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REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE:

- | | |
|---------------------------------|--------|
| (1) REPORTABLE: | YES/NO |
| (2) OF INTEREST TO OTHER JUDGES | YES/NO |
| (3) REVISED: | NO |

DATE: 10 June 2024 SIGNATURE: [...]

CASE NR: 25007/2022

In the matter between:

JRM

PLAINTIFF

and

VVC

FIRST DEFENDANT

**THE MINISTER OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

SECOND DEFENDANT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 10 June 2024

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] Rogers J in *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others*, accepted the notion that ‘... women typically enter into marriage poorer and more dependent than men, and therefore have less bargaining power’.¹ Despite their increased employment and business participation in modern times, by and large, women are still generally financially weaker spouses in marriages. This significantly reduces their bargaining power to, among others, choose their desired matrimonial property system or propose changes thereto when they so wish.

[2] This matter highlights the disturbing reality of financially weaker spouses, most of whom are women, who are impacted negatively by decisions taken by financially stronger spouses, most of whom are men, that are simply prejudicial to their financial well-being, particularly at the time of divorce.

[3] This matter was allocated as a special case for the adjudication of points of law in terms of the Uniform Rule 33(1) and the parties have provided a written statement of facts. The issues that call for determination are:

¹ 2024 (1) BCLR 16 (CC); 2024 (2) SA 1 (CC) para 122.

- [3.1] whether the purported 'antenuptial contract' entered into by the plaintiff and the first defendant which enabled them to enter into a civil marriage out of community of property, years after concluding their customary marriage in community of property is valid;
- [3.2] if the purported 'antenuptial contract' is valid, whether section 10(2) of the Recognition of Customary Marriage Act² (hereafter Recognition Act) is unconstitutional in so far as it allows for spouses in a monogamous customary marriage to change their matrimonial property regime from in community of property to out of community of property when they later decide to enter into a civil marriage with each other without judicial oversight to the prejudice of the economically weaker spouse;
- [3.3] does the agreement that the first defendant and the plaintiff signed on 19 February 2019 after concluding a customary marriage that seeks to regulate their future matrimonial property system amount to an antenuptial contract or a post-nuptial contract that requires judicial intervention?
- [4] During oral argument, it became clear that the court is also required to determine whether an agreement to conclude a civil marriage out of community of property after a valid customary marriage was entered into, where a default system of community of property is applicable, has the effect of depriving a financially weaker spouse of her ownership in undivided shares of the assets that constitute part of her joint estate created by the customary marriage. Neither the plaintiff nor the second and third defendants who were subsequently joined to these proceedings opposed this matter.

² 120 of 1998.

B BACKGROUND

[5] The following facts are upon in terms of the parties' written statement of facts:

[5.1] the first defendant and the plaintiff entered into a customary marriage on 5 August 2011 without concluding an antenuptial agreement, making the default matrimonial property regime of community of property applicable to their customary marriage;

[5.2] on 19 February 2019, the first defendant and the plaintiff signed a purported 'antenuptial contract' which provided that the civil marriage they agreed to enter into would be out of community of property subject to the accrual system;

[5.3] while the plaintiff claims that this contract is valid, the first defendant disputes the validity thereof;

[5.4] on 10 June 2021, the first defendant and the plaintiff entered into a civil marriage;

[5.5] before this marriage was concluded, there was no division of the joint estate created by the customary marriage;

[5.6] the parties no longer wish to continue with their marriage relationship;

[5.7] both parties claim that their marriage has irretrievably broken down with no prospects of its restoration;

[5.9] the plaintiff issued a summons that was duly served on the first defendant;

[5.10] the first defendant also filed her plea and counterclaim which were followed by a notice to the Registrar of this court in terms of Uniform Rule 16A where a constitutional issue was raised in these proceedings.

[6] The matter was due to be heard on 30 November 2023. On this date, I indicated to the first defendant's counsel that I intended to invite interested parties who may wish to participate in this matter as friends of the court to make their submissions given the importance of the issues the court is called to determine.

[7] The Pretoria Attorneys Association heeded the call but indicated that their preferred counsel was not available to deal with the matter. It was agreed that the matter would be heard on 4 December 2023. Counsel for both the first respondent and the *amicus curiae* submitted comprehensive heads of arguments. I am thankful to all of them for their assistance in this regard.

B PARTIES SUBMISSIONS

i) Plaintiff's submissions

[8] In the written statement of facts provided by the parties in terms of Uniform Rule 33(1), the plaintiff contends that the customary marriage between himself and the first defendant was converted into a civil marriage in terms of section 10(2) of the Recognition Act.

[9] According to the plaintiff in this written statement, it was always his and the first defendant's intention that their marriage should be out of community of property subject to the accrual system, which intention was reflected by the signing and registration of the purported 'antenuptial contract' that was entered into after their customary marriage was concluded.

[10] The plaintiff maintains that the applicable matrimonial property system to his marriage with the first defendant is that of out of community of property with the application of the accrual system. The plaintiff did not submit the heads of

argument in this matter. There was also no appearance on behalf of the plaintiff when the matter was argued in court.

ii) First Defendant's Submissions

[11] It was submitted on behalf of the first defendant that section 10 of the Recognition Act is silent on the fate of the initial customary marriage following the conclusion of the subsequent civil marriage after the signing of an 'antenuptial agreement' that contracts the parties to a marriage out of community of property after marrying each other in community of property in terms of customary law. Further, this section allows spouses in monogamous customary marriages to also marry each other in terms of the Marriages Act.³

[12] The first defendant contends that she is married to the plaintiff in community of property and the purported 'antenuptial contract' concluded after entering into a customary marriage is invalid. She further contends that should the purported 'antenuptial contract' be found to be valid, then section 10(2) of the Recognition Act is unconstitutional because it allows for the matrimonial property regime applicable to a customary marriage to be changed from community of property to out of community of property by written agreement between the parties.

[13] It was argued further that the contemplated change is effected without judicial intervention and notice to creditors as dictated in section 21 of the Matrimonial Property Act.⁴ As such, there are currently no checks and balances to prevent financially stronger spouses from unilaterally changing their matrimonial property regimes without regard to the rights and interests of financially weaker spouses.

[14] The heading of section 10 of the Recognition Act is '*[c]hange of marriage system*'. It was submitted on behalf of the first defendant that, based on this

³ 25 of 1961.

⁴ 88 of 1984.

heading, the word 'change' denotes something that may be substituted for another thing of the same type. Further, this entails that the parties' customary marriage changed into a civil marriage which is something different to the extent that the customary marriage ceased to exist.

[15] According to the first defendant, the conclusion of a subsequent marriage aims to enable the parties to convert their customary marriage into a civil marriage which indicates the change in their matrimonial property regime. The first defendant further argues that despite the conclusion of both a customary and civil marriage, those who are party to these marriages may not view these 'dual marriages' as creating separate and distinct legal marriages.

[16] It was argued that the parties' intention is often to conclude a marriage that would be celebrated in different forms. A customary marriage is often considered to be a process rather than a single legal event. Further, spouses are entitled to celebrate and conclude a customary marriage before they conclude a civil marriage. However, financially weaker spouses should not be disadvantaged by the contemplated changes in the matrimonial property regimes without judicial intervention following the signing and registration of 'antenuptial contracts'.

