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

REPORTABLE

CASE NO: 4225/2006

In the matter between:

ELIZABETH GUMEDE (BORN SHANGE)	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second respondent
PREMIER OF KWAZULU-NATAL	Third respondent
KWAZULU-NATAL MEC FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS	Fourth respondent
AMOS GUMEDE	Fifth respondent
MINISTER OF HOME AFFAIRS	Sixth respondent
WOMEN'S LEGAL CENTRE TRUST	Intervening as *Amicus Curiae*

JUDGMENT

Date of Hearing: 6 December 2007
Date of Judgment: 13 June 2008

THERON J

[1] Customary marriages concluded after the commencement of the Recognition of Customary Marriages Act 120 of 1998 ('the Recognition Act'), 15 November 2000, are automatically in community of property. Those concluded prior to the

commencement of the Recognition Act continue to be governed by customary law. In this application the applicant seeks an order declaring certain provisions of the KwaZulu Act on the Code of Zulu Law 16 of 1985 ('The KwaZulu Act') and the Natal Code of Zulu Law Proclamation R151 of 1987 ('the Natal Code'), unconstitutional. The applicant also seeks an order declaring that the distinction that the Recognition Act draws between the two categories of marriages is unconstitutional. This application was opposed by the fourth and sixth respondents ('the respondents').

[2] The applicant and the fifth respondent entered into a customary marriage on 29 May 1968, at KwaMuhle, Durban. The fifth respondent is not, and has never been, a partner to any other marriage, customary or civil. The applicant and fifth respondent have four children, all of whom have reached the age of majority. The marriage relationship between the parties has broken down. In January 2003 the fifth respondent instituted divorce proceedings against the applicant in the North Eastern Divorce Court ('the Divorce Court') seeking a decree of divorce and other ancillary relief. The divorce action has been stayed, pending the determination of this application.

[3] During the course of the marriage the fifth respondent acquired an immovable property at Umlazi Township, where the applicant currently resides, and an immovable property at Adams Mission, where he resides. The fifth respondent has

been on pension since April 2000. The applicant alleges that the fifth respondent did not allow her to work during the marriage. She says she performed all the requisite tasks to look after and maintain their home at Umlazi as the family home for the fifth respondent, herself and their four children. She was the primary care-giver of the children and she performed numerous functions of a familial and domestic nature. The Umlazi home contains furniture and appliances acquired by the applicant with an approximate value of R40 000.

[4] The applicant alleges that she has nowhere else to live other than at the Umlazi property. Her father died in 1985 and her mother in 1994. At the time of their deaths, they had been living on her father's employer's farm, which has since been sold. The applicant does not have any living brothers and her sisters are domestic workers who do not have sufficient means to care for her. The applicant is an old age pensioner. She survives on her pension and contributions which she receives from her children. She receives no maintenance from the fifth respondent.

[5] The applicant's primary complaint is that the matrimonial property regime to which she is subject (in consequence of the application of customary law) is discriminatory. It discriminates against her on the grounds of gender, because she is a woman, and on the grounds of race, because she is African. In her affidavit she states that:

'... the law discriminates between my husband and me. It makes him the sole owner of all of the property acquired during our marriage. It creates a default situation in which, upon divorce, he will remain the owner of all that property, without having to make any showing as to why that should be the case. I will be the owner of none of the property, and will remain property-less, unless I am able to persuade the divorce court to order the transfer of some of "his" property to me, or the forfeiture of the patrimonial benefits of the marriage.'

The applicant's secondary complaint is that while the Recognition Act recognises the discriminatory consequences of this provision of customary law,[1] and rectifies the position in respect of customary marriages entered into after the commencement of the Act, it perpetuates this discrimination in respect of customary marriages concluded before the commencement of the Act. The applicant contends that the under-inclusiveness of the Recognition Act and its perpetuation of the application of customary law to her marriage and the marriages of other women who are similarly placed, is inconsistent with the Constitution and accordingly invalid.

