IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D12515/2018

In the matter between:

A S	**FIRST APPLICANT**
COMMISSION FOR GENDER EQUALITY	**SECOND APPLICANT**
and	
G S	**FIRST RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**SECOND RESPONDENT**

JUDGMENT

Madondo DJP

Introduction

[1] The applicants seek a declaratory order in the following terms:

'1. It is declared that sections 21 (1) and 21 (2)(a) of the Matrimonial Property Act 88 of 1984 are invalid to the extent that they maintain the default of marriage out of community of

property, established by section 22 (6) of the Black Administration Act 38 of 1927, in respect of marriages entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

2. It is declared that all marriages concluded out of community of property under section 22 (6) of the Black Administration Act are deemed to be marriages in community of property. Couples who wish to opt out of this position and alter the matrimonial property system applicable to their marriage may do so by executing and registering a notarial contract to this effect.

3. The above orders are subject to the following conditions:

3.1 Existing burdens on the property now falling into the joint estate as a result of this order will remain in place; and

3.2 From the date of this order, chapter 3 of the Matrimonial Property Act will apply in respect of all marriages that have been converted to marriages in community under Prayer 2, unless and until affected couple has opted out in accordance with the procedure set out in Prayer 2.

4. The costs of this application are to be paid jointly and severally, by the First Respondent and, if he opposes the application the Second Respondent, jointly and severally, the one paying, the other to be absolved.

5. Further and or alternative relief.'

[2] The applicants ground their application on that s 22(6) of the Black Administration Act[1] ('the BAA') disadvantaged black women, in particular, by providing that except in limited circumstances, their marriages would be out of community of property. The 1988 Marriage and Matrimonial Property Law Amendment Act[2] ('the Amendment Act') repealed s 22(6) but this did not end the disadvantage suffered by black women who had married before that date. The Amendment Act created limited mechanisms for black women to escape this disadvantage, but those mechanisms were inadequate. A marriage out of community of property remained the default position for those who had married before the repeal of s 22(6).

[3] The applicants contend that s 22(6) of the BAA denied hundreds of thousands of black women the protection that is afforded by a marriage in community of property. By doing so, it exacerbated their vulnerability and rendered them entirely dependent on the

[1] Black Administration Act 38 of 1927.
[2] Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

goodwill of their husbands, who generally control the bulk of the family's wealth. These women have largely contributed to the joint household and raising of children, yet they cannot enjoy the fruit of their labour. According to the applicants, s 22(6) was discriminatory in two respects. Firstly, it discriminated against black women by disadvantaging them relative to their husbands. Secondly, the BAA unfairly discriminated against black women, as by contrast, the laws regulating civil marriages between couples of all other races set the default position as marriage in community of property. The law had resulted in black women who were married before 1988 being afforded less protection than all other women in the country.

[4] The applicants argue that the continued default positon of a marriage being automatically out of community of property for black women who married before 1988 and who were subjected to s 22(6) of the BAA, offends against the equality provisions of the Constitution of the Republic of South Africa[3] ('the Constitution'). Black women who were married before 1988 under s 22(6) of the BAA do not enjoy the protection afforded to other women who were married before 1988, and women who were married after 1988, whose marriages are automatically in community of property. It is the applicants' submission that the law differentiates between men and women, and between black people and other people. It also discriminates on the grounds of age against elderly black women who were married before 1988, as it differentiates between the proprietary consequences applicable to women who were married under the BAA before 1988, and those women who married after 1988. According to the applicants, the law discriminates unfairly in violation of the Constitution.

[5] The applicants submit that the provisions of s 21(1) and s 21(2)*(a)* of the Matrimonial Property Act[4] ('the MPA') are unconstitutional and invalid to the extent that it maintains the default position established by s 22(6) of the BAA. The effect of the provisions of s 21(1) and s 21(2)*(a)* is that couples who were married subject to s 22(6) of the BAA will remain married out of community of property, unless they opt to change their property regime to 'in community of property'.

---

[3] The Constitution of the Republic of South Africa, 1996.
[4] Matrimonial Property Act 88 of 1984.

The parties

[6] The first applicant is a seventy-two (72) year old housewife of […], Pinetown, KwaZulu-Natal. She is one of approximately 400 000 black women whose marriages are out of community due to s 22(6) of the BAA.

[7] The second applicant is the Commission for Gender Equality ('the Commission'), established in terms of s 187 of the Constitution to promote respect for gender equality and the protection, development and attainment of gender equality. Its offices are situated at Constitutional Hill, 2 Kotze Street, Braamfontein, Johannesburg.

[8] The first respondent is G S, a seventy-four (74) year old male electrical contractor residing at the same address as the first applicant.

[9] The second respondent is the Minister of Justice and Correctional Services, cited herein as the executive member responsible for the administration of the MPA, and as the representative of the Government of the Republic of South Africa.

[10] The first applicant and the first respondent were married to each other on 16 December 1972, out of community of property under s 22(6) of the BAA. They have so been married for a period of 47 years and such marriage still subsists. The first applicant contends that notwithstanding the repeal of s 22(6), being married out of community of property is still the default position of their marriage due to the fact that the provisions of s 21(1) and s 21(2)*(a)* of the MPA perpetuate such position. The applicants submit that the discrimination is in terms of s 9(5) of the Constitution unfair and that accordingly, the provisions of s 21(1) and s 21(2)*(a)* of the MPA are unconstitutional and invalid to that extent.

