CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 50/08
[2008] ZACC 23

ELIZABETH GUMEDE (BORN SHANGE)	Applicant
versus	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR 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	Amicus Curiae

Heard on : 11 September 2008

Decided on : 8 December 2008

JUDGMENT

MOSENEKE DCJ:

Introduction

[1] This case concerns a claim of unfair discrimination on the grounds of gender and race in relation to women who are married under customary law as codified in the province of KwaZulu-Natal. It brings into sharp focus the issues of ownership, including access to and control of family property by the affected women during and upon dissolution of their customary marriages. At one level, the case underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage. At another level, the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform.

[2] These issues arise in proceedings under section 167(5)[1] of the Constitution in which Mrs Elizabeth Gumede, a spouse in a customary marriage, seeks confirmation from this Court of an order of constitutional invalidity made in her favour by the High Court.[2] The High Court found that the impugned provisions offend the equality protection afforded by sections 9(3) and (5) of the Constitution because they unfairly discriminate on the grounds of gender and race.[3]

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[1] Section 167(5) provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

See also section 172(2)(d) of the Constitution.

[2] *Gumede v President of the Republic of South Africa and Others* Case No 4225/2006 Durban and Coast Local Division, 13 June 2008, unreported.

[3] Section 9(3) 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."

[3] The High Court declared the following legislative provisions that regulate the proprietary consequences of a customary marriage as being inconsistent with the Constitution and invalid:

(a) Section 7(1) of the Recognition of Customary Marriages Act (Recognition Act).[4] It provides that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

(b) The inclusion of the words "entered into after the commencement of this Act" in section 7(2) of the Recognition Act. The inclusion provides that a customary marriage entered into after the commencement of the Recognition Act is a marriage in community of property subject to a number of exceptions which are not, for present purposes, relevant.

(c) Section 20 of the KwaZulu Act on the Code of Zulu Law (KwaZulu Act).[5] It provides that the family head is the owner of and has control over all family property in the family home.

(d) Section 20 of the Natal Code of Zulu Law (Natal Code).[6] It provides that the family head is the owner of and has control over all family property in the family home.

Section 9(5) provides: "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[4] Act 120 of 1998.

[5] KwaZulu Act on the Code of Zulu Law 16 of 1985.

[6] Natal Code of Zulu Law published in Proclamation R151 of 1987, GG No. 10966.

(e) Section 22 of the Natal Code. It provides that "inmates" of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

[4] Mr Gumede did not join issue with his wife's equality claim in the High Court, nor has he done so in this Court.[7] However, certain members of government at the national and provincial levels do resist the relief Mrs Gumede seeks. They oppose the confirmation of the order of constitutional invalidity and have appealed, as of right, to this Court against the order of the High Court.[8] They are the Minister of Home Affairs (the Minister) who is charged with the responsibility of administering the impugned national legislation, being the Recognition Act, and the KwaZulu-Natal Member of the Executive Council for Traditional and Local Government Affairs (the MEC) who, administers the provincial legislation, being the KwaZulu Act and the Natal Code. As a matter of expedience, I refer to these parties as the government. The grounds of appeal advanced by the government are in substance the same as the grounds relied upon by it to resist the confirmation of the order of constitutional invalidity. The notice of appeal was filed three days out of time. The government has furnished an adequate explanation of the delay and I am satisfied that the delay should be condoned.

[7] Initially Mrs Gumede instituted proceedings in the Equality Court. The proceedings were aborted. In those proceedings, Mr Gumede did depose to an affidavit, which is attached to the High Court record as an annexure to the affidavit filed on behalf of the MEC. Mr Gumede's affidavit does not deal with the unfair discrimination claim. He only disputes the extent of the matrimonial property.

[8] Section 172(2)(d) of the Constitution confers on a party with sufficient interest in an order of constitutional invalidity made by a court, a right of appeal to this Court. It states:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[5] The Women's Legal Centre Trust has been admitted as amicus curiae. The amicus supports the confirmation of the order of constitutional invalidity and urges us to extend the terms of the order to include polygamous marriages under customary law.

The facts

[6] Before I identify the issues to be resolved, it may be helpful to narrate the background facts. On 29 May 1968, Mrs Gumede and her husband entered into a customary marriage, the only marriage to which her husband was a party. Both Mr and Mrs Gumede reside permanently and are domiciled in the province of KwaZulu-Natal. Their marriage was of long duration. It has lasted for over 40 years and out of it four children were born, now all adults.

[7] During the marriage, Mrs Gumede was not in formal employment because her husband did not permit her to work. However, by whatever means she could garner, she maintained the family household and was the primary caregiver to the children. She had no means to contribute towards the purchase of the common home; her husband who was working did. Mrs Gumede states that over time the family acquired two homes. She further explains, and the High Court accepted, that she acquired the furniture and appliances in the Umlazi Township home valued at approximately R40 000. For some time now, they have been living separately. Mrs Gumede lives in the residence in Umlazi, eThekwini and Mr Gumede lives in the house at Adams

Mission, Amanzimtoti. He also receives a pension arising from his employment with Rennies Cargo, where he was a foreman until his retirement in April 2000. Mrs Gumede has no other family who can care for her, no other residence or family home. She is now an old-aged pensioner and lives off a government pension and the occasional financial support which she receives from her children. It should be added that she receives no maintenance contribution from Mr Gumede. I pause to record that in earlier proceedings in the Equality Court, Mr Gumede filed an affidavit in which he denied that he owns the house at Adams Mission.[9] However, he has not repeated that denial in the High Court or in this Court as he has not filed any papers in either court. In any event, nothing turns on this apparent dispute of fact.