[17] According to the first defendant, while the alleged change brings the customary marriage to an end, the marriage does not terminate but merely changes from a customary marriage in community of property to a civil marriage out of community of property. In other words, it is the legal consequences of the marriage that change without judicial intervention. The first defendant further contends that this lack of judicial involvement in the changing of the applicable matrimonial property regime infringes upon the rights of creditors who are also not informed before the change takes place to protect their interests in the parties' joint estate.

[18] According to the first defendant, by converting their marriage from community of property to out of community of property, the parties 'antenuptial contract' allowed interference with her accrued rights in the assets that formed part of the joint estate created by their customary marriage even though the

proprietary consequences of a marriage may only be changed through a court order.

- [19] The first defendant argues further that the 'antenuptial contract' should only regulate the subsequent civil marriage which ended the customary marriage. Further, the antenuptial contract should not change the proprietary consequences of the customary marriage. The customary marriage remains in community of property until it ceases to exist, but accrued rights in the joint estate should never be affected.
- [20] The first defendant argues that the effect of section 10(2) of the Recognition Act is that she lost her right of ownership over assets that bear the name of the plaintiff held in the joint estate created by the customary marriage. It is contended that this provision creates legal uncertainty by not providing clarity on the status of the communal estate that accrued due to the customary marriage that was concluded before the 'antenuptial contract' was signed and registered.
- [21] It is submitted further that this provision creates a platform for financially weaker spouses to be deprived of assets that form part of their joint estates. These assets would be recognized as the sole properties of financially stronger spouses once purported 'antenuptial contracts' post the conclusion of customary marriage are registered. It is argued that this amounts to the expropriation of the common property without compensation.
- [22] According to the first defendant, section 10(2) of the Recognition Act disregards the communal estate and leads to loss of ownership and is thus, inconsistent with the main purpose of this Act. Further, this provision does not recognise the matrimonial property regime created by the customary marriage when a subsequent civil marriage is entered into by the same parties. The first defendant contends that this provision creates a hierarchy between two marriage statutes by recognising the Marriages Act as superior to the Recognition Act.

- [23] The first defendant is of the view that unless the proprietary rights as established by the customary marriage are transferred into the civil marriage, section 10(2) of the Recognition Act is inconsistent with section 8(1) of this Act which mandates that customary marriages may only be dissolved by the court of law based on the irretrievable breakdown of the marriage.
- [24] The first defendant argues that section 10(2) of the Recognition Act creates a mechanism that unfairly discriminates against financially weaker spouses, the majority of whom are women who are generally vulnerable spouses in customary marriages. It is alleged that this discrimination materialises through the elimination of judicial oversight in the process of changing the matrimonial property regime when ‘antenuptial contracts’ are registered after the conclusion of customary marriages.
- [25] It is submitted further that financially weaker spouses tend to be deprived of their matrimonial property under the guise of having consented to an ‘antenuptial contract’. According to the first defendant, section 10(2) of the Recognition Act encroaches on section 25(1) of the Constitution, in that it results in the deprivation of property in an arbitrary way that is not for a public purpose.
- [26] It is submitted further that this provision undermines the protection that the Constitution affords black women in particular, by subjecting them to continuous discrimination wherein they are denied ownership and control of their marital property through the signing and registration of ‘antenuptial contracts’ after entering into customary marriages. Finally, the first defendant contends that section 10(2) of the Recognition Act should be declared unconstitutional and invalid. The first defendant contends further that this section can be remedied through a ‘read in’ order as demonstrated below.

iii) Submissions by the amicus curiae

- [27] The *amicus curiae* submitted that the law allows parties to a monogamous customary marriage to marry each other in terms of the Marriages Act.

Further, section 10 of the Recognition Act contains a provision that allows spouses of a *de facto* monogamous customary marriage to convert that marriage into a civil marriage. It is argued that the new marriage is deemed to be in community of property unless an 'antenuptial contract' provides otherwise. According to the *amicus curiae*, the existing customary marriage is presumably superseded and extinguished by the second marriage.

[28] However, the *amicus curiae* contend that on a proper interpretation of section 10 of the Recognition Act, there can be no doubt that a further marriage between the parties in terms of the Marriages Act is intended. The *amicus curiae* contended that the civil marriage envisaged in section 10(2) of the Recognition Act is a distinct further marriage that is separate from and in substitution of the previous customary marriage. In that, two separate marriages take place. This provision effectively allows a married person to marry the same person again, which ordinarily and in terms of the common law would not be allowed.

[29] It is further submitted that the civil marriage replaces the customary marriage and the antenuptial contract entered after the conclusion of the customary marriage but before entering into a civil marriage will regulate the parties' future proprietary consequences. Further, the intended agreement is an 'antenuptial contract'. The *amicus curiae* further submitted that the purported 'antenuptial contract' was entered into before the second marriage and does not amount to a variation or amendment of the parties' matrimonial property regime that applies to the first marriage.

[30] According to the *amicus curiae*, the parties' purported 'antenuptial contract' was entered into before the civil marriage was concluded and does not amount to a postnuptial contract. Further, this contract does not seek to regulate the proprietary consequences of the customary marriage that was terminated by the civil marriage. It is submitted that the first defendant and the plaintiff did not change their matrimonial property regime but entered two separate marriages that are regulated by separate rules, where one marriage terminated the other.

[31] According to the *amicus curiae*, had the parties remained married in a customary marriage, a variation of their matrimonial property regime in the customary marriage could only have been effected through leave of the court. Further, section 10 of the Recognition Act is problematic because it offers no protection to a wife who may for various reasons not be on the same footing as her husband to negotiate a new matrimonial property regime. However, in every single contract, parties have the freedom to contract, and the fact that there may be some inequality between the parties regarding their footing when negotiating does not detract from the validity of the contract.

[32] The *amicus curiae* argued further that notwithstanding the conclusion of a further civil marriage, the joint estate established by the customary marriage continues to exist and the division thereof must occur as it does upon divorce and death. In other words, the 'antenuptial contract' that renders the civil marriage to be out of community of property with the application of the accrual system does not interfere with the already accrued rights in the joint estate established by the customary marriage.

[33] Even though the *amicus curiae* disagrees with the first defendant that there is a change in the matrimonial property regime and maintains that the customary marriage is terminated by the civil marriage, it agrees with the first defendant that section 10 of the Recognition Act should be declared unconstitutional. The *amicus curiae* further contend that, to the extent that this provision allows for a married person to marry the same person again thereby creating an illusion that customary marriages rank below civil marriages, is an anomaly.

C APPLICABLE LEGAL PRINCIPLES AND RELEVANT JUDICIAL APPROACHES

i) Relevant Constitutional Provisions

[34] The court is mandated by section 211(3) of the Constitution of the Republic of South Africa, 1996 (hereafter Constitution) to '*... apply customary law when*

that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’.

[35] In terms of section 31(1)(a) of the Constitution,

‘[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practice their religion, and use their language ...’.

[36] In terms of section 39(2) of the Constitution:

‘[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the bill of rights’.

[37] In terms of section 9(1) of the Constitution, *[e]veryone is equal before the law and has the right to equal protection and benefit of the law’.* The state may not unfairly discriminate directly or indirectly against anyone based on among others, gender, sex, marital status, and culture.⁵ Discrimination on any of these grounds is unfair unless it is demonstrated that the discrimination is fair.⁶

[38] Section 25(1) of the Constitution provides that:

‘[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’.

