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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No.: 2252/2024

Date Heard: 10 October 2024

Date Delivered: 04 February 2025

In the matter between:

G[...] D[...]

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second Respondent

G[...] D[...]

Third Respondent

JUDGMENT

Introduction

General

- [1] The purpose of this application, as described in the founding affidavit, is to obtain an order declaring section 7(7)(c) of the Divorce Act, 70 of 1979 (“the impugned section”) unconstitutional and invalid. The fundamental problem with the impugned section, so it is contended, is that it excludes pension interests from the redistribution remedy that is now available in respect of all marriages concluded out of community of property and without accrual, regardless of the date of their conclusion.

- [2] Section 7(3) of the Divorce Act, as originally formulated, provided for a redistribution of assets upon dissolution of a marriage concluded out of community of property, by divorce, in certain circumstances. Section 7(3)(a) of the Divorce Act restricted the remedy of redistribution to marriages out of community of property and without accrual that had been concluded before 1 November 1984 - the date on which the Matrimonial Property Act, 88 of 1984 took effect. From that date the latter Act made accrual-sharing available to parties to a marriage out of community of property. It was considered that marriages concluded after that date did not require redistribution as the parties were free to agree to accrual.

- [3] In a sea change the Constitutional Court handed down judgment in *KG v Minister of Home Affairs and Others* 2024 (2) SA 1 (CC) (“KG”), on 10 October 2023, in terms of which it declared that section 7(3)(a) of the Divorce Act was unconstitutional and invalid for confining the redistribution of assets to marriages out of community of property and without accrual, concluded prior to 1 November 1984. It held that, from the date of its judgment, the section 7(3) redistribution remedy would apply to all marriages out of community of property, in terms of which accrual-sharing has been excluded.

- [4] The impugned section, however, did not enjoy the attention of the Constitutional Court in KG. Section 7(7)(a) of the Divorce Act provides that for the determination of the

patrimonial benefits to which the parties to any divorce may be entitled (which would include redistribution) the pension interest (as defined in the Divorce Act) of a party shall be deemed to be part of his/her assets, subject to the qualification in the impugned section. In terms of the impugned section 7(7)(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 or loss and the accrual system are excluded”*.

- [5] Thus, while the distinction between pre- and post-1984 marriages, as embodied in section 7(3)(a) of the Divorce Act, has been declared unconstitutional and invalid, that distinction remains in respect of pension interests, keeping them immune from the redistribution remedy now applicable to all other assets. Hence this application to declare the impugned section unconstitutional and invalid.

The parties to this application

- [6] The following persons are the parties to this application:

- 6.1. the applicant, who is G[...] D[...] (“Mrs D[...]”). She states that she brings this application in her personal capacity, but also on behalf of all spouses who are impacted by the impugned section;
- 6.2. the first respondent, who is the Minister of Home Affairs and who is the Minister responsible for the administration of the Divorce Act (“the Minister”);
- 6.3. the second respondent, who is the Minister of Justice and Constitutional Development and who is joined to the extent that he may have an interest in its outcome; and
- 6.4. the third respondent, who is G[...] D[...] (“Mr D[...]).

The divorce action

- [7] Mr and Mrs D[...] were married to each other on 25 April 2004, out of community of property, with the exclusion of the accrual system. The antenuptial contract concluded by them on 23 April 2004 records that there would be no community of property and loss between them and that the accrual system would not apply to their marriage.
- [8] Mrs D[...] states that, although she did engage in projects that were designed to achieve a profit during the subsistence of the marriage, her primary focus during the marriage was the management of the family home and supporting Mr D[...] in his career and in his business and personal endeavours. Her role, like the role of many women, included caring for the three children born of the marriage (all of whom are still minors), prioritising their development and well-being and their best interests, running and maintaining the family home and prioritising the third respondent's career and business aspirations, his activities and his personal endeavours in numerous ways. Her efforts materially contributed to the growth and maintenance of Mr D[...]’s estate.
- [9] By reason of the alleged irretrievable breakdown of the marriage relationship Mrs D[...] instituted an action for divorce against Mr D[...], on 13 October 2020, in this Court. In terms of her amended particulars of claim she now also seeks relief in the form of a redistribution of Mr D[...]’s assets, inclusive of assets ostensibly held in a trust, in her favour. Mr D[...] has defended the action and disputes her entitlement to any form of favourable redistribution.
- [10] Mrs D[...] states that she is unaware of the extent of Mr D[...]’s pension interests but that he does have such interests in the form of retirement annuities (which form part of the definition of a pension interest in the Divorce Act). She estimates the value of his retirement annuity policies at the sum of R1 500 000.00.
- [11] In her amended pleadings in the divorce action Mrs D[...] indicated her intention of bringing the present application to declare the impugned section unconstitutional and invalid, to ensure that in, calculating the value of the estate of Mr D[...], his pension interest would be taken into account.