[8] On all accounts it appears that the marriage has broken down irretrievably. In January 2003, Mr Gumede instituted court proceedings to end the marriage. The divorce proceedings are pending before the divorce court. Mrs Gumede does not dispute that their marriage has broken down irreparably and that it cannot be salvaged. Before a divorce was granted, she approached the High Court with a view to procuring an order invalidating the statutory provisions that regulate the proprietary consequences of her marriage. She sought to pre-empt the divorce court from relying on legislation she considers unfairly discriminatory to customary law wives on grounds of gender and race.

[9] *Gumede v Minister of Justice and Constitutional Development and Others* Case No. 2/2005 in the Equality Court held at the Durban and Coast Local Division, unreported 2/2005.

[9] It is appropriate to add, with a view to settling the proprietary aspect of the divorce, that Mr Gumede has offered to allow the residence at Umlazi to be sold and the proceeds to be divided equally between him and Mrs Gumede. This, of course, means that on Mrs Gumede's version, her husband will retain the rest of the property whilst she will receive approximately one quarter of the total value of the matrimonial property.

[10] I give detailed attention to the impugned legislation later in this judgment. However, this account will go somewhat limping if I do not, at this early stage, briefly describe the legislation which aroused Mrs Gumede's protest. The Recognition Act provides that a customary marriage concluded after its commencement on 15 November 2000 is ordinarily a marriage in community of property.[10] For ease of reference, I refer to these customary marriages as 'new' marriages. The Recognition Act also provides that customary marriages concluded before the cut-off date of 15 November 2000 ('old' marriages) are governed by customary law.[11] The Gumedes concluded their marriage in 1968. It follows that it is governed by customary law. None of the parties has contended otherwise.

[10] Section 7(2) provides:

> "A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouse in an antenuptial contract which regulates the matrimonial property system of their marriage."

[11] Section 7(1) provides: "The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law."

[11] In KwaZulu-Natal, where the Gumedes are domiciled, customary law has been codified in the KwaZulu Act and the Natal Code. These pieces of provincial legislation provide that in a customary marriage, the husband is the family head and owner of all family property, which he may use in his exclusive discretion. This plainly means that in terms of codified customary law in KwaZulu-Natal a wife to an 'old' customary marriage will not have any claim to the family property during or upon dissolution of the marriage. I make this observation mindful of the distinction that should properly be made between a particular version of 'official' or codified customary law, which should not be equated with living indigenous/customary law – a matter to which I revert later.

[12] In this Court the applicant seeks confirmation of the order of constitutional invalidity in terms of the Constitution. The government resists confirmation. It contends that the legislative measures in issue are constitutionally defensible because, first, the Constitution obliges courts to apply customary law when it is applicable.[12] And second, the differentiation the legislation makes between 'old' and 'new' customary marriages is justifiable under the Constitution.

[13] In another argument, government states that the relief Mrs Gumede is asking for is premature and unnecessary because a decision on the proprietary consequences of her marriage is well within the power of the divorce court. The nub of this

[12] For this proposition the government relies on section 211(3) of the Constitution which states:

> "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

argument is that the Recognition Act[13] provides that a court granting a decree for the dissolution of a customary marriage has the powers of a court granting a divorce under the Divorce Act.[14] In turn, the Divorce Act permits a divorce court to order the transfer of property to another spouse if it is just and equitable to do so.[15] Her remedy, they urge, lies in persuading the divorce court that it is just and equitable for her to be awarded part of the matrimonial property. On this argument, this is something the divorce court may only do after hearing evidence and taking into consideration all relevant circumstances. They make the point that Mrs Gumede's remedy is not to seek an order invalidating the laws concerned, but to approach the divorce court for appropriate relief.

[14] In this Court, the amicus curiae aligns itself with the applicant's submissions and adds that the proprietary regime of 'old' marriages is in conflict not only with the Constitution but also with international and regional African human rights instruments by which South Africa is bound. The amicus makes the further point that the unintended result of the order of the constitutional invalidity of sections 7(1) and (2) of the Recognition Act will be that the proprietary consequences of polygamous marriages will not be provided for in the legislation. For that reason, the amicus urged

[13] Section 8(4)(a) of the Recognition Act provides:

> "A court granting a decree for the dissolution of a customary marriage—
> (a) has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24(1) of the Matrimonial Property Act, 1984 (Act 88 of 1984)."

[14] Divorce Act 70 of 1979, and in particular the powers contemplated in sections 7, 8 and 9 of the Act. Section 7 of the Act provides for the division of assets and maintenance of the parties. Section 8 of the Act provides for the rescission, suspension and variation of orders. Section 9 of the Act deals with the forfeiture of patrimonial benefits.

[15] Sections 7(3) and (4) of the Divorce Act.

us to make an order requiring parliament to remedy the legislative gap in relation to polygamous marriages.

The issues

[15] The issues presented are neither obscure nor vast. The core issue is whether the order of constitutional invalidity made by the High Court should be confirmed. The outcome of that inquiry is predicated on whether the impugned provisions discriminate unfairly against the applicant and other women similarly situated. If they do, the next question would be whether there is justification that saves the provisions from constitutional inconsistency. Lastly, if unfair discrimination is found and cannot be justified, this Court must make an order of constitutional invalidity including any order that may be just and equitable.[16]

The statutory scheme

[16] Before I confront the equality claim, it may be helpful to discuss up-front the operative statutory arrangements. The Recognition Act was assented to and took effect well within our new constitutional dispensation.[17] It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and

[16] Sections 172(1)(a) and (b) read as follows:

> "(1) When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make an order that is just and equitable, including—
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[17] The Recognition Act was assented to on 20 November 1998 and its date of commencement was 15 November 2000.

exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary 'unions'.[18]

[17] This grudging recognition of customary marriages prejudiced immeasurably the evolution of the rules governing these marriages. For instance, a prominent feature of the law of customary marriage, as codified, is male domination of the family household and its property arrangements. Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage. As Professor Nhlapo poignantly points out:

> "[L]egislating these misconstructions of African life had the affect of placing women 'outside the law'. The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African

[18] See Mbatha, Moosa and Bonthuys "Culture and Religion" in Bonthuys and Albertyn (eds) *Gender, Law and Justice* (Juta, Cape Town 2007) at 159-64; see also Mamashela "New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act" (2004) 20 *SAJHR* 616 at 628; Pieterse "It's a 'Black Thing': Upholding culture and customary law in a society founded on non-racialism" (2001) 17 *SAJHR* 364 at 373 and 381.