[6] The respondents, on the other hand, contend that, in terms of the provisions of the Recognition Act and the Divorce Act 70 of 1979 ('the Divorce Act'), the Divorce Court is adequately empowered to protect all of the applicant's proprietary and financial rights and interests upon her divorce from the fifth respondent. They contend that the impugned provisions do not violate the applicant's right to equality and, in the alternative, if the court finds that the provisions are unfair, then any limitation of the right to equality was justifiable under s 36 of the Constitution.

[1] One of the purposes of the Recognition Act is 'to provide for the equal status and capacity of spouses in customary marriages'.

[7] In the Recognition Act customary law is defined as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.[2] In KwaZulu-Natal customary law has been codified in the KwaZulu Act and the Natal Code. The KwaZulu Act applies in those areas which previously fell within the jurisdiction of the former KwaZulu Legislative Assembly. The Natal Code exists as Regulations made under the Black Administration Act 38 of 1927 and applies in those parts of the former province of Natal which did not fall under the jurisdiction of the KwaZulu Legislative Assembly. Both of these pieces of legislation are still in force by virtue of the provisions of s 2 of Schedule 6 of the Constitution.[3]

[8] It was not in dispute that customary law in its various manifestations has the result that the fifth respondent is the owner of all of the property acquired during the course of the marriage. This is so by virtue of the provisions of the KwaZulu Act and the Natal Code. Section 20 of both the KwaZulu Act and the Natal Code provides that:

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[2] Section 1.

[3] Section 2 of Schedule 6 reads:

'(1) All law that was in force when the new Constitution took effect, continues in force, subject to-
(a) any amendment or repeal; and
(b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1)-
(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
(b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.'

'The family head is the owner of all family property in his family home.[4] He has charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors. He may use, exchange, loan or otherwise alienate or deal with such property for the benefit of or in the interests of the house to which it attaches, but should he use the property attaching to one of the houses for the benefit or on behalf of any other house in the family home an obligation rests upon such other house to return the same or its equivalent in value.'

Section 22 of the Natal Code states that:

'The inmates of a family home irrespective of sex or age shall in respect of all family matters be under the control of and owe obedience to the family head.'[5]

A similarly worded provision of the KwaZulu Act (s 22), was repealed by the Recognition Act.

[9] This regime was to some extent altered by s 7(2) of the Recognition Act which provides that customary marriages entered into after the commencement of that Act is a marriage in community of property and of profit and loss. Section 7(1) of the Recognition Act provides that the proprietary consequences of a marriage entered into before the commencement of the Act continues to be governed by customary law. In terms of s 8(1) of the Recognition Act, only a court may dissolve a customary marriage. In terms of s 8(4)(a) of the Recognition Act, a court dissolving a customary marriage has the powers contemplated in ss 7, 8, 9 and 10 of the Divorce Act.[6] S 8(4)(e) of the Recognition Act provides that the Divorce Court may, when making an order for the payment of maintenance, take into account any provision or arrangement

[4] In both these Acts 'family property' is defined as 'all the property in a family home other than (i) property vesting in or pertaining specially to any particular house of that family home and (ii) the personal property of any major inmate or any inmate not related to or belonging to the family of the family head' and the 'family home' is defined as 'the domestic establishment and ordinary place of residence of a person and may consist of one or more houses and includes individual dwellings occupied by persons in townships, on mission stations or on private lands'.

[5] In section 1 of the Natal Code, an 'inmate' is defined as 'in relation to a family home ... any person usually residing therein and includes the head of a family resident in a family home, subject to the control of the family head'.

[6] See Annexure 'A' to this judgment for an extract of these provisions.

made in accordance with customary law. In the absence of a written agreement between the parties on the payment of maintenance, the Divorce Court may, after taking into account specified factors, make an order that one party pays maintenance to the other for any period or until the death or remarriage of that other party.[7] Where the parties were married out of community of property, the court may, in the absence of an agreement between the parties and on the application of a party, order that the assets of the other party be transferred to the applicant party.[8] The pension interest of a party is a patrimonial benefit[9] and the court may order the pension fund to pay over to the other spouse any part of the pension interest of the member spouse.[10]

[10] Section 39(1)(b) of the Constitution requires that a court consider international law when interpreting the Bill of Rights. There are numerous international instruments which underscore the imperative to protect the rights of women and to abolish laws that discriminate against them. One such instrument is the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') which was ratified by South Africa on 15 December 1995. In CEDAW discrimination against women is defined as:

'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'[11]

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[7] Section 7(2) of the Divorce Act.
[8] Section 7(3) of the Divorce Act. Sections 7(4) and (5) sets out the considerations that must be taken into account when such an order is made.
[9] Section 7(7)(a) of the Divorce Act.
[10] Section 7(8)(a)(i) of the Divorce Act.
[11] Article 1.