[39] The rights contained in the Bill of Rights can be limited as provided for in section 36 of the Constitution.

ii) Entitlement to Acquire and Control Property

⁵ Section 9(4) of the Constitution.

⁶ Section 9(5) of the Constitution. See also *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC) para 22, where it is stated that “The [Recognition of Customary Marriages Act makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses’.

[40] Among others, the objective of the Recognition Act is '*... to provide for the equal status and capacity of spouses in customary marriages [and] to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages*'. Section 6 of this Act provides that:

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

[41] The Constitutional Court in *Ramuhovhi and Others v President of the Republic of South Africa and Others*, held that:

'[s]ection 6 introduces equality in status between husbands and wives, grants full legal capacity to wives and affords them an entitlement to acquire and dispose of assets'.⁷

[42] In *Gumede (born Shange) v President of the Republic of South Africa and Others*, it was held that the Recognition Act:

'... makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses. ... The Recognition Act regulates proprietary consequences and the capacity of spouses and governs the dissolution of the marriages, which now must occur under judicial supervision'.⁸

[43] In terms of section 7(2) of the Recognition Act:

'[a] customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage'.

⁷ 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) para 35.

⁸ 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) para 23. In para 20, it was stated that this Act, '*... is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes*'.

iii) Changing Marital Regimes

[44] In terms of section 10 of the Recognition of Customary Marriages Act:

- (1) *'A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961), if neither of them is a spouse in a subsisting customary marriage with any other person.*
- (2) *When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.*
- (3) *Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any marriage which is in community of property as contemplated in subsection (2).*
- (4) *Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage'.*

[45] In *S.M.S v V.R.S.*⁹ the parties concluded a customary marriage. Four years later, they entered a civil marriage. The parties verbally agreed to be married out of community of property, with the exclusion of the accrual system and subsequently registered their agreement at the Deeds Registry a month after the civil marriage was concluded. The validity of the contract was disputed, and the court deemed the verbal agreement between the parties to be an informal ante-nuptial contract and concluded that the subsequent civil marriage was out of community of property.¹⁰ The court held that:

'[s]ection 10 (1) of the RCMA provides that a man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961, if neither of them is a spouse in a subsisting customary marriage with another person. It appears from the wording of this section

⁹ (181/2015) [2019] ZALMPPHC 5 (15 March 2019).

¹⁰ *Ibid* para 20.

that this change can be done without the intervention of the court as envisaged in section 21 of the Matrimonial Property Act 88 of 1984.¹¹

[46] The Gauteng Division, Johannesburg rejected the invitation to follow *S.M.S v V.R.S* and held that:

'[t]he decision in SMS v VRS is based on an interpretation of s 10 of the RCMA, which envisages a change of the marriage system by entering a marriage in terms of the Marriage Act. Although the court referred to the contract as a 'postnuptial' contract for the sake of convenience, it treated the contract between the parties in SMS v VRS as an antenuptial contract registered postnuptially. Thus, the court in SMS v VRS enforced the contract without a preceding court order authorising the registration of the antenuptial contract postnuptially'.¹²

[47] In terms of section 21(1) of the Matrimonial Property Act,

'[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, 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 the court may think fit'.

[48] In *Sithole and Another v Sithole and Another*, held that:

'[s]ection 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'.¹³

[49] Section 7(5) of the Recognition Act provides that:

¹¹ Ibid para 17.

¹² *LNM v MMM* (2020/11024) [2021] ZAGPJHC 563 (11 June 2021) para 44.

¹³ 2021 (6) BCLR 597 (CC); 2021 (5) SA 34 (CC) para 17. See also *A M v H M* (CCT95/19) [2020] ZACC 9; 2020 (8) BCLR 903 (CC) (26 May 2020) para 9.

'[s]ection 21 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984) is applicable to a customary marriage entered into after the commencement of this Act in which the husband does not have more than one spouse'.

iv) Approaches to interpretation

[50] Section 10 of the Recognition Act is titled '*[c]hange of marriage system*'. In *Turffontein Estates Ltd v Mining Commissioner Johannesburg*,¹⁴ it was held that:

'[a]s already pointed out, the heading has been expressly incorporated in the Statute. We are therefore fully entitled to refer to it for the elucidation of any clause to which it relates. It is impossible to lay down any general rule as to the weight which should be attached to such headings. The object in each case is to ascertain the intention of the Legislature, and the heading is an element in the process'.

[51] In *Turffontein Estates Ltd*, Innes CJ further held that:

*'[w]here the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overridden by the words of a heading. But where the intention is doubtful, whether the doubt arises from ambiguity in the section itself or from other considerations, then the heading may become of importance. The weight to be given to it must necessarily vary with the circumstances of each case'.*¹⁵

[52] Petse DP in *Mzalisi NO and Others v E O and Another*, held that:

*'... headings in a Statute may be resorted to only where the meaning of a provision under consideration is doubtful. Otherwise headings play no role in the interpretation process where the words are unambiguous and their meaning is clear. That the provisions of s 10 [of the Recognition of Customary Marriages Act] are unambiguous and clear admits of no doubt'.*¹⁶

¹⁴ 1917 AD 419 at 431.

¹⁵ Ibid. See also *Chidi v Minister of Justice* 1992 (4) SA 110 (AD) para 16.

¹⁶ 2020 (3) SA 83 (SCA) para 32

[53] The Supreme Court of Appeal in *Manyasha v Minister of Law and Order*,¹⁷ provided the necessary guidance on the interpretation of legislative provisions where it was held that:

'[i]t is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature . . . One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the [Legislature] could not have contemplated it'.¹⁸

[54] It has also been held that:

'... the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous'.¹⁹

[55] The Supreme Court of Appeal in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*, further held that South African case law recognises that statutory interpretation aims to give effect to the object or purpose of the legislation in question.²⁰ The Appellate Division (as it then was) in *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others*, held that:

'... where the application of the literal interpretation principle results in ambiguity and one seeks to determine which of more than one meaning was intended by the Legislature, one may properly have regard to the purpose of the provision under consideration to achieve such objective'.²¹

¹⁷ 1999 (2) SA 179 (SCA); [1999] 1 All SA 242 (A).

¹⁸ *Ibid*, paras 7 and 8. The court endorsed the approach to the interpretation of legislative provisions adopted by the minority opinion in *Jaga v Dönges NO & Another; Bhana v Dönges NO & Another* 1950 (4) SA 653 (A) 662 and 664.

¹⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) para 90. In para 91, Ngcobo J in his concurring judgment, further held that '[t]he technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the "spirit, purport and objects of the Bill of Rights'.

²⁰ [2008] 4 All SA 117 (SCA); 2008 (5) SA 1 (SCA) para 19.

²¹ 1990 (1) SA 925 (A) 926.

[56] The provisions of section 10 of the Recognition Act were interpreted by the Limpopo Division of the High Court in an unreported case of *Mphosi v Mphosi*.²² In this case, the parties also concluded a monogamous customary marriage in community of property in 2006. They subsequently concluded an antenuptial contract on 3 December 2010 and got married to each other out of community of property in terms of the Marriages Act on 10 December 2010. They did not apply for leave to the high court in terms of section 21 of the Matrimonial Property Act²³ to have their matrimonial property system changed.