> women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became 'outlaws'."[19]

[18] In our pre-colonial past, marriage was always a bond between families and not between individual spouses. Whilst the two parties to the marriage were not unimportant, their marriage relationship had a collective or communal substance. Procreation and survival were important goals of this type of marriage and indispensable for the well-being of the larger group. This imposed peer pressure and a culture of consultation in resolving marital disputes. Women, who had a great influence in the family, held a place of pride and respect within the family. Their influence was subtle although not lightly overridden. Their consent was indispensable to all crucial family decisions. Ownership of family property was never exclusive but resided in the collective and was meant to serve the familial good.[20] After collecting authorities and reviewing ample ethnographic material, Aninka Claassens records the following about property rights, women and gender equity:

> "There is a range of historical and ethnographic accounts that indicate that women, as producers, previously had primary rights to arable land, strong rights to the property of their married houses within the extended family, and that women, including single women, could be and were allocated land in their own right. Furthermore there are accounts of women inheriting land in their own right. However, Native Commissioners applying racially based laws such as the Black Land Areas Regulations and betterment regulations issued in terms of the South African

[19] Nhlapo "African customary law in the interim Constitution" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (Community Law Centre: University of the Western Cape, Cape Town 1995) at 162.

[20] See Claassens "Women, Customary law and discrimination: The impact of the Communal Land Rights Act" (2005) *Acta Juridica* 42.

> Development Trust and Land Act repeatedly intervened in land allocation processes to prohibit land being allocated to women."[21]

[19] It must, however, be acknowledged that even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children.[22]

[20] However, during colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it. Even when notions of spousal equality and equity and the abolition of the marital power of husbands over wives were introduced in this country to reform the common law,[23] 'official' customary law was left unreformed and stone-walled by static rules and judicial precedent, which had little or nothing to do with the lived experience of spouses and children within customary marriages.[24] With the advent of democratic rule much had to give way.

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[21] Id at 50.

[22] Above n 19 at 160-61. See also *Bhe and Others v Magistrate, Khayelitsha and Others* [2004] ZACC 17; 2005 (1) BCLR 1 (CC); 2005 (1) SA 580 (CC) at para 78.

[23] Section 11 of the Matrimonial Property Act 88 of 1984 abolished a husband's marital power over the person and property of his wife under the common law. For a discussion of gender equality reforms to previously discriminatory common law rules see *Van Der Merwe v Road Accident Fund and Another* [2006] ZACC 4; 2006 (6) BCLR 682 (CC); 2006 (4) SA 230 (CC) at paras 29-32.

[24] *Shilubana and Others v Nwamitwa* [2008] ZACC 9, 4 June 2008, as yet unreported, at para 45; *Bhe*, above n 22 at para 90, and with respect to the rules of succession in particular, at para 82. See also Himonga and Bosch "The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?" (2000) 117 *SALJ* 306 at 328-9; and Van der Meide "Gender Equality v Right to Culture" (1999) 116 *SALJ* 100 at 101 and 105-6.

[21] The Recognition Act is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes. It is also necessitated by our country's international treaty obligations, which require member states to do away with all laws and practices that discriminate against women.[25] On the other hand, the Recognition Act gives effect to the explicit injunction of the Constitution that courts must apply customary law subject to the Constitution and legislation that deals with customary law.[26] Courts are required not only to apply customary law but also to develop it. Section 39(2) of the Constitution makes plain that when a court embarks on the adaptation of customary law it must promote the spirit, purport and objects of the Bill of Rights.[27]

[22] The adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution. In this regard

[25] See articles 2 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which South Africa acceded to on 15 December 1995; article 18(3) of the African Charter on Human and Peoples' Rights, which South Africa acceded to on 9 July 1996; articles 2, 6 and 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which South Africa ratified on 17 December 2004; and articles 3 and 23(4) of the International Covenant on Civil and Political Rights, which South Africa ratified on 10 December 1998.

[26] See section 211(3), above n 12. See also *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC); 2004 (5) SA 460 (CC) at para 51.

[27] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

we must remain mindful that an important objective of our constitutional enterprise is to be "united in our diversity."[28] In its desire to find social cohesion, our Constitution protects and celebrates difference. It goes far in guaranteeing cultural, religious and language practices in generous terms provided that they are not inconsistent with any right in the Bill of Rights.[29] Therefore, it bears repetition that it is a legitimate object to have a flourishing and constitutionally compliant customary law that lives side by side with the common law and legislation.[30]

[23] The Constitution does not define customary law. The Recognition Act does. It defines customary law as "customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".[31] Difficult questions may surface about the reach of customary law, whom it binds and, in particular, whether people other than indigenous African people

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[28] Preamble, Constitution of the Republic of South Africa, 1996.