The relief sought by Mrs D[...] in this application

[12] Against the background set out in the preceding paragraphs, Mrs D[...] asks for relief in the form of orders:

- 12.1. declaring that the impugned section is inconsistent with the Constitution and accordingly invalid;
- 12.2. stating that the order envisaged in the preceding sub-paragraph shall not affect the legal consequences of any act done or omission or fact existing before the order was made in relation to a marriage concluded on or after 1 November 1984;
- 12.3. directing the Registrar of this Court to lodge a copy my judgment and orders with the Registrar of the Constitutional Court, within 15 days of the date of the judgment and orders; and
- 12.4. directing the Minister to pay her costs, with the costs of counsel to be taxed on scale C.

[13] None of the respondents have opposed this application.

The legislative history of section 7(7) of the Divorce Act

[14] The date of commencement of the Divorce Act was 1 July 1979. The Act, as it then read, contained no reference to pension interests.

[15] In August 1987 the South African Law Reform Commission issued a report on its “Investigation into the Possibility of Making Provision for a Divorced Woman to Share in the Pension Benefits of her Former Husband (Project 41)”. The report resulted in an amendment to the Divorce Act, with effect from 1 August 1989, in terms of the Divorce Amendment Act, 7 of 1989 the object of which was said to be “*To amend the Divorce Act, 1979, so as to provide that a party to a divorce action may share in the pension interest of the other party and to provide for matters connected therewith.*”

Pursuant to the amendment the definitions of a “*pension interest*” and a “*pension fund*” as well as section 7(7) were included in the Divorce Act.

[16] Section 7(7)(a) confirmed that in determining the patrimonial benefits to which a party to a divorce action may be entitled his/her pension interest would be deemed to be part of his/her assets.

Mrs D[...]’s case

[17] Mrs D[...] contends that she is entitled to the relief she seeks as the impugned section is a “*lingering constitutional flaw in the Divorce Act.*” It excludes one category of assets, namely pension interests, from redistribution despite the advent of a post-KG section 7(3).

[18] The impugned section, so it is submitted, is unconstitutional for two reasons:

18.1. it is irrational. In a post-KG world, there is no rational reason for the exclusion of pension interests from redistribution;

18.2. it is unfair discrimination on the basis of sex and gender. The reason *KG* declared section 7(3) unconstitutional and invalid is that, “*while facially neutral*” it had a disproportional impact on women who were more likely to be the economically weaker partner. The same logic applies to all assets including pension interests. The evidence shows that men are more likely to have pensions and are likely to have larger pensions.

[19] Mrs D[...] does not ask that the order I make should have retrospective effect.

The expert evidence

[20] Mrs D[...] presents three persuasive forms of expert evidence to establish that the exclusion of pension interests in terms of the impugned section has a disproportionate impact on women.

[21] In the first instance she relies on the evidence presented in the Constitutional Court in *KG* and relied upon by the court at [115]. In summary, this evidence shows that:

- 21.1. women typically enter into marriage poorer and more dependent than men and having less bargaining power;
- 21.2. women are less securely employed and concentrated in employment sectors less advantageous in remuneration than men. As a result, South Africa has amongst the highest mean and median gender income gaps;
- 21.3. women are more likely to perform unremunerated work in the household than men who are more likely to perform remunerated work; and
- 21.4. in the final analysis this means that the exclusion of post-1984 marriages from section 7 (3) has a great impact on women than on men.

