

GUMEDE (BORN SHANGE) V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Constitutional Court of South Africa (Moseneke DCJ, Langa CJ, Madala, Mokgoro, Ngcobo, O'Regan, Sachs, Skweyiya, Van der Westhuizen and Yacoob JJ)

8 December 2008

[2008] ZACC 23

South Africa – constitutional law– gender discrimination– property rights of women under customary law – confirmation of the order of the High Court – whether ss 7(1) and 7(2) of the *Recognition of Customary Marriages Act No 120 of 1998* (SA) discriminate on the basis of gender contrary to the *Constitution* – whether s 20 of the *KwaZulu Act on the Code of Zulu Law Act No 6 of 1985* (SA) discriminates on the basis of gender contrary to the *Constitution* – whether s 20 of the *Natal Code of Zulu Law 1987* discriminates on the basis of gender – whether the discrimination is justified under s 8(4)(a) of the *Recognition of Customary Marriages Act No 120 of 1998* (SA)

Facts:

In this case, the applicant Elizabeth Gumede ('Mrs Gumede') sought confirmation from the Constitutional Court of South Africa, pursuant to s 167(5) of the *Constitution*, of an order of constitutional invalidity made by the High Court. Mrs Gumede and her husband entered into a monogamous customary marriage in 1968 that lasted forty years. The couple resided in the province of KwaZulu-Natal. Over the term of their customary marriage the couple acquired two homes and furniture and appliances worth R40 000. The marriage has since broken down and in January 2003 Mr Gumede instituted court proceedings to end the marriage. In response Mrs Gumede tried to preempt the divorce court in the division of their assets and took her case to the High Court, in order to attempt to procure an order invalidating the statutory provisions that regulate the proprietary consequences of her marriage. Mrs Gumede argued that the provisions unfairly discriminated against customary law wives on grounds of gender and race.

The first of the impugned provisions, s 7(1) of the *Recognition of Customary Marriages Act No 120 of 1998* (SA) ('*Recognition Act*') stated that the proprietary consequences of a customary marriage entered into before the commencement of the *Recognition Act* continued to be governed by customary law (old marriage). The *Recognition Act*, s 7(2) provided that a customary marriage entered into after the commencement of

the *Recognition Act* is a marriage in community of property (new marriage). Pursuant to s 7(1) of the *Recognition Act* the Gumedes' marriage was governed by the customary law of KwaZulu-Natal as codified in the *Natal Code of Zulu Law 1987* ('*Natal Code*') and also in the *KwaZulu Act on the Code of Zulu Law Act No 6 of 1985* (SA) ('*KwaZulu Act*'). Section 20 of the *Natal Code* and s 20 of the *KwaZulu Act* provide that the family head is the owner of all family and, therefore, his wife would not have any claim to the family property upon dissolution of the marriage. In addition, s 22 of the *Natal Code* provided that the 'inmates' of a family home owe obedience and are subject to the head of the family.

Under ss 9(3) and 9(5) of the *Constitution of the Republic of South Africa*, discrimination based on gender is presumed to be unfair. The High Court found that the impugned provisions unfairly discriminated on the grounds of gender and race and therefore offended the equality protection in ss 9(3) and 9(5) of the *Constitution*. The overarching issue the Constitutional Court of South Africa had to decide was whether the order of constitutional invalidity made by the High Court should be confirmed. In answering that question the Court needed to establish whether the provisions discriminated against the applicant and, if they did, whether the discrimination was justified.

Held, confirming the order, per Moseneke DCJ (Langa CJ, Madala, Mokgoro, Ngcobo, O'Regan,

Sachs, Skweyiya, Van der Westhuizen and Yacoob JJ agreeing):

1. Section 39(2) of the *Constitution* requires courts to apply and develop customary law in order to promote the spirit, purport and objects of the Bill of Rights. However, this is not a case where the Court has a constitutional obligation to develop customary law in order to align it with constitutional dictates. The customary law is codified in legislation in the *KwaZulu Act*. The court's power in relation to legislation is not to develop the legislation, but to interpret it in a manner promoting the objects of the *Constitution*, or to hold that it is inconsistent with the *Constitution* and thus invalid: [22]–[29].

2. Sections 7(1) and 7(2) of the *Recognition Act* are discriminatory on the basis of gender. The provisions discriminate not only between a wife and husband but also between an old customary law marriage and a new customary law marriage: [34].

3. Under the *KwaZulu Act* and the *Natal Code*, affected wives in customary marriages are considered incapable or unfit to hold or manage property. This is a violation of women's right to dignity and equality and is unfair: [34]–[36]; *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17 applied.

4. Under s 36 of the *Constitution*, the Government may provide factual material and policy considerations so as to justify the discriminatory provision in order to save it from unconstitutionality: [37]; *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21 considered.

5. According to s 8(4)(a) of the *Recognition Act*, a court can have regard to ss 7–10 of the *Divorce Act 70 of 1979* (SA) ('*Divorce Act*') in the distribution of assets following the dissolution of a customary marriage. Section 8(4)(a) of the *Recognition Act* does not restrict the equitable jurisdiction of a court to a marriage out of community of property. Every divorce court granting a divorce decree relating to a customary marriage has the power to order how the assets of the customary marriage should be divided between the parties, in having regard to what is just and equitable in the particular case: [44].

6. The meaning given to s 8(4)(a) of the *Recognition Act* does not cure the discrimination that a spouse in a

customary marriage has to endure during the course of the marriage because s 8(4)(a) and the *Divorce Act* only apply upon dissolution of the marriage. In addition, Mrs Gumede would be prejudiced before the divorce court because the starting point of the enquiry, concerning what is a just and equitable division of the assets, is that all the family property belongs to her husband. In order to be treated equally, Mrs Gumede would have to persuade the court that it is just and equitable that she be awarded some of the property: [38]–[47].

7. The order of invalidity made by the High Court should be confirmed on the basis that the provisions in the *KwaZulu Act*, *Natal Code* and *Recognition Act* discriminate on the ground of gender contrary to the *Constitution* and the discrimination is not justified. Section 7(1) of the *Recognition Act* discriminates in the sense that marriages entered into before the commencement of the Act are governed by customary law. Section 7(2) of the *Recognition Act* discriminates as it distinguishes between customary marriages entered into before and after the commencement of the Act. Section 20 of the *KwaZulu Act* and s 20 of the *Natal Code* discriminate as they provide that during the course of a customary union the family head is the owner of and has control over all family property. Section 22 of the *Natal Code* discriminates as it provides that the 'inmates' are under control and owe obedience to the family head: [46]–[49].

8. The retrospective effect of the declaration of invalidity should not be limited to parties to existing marriages for several reasons: first, a prospective order would not grant any relief to parties whose marriages concluded before the commencement of the *Recognition Act*; second, the discrimination that ss 7(1) and 7(2) of the *Recognition Act* create is so egregious that it should not remain on the statute books; and third, the retrospective regime created by the order is in line with the prospective regime created by the *Recognition Act* with the result that all customary marriages would become marriages in community of property. However, a generic order may be necessary in relation to permitting claims by third parties prejudiced by the retrospective change to the marital regime: [50]–[54].