[11] The first applicant brings this application in her own personal interest, as well as in the interest of many other black women whose marriages were subject to s 22(6) of the BAA, who remain married out of community of property, and who are unable due to the lack of knowledge of their rights, and the lack of access to legal representation, to act in their own name. Whereas the second applicant brings the application in furtherance of its constitutional mandate. Through this application, the applicants seek

to address the legacy of s 22(6) of the BAA in terms of which black couples who conducted civil marriages were married, by default, out of community of property. This motion proceeding is aimed at the resolution of legal issues based on common facts. It is therefore not geared towards the decision of factual disputes. It is well established that where in motion court, disputes of fact arise on the papers, the matter can only be decided on the respondent version of the disputed facts, unless that version is so far-fetched or clearly untenable that it can justifiably be rejected merely on paper.[5]

Factual background

[12] Between 1972 and 1985 the first applicant had been a housewife, and was raising a family. She runs a home-based business selling clothing. Her earnings were utilised to pay for the education of their children at private schools. The remainder was used on the family and household expenses. In 2000 the parties purchased a property which was registered in the name of the first respondent. During the past two years, the relationship between the parties deteriorated allegedly due to the fact that the first respondent engaged in extra-marital affairs. The first respondent then threatened to sell the property. The first respondent admits that the relationship between them has deteriorated, but denies that this was due to the fact that he was engaged in extra-marital affairs. He states that the deterioration of the relationship could be attributed to the fact that the first applicant showed a lacked of respect towards him in that she did not speak to him in a manner befitting to her husband. Similarly, with regard to the sale of the house, the first respondent admits that he intended to sell the house but denies that he threatened to sell it. He states that the suggestion to sell the property came as a result of the fact that the children have now grown up and left the house, and accordingly the house is now too big for the two of them. However, nothing detracts from the fact that the love relationship between the two had gone sour and that the first respondent intended to sell the house.

[13] The first applicant sought legal advice and launched proceedings in the Pinetown Magistrates' Court for her protection. She learnt that she was still married out of community of property and that her husband, the first respondent, did not need her consent to sell their family property. The first respondent's threat to sell the property

[5] See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

continued until the first applicant sought and obtained an order interdicting and restraining the first respondent from selling the house or in any manner alienating it pending the finalisation of the application. Should her house be sold, she would be rendered homeless as she would be deprived of the house in respect of which she has contributed so much.

[14] The first applicant is a devoted member of the Roman Catholic Church, and divorce in her church is discouraged and frowned upon. She still entertains hope of reconciling with her husband. She is, therefore, not willing to divorce her husband in order to secure an equitable distribution of the parties' assets by utilising the remedy which s 7(3) to (5) of the Divorce Act[6] ('the Divorce Act') provides for in the event of parties who are married out of community of property divorce.

[15] The first applicant avers that if a woman is married in community of property, the assets acquired with her husband's income fall into the joint estate and she becomes the co-owner of those assets. If the couple is married out of community of property, the assets amass in her husband's separate estate. The wife has no right of ownership in relation to those assets and the husband is able to use and dispose of them without his wife's consent. He may recklessly fritter away the family's wealth, leaving the property to somebody else other than his wife upon his death or unilaterally sell the family house. This may impact negatively upon the rights and interest of the wife in various ways: She may be forced out of her home, leaving her vulnerable and unsafe; and she may be left with nothing to live on in her old age or nothing to ensure that her basic needs are met (including healthcare, food and security).

[16] The applicants state that a woman, who is unable to divorce her husband or to change the proprietary system of their marriage, will continue to suffer the discriminatory impact of s 22(6) of the BAA. In the applicants' submission, this will result in the violation of the rights to equality, to dignity and socio-economic rights including housing, healthcare and education. Husbands may recklessly dispose of the family assets or disinherit their wives and leave them with nothing.

[6] Divorce Act 70 of 1979.

[17] The applicants contend that the provisions of s 21(1) and s 21(2)*(a)* of the MPA do not reverse the negative impact of s 22(6) of the BAA on black women. Instead, they maintain the default position set by s 22(6) of the BAA, being a marriage out of community of property. They require women to obtain the consent of their husbands in order to change the default position. In this regard, according to the applicants, as the provisions of s 21(1) and s 21(2)*(a)* of the MPA perpetuate the discriminatory effect of s 22(6) of the BAA, they are inconsistent with the Constitution.

Issue

[18] This application has raised an issue for determination, namely whether the provisions of s 21(1) and s 21(2)*(a)* of the MPA are unconstitutional and invalid. Section 9 of the Constitution, which deals with social equality and which is referred to as an equality clause, contains five subsections. The first provides for the principle of equality before the law. The second deals with affirmative action (remedial measures). The third contains a prohibition of unfair discrimination by the state on certain grounds. The fourth extends the prohibition of unfair discrimination on the listed grounds by any person. The fifth provides for a presumption of unfairness in discrimination based on the listed grounds. The section is also a horizontal applicable right to non-discrimination.

[19] 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 type of society the Constitution 'wishes to create is the one based on equality, dignity and freedom'.[7] In terms of s 9(2) 'equality includes the full and equal enjoyment of all rights and freedoms'. In order to achieve that objective, s 9(2) permits 'measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. . . .'