[57] In *Mphosi*, the court was called to determine whether the parties' antenuptial contract that was concluded years after entering a customary marriage was valid. The court was of the view that section 10 of the Recognition Act:

'... is intended to mean that the conclusion of a civil marriage extinguishes the customary marriage by the operation of law and brings to an end to the proprietary consequences of the customary marriage in community of property or in terms of an antenuptial contract, if an antenuptial contract was entered into'.²⁴

The court further held that:

'... to require of the spouses first to dissolve their subsisting customary marriage by [a] decree of divorce, as provided for in section 8, before they may enter into a civil marriage on the ground of irretrievable breakdown of the marriage relationship between them, which is the only basis upon which the customary marriage, in casu, may be dissolved where there is no such breakdown, is simply absurd and against the clear meaning of section 10(1)'.²⁵

[58] A similar dispute arose in *M.R v M.T*,²⁶ where the parties married each other in 2009 in terms of customary law without concluding an antenuptial contract. In 2015, the parties concluded an 'antenuptial contract' thereby contracting to enter a civil marriage with each other out of community of property. The wife

²² 1142/2014 29 (29 November 2018).

²³ 88 of 1984.

²⁴ *Mphosi* supra para 20.

²⁵ Ibid.

²⁶ (HCA38/2022) [2024] ZALMPPHC 45 (6 May 2024).

conceded that the parties agreed that they would eventually enter a civil marriage with each other. Further, she arranged an appointment with the notary, and she started the process that led to the drafting of the 'antenuptial contract'.

[58.1] According to the wife, the parties entered a customary marriage that was later changed into a civil marriage through an antenuptial contract, which she argued was invalid.²⁷

[58.2] The issue the court was called to determine was the validity of the antenuptial contract. The court did not deal with the status of the antenuptial contract that was registered after the conclusion of the customary marriage. Nonetheless, the court held that '*[t]here is no evidence that parties have consented to be married to each other under customary marriage. In fact, they have both testified that it was their understanding/intention that they were going to enter a civil marriage*'.²⁸

[58.3] The court further held that whether the requirements of customary marriage were ever complied with or not, was not a bar to the parties to enter a civil marriage.²⁹

v) Dissolution of Customary Marriages

[59] Section 8(1) of the Recognition Act provides that:

- 1) *'A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.*
- 2) *A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is*

²⁷ Ibid para 12

²⁸ Ibid para 20.

²⁹ *M.R v M.T* supra note 26 above para 20.

no reasonable prospect of the restoration of a normal marriage relationship between them'.

vi) Test for Discrimination

[60] The Constitutional Court in *Harksen v Lane NO and Others*,³⁰ formulated the following test:

- (a) *Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of ... [equality clause]. 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-staged 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 was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had 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 amounted to "discrimination", did it amount to "unfair discrimination"? If it had been found to have been on a specified ground, unfairness would be presumed. If on an unspecified ground, unfairness would have to be established by the complainant. The test of unfairness focused primarily on the impact of the discrimination on the complainant and others in his or her situation. If the differentiation was found not to be unfair, there would be no violation of ... [equality clause].*

³⁰ 1997 (11) BCLR 1489 (CC) para 50.

- (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 ...'.*

D EVALUATION

i) *Brief Historical Overview*

- [61] Before the promulgation of the Recognition Act, customary marriages were neither accorded the respect they deserved nor recognized as valid marriages.³¹ Those who wished to marry each other under customary rites were regarded as having concluded customary unions which were regulated by the now-repealed Black Administration Act.³² Under this repealed Act, a customary union was viewed as an association of a man and a woman in a conjugal relationship according to what was described as 'Black law and custom' where neither the man nor the woman was a party to a subsisting marriage by civil rights.³³ This union was regarded as automatically out of community of property.³⁴
- [62] In *Matchka v Mnguni*,³⁵ it was held that where black people (who were referred to as natives in the judgment), entered a customary union and subsequently concluded a civil marriage, the civil ceremony automatically overridden the customary union and the parties would be regarded as having been entered into a civil marriage with each other.
- [63] Section 22(6) of the Black Administration Act was repealed through the insertion of sections 21(2)(a) and 25(3) into the Matrimonial Property Act where those who were party to a customary union were allowed to change

³¹ See Burman S 'Illegitimacy and the African Family in a Changing South Africa' (1991) *Acta Juridica* 36-51, 36, who at the time observed that '[i]n South Africa marriage by customary law has a somewhat anomalous status. It is not recognized by the state as a full marriage with the consequences of a marriage according to the law of the land, and is termed a 'customary union' to distinguish it from a marriage'.

³² 38 of 1927.

³³ *M.M v R.A.N* (A07/2022) [2023] ZALMPHHC 2 (3 March 2023) para 15.

³⁴ See repealed section 22(6) of the Black Administration Act.

³⁵ PH.1946(2) 88.

such a union into civil marriages but were not allowed to conclude a civil marriage with a different person while they were still married to each other.³⁶

[64] The promulgation and coming into effect of the Recognition Act had the effect of converting customary unions into customary marriages. Since the promulgation of this Act, couples can enter customary marriages and not customary unions. This Act also provided space for those who entered customary marriages to register these marriages. Most importantly, section 4(9) of this Act provides that '*[f]ailure to register a customary marriage does not affect the validity of that marriage*'. This Act provides full recognition to customary marriages and, in terms of its preamble, aims to provide for the equal status and capacity of spouses in these marriages.

[65] The Constitutional Court in *Sithole and Another v Sithole and Another*,³⁷ declared section 21(2)(a) of the Matrimonial Property Act unconstitutional and invalid because it perpetuated the discrimination created by the repealed section 22(6) of the Black Administration Act by continuing to classify marriages entered into by black couples as automatically out of community of property. All marriages of black people that were out of community of property and were concluded under section 22(6) of the Black Administration Act before the 1988 amendment were, save for those couples who opted for marriage out of community of property, declared to be marriages in community of property.

[66] All monogamous customary marriages are regulated by section 7(2) of the Recognition Act. In terms of this provision, these kinds of marriages are in community of property unless the parties execute an antenuptial contract before they conclude them where they specifically exclude community of property.

³⁶ See generally Marriage and Matrimonial Property Law Amendment Act 3 of 1998. See also *Nkambula v Linda* [1951] 1 All SA 412 (A) 417, where it was stated that '[s]ince our common law did not regard a Native customary union as a legal marriage, such a union was no legal obstacle to a civil marriage between one of the partners to it and a third person, and there was no reason why the Act should make it so. It was only logical, therefore, for the Act to take cognisance of the possibility of such a partner civilly marrying someone else. What it did was to preserve the "material rights" of the other partner to the customary union and any issue thereof ...'.

³⁷ 2021 (6) BCLR 597 (CC); 2021 (5) SA 34 (CC).

[67] It is important to note that there is no hierarchy between customary law and common law. In other words, while marriages concluded in terms of customary rites were disrespected and seen as subservient to those entered into in terms of the accepted norms under the common law during the dark colonial and apartheid times, with the advent of a constitutional order which is based on the values of equality, freedom, and human dignity, customary law as a system of law generally and customary marriages, in particular, are worth of equal respect, protection, and application.

