CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 146/17

In the matter between:

BUKELWA NOLIZWE HOLOMISA Applicant

and

SANGO PATEKILE HOLOMISA First Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Second Respondent

Neutral citation:	*Bukelwa Nolizwe Holomisa v Sango Patekile Holomisa and Another* [2018] ZACC 40
Coram:	Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J and Theron J
Judgment:	Froneman J (unanimous)
Heard on:	14 August 2018
Decided on:	23 October 2018
Summary:	Transkei Marriage Act 21 of 1978 — Divorce Act 70 of 1979 — Community of Property — Rationalisation of laws — Direct Access

ORDER

The following order is made:

1. The Minister of Justice and Correctional Services is joined as second respondent.
2. Direct access is granted.
3. Sub-section 7(3) of the Divorce Act 70 of 1979 is declared constitutionally invalid to the extent that it excludes a spouse married out of community of property who has not entered into an ante-nuptial contract or an express declaration in terms of section 39(2) of the now repealed section 39 of the Transkei Marriage Act 21 of 1978, from its ambit.
4. The declaration of constitutional invalidity is suspended for 24 (twenty-four) months to allow Parliament to remedy this defect.
5. During the period of suspension section 7(3) of the Divorce Act 70 of 1979 must be read so as to include the following as section 7(3)(c):

   "entered into in terms of the Transkei Marriage Act 21 of 1978, as it existed before the repeal of section 39, without entering into an ante-nuptial contract or an express declaration in terms of the repealed section 39(2) before the marriage."
6. Leave to appeal is granted
7. The appeal succeeds.
8. The order of the Supreme Court of Appeal is set aside and substituted with the following:

   "(a) The matter is referred back to the Regional Court to determine the proprietary interests of the applicant and the first respondent;

(b) Nothing in this order will bar any party from amending their pleadings in relation to the determination of their proprietary interests arising from the marriage;

(c) Costs of this appeal will be costs in the cause of determining the proprietary interests arising from the marriage."

9. There will be no costs order in this Court.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J and Theron J concurring):

Introduction

[1] In *Khohliso* Van der Westhuizen J, writing for this Court, remarked:

> "It is rather odd that – 20 years into our constitutional democracy – we are left with a statute book cluttered by laws surviving from a bygone undemocratic era remembered for the oppression of people; the suppression of freedom; discrimination; division; attempts to break up our country; and military dictatorships."[1]

[2] This case concerns the discriminatory oddity that women married out of community of property under the Transkei Marriage Act[2] do not enjoy the protection, on divorce, of section 7(3) of the Divorce Act.[3] Section 7(3), read with section 7(4) and 7(5), empowers a court granting a decree of divorce in respect of a marriage out

[1] *Khohliso v the State* [2014] ZACC 33; 2015 (1) SACR 319 (CC); 2015 (2) BCLR 164 (CC) at para 53.

[2] 21 of 1978.

[3] 70 of 1979.

of community of property to order a redistribution of assets where it considers it just and equitable to do so, taking into consideration the contribution, monetary and otherwise, of the parties to the marriage.[4] Its effect was mainly to make transfers possible that favoured women married out of community of property.

[3] The section addresses only those persons who were married out of community of property—

(a) before the commencement of the Matrimonial Property Act[5] in terms of an ante-nuptial contract which excluded community of property, profit and loss and accrual; and

(b) before the commencement of the Marriage and Matrimonial Property Law Amendment Act[6] in terms of section 22(6) of the Black Administration Act.[7]

No mention is made of those persons married out of community of property under the Transkei Marriage Act.

[4] There is no dispute that this differentiation is irrational and discriminatory. The problem is what to do about it in view of procedural and formal hurdles. In order to understand these some factual context is needed.

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[4] The section is quoted in full below at [17].

[5] 88 of 1984.

[6] 3 of 1988.

[7] 38 of 1927. Section 22(6) reads:

> "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 spouse at any time within one month previous to the celebration of such to declare jointly before any magistrate, native commissioner, or marriage officer (who is hereby authorised 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."

Litigation history

[5] The applicant and the first respondent married each other at Mqanduli in the Transkei on 16 December 1995. The first respondent instituted an action for divorce in the Mthatha Regional Court, averring that the marriage was out of community of property. The applicant denied this in her plea and pleaded that the marriage was in community of property. She counterclaimed for a divorce, primary care of the children, maintenance for herself and the children and division of the joint estate.

