing on 17 October 2019.

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8 Vol 1 FA Sithole, page 12 para 30.1 – 31.

9 Vol 1, FA Nare, page 36 para 6-7.

10 Vol 1, FA Nare, page 38 para 8.1.

36. On 15 October 2019, the first respondent (Mr Sithole) filed an answering affidavit.[11] The applicants had no opportunity to reply to it.

37. In that affidavit, Mr Sithole raised a dispute as to what he and Ms Sithole knew and desired when they entered into their marriage. He asserted that the marriage officer informed them that they could declare jointly that they desired that community of property and of profit and loss would result from the marriage, and that thereupon such community would result from their marriage. He states that he and Ms Sithole agreed that it was their desire to be married out of community of property.[12]

38. As evidence of this, Mr Sithole attached a copy of their marriage certificate, in which the marriage officer recorded "Community of property excluded in terms of section twenty-two (6) of act no 38 of 1927".[13]

39. We make the following submissions in this regard:

40. First, the marriage certificate does not record that the parties decided that they wished to have a marriage out of community of property. All it does is record the default position in terms of section 22(6) of the BAA.

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11 Vol 4 AA Mr Sithole, pages 294-312.

12 Vol 4 AA Mr Sithole, pages 296-297 para 5.5 and 5.6.

13 Vol 4 Annexure GS2 page 311.

41. Second, the alleged intention of the parties to this marriage is irrelevant to the constitutional validity of the Matrimonial Property Act. Ms Sithole and the Commission on Gender Equality seek a declaration of invalidity of the relevant provisions of the Act. Mr Sithole makes no answer to that.

42. Third, the High Court order -

42.1 declared the relevant statutory provisions inconsistent with the Constitution and invalid.

42.2 declared that all marriages of black persons concluded out of community of property under section 22(6) of the BAA shall be marriages in community of property.

42.3 provided that a spouse in a marriage which is thereby declared to be a marriage in community of property may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding the declaration in paragraph 2 of the order.

43. Mr Sithole's allegations as to what happened at the time of the marriage may be relevant if he applies to the High Court for a declaration that his marriage is out of community of property. They are not relevant to the constitutionality of the MPA.

THE LEGISLATIVE FRAMEWORK AND ITS CONSEQUENCES

The Black Administration Act

44. Section 22(6) of the BAA provided:

> "A marriage between Blacks, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, Commissioner or marriage officer (who is hereby authorised to attest to such declaration) that it is their intention and desire that a community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community."

45. The salient features of section 22(6) were the following:

45.1 The default position was that Black couples married under the BAA were married out of community of property;

45.2 Black couples were permitted to marry in community of property if in the month preceding the marriage, they jointly declared to the marriage officer their intention to be married in community of property.

The consequences of section 22(6) for Black women

46. Section 22(6) denied Black women the protection that is afforded by a marriage in community of property. By doing so, it exacerbated their vulnerability and rendered them entirely dependent on the goodwill of their husbands, who generally control the bulk of the family's wealth.[14] It was discriminatory in two respects.

47. First, it discriminated against Black women by disadvantaging them relative to their husbands.

48. In general, marriages in community of property work in favour of women. The reason for this is that women are less likely to be employed than men and, if they are employed, they are likely to earn less than men. One of the primary reasons for this is that women traditionally bear the main responsibility for house work, bearing children and child care.[15]

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14 Vol 1, FA Sithole page 7 para 10.

15 Compare *Bannatyne* v *Bannatyne* 2003 (2) SA 363 (CC) para 29.

49. The disadvantaged position of women in marriages out of community is widely acknowledged:

49.1 If a woman is married in community of property, the assets acquired with her husband's income fall into the joint estate, and she becomes co-owner of those assets.

49.2 However, if the couple is married out of community of property, the assets amass in the husband's estate. The wife has no ownership in respect of those assets, and the husband is able to use and dispose of them without his wife's consent. He may recklessly fritter away the family's wealth, may leave the property to somebody other than his wife upon his death, or may unilaterally sell the family home. The wife may be forced out of her home, leaving her homeless and unsafe. She may be left with nothing to live on in her old age or to ensure her basic needs are met (including healthcare, food and security).

50. Second, the BAA unfairly discriminated against Black women compared with other women. Under section 22(6), the default position for Black couples was marriage out of community of property. By contrast, the law regulating civil marriages between couples of all other races provided that

the default position was marriage in community of property.[16] The BAA had the result that Black women were afforded less protection than other women.