[22] Mrs D[...] also commissioned an additional expert report from Professor Bonthuys, which deals specifically with the question as to whether pension interests follow a similar gendered distribution to work and wealth. She concludes as follows:

- 22.1. there is no clear evidence on respective retirement contributions and income for men and women. The following does emerge:
 - 22.1.1. in OECD countries women's retirement entitlements are 27% lower than men's;
 - 22.1.2. despite the absence of clear South African data in published journals there is "*no clear reason why a gender pensions gap, which has been clearly demonstrated in other countries, would not also manifest in this country. Certain standard demographic and labour market features would tend to support the inference that women would tend to have less access to retirement savings than men*";

22.2. in addition to general factors that reflect women's inferior economic position there are additional factors that affect their access to retirement benefits:

22.2.1. women's longer life expectancy means that any pension savings would have to cover a longer period of post-retirement living;

22.2.2. women are more likely to be widowed than men, thus depriving them of the economic support of male partners; and

22.2.3. *"women's traditional patterns of unpaid care work tend to be linked with fewer average years of paid work, relatively high representation in part-time work and gender gaps in earnings and lifetime incomes"*;

22.3. all of these are present in South Africa. The result is that *"women by their disproportionate household and caring labour make indirect contributions to the growth of their male partners' estates, including to their future pension benefits on the assumption that they will eventually share in these benefits"*.

[23] Third, Mrs D[...] relies on the evidence of Mr Boshoff, an actuary and a fellow of the Actuarial Society, who provided the following unchallenged expert evidence:

23.1. on average, women in South Africa are expected to retire with approximately 71% of the wealth accumulated by men and just 74% of the retirement income;

23.2. not only do men have larger pension interests, but they are also more likely to have pension savings at all. 45.5% of men have pension savings compared to only 43.4% of women; and

23.3. this is a result of the ongoing gender employment and wage gap. Women are less likely to be employed and where they are they earn less than men. They therefore contribute less towards their pensions.

[24] In summary, the reasons why the impugned section has a disproportionate impact on women applies equally to pension interests as it does to any other asset. Women's disadvantaged economic position means that they are less likely to have pensions, and likely to have smaller pensions. They are therefore more likely to be prejudiced by the absence of a redistribution remedy in respect of those assets than men.

The Divorce Act

[25] The two principal provisions in the Divorce Act which require consideration are section 7(3) and the impugned section.

[26] Prior to the judgment in *KG* the salient portions of section 7(3) read like this:

(7)(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;

...

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. (My emphasis).

[27] Sections 7(4)-(6) deal with the circumstances under which a distribution order can be made.

[28] *KG* declared the limitation of the redistribution remedy in section 7(3)(a) to post-1984 marriages to be unconstitutional and invalid. The order was suspended for 24 months to allow Parliament to remedy the defect. Until it does so section 7(3)(a) is to be read without the words "*before the commencement of the Matrimonial Property Act, 1984*".

Thus, parties to a divorce may always seek a redistribution of assets under section 7(3) as long as they were married out of community of property, with the exclusion of the accrual system.

[29] The impugned section, however, did not enjoy the attention of the Constitutional Court and therefore contains a remnant of the old section 7(3) which remains unaffected by the order in KG.

[30] Section 7(7) reads as follows:

(7)

- (a) In the determination of the matrimonial 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. (My emphasis).

[31] The intention of the legislature by including section 7(7) in the Divorce Act was to allow for the distribution of pension interests on the dissolution of marriages in community of property and marriages out of community of property, subject to the

accrual system, but to prevent distribution in the case of marriages out of community of property, with the exclusion of the accrual system, unless the latter marriages were concluded prior to 1 November 1984.

[32] While section 7(7) provides that pension interests form part of the assets of the parties in a divorce action the impugned section contains a limitation by making it applicable only to marriages out of community of property, without accrual, concluded before 1 November 1984.

[33] Therefore, all assets, except pension interests, can be redistributed in terms of section 7(3). Thus, for as long as the impugned section remains, the purpose which the order in *KG* sought to achieve will not be fully realised.

Whether the impugned section amounts to arbitrary differentiation

[34] Section 9(1) of the Constitution provides that, “*Everyone is equal before the law and has the right to equal protection and benefit of the law*”. The provision requires that whenever the State differentiates between categories of people the differentiation must be rationally connected to a legitimate government purpose. In this regard the Constitutional Court expressed itself as follows in *KG*, at [47], in applying its judgment in *Prinsloo v Van der Linde* 1997 (3) SA (CC) at [25]:

[47] Does this differentiation bear a potential connection to a legitimate government purpose? If it does, it is ‘mere differentiation’ as opposed to a ‘naked preference’. A naked preference is one where the state regulates in an arbitrary way. In *Prinsloo* this court said the following in that regard:

‘The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In *Mureinik’s* celebrated formulation, the new constitutional order constitutes a bridge away from a culture of authority ... to a culture of justification.’

