IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT: 194/2016

In the matter between:

MATODZI RAMUHOVHI (born NETSHITUKA)	**FIRST APPLICANT**
THINAMAANO EDSON NETSHITUKA	**SECOND APPLICANT**
AND	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIRST RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**SECOND RESPONDENT**
ESTATE: MUSENWA JOSEPH NETSHITUKA	**THIRD RESPONDENT**
MUNYADZIWA JOYCE NETSHITUKA	**FOURTH RESPONDENT**
MASTER OF THE HIGH COURT, THOHOYANDOU	**FIFTH RESPONDENT**
MINISTER OF HOME AFFAIRS	**SIXTH RESPONDENT**

AND

TRUSTEES OF THE WOMEN'S

LEGAL CENTRE TRUST **AMICUS CURIAE**

APPLICANTS WRITTEN SUBMISSIONS

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1 INTRODUCTION

1.1 This case concerns a constitutional challenge to legislative provisions that differentiates between proprietary consequences of polygynous marriages of women married prior to the enactment of the Recognition of Customary Marriages Act "the Recognition Act" and women in polygynous marriages concluded after the Recognition Act, and more particularly their own ownership and control over property during their marriages and upon their death.

1.2 The Limpopo Local Division, Thohoyandou (High Court) granted an order declaring section 7 (1) inconsistent with the Constitution and invalid.

1.3 On the 01st August 2016, Lamminga AJ made the following order:

1. Section 7(1) of the Recognition of Customary marriages Act 120 of 1998 is declared

inconsistent with the Constitution and invalid;

2. *Until such time as Parliament enacts legislation to govern the matrimonial property regimes of persons who are parties to polygynous customary marriages concluded before the Recognition of Customary Marriages Act 120 of 1998 came into operation, the following regime shall apply to such marriages:*

(a) *The wives who are parties to such marriages shall have joint and equal rights of management and control over and in the marital property to their husbands, and these rights shall be exercised as follows:*

(i) *In respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interest of the family unit.*

(ii) *In respect of all family property, by the husband and all the wives, jointly and in the best interest of the family unit.*

(b) *In respect of personal property, a party shall retain exclusive rights*

to her or her personal property.

(c) *In the event of any disputes arising from this order, any party to such a marriage may approach the court for an order regulating the matrimonial property regime on a just and equitable basis.*

3. *In terms of section 172(1) (b) the order should not affect:*

a. *Customary marriages that have been terminated by death or divorce before the date of this order.*

b. The legal consequences of any act done or omission or fact existing in relation to a polygynous customary marriage before this order was made.

c. Any rights to property or rights of control or management over property that may have vested in or accrued to a wife in a polygynous customary marriage, before or during her marriage, and which confer greater rights to property than those she would be entitled to in terms of the interim regime, including, but not limited to rights in terms of the living customary law.

4. Any interested person may approach the court for a variation of this order

in the event of serious administrative or practical difficulties being experienced.

5. This order is referred to the Constitutional Court for confirmation;

6. Prayers 4 and 5 of the notice of motion is postponed sine die

7. Cost is reserved."[1]

1.4 The applicants in these proceedings are seeking for confirmation of the High Court's declaration of invalidity and appeal against the order reserving costs in the High Court.

[1] Ramuhovhi and Another v President of the Republic of South Africa and Others (412/2015) [2016] ZALMPTHC 18; 2016 (6) SA 210 (LT) (1 August 2016) at para 76

2 FACTUAL BACKGROUND

2.1 The applicants are the biological children of Masenwa Joseph Netshituka "the deceased" who died testate on the 4th January 2008.[2] During his lifetime the deceased entered into polygynous customary marriage with Tshinakaho Netshituka, Masindi Netshituka and Diana Netshituka.[3]

2.2 At the time of the deceased death, he was survived by Tshinakaho and Diana Netshituka as his customary wives. The deceased was also survived by the fourth respondent as his civil marriage wife. On the 20th July 2011, the Supreme Court of Appeal ("SCA") declared the civil marriage between the deceased and the fourth respondent null and void.[4]

2.3 The SCA found that there was no evidence that the deceased attested his last Will and Testament, when he was mentally incapacitated. The fourth respondent was named as one of the major beneficiary of the deceased and she was also appointed as the executrix of the deceased estate. The first and second applicants are children born from the polygynous customary marriage with Tshinakaho and Masindi respectively.

2.4 By the time the application was heard in the High Court, all the previous wives of the deceased and most of his children had passed away.

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[2] See the deceased death certificate, record of application Vol. 1 page 20; deceased Will and Testament record of application Vol. 1 pages 36 to 40

[3] See Confirmatory Affidavit of Sarah Mutshidza Nengudza, Record of Application Vol. 2 page 135 lines 15 to 18; Confirmatory Affidavit of Andries Muthuhadini Netshituka, Record of Application Vol. 1 page 29, lines 13 to 15.

[4] See Netshituka v Netshituka 2011 ZASCA 120 paragraph 15.

2.5 In the High Court, the applicants argued that due to the application of section 7 (1) of the Recognition Act and the applicable Venda customary law, their mothers were excluded from ownership of the estate amassed by the deceased. This discrimination caused prejudice to the deceased customary wives and their children.

