



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/20

In the matter between:

AGNES SITHOLE

First Applicant

COMMISSION FOR GENDER EQUALITY

Second Applicant

and

GIDEON SITHOLE

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

Neutral citation: *Sithole and Another v Sithole and Another* [2021] ZACC W

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J,
Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ

Judgments: Tshiqi J (unanimous)

Heard on: 17 September 2020

Decided on: 14 April 2021

Summary: Matrimonial Property Act 88 of 1984 — constitutionality of
section 21(2)(a) — section is unconstitutional.

ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, KwaZulu-Natal Local Division, Durban:

1. The provisions of section 21(2)(a) of the Matrimonial Property Act 88 of 1984 ('the MPA') are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), and thereby maintain the default position of marriages of black couples, entered into under the Black Administration Act before the 1988 amendment, that such marriages are automatically out of community of property.
2. All marriages of black persons that are out of community of property and were concluded under section 22(6) of the Black Administration Act before the 1988 amendment are, save for those couples who opt for a marriage out of community of property, hereby declared to be marriages in community of property.
3. Spouses who have opted for marriage out of community of property shall, in writing, notify the Director-General of the Department of Home Affairs accordingly.
4. In the event of disagreement, either spouse in a marriage which becomes a marriage in community of property in terms of the declaration in paragraph 2, may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding that declaration.
5. In terms of section 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 in relation to a marriage before this order was made.
6. 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 of property, unless the affected couple has opted out in accordance with the procedure set out in paragraph 3 above.

7. Any person with a material interest who is adversely affected by this order, may approach the High Court for appropriate relief.
8. The second respondent is ordered to pay the costs of this application and such costs to include the costs of two counsel, where so employed.
9. It is ordered that the first respondent's attorney, Mr Dlamini, should forfeit his legal fees in respect of this application.

JUDGMENT

TSHIQI J (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ concurring):

Introduction

[1] This application for confirmation of an order of invalidity by the High Court¹ concerns a constitutional challenge aimed at the provisions of section 21(2)(a) of the Matrimonial Property Act² (MPA). The section is attacked on the basis that it is inconsistent with the Constitution and should be declared invalid to the extent that it maintains the default position of marriages of Black people entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act³ (Amendment Act). Historically marriages of Black people had a separate dispensation from other marriages. They were governed by the Black Administration Act⁴ (BAA). In terms of section 22(6) of the BAA these marriages were automatically out of community of property, except where certain conditions were met. Section 22(6) was repealed by the Amendment Act. The Amendment Act deleted section 22(6) and

¹ Section 167(5) of the Constitution.

² 88 of 1984.

³ 3 of 1988.

⁴ 38 of 1927.

inserted sections 21(2)(a) and 25(3) into the MPA, thereby giving persons married out of community of property in terms of section 22(6) of the BAA the opportunity to change their matrimonial property regime within two years from 2 December 1988. Those parties who did not know that they could change their matrimonial property regime and those who were simply not aware that their marriages were automatically out of community of property, or did not appreciate the legal consequences of this, are still married out of community of property.

[2] The first applicant, Mrs Sithole, is one of those who did not know that their marriages are out of community of property. Her version will become more apparent below when I traverse the facts. She challenged section 21(1) and 21(2)(a)⁵ of the MPA on the basis that it unfairly discriminates against women in her position on the grounds of gender and race. The challenge compels us to focus sharply on the effects of the alleged unfair discrimination on the capacity of Black couples, especially women in her position, to own property. It also requires us to examine the intersectional effects of the unfair discrimination on the constitutional rights of women to dignity, healthcare, food, water and social security. It further obliges us to deal with the uncomfortable reality that even after twenty-five (25) years into our constitutional democracy, Black people are still subjected to the remnants of the oppressive and discriminatory laws of the apartheid regime, notwithstanding the Constitution, which envisages that everyone be equally protected by the law. Our Constitution enjoins us to adopt restitutionary measures that remedy the cruel effects of these past discriminatory laws and deliver substantive equality. As Aristotle aptly observes:

“Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.”⁶

[3] The High Court agreed that section 21(2)(a) of the MPA does not pass constitutional muster, in that it discriminates unfairly on the grounds of gender and race.

⁵ Section 21(1) and (2)(a) are quoted below.

⁶ Jyakhwo “Right to Equality” (2019) 28 *Nepal Law Review* 477 at 477.