[35] In my view the impugned section results in two forms of differentiation:

- 35.1. post-1984 marriages out of community of property without accrual on the one hand, and all other marriages on the other. Spouses in the latter category can claim against their spouse's pension interest (whether because they are married in community of property, or they are married out of community of property with an accrual claim, or they have a section 7(3) redistribution claim). Those in the former category cannot so claim; and
- 35.2. there is also a differentiation between spouses in post-1984 marriages out of community of property without accrual where neither spouse has a pension interest, and those where one or both has a pension interest. In the former case section 7(3) allows for a redistribution of assets, but in the latter the impugned section precludes a full redistribution claim.

[36] In *KG* the Constitutional Court found that the exclusion in respect of pre-1984 marriages did serve a legitimate government purpose. Prior to 1984, accrual was not the default result of a marriage out of community of property but post-1984 it was. By distinguishing between the two, "*the legislative philosophy was that parties should be bound by their choices*" - *KG* at [104].

[37] Prior to *KG* the impugned section served the same purpose. It merely made it clear that there could only be a redistribution of pension interests in pre-1984 marriages. Given that it dealt with just another class of assets and given section 7(3), the provision was arguably superfluous. It would have been rational for the same reason that section 7(3) was rational. Post-*KG*, however, the impugned section is the only provision which retains the distinction while the underlying basis for its existence has disappeared, in the light of the judgment in *KG*.

[38] This is best explained if regard is had to the judgment of the Constitutional Court in *EB v ER N.O.* (a judgment handed down contemporaneously with the judgment in *KG* and reported under the same reference). In that case there was a challenge to the constitutionality of section 7(3) because it permitted redistribution only on divorce and not on death. The Constitutional Court found that the differentiation was not rationally

connected to a legitimate government purpose and was therefore contrary to section 9(1) of the Constitution. As explained by the Court at [48] the redistribution remedy was introduced to ameliorate the hardship which might be suffered by spouses in marriages out of community of property. That hardship would arise without regard to the way in which the marriage was dissolved.

[39] In the post-KG scenario, there is no longer a distinction in section 7(3) of the Divorce Act between pre- and post-1984 marriages. The purpose of section 7(3) now is to provide a redistribution remedy to avoid hardship to all spouses in marriages out of community of property, without accrual, no matter when they were concluded.

[40] In that scenario no legitimate purpose is served by including pension interests for pre-1984 marriages but excluding them for post-1984 marriages. If there was such a legitimate purpose one would have expected the Minister to have made contentions in this regard, by way of affidavit or argument, but this has not occurred. No such legitimate purpose comes to mind.

[41] I conclude that the impugned section is irrational and contrary to section 9(1) of the Constitution and is therefore unconstitutional and invalid.

[42] Ordinarily, in proceedings which do not raise a constitutional question, my conclusion would be dispositive of this application. The position is different in respect of constitutional challenges to legislation, where the Constitutional Court has held that High Courts should opine on all the constitutional challenges raised. *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) at [21]. As any declaration of invalidity must be confirmed by the Constitutional Court it assists that Court to have the view of the High Court on all the constitutional challenges. I will therefore now proceed to decide also whether the impugned section constitutes unfair discrimination.

Unfair discrimination

[43] Section 9(3) of the Constitution prohibits indirect unfair discrimination on the basis of sex or gender. The section reads in full, as follows:

The state may not unfairly discriminate directly and 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.

[44] Section 9(5), in turn, provides that, “*Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair*”.

[45] Thus, to determine whether there is unfair discrimination I must follow a two-step process, which entails that:

45.1. the onus is on Mrs D[...] to establish that discrimination has occurred or will occur. She alleges indirect discrimination on the basis of sex and gender. She must demonstrate that despite being facially neutral on sex and gender the impugned section has a disparate impact on women compared to men; and

45.2. once Mrs D[...] demonstrates that there is discrimination, in terms of section 9(5) of the Constitution, the onus shifts to the respondents to show that the discrimination is fair. None of the respondents has sought to do so.

[46] I consider that the impugned section unfairly discriminates for reasons that are almost identical to the reasons for which the Constitutional Court in *KG* concluded that section 7(3) unfairly discriminated. My conclusion follows the reasoning in *KG* which I apply to the facts in this case.