[6] Although the matter was defended the Magistrate allowed it to proceed in the absence of the applicant. This was done on the basis that her attorneys had mischievously and irregularly filed a notice of withdrawal of the set down notice and that accordingly the Magistrate inferred that she had received proper notice of the set down for trial. The applicant's attorney had also not attended the pre-trial conference despite notice to do so.

[7] Before the first respondent was called to testify the Magistrate made a ruling that the marriage was in community of property. After the first respondent's evidence was led the Magistrate granted a decree of divorce, made orders in relation to the care of the children and ordered division of the joint estate.

[8] The first respondent appealed to the High Court of South Africa Eastern Cape Local Division, Mthatha (High Court). For different reasons than those of the Regional Court, the High Court nevertheless confirmed the holding that the marriage was in community of property and the resultant order of division of the joint estate. The appeal was thus dismissed with costs.[8]

[8] The reasoning of the High Court was that the Magistrate erred in holding that the Marriage Extension Act impliedly repealed the Transkei Marriage Act. The High Court held that retrospective operation of the Marriage Extension Act did not have the effect of altering the matrimonial property regimes of parties whose marriages were solemnised after 27 April 1994 and prior to the repeal of section 39 of the Transkei Act by virtue of the Recognition of Customary Marriages Act during November 2000. However the High Court concluded that the evidence adduced by the first respondent from the witness stand coupled with the fact that he was unable to provide a copy of the Marriage Certificate to establish a prima facie case that he and the applicant were in fact married and domiciled in the Transkei in terms of the Transkei Marriage Act, coupled with the fact that in the High Court he had been unable to establish same, meant that he failed to adduce sufficient evidence to prove

[9] On further appeal to the Supreme Court of Appeal that Court reversed this conclusion. It held that the marriage was out of community of property. It upheld the appeal and substituted the order of the Regional Court to the limited extent that the order of division of the joint estate was deleted and the applicant's counterclaim dismissed.

[10] The issue relating to the constitutional validity of section 7(3) of the Divorce Act was raised for the first time, and only in heads of argument, before the Supreme Court of Appeal. The applicant's contentions in that regard received short thrift:

> "However, she contended that the issue pertaining to the matrimonial property regime of the parties had not been properly ventilated in the Regional Court and urged this court to refer the matter back to that court so that more evidence could be led on this aspect. In the alternative, Counsel submitted that section 7(3) of the Divorce Act 70 of 1979 was unconstitutional in that it did not allow the respondent and other vulnerable women married in terms of the Transkei Act, without an ante-nuptial contract, to seek a redistribution of the husband's assets, as was afforded to women married in terms of section 22(6) of the Black Administration Act 38 of 1927.
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> The first contention can be disposed of easily on the basis that no purpose will be achieved by referring the matter to trial: First, the marriage certificate of the parties – which was not placed before the Regional Court, and which Counsel agreed would be placed before the Regional Court if the matter was referred to it – showed that the marriage was out of community of property. Second, it is common cause that the marriage was solemnised in Mqanduli, which is within the territory of the erstwhile Transkei, and the Transkei Act was applicable at the time of the conclusion of the marriage. The respondent in her counterclaim agreed that the appellant was domiciled in that area. A referral of the matter to trial would thus not rescue her case.
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> The constitutional argument must also fail: It was raised for the first time in this appeal and it was not traversed at all in the pleadings. A court will not allow a new point to be raised for the first time on appeal unless it was covered by the pleadings.

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that the marriage was solemnised in terms of the Transkei Marriage Act, and could not consequently claim that section 39(1) of the Transkei Marriage Act was applicable to his marriage.

Secondly, section 39(2)(a) and (b) of the Transkei Act provided that parties who did not wish to marry out of community of property could make a declaration to that effect, jointly before a magistrate or a marriage officer at any time before the solemnisation of the marriage or could conclude an ante-nuptial contract. The respondent did not make the election and there is no evidence to suggest that she wished to do so but was unable to. The court cannot make a new contract for the parties and [is] obliged to enforce the terms of their marriage contract. For those reasons the appeal must succeed. The appellant agreed to forego the costs of the appeal and there will thus be no costs order against the respondent."[9] (Footnote omitted.)