[29] See in this regard section 6 of the Constitution, which mandates measures for the protection of South Africa's official languages. With respect to language and culture section 30 states:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

Finally, section 31 provides:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied that right, with other members of that community—
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[30] For a critical appraisal of legal pluralism in relation to customary law see Cornell *uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa* (Inaugural lecture delivered at the University of Cape Town on 10 September 2008), available at http://www.news.uct.ac.za/usr/lectures/Drucilla_Cornell.pdf, accessed on 2 December 2008.

[31] Section 1 of the Recognition Act.

may be bound by customary law.[32] Happily, that matter will have to stand over for decision on another day. Given the conclusion I reach on the equality claim of the applicant, it is not necessary to resolve whether the discrimination is also on the ground of race or whether any of the parties is not bound by customary law. Both consider themselves spouses in a customary marriage and bound by the codified customary law of KwaZulu-Natal.

[24] I revert to consider the main and other purposes of the Recognition Act. Without a doubt, the chief purpose of the legislation is to reform customary law in several important ways. The facial extent of the reform is apparent from the extended title of the Recognition Act. The legislation makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses. It specifies the essential requirements for a valid customary marriage and regulates the registration of marriages. In this way, it introduces certainty and uniformity to the legal validity of customary marriages throughout the country. The Recognition Act regulates proprietary consequences and the capacity of spouses and governs the dissolution of the marriages, which now must occur under judicial supervision. An additional and significant benefit of this legislative reform is that it seeks to salvage the indigenous law of marriage from the stagnation of official codes and the inscrutable jurisprudence of colonial 'native' divorce and appeal courts.

[32] For the academic debate on the reach and implications of the definition of customary law see Pieterse, above n 18, who argues that customary law applies in a racially exclusive manner; and Himonga and Bosch, above n 24 at 314-5, who argue that customary law after the final Constitution applies on the basis of culture and not race. On whether customary law has in-built racial or cultural determinants see also Bennett *Customary Law in South Africa* (Juta, Cape Town 2004) at 42.

[25] For purposes of the equality analysis in this case, a useful starting point is section 6 of the Recognition Act. It provides:

> "A wife in a customary marriage has, on the basis of equality with her husband and *subject to the matrimonial property system governing the marriage*, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law." (Emphasis added.)

On its terms it appears to usher in a remedial regime of equal worth and capacity of spouses in customary marriages.

[26] However, section 7(1) of the Recognition Act swiftly qualifies the equal dignity, status and capacity of the spouses by providing that the proprietary consequences of a customary marriage entered into before its commencement continue to be governed by customary law. This means that 'old' marriages are subject to the matrimonial system dictated by customary law. On the other hand, section 7(2) provides that, subject to certain exclusions that are not here relevant,[33] a marriage concluded after the commencement of the Recognition Act is a marriage in community of property and of profit and loss between the spouses unless these consequences are excluded by the spouses in an antenuptial contract. In order to complete the picture, it is necessary to note that section 20 of the KwaZulu Act and

[33] For convenience, I repeat the text of section 7(2):

> "A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage."

section 20 of the Natal Code provide that a family head is the owner and has control of all family property in the family home.[34] In turn, section 22 of the Natal Code places all "inmates" of a kraal in respect of all family matters "under the control" of the family head to whom they all "owe obedience".[35]

[27] There appears to be no interpretive dispute between the parties over the meaning of these provisions and in particular that the codified customary law, which is applicable in the province where Mrs Gumede is domiciled, has the outcome that her husband is the exclusive owner of all the property that was acquired during the subsistence of the marriage. The first and trite observation is that all these provisions fall to be tested for constitutional compliance against the dignity and equality guarantees of our Bill of Rights.

Should the offending customary law be developed?

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[34] Section 20 of the KwaZulu Act states:

> "The family head is the owner of all family property in his family home. 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 property attaching to one house 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 20 of the Natal Code provides:

> "The family head shall be the owner of all family property in his family home. He shall have 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 property attaching to one house for the benefit or on behalf of any other house in the family home an obligation shall rest upon such other house to return the same or its equivalent in value."

[35] Section 22 of the Natal Code reads: "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."

[28] However, before I consider the equality argument, I digress to dispose of a debate that ensued during the course of the hearing of this matter. The debate was prompted by a written submission that was made on behalf of Mrs Gumede, to the effect that her primary complaint arises from customary law and therefore it is that matrimonial property regime to which she is subjected and which discriminates against her because she is a woman. One associated question that arose was why it would then be necessary to declare invalid the provisions of sections 7(1) and (2) of the Recognition Act, if the mischief targeted resides in customary law. Another associated question was whether it would be appropriate to develop the offending customary law that is applicable to 'old' marriages in order to make that law consistent with the equality and dignity prescriptions of the Constitution.

[29] I intimated earlier that, when appropriate, courts have a constitutional obligation to develop customary law in order to align it with constitutional dictates. However, the question of developing customary law in this particular instance does not arise. Firstly, the version of customary law we are faced with is codified by legislation and applies only to the province of KwaZulu-Natal. A competent court may develop customary law but its power in relation to legislation is not to develop the legislation but to interpret it in a manner that promotes the objects of the Constitution or to hold, where appropriate, that it is inconsistent with the Constitution and for that reason invalid. In confirmatory proceedings such as the present, the enquiry the Court ordinarily makes is narrow. This enquiry is whether the order of constitutional invalidity made by the High Court should be confirmed by this Court.