2.6 In the High Court, parties where in agreement that the proprietary consequences of polygynous customary marriages in terms of Venda customary law. The parties are in agreement regarding the proprietary consequences of polygyny marriages as not vesting property rights or control over property in the hands of wives in polygynous marriages in terms of Venda customary law.

2.7 The applicants also argued that it would be just and equitable to apply the order retrospectively to estates where the polygynous marriage had already been terminated by death, if the estate had not yet been finalized.[5]

3 INTERNATIONAL LAW

3.1 Section 39(1) (c) of the constitution provides that the Court, when interpreting the Bill of Rights "Must consider international law".

3.2 We submit that Women's right to equality must be protected even where communities are governed by customary laws.

[5] Record of applicationVol. 3 page 160 lines 16 to 21.

3.3 The family is regarded as the natural unit and basis of society, which must be protected by the state, which is obliged to raise measures that are discriminating.[6]

3.4 Married women are to enjoy equal rights to conclude contract, administer property and to manage property.

3.5 In *Dawood v Minister of Home Affairs and other*[7] this Court recognized the importance of marriage and the state's obligation to protect, the family both under International Human Rights Law and the South African Constitution.

3.6 This Court in *Gumede* sets out the principle as follows:

"The Recognition Act is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes. It is also necessitated by our country's international treaty obligations, which requires member states to do away with all laws and practices that discriminate against women."

4. RECOGNITION ACT

4.1 Section 7 (1) of the Recognition Act has already been found to be discriminatory on the basis of gender. [8]The Recognition Act represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted

[6] Article 18 (1) of the African Charter on Human and Peoples' Right, 1981 ('the African Charter"); Article 23 (1) of the International Convention on Civil and Political Rights ("ICCPR")
[7] *Dawood v Minister of Home Affairs and other* 2000 (3) SA 936 (CC) at paras 28-29 and 34-37
[8] Gumede case.

out to spouse in marriages which were entered into in accordance with the law and culture of the indigenous African people of South Africa.

4.2 The Recognition Act is legislation specifically dealing with customary law as envisaged in terms of section 211 (3) of the Constitution. Its enactment was inspired by the dignity and equality rights and normative value system of the Constitution.

4.3 The marital property regimes of new polygynous marriage are governed by Section 7 (6) of the Recognition Act. If a husband in a customary marriage entered into a further customary marriage with another woman after the Commencement of the Act, he must make an application to Court to approve a written contract which will regulate the future matrimonial property system of his marriage.

4.4 We thus submit that a different remedy in the context of Pre-Act Polygynous Marriages must be drafted by the Court in order to accommodate women in Pre-Act Polygynous Marriages.

5 DOES SECTION 7 (1) VIOLATE THE RIGHTS CONTENDED FOR?

5.1 It is respectfully submitted that in its manifestation the customary law and section 7 (1) of the Recognition Act has resulted that the deceased is the owner of the properties he acquired during the course of the customary marriages with his customary wives.

5.2 The Constitution itself places a particular premium on gender equality by providing that if discrimination is based on gender as one of the listed grounds, it is presumed to

be unfair.[9] By providing that old polygynous marriages will continue to be governed by customary law, this implies that women are not fit or competent to own and administer property and this violates their right to dignity and equality.

5.3 This Court has on numerous occasions dealt with challenges to legislative enactments that were said to infringe the right to equality under section 9 of the Constitution. The resultant jurisprudence has developed into a comprehensive set of principles, which have been applied on numerous occasions and within a variety of contexts.[10] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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[9] Gumede,

[10] See in this regard *Van der Merwe v Road Accident Fund and Others* [2006] ZACC 4; 2006 (6) BCLR 682 (CC); 2006 (4) SA 230 (CC); *Hoffmann v South African Airways* [2000] ZACC 17; 2000 (11) BCLR 1211 (CC); 2001 (1) SA 1 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC); *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC); *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC); *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC); and *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (6) BCLR 752 (CC); 1996 (4) SA 197 (CC). See also *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC) at para 27, Moseneke J, as he then was, eloquently described the duty on every court when embarking on an analysis in terms of section 9. He stated that it is—

> "incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution." (Footnote omitted.)

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

5.4 The correct approach to a constitutional challenge based on the equality clause was summarised in *Harksen v Lane NO and Others*[11] as follows:

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

[11] Above n 15 at para 54.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have 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 amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."

5.5 Although this test was formulated with reference to the interim Constitution it has been applied to challenges based on section 9.[12]

5.6 Section 39(2)[13] of the Constitution enjoins every court to promote the spirit, purport and objects of the Bill of Rights when, inter alia, interpreting any legislation.[14] South African history, as this Court has stated in *Brink*,[15] is of particular relevance to the concept of equality.

5.7 In *Daniels*, this Court held that "discriminatory interpretations deeply injurious to those negatively affected were in the conditions of the time widely accepted in the Courts. They are no longer sustainable in the light of our Constitution."[16]

5.8 Proof of infringement of either section 9 (1) or 9 (3) will justify a declaration of constitutional invalidity. Therefore it is not necessary to begin with the rational connection enquiry if a court holds that the discrimination is unfair and unjustifiable.[17]

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[12] *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC).