The High Court thus declared that all marriages concluded out of community of property under section 22(6) of the BAA are deemed to be marriages in community of property from the date of its order. It permitted couples who wish to opt out of this position and who wish to alter the matrimonial property system applicable to their marriage as a result of the declaratory order to do so by executing and registering a notarial contract to this effect. The High Court further ordered that existing burdens on the property falling into the joint estate as a result of its order will remain in place; and that from the date of its order, Chapter 3⁷ of the MPA will apply in respect of all marriages that have been converted to marriages in community of property, unless and until the affected couple has opted out of such a matrimonial property regime. The High Court, however, did not agree that section 21(1) of the MPA is discriminatory.

Parties

[4] The first applicant is Mrs Agnes Sithole, a seventy-two (72) year old housewife residing in KwaZulu-Natal. She brings this application in her own personal interest, as well as in the interests of many other Black women whose marriages were subject to section 22(6) of the BAA. Those women remain married out of community of property because they did not know that they could opt out of their matrimonial regime or knew they could, but did not, due to several socio-economic factors. Ms Deborah Jean Budlender, an expert who is a social policy researcher and who filed an affidavit in support of the application in the High Court, acknowledges that it is not possible to estimate the exact number of women in the first applicant's position because the data that is available is incomplete. Drawing on evidence, which is set out in her affidavit, she concludes that there could be more than 400 000 women in the same position as Mrs Sithole.

[5] The second applicant is the Commission for Gender Equality established in terms of section 187 of the Constitution to promote respect for and the protection, development and attainment of gender equality. It brings the application in furtherance

⁷ Chapter 3 of the MPA deals with the provisions relating to marriages in community of property.

of its constitutional mandate. Through this application, the applicants seek to address the legacy of section 22(6) of the BAA in terms of which Black couples who concluded civil marriages were married out of community of property by default. The first respondent is Mr Gideon Sithole, a then seventy-four (74) year old male electrical contractor. Mr Sithole sadly passed away on 23 January 2021, after the application was argued. 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.

Background facts

[6] Mr and Mrs Sithole got married to each other on 16 December 1972, out of community of property under section 22(6) of the BAA. At the time Mrs Sithole launched the application, they had been married for a period of 47 years and the marriage still subsisted. It was out of community of property due to the fact that the provisions of section 21(2)(a) of the MPA did not automatically alter their matrimonial regime.

[7] Between 1972 and 1985 Mrs Sithole was a housewife and raising her family. She ran 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 for family and household expenses. In 2000, she and her husband purchased a house which was registered in Mr Sithole's name. After a while the relationship between the parties deteriorated. Mr Sithole then threatened to sell the house.

[8] Mrs Sithole sought and obtained an order interdicting and restraining Mr Sithole from selling the house or in any manner alienating it pending the finalisation of the present application. She is a devout member of the Roman Catholic Church, and divorce in her church is discouraged and frowned upon. She still entertained hope of reconciling with her husband. She was therefore, not willing to divorce her husband in order to secure an equitable distribution of the parties' assets by utilising the remedy

which section 7(3) to (5) of the Divorce Act⁸ provides for, in the event parties who are married out of community of property, get divorced.

[9] Mr Sithole admitted that the relationship between them had deteriorated. He also admitted that he intended to sell the house but denied that he threatened to do so. Regarding the matrimonial regime, Mr Sithole submitted that he and Mrs Sithole agreed to a marriage out of community of property while fully cognisant of its consequences and that there was never any interest by either of them to conclude a marriage in community of property. In support of this averment, he attached an affidavit from a priest, Father Mdabe of the Catholic Church, stationed at Marianhill Monastery Church, who was only ordained in 1989, 17 years after their marriage was solemnised. It sets out the procedure generally followed before marriages are concluded in that church.

[10] Apart from the fact that the affidavit does not deal with the procedure that was followed 17 years previously when Mr and Mrs Sithole got married, the contents of the affidavit are irrelevant to whether the provisions of section 21(2)(a) of the MPA are consistent with the Constitution. Whether they deliberately elected to marry out of community of property is also not before this Court.