[20] A distinction must be drawn between formal and substantive equality. Formal equality means sameness of treatment. The law must treat individuals in the same manner regardless of their circumstances. Substantive equality takes their circumstances into account and requires the law to ensure equality of outcome. Formal equality does not take actual social and economic disparities between groups and

[7] I Currie and J De Waal *The Bill of Rights Handbook* 5 ed (2006) at 231.

individuals into account. Whereas, substantive equality requires the taking into account, and an examination, of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being held.

[21] Section 9 requires a purposive approach to constitutional interpretation. The Constitutional Court in *President of the Republic of South Africa v Hugo*[8] held:

'We need . . . to develop a concept of unfair discrimination which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goals of equality or not. . . '

[22] In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[9] the Constitutional Court held:

'Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied. . . . One could refer to such equality as remedial or restitutionary equality.'

[23] In *Harksen v Lane NO*[10] the Constitutional Court tabulated the stages of an enquiry into a violation of the equality clause as follows:

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

---

[8] *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) para 41.
[9] *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) para 60-61.
[10] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) para 54.

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

(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If it has been found to have been on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be np violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause. . . .’

[24] Basically, this means that there is a preliminary enquiry as to whether the impugned provision or conduct differentiates between people or categories of people. This is a threshold test: if there is no differentiation then there can be no question of a violation of any part of s 9. If a provision or conduct does differentiate, then a two–stage analysis must be applied. The first stage ((a) above) concerns the right to equal treatment and equality before the law. It tests whether the law or conduct has a rational basis: is there a rational connection between the differentiation in question and a legitimate government purpose that is designed to further or achieve? If the answer to this is no, then the impugned law or conduct violates s 9(1) and it fails at the first stage. If, however, the differentiation is shown to be rational, then the second stage of the enquiry ((b) above) is activated. A differentiation that is rational may nevertheless constitute an unfair discrimination under s 9(3) or (4). In principle, both unfair discrimination and differentiation without a rational basis can then be justified as limitations on the right to equality in terms of s 36. Such unfairness and irrationality should be justified in an open and democratic society based on human dignity, equality and freedom.

[25] The structure of the enquiry as set out above appears to be quite systematic. One first considers whether there has been a violation of the right to equality before the law and then considers whether there is unfair discrimination. If the equal treatment right in s 9(1) has been violated, then there will be no need to consider whether there has been a violation of the non-discrimination right. However, the Constitutional Court has held that it is neither desirable nor feasible to divide the equal treatment and non-discrimination components of s 9 into a watertight component. The equality right is a composite right. In a case in which a court finds that a law or conduct unjustifiably infringes s 9(3) or (4), there is no need to first consider whether the law or conduct is a violation of s 9(1).

[26] Section 9 can be said to identify three ways in which a law or conduct might differentiate between people or categories of people. Firstly, there is what the Constitutional Court terms 'mere differentiation',[11] which while it does treat some people differently to others does not amount to discrimination. Mere differentiation will fall foul of s 9(1) unless it has a legitimate government purpose. Secondly, there is differentiation which amounts to unfair discrimination, prohibited by s 9(3) and (4). Even where there is a rational connection between a differentiation and legitimate government purpose, differentiation will still violate the equality clause if it amounts to unfair discrimination. Thirdly, law or conduct that discriminates but which does not do so unfairly, taking into account the impact of the discrimination on the complainant and others in his or her situation.

[27] The limitation clause in terms of s 36 of the Constitution applies generally to all the rights listed in the Bill of Rights. This requires a two-stage process of analysis. If it is argued that conduct or a provision of the law infringes a right in the Bill of Rights, it will firstly have to be determined whether the right has been infringed. The second stage commences once it has been shown that a right has been infringed. The respondent is required to show that the infringement is a justifiable limitation of rights. This entails showing that the criteria set out in s 36 are satisfied: the rights have been limited by law of general application for reasons that can be considered 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

---

[11] *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) para 25.

[28] If discrimination is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, it cannot be acceptable in an open and democratic society based on human dignity, freedom and equality.[12] The limitations clause specifically requires a limiting law to be related to the achievement of a legitimate purpose. In *Harksen*[13] the Constitutional Court stated that the limitation involves '. . . a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.'

[29] In the present matter this court is called upon to consider and decide the constitutionality and the validity of the provisions of s 21(1) and s 21(2)*(a)* of the MPA to the extent that they maintain the default of marriage out of community of property, established by s 22(6) of the BAA in respect of marriages entered into by black couples before 1988. Black women who were married before 1988 under s 22(6) of the BAA do not enjoy the protection afforded to other women who married before 1988, and women who married after 1988, whose marriages are automatically in community of property. Mr Budlender, counsel for the applicants, has argued that despite the repeal of s 22(6) by the Amendment Act, s 21(1) and s 21(2)*(a)* of the MPA still maintain that a marriage under s 22(6) of the BAA is out of community of property as the default position of the black couples married before 1988. According to Mr Budlender the provisions of s 21(1) and s 21(2)*(a)* of the MPA perpetuate the harm created by to s 22(6) of the BAA, and in his submission, to that extent such provisions are inconsistent with the Constitution and are accordingly invalid.