South Africa, as a state party to CEDAW, has 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 freedoms on a basis of equality with men.'[12]

Article 13 of CEDAW makes specific reference to the duty of state parties to eliminate, in particular, discrimination against women in the areas of economic and social life, in order to ensure that men and women enjoy the same rights in respect of family benefits. Of particular relevance is Article 16(1) which provides that state parties shall ensure, on a basis of equality of men and women, the same rights and responsibilities during marriage and at its dissolution and the same rights for spouses in respect of ownership and management of property.

[11] Section 7 of the Recognition Act differentiates between people who entered into customary marriages before the commencement of the Act and those who entered into such marriages thereafter. The position prior to the Recognition Act was that the proprietary consequences of *all* customary marriages were governed by customary law. Now, the default position in respect of monogamous customary marriages entered into after the commencement of the Recognition Act is that they are in community of property.

[12] In my view, the proprietary regime established by the codification of customary law, is, *prima facie*, discriminatory. It is discriminatory as only African women are

[12] Article 3.

subjected by the law to such consequences. The discrimination is on two of the prohibited grounds listed in s 9(3) of the Constitution,[13] namely race and gender. The next question to consider is whether the discrimination is unfair.

[13] It was submitted, on behalf of the respondents, that the effect of the differentiation is not fixed. It was contended that persons such as the applicant, who had entered into customary marriages before the commencement of the Recognition Act, could vary the proprietary consequences of their marriages and that at the time of divorce, they had the same rights in respect of property and finances as the spouse in a civil marriage. It was argued that the flexibility of the system and the protection it afforded women at the time of divorce constituted a safety net that ensures that the provisions as a whole operate fairly. It was further submitted that the Divorce Court would be in a position to address all the applicant's concerns and that in these circumstances, the differentiation has very little, if any, potential to significantly impair the dignity of the applicant and is fair. It was further contended that the differentiation served a legitimate purpose in that it gives effect to indigenous culture and leaves intact the position of those who had already entered into customary marriages, but makes it possible for them to voluntarily change the proprietary regime of their marriages.[14]

[13] Section 9(3) of the Constitution provides: '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.'
[14] Section 7(4) of the Recognition Act.

[14] This court accepts that the Divorce Court has the power, *inter alia*, flowing from the provision of s 8(4) of the Recognition Act, read with s 7 of the Divorce Act, to make an order for maintenance and to order that the assets of one party be transferred to the other party. This does not resolve the problem. Firstly, the provisions of the Divorce Act do not affect the proprietary regime which exists during the subsistence of the customary marriage. Secondly, the current statutory provisions creates a default situation in which, upon divorce, the fifth respondent will remain the owner of all the property acquired during the course of the marriage, unless the applicant is able to persuade the Divorce Court to make an order transferring some of the fifth respondent's property to her or a forfeiture of benefits order in her favour. The position of the applicant in this regard is sharply different to that of women who are not black or who entered into customary marriages after the commencement of the Recognition Act.

[15] It was submitted by counsel for the respondents that the applicant's constitutional attack must be considered against the background and genesis of the Recognition Act. It was accepted that the Recognition Act is largely based on a report on customary marriages compiled by the South African Law Commission ('the Law Commission') in August 1998. It was common cause that the report was compiled after extensive consultations with, *inter alia*, non-governmental organisations, women's groups, traditional leaders, the legal profession, state departments and the religious community. It was also common cause that one of the principle aims of the