Issues

[11] The core issue for determination is whether the order of constitutional invalidity made by the High Court should be confirmed.⁹ The outcome of that inquiry is predicated on whether the impugned provisions discriminate unfairly against Black couples whose marriages were concluded in terms of the BAA, including the applicant and other women similarly placed. If they do, the next question would be whether there is a justification that saves the challenged provisions from constitutional inconsistency. Lastly, if unfair discrimination is found and it cannot be justified, this Court must

⁸ 70 of 1979.

⁹ Section 167(5) of the Constitution.

confirm the order of constitutional invalidity and make an order that is just and equitable.¹⁰

Statutory scheme of Marriages concerning Black persons

[12] Section 22(6) of the BAA provided:

“A marriage between Natives, 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, native 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 such community.”

[13] Section 22(6) of the BAA created the default position that Black couples were married out of community of property. They were permitted to marry in community of property if, in the month prior to their marriage, they jointly 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 woman other than his wife. As the text indicates, section 22(6) of the BAA only governed marriages of Black people and not marriages of other races.

[14] Section 22(6) of the BAA was repealed by the Amendment Act. The Amendment Act deleted section 22(6) of the BAA and inserted sections 21(2)(a) and 25(3) into the MPA. The effect of the repeal for Black couples was that those who were married out of community of property under section 22(6) of the BAA had the

¹⁰ Id.

opportunity to change their matrimonial regimes 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 permitted couples to make the out of community accrual system provided for in Chapter I of the MPA applicable to their marriages. It provides:

“(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 –

...

(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 1927), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

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

[15] Section 25(3)(b) of the MPA permitted couples married out of community of property under section 22(6) of the BAA, where the wife was subject to the marital power of their husbands, to convert their marriage to a marriage in community of property. Section 25(3)(b) of the MPA provided:

“(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.”

[16] The marital power was fully abolished by section 11 of the MPA as amended by section 29 of the General Law Fourth Amendment Act,¹¹ including in respect of marriages entered into before the commencement of the MPA. Prior to the amendment, section 11 of the MPA partially abolished the marital power. It 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 into after the commencement of this Act.

[17] Section 21(1) of the MPA permits couples to apply to a court at any time, to alter the matrimonial property regime applicable to their marriages. To achieve this both spouses must consent and certain procedural requirements must be complied with. Section 21(1) provided:

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

¹¹ 132 of 1993.

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

[18] The Divorce Act was also amended by section 36(b) of the MPA and then by section 2 of the Amendment Act to address part of the legacy of the BAA. Section 7(3) to (5) of the Divorce Act now provides that a divorce court may order the equitable distribution of assets between spouses married out of community of property under section 22(6) of the BAA as the court may deem just. The applicants contend that although these amendments have ameliorated the discriminatory legacy of section 22(6), they do not remedy or reverse the negative impact of section 22(6) on Black spouses. The default position of these marriages continues to be out of community of property, unless the couples have taken steps to alter their matrimonial regime. For the reasons that will be explored later during the analysis, this submission has merit. Before embarking on the analysis, it is helpful to contextualise this submission and briefly set out a conspectus of the relevant equality and discrimination jurisprudence.

Equality and discrimination

[19] The idea of differentiation lies at the heart of equality jurisprudence in general.¹² Equality jurisprudence deals with differentiation in two ways: differentiation which does not involve unfair discrimination and another which does.¹³ 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, “[i]t is impossible to [regulate the affairs of inhabitants] without differentiation and without classifications which treat people differently and which impact on people differently”.¹⁴

¹² *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 23.

¹³ *Id.*

¹⁴ *Id.* at para 24.

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 section 9(1) of the Constitution.

[20] In *Harksen v Lane N.O.*,¹⁵ this Court said that where the equality clause is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the following stages of the enquiry into a violation of section 8 are helpful:¹⁶

- “(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 section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
 - (i) Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. ...
 - (ii) If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. ...

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 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 limitations clause (section 33 of the interim Constitution [now section 36 of the Constitution]).”¹⁷

[21] The first question in the *Harksen* enquiry must be answered in the affirmative. The provisions perpetuate the existence of a special matrimonial regime for Black

¹⁵ *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

¹⁶ In *Harksen* this Court was dealing with section 8, the equality clause under the interim Constitution, which has been replaced by section 9 of the Constitution.