Marriage and Matrimonial Property Law Amendment Act 3 of 1988

51. In 1988, amendments were made to the matrimonial law governing Black people. Section 22(6) of the BAA was repealed by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The Amendment Act inserted section 21(2)(a) and 25(3) into the Matrimonial Property Act 88 of 1984, giving persons married out of community of property in terms of section 22(6) of the BAA some limited opportunity to change their matrimonial property regime.

52. Section 21(2)(a) permitted couples to make the out of community accrual system provided for in chapter 1 of the Act applicable to their marriages. It provides that:

> "(2)(a) Notwithstanding anything to the contrary in any law or the common law contained, but subject to the provisions of paragraphs (b) and (c), the spouses to a marriage out of community of property—

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[16] This is the default position at common law: *"Marriage at common law creates community of property and of profit and loss … Every marriage is presumed to be in community until the contrary is proved."* Hahlo The South African Law of Husband and Wife (Juta, 1975) p 213.

(i) entered into before the commencement of this Act in terms of an antenuptial contract by which community of property and community of profit and loss are excluded; or

(ii) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act 38 of 1927), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry within two years after the commencement of this Act or, in the case of a marriage contemplated in subparagraph (ii) of this paragraph, within two years after the commencement of the said Marriage and Matrimonial Property Law Amendment Act, 1988, as the case may be, or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect."

53. Section 25(3)(b) permitted couples married out of community of property under section 22(6) of the BAA, where the wife was subject to the marital power, to convert their marriage to a marriage in community of property. Section 25(3)(b) provides as follows:

"(3) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of

> the Marriage and Matrimonial Property Law Amendment Act, 1988, and in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act, 1927 (Act 38 of 1927), may—
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> ...
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> (b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage,
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> by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect, and in such a case those provisions apply from the date on which the contract was so registered."

54. The marital power was fully abolished by section 11 of the Act as amended by section 29 of the General Law Amendment Act 132 of 1993, including in respect of marriages entered into before the commencement of the Act.[17] It appears that there are therefore no longer any women to whom section 25(3)(b) applies.

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[17] Prior to that amendment, section 11 created a limited abolition of the marital power. It provided:

> Subject to the provisions of section 25, the marital power which a husband has under the common law over the person and property of his wife is hereby abolished in respect of marriages entered into after the commencement of this Act.

55. Section 21(1) of the Matrimonial Property Act permits couples to apply to court, at any time, to alter the matrimonial property regime applicable to their marriage. To achieve this both spouses must consent and certain procedural requirements must be satisfied. Section 21(1) provides as follows:

> "(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that—
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> (a) there are sound reasons for the proposed change;
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> (b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and
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> (c) no other person will be prejudiced by the proposed change,
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> order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit."

56. The Divorce Act 70 of 1979 was amended by section 36(b) of the Matrimonial Property Act and then by section 2 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. Sections 7(3) to

(5) now provide that a divorce court may order distribution of assets between spouses married out of community of property under section 22(6) of the BAA "as the court may deem just".

THE LEGISLATIVE CHANGES ARE INADEQUATE TO ADDRESS THE DISCRIMINATORY LEGACY OF SECTION 22(6) OF THE BAA

57. These measures described above have ameliorated the discriminatory legacy of section 22(6) of the BAA. They are however fundamentally inadequate. The fundamental reason for this is that a marriage which was subject to the now repealed section 22(6) remains out of community of property, unless one of the procedures required by those measures is followed. Marriage out of community of property is the default position. The law perpetuates the discrimination.

58. The Commission illustrates this by describing the recent case of Z v N and Others in the Pietermaritzburg High Court. Ms Z was married in 1986 subject to section 22(6) of the BAA. Upon her husband's death, she found that during the course of their marriage, he had had a relationship with another woman (Ms N), and that he had nominated her as the sole beneficiary of a life policy. Ms Z approached the court to interdict the

payment of the benefits under the policy to Mrs N. She brought this application in the belief that she had been married to Mr Z in community of property. This was in fact not the case. Her application was dismissed, and she now lives in poverty. This was the consequence of the continuing legacy of section 22(6) of the BAA. The amendment of the MPA did not assist her.[18]

59. Many women are unable to obtain their husband's consent to alter their matrimonial property regime. This is because in a marriage out of community of property, men generally own and control the family assets. As a marriage in community of property generally favours the wife, many men are unlikely to agree to convert their marriage to one which is in community of property.