[11] The applicant now seeks an order in this Court in the following terms:

"2. That leave to appeal to the Constitutional Court be granted and/or that the Applicant be granted direct access to the Constitutional Court in respect of the constitutional challenge to section 7(3) of the Divorce Act 70 of 1979 as more fully set out below;

3. That the Minister of Justice and Correctional Services be joined as a respondent to these proceedings;

4. That section 7(3) of the Divorce Act 70 of 1979, as it currently reads, is declared unconstitutional to the extent that it does not allow a spouse married out of community of property without having entered into an antenuptial contract (as contemplated in the now repealed section 39 of the Transkei Marriage Act 21 of 1978), the right to claim a redistribution of property on divorce;

5. That section 7(3) of the Divorce Act 70 of 1979 must be amended to include a section (c) which should read '*entered into in terms of the Transkei Marriage Act 21 of 1978, as it existed before the repeal of section 39 thereof, without entering into an antenuptial contract prior to the said marriage*';

6. That the appeal against the order of the Supreme Court of Appeal dated 29 May 2017, under case no 564/2016 (also known as 118/2016), be upheld;

7. That the order of the Supreme Court of Appeal is set aside and its stead the following order is substituted:

[9] *Patekile Holomisa v Nolizwe Holomisa* [2017] ZASCA 64 at paras 6-8.

7.1. The matter is referred back to the Trial Court to determine the proprietary interests of the Applicant and the First Respondent, Mr Holomisa;

7.2. Nothing in this order will bar either party from amending his/her pleadings and/or from leading further evidence and / or from taking such steps as may be necessary to bring the divorce to finality;

7.3. Costs of this appeal will be costs in the cause."[10]

The procedural obstacles

[12] Before us, all concerned agreed that the marriage was indeed out of community of property. This concession was correctly made, for the reasons set out later in this judgment. Acceptance of this necessitated the change in tack by the applicant to attacking the constitutional validity of section 7(3), belatedly in the Supreme Court of Appeal, and now before us.

[13] The conundrum the applicant finds herself in is that she needs a declaration of the constitutional invalidity of section 7(3) in order for her to gain any personal advantage in the divorce proceedings. The first hurdle she faces is this Court's reluctance to grant direct access for constitutional challenges to legislation. Even if she is able to convince us that it is in the public interest to allow a direct access constitutional challenge, she then needs to show why she should derive personal benefit from a declaration of constitutional invalidity, given the apparent lack of explanation on affidavit for the procedural lapses along the way.

[14] First, though, the proprietary regime regulating the marriage.

In or out of community of property?

[15] In terms of section 22(6) of the Black Administration Act the default proprietary regime for civil marriages entered into between black persons was not in

[10] This is based on the relief the applicant seeks in her amended notice of motion which was filed with this Court.

community of property, as it was under the common law, unless the intending spouses within a month before the marriage jointly declared before a competent official that it was their intention that community of property and of profit and loss must result from their marriage. After the so-called independence of the former Transkei, the Transkei Marriage Act repealed section 22 of the Black Administration Act for citizens of the former Transkei and replaced it with a similar provision, section 39.[11]

[16] But then things started to happen on the "South African" side of the border which, because of the Transkei's independence under South African and Transkeian law,[12] was not mirrored in the Transkei. Legislation was passed to ensure that the default proprietary regime for all marriages in "South Africa", regardless of race, would be in community of property, unless an ante-nuptial contract was entered into. In addition, the potential harsh consequences flowing from a marriage out of

[11] Section 39 reads:

> "(1) Subject to the provisions of subsection (2), a marriage contracted in terms of the provisions of this Act shall produce the legal consequences of a marriage out of community of property or of profit and loss; or
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> (2) It shall be competent for the parties to any intended civil marriage who desire that community of property and of profit and loss shall result from their marriage—
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> (a) to enter into an antenuptial contract which provides for community of property or of profit and loss; or
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> (b) to be declared jointly before a magistrate or marriage officer, at any time prior to the solemnisation of such civil marriage and substantially in the prescribed form that it is their intention and desire that community of property and of profit and loss shall result from their civil marriage,
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> and thereupon such community shall, subject to the laws relating to the registration of antenuptial contracts, result in accordance with the provisions of such antenuptial contract or declaration, case may be; Provided that the provisions of such an antenuptial contract or declaration in terms of paragraph (b) shall not—
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> (i) apply to land held in individual tenure under quitrent conditions which shall be excluded from such community; or
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> (ii) in any way affect the marital power of the male party to such civil marriage."

[12] Transkei's independence was never internationally recognised.

community of property under certain circumstances were ameliorated by section 7(3) of the Divorce Act.