¹⁷ *Harksen* above n 15 at para 54; *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 42.

couples who concluded their marriages before 1988. In this regard marriages of Black people were different from those of other races. No evidence was tendered in support of a government purpose for which the differential treatment of marriages between Blacks existed. I cannot conceive of any such purpose either. Therefore, the question of a rational connection between the differentiation and a legitimate government purpose does not arise.

[22] I now consider whether the impugned provisions amount to unfair discrimination. The discrimination complained about is on the listed grounds of race, gender and age in section 9(3) of the Constitution. In terms of this section, the state may not unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in the section.¹⁸ In terms of section 9(5) of the Constitution, discrimination on one or more of the grounds listed in section 9(3) is presumed to be unfair unless proven otherwise. It was thus open to the respondents to prove that the discrimination is fair and none of them have contended that it is. This is not surprising, as there is no basis upon which such a submission could have been made.

[23] The discriminatory effect of the provisions can be traced back to the provisions of the BAA. The differentiation under the BAA was on a racial basis in that it created a special dispensation for Black couples. Section 22(6) of the BAA had the effect that unless Black couples expressed a desire to enter into a marriage in community of property their marriage was automatically out of community of property. This was different to what pertained in respect of other racial groups whose marriages were automatically in community of property.

[24] Section 21(2)(a) of the MPA did not have the effect of automatically converting the default position of marriages of Black people so that they were automatically in

¹⁸ Section 9(3) of the Constitution provides:

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

community of property like those of other races. Instead, it required all spouses in marriages out of community of property, entered into before the commencement of the MPA either (i) in terms of an antenuptial contract; or (ii) in terms of section 22(6) of the BAA, to cause the provisions of Chapter I of the MPA (the accrual system) to apply for the conversion of their marriages, within two years after the commencement of the MPA. Thus, although the amendment brought by section 21(2)(a) formally rectified the discriminatory provisions of the BAA, it failed to address the lasting discriminatory effects of these provisions. Instead, it imposed a duty on Black couples who wanted their matrimonial regimes to be similar to those of the other racial groups, to embark on certain laborious, complicated steps to enjoy equality with other races.

[25] The kind of equality envisaged by section 9 of the Constitution was aptly articulated by this Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* in these terms:¹⁹

“Section 9 of the 1996 Constitution, like its predecessor, clearly contemplates both substantive and remedial equality. Substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes ‘the full and equal enjoyment of all rights and freedoms’. The State is further obliged ‘to promote the achievement of such equality’ by ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’, which envisages remedial equality.”²⁰

[26] Thus, although section 21(2)(a) may superficially seem to have afforded the same treatment to couples of all the different races, it effectively guaranteed formal equality but not substantive equality (equality of outcomes and opportunity), which is the kind of equality promised by our Constitution.²¹ Furthermore, section 9(3) prohibits both direct and indirect discrimination. A provision is indirectly discriminatory against

¹⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] ZACC 17; 1998 (2) SACR 556 (CC); 1998 (12) BCLR 1517 (CC).

²⁰ *Id* at para 62.

²¹ *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 73.

a group where it has a disproportionate impact on that group.²² Therefore, when examining the constitutionality of section 21(2)(a), the emphasis should not be on the fact that it provided an option for Black couples to convert their marriages, but rather on its failure to level the playing field and place marriages of Black people under the same umbrella as marriages of couples of other racial groups.

[27] The challenged provisions also have indirect unfair discriminatory consequences for women. The evidence led at the High Court showed that Black women are hard hit by the impugned provisions disproportionately to their husbands and the challenged provisions have far reaching intersectional effects on Black women's rights compared to their male counterparts. It is thus necessary, before I venture into whether the provisions can be justified under the limitations clause, which is the third stage of the *Harksen* enquiry, to elaborate on the intersectional consequences of the impugned provisions on women's constitutional rights, especially the rights to dignity (section 10), property (section 25), housing (section 26), and health care, food, water and social security (section 27). It is to this that I now turn my focus.