Our enquiry cannot possibly include the question of whether this Court should develop the customary law, not as codified, but in its living form. This is so because no rule of living customary law has been relied upon or impugned in these proceedings. Therefore there can be no merit in the contention that this Court should develop the official customary law as codified or the living indigenous law.[36]

[30] Secondly, even if there were a good reason for developing living customary law, it would be ill-advised to do so because parliament appears to have made a conscious election that all 'new' customary marriages should be marriages in community of property and of profit and loss, and that by implication, they are in harmony with the communal ethos that underpins customary law. It has not been shown, nor can I find, that the legislative choice is constitutionally flawed. This view is fortified by the provisions of section 211(3) of the Constitution, which require courts to apply customary law "subject to . . . any legislation that specifically deals with customary law." In my judgement a development of customary law for the limited purpose of ameliorating the proprietary consequences of pre-recognition marriages would not be appropriate in the face of a deliberate election by parliament to render all post-recognition marriages in community of property.

[31] An additional important consideration is that if we were to declare sections 7(1) and (2) of the Recognition Act inconsistent with the Constitution and invalid we

[36] On living customary law see *Alexkor Ltd and Another v The Richtersveld Community*, above n 26 at paras 52-3; and *Shilubana v Nwamitwa*, above n 24 at para 81. In *Bhe*, above n 22 at para 87, this Court also contrasted official rules of customary law with "'living customary law', which is an acknowledgment of the rules that are adapted to fit in with changed circumstances." For further discussion on living customary law, see Himonga and Bosch, above n 24 at 319-323.

would be rendering customary law consistent with the guarantees and ethos of the Constitution. In other words, customary law would become consistent with the Constitution and it follows, therefore, that it would be unnecessary to develop it.

Equality and discrimination

[32] Beyond the Constitution, the Recognition Act is the starting point of this equality analysis. It must be understood within the context of its legislative design. Its avowed purpose, as I have earlier remarked, is to transform spousal relations in customary marriages. The legislation not only confers formal recognition on the marriages but also entrenches the equal status and capacity of spouses and sets itself the task of regulating the proprietary consequences of these marriages. In doing so, the Recognition Act abolishes the marital power of the husband over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise.

[33] It is helpful to keep in mind that the impugned provisions fall into two categories. The first is an attack on the provisions of the Recognition Act and the second is an attack on the codified customary law in KwaZulu-Natal. As I have already stated, sections 7(1) and (2) of the Recognition Act differentiate between the proprietary consequences of marriages entered into before and after the commencement of the Recognition Act, by providing that 'old' marriages will continue to be governed by customary law, whilst 'new' marriages are to be marriages in community of property and of profit and loss, except where the parties agree otherwise. On the other hand, the codified customary law in KwaZulu-Natal subjects

a woman married under customary law to the marital power of her husband, who is the exclusive owner and has control of all family property.

[34] These impugned provisions are self-evidently discriminatory on at least one listed ground: gender. The provisions are discriminatory as between wife and husband. Only women in a customary marriage are subject to these unequal proprietary consequences. This discrimination is on a listed ground and is therefore unfair unless it is established that it is fair.[37] And within the class of women married under customary law, the legislation differentiates between a woman who is a party to an 'old' or pre-recognition customary marriage as against a woman who is a party to a 'new' or post-recognition customary marriage. This differentiation is unfairly discriminatory.

[35] The consequence of the discrimination created by the Recognition Act is to subject Mrs Gumede, and other women in KwaZulu-Natal similarly situated, to the proprietary system governed by customary law as codified in the KwaZulu Act and the Natal Code. The impact of this legal arrangement is that the affected wives in customary marriages are considered incapable or unfit to hold or manage property. They are expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property. In this regard, in *Bhe*, Langa DCJ had the following to say, albeit it in the context of the male primogeniture rule of customary law:

[37] Sections 9(3) and (5) of the Constitution, above n 3.

> "At a time when the patriarchal features of Roman-Dutch law were progressively being removed by legislation, customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner."[38] (Footnotes omitted.)

Langa DCJ proceeded to hold that a rule of customary law that implies that women are not fit or competent to own and administer property violated their right to dignity and equality.[39]

[36] There can be no doubt that the marital property system contemplated by the KwaZulu Act and the Natal Code strikes at the very heart of the protection of equality and dignity our Constitution affords to all, and to women in particular. That marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent. This is unfair. The Constitution itself places a particular premium on gender equality by providing that that if discrimination is based on gender as one of the listed grounds, it is presumed to be unfair. What remains is to consider whether any justification has been advanced to save the unfair discrimination spawned by the impugned provisions.

Justification

[38] Above n 22 at para 90.

[39] Id at paras 90-2.

[37] It is trite that where there is unfair discrimination, a respondent who contends that the discrimination is fair must place before the court material that will save the challenged provision from unconstitutionality. This process of justification is prescribed by section 36 of the Constitution.[40] It follows that the government, in this case, bears the burden of justifying the limitation that has been found to exist on the right to equality afforded to Mrs Gumede by the Bill of Rights. The justificatory burden that the government bears was described in the following terms in *Moise v Greater Germiston Transitional Local Council*:

> "If the government wishes to defend the particular enactment, it then has the opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but placing before court the requisite factual material and policy considerations. Therefore, although the burden of justification under section 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment." [41]

[38] The government contends that the discrimination is justifiable under our Constitution. For that contention it advances one principal reason and two ancillary reasons relating to the ripeness of the equality claim. They argue that in terms of

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[40] Section 36(1) of the Constitution reads:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[41] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as amicus curiae)* [2001] ZACC 21; 2001 (8) BCLR 765 (CC); 2001 (4) SA 491 (CC) at para 19.

section 8(4)(a) of the Recognition Act, a court dissolving a customary marriage has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act.[42] Section 7(3) of the Divorce Act provides:

> "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 No. 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."