[13] Section 39(1) and (2) provide:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When 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."

[14] See also in this regard the majority decision in *Daniels* above n 12 at para 43.

[15] *Brink* above n 21 at para 40.

[16] Above n 12 at para 20.

5.9 Section 7 (1) violate women's equality and dignity. It differentiates between the proprietary consequences applicable to women in pre Recognition Act and Post Recognition Act polygynous customary marriages; women in pre Recognition Act and all other marriages.

5.10 The discrimination amounts to discrimination as it is on the listed grounds of:

(a) **Gender**; in that only women in polygynous customary marriages are subjected to unequal proprietary consequences.

(b) **Race**; despite being in vulnerable position, women in polygynous customary marriages do not have legislative protection in place in relation to women in other marriages.

(c) **Marital status;** in that it applies only to women in pre-Recognition Act polygynous customary marriages.

(d) **Age**, as women who are in Pre- Recognition marriages are likely to be older than people in other marriages.

5.11 We submit that the discrimination is thus presumed to be unfair. Nkabinde ADCJ in the Hassam v Jacobs NO and Others held that:

"By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to be

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[17] *National Coalition of Gay and Lesbian Equality and Others v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 18.

unworthy of protection. Needless to say, by so discriminating against those women, provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights."

5.12 We respectfully submitted that the section 7 (1) is inconsistent with sections 9 and 10 of the Constitution because of its blatant discrimination on grounds of race, colour, gender, marital status and age and its harmful effects on the dignity of persons affected by it.

5.13 If this is not corrected, Women in pre Recognition polygynous marriages will continue to be subjected to a patriarchal and discriminatory marital property regime.

5.14 In the High Court and in this Court the first, second, fifth and sixth Respondents are not opposing the challenge, and thus no justification is offered.

6 JUSTIFICATION

6.1 Section 36 of the Constitution requires that a provision that limits rights should be a law of general application and that the limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

6.2 It is trite that where there is unfair discrimination, a respondent who contends that the discrimination is fair must place before the Court material that will save the provision from unconstitutionality. The Respondents did not offered.

6.3 As was said in *S v Manamela and Another (Director-General of Justice Intervening)*:

> *". . . [t]he Court must engage in a balancing exercise and arrive at a global judgment on proportionality . . . . As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."* [18]

6.4 The rights violated are important rights, particularly in the South African context. The rights to equality and dignity are of the most valuable of rights in any open and democratic state.

6.5 In the light of its destructive purpose and effect, it could not be justified in any open and democratic society.

6.6 It is clear from what is stated above that the serious violation by the provisions of section 7 (1) of the rights to equality and human dignity cannot be justified in our new constitutional order. In terms of section 172(1) (a) of the Constitution,[19] section 7 (1) must accordingly be struck down.

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[18] 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32. See also *Prince V President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

[19] Section 172(1) of the Constitution provides that:

> "(1) When deciding a constitutional matter within its power, a court–

6.7 It is important that polygynous pre Recognition marriage should be put in the same position as other marriages.

6.8 In Hassan, Nkabinde ADCJ held at para 46:

"Marriage, as a social institution, is important to all members of South African society, irrespective of skin colour or religious background. Marriages concluded under Muslim rites are potentially polygynous as a man is permitted, subject to the Qur'anic prescripts, to marry more than one woman.[20] *The significance attached to polygynous unions solemnised in accordance with the Muslim religious faith is by no means less than the significance attached to a civil marriage under the Marriage Act or an African customary marriage. Similarly, the dignity of the parties to polygynous Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages."*

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including–

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[20] See in this regard 'Abdur Rahman I. Doi, *Sharia: The Islamic Law* (Ta Ha Publications, London 1984) at 146, where the author quotes the following Qur'anic verse:

"If you fear you shall not be able to deal justly with the orphans, *marry the women of your choice, two, or three or four*. But if you fear that you shall not be able to deal justly with them, then only one." (Emphasis added.)

7. The Venda Customary Law of succession

7.1 It is important to examine the context in which the rules of customary law, particularly in relation to succession, operated and the kind of society served by them. The rules did not operate in isolation. They were part of a system which fitted in with the community's way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities.

7.2 Everyone, man, woman and child had a role and each role, directly or indirectly, was designed to contribute to the communal good and welfare.

7.3 Before the Bhe case, in terms of Venda Customary law of succession the heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit.

7.4 The property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head.

7.5 The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support

all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support.

7.6 He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.[21]

7.7 When Courts engaged with the adjudication of a customary law matter, must remain mindful of their obligations under section 39 (2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights. This means that the Courts must be patient and caution in ensuring that the living customary law reflects the rights and values of the Constitution from which it draws its legal force.

8 REMEDY

8.1 The correct approach to the question of remedy in cases where an order of constitutional invalidity is contemplated is the following: If the Court finds the challenged legislative provision to be inconsistent with the Constitution, section 172(1) of the Constitution[22] obliges the Court to declare such provision invalid to the extent of the inconsistency.

[21] *Mthembu* (SCA) 71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000) at para 8.
[22] The full text of the subsection appears in n 35 below.