[28] Intersectionality is a recognised concept in our law of equality. In *National Coalition for Gay and Lesbian Equality*,²³ Sachs J's concurring judgment acknowledged the concept and held:

“One consequence of an approach based on context and impact would be the acknowledgement that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. ... Alternatively, a context rather than category-based approach might suggest that overlapping

²² *Id.*

²³ *National Coalition for Gay and Lesbian Equality* above n 19 at para 78 the judgment penned by Ackermann J and concurred in by all other members of this Court, agreed with this concurrence.

vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as [Black people], as Africans, as women, as African women, as widows and usually, as older people.”²⁴

[29] In *Van Heerden*²⁵ this Court said:

“This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but ‘situation sensitive’ approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.”²⁶

[30] Recently in *Mahlangu*,²⁷ this Court, dealing with the Compensation for Occupational Injuries and Diseases Act²⁸ and the exclusion of domestic workers from its protection, said the following about multiple forms of discrimination:

“Crenshaw who coined the concept of the ‘intersectional’ nature of discrimination, writing as a Black feminist on women studies, recognised and demonstrated how overlapping categories of identity (such as gender and race) impact individuals and institutions. Intersectionality aims to evaluate how intersecting and overlapping forms of oppression result in certain groups being subject to distinct and compounded forms

²⁴ Id at para 113.

²⁵ *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*).

²⁶ Id at para 27.

²⁷ *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC).

²⁸ 130 of 1993.

of discrimination, vulnerability and subordination.²⁹ As such, at times Black women may experience compounded forms of discrimination as compared to say Black men or White women. Yet still in other cases they may experience forms of discrimination and vulnerability that are qualitatively different from both these groups.”³⁰

[31] Societal dynamics such as patriarchy, gender stereotyping, inflexible application of oppressive cultural practices etc, perpetuate the intersectional consequences of the challenged provisions on Black women. Patriarchy has resulted in different forms of discrimination against women with dire consequences. It is therefore one of the main drivers of the oppression of women through gender stereotyping and the abuse of cultural practices. These dire consequences have rendered women vulnerable and this vulnerability is an aspect of social reality. In unpacking patriarchy Coetzee³¹ traces its origin and evolution as follows:

“The ‘ideology of patriarchy’ ... seems to have developed as a result of the elevation of ‘the idea of the leadership of the fathers’, to a position of paramount importance in society. ... However, as a result of the elevation of this ideal to acquire hyper-normative status, women were regarded as inferior to men. An uneven power-relationship developed through which the male sex obtained supremacy over women, resulting in their subordination to men throughout society.”³²

She then observes how it has been used to oppress women for generations and says:

“In the first instance, women have been oppressed for generations and have been kept from liberating themselves by structures of domination, designed to maintain the ideology. In the struggle to maintain the supremacy of the fathers, women were kept in their position of subservience through measures such as less educational

²⁹ Crenshaw “Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Policies” (1989) *University of Chicago Legal Forum* 139 at 149. Crenshaw is a pioneer and leading scholar on intersectionality. Intersectionality as a concept has been used and developed by legal scholars and lawyers in the field of discrimination law.

³⁰ *Mahlangu* above n 27 at para 85.

³¹ Coetzee “South African Education and the Ideology of Patriarchy” (2001) 21 *South African Journal of Education* 300.

³² *Id* at 300.

opportunities than men, economic dependence, physical harassment, exclusion from leading roles in education, politics, the church and society at large.³³

[32] It is uncontroverted that the devastating impact of the challenged provisions on women, which is in turn aggravated by the multiple forms of discrimination and societal dynamics, manifests itself in different ways. For instance, women traditionally bear the main responsibility for house work and child care. The result is that women are less likely to be employed than men and, if employed, are more likely to earn less than men.³⁴ Most of these women depend on their husbands for maintenance.

[33] Men, as income earners, are also more likely to obtain credit and therefore acquire property. The consequence is that women in the position of Mrs Sithole are not able to register property or valuable assets in their own names. Their husbands, who are generally breadwinners, are able to have property, usually the residential home of the couple, registered in their names. The effect of this is that the wife will have no control over the family property. The husband may recklessly fritter away the family's wealth, leave the property to somebody else other than his wife upon his death or unilaterally sell the family house. This in turn may impact negatively upon the rights and interests of the wife in various ways: she may be evicted out of her home, and possibly leaving her vulnerable and unsafe; and she may be left with no livelihood or nothing to ensure that her basic needs are met (including healthcare, food and security).

[34] This is the kind of situation that Mrs Sithole found herself in when she experienced marital problems. She had utilised her own meagre earnings to pay for the other needs of the family, yet, according to her, her husband threatened to dispose of the property unilaterally with no regard for her welfare and security. In order to avoid losing her home, she had to seek an interdict. Had she not sought legal advice in order to obtain the interdict, she would probably have been rendered homeless. The fact that

³³ Id at 301.