[68] In short, common law is not and should never be regarded as superior to customary law in South Africa. Both these systems of law are subject to the Constitution which is the supreme law in the country and courts must develop their principles and rules when they are found to be constitutionally wanting. I agree with the first defendant in this matter that civil marriages which represent a Western culture were generally regarded as superior to customary marriages. With respect, this view represented a backward and unfounded superiority complex that cannot be sustained in a constitutional democracy. The foundation of this judgment is that the initial customary marriage that the parties entered into in this case is not inferior to the subsequent civil marriage that they concluded.

ii) Validity of the Purported Antenuptial Contract

[69] This case presents a difficult question of law, which with respect, is yet to be adequately answered in South Africa. Currently, there is neither legislative nor judicial clarity on the status of an agreement that parties to an existing customary marriage in community of property sign to provide for the proprietary consequences of the civil marriage that they contemplate concluding out of community of property.

[70] It is not entirely clear whether this is antenuptial, which ordinarily should be concluded before entering into a marriage, or a postnuptial contract that should be concluded after the parties have entered into their marriage to change the matrimonial property regime that is already applicable to their

existing marriage. The *amicus curiae* maintains that such a contract is an antenuptial contract that does not affect the existing customary marriage but merely regulates the proprietary consequences of the contemplated civil marriage.

[71] In my view, the approach taken by the *amicus curiae* is an oversimplification of a very complex legal construct. While it may be correct that the contract entered into between the parties was intended to be an antenuptial contract, sight cannot be lost to the fact that this contract also seeks to regulate assets that formed part of the parties' joint estate created by the customary marriage. The party advocating for the signing and registration of this contract usually has his eyes on the existing assets that are part of the joint estate that he may have brought into the marriage. This contract is used to remove such assets from the reach of the other spouse should the parties divorce. It is not a contract that is purely forward-looking, in that it only seeks to regulate the proprietary consequences of the contemplated civil marriage.

[72] Usually, when one of the parties to the customary marriage already owns significant assets such as immovable property, when he (or she) marries in community of property, no process is taken by the parties to ensure that both of the parties' names appear on the title deed which is a *prima facie* proof of ownership. By virtue of the contract of marriage, the other spouse will by operation of law become a co-owner in an undivided share of that asset. Once ownership has accrued to such a spouse, should the parties later conclude an antenuptial contract out of the complete community of property, severe prejudice may befall the financially weaker spouse.

[73] While in principle, as argued by the *amicus curiae*, the rights of the spouse who did not bring the asset into the marriage 'should' not be affected, however, once the antenuptial contract has been registered, the spouse who brought the asset into the customary marriage will be able to unilaterally deal with that asset as he (or she) wishes to the prejudice of the other spouse. This is because the name that appears on that asset would be his (or hers) and he (or she) will be armed with an antenuptial contract that does not reflect the

joint estate created by the customary marriage. As a spouse who is now married out of community, the spouse who is prejudiced will not be able to rely on the protections provided in Chapter III of the Matrimonial Property Act.

[74] The situation might be different when the accrual system is applicable and none of the assets that were part of the joint estate established by the customary marriage are not excluded in the antenuptial contract. In this case, the contract signed by the parties starts by reflecting both parties' net commencement value as nil. In terms of section 4(1) of the Matrimonial Property Act, *'[t]he accrual of the estate of a spouse in the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage'*.

[75] The contract signed by the parties gives the impression that none of them had any assets of value at the time this contract was signed. Further, upon divorce, only the assets that were accumulated after the civil marriage was concluded will be considered for the calculation of the accrual if it is found that the estate of any of them at the time of divorce is smaller than the other. But the averments in the particulars of claim provide a different story. It is stated therein that the parties' assets include immovable property, movable property, pension fund, and or other policies. It is even clearer in the counterclaim that there is an immovable property that is in the name of the plaintiff.

[76] This means that the net commencement value of the parties at the time they registered an antenuptial agreement was certainly not nil. Most concerningly, this agreement expressly states that the assets of the parties, some of which formed part of the joint estate, should not be considered as part of their respective estates at either the commencement or the dissolution of the marriage. By so doing, this agreement has been used to decide the fate of the assets that originally formed part of the parties' joint estate established by their customary marriage. This is not an academic issue, but the first defendant's and similarly situated black women's reality.

[77] In *Mphosi*, the court appears to have adopted the pre-constitutional approach of *Matchka v Mnguni*, that a subsequent civil marriage terminates the initial customary marriage by operation of law. With respect, I disagree with this view. There is nothing in section 10 of the Recognition Act that supports the view that a civil marriage terminates the initial customary marriage and ends the proprietary consequences of the customary marriage in community of property.

[78] The legal position of spouses who entered into a monogamous customary marriage in community of property and later concluded a civil marriage out of community of property with each other requires urgent clarification. In particular, the effect of the subsequent civil marriage on the customary marriage is not particularly clear. Section 8 of the Recognition Act is quite clear on how customary marriages dissolve. In terms of this provision, customary marriages may only be dissolved by a court through a decree of divorce.

[79] While it cannot be doubted that death can certainly terminate a customary marriage, there is nothing in this provision that seeks to suggest that monogamous customary marriages can be terminated by the same spouses entering a civil marriage. In my view, the issue of termination does not arise. There is no need for the parties' marriage to be dissolved to allow them to share assets before they enter a contract that is intended to regulate the proprietary consequences of their contemplated civil marriage.

[80] I am also not convinced, as was stated in *Mphosi*, that:

'[t]he legal position of the parties to the customary marriage who elected to conclude a civil marriage is similar to parties in community of property who divorced and subsequently remarry out of community of property in terms of an antenuptial contract with the exclusion of the accrual system as contemplated by the Matrimonial Act'.³⁸

³⁸ *Mphosi* supra note 22 above para 21.

- [81] I do not agree that the Legislature intended that section 10 of the Recognition Act should be interpreted as allowing for the dissolution of monogamous customary marriages by civil marriages between the same parties. In my view, there is no reason why the words used in this section should not be given their ordinary grammatical meaning that their context dictates. Section 10(1) of this Act clearly provides that spouses in monogamous customary marriages are legally entitled to enter into a civil marriage with each other if none of them is married to another person in terms of customary law. There is nothing ambiguous about this provision as was stated in *Mzalisi NO and Others v E O and Another*.
- [82] None of the parties in this case has challenged the constitutionality of section 10(1) of the Recognition Act or suggested that it is somehow ambiguous. It was, however, argued on behalf of the *amicus curiae* that permitting persons married to each other in terms of customary law to marry each other again under the Marriages Act is an anomaly. Similarly, section 10(2) of the Recognition Act should be interpreted literally because it is not ambiguous. The intention of the legislature in this provision was clearly to provide for the proprietary consequences of the contemplated civil marriage. Subsequent civil marriages will be in community of property unless the parties enter into a contract that specifically excludes community of property. There is nothing ambiguous about this.
- [83] Unfortunately, the problem that the Legislature seems to have not anticipated arises when parties to a customary marriage in community of property later enter into a contract that allows them to conclude a civil marriage out of community of property. This is an important aspect that the Recognition Act in its entirety does not address.
- [84] The Legislature would not have intended that the subsequent marriage would terminate the initial marriage. The Legislature intended that the initial customary marriage would be replaced by the subsequent civil marriage and in the process not to frustrate the spouses' marital relationship. The act of termination is a legal conduct that dissolves marriages and forces parties to

live without each other. The provisions of section 10 of the Recognition Act deal with the concept of change and are consistent with the heading of this section. Osman correctly argues that:

'[a] basic rule of statutory interpretation is that the headings of legislation are part of the enactment and may be referred to in establishing the meaning of ambiguous provisions. Section 10 is entitled "Change of marriage system". The word "change" is defined as "something that may be substituted for another thing of the same type". This suggests that the customary law marriage is made into something different, namely a civil marriage'.³⁹

[85] However, Osman further argues that *'[t]his lends credence to the interpretation that the civil law marriage terminates the customary law marriage, which now becomes a civil marriage'*. I am afraid I do not agree with this view. Once it is accepted that the legislature intended the change not only in terms of marriage types but also the matrimonial property regimes, it cannot follow that an initial customary marriage is terminated by a subsequent civil marriage. A customary marriage is not terminated but replaced by a civil marriage. If the argument for termination is accepted, it will raise unnecessary legal uncertainties.