8.2 Thereafter the Court must make an order that is just and equitable which may include limiting the retrospective effect of the invalidity order or its suspension. Counsel for the respondents urged us not to follow this approach in so far as the determination of a just and equitable order is concerned.

8.3 Ordinarily an order of constitutional invalidity has a retrospective effect unless its operation is suspended. In terms of the doctrine of objective constitutional invalidity, unless ordered otherwise by the court the invalidity operates retrospectively to the date on which the Constitution came into force.[23]

8.4 But if the legislation in question was enacted after that date, as was the present Act, the retrospective operation of invalidity goes back to the date on which the legislation came into force.

8.5 Section 172(1) of the Constitution[24] enjoins the Court to make a just and equitable order, following a declaration of invalidity.

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[23] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) this Court said at para 28:

> "A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect. The fact that this Court has the power in terms of s 98(5) of the Constitution to postpone the operation of invalidity and, in terms of s 98(6), to regulate the consequences of the invalidity, does not detract from the conclusion that the test for invalidity is an objective one and that the inception of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. The provisions of s 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity."

See also *Van der Merwe v Road Accident Fund and Another* above n 26 at para 77.

[24] Section 172(1) provides:

> "(1) When deciding a constitutional matter within its power, a court—

8.6 Depending on the circumstances of the case, such order may include an order limiting the retrospective effect of the declaration of invalidity or suspension to allow a competent authority to correct the defect. In this case there is evidence which warrants the determination of a just and equitable order.

8.9 In determining a suitable remedy, the courts are obliged to take into account not only the interests of parties whose rights are violated, but also the interests of good government.[25] These competing interests need to be carefully weighed.

9. JUST AND EQUITABLE ORDER

9.1 Unless the interests of justice and good governance dictate otherwise, the applicants are entitled to the remedy they seek because they were successful.[26]

9.2 Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, the applicants are entitled to a remedy that will effectively vindicate those rights.

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
  (i) an order limiting the retrospective effect of the declaration of invalidity; and
  (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[25] *S v Bhulwana; S v Gwadiso* above n 36 at para 32.
[26] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

9.3 The Court may decline to grant it only if there are compelling reasons for withholding the requested remedy. It is the discretion conferred on the courts by section 172(1) must be exercised judiciously.

9.4 The High Court held as follows:-

"Various factors militate against an order which would include those polygynous customary marriages already terminated by death, if the estate of the deceased has not yet been finalized. The most significant of these factors is that in Gumede the Constitutional Court decided not to limit the retrospectively of the order of invalidity, but to exclude customary marriages terminated by death or divorce predating the said order.[76] That has the effect that widows from monogamous customary marriages entered into before the RCMA, whose marriages were terminated by death before the Gumede judgment, did not enjoy the protection afforded by that judgment. Their children, by implication, would also have been excluded. Nothing has been placed before me that would justify treating widows in "old" polygynous customary marriages, whose marriages had already been terminated by death, differently. There is no justification in providing them and their children wider protection upon the invalidity of the same legislative provision, being section 7(1) of the RCMA. It follows thus that such an order would not be in the interest of justice."

9.5 In *S v Ntsele,*[27] it was held that the question of retrospectivity, prospectivity and conditional suspension of orders of invalidity often depend on factors in respect of

[27] 1977 ZACC 14; 1997 (11) BCLR 1543 para 13.

which evidence is necessary. We submit that no evidence was led by the respondents with regard to practical difficulties in respect of the administration of affected deceased's estate that would result from a retrospective order.

9.6 We concede that in the absence of order limiting the retrospective effect of declaration of invalidity, the law which is subject of the declaration is regarded as having become invalid from the moment the relevant provisions of the Constitution came into force.

9.7 This will means that unless the respondents can satisfy the Court that the interests of justice and equity require an order of prospective invalidity to be made, the challenged provisions of section 7 (1) of the Act would have become invalid long before the death of the deceased. This is because of the effect of the so called " supremacy clause" of the Constitution (section 2), in terms of which the Constitution is the supreme law of the Republic and all law or conduct inconsistent with it is invalid.

9.8 In this case, there is no evidence to support the contention that the confirmation of the order which will include those polygynous marriages terminated by death if the estate of the deceased has not been fully finalised, would cause any significant disruption or dislocation in the administration of the deceased's estate.

9.9 To deprive the applicants of the order which will include polygynous marriages terminated by death and the deceased's estate has not finally wound up it will not be

consistent orders made in the cases previously decided by this court in matters affecting substantive rights of inheritance.[28]

9.10 In *Gumede,* the applicant was protected by the order granted by this Court. She was granted the relief she sought. The relief sought in the *Gumede* case is not similar to the relief sought by applicant in this matter.

9.11 To limit the order of retrospectively to cases in which transfer of ownership has not yet been completed would enable an heir to avoid the consequences of any declaration of invalidity by going ahead with transfer as speedily as possible.

9.12 What will accordingly be just and equitable is to limit the retrospectively of the order so that the declaration of invalidity does not apply to any completed transfer to an heirs who are bona fide in the sense of not being aware that the constitutional validity of the provision in question was being challenged.

9.13 It is fair and just that all transfers of ownership obtained by an heirs who are on notice ought not to be exempted.