[30] In *Fraser v Children's Court, Pretoria North*[14] it was stated that 'equality lies at the very heart of the Constitution.' In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others*[15] Davis J remarked that with a breach of a foundational value such as equality, the respondent's onus of justification would be

[12] *S v K* 1997 (9) BCLR 1283 (C) para 30.
[13] *Harksen* fn 10 para 52.
[14] F*raser v Children's Court, Pretoria North, & others* 1997 (2) SA 261 (CC) para 20.
[15] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 1999 (3) SA 173 (C) 186J-187A.

extremely difficult to discharge. In *Lotus River, Ottery, Grassy Park Residents Association & another v South Peninsula Municipality*[16] Davis J said:

'. . . a Court should be extremely cautious before upholding a justification of an act which limits the right to equality, particularly as the latter is one of the three values which form the foundation of the Constitution.'

[31] In the absence of evidence rebutting the presumption that discrimination on racial grounds is unfair, it should be held to be unfair.[17] The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same. However, the government may classify people and treat them differently for a variety of legitimate reasons. For, 'it is impossible to regulate the affairs of the inhabitants of a country without differentiation and without classifications that treat people differently and that impact on people differently.'[18] Not every differentiation can amount to unequal treatment. Differentiation is permissible provided it does not amount to unfair discrimination. Mere differentiation will be valid as long as it does not deny equal protection or benefit of the law, or does not amount to unequal treatment under the law in violation of s 9(1).

[32] The law will violate s 9(1) if the differentiation does not have a legitimate purpose and if there is no rational connection between differentiation and the purpose. In *Prinsloo*[19] the Constitutional Court held:

'In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner . . . ' (footnotes omitted)

[33] Differentiation on a ground based on attributes and characteristics with the potential to impair the fundamental human dignity of persons as human beings or to

---

[16] *Lotus River, Ottery, Grassy Park Residents Association & another v South Peninsula Municipality* 1999 (2) SA 817 (C) 831B-C.
[17] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).
[18] *The Bill of Rights Handbook* fn 7 at 239.
[19] *Prinsloo* fn 11 para 25.

affect them adversely in a comparably serious manner is unfair. In the present case, the basis of discrimination is on listed grounds, i.e. marital status, race, gender and age. However, the equality clause does not prohibit discrimination per se, but rather prohibits unfair discrimination. Unfair discrimination 'principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.'[20]

[34] In *Harksen*[21] the court held that the following factors must be taken into account in determining whether the discrimination has an unfair impact:

34.1 The position of the complainants in the society and whether they have been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those who are relatively well–off.

34.2 The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal.

34.3 The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

[35] According to the court, these factors assessed objectively will assist in giving precision and elaboration to the constitutional test of unfairness. It was also emphasised in *Harksen* that these factors should be assessed cumulatively in determining whether discrimination is unfair. Differentiation on one or more of the listed grounds is presumed to be unfair discrimination. When a listed ground is involved, all that the applicant is required to do is to establish that differentiation is based on one or other of the listed grounds, and there is no need to prove that the discrimination impairs his or her fundamental dignity as human beings. To presume discrimination on a listed ground to be unfair does not automatically mean that the discrimination is unfair. It is open to the respondent to prove that, on the contrary, the discrimination is not unfair. Where the discrimination is on an analogous ground, then it is necessary for the applicant to prove the unfairness of the discrimination by showing that it impairs his or her fundamental

[20] *Prinsloo* fn 11 para 31.
[21] *Harksen* fn 10 para 52.

dignity. An analogous ground is one based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them in a comparably serious manner.

[36] Section 9(5), which presumes discrimination on one or other listed grounds to be unfair discrimination, applies to both direct and indirect discrimination. There is no need for an applicant to show that a law or conduct which has a discriminatory effect was intended to discriminate.[22] Thus, the applicant has to show only that she or he was unfairly discriminated against but not that the unfair discrimination was intentional. However, intention to discriminate is relevant to the enquiry on whether the discrimination has an unfair purpose for the conduct or action, and whether its purpose is manifestly not directed at impairing the complainant's dignity, but is aimed at achieving a worthy and important societal goal.

[37] The Republic of South Africa is founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.[23] Section 7(1) of the Constitution describes the Bill of Rights as an instrument which 'enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. The right to human dignity provided for in s 10 is therefore one of the core constitutional rights. All rights in the Bill of Rights must be interpreted so as to promote the Constitution's ambition of creating 'an open and democratic society based on human dignity, equality and freedom'.[24] Rights can only be limited to the extent justifiable in such a society.[25]

[38] According to O'Regan J in *S v Makwanyane & another*:[26]

'Recognising a right to dignity is an acknowledgment of the intrinsic work of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in . . . [the Bill of Rights].' (footnotes omitted)

---

[22] *Pretoria City Council* fn 17.
[23] Section 1 of the Constitution.
[24] Section 39(1)(a) of the Constitution.
[25] Section 36 of the Constitution.
[26] *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 328.

Human dignity accordingly provides the basis for the right to equality. In as much as every person possesses human dignity in equal measure, everyone must be treated as equally worthy of respect.[27] The constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. The right to dignity is a basis for a number of other rights.