[86] For instance, how should the rights that accrued in the joint estate established by the customary marriage be protected once the civil marriage has been concluded if the financially stronger spouse chooses to prejudice the financially weaker spouse? A better approach is to interpret section 10 of the Recognition Act in line with its heading, which deals with the concept of change as opposed to termination. This is also a literal interpretation that gives content to the grammatical construction of this provision.

[87] The legislature clearly intended to allow spouses to change their marriages from customary to civil marriages. Allowing spouses to initiate this change and not legislatively allow those who are party to civil marriages to change their marriages to customary marriages raises eyebrows and creates an

³⁹ Osman F 'The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?' (2019) 22 *PER* 1 – 22 at 10.

impression that civil marriages are viewed as superior to customary marriages. However, this is not an issue that this court must decide. Currently, the law allows spouses married in monogamous customary marriages to change their marriages to civil marriages. There are generally no difficulties that arise when parties retain the same matrimonial property regime when effecting the change.

[88] The position is different when spouses enter into a contract that seeks to adopt a different matrimonial property regime for the contemplated civil marriage to that which applies to their customary marriage. Under these circumstances, there is a need for judicial oversight to ensure that the rights of financially weaker spouses are not prejudiced. In other words, the parties must apply to the High Court in terms of section 21 of the Matrimonial Property Act for leave to change their matrimonial property regime, particularly when the contract intended to pave the way for the conclusion of a civil marriage will allow one of the parties to unilaterally deal with any of the assets or deemed assets that accrued or were to accrue to the spouses' joint estate created by the customary marriage.⁴⁰

[89] While I am not convinced that these marriages are dual marriages in the strict sense simply because one marriage changes into another or is substituted by another, I agree with Sibisi that:

'when parties enter into a customary marriage, in compliance with culture, without an antenuptial contract such marriage will be in community of property. If the parties subsequently attempt to execute an antenuptial contract in view of an impending civil marriage, this antenuptial contract will be null and void because the parties are already married in terms of customary law and their marriage is in community of property. The correct procedure is to approach the High Court for an order allowing the parties to change the matrimonial property system applicable to their marriage. This procedure is set out in s 21 of the Matrimonial Property Act 88 of 1984'.⁴¹

⁴⁰ Section 7(5) of the Recognition of the Customary Marriages Act.

⁴¹ Siyabonga Sibisi 'Dual marriage: S guide to antenuptial contracts' (2022) Nov *De Rebus* 8.

- [90] It was submitted on behalf of the *amicus curiae* that a civil marriage is contemplated as a further marriage by section 10 of the Recognition Act, meaning that two marriages are envisaged. I doubt that the Legislature could have intended that the same parties who are married in terms of Customary Law could also simultaneously enter a civil marriage.
- [91] What was intended with section 10(2) of the Recognition Act was that only one marriage would exist at a time. First, the parties are allowed to enter into a customary marriage. Secondly, if they wish to conclude a civil marriage, they are empowered to replace their existing customary marriage with their contemplated civil marriage. The issue of dual marriages does not *per se* arise. At all times, the parties would be spouses to only one marriage, with one replacing the other. I do not agree that this provision could be interpreted to the extent that it contemplates a further marriage. This provision only provides for a substitute. However, the challenge arises when a different matrimonial property system is entered into without leave of the court that will alter accrued rights in assets that are held in co-ownership in undivided shares.
- [92] The fact that spouses celebrate their 'union' by first following the indigenous route and later the Christian route through a white wedding, does not necessarily indicate that the parties concluded dual marriages. If in the Indigenous route, the parties comply with all the requirements of concluding a valid marriage and later go to a church or hired venue to exchange vows and comply with the formalities listed in the Marriages Act, at the time of the registration of the civil marriage, the customary marriage will automatically be changed and replaced by the civil marriage as contemplated in section 10(2) of the Recognition Act. Before such registration, the parties were married in terms of customary law. After the registration, they would have entered a civil marriage. At no point, they would have been married in terms of two marriage types to sustain the argument of dual marriages.
- [93] The challenge is when the contemplated civil marriage is preceded by a contract that seeks to regulate assets that fell into the joint estate established

by the customary marriage to the prejudice of one of the spouses. The extent to which the contract that the parties entered to regulate their contemplated civil marriage years after concluding their customary marriage refers to or deals with any of the assets that fell within the joint estate created by the customary marriage, such a contract cannot be regarded as an antenuptial contract. To do so will be to allow the plaintiff in this case to effectively deal with the assets that fell within the joint estate, particularly the immovable property and retirement benefit which should be deemed to be a patrimonial asset for the purposes of divorce, as if those assets were his sole assets to the prejudice of the first defendant.

[94] This will grant the first defendant a mere right to share in the growth of the plaintiff's estate as opposed to sharing as a co-owner in undivided shares in these assets. In my view, this is not an antenuptial contract but a postnuptial contract that changes the parties' matrimonial property system from that of community of property to that of out of community of property with the application of the accrual system which was concluded without leave of the court as contemplated in section 21 of the Matrimonial Property Act. This renders this contract to be invalid.

[95] Section 21 of the Matrimonial Property Act must be complied with when spouses who are married in monogamous customary marriages in community of property later wish to enter civil marriages out of community of property with each other. This will provide the necessary protection to financially weaker spouses and the parties' creditors. This section prevents the change of the applicable matrimonial property system without judicial oversight.

iii) Unfair Discrimination

[96] Mr Myburgh correctly argued on behalf of the first defendant that section 10(2) of the Recognition Act allows for the conclusion of a contract that materially alters the patrimonial position of both spouses, which alteration then constitutes the patrimonial regime of the civil marriage without spouses sharing their assets or application to the court. This provision disregards the

communal estate created by the customary marriage and allows interference with the ownership rights of the spouse who did not bring the assets into the joint estate.

[97] It was also correctly argued on behalf of the first defendant that in terms of section 8(1) of the Recognition Act, customary marriages may be dissolved by a court. Mr Haskins argued that since death can also dissolve a customary marriage and is not one of the listed methods of dissolution in this provision, the conclusion of civil marriages by spouses who are married in terms of customary law also dissolves their customary marriage.

[98] This may well be true. However, this approach does not deal with the practical reality of the financially stronger spouse dealing with the property that fell into the joint estate as he pleases after the conclusion of the civil marriage and the other spouse being rendered legally powerless to protect the ownership rights that accrued to her in that asset when the customary marriage was entered into in community of property.