60. The expert affidavit of Deborah Budlender[19] describes research carried out in the late 1970's on the different attitudes of men and women to the nature of relationships in a marriage. The research showed that many men believe that they should be the primary decision-maker rather than making decisions through discussion and consensus. Such men are unlikely to agree to change the matrimonial property system when such a

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18 *Z v N & others* (case number 4367/17P): Vol 1, FA Nare page 37-38 para 9-10.

19 Vol 1, affidavit Budlender pages 49-50.

change would shift a significant portion of the decision-making power to their wives. For women in this position, the protective measures under section 21(1) and 21(2)(a) are not available.

61. The Commission states that it is not a rare occurrence for persons married under the BAA to wrongly assume that their marriage is community of property. For such persons, the 1988 amendment of the MPA, creating the right to change the matrimonial property regime by registering a notarial contract, was a dead letter. There is no evidence, according to their research, which shows that affected persons used this law to change their matrimonial property regime.[20] The amendments have failed to bring real, effective or meaningful relief to Black women married subject to section 22(6) of the BAA. To the contrary, they maintain the position created by section 22(6), and perpetuate its discrimination against Black women.[21]

62. Even if a woman is potentially able to obtain the consent of her husband to alteration of the matrimonial property regime, this protection is only available if she has the knowledge of her rights, and the necessary access to legal services, to enable her to approach a court and/or arrange the

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[20] Vol 1, FA Nare page 38 para 8.2.

[21] Vol 1, FA Nare page 39 para 12.

execution and registration of a notarial contract. A substantial portion of the women married under the BAA are not in such a position.

63. As we have noted, section 7 of the Divorce Act gives a divorce court the discretion to redistribute the assets held by the parties as it deems just. This does not assist women who cannot (or will not) divorce their husbands for religious or social or family reasons. For these women, the remedy provided by section 7(3) to (5) of the Divorce Act is of no assistance.

64. The Divorce Act "remedy" also does not address the discrimination against women such as Ms Sithole during the course of their marriage.[22]

65. And in any event, the Constitution does not contemplate that a woman must divorce her husband and rely on the exercise of a discretion by a court, in order to achieve her right to equality.

66. Ms Budlender estimated the number of Black women who concluded civil marriages prior to 1988, and whose marriages are likely to be out of community of property. Drawing on evidence, which is set out in her

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[22] Compare *Gumede v President of Republic of South Africa and others* 2009 (3) SA 152 (CC) para 45.

affidavit, she concludes that there could be more than 400 000 women who could be in the same position as Ms Sithole.[23]

67. Few people took up the opportunity to execute and register a notarial contract. The apartheid government did not place the same emphasis as the current democratic government on informing people of their rights. Many women were simply unaware of their rights.[24]

68. The fact that marriage in community of property tends to favour women is likely to have presented a barrier for many of those women who were aware of the two-year period between 1988 and 1990 and wished to convert their marriages, and who would have required the consent of their husbands to do so.[25]

69. The unpaid care work performed by women constitutes an invaluable contribution to their families and to society more generally. For Ms Sithole and hundreds of thousands of other Black South African women, the performance of this unpaid work has in effect penalised them.[26]

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23 Vol 1, affidavit Budlender pages 44-48 para 10-12.

24 Vol 1, affidavit Budlender page 48 para 14.

25 Vol 1, affidavit Budlender page 49 para 18.

26 Vol 1, affidavit Budlender page 49 para 17.

VIOLATION OF CONSTITUTIONAL RIGHTS

The right to equality

70. Black women married before 1988 subject to section 22(6) of the BAA, whose marriages are automatically out of community of property, do not enjoy the protection afforded to other women who married before 1988, and women who married after 1988, whose marriages are automatically in community of property.

71. As we have noted, marriage in community of property is the default position at common law. Black women married before 1988 are the only women in South Africa whose marriages are by default out of community of property.[27]

72. Section 9 of the Constitution provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
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> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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[27] Hahlo The South African Law of Husband and Wife (Juta, 1975) p 213.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

73. The stages of an enquiry into the violation of the equality clause were explained by this Court in *Harksen v Lane*:[28]

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

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[28] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 54. Although this test was formulated with reference to the interim Constitution it has consistently been applied to challenges based on sec 9 of the final Constitution. See for example *Van der Merwe v Road Accident Fund and another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC)).

