



CONSTITUTIONAL COURT OF SOUTH AFRICA

Elizabeth Gumede (born Shanga) v President of the Republic of South Africa and Others

Case CCT 50/08

[2008] ZACC 23

Judgment Date: 08 December 2008

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the confirmation of an order of constitutional invalidity made by the Durban High Court in respect of certain provisions of the Recognition of Customary Marriages Act, 1998 (the Recognition Act), the KwaZulu Act on the Code of Zulu Law Act, 1985 (the KwaZulu Act), and the Natal Code of Zulu Law Proclamation of 1987 (the Natal Code). The Minister of Home Affairs and the KwaZulu Natal MEC for Traditional and Local Government Affairs are the only respondents that have made submissions to this Court and oppose the confirmation of the order of invalidity. The Women's Legal Centre Trust was admitted as amicus curiae and supports the order of the High Court.

Elizabeth Gumede entered into a customary marriage in 1968, which was the only marriage to which the applicant's husband was party. The marriage has since broken down irretrievably, and in January 2003 her husband instituted divorce proceedings. Mrs Gumede did not work during the marriage, but maintained the family household as well as the four children. The family acquired two pieces of immovable property during the course of the marriage with the furniture and appliances in both amounting to approximately R40 000 each.

The Recognition Act provides that a customary marriage concluded after the commencement of that Act, being 15 November 2000, are automatically in community of property. The Act does not, however, provide for this property regime in respect of customary marriages concluded before the commencement of the Act, and those marriages are subsequently governed by customary law. Customary law in KwaZulu Natal has been codified in the KwaZulu Act and the Natal Code, both of which provide, in section 20, that the husband is the family head and owner of all family property. The result of the KwaZulu Act, the Natal Code and the lack of provision in the Recognition Act is therefore that a wife to a customary marriage concluded before the commencement of the Act will in effect be entitled to nothing upon dissolution of the marriage. Provision is, however, made in the Recognition Act for a court, upon the dissolution of a customary marriage, to exercise the powers contemplated in

the Divorce Act. In terms of the Divorce Act, a court has discretion, upon the dissolution of a marriage, to transfer property from one spouse to another.

Moseneke DCJ, writing for a unanimous Court, examined sections 7(1) and 7(2) of the Recognition Act, which have the effect that marriages concluded prior to the enactment of the Recognition Act ('old' marriages) will continue to be governed by customary law, whilst those concluded after the enactment of the Recognition Act ('new' marriages) are to be marriages in community of property and of profit and loss, except where the parties agree otherwise. He also examined the codified customary law of marriage in KwaZulu-Natal, which subjects a woman married under customary law to the marital power of her husband, who is the exclusive owner and has control of all family property. Moseneke DCJ found these impugned provisions to be self-evidently discriminatory on at least the one listed ground of gender. Only women in a customary marriage are subject to these unequal proprietary consequences. Because this discrimination is on a listed ground it is presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality right of women party to 'old' marriages concluded under customary law.

Moseneke DCJ found that the respondents had failed to provide adequate justification for this unfair discrimination. He held that section 8(4)(a) of the Recognition Act, which gives a court granting a decree of divorce of a customary marriage the power to order how the assets of the customary marriage should be divided between the parties, is no answer to or justification for the unfair discrimination based on the listed ground of gender. This is because section 8(4)(a) of the Recognition Act does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage. The matrimonial proprietary system of customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limits the equality dictates of our Constitution and of the Recognition Act.

In light of these findings, Moseneke DCJ confirmed the order of constitutional invalidity issued by the High Court and held that the following provisions are inconsistent with the Constitution and invalid:

- a) Section 7(1) of the Recognition Act insofar as it provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.
- b) Section 7(2) of the Recognition Act, insofar as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act, by virtue of the inclusion of the words "entered into after the commencement of this Act".
- c) Section 20 of the KwaZulu Act on the Code of Zulu Law because it provides that during the course of a customary union the family head is the owner of and has control over all family property in the family home.
- d) Section 20 of the Natal Code of Zulu Law because it provides that the family head is the owner of and has control over all family property in the family home.
- e) Section 22 of the Natal Code of Zulu Law because it provides that the inmates of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

The unanimous Court also ordered that the government parties pay the legal costs of Mrs Gumede