9.14 In this matter, the estate is still pending. The inheritance has not been transferred to the beneficiaries names, thus the order sought will not affect the administration of justice and good governance.

[28] This is evident from both of the other decisions of this Court on the constitutionality of section 1(1) of the Act, in *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) and *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC). see also *Gory v Kolver NO and Others* (CCT28/06) [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) (23 November 2006)

9.15 The order must be retrospective, save that it does not affect customary marriages wherein the estate which have been finally wound up. This order will not affect the administration of justice and good governance.

9.16 We submit that constitutional breaches such as the present must be redressed effectively by, where possible, vindicating the infringed rights fully. It is was drawn to the Government Respondents by the South African Law Commission.

9.17 Despite that such legislation accommodating women in polyganous customary marriages prior to Gumede, such legislation has not yet been forthcoming.

9.18 Section 7 (1) of the Recognition of the Act still remaining on the statute books in its unconstitutional form. Justice and equity thus requires that the government Respondent be ordered to pay the Applicants' costs, not only in this Court, but also in the High Court.

9.19 This Court in *Fose v Minister of Safety and Security*[29] said:

> *"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values*

[29] [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."

10 THE INTERIM RELIEF

10.1 In *Ntuli*[30] this Court declare:-

"*It is the duty of the Minister responsible for the administration of the states who wishes to ask for an order of invalidity to be suspended … to place sufficient information before the Court to justify the making of such an order, and to show the time that will be needed to remedy the defect in the legislation."*

11 THE APPEAL: COSTS ORDER

[30] *Minister of Justice v Ntuli* 1997 ZACC7; 1997 (3) SA 772 (CC) at para 40.

11.1 The applicants are appealing the High Court's costs order. The High Court made an order that the cost is reserved. This is despite fact that the issue with regard to costs was ventilated before the High Court.

11.2 This appeal with regard to the costs order is an issue connected with the decision on constitutional matter and thus we respectfully submit that this Court has jurisdiction to entertain the appeal. A court of appeal can interfere with a costs order of a Court a quo where that Court has no excised its discretion judicially or where it has been influenced by wrong principles or misdirection of facts.[31]

11.3 Section 172 (2) (2) (a) of the Constitution make it clear that confirmation proceedings are limited to an "order of constitutional invalidity". In this case, it is the only part of the order declaring Section 7 (1) of the Recognition Act invalid, in order to give legal force to such invalidity.

11.4 Costs, on the other hand, follows a different logic. The purpose of a Costs order is to indemnify the successful party and to refund expenses actually incurred.

11.5 The applicants were entitled to their costs. The general principle in constitutional litigation was laid down in Biowatch.[32] In that case, this Court found that the general rule in constitutional litigation between a private party and the state is that if the private

[31] *Giddey No v JC Barnard and Partners* 2006 ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 19; *Naylor v Jansen* 2006 ZASCA 94; 2007 (1) SA 16 at para 14
[32] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (9) SA232 (CC).

party is successful, it should have its costs paid by the state, while, if unsuccessful, each party should pay its own costs.

11.6 When the Court departs from the general rule, a Court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to the applicants court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future.[33]

11.7 The order to reserved costs made by the High Court have a chilling effect on the applicants who approach Court to assert their constitutional rights. In the circumstances the applicants ask this Court to overturn the costs order.

11.8 We submit that it is in the interest of justice to approach this honourable Court directly, instead of approaching the High Court to reconsider the Costs order. We further submit that the High Court did exercise its judicial discretion capriciously and or incorrectly.[34] The High Court did not act judicially in deciding on costs, as well as the clear principles this court laid down in Biowatch.[35] There is nothing in the High Court judgment which demonstrate that an effective exercise of its description in reserving costs.

11.9 We accordingly ask this Court to overturn the costs order of the High Court and be replaced it with the order that the respondents must pay the applicants costs in the High Court.

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[33] *Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and Another* (2015) ZACC 4
[34] *Sublime Technologies (Pty) Ltd v Jonker and another* 2010 (2) SA 522 (SCA)
[35] *South African Municipal Workers Union v Minster of Co-Operative Governance and Traditional Affairs* 2017 ZACC 7 para100.

12. CONCLUSION

12.1 The State is under an ongoing constitutional obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights" by ensuring that legislation which violate constitutional rights is amended or replaced.

12.2 Despite the fact that in *Gumede*, Moseneke DCJ in respond to *amicus curiae* submission that the Court should regulate the consequences of all polygynous marriages as well, he did not adopt the submission, holding:-

"*In my view, it is sufficient to do no more than draw the legislature, attention to this possible lacuna, if any. I think that one section 7(1) of the Recognition Act has been declared inconsistent with the Constitution and invalid, the proprietary consequences of polygynous relationships will be regulated by the Customary Law until parliament intervenes.*[36]

12.3 We propose that this Court confirm the order of invalidity and make the following order:

(1) Section 7(1) of the Recognition of Customary marriages Act 120 of 1998 is declared inconsistent with the Constitution and invalid;

[36] Gumede at Para 56

(2) Until such time as Parliament enacts legislation to govern the matrimonial property regimes of persons who are parties to polygynous customary marriages concluded before the Recognition of Customary Marriages Act 120 of 1998 came into operation, the following regime shall apply to such marriages:

(a) The wives who are parties to such marriages shall have joint and equal rights of management and control over and in the marital property to their husbands, and these rights shall be exercised as follows:

(i) In respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interest of the family unit.