The dissolution of a customary marriage, the government says, is now dealt with on the same basis as that of a civil marriage. Where parties are married out of community of property, in the absence of an agreement between them and on application of a party, a court may, if it is just and equitable, order that the assets of the other party be transferred to the applicant party.

[42] Subsection 7(4) requires that an order granted in terms of subsection (3) must be just and equitable and may be ordered only after taking into consideration any contribution to maintenance or an increase in the estate of the other party during the subsistence of the marriage; subsection 7(5) lists the factors which a court needs to take into account in considering whether and which assets are to be transferred in accordance with subsection (3); a court may order, in terms of subsection 7(6), that satisfaction of an order made in terms of subsection (3) may be deferred on certain conditions, upon application being made by the party against whom the order is granted; and subsection 7(7) renders a party's pension interests part of his or her assets for purposes of determination of patrimonial benefits. Section 8 deals with rescission, suspension or variation of orders. Section 9 makes provision for the forfeiture of patrimonial benefits. And section 10 provides a court with a discretion as to whom to award costs against.

[39] The subtext of this argument is that on divorce, Mrs Gumede may very well persuade the court that assets of her husband should be transferred to her. On its very terms, this argument does not pretend to deal with the spousal relationship during marriage. It is limited to the proposition that on divorce, a court may rely on its just and equitable jurisdiction to transfer property of a husband to a wife of a pre-recognition customary marriage.

[40] The foundation stone of this contention is that the proprietary consequences of a pre-recognition customary marriage are equivalent to those of a civil marriage out of community of property. This contention appears to be premised on the fact that section 8(4)(a) of the Recognition Act confers on a divorce court the powers in sections 7, 8, 9 and 10 of the Divorce Act. However, sections 7(3), (4), (5) and (6) of the Divorce Act which give the court the power to transfer property of the husband to the wife apply only to marriages out of community of property.[43]

[41] There is considerable debate over the proper meaning to be ascribed to the provisions of section 8(4)(a) of the Recognition Act.[44] Professors Cronjé and Heaton contend that a divorce court does have the power to exercise the equitable jurisdiction given to a divorce court by section 7(3) of the Divorce Act to customary marriages even if they are not out of community of property by reason of the provisions of

[43] Above n 42.

[44] See for instance Bennett, above n 32 at 182.

section 8(4)(a) of the Recognition Act.[45] On the other hand, Professor Bennett argues that to reach that conclusion requires an "adventurous interpretation" of section 8(4)(a).[46] However, in argument on Mrs Gumede's behalf we were urged not to decide the proper meaning of the section because the equality claim can be adjudicated upon without deciding the interpretive question. My view is that the meaning of section 8(4)(a) is germane to the justification enquiry and must be decided. And what is more, this is a question of importance in the adjudication of divorces relating to customary marriages. We have heard full argument on the interpretation of the provision and there is no reason why we should not decide the issue. Another important consideration is that it is not always feasible or affordable for litigants in divorce proceedings, particularly those relating to customary marriages, to approach this Court for the determination of a proper interpretation of a legal provision that affects them so closely.

[42] In doing so we are obliged to give a purposive meaning to the provisions of section 8(4)(a) of the Recognition Act. The provisions must be understood within the context of the dominant purpose of the Recognition Act to recognise and reform the law on customary marriages and, in particular, to equalise the status and capacity of spouses. The purpose of the Recognition Act includes regulating the proprietary consequences of the marriages and their dissolution under judicial supervision. Section 8(4) is couched in broad terms. On its terms it does not refer to customary marriages in or out of community of property. I must instantly add that this inclusive

[45] Cronjé and Heaton *South African Family Law* 2ed (LexisNexis Butterworths, Durban 2004) at 195-6.

[46] Bennett, above n 32 at 282.

stance of the section is correct because in its original setting, customary law did not recognise the divide between marriages in community of property and marriages out of community of property. The section directs a court granting a decree of divorce of a customary marriage to exercise certain powers which are more fully described in section 7 of the Divorce Act. It is however so that section 7(3) of the Divorce Act appears to relate to the powers a court has in granting a divorce in a marriage out of community of property. That, however, does not mean that the limitation found in section 7(3) of the Divorce Act to civil marriages out of community of property also restricts the powers section 8(4)(a) of the Recognition Act confers on courts in relation to customary marriages.

[43] This conclusion is fortified by three important considerations. The first is that the Recognition Act must be given a meaning that extends optimal protection to a category of vulnerable people who, in this case, are women married under customary law, in order to give effect to the equality and dignity guarantees of the Constitution. That, after all, is the primary purpose of the Recognition Act. The second is that, properly understood, customary marriages should not be seen through the prism of the marital proprietary regimes under the common law or divorce legislation that regulates civil marriages. They must be understood within their own setting which does not place a premium on the dichotomy between marriages in and out of community of property. In this regard, this Court had the following to say in *Alexkor v The Richtersveld Community*:

> "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution."[47] (Footnote omitted.)

Lastly, section 8(4)(a) of the Recognition Act rightly confers equitable jurisdiction to a divorce court seized with the dissolution of a customary marriage. This power that the court exercises is, in my view, more consonant with the underlying ethos of customary law which strives for equity in resolving conflict.

[44] In my view, there is no cogent reason for limiting the scope of the equitable jurisdiction conferred on a divorce court by section 8(4)(a) of the Recognition Act in relation to matrimonial property of a customary marriage which is out of community of property. It is clear that at both a textual and purposive level, section 8(4)(a) does not restrict the equitable jurisdiction of a court to a marriage out of community of property. This means that every divorce court granting a divorce decree relating to a customary marriage has the power to order how the assets of the customary marriage should be divided between the parties, regard being had to what is just and equitable in relation to the facts of each particular case. This would require that a court should carefully examine all the circumstances relevant to the customary marriage and in particular the manner in which the property of the marriage has been acquired, controlled and used by the parties concerned, in order to determine, in the final instance, what would be a just and equitable order on the proprietary consequences of the divorce.