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established…..

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed…..

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."[29]

74. In the present matter:

74.1 The law differentiates between men and women, and between Black people and other people. Neither of the respondents has suggested that the differentiation bears a rational connection to any legitimate government purpose. Proof of infringement of either section 9(1) or 9(3) will justify a declaration of constitutional invalidity. It is therefore not necessary to begin with the rational

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[29] Now sec 36 of the final Constitution.

connection enquiry if the court holds that the discrimination is unfair and unjustifiable.[30]

74.2 The differentiation amounts to unfair discrimination, because it is on the specified grounds of race and gender. It also discriminates on the grounds of age against elderly Black women who were married before 1988, as it differentiates between the proprietary consequences applicable to women who were married BAA prior to 1988, and women who married after 1988.

74.3 Neither of the respondents has suggested that the unfair discrimination amounts to a justifiable limitation of the right to equality.

74.4 The law therefore unfairly discriminates in breach of the Constitution.

75. Nkabinde ADCJ held in *Hassam v Jacobs NO and Others*[31] that:

> "By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a

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30 *National Coalition of Gay and Lesbian Equality and Others v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 18.

31 *Hassam v Jacobs NO and Others* 2009 (5) SA 572 (CC).

> pattern of stereotyping and patriarchal practices that relegates women in these marriages to be unworthy of protection. Needless to say, by so discriminating against those women, provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights."

76. The nature of intersectional discrimination on grounds of marital status, sex and race was recognised in *Brink*,[32] where O'Regan J noted that *"these patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap*".

77. The discriminatory legislation has a continuing discriminatory effect on women such as Ms Sithole.

The right to dignity

78. The law also infringes Ms Sithole's and other older Black women's right to dignity under section 10 of the Constitution.[33] They are trapped in a situation in which they have no control over their family's assets.

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32 *Brink v Kitshoff* 1996 (4) SA 197 (CC) para 44.

33 Vol 1, FA Sithole page 23 para 40.2

79. The consequences are illustrated by Ms Sithole's position. She is in danger of losing her marital home and has been compelled to interdict her husband so that he does not dispose of it prior to this application. She has spent her adult life contributing to the joint household and raising the children, yet she cannot enjoy the fruits of her labour. This has been brought about by her marriage being out of community of property as a result of the default position perpetuated by the statute.

The right to housing, food and healthcare

80. The rights of access to housing, food and health care services (section 26 and 27 of the Constitution) of women such as Ms Sithole are infringed because they cannot exercise control over the family's wealth or assets.[34] If their husbands choose to force them from their homes, to recklessly dispose of the family's assets, or to disinherit them, they are left with nothing. They will then not have the means to secure housing for themselves or to satisfy other basic needs such as food or healthcare.

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[34] Vol 1, FA Sithole page 23 para 40.3

Gumede* and *Ramuhovhi

81. The *Gumede*[35] and *Ramuhovhi*[36] cases are directly in point. They dealt with the validity of a statute (the Recognition Act) which remedied discrimination in the proprietary consequences of customary marriages, but preserved and perpetuated the discrimination in customary marriages entered into before the Act commenced.

82. This was the result of section 7(1) of the Recognition Act, which provided that *"(t)he proprietary consequences of customary marriages entered into before the commencement of this Act continue to be governed by customary law"*.

83. In *Gumede*, this Court held that section 7(1) was invalid insofar as it applied to monogamous customary marriages. In *Ramuhovhi*, the Court held that section 7(1) was invalid insofar as it applied to polygamous customary marriages.

84. In both cases, this Court found the Act in breach of the equality and dignity guarantees in the Constitution.

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35 *Gumede v President of Republic of South Africa and others* 2009 (3) SA 152 (CC)

36 *Ramuhovhi and others v President of the Republic of South Africa and others* 2018 (2) SA 1 (CC)

JUST AND EQUITABLE REMEDY

85. The approach to remedy where a statutory provision is found to be inconsistent with the Constitution is the following:

85.1 Section 172(1)(a) of the Constitution obliges the court to declare such provision invalid to the extent of the inconsistency.