Recognition Act was to remove elements of discrimination in customary law and to 'provide for the equal status and capacity of spouses in customary marriages'. In doing so the Act gave expression to two constitutional principles. The first was passing legislation contemplated in s 15(3) of the Constitution. The second was to give effect to the cultural pluralism that is guaranteed by ss 30 and 31 of the Constitution. It was further submitted that the Law Commission had considered it unfair not to draw a distinction between customary marriages entered into before or after the commencement of the Recognition Act, as not to do so may have retrospectively taken away contracted rights, not only of male spouses, but of third parties as well.[15] The Law Commission had noted in its report that the need to protect the economically weaker spouse arises at divorce. It is recorded that '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', since problems tended to emerge only when the union was dissolved. The Law Commission's main goal was to ensure an equitable distribution of assets on the breakup of the marriage. It was further submitted that the respondents had acted upon the recommendation of the Law Commission and that they had accepted that the Recognition Act was the 'first step in a process of reform'.

[15]It is recorded in the report that: 'The Council of SA Banks has urged that all contractual undertakings entered into under existing laws should continue to be governed by those laws until the contracts come to their conclusion or are renegotiated. This request (which aims at ensuring legal certainty) would accord with general legislative principles and is therefore supported by the Commission.' (South African Law Commission Project 90 *Report on Customary Marriages* 1998 at 99).

[16] In my view, the respondents have failed to show that any limitation of the right to equality is justifiable under s 36 of the Constitution. In any event, the applicant's primary complaint is not the differentiation contained in s 7 of the Recognition Act. It is not the Recognition Act which creates that discrimination – it is customary law in its various manifestations which does so. The complaint against the Recognition Act is that it is under-inclusive in remedying that discrimination against African women.

[17] The following order is made:-

1. Declaring that s 7(1) of the Recognition of Customary Marriages Act 120 of 1998 is inconsistent with the Constitution and invalid.

2. Declaring that the inclusion of the words 'entered into after the commencement of this Act' in s 7(2) of the Recognition of Customary Marriages Act 120 of 1998 is inconsistent with the Constitution and invalid.

3. Declaring that s 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985 is inconsistent with the Constitution and invalid.

4. Declaring that s 20 of the Natal Code of Zulu Law Proclamation R151 of 1987 is inconsistent with the Constitution and invalid.

5. Declaring that s 22 of the Natal Code of Zulu Law Proclamation R151 of 1987 is inconsistent with the Constitution and invalid.

6. That the fourth and sixth respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

7. That each party is to pay its own costs in respect of the joinder application.[16]

8. That, in terms of s 172(2)(a) of the Constitution, this order is referred to the Constitutional Court for confirmation.

Applicant's counsel:	Mr G Budlender SC
Applicant's attorneys:	Legal Resources Centre (Durban)
Fourth and Sixth Respondents' counsel:	Mr V Soni SC
Fourth and Sixth Respondents' attorneys:	State Attorney (KZN)
Counsel for *amicus curiae:*	Ms S Poswa-Lerotholi
Instructed by:	Zubeda K Seedat & Co.

[16] The sixth respondent was joined as a party in these proceedings in terms of an order granted by this court on 22 August 2006 and pursuant to an application brought by the applicant.

ANNEXURE "A"

Sections 7, 8, 9 and 10 of the Divorce Act, 70 of 1979

7. Division of assets and maintenance of parties

(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

(3) A court granting a decree of divorce in respect of a marriage out of community of property-

(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or

(b) 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 existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

(4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would have otherwise have been incurred, or in any other manner.

(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account-

(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3) (b) of this section may have in terms of section 22 (7) of the Black Administration Act, 1927 (Act 38 of 1927);

(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

(c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and

(d) any other factor which should in the opinion of the court be taken into account.

(6) A court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.

(7) (a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

(b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce-

(i) was paid over or awarded to another party; or

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;

(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply mutatis mutandis with regard to the right of that other party in respect of that part of the pension interest concerned.

(9) When a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse.

8. Rescission, suspension or variation of orders

(1) A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (b) or (2) (b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4 (1) have been considered by the court.

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

(3) The provisions of subsections (1) and (2) shall mutatis mutandis apply with reference to any order referred to in subsection (1) given by a court in a divorce action before the commencement of this Act.

9. Forfeiture of patrimonial benefits of marriage

(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

10 Costs

In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.