[99] The first constitutional attack on section 10(2) of the Recognition Act is that it unfairly discriminates against financially weaker spouses, most of whom are women, in monogamous customary marriages. It is argued on behalf of the first defendant that even though this provision does not *per se* treat different people differently, its application results in a certain group of people being treated differently. Does this provision differentiate between people or categories of people?

[100] To answer this question, it is important to reflect on the circumstances of spouses who are party to civil marriages in community of property who wish to change their matrimonial property system to out of community of property. First, there is no legislative framework for these spouses' marriages to be replaced by another form of marriage to their financial prejudice. These parties' civil marriages cannot legislatively be changed to customary marriages or even civil unions. Secondly, their vested rights and entitlements

in the assets that constitute their joint estate cannot be affected by any contract that is signed by the parties without judicial oversight.

[101] In other words, these spouses chosen matrimonial property regime cannot be changed without leave first being sought from a court in terms of section 21 of the Matrimonial Property Act. It appears that the first defendant is of the view that the discrimination is based on gender, and to some extent race. These are listed grounds in section 9(3) of the Constitution. This provision provides that the State may not unfairly discriminate, “directly or indirectly”, against any person on one or more of the grounds listed in that section.

[102] Spouses in monogamous civil marriages have legislative protection that spouses in monogamous customary marriages do not have and that amounts to differentiation. While there is no legislative bar on persons from any other races to enter into customary marriages, these types of marriages are concluded mainly by black South Africans. Even though this category of people is not prohibited from concluding civil marriages when they have concluded monogamous customary marriage they are treated differently. This issue is also gendered by its very nature. It is mostly women, as argued by the first defendant supported by the *amicus curiae*, who are financially prejudiced when their monogamous customary marriages are changed into monogamous civil marriages, and they are later divorced.

[103] The plight of women in marriages was captured by the Constitutional Court in *EB (born S) v ER (born B) and others and a related matter*.⁴² It cannot be denied that black married women have been marginalized in South Africa and are deserving of legislative and judicial protection.⁴³ Black women who are party to monogamous customary marriages were antenuptial contracts that paved the way for the conclusion of monogamous civil marriages are

⁴² 2024 (1) BCLR 16 (CC) para 130, where the court held that ‘[t]he hardship for women in new ANC marriages on divorce can be very great. Women have in the past suffered from patterns of disadvantage. A woman’s fundamental human dignity is impaired when no recognition is given to the contribution she has made to the increase in her husband’s estate’.

⁴³ *K.R.G v Minister of Home Affairs and Others* [2022] 3 ALL SA 58 (GP); 2022 (5) SA (GP) para 56.

registered, are prejudiced by section 10(2) of the Recognition Act. This provision allows for their matrimonial property regime established by their customary marriage to also be changed when their marriage is changed from customary to civil without judicial oversight. This differentiation does not bear any rational connection to any legitimate governmental purpose.

[104] The second task in the inquiry is to assess whether the differentiation amounts to unfair discrimination. To do so, the starting point is to establish whether the differentiation amounts to discrimination. It cannot be denied that spouses in monogamous civil marriages can apply to the court to have their matrimonial property regime changed before any contract that seeks to change and regulate their proprietary consequences can take effect. However, section 10(2) of the Recognition Act has effectively taken that protection away from spouses who are party to monogamous customary marriages. The differentiation does amount to discrimination.

[105] Once discrimination has been established, there is a need to assess whether it amounts to unfair discrimination. The unfairness of the discrimination is assumed because it is based on gender and to some extent race, which are specified grounds of discrimination. In this case, the test of unfairness is focused primarily on the impact of the discrimination on the first defendant and those who are similarly situated. There is an immovable property in this case which fell within the joint estate. There is also mention of the retirement benefit in the plaintiff's particulars of claim. This indicates that the plaintiff is a member of a retirement fund.

[106] The impact of the contract that the parties signed years after concluding their customary marriage and before entering their civil marriage on the first defendant is that it sought to prescribe what should happen to the immovable property within the parties' joint estate to her prejudice. In particular, it sought to describe this asset as the exclusive asset of the plaintiff, thereby forcing the first defendant to waive her accrued and entitled rights on this property without judicial oversight.

[107] Similarly, when spouses are married in community of property, divorce becomes a trigger event that entitles the non-member spouse to claim a portion of the member spouse's retirement benefit as a co-owner in an undivided share once that benefit has been deemed to be a patrimonial assets in terms of section 7(7) of the Divorce Act.⁴⁴ However, through the contract that was signed by the parties, the first defendant will not be entitled to claim her portion directly as the co-owner in an undivided share once the deeming provision has taken effect but will have to claim this benefit as part of the accrual. Spouses whose matrimonial property regimes were not changed to out of community of property without judicial intervention are not forced to waive their benefits in this manner. The discrimination is certainly unfair.

[108] The final stage of analysis is to determine whether section 10(2) of the Recognition Act can be justified under section 36 of the Constitution. It cannot be denied that this provision applies generally to those who enter into customary marriages and later decide to marry each other in civil marriages. It is doubtful whether not providing for judicial intervention when a matrimonial property regime is changed is reasonable in an open and democratic society based on human dignity, equality, and freedom.

[109] In my view, this provision cannot be saved by the limitation clause because the importance of the limitation is simply not clear to even assess whether it justifies denying black women in monogamous customary marriages who are financially weaker spouses legislative protection when their marriages are changed into civil marriages out of community of property. The extent to which section 10(2) of the Recognition Act permits spouses married in terms of customary law to change their applicable matrimonial property regime from community of property to out of community of property without judicial oversight as contemplated in section 21 of the Matrimonial Property Act to the prejudice of economically weaker spouses, majority of whom are women just like the first defendant, is invalid and inconsistent with section 9(1) of the Constitution.

⁴⁴ See *CNN v NN* [2023] 2 ALL SA 365 (GJ); [2023] (5) SA 199 (GJ) para 24.

vi) Deprivation of Property

[110] Community of property is a default matrimonial property regime that demonstrates the spouses' willingness to co-own with each other, and in undivided shares, the assets they individually bought into the marriage and those that they either individually or collectively acquired during the marriage.⁴⁵ Those who choose to enter into customary and civil marriages which are in community of property are also jointly liable for the liabilities that arise from their joint estates.⁴⁶

[111] There is a statutory avenue available to spouses who wish to protect their interests in the assets that form part of their joint estate during the subsistence of the marriage. In terms of section 20 of the Matrimonial Property Act, any spouse to a marriage in community of property who is of the view that his or her interest in the joint estate is seriously prejudiced by the conduct or proposed conduct of the other spouse can apply to the court for an immediate division of the joint estate.⁴⁷

[112] In this case, the *amicus curiae* seems to be of the view that this is one of the options available to a prejudiced spouse in a monogamous customary marriage. The difficulty with this is that prejudice is often crystalized at the time of divorce. It is for this reason that an inquiry into whether the first defendant was not deprived of her assets, or her interests therein, at the time when the contract that paved the way for the parties to conclude a civil marriage was registered with the deeds registry is necessary. Most importantly, it is worth assessing whether the assets held in the joint estate constitute property that requires constitutional protection.

[113] Section 25 of the Constitution has constitutionalized the right to property. In South Africa, there is no closed list of proprietary interests that can exclusively be accorded constitutional protection. The concept of property, from a

⁴⁵ *D v D* (15402/2010) [2013] ZAGPJHC 194 (10 May 2013) para 14.