[39] The purpose of the limitation and restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other way in which the purpose can be achieved without restricting rights. A court cannot determine in the abstract whether the limitation of a right is reasonable or 'justifiable in an open and democratic society based on human dignity, equality and freedom'; appropriate evidence must be led to justify a limitation of a right in accordance with the criteria laid down in s 36. This determination often requires evidence such as sociological or statistical data, on the impact that the legislative restriction has on society. In this regard rule 31 of the Constitutional Court's rules makes provision for the introduction of factual material which 'is relevant to the determination of the issues before the Court' provided that the facts 'are common cause or otherwise incontrovertible; or are of an official, scientific, technical or statistical nature capable of easy verification'.[28]

[40] The limitation clause in terms of s 36 of the Constitution applies generally to all the rights listed in the Bill of Rights. This requires a two-stage process of analysis. If it is argued that conduct or a provision of the law infringes a right in the Bill of Rights, it will first have to be determined whether the right has been infringed. The second stage commences once it has been shown that a right has been infringed. The respondent is required to show that the infringement is a justifiable limitation of rights. This entails showing that the criteria set out in s 36 are satisfied: the rights have been limited by law of general application for reasons that can be considered 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

---

[27] *National Coalition for Gay and Lesbian Equality* fn 9 paras 28 & 30.
[28] See for example *Makwanyane.*

[41] A law may legitimately limit a right in the Bill of Rights if it is a law of general application that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. A limitation must be authorised by a law, and the law must be of general application. The law of general application requirement is the expression of a basic principle of liberal political philosophy and of constitutional law known as the rule of law. There are two components to this principle. The first is that the power of the government is derived from the law. The government must have lawful authority for all its actions, otherwise it will not be a lawful government but will be despotism or tyranny.

[42] The law must be general in its application which means the law must apply equally to all and must not be arbitrary.[29] This means that law must be sufficiently clear, accessible and precise that those who affected by it can ascertain the extent of their rights and obligations.[30] The infringement will not be unconstitutional if it takes place for a reason that is recognised as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. . In addition, the law must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose. It must be shown that the law in question serves a constitutionally acceptable purpose, and that there is sufficient proportionality between the harm done by the law and the benefits it is designed to achieve.

[43] The court in *Makwanyane* in dealing with the limitation of a right held as follows:[31]
'The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighting up of competing values, and ultimately an assessment based on proportionality. . . [The requirement of proportionality] calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.' (footnotes omitted)

---

[29] A V Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (1979) Chapter IV.
[30] *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC) para 47.
[31] *Makwanyane* fn 26 para 104.

[44] There must be a causal connection between the law and its purpose: the law must tend to serve the purpose that it is designed to serve. A compelling good reason is that the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy. The burden of showing whether a law or conduct is justified by a special limitation provision is on the party seeking to uphold the law or conduct and not on the applicant.

[45] Section 22(6) of the BAA created the default positon that black couples, who were married under the BAA, were married out of community of property. Section 22(6) provided that:

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

[46] The provisions of s 22(6) only precluded black couples from having their marriage in community of property, unless they had a month prior the celebration declared to a magistrate, commissioner or marriage officer that they intended their marriage to be in community of property and of profit and loss. That could only occur if the marriage was not contracted during the subsistence of a customary union between the husband and any other woman other than the wife. Otherwise, the black couples were effectively excluded from the marital regime enjoyed by all other citizens in the country. Black couples therefore did not enjoy the legal protection and benefit which a marriage in community of property afforded. Black women in particular were afforded less protection and benefits than white women and women of other races.

[47] The Amendment Act deleted s 22(6) of the BAA and substituted s 21(2)*(a)* of the MPA and added s 25(3) into the MPA thereby giving persons married out of community of property under s 22(6) of the BAA the opportunity to change their matrimonial property regime within two years from 2 December 1988. Couples were required to do so by executing and registering a notarial contract to that effect. Section 21(2)*(a)* of the MPA provides:

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

(i) . . . .

(ii) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1937), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

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

[48] Section 25(3)*(b)* of the MPA permitted couples married out of community of property under s 22(6) of the BAA to cause the provisions of Chapter 2 of the MPA to apply to their marriage. Chapter 2 of the MPA deals with the marital power which a husband has in terms of the common law. Section 25(3)*(b)* of the MPA provides:

'(3) Notwithstanding anything to the contrary in any law or the common law contained, the spouses to a marriage entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, and in respect of which the matrimonial property system was governed by section 22 of the Black Administration Act, 1927 (Act No. 38 of 1927), may –

. . .

(b) if they are married out of community of property and the wife is subject to the marital power of the husband, cause the provisions of Chapter II of this Act to apply to their marriage,

by the execution and registration in a registry within two years after the said commencement or such longer period, but not less than six months, determined by the Minister by notice in a

Gazette, of a notarial contract to the effect, and in such a case those provisions apply from the date on which the contract was so registered.'

[49] Section 11 of the MPA (prior to its amendment in 1993), which is part of Chapter 2, provided that:

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

Section 25(3)*(b)* allowed couples married under s 22(6) of the BAA to cause this provision to apply to their marriages. Section 11 of the MPA was amended in 1993 to abolish the marital power for all marriages including these concluded before 1988.

[50] The Divorce Act was also amended to address part of the legacy of the BAA. Section 7(3) to (5) provides that a divorce court may order the equitable distribution of assets between spouses married out of community of property under s 22 (6) of the BAA. The court may only make such order if it is satisfied that this is equitable to do so. Section 7(3)*(b)* and (4) provides:

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

. . . .

(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.

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

[51] Section 21(1) of the MPA permits couples to apply to court, at any time, to alter the matrimonial property regime applicable to their marriage. To achieve this, both spouses must consent to the change and certain procedural requirements must be satisfied. Section 21(1) provides:

'(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the martial power, which applies to their marriage, and the court may, if satisfied that–

(a) there are sound reasons for the proposed change;

(b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change,

order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as they court may think fit.'