[47] Above n 26 at para 51.

[45] Given the meaning I have ascribed to section 8(4)(a) of the Recognition Act, it is so that Mrs Gumede could have approached the divorce court requiring it to make an order that is just and equitable in relation to the marriage property. That, however, is no answer to or justification for the unfair discrimination based on the listed ground of gender. The persisting difficulty confronting government is that the provisions of section 8(4)(a) of the Recognition Act read together with sections 7(3), (4), (5), (6) and (7) of the Divorce Act, apply only upon dissolution of the customary marriage. In other words a divorce court may make the equitable order in relation to family property only when the marriage is dissolved. This does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage. Another difficulty the government must confront is the following. Even if Mrs Gumede approached the divorce court relying on section 8(4)(a) of the Recognition Act, she might be severely prejudiced because under the codified customary law all the family property belongs to her husband. However, if sections 7(1) and (2) of the Recognition Act are declared inconsistent with the Constitution, the starting point of the just and equitable enquiry a divorce court has to make would be that she and her husband both own the matrimonial property in equal shares. This means that when the court takes into consideration all relevant circumstances, one important consideration will be that the parties own the family property in equal shares. It is clear to me that the government has not advanced any justification for this unfair discrimination.

[46] The matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limits the equality dictates of our Constitution and of the Recognition Act. The former statutes provide that the family head is owner of all the family property over which he has "charge, custody and control" 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."[48] This patriarchal domination over, and the complete exclusion of, the wife in the owning or dealing with family property unashamedly demeans and makes vulnerable the wife concerned and is thus discriminatory and unfair. It has not been shown to be otherwise, nor is there any justification for it.

[47] On behalf of the applicant it has been submitted that even if the provisions of section 7(4) of the Divorce Act do apply, there is a further hurdle in the way of the case of the government. That hurdle is that section 7(3) empowers a court to direct that assets of one party may not be transferred to the other unless the court is satisfied that it is *equitable and just to do so*. On that argument, unless the wife succeeds in persuading the court that it is just and equitable that she be awarded some of the property, the husband will retain ownership of all the property acquired during the course of the marriage. To the extent, the argument runs, that section 7(3) of the Divorce Act applies, it is unfairly discriminatory against a wife to a customary marriage who must fight her way to sharing in the family property as against her husband who is entitled to all of the family property acquired during the marriage.

[48] Above n 34.

[48] It is unnecessary to decide the constitutional validity of section 7(3) of the Divorce Act, the validity of which was not challenged before the High Court and has not been referred to us for purposes of confirmation. Suffice it to point out that in my view, I do not think that the just and equitable jurisdiction of a court granting a divorce in a customary marriage should approach the matter on a footing that the wife bears the onus to establish that she is entitled to have certain assets transferred to her. As I have intimated earlier, the court must investigate all the facts relevant to the marriage property in order to be in a position to decide properly how the marriage property should be shared by the husband and wife.

[49] In my view the government has advanced no justification for the discrimination to be found in the impugned legislation. I conclude that the order of invalidity made by the High Court should be confirmed. In other words, I hold that the following provisions are inconsistent with the Constitution and invalid because each of them unfairly discriminates against the applicant on the ground of gender:

a) Section 7(1) of the Recognition Act insofar as it provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.
b) Section 7(2) of the Recognition Act, insofar as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act, by virtue of the inclusion of the words "entered into after the commencement of this Act".

c) Section 20 of the KwaZulu Act because it provides that during the course of a customary union the family head is the owner of and has control over all family property in the family home.

d) Section 20 of the Natal Code because it provides that the family head is the owner of and has control over all family property in the family home.

e) Section 22 of the Natal Code because it provides that the inmates of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

Order and retrospectivity

[50] Having found that the impugned legislation is inconsistent with the Constitution and thus invalid, this Court must make an order that is just and equitable, which may include an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity to allow the legislature to correct the defect. It is noteworthy that the government has not asked the Court to limit the retrospective effect of the order of invalidity, as contemplated in section 172(1)(b)(i) of the Constitution.[49] And they have not tendered any evidence or other cogent material in support of such an order.

[51] For several good reasons, it would not be just and equitable to limit the retrospective effect of the declaration of invalidity. Suffice it to point to three reasons only. First, the Recognition Act has provided for customary marriages since

[49] See above n 16 for the full text of section 172(1)(b)(i).

15 November 2000 to be in community of property. It would not be just and equitable to order that the declaration of invalidity should have a prospective effect only, when the equality challenge relates to pre-recognition marriages. In other words, a prospective order would not grant any, or effective, relief to wives in marriages concluded before the startt of the Recognition Act. Second, whilst the Recognition Act is remedial in purpose, the provisions of sections 7(1) and (2) of the Recognition Act are improperly under-inclusive. The discrimination they spawn is so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order we are to make, or even by suspending the order of invalidity to allow parliament to rectify the error. Third, the retrospective regime which the order would permit is properly aligned to the prospective regime created by parliament in the Recognition Act in relation to post-recognition marriages. The effect of the order we are to make is that all customary marriages would become marriages in community of property. The recognition of the equal worth and capacity of all partners in customary marriages is well overdue and no case has been made out as to why it should be delayed any further.

[52] It is important to add that nothing in the order we intend making will affect customary marriages that have been terminated either by death or by divorce before the date of this order. Also any exercise of marital power before the date of the order we will make, will not be undone only as a result of this order.