³⁴ Sinden "Exploring the Gap Between Male and Female Employment in the South African Workforce" (2017) 8 *Mediterranean Journal of Social Sciences* 37 at 37.

she had used her own income for the other household expenses would not have been factored in.

[35] Women of other racial groups who got married before the 1988 amendment and who did not opt out of the default position, did not suffer the prejudices suffered by the likes of Mrs Sithole. The default position was that they were married in community of property and this meant that assets acquired with their husbands' income fell into the joint estate and they became co-owners of those assets.

[36] Most women did not change their matrimonial regimes, because they were unaware of their legal rights and were not apprised of the provisions of section 21(2)(a). The fact that a majority of Black women in the position of Mrs Sithole did not convert their matrimonial regimes as envisaged in section 21(2)(a) can be attributed largely to the legacy of our ugly racial and unequal past. As is commonly known a majority of Black women in South Africa live in the rural areas and townships and are not fully apprised of their legal rights. Ms Budlender, in her affidavit, highlights the fact that the apartheid government did not place the same emphasis as the current democratic government on informing people of their rights.

[37] For these reasons, few people took up the opportunity to execute and register notarial contracts to modify their matrimonial regime. The second applicant corroborates, to a certain extent, Ms Budlender's evidence that some women are simply ignorant of their matrimonial regimes. It states that, "it is not a rare occurrence for persons married under the BAA to wrongly assume that their marriage is in community of property. For such persons, the 1988 amendment of the MPA, creating the right to change the matrimonial property regime by registering a notarial contract, was a dead letter."

[38] Although section 21(1) was held to pass constitutional muster by the High Court, it is important to highlight that to the extent that it envisages consensus between the parties in order to vary the matrimonial regime, it is not disputed that many women are

unable to obtain their husband's consent to alter their matrimonial regime. This is because a marriage in community of property would generally benefit the wife as the man would be compelled to share the estate with the wife. Ms Budlender, in her affidavit, says that "research showed that many men believe that they should be the primary decision-makers rather than make decisions through discussion and consensus. Such men are unlikely to agree to change their matrimonial property system, specifically when such a change would shift a significant portion of the decision-making power to their wives. For women in this position, the protective measures under section 21(1) and 21(2)(a) were thus not available."

[39] In any event, in order for a woman to seek the consent of her husband to the alteration of the matrimonial regime, she must have had the knowledge of her rights and the necessary access to legal services, to enable her to approach a court or arrange the execution and registration of a notarial contract. It is not in dispute that a substantial number of the women married under the BAA were not in such a position.

[40] Section 7 of the Divorce Act does not assist women in Mrs Sithole's position. Although section 7(3) to (5) gives a divorce court the discretion to redistribute the assets held by the parties as it deems just, this does not assist women who cannot (or will not) divorce their husbands for religious or social or family reasons. Furthermore, as this solution is only available in the event of a divorce, it does not address the inherent discrimination during the course of the marriage. The Constitution does not contemplate that a woman must divorce her husband and rely on the exercise of a discretion by a court, in order to achieve her right to equality.

[41] This Court in *Gumede*,³⁵ dealing with the effect of section 8(4)(a) of the Recognition of Customary Marriages Act,³⁶ (Recognition Act) first acknowledged that Mrs Gumede could have approached the Divorce Court for an order that is just and

³⁵ *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) at para 45.

³⁶ 120 of 1998.

equitable in relation to the marriage property. It said that the persisting difficulty is that the provisions of section 8(4)(a) of the Recognition Act, read together with section 7(3) to (7) of the Divorce Act, apply only upon dissolution of the customary marriage. It also said that the fact that a divorce court may make the equitable order in relation to family property only when the marriage is dissolved, does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage.

[42] The second respondent did not dispute the evidence that shows the intersectional effects of the challenged provisions on women, nor did he contend that this form of discrimination against women is fair. It follows that the impugned provisions do not only amount to unfair discrimination on the basis of race, but also on the basis of gender.

[43] There can be no doubt that the provisions of section 21(2)(a) of the MPA perpetuate the discriminatory effect of section 22(6) of the BAA. The measures taken to remedy the discriminatory legacy of section 22(6) of the BAA are inadequate.