[17] It reads:

> "(3) A court granting a decree of divorce in respect of a marriage out of community of property—
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> (a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or
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> (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration, 1927 (Act 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,
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> may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party."

[18] Further legislative amendments in "South Africa" also ensured that married women in "South Africa" were no longer subject to their husband's marital power.[13]

[19] Whether by design or oversight, these developments passed women in the Transkei by before our new constitutional dawn in 1994. But as we will see, the promise of the new era has not been fulfilled for all, including the applicant.

[13] General Law Fourth Amendment Act 132 of 1993.

[20] The Justice Laws Rationalisation Act[14] (Rationalisation Act) commenced on 1 April 1997. It extended the operation of a number of laws, including the Divorce Act and the Matrimonial Property Act, to every area which before 27 April 1994 formed part of the former homelands, including the Transkei.[15] It also repealed sections 42 to 50 of the Transkei Marriage Act.[16] Section 42(5) of the Transkei Marriage Act had empowered a court to make an order determining the mutual property rights of the parties to a marriage. The Rationalisation Act included savings provisions to the effect that nothing in the Act shall affect the operation of any law made by section 2 or repealed by section 3 or anything done or suffered under those, nor affect any right, privilege, obligation or liability acquired, accrued or incurred under these laws.[17] The remaining provisions of the Transkei Marriage Act continued to operate as law under the Interim Constitution until amended or repealed.[18] The transition was supposed to be completed by the Marriage Extension Act,[19] which extended the operation of the South African Marriage Act[20] retrospectively to the whole of South Africa, including the Transkei.

[21] What was lacking, however, was a repeal of the operational provision of the Transkei Marriage Act that determined the matrimonial proprietary regime, section 39.[21] That only came about by the Recognition of Customary Marriages Act, which expressly repealed, among others, section 39 of the Transkei Marriage Act. The Act only came into operation on 15 November 2000. It did not purport to invalidate section 39 of the Transkei Marriage Act retrospectively.

[14] 18 of 1996.

[15] Section 2 of the Rationalisation Act.

[16] Section 3.

[17] Section 15.

[18] Section 229 of the Interim Constitution Act 200 of 1993.

[19] 50 of 1997.

[20] 25 of 1961.

[21] See above n 14.

[22] The result of all this was that the property regime of the applicant's marriage was determined by section 39 of the Transkei Marriage Act. The default regime of that provision was a marriage out of community of property, unless excluded by an antenuptial contract or an express declaration in terms of section 39(2).[22] And by the time the matter was argued before us all the parties accepted, correctly, that there was no exclusion of the default regime and that the marriage between the applicant and the first respondent was indeed one out of community of property.

Rationality and equality

[23] Is there any reason why Transkei women[23] in the position of the applicant should be deprived of the benefits of a possible just transfer of assets on divorce in terms of section 7(3) of the Divorce Act? I can think of none. Tellingly, neither could the Minister, the second respondent.

[24] It fails the test of rationality in terms of section 9(1) of the Constitution,[24] namely whether the distinction drawn between women in this position in the Transkei and those in the rest of South Africa is connected to a legitimate governmental purpose.[25] No legitimate governmental purpose was proffered by the representative of government, the Minister, and it seems almost impossible to conceive of one. As was suggested from the Bench during oral argument, it is, in colloquial terms, a "no-brainer". Nothing more needs to be said on that score.

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[22] See above n 11.

[23] Counsel for the applicant in reply argued that this Court is not called upon to consider the matrimonial legislations of the other former TBVC states, namely, Bophuthatswana Marriage Act 15 of 1980, Venda Matrimonial Affairs Act 37 of 1953, and Ciskei Matrimonial Act 37 of 1953.

[24] Section 9(1) of the Constitution reads:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[25] *Print Media South Africa v Minister of Home Affairs* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 BCLR 1346 (CC) at paras 79-82.

Direct access?