[52] Mr Budlender has argued on behalf of the applicants that the provisions of s 21(2) *(a)* of MPA do not remedy or reverse the negative impact of s 22(6) on black women. Instead, both s 21(2)*(a)* and s 21(1) maintain the default position set by s 22(6) of the BAA as being a marriage out of community of property. Section 21(1) of the MPA for instance, requires women to obtain consent from their husbands in order to change the default position of out of community of property. It is against this backdrop the applicants contend that, in the circumstances, the provisions of s 21(2) *(a)* and 21(1) perpetuate the discriminatory effect of s 22(6) of the BAA in violation of the Constitution. The provisions of s 21(2)*(a)* differentiate between black spouses who entered into marriage before 1988 and black spouses who entered into marriage after 1988. With the exception of those who married before 1988, all spouses in South Africa are married in community of property and they therefore enjoy the legal protection and benefits that come with such marital regime.

[53] The discrimination against black persons married before 1988 constitutes an inequality which inhibits the enjoyment and exercise of the constitutional rights of a large number of black women in South Africa. It is common cause that s 22(6) denied thousands of black women protection which is afforded by a marriage in community of property, and that thereby it exacerbated their vulnerability and rendered them entirely

dependent on the goodwill of their husbands, who generally control the bulk of the family's wealth and assets.

[54] It is a general accepted fact that in a case of a woman married in community of property that the assets acquired with her husband's income fall into the joint estate and she becomes the co-owner of the assets. Whereas, if spouses are married out of community of property, the assets amass in the husband's separate estate. The wife has no right of ownership in respect of those assets and the husband is able to use and dispose of them without the consent of his wife. This may impact negatively upon the rights, interests and security of the wife concerned in various ways: The husband may recklessly dispose of the family assets or disinherit her and leave her with nothing. She may be forced out of her own house. She may be left with nothing to live on in her old age or to ensure that her basic needs are met, including health care, food and security. The husband may recklessly fritter away the family's wealth to the prejudice of the wife and children.

[55] Mr Budlender has argued that the measures taken to remedy the discriminatory legacy of s 22(6) of the BAA are inadequate in that they do not assist women who cannot divorce their husbands, and who are unable to obtain their husband's consent for the alteration of their matrimonial property regime. Ms Khowa, on behalf of the first respondent, has argued that upon divorce a female spouse may avail herself of the protection provided by the Divorce Act under s 7(3)*(b)*, to have the matrimonial assets distributed between the parties. Black spouses who entered into marriage before 1988 can only avail themselves of the protection provided by s 7(3) to (5) of the Divorce Act if they get divorced, and the courts deem it just and equitable to order the distribution of assets between spouses. Section 7(3) of the Divorce Act does not assist a woman who cannot divorce for religious, social or financial reasons. For these women, the remedy provided by s 7(3) and (4) of the Divorce Act is of no assistance. More so, the issue of the order under s 7(3) depends entirely upon the discretion of the court granting a decree of divorce. The court may only grant the order if it deems it just and equitable to order the distribution of matrimonial assets between the parties. It is by no means guaranteed by the operation of law. I agree with Mr Budlender that a woman who is unable to divorce her husband or to change the property system of their marriage, will

continue to suffer the discriminatory impact of s 22(6). I also agree with Mr Budlender that the Constitution does not contemplate a situation where a black female spouse has to divorce her husband or rely on the exercise of a discretion by court before achieving her right to equality.

[56] Mr Budlender has gone on to argue that many women have been unable to obtain the consent required by s 21(1) to alter their matrimonial property regime to be in community of property. Further, that even if women were able to obtain the consent of their husbands to alter their matrimonial property regime, the protection afforded under s 21(1) and s 21(2)*(a)* would only be available if a woman has knowledge of her rights, and access to legal assistance, to approach the court and/or arrange the execution and registration of a notarial contract. Further, that in order to promote equality and to protect vulnerable women's rights to dignity and housing, this default position should be reversed. The default position should be that all of these couples are deemed to have been married in community of property. They have the choice to opt out and change their matrimonial regime to out of community of property.

[57] In the past blacks 'were refused respect and dignity. . . The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution'.[32] The fundamental purpose of our 'constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular group'.[33] In *Egan v Canada*[34] the Supreme Court of Canada said the following about equality:

'Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.'

[58] The provisions of s 21(2)*(a)* of the MPA have the effect of demeaning black spouses married before 1988 in their inherent humanity and dignity, and divesting them

[32] *Makwanyane* fn 26 para 329.
[33] *Hugo* fn 8 para 41.
[34] *Egan v Canada* [1995] 29 CRR (2d) 79 at 105.

of the protection and the benefit of the law which all the couples of this country enjoy. The differentiations contained in these provisions constitute an impairment to black couples married before 1988 of a comparably serious nature.[35] They therefore, have their interests overlooked and their rights to equal concern and respect violated. Accordingly, it can be concluded that the provisions of s 21(2)*(a)* of the MPA do perpetuate the discrimination created by s 22(6) of the BAA against black spouses married before 1988.