[47] In *KG*, the Constitutional Court concluded that section 7(3) indirectly discriminated against women on the basis of gender. Its reasoning is set out in the following paragraphs of the judgment:

[115] The applicant argues that the basis of differentiation is indeed on listed grounds: gender and sex. This is on the strength of expert evidence that, when marriages fail, it is more often women than men who are prejudiced by the absence of

a redistribution remedy. This disparity exists only in heterosexual marriages, and its precise extent is difficult to know. Nowadays it is not unusual for both spouses to work, leaving children in the daycare of extended families or employees. And, as the High Court pointed out, stereotypical roles are sometimes reversed.

[116] I nevertheless accept that this disparate effect is a present-day reality. It is borne out by the expert evidence put up by the applicant and accords anecdotally with what we all observe in society and, in the case of judges, with the matrimonial cases that serve before them.

[120] To return to the present case, the direct differentiation is based on date of marriage, which is in turn based on the absence or availability of the accrual regime as a default regime for marriages out of community of property. There are not listed grounds, nor are they grounds based on the characteristics and attributes of the spouses in question. Indirectly, though the burden of the exclusion of new ANC marriages in s 7(3) falls more heavily on women than men.

[127] In the present case women in old ANC marriages are treated differently from women in new ANC marriages. While this differentiation is not directly a differentiation based on gender, its practical effect in the case of new ANC marriages is to prejudice women and benefit men disproportionately. Unlike *Gumede*, where this impact was brought about by a second piece of legislation (the Natal Code), here the impact is brought about, as it was in *Mahlangu*, by social realities.

[48] The presumption of unfairness was not rebutted. The factors relied on by the Constitutional Court in this regard are best illustrated by the following passages from its judgment:

[130] The primary focus, in assessing whether discrimination is unfair, is its impact on those discriminated against. The hardship for women in new ANC marriages on divorce can be very great. Women have in the past suffered from patterns of disadvantage. A woman's fundamental human dignity is impaired when no recognition is given to the contribution she has made to the increase of her husband's estate. In its 1982 report the SALC said that the objection to a system of complete

economic separation was not the risk of a wife being left destitute (maintenance might be sufficient to avoid that risk); it was that she could not claim, as of right, a share of that which was achieved with her assistance. I was mainly for this reason that the majority report of the SALC recommended that the redistribution remedy be made available for both old and new ANC marriages.

[132] First, there are degrees of voluntariness when it comes to contractual choice. For this reason, Parliament has intervened in other spheres of relations, such as employment, consumer law and the granting of credit. Some prospective spouses may be commercially savvy or have the benefit of independent advice, but for many others this is not the case. Prospective spouses are often young, in love and looking forward to a long relationship. A prospective spouse may readily succumb to pressure to sign a standard antenuptial contract excluding the accrual regime. The pending marriage may have been announced and organised by the time the prospective spouses come to consider an antenuptial contract. The danger of imprudent decision making is ever present in this setting.

[133] Second, valuing spousal choice and allowing a redistribution remedy does not have to be a binary choice. In terms of section 7(5)(d) of the Divorce Act, a court considering a redistribution claim can take into account “any other factor which should in the opinion of the court be taken into account”. This is as wide as can be. The fact that the parties concluded an antenuptial contract excluding the accrual regime could be taken into account. The weight this factor should receive would depend on the circumstances.

[136] Another relevant factor, in assessing the constitutional standard of fairness in section 9, are this country’s international law obligations, to which I made reference in summarising the CGE’s submissions. The international instruments by which South Africa is bound on the international plane militate against accepting, as fair, a form of discrimination which continues in the main to prejudice women.

[137] The remedy accorded by section 7(3) can only be granted if the court deems it “equitable and just”, having regard to the claimant’s contribution and other relevant factors, factors which would include – if the remedy were available to new ANC

marriages – the choice made by the spouses to exclude the accrual system. So one may ask rhetorically: How can it be a fair form of discrimination to withhold, from one class of spouses and in particular women in that class, a fair judicial remedy of which they may have as much need as other spouses and the fairness of which will take into account the choice the spouses made when concluding their antenuptial contract? In my view, this question cannot be plausibly answered. The discrimination is unfair.