[53] What remains is to consider the interests of third parties who may be affected by a change in the proprietary regime of customary marriages entered into before the Recognition Act. In this regard, the provisions of section 11(4) of the Matrimonial Property Act are instructive. Section 11(4) reads as follows:

> "The abolition of the marital power by subsection (2) shall not affect the legal consequences of any act done or omission or fact existing before such abolition."

[54] Although this provision does not find direct application in this case, it serves as an example of how a concern over the possible interests of third parties may be legislatively managed during the transition period. That provision protected legal consequences from acts done or omissions or facts existing before the abolition of marital power. To the extent necessary, the order of invalidity we are to make may incorporate a provision which in substance is an equivalent of section 11(4) of the Matrimonial Property Act. I am of the view that the interests of third parties, who may be affected by the altered matrimonial regime in relation to pre-recognition customary marriages, may also be preserved by incorporating a provision that allows a party to approach a competent court should there be any adverse consequences arising from the order we have made.

Amicus curiae

[55] Lastly, the amicus curiae made very useful submissions by pointing us to international law and regional African human rights law and standards, to the vulnerability and position of the class of women affected and to polygamous

relationships.[50] The submissions on the first two issues have been adopted in varying measures during the course of this judgment. Whilst some of the submissions made in relation to polygamous marriages are instructive, I do not think that they should form the subject-matter of the order of invalidity. The amicus argued that by striking down section 7(1) of the Recognition Act there will be no statutory provision that regulates pre-recognition polygamous marriages which are not covered by section 7(6) of the Act. The amicus submitted that this legislative lacuna should be remedied by this Court by directing that upon the dissolution of a pre-recognition polygamous customary marriage, the family and house properties should devolve in a manner specified in an order of this Court.

[56] In my view, it is sufficient to do no more than draw the legislature's attention to this possible lacuna, if any. I think that once section 7(1) of the Recognition Act has been declared inconsistent with the Constitution and invalid, the proprietary consequences of polygamous relationships will be regulated by customary law until parliament intervenes.

Costs

[57] Mr Gumede has not participated in these proceedings. There should be no order of costs against him. However, in relation to the two government respondents, I can find no reason why they should not be ordered to pay costs including costs

[50] The amicus referred to several international as well as regional African human rights instruments, to wit: the International Covenant on Civil and Political Rights; CEDAW; the SADC Protocol on Gender and Development; the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

consequent upon the use of two counsel. Costs should include costs as ordered by the High Court.

Conclusion

[58] For the sake of completeness I restate the principal findings I have made:

(a) The order of constitutional invalidity made by the High Court in relation to certain legislation (sections 7(1) and (2) of the Recognition Act; section 20 of the KwaZulu Act; and sections 20 and 22 of the Natal Code) should be confirmed.

(b) The impugned legislative provisions unfairly discriminate against the applicant and other women similarly situated.

(c) The government has failed to furnish justification for the legislative discrimination on a listed ground, the discrimination is therefore unfair, and the provisions concerned are inconsistent with the Constitution and invalid.

(d) The order should—

(i) not limit its retrospective effect on parties to existing marriages;

(ii) not suspend the declaration of invalidity; and

(iii) if necessary, have a saving provision in favour of third parties or a generic order permitting a party claiming specific prejudice arising from the retrospective change of the matrimonial regime to approach a court for appropriate relief.

(e) The order of constitutional invalidity in relation to section 7(1) of the Recognition Act is limited to monogamous marriages and should not concern polygamous relationships or their proprietary consequences.

(f) The order we are to make should not affect customary marriages that have been terminated by death or divorce before this order is made.

(g) Any exercise of marital power that is made before the date of the order should not be undone only as a result of this order.

(h) The Minister (sixth respondent) and the MEC (fourth respondent) should be ordered to pay costs of the applicant in the High Court and in this Court.

Order

[59] The following order is made:

(a) The application for the condonation of the late filing of the appeal of the fourth and sixth respondents against the order of constitutional invalidity made by the High Court is granted.

(b) The appeal is dismissed.

(c) The order of constitutional invalidity made by the High Court is confirmed.

(d) Section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 is declared inconsistent with the Constitution and invalid to the extent that its provisions relate to monogamous customary marriages.

(e) The inclusion of the words "entered into after the commencement of this Act" in section 7(2) of the Recognition of Customary Marriages Act 120 of 1998 is declared inconsistent with the Constitution and invalid. These words are

severed from section 7(2) of the Recognition of Customary Marriages Act 120 of 1998.

(f) Section 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985 is declared inconsistent with the Constitution and invalid.

(g) Section 20 of the Natal Code of Zulu Law published in Proclamation R151 of 1987 is declared inconsistent with the Constitution and invalid.

(h) Section 22 of the Natal Code of Zulu Law published in Proclamation R151 of 1987 is declared inconsistent with the Constitution and invalid.

(i) In terms of section 172(1)(b) of the Constitution the orders in paragraphs (c), (d), (e), (f), (g) and (h) of this order shall not affect the legal consequences of any act done or omission or fact existing in relation to a customary marriage before this order was made.

(j) Any interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced as a result of this order.

(k) The fourth and sixth respondents are to pay the costs of this application, including the costs in the High Court, jointly and severally, the one paying the other to be absolved, which shall include costs of two counsel.

Langa CJ, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Moseneke DCJ.

Counsel for the Applicant:	Advocate G Budlender, Adv E van Huyssteen instructed by the Legal Resources Centre
Counsel for the Fourth and Sixth Respondents:	Advocate V Soni SC instructed by the State Attorney.
Counsel for the Amicus Curiae:	Advocate S Cowen, Adv N Mangcu-Lockwood instructed by the Women's Legal Centre