[25] Despite not being able to put forward any defence for continuing the obvious and gross inequality, the Minister, though formally abiding our decision, nevertheless referred us to the many cases where this Court has made the point that direct access will be granted only in exceptional circumstances.[26] Important considerations in that regard are that this Court should only rarely sit as a court of first and last instance,[27] and that the constitutional attack should properly be raised in the papers at the outset.[28] Both relate to the same concern, namely that this Court will normally benefit from the views of another court in complex constitutional matters.[29]

[26] The answer to these concerns lies in the fact that the issue is not complex. It is simple and straightforward. That also explains why the formal failure, the lack of early pleading, is not an insuperable bar. A failure to raise the constitutional issue may amount to a breach of legality and the rule of law.[30] The test for meeting the

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[26] *Minister of Police v Premier of the Western Cape* [2013] ZACC 33; 2014 (1) SA 1 (CC); 2013 (12) BCLR 1405 at para 20; *Women's Legal Centre Trust v President of the Republic of South Africa* [2009] ZACC 20; 2009 (6) SA 94 (CC); 2009 JOL 23910 (CC) at para 27; *Mkontwana v Nelson Mandela Metropolitan Municiplality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* (*KwaZulu-Natal Law Society and Msunduzi Municipality as amici curiae*) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*) at para 11; *Christiaan Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 9; *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at paras 7-8.

[27] *Mkontwana* id at para 11; *Bruce* id at paras 7-9; *Minister of Police* id at para 20; *Women's Legal Centre Trust* id at para 27.

[28] *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 43.

[29] *Mkontwana* above n 26 at para 11:

> "A useful point at which to start in considering an application for direct access is to recognise the importance of the principle that it is ordinarily not in the interest of justice for this Court to be court of first and last instance. The Constitution and the rules of this Court do, however, provide for this Court to be the court of first and final instance, but only in exceptional circumstances. The saving of time and costs, the importance of the issue or the existence of conflicting judgments on an issue in a case do not, without more, constitute exceptional circumstances and justify this Court being a court of first and last instance. Indeed the importance and complexity of the issues raised would weigh heavily against this Court being a court of first and final instance. As a general rule, the more important and complex the issues in a case, the more compelling the need for this Court to be assisted by the views of another court. Each of the issues in respect of which direct access is sought must be considered separately."

[30] *South African Transport & Allied Workers Union v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 113-4 Jafta J writing for the minority held that:

problem of inadequate pleading is that of potential prejudice in dealing with the point on a factual or legal level.[31] No prejudice of that kind exists here.

[27] Since the issue is not a complex constitutional question, there is no additional benefit that this Court would have from the constitutional issue being ventilated in lower courts because the discrimination the applicant faces as one of many vulnerable women in the former Transkei is indefensible.

[28] The anomaly here results from the tangled net of post-apartheid legislation that sought, in good faith, to regularise the position in democratic South Africa but failed to do so completely. None of the succeeding statutes designed to rationalise, normalise and make uniform the rights and obligations of inhabitants of the former homelands remedied the position of persons finding themselves in the position of the applicant. This is not a case where there could be debate about constitutional validity and whether it was proper for the Department of Justice to wait for a challenge. Here, the Department knew that there was a legislative mess, tried to fix it but – for undoubtedly obscure and extremely rare reasons – failed to do so comprehensively.[32]

> "Orders of constitutional invalidity have a reach that extends beyond the parties to a case where a claim for a declaration of invalidity is made. But more importantly these orders intrude, albeit in a constitutionally permissible manner, into the domain of the legislature. The granting of these orders is a serious matter and they should be issued only where the requirements of the Constitution for a review of the exercise of legislative powers have been met.
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> . . .
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> Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."

[31] *Phillips* above n 28 at para 39; *Prince v President, Cape Law Society* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.

[32] See *S v Thunzi* [2010] ZACC 27; 2010 JDR 1472 (CC); 2010 (10) BCLR 983 (CC) at para 8 confirmed the following:

> "Parliament accepted, and it was common cause, that it had an obligation to effect rationalisation in order to have uniform national legislation regulating the use of dangerous weapons."

In *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 36 Ngcobo J held that—

The extreme rarity of this, incidentally, counteracts the fear that the floodgates to direct access will now be opened.[33]

[29] The discrimination in this case is a relic of South Africa's apartheid history which sought to disadvantage women on the basis of a number of intersecting grounds: gender, race, ethnicity, marital status, geographic location and socio-economic status.[34] The intersectional nature of this discrimination compounds the gravity of Parliament's failure to rationalise the Transkei Marriage Act. Although Parliament did not seek intentionally to continue to discriminate against women in the former Transkei, the effect of its failure to remedy the situation is that the discrimination continues. It is imperative to acknowledge and eradicate all forms of discrimination in order to achieve effective change.

[30] Direct access to declare section 7(3) constitutionally invalid to the extent that it excludes women in the applicant's position should thus be granted.

Individual remittal?