[49] The same reasoning, almost identically, applies to Mrs D[...]’s attack on the impugned section, as:

49.1. the expert evidence shows not only the general factors relied on by the court in *KG* to the effect that women are economically disadvantaged compared to men, perform unremunerated labour, and work to enable men to earn more wealth but also shows that the same patterns of economic and social discrimination mean that men are more likely to have pensions than women and have larger pensions than women;

49.2. although the impugned section, like section 7(3), directly distinguishes on the basis of the date of the marriage, its effect is gendered. Women are more likely to be affected by the continued exclusion of pension interests from redistribution than men. That amounts to indirect discrimination on the basis of sex and gender; and

49.3. there is no possible basis to conclude that the discrimination is fair, as:

49.3.1. no respondent has entered the fray and sought to rebut the onus created by section 9(5);

49.3.2. the discrimination is irrational for the reasons I have given above and thus could never be fair;

49.3.3. it does not serve to protect the illusory freedom of choice that was considered in *KG*. Section 7(3) now applies to all marriages, with the only exclusion being pension interests. No person would have chosen

a particular marital regime on the basis of the impugned section. If they did, the reasons advanced in *KG* why that does not render the discrimination fair are even more persuasive in this case; and

49.3.4. the international law considered in *KG* does not make any exception for pension interests. It requires redistribution in all marriages, without the exclusion of any asset type.

[50] In line with *KG*, it cannot be a fair form of discrimination to withhold from one class of spouses and in particular women in that class, a fair judicial remedy of which they may have as much need as other spouses. It cannot be fair. For these reasons too the impugned section is unconstitutional.

Whether the limitation imposed by the impugned section can be justified

[51] In principle it is possible for a statute that violates sections 9(1) and (3) to be justified in terms of section 36(1) of the Constitution. In this matter there is no basis for justification, as:

- 51.1. the onus would be on the respondents to provide the justification. *Mlungwana and Others v S and Another* [2018] ZACC 45 at [57]. None of them have done so;
- 51.2. if the impugned section amounts to an arbitrary differentiation under section 9(1) it could never be reasonable and proportional under section 36(1);
- 51.3. by parity of reasoning, if the discrimination is unfair, it cannot be justified for the same reasons.

Conclusion and order

[52] in terms of section 172(1)(a), once I conclude that a law is inconsistent with the Constitution I must declare it invalid to the extent of its inconsistency. In this case the whole of the impugned section is invalid. It does not do anything other than what is

unconstitutional by excluding a spouse in a post-1984 marriage from claiming a redistribution in respect of the pension interests of the other spouse. It is thus invalid in its entirety.

[53] Section 172(1)(b) of the Constitution allows me to grant further relief that is just and equitable. In *KG* the Constitutional Court suspended its order of invalidity for 24 months and granted an order severing the unconstitutional parts of section 7(3) until Parliament passed remedial legislation. That would not be necessary here. The impugned section's existence was justified in the light of the pre-*KG* wording of section 7(3), which has been declared to be invalid. Thus, in this case a simple declaration of invalidity is sufficient.

[54] It is important to ensure that the order I intend to make does not have the effect of undoing any divorces that have already been completed, or any estates that have already been wound up and distributed. Such an order was granted in *KG* and I am bound to follow suit.

[55] Any order declaring legislation to be constitutionally invalid must be confirmed by the Constitutional Court. Accordingly, I shall direct the Registrar of this Court to refer my order to the Registrar of the Constitutional Court.

[56] In my view Mrs D[...] is entitled to costs. Although the Minister has not opposed her application, the Minister remains liable for the costs, as was held to be the case in *KG*. While the matter proceeded unopposed it nevertheless was a challenge to the constitutionality of legislation of some complexity. Accordingly, Mrs D[...] is entitled to have her counsel's costs paid on scale C.

[57] Thus, I make the following order:

1. *Section 7(7)(c) of the Divorce Act, 70 of 1979, is declared to be inconsistent with the Constitution of the Republic of South Africa and accordingly invalid.*

2. *The order in paragraph 1, above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to a marriage concluded on or after 1 November 1984.*
3. *The Registrar of this Court is directed, within 15 days of the date of this order, to lodge a copy of this order with the Registrar of the Constitutional Court.*
4. *The first respondent is directed to pay the applicant's costs, and the costs of the applicant's counsel are to be taxed on scale C.*

O H RONAASEN
ACTING JUDGE OF THE HIGH COURT

Appearances: **M Bishop for the applicant,**
 Instructed by Catto Neethling Wild Inc.
 c/o Heuer and Associates
 No appearances for the respondents