85.2 Thereafter, the Court may make an order in terms of section 172(1)(b) that is just and equitable.

86. Ordinarily, an order of constitutional invalidity has retrospective effect. In terms of the doctrine of objective constitutional invalidity, unless the court orders otherwise under section 172(1)(b), the invalidity operates retrospectively to the date on which the Constitution came into force.[37]

87. We submit that in this case there is no basis or justification for limiting the retrospective effect of invalidity.

88. Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, the applicants are entitled to a remedy that will effectively vindicate their rights.

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[37] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

89. In determining a suitable remedy, the courts are obliged to take into account not only the interests of parties whose rights are violated, but also the interests of good government.[38]

90. We submit that in the present matter, there are two material considerations which should affect the form of the remedy:

90.1 First, third parties may in good faith have contracted with the husband in a manner that burdens the matrimonial property, on the basis that the marriage was out of community of property and the husband had sole power to make decisions with regard to that property. It would not be just and equitable for the rights of such third parties to be prejudiced by the declaration of invalidity.

90.2 Second, there may be people who wish to be married out of community of property. The law should allow them to make that election.

91. Consistently with this approach, the Court *a quo* declared the provisions of s 21(2) of the Matrimonial Property Act unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by s 22(6) of the BAA that the marriages of black couples are automatically

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38 *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at para 32.

out of community of property, in relation to marriages entered into before the commencement of the MPA.

92. The Court ordered the following remedy in consequence of the declaration of invalidity:

92.1 All marriages of Black persons concluded out of community of property under s 22(6) of the BAA before 1988 are declared to be marriages in community of property (para 2);

92.2 A spouse in a marriage which is declared to be a marriage in community of property in terms of this order may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding the provisions of para 2;

92.3 These orders shall not affect the legal consequences of any act done or omission or fact existing in relation to a marriage before this order was made;

92.4 From the date of this order, Chapter 3 of the MPA will apply in respect of all marriages that have been converted to marriages "in community of property", unless the affected couple has opted out in accordance with the procedure set out in the order;

92.5 any interested person may approach the court *a quo* or any other competent court for a variation of this order in the event of serious administrative or practical problems being experienced as a result of this order.

THIS APPLICATION FOR CONFIRMATION OF THE ORDER OF THE HIGH COURT

93. The applicants seek confirmation of the order of the court a quo.

93.1 First, a declaration that sections 21(1) and 21(2) (a) of the Matrimonial Property Act, are invalid to the extent that they maintain the default position established by section 22(6) of the BAA.

93.2 Second, a declaration that all marriages concluded out of community of property under section 22(6) of the BAA are converted to marriages in community of property.

93.3 Third, couples who wish to opt out of this position and alter the matrimonial property system applicable to their marriage may do so by executing and registering a notarial contract to this effect.

93.4 Fourth, existing burdens on the property now falling into the joint estate will remain in place; and

93.5 Fifth, from the date of the Court's order, Chapter 3 of the Matrimonial Property Act (which regulates marriages in community of property) will apply in respect of all marriages that have been converted to marriages "in community of property'' under Prayer 2 unless and until the couples have opted out.

94. We submit that this order provides just and equitable relief, for the following reasons:

94.1 The current default position is that a marriage which was subject to section 22(6) remains out of community of property, unless one of the procedures required by those measures is followed.

94.2 The default position should be that all these marriages are deemed to have been in community of property unless an affected couple applies to change their regime to one out of community of property.

94.3 This will ensure that the burden is not placed on women to obtain their husband's consent and approach the courts for leave to alter the applicable property system (something which, given existing power dynamics, remains very difficult for many).

94.4 Existing burdens on property falling into the joint estate will remain. This ensures that creditors will be protected and avoids unforeseen prejudice to third parties.

94.5 Chapter 3 of the Matrimonial Property Act will apply from the date of the order to all marriages converted from "out of community of property" to "in community of property" under Prayer 2. Chapter 3 of the Act, which will apply, is designed to protect the rights and interests of both spouses in a marriage in community of property.

95. An order which is retrospective subject to these provisions -

95.1 will restore the infringed rights of Black women affected by this discriminatory law;

95.2 will avoid placing the burden on vulnerable Black women to access legal services in order to remedy their position; and

95.3 will afford appropriate protection to the interests of third parties.