[31] The applicant never explained on affidavit why the case went ahead with her unrepresented in the Regional Court and laid no factual premise impugning the

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> "where a court is concerned with legislation that is rooted in apartheid, it is necessary to cleanse the statute books of such statutes. Such statutes are inconsistent with the Constitution and they cannot be allowed to remain in our statute books."

[33] There are others who fear that this Court has not even allowed a trickle; see Dugard "Court of First Instance? Towards a Pro-Poor Jurisdiction for South African Constitutional Court" (2006) 22 *SAJHR* 261 at 273-4:

> "Notwithstanding such caution, I believe it does say something about the Court's formalistic style of adjudication that, since its inception, direct access has been granted 'in only a handful of cases'. Indeed apart from *Zuma* referred to above, my research uncovered only eight direct access applications in which direct access has been granted between February 1995 and December 2005. Moreover, in most of these instances, the granting of direct access appears to have been based more on the need to remedy some procedural defect in the circumstances around which the case came before the Court or to attach what serves as an essentially amicus-type intervention by a relevant interest group to an existing matter, than on substantive consideration of whether, had the case been a genuine 'off the street' case, direct access would have been granted. As a consequence, the Court's direct access jurisprudence throws more light on the kinds of situations in which direct access will *not* be granted than on what conditions will be construed to be sufficiently 'in the interests of justice' for direct access to be granted."

[34] See for example *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 44.

constitutional unacceptability of her omission from section 7(3) of the Divorce Act. In terms of pure process, she never brought a substantive application for direct access explaining why the constitutional point had never been raised before or why it should be heard now, only belatedly, and before this Court as a court of first and last instance. To compound matters, because of recusation complexities, oral argument had to be postponed in this Court.[35] All this, with no particular blame anywhere, means little credit can be derived from the legal system, the legal advice and support the applicant received until the Supreme Court of Appeal hearing and the complexities of bringing a constitutional challenge before this Court.

[32] It is hardly imaginable that the Minister or any other party could advance grounds to defend the injustice that would be inflicted on the applicant if relief were not offered to her. We were informed at the start of the hearing that the first respondent had filed a notice to abide. It would be iniquitous for us to send the applicant away with a stone instead of bread.

Remedy and costs

[33] The applicant seeks an order in two parts, one declaring section 7(3) unconstitutional, and the other referring her own proprietary claim back to the Regional Court. She asked for a final declaration of constitutional invalidity, but the Minister suggested a declaration of invalidity together with a suspension of the declaration and an interim reading-in. That seems best. It will allow Parliament to find out in what former homelands comparable anomalies arise and decide on the final legislative formulation.

[34] The applicant did not seek a costs order. She is represented by Legal Aid South Africa. The applicant's Legal Aid representatives have done her, women in her position and our justice system a great service.

[35] The matter was originally set down for hearing on Tuesday, 6 March 2018. However, it was finally set down and heard on Tuesday, 14 August 2018.

Order

[35] The following order is made:

1. The Minister of Justice and Correctional Services is joined as second respondent.
2. Direct access is granted.
3. Sub-section 7(3) of the Divorce Act 70 of 1979 is declared constitutionally invalid to the extent that it excludes a spouse married out of community of property who has not entered into an ante-nuptial contract or an express declaration in terms of section 39(2) of the now repealed section 39 of the Transkei Marriage Act 21 of 1978, from its ambit.
4. The declaration of constitutional invalidity is suspended for 24 (twenty-four) months to allow Parliament to remedy this defect.
5. During the period of suspension section 7(3) of the Divorce Act 70 of 1979 must be read so as to include the following as section 7(3)(c):

   "entered into in terms of the Transkei Marriage Act 21 of 1978, as it existed before the repeal of section 39, without entering into an ante-nuptial contract or an express declaration in terms of the repealed section 39(2) before the marriage."
6. Leave to appeal is granted
7. The appeal succeeds.
8. The order of the Supreme Court of Appeal is set aside and substituted with the following:

   "(a) The matter is referred back to the Regional Court to determine the proprietary interests of the applicant and the first respondent;

   (b) Nothing in this order will bar any party from amending their pleadings in relation to the determination of their proprietary interests arising from the marriage;

(c) Costs of this appeal will be costs in the cause of determining the proprietary interests arising from the marriage."

9. There will be no costs order in this Court.

For the Applicants:	L Crouse instructed by Legal Aid South Africa
For the First Respondent:	S L Mgxaji instructed by Mgxaji and Co Inc
For the Second Respondent:	N Rajab-Budlender instructed by State Attorney