[59] The determining factor in deciding whether discrimination is unfair is its impact on the people affected. For people to be denied a marital regime to which all the citizens of the country are entitled to, without regard to the prevailing prejudice against them, is a violation of dignity. Though the basis of differentiation may, on the face of it, be innocent, the impact or effect of the differentiation is discriminatory. Any law which has an unfairly discriminatory effect or consequences or which is unfairly administered may amount to prohibited discrimination, even if the law appears on its face to be neutral and non-discriminatory.[36]

[60] The discrimination created by s 21(2)*(a)* of the MPA perpetuates systemic disadvantage, undermines human dignity, and adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a prohibited ground. Unfair discrimination is differentiation that has an unfair impact on its victim. Spouses married under s 22(6) of the BAA are black and they had been disadvantaged by the racial policies and practices of the past. No legitimate reason for such a differentiation has been advanced.

[61] They are affected in a manner which is comparably serious to spouses married after 1988. Nor is it a measure aimed at achieving substantive or restitutionary equality, and is in conflict with the right to equality. No members of a racial group should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than others who belong to other racial groups. Differentiation on the basis of one of the grounds listed in s 9(3)

---

[35] *Harksen* fn 10 para 52.
[36] *Pretoria City Council* fn 17 para 31.

is presumed to be unfair discrimination until the contrary is proved. The 'grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity'.[37]

[62] The law grants protection and benefit to black spouses married after 1988, which is not granted to black spouses who married before 1988. Persons who are adversely impacted by such provisions are female spouses of marriages entered into before 1988. Section 21(2)*(a)* of the MPA, therefore, also constitutes an indirect unfair discrimination against women on sexual ground. 'Sex' is a biological term whereas 'gender' is a social term. In other words, sex refers to the biological and physical differences between men and women.[38] Sexual discrimination therefore occurs where pregnant women are discriminated against or where women are indirectly discriminated against the basis of, for example, height or weight requirements. On the other hand, gender refers to ascribed social and actual male and female roles.

[63] The law must be general in its application in that it must apply equally to all and not be arbitrary. In other words, the law must apply impersonally and not to a particular people or groups. In essence, the law must apply uniformly in the whole of South Africa. Section 21(2)*(a)* of the MPA has an unequal application and its application is arbitrary. Section 21(2)*(a)* does not only apply to all citizens of the county but its application is limited to a certain category of the population, i.e. black couples married under the BAA before 1988. No proof has been tendered to show that the differentiation which the provisions of the section makes between black people married before 1988, and after 1988, as well as the rest of the spouses in the whole country, is intended to serve any constitutionally accepted purpose. Neither of the respondents have proved that the differentiation bears a rational connection to any legitimate government purpose. The differentiation amounts to an unfair discrimination because it is on the specified grounds of marital status, race, and gender. It also discriminates on the grounds of age against elderly black women married before 1988, as it differentiates between the proprietary consequences applicable to women who were married under the BAA prior to 1988 and who are married after 1988. 'Arbitrariness, by its very nature, is dissonant with these

[37] *Harksen* fn 10 para 50.
[38] S Woolman and M Bishop *Constitutional Law of South Africa* (2 ed) (Revision Service 6, April 2014) Ch 35 at 56.

core concepts of our new constitutional order.'[39] The compelling good reason is that the infringement must serve a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy. In *Gumede v President of Republic of South Africa & others*[40] the provisions of s 7(1) of the Recognition of Customary Marriages Act[41] ('the Recognition Act') which only applied to monogamous customary marriages were held to be invalid for that reason. The application of such provisions had the effect of perpetuating the inequality between husbands and wives in pre-Act marriages. In *Ramuhovhi & others vs President of the Republic of South Africa & others*[42] s 7(1) of the Recognition Act, which provided that the proprietary consequences of customary marriages entered into before the commencement of the Recognition Act, continued to be governed by customary law. Customary law retains the marital power of the husband. This had the effect of perpetuating the inequality between husbands and wives in the case of pre-Act polygamous customary marriages.

[64] With regard to s 21(1) of the MPA, Mr Budlender has argued that s 21(2)*(a)* still maintains a marriage out of community of property as the default position of black persons who married before 1988. The effect of this is that a wife whose marriage is out of community of property as the default position of the BAA, remains subject to that regime unless her husband consents to the regime being changed to in community of property. The applicants contend that given the imbalance of power that generally exists between husband and wife, the consent is very frequently difficult to obtain.

[65] Upon proper construction, the provisions of s 21(1) of the MPA are a law of general application, equally applicable to all spouses in South Africa irrespective of the matrimonial property regimes of their respective marriages. The application of these provisions is not only limited to marriage out of community of property but it applies even where the matrimonial property regime is in community of property. The section merely sets out procedural requirements which all spouses in South Africa must satisfy if they desire to have their matrimonial property regimes altered. Being so, it could not be said that it discriminates against black spouses who entered into marriage pre-1988,

---

[39] *Makwanyane* fn 26 para 156.
[40] *Gumede v President of Republic of South Africa & others* 2009 (3) SA 152 (CC).
[41] Recognition of Customary Marriages Act 120 of 1998.
[42] *Ramuhovhi & others v President of the Republic of South Africa & others* 2018 (2) SA 1 (CC).

and that it thereby perpetuates the discrimination created by s 22(6) of the BAA. Nor does s 21(1) of the MPA afford protection or grant a benefit to black spouses married after 1988 or to spouses of any other race in South Africa to the exclusion of black spouses who married before 1988. The section does not really need the consent of the husband alone when the spouses wish to change their marital regime but consent by both spouses. The requirement is the same even if only the husband intends to change the marital regime. In my view, the applicants have not made a case for the declaration of s 21(1) of the MPA to be inconsistent with the Constitution and therefore, invalid. If the law and conduct unjustifiably violate the Bill of Rights, constitutional remedy should be given to the applicant.