[44] Having held that the provisions amount to unfair discrimination, the next enquiry is whether they can be justified under the limitations clause.³⁷ The second respondent did not contend that there was any basis on which the unfair discrimination suffered by Black couples can be justified. The genesis of the provisions was the orchestrated pattern of racial discrimination and segregation. They resulted from a legislated, deliberate, unjust and senseless system of separation between races that was based on a twisted notion that Black and white people were not worthy of the same treatment. Blacks specifically were regarded as inferior to all other races and not worthy of being respected nor protected by government.

[45] The fact that the ghosts of our ugly past still rear their ghastly heads in the form of provisions like this many years after the advent of democracy is unacceptable. The only possible explanation for the retention of these remnants of past discriminatory laws

³⁷ Section 36 of the Constitution.

in our statutes is that they have been overlooked. The dire consequences suffered by Black people as a result of such discriminatory laws make it compelling that such laws should be obliterated from our statutes urgently.³⁸ To do so would have the effect that the constitutional right to dignity³⁹ of all Black couples affected by the impugned provisions is respected and protected as commanded by the Constitution. The pressing need for the vindication of the dignity of Black couples points away from any possibility of the unfair discrimination being reasonable and justifiable. 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.⁴⁰ In terms of section 7(1) of the Constitution, the Bill of Rights is the cornerstone of our democracy and “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 is therefore one of the core constitutional rights.

[46] Recognising the right to dignity is an acknowledgment of the intrinsic worth of human beings. This right therefore is the foundation of many other rights that are specifically entrenched in the Bill of Rights. One of these is the right to equality. Black couples, like all others have to be afforded equal protection and benefit of the law⁴¹ so that their inherent dignity is respected and protected.⁴²

[47] To conclude, the unfair discrimination is not saved by section 36(1) of the Constitution. The provisions of section 21(2)(a) of the MPA are thus inconsistent with the Constitution and invalid and the High Court order to this effect should be confirmed. Henceforth, the default position must be that all marriages which, in terms of the BAA, were automatically out of community of property are in community of property. The

³⁸ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 61.

³⁹ Section 10 of the Constitution guarantees everyone’s right to “inherent dignity and the right to have their dignity respected and protected.”

⁴⁰ Section 1 of the Constitution.

⁴¹ Section 9 of the Constitution.

⁴² Section 10 of the Constitution.

affected couples must then have the option, like other races, to opt out and change their matrimonial regime to be out of community of property.

Remedy

Order and retrospectivity

[48] Having held that the impugned section is inconsistent with the Constitution and thus invalid, this Court must make an order that is just and equitable. That order may entail an “order limiting the retrospective effect of the declaration of invalidity; and suspending the declaration of invalidity” to allow the legislature to correct the defect. The second respondent has not asked this Court to limit the retrospective effect of the order of invalidity, as contemplated in section 172(1)(b)(i) of the Constitution.

[49] As already indicated, the fact that these kinds of provisions are still in our statute book is unacceptable. It would thus not be just and equitable to limit the retrospective effect of the declaration of invalidity. Furthermore, a prospective order would not grant any, or effective relief to Black couples in marriages concluded before 1988. The retrospective regime which the order would permit is properly aligned with the prospective regime created by Parliament for other couples of other racial groups and the effect is that the default position in all marriages would be marriages in community of property.

[50] There is no basis to delay and thus perpetuate the unjustified unequal treatment of Black couples. However, the order should not affect the legal consequences of any act or omission existing in relation to a marriage before this order was made. Also, the order must not undo completed transactions in terms of which ownership of property belonging to any of the affected spouses has since passed to third parties. Further, a saving provision or generic order should be made in favour of a person claiming specific prejudice arising from the retrospective change of the matrimonial regime, to approach a competent court for appropriate relief.

Costs

[51] Only the first respondent has opposed the application. In the interests of protecting Mrs Sithole's share of the joint estate, no costs order should be made against Mr Sithole's estate.

[52] In the High Court costs were sought against the Minister only if he opposed the application. He did not oppose the application but he was ordered to pay the costs. The applicants have elected to abandon that order as it was sought and granted in error.