(ii) In respect of all family property, by the husband and all the wives, jointly and in the best interest of the family unit.

(b) In respect of personal property, a party shall retain exclusive rights

to her or her personal property.

(c) In the event of any disputes arising from this order, any party to such a marriage may approach the court for an order regulating the matrimonial property regime on a just and equitable basis.

(3) The order in paragraph 1 and 2 operate retrospectively, save that they do not affect:

1. *Customary marriages that have been terminated by death;*

2. *Customary marriages that have been terminated by death if the estate has been final wound up before the date of this order.*

TABLE OF AUTHORITIES

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Biowatch Trust v Registrar Genetic Resources and Others 2009 (9) SA232 (CC).

Dawood v Minister of Home Affairs and Other 2000 (3) SA 936 (CC)

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Gumede v President of the Republic of South Africa 2009 (3) SA 152 CC

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Hassam v Jacobs NO and Others 2009 5 SA 572 (CC)

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Minister of Justice v Ntuli 1997 ZACC7; 1997 (3) SA 772 (CC)

Mthembu v Letsela and another (SCA) 71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000)

National Coalition of Gay and Lesbian Equality and Others v Minister of Justice and Others

1999 (1) SA 6 CC

Naylor v Jansen 2006 (3) SA 546 (SCA)

Netshituka v Netshituka 2011 (5) SA 453

Prince v President, Cape Law Society, and Others 2001 (2) SA 388 (CC);

Ramuhovhi and Another v President of the Republic of South Africa and Others (412/2015) [2016] ZALMPTHC 18; 2016 (6) SA 210 (LC) (1 August 2016)

S v Bhulwana 1995 (2) SACR 748

S v Gwadiso 1996(1). SALR 388

S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA (1) (CC)

S v Ntsele 197/96) [1998] ZASCA 49

South African Municipal Workers Union v Minster of Co-Operative Governance and Traditional Affairs 2017 ZACC 7

Sublime Technologies (Pty) Ltd v Jonker and another 2010 (2) SA 522 (SCA)

Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and Another (2015) ZACC 4

Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae) 2006 4 SA 230 CC

LEGISLATION

Recognition of Customary Marriages Act 120 of 1998

Constitution of the Republic of South Africa

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OTHER

SALC Report on Customary Marriages: Project 90 The Harmonisation of the Common Law and the Indigenous Law August 1998.

SA Law Commission “Marriages and Customary Unions of Black Persons” (1985) working paper.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT: 194/2016

In the matter between:

MATODZI RAMUHOVHI (BORN NETSHITUKA)	First Applicant
THINAMAANO EDSON NETSHITUKA	Second Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	Second Respondent
ESTATE OF LATE MASEWA JOSEPH NETSHITUKA	Third Respondent
MUNYADZIWA JOYCE NETSHITUKA	Fourth Respondent
MASTER OF THE HIGH COURT, THOHOYANDOU	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
WOMEN'S LEGAL CENTRE TRUST Amicus Curiae	Seventh Respondent

THIRD AND FOURTH RESPONDENTS' WRITTEN SUBMISSIONS

1.

The legal dispute that is now serving before this Honourable Court has been ongoing since 2008 when Tshinakaho Netshituka commenced with an application for relief in terms of which Tshinakaho Netshituka, the mother of the now first applicant, sought an order:

"1. Declaring that first applicant was married to the late Masewa Joseph Netshituka in terms of a customary marriage;

2. Declaring the civil marriage concluded between the first respondent (current fourth respondent) and the late Masewa Joseph Netshituka on 17 January 1997 null and void ab initio as the late Masewa Joseph Netshituka was already married to the first applicant (Tshinakaho Netshituka) in terms of customary law;

3. Declaring the last will and testament of the late Masewa Joseph Netshituka dated 20 November 2007 invalid and ordering that the late Masewa Joseph Netshituka died intestate;

4. Declaring that the first respondent is not entitled to benefit in terms of the last will and testament of the late Masewa Joseph Netshituka as she was not married to him;

5. Declaring the acceptance of by the fifth respondent dated 22

January 2008 of the last will and testament of the late Masewa Joseph Netshituka null and void;

6. *Declaring all the proceedings in terms of the Administration of Estates Act, conducted by first and second respondents in respect of the third respondent's estate being the determination of this matter by the Honourable Court..."*

2.

This relief was dismissed in the then Venda High Court and formed the subject of an appeal which culminated in the matter that is reported as Netshituka v Netshituka and Others 426/10) [2011] ZASCA 120; 2011 (5) SA 453 (SCA); [2011] 4 All SA 63 (SCA) (20 July 2011).

3.