96. The proposed relief will remedy the constitutional invalidity of the Act, while balancing and protecting the rights and interests of all affected parties.

97. We submit that the order of the Court a quo should be confirmed.

The first respondent's opposition to this application

98. Mr Sithole has filed a notice of intention to oppose this application together with an opposing affidavit. The affidavit was served on the applicants' attorneys on 26 February 2020.

99. In that affidavit, Mr Sithole alleges that Ms Sithole brought the main application "in secret".

100. The applicants prepared and served an application in terms of Rule 11(1)(b) of the Rules of this Court for an order authorising them to serve and file a replying affidavit to the first respondent's answering affidavit in the light of those allegations, which were made for the first time in this Court.

101. The Registrar has not accepted the Rule 11(1)(b) application because Mr Sithole's opposing affidavit has not been filed at this Court, despite the request made by the applicants' attorneys to Mr Sithole's attorney that he file it.

102. If and when Mr Sithole files his opposing affidavit, the applicants will file their application in terms of rule 11(1)(b).

103. The first respondent's allegation that the application to the High Court was brought "in secret", and that he would not have known about it were it not for the divorce proceedings which he initiated, is demonstrably false. The applicants' attorneys went to great pains to ensure that Mr Sithole was properly served at all times in the proceedings. This will be fully documented if and when the applicants are permitted to do so.

104. At this stage, we can only record that as appears from the judgment of the High Court, Mr Sithole was represented by counsel and his attorney at the hearing in the High Court.[39]

105. At that hearing, Mr Sithole's counsel did not raise any complaint of the kind which is now raised.

106. Mr Sithole has not sought leave to appeal against the order made by the High Court.

107. Even if his complaint were valid, it would have no bearing on the matter now before this Court:

107.1 Mr Sithole received the application to the High Court;

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[39] Vol 4, High Court Judgment at page 344

107.2 He filed an answering affidavit (albeit only two days before the hearing in the High Court, without any explanation or application for condonation); and

107.3 He was represented in the High Court by counsel, who made submissions on his behalf with regard to the merits of the matter

108. The matter now before this Court is whether the order made by the High Court should be confirmed. Mr Sithole's unfounded complaint does not bear on that question.

CONCLUSION

109. The Applicants seek confirmation of the order of invalidity made by the High Court.

Costs

110. In the High Court the applicants sought an order that the Minister pay the costs. The Court ordered accordingly.

111. On reflection, the order was wrongly sought and (with respect) wrongly granted. The Notice of Motion stated that costs were sought against Mr Sithole, and against the Minister only if he opposed the application.[40] As the Minister did not oppose, and did not know that an order of costs was being sought against him, that order should not have been sought and made.

112. Under the circumstances, the applicants abandon the costs order made in their favour by the High Court.

113. The position is different in this Court. The application to this Court for confirmation of the order of the High Court states that an order will be

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[40] Vol 1, Notice of Motion page 2 para 4.

sought that the Minister is to pay the costs. The application was served on the Minister, who therefore had notice that an order would be sought that he pay the costs of the application for confirmation.

114. Such an order would be consistent with the practice of this Court.[41]

115. It is submitted that the costs of two counsel are justified having regard to the complexity and importance of the legal issues arising in this matter.

G M BUDLENDER SC

S A SEPHTON

Chambers

Cape Town and
Grahamstown

22 March 2020

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[41] This should be the case even though the Minister has not opposed: *Rahube v Rahube and others* 2019 (2) SA 54 (CC) para 72, 73.

LIST OF AUTHORITIES

Gumede v President of Republic of South Africa and others [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC).

Ramuhovhi and others v President of the Republic of South Africa and others [2017] ZACC 41; 2018 (2) SA 1 (CC); 2018 (2) BCLR 217 (CC)

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others [1995] ZACC 13; 1996(1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

Harksen v Lane NO and Others [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC).

Hassam v Jacobs NO and Others [2009] ZACC 19; 2009 (5) SA 572 (CC); 2009 (11) BCLR 1148 (CC).

National Coalition of Gay and Lesbian Equality and Others v Minister of Justice and Others [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as amicus curiae) [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC).

Bannatyne v Bannatyne (Commission for Gender Equality as amicus curiae) [2002] ZACC 31; 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC).

Rahube v Rahube and others [2018] ZACC 42; 2019 (2) SA 54 (CC); 2019 (2) BCLR 54 (CC).