⁴⁶ *Sequeira v Standard Bank of South Africa Ltd and Others* (45914/2021) [2023] ZAGPJHC 1272 (27 October 2023) para 6.

⁴⁷ Section 20 of the Matrimonial Property Act.

constitutional point of view, cannot be divorced from the social context of the society that is regulated by the Constitution and its members. Spouses in monogamous customary marriages are part of the society that is regulated by the Constitution, and they too are entitled to the protection that section 25 of the Constitution offers concerning properties in South Africa.

[114] In this case, there is an immovable property and possibly a retirement benefit (when it accrues and is deemed to be an asset) from which the first defendant derived the right to benefit because of the customary marriage that she entered with the plaintiff. However, she now faces the reality of these assets being taken out of the joint estate. These assets are now placed far from her reach as the co-owner thereof in undivided shares through a contract that sought to regulate the proprietary consequences of the civil marriage that the parties later concluded.

[115] The Constitutional Court in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance*,⁴⁸ held that:

'... a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'.

[116] According to the Constitutional Court, one of the factors that can be used to provide sufficient reason for the deprivation is the *'... relationship between the purpose for the deprivation and the person whose property is affected'*. It is not clear what is the purpose of depriving the first respondent of her ownership over the assets that constituted her joint estate. There appears to be no sufficient reason for this deprivation.

[117] The contract the parties signed after entering a customary marriage but before concluding their civil marriage, which has the effect of allowing the plaintiff to deal with the immovable property (and the retirement benefits when

⁴⁸ 2002 (7) BCLR 702 (CC) para 100.

it accrues) as he wishes and relegate the first defendant's claim to an accrual claim, amounts to an arbitrary deprivation of property. This deprivation is unlawfully permitted by section 10(2) of the Recognition Act, which is a law of general application.

v) Remedy

[118] It was submitted on behalf of the first defendant that the unconstitutionality of section 10(2) of the Recognition Act can be cured by 'reading in' certain work into this provision. The Constitutional Court in *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and others v Minister of Police and others*,⁴⁹ cautioned that '*... the remedy of reading-in must be used sparingly so as not to encroach on the terrain of the Legislature*'. This is because the judges' business is not to make law. After all, they are not elected to do so. While judges can develop the common law and declare any conduct or law to be inconsistent with the Constitution, their primary duty is to resolve disputes through the interpretation and application of the law.

[119] Nonetheless, 'read in' is an effective constitutional remedy that courts can use to cure the unconstitutionality identified in any legislative provision caused by an omission of the words that need to be inserted into the legislative provision to make that provision constitutionally compliant.⁵⁰ It has been held that '*... when reading in ... a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution*'.⁵¹ Most significantly, The Constitutional Court in *National Director of Public Prosecutions and Another v Mohamed NO and Others*, confirmed that:

'... a High Court has the same competence as the Constitutional Court to "read in", as a remedy for the constitutional invalidity of a statutory provision. This may of course only be done in circumstances appropriate to such a remedy and will have no force unless and until confirmed by this Court'.⁵²

⁴⁹ 2022 (1) BCLR 46 (CC)

⁵⁰ See *Mkhize v Umvoti Municipality & others* [2011] JOL 27891 (SCA) para 19.

⁵¹ *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* [2000] JOL 5877 (CC) para 75.

⁵² 2002 (9) BCLR 970 (CC) para 28.

[120] It was argued on behalf of the first defendant that the identified unconstitutionality can be cured by reading in two words into section 10(2) of the Recognition Act. It was proposed that the word 'existing' should be read in between the words 'an' and 'antenuptial contract'. Further, the word 'customary' should be read in between the words 'their' and 'marriage' in that provision. The *amicus curiae* supports this proposal.

[121] A careful reflection on the first defendant's proposal reveals that it seeks to offer some protection to spouses who are party to monogamous customary marriages to ensure that their rights and financial interests in the existing customary marriages are not disregarded when a monogamous civil marriage is later concluded. This proposal is sound and does not include any budgetary implications for the state. Furthermore, it does not amount to undue or excessive encroachment on the terrain of the legislature. However, I am of the view that the Legislature should first be allowed an opportunity to correct the identified defect within 12 months, failing which the suggested words should automatically be read in to the section.

E CONCLUSION

[122] The courts are constitutionally mandated to interpret and apply the law in such a way that promotes respect for the rule of law, advancement of the constitutional project, and protection of the marginalized groups in society. While some efforts have been made to economically emancipate women generally and black women in particular, a lot still has to be done to ensure their economic equality. The Constitutional Court has accepted that black women are the 'marginalised of the marginalised' and that the burden of poverty is heavier on them than white women.⁵³ It is for this reason that black women should be afforded some legislative protection when they are married in terms of customary law in community of property, and are later led to change their marriages to civil marriages out of community of property.

⁵³ *EB (born S)* supra note 1 above paras 74 and 121.

[123] Even though there was no appearance on half of the plaintiff when the matter was argued, the plaintiff put up a version that contradicted that of the first defendant which was considered in this judgment. Further, the first defendant was placed by the plaintiff in a position where she has to litigate to safeguard her proprietary rights. There is no reason why the plaintiff should not be ordered to pay the first defendant's costs. It will not be fair to force the plaintiff to also pay the legal costs for the *amicus curiae*.

ORDER

[124] In the results, the following order is made:

1. The agreement entered into by the first defendant and the plaintiff on 19 February 2019 is declared invalid and unenforceable.
2. Section 10(2) of The Recognition of Customary Marriages Act is declared to be inconsistent with sections 9(1) of the Constitution and invalid to the extent that it permits the conclusion of contracts that seek to change the parties' matrimonial property regimes and thereby regulate their proprietary consequences after such parties' have concluded customary marriages without judicial oversight.
3. Section 10(2) of The Recognition of Customary Marriages Act is declared to be inconsistent with section 25(1) of the Constitution and invalid to the extent that it permits arbitrary deprivation of financially weaker spouses' ownership rights over assets that form part of their joint estates established by their customary marriages, when post their marriages they are led to sign contracts that change their matrimonial property regimes from community of property to out of community of property without judicial oversight.
4. This declaration of invalidity is suspended for 12 months to allow the Legislature to correct the defect.
5. Should the Legislature fail to correct the defect within this period, the words '*existing*' and '*customary*' will be read in to section 10(2) of The Recognition of Customary Marriages Act as follows:

*'When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an **existing** antenuptial contract which regulates the matrimonial property system of their **customary** marriage'.*

- 6 The abovementioned orders are referred to the Constitutional Court in terms of section 172(2)(a) of the Constitution for confirmation.
- 7 The Registrar of this Court is directed to comply with Rule 16(1) of the Rules of the Constitutional Court in this regard.
- 8 The plaintiff is ordered to pay the costs of the first defendant in this matter including the costs of two counsel, in terms of the rules that were applicable before the recent amendments that took effect on 12 April 2024.

[...]

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Counsel for the Plaintiff	:No appearance
Instructed by	:No appearance
Counsel for the First Defendant	:Adv SJ Mayburgh and with Adv C Jacobs and with Adv S Maseko
Instructed by	:Phuti Manamela Attorneys
Counsel for the amicus curiae	:Adv Haskins SC and with Adv Standler

Instructed by :Adams & Adams

Date of the hearing : 4 December 2023

Date of Judgment :10 June 2024