This judgment of the Supreme Court of Appeal was given on 20 July 2011. This in turn led to the continuation of the finalization of the estate until the current applicants brought the application in question on 27 May 2015 in terms of which it sought:

3.1 Declaring that section 7(1) of the Recognition of Customary Marriages Act, 120 of 1998 ("the Recognition

Act") is inconsistent with the Constitution and accordingly invalid;

3.2 Declaring that the polygamous customary marriage entered before the enactment of the Recognition Act produced legal consequences of a marriage in community of property;

3.3 Declaring that a spouse in a polygamous customary marriage is entitled on divorce and/or death to claim from the other spouse death benefit or benefit accrued from such marriage.

3.4 Declaring that the alienation by the deceased to the fourth respondent of the half shares in Why Not Centre Erf 22 and 23 Thohoyandou, alternatively the fourth respondent's members interest in the Why Not Centre are invalid;

3.5 Directing that the fourth respondent to transfer to the deceased estate, the members interest or shares held by her in the Why Not Centre.

4.

This entails in short that this estate has, in various Courts, been the subject of litigation since 1998 to date of this application for confirmation. The finalization of the estate has therefore been delayed since 2008 by the first dispute and thereafter by the claims that culminated in the application that served in the court *a quo*.

5.

5.1 The applicants brought an application for confirmation of the order of the Court a quo in terms of Rule 16(4) of the Constitutional Court's Rules.

5.2 No appeal was filed as contemplated in Rule 16(2) of the Rules.

5.3 In the heads of argument filed on behalf of the applicants, they take issue with the order of the Court a quo in as far as retrospectivity is concerned and now argues that this Honourable Court should extend the scope of the Order made and order that it has retrospective operation to include estates not yet finalised.

5.4 On behalf of the third and fourth respondents, it is

submitted that in the absence of an appeal against the Order of the Court a quo, that the applicants are not as of right entitled to argue against the scope of the order made by the Court a quo.

6.

Based on the decision and the rational set out in the Gumede decision by this Honourable Court, no submissions are made on behalf of the third and fourth respondents against the finding of unconstitutionality as set out in the judgment of Acting Judge Lamminga in the court *a quo.*

7.

7.1 The *crux* of the arguments will be centred on the issue of retrospectivity, raised in the written submissions filed on behalf of the applicants, in as far as the Honourable Court allows the argument, in the absence of an appeal against the order.

7.2 Third and fourth respondents support the order granted in line with the decision in Gumede and are in favour thereof that a costs order be granted against the first and second

respondents based on the failure by the State to affect the necessary legislative amendments as prescribed in Gumede.

RETROSPECTIVITY

8.

It is conceded for purposes of argument in this Honourable Court that, as a rule, retrospectivity operates from the date when the constitutional right encroached by the legislation was recognised.

9.

For purposes of the argument against retrospectivity other than that was already applied by this Honourable Court in Gumede, it is apposite to point out in brief the chronology that is applicable in this case:

9.1 1 December 1956-Customary marriage between the deceased and Tshinakaho

9.2 Prior to 5 July 1984-Civil marriage between Martha Mosele Netshituka (Martha) and the deceased

9.3 5 July 1984- Decree of divorce Martha and deceased.

9.4 Fourth respondent married the deceased in a civil

marriage on 17 January 1997.

9.5 The immovable property (shopping complex), forming the bulk of the assets of the estate was sold to the Gerda Fourie Trust in 1998.

9.6 The immovable properties were bought by the deceased and the fourth respondent during 2000 from the Gerda Fourie Trust.

9.7 20 November 2007- Last will and testament of deceased;

9.8 4 January 2008- Mr Netshituka passed away.

9.9 22 January 2008- Master accepts last will and testament.

9.10 In 2009 the Gumede[1] Constitutional Court judgment is given.

9.11 In 2011 the Supreme Court of Appeal judgment [2] in Netshituka is given.

9.12 In 2015 the new application as set out in the preceding

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[1] Gumede v President of the Republic of South Africa 2009 (3) SA 152 CC)
[2] Netshituka *v Netshitukaand Others* 2011 (5) SA 453 (SCA

paragraph is brought.

9.13 In 2016 the Limpopo High Court gives its ruling[3] on constitutionality.

10.

In order to address the issue of retrospectivity on behalf of the third and fourth respondents it is submitted that the fact that the Deputy Chief Justice Moseneke (as he then was) in paragraphs 52-54 of the judgment in Gumede remarked as follows:

> *[52] It is important to add that nothing in the order we intend making will affect customary marriages that have been terminated either by death or by divorce before the date of this order. Also, any exercise of marital power before the date of the order we will make, will not be undone only as a result of this order.*

> *"[53] What remains is to consider the interests of third parties who may be affected by a change in the*

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[3] Ramuhovhi & Another v President of the Republic of South Africa & Others 2016 (6) SA 181 (LT)

proprietary regime of customary marriages entered into before the Recognition Act. In this regard, the provisions of s 11(4) of the Matrimonial Property Act are instructive. Section 11(4) reads as follows: The abolition of the marital power by ss (2) shall not affect the legal consequences of any act done or omission or fact existing before such abolition.

[54] Although this provision does not find direct application in this case, it serves as an example of how a concern over the possible interests of third parties may be legislatively managed during the transition period. That provision protected legal consequences from acts done or omissions or facts existing before the abolition of marital power. To the extent necessary, the order of invalidity we are to make may incorporate a provision which in substance is an equivalent of s 11(4) of the Matrimonial Property Act. I am of the view that the interests of third parties, who may be affected by the altered matrimonial regime in relation to pre-recognition customary marriages, may also be preserved by incorporating a provision that allows a party to approach a competent court should there be any adverse consequences arising from the

order we have made."