[53] In this Court too the Minister has elected to abide by our decision. However, as a member of the Executive responsible for the administration of the legislation in question, he bears the responsibility to detect areas of concern in legislation and take responsibility to rectify them. Had he amended the legislation, this application would not have been brought. In the circumstances a costs order against the Minister in this Court is appropriate. In any event, generally where this Court confirms a declaration of constitutional invalidity, the applicant is entitled to costs against the member of the Executive responsible for the administration of the impugned legislation.

[54] This application was set down for hearing on 17 September 2020. On 16 September 2020 the applicants' attorneys contacted Mr Sithole's attorney, Mr Dlamini to ascertain whether he would be participating in the hearing. They were advised that Mr Dlamini had no knowledge of the matter being set down for hearing on 17 September 2020. Mr Dlamini provided the applicants' attorneys with a different email address to the one previously provided to them as well as the different courts. On the morning of 17 September 2020, Mr Dlamini, through his counsel, alleged that he had not received notification of the set down, and for this reason requested a postponement. Mr Sithole's counsel advised this Court that Mr Dlamini has several email addresses which change very often due to the fact that he has an "inherent phobia of technology". In the interests of fairness, the application was postponed and directions requiring Mr Dlamini to show cause why a punitive costs order should not be made against him were issued.

[55] No affidavit was received by this Court in response to the directions, but during argument, Mr Sithole's counsel stated that she had been briefed that an affidavit had been filed in this regard. Counsel, however, could not explain to this Court why Mr Dlamini did not inform this Court of the several changes in his email addresses. The only explanation proffered was that Mr Dlamini expected that service would be effected physically to his office address because a certain set of pleadings had previously been served in this fashion.

[56] Subsequent to the postponement, and in an attempt to deal with the version of Mr Dlamini suggesting that he was not apprised of the progress of the proceedings, and in response to an insinuation that the applicants deliberately conducted these proceedings secretly, the applicants' attorneys filed an affidavit. The affidavit maps out the several measures taken by the applicants' attorneys to ensure service of all the court processes on Mr Dlamini. What stands out from the affidavit is that from 16 April 2019, when the applicants' attorneys served the High Court application on Mr Dlamini, they had to prompt the latter through several emails and telephone calls before any set of pleadings could be received from Mr Dlamini.

[57] The affidavit highlights that on one occasion, after several attempts to contact Mr Dlamini were unsuccessful, the applicants' attorneys contacted Mr Sithole personally. He undertook to contact his attorney. Subsequently, a full set of pleadings was served on Mr Sithole personally and this prompted Mr Dlamini to file a notice of opposition of the High Court application. However, he did not file an answering affidavit afterwards until two days before the hearing.

[58] The narrative given by the applicants' attorneys shows just how tardily Mr Dlamini has handled this matter. He has litigated with indifference and has not displayed the professionalism expected from an officer of the court. He has also failed to ensure that his client's interests were promptly and efficiently protected. Had it not been for the efforts of the applicants' attorneys prompting him to perform his legal

duties, his client's interests would probably not have been protected. He should not be entitled to charge Mr Sithole or his estate any fees in this matter.

Order

[59] The following order is made:

1. The provisions of section 21(2)(a) of the Matrimonial Property Act 88 of 1984 ('the MPA') are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), and thereby maintain the default position of marriages of black couples, entered into under the Black Administration Act before the 1988 amendment, that such marriages are automatically out of community of property.
2. All marriages of black persons that are out of community of property and were concluded under section 22(6) of the Black Administration Act before the 1988 amendment are, save for those couples who opt for a marriage out of community of property, hereby declared to be marriages in community of property.
3. Spouses who have opted for marriage out of community of property shall, in writing, notify the Director-General of the Department of Home Affairs accordingly.
4. In the event of disagreement, either spouse in a marriage which becomes a marriage in community of property in terms of the declaration in paragraph 2, may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding that declaration.
5. In terms of section 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 in relation to a marriage before this order was made.
6. 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 of property, unless the affected couple has opted out in accordance with the procedure set out in paragraph 3 above.

7. Any person with a material interest who is adversely affected by this order, may approach the High Court for appropriate relief.
8. The second respondent is ordered to pay the costs of this application and such costs to include the costs of two counsel, where so employed.
9. It is ordered that the first respondent's attorney, Mr Dlamini, should forfeit his legal fees in respect of this application.

For the Applicants:

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MZ Suleman
Instructed by Legal Resources Centre

For the First Respondent:

N Badat
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For the Second Respondent:

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