Remedy

[66] There are only three major types of constitutional remedies, namely: The declarations of invalidity, prohibitory and mandatory interdicts, and awards of constitutional damages. With regard to the powers of courts in constitutional matters section 172(1) of the Constitution provides:

'(1) When deciding a constitutional matter within its powers, a court may–

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and

(b) may make any 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.'

[67] On the appropriate relief, the Constitutional Court in *Fose v Minister of Safety and Security*[43] held:

'[19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.' (footnotes omitted)

[43] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19.

[68] Once the court finds a particular law or conduct to be inconsistent with the Constitution, it is obliged to declare the law unconstitutional and the conduct invalid.[44] Section 172 recognises, that when it comes to the invalidation of law and state conduct, a court cannot simply consider what is appropriate relief for the parties before it, it must also consider the effect of its order on society at large.

[69] The violation of the Constitution impedes the realisation of the constitutional project of creating a just and democratic society. Therefore, the object in awarding a remedy should be, at least, to vindicate the Constitution and deter future infringements. Vindication is necessary because harm to constitutional rights, if not addressed, will diminish the public's faith in the Constitution. The judiciary bears the burden of vindicating rights.

[70] Section 172(1)*(a)* of the Constitution provides that a law or conduct must be declared invalid to the extent of its inconsistency with the Constitution. The impact of a declaration of invalidity may be regulated by severing the unconstitutional provisions in a statue from the constitutional ones, by controlling the retrospective effects of a declaration of invalidity and by temporarily suspending a declaration of invalidity.

[71] The right to equality does more than simply prohibit discrimination or unequal treatment by the state or by private individuals. It also imposes a positive obligation on the government to act so as to ensure that everyone fully and equally enjoys all rights and freedoms. Section 21(2)*(a)* of the MPA must therefore be amended or repealed so to prevent the continued unfair discrimination against black couples who entered into marriages before 1988, and to promote the achievement of substantive equality.

Order and its retrospectivity

[72] The discrimination the impugned provisions perpetuate is so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order or by suspending the order of invalidity to allow Parliament to rectify the error. The effect of the order is that all civil marriages are in community of property. The recognition of the equal worth and dignity of all black couples of a civil

[44] Section 172 of the Constitution; *Fose* para 94.

marriage is well overdue and no case has been made out as to why it should be delayed any further. Nor has the government furnished any justification for such legislative discrimination on listed grounds. However, the order should not affect marriages which have been terminated by death or divorce before the making of this order, but a saving provision or generic order should be made in favour of a party claiming specific prejudice arising from the retrospective change of the matrimonial regime, to approach a competent court for an appropriate relief.

Costs

[73] Only the first respondent has opposed the application, and the second respondent has elected to abide by the decision of this court. Although the second respondent has not opposed the application, as a member of the executive responsible for the administration of the legislation in question, it has the duty to pick up pitfalls in legislation which need attention in the form of amendment or repeal.

[74] The second respondent has since 1994 had an opportunity to check the legislation for the pitfalls and to attend to them by amending or repealing the legislation in question. However, to date he has not availed himself of such opportunity. This court has afforded the second respondent an opportunity to be heard on the purpose pursued by the impugned provisions of the legislation in question, its legitimacy, the factual context, the impact of its application and the justification, if any, for limiting the right of black couples married under the BAA before 1988 of equal protection under the law and benefit of the law enjoyed by all other couples in the country. Had the second respondent, as an organ of the state, availed itself of such an opportunity and provided the necessary information, the first respondent might have found it unnecessary to oppose this application. He would not have used the impugned provisions as the legal basis to stand on, in opposing this application. The provisions of s 21(2) *(a)* of the MPA need urgent attention so for them to be in line with the Constitution. In the circumstances Mr Budlender has, in my view, rightly asked for a costs order against the second respondent only.

Order

[75] The following order is granted:

1. The provisions of s 21(2) *(a)* of the Matrimonial Property Act 88 of 1984 ('the MPA') be and are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination, created by s 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), in that the marriages of black couples, entered into under the BAA before 1988, are automatically out of community of property.

2. All marriages of black persons concluded out of community of property under s 22(6) of the BAA before 1988 be and are hereby declared to be marriages in community of property.

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

4. In terms of s 172(1) *(b)* of the Constitution, the orders in paragraphs 1 and 2 shall not affect the legal consequences of any act done or omission or fact existing in relation to a marriage before this order was made.

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

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

7. The order is, in terms of section 172(2)*(a)* of the Constitution, referred to the Constitutional Court for confirmation.

8. The second respondent is ordered to pay the costs of this application and such costs to include the costs of two counsel.

_____

MADONDO DJP

Date of hearing:	17 October 2019
Date delivered:	24 January 2020
Counsel for the applicant:	Adv Budlender SC
Instructed by:	Legal Resources Centre Ref: S Samuel 031-3017572
Counsel for the respondent:	Adv Khowa
Instructed by:	BT Dlamini Attorneys Ref: BTD/UDM 65 031-8262008