11.

The third and fourth respondents' interpretation of the Gumede judgment is that the Honourable Court excluded marriages that were already terminated as a result of death or divorce from the provisions of the Order, save that it reserved the right for persons affected by the judgment to apply to Court on their specific circumstances should it be applicable for an order contrary to the norm set in the judgment. Fourth respondent is similarly, as a consequence of the Netshituka Supreme Court of Appeal decision, in a position where she obtained certain rights by virtue of her co-ownership of properties acquired by her and the deceased as well as assets that were bequeathed to her in terms of the will.

12.

It is submitted that having regard to the chronology that were included in the introductory portion of these written submissions, that the basis upon which this court decided to limit retrospectivity in the Gumede case, is equally, if not more applicable in this case.

13.

13.1 The fourth respondent was not responsible for any delay in the finalization of the estate and the ongoing litigation from 2008 to date hereof has prevented the estate from being finalised.

13.2 The will that formed the subject of the dispute clearly provided for several wives to be beneficiaries and it is submitted that the deceased regarded the fourth respondent as his wife and clearly intended only to dispose of his half of the estate and recognized her proprietary rights to the assets in question.

13.3 Most importantly, it is submitted that Mr Netshituka is not here to have any say in the events that have no culminated in a dispute regarding his estate. From the evidence, Mr Netshituka was an astute businessman and there is no indication that he would not have dealt with his estate differently if he had known that he would be regarded as being married in community of property. He was not afforded the choice, as is every other person who enters into a marriage to dictate to martial regime

applicable to his marriage.

13.4 On a hypothetical scenario, the following submissions are made:

13.4.1 Mr Netshituka seeks legal advice in 1956 on the proprietary consequences of a customary marriage in 1956 and is advised that customary are not recognized in law and he accordingly does not enter into any ante nuptial contract.

13.4.2 Mr Nestshituka is similarly advised that in terms of Venda Customary law there is no community of property in a customary marriage.

13.4.3 He enters into more customary marriages but then decides to marry Martha in terms of civil marriage prior to 1984.

13.4.4 At that time, he is advised that marriages between "black persons"[4] are out of community

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[4] Black Administration Act 38 of 1927

of property unless the parties enters into an ante nuptial contract providing for a different regime.

13.4.5 He divorces Martha in 1984 and is regarded as unmarried in terms of the applicable legislation at the time.

13.4.6 In 1997 he decides to marry fourth respondent in a civil marriage, he is advised that a marriage at this stage without an ante nuptial contract is in community of property.

13.4.7 In 2007 he decided to have a will prepared. He clearly provides in his will for different wives that he had in his lifetime and clearly reflects that he is married in community of property with the fourth respondent and only disposes of half of the assets of his estate.

13.5 The Recognition of Customary Marriages Act, only came into operation on 15 November 2000 after all the marriages were concluded.

13.6 Fourth respondent married a man that was regarded as

divorced in 1997 only to find out in 2011 that the marriage was void as a result of the customary marriage with the first customary wife that was not automatically dissolved when Mr Netshituka married Martha.[5]

13.7 None of the customary wives had their customary unions registered.[6]

13.8 It is conceded that it does not impact on the validity of the marriage [7], but it does impact on third parties who enters into a marriage with a person, as the Department of Home Affairs will not reflect the status of the person in an unregistered customary marriage as "married".

13.9 The fourth respondent invested time, money and effort since 2000 in the business that she purchased with Mr Netshituka in 2000 when they re -purchased the Why Not Shopping Centre from the Gerda Fourie Trust. She worked in the business and still does.

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[5] Nkambula v Linda 1951 (1) SA 377 (A)
[6] Section 4 of the Recognition Act
[7] Section 4(9) of the Recognition Act

13.10 The effect of an order of retrospectivity further than that provided for in Gumede will have catastrophical consequences for fourth respondent, who on all available evidence, is an innocent third party.

13.11 If she is found not to be the owner of an undivided half share in the immovable properties and only entitled to inherit in terms of the will, she will effectively be expropriated of her rights to the properties, without compensation.

13.12 Should the order have unlimited retrospective effect back to 1956, each transaction for the purchase of immovable property would be void for lack of consent by the first customary wife.[8]

13.13 The unravelling of each and every transaction and the protection of the other customary wives and their status, having regard to the non-compliance with the provisions of the Recognition Act as to consent from Court, will be

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[8] Section 15(2) of the Matrimonial Property Act 88 of 1984

impossible to unravel and ensure an equitable distribution based on the post Recognition Act position.

14.

14.1 Following the judgment in the Supreme Court of Appeal, fourth respondent elected not to challenge the decision by the Supreme Court of Appeal as she remained the co-owner of immovable properties and was and remained a beneficiary in terms of the deceased's will.

14.2 The benchmark regarding retrospectivity, set in Gumede, which protects fourth respondent's proprietary interests that vested whilst in the relationship with the deceased, is the only viable solution for the facts of this case.

15.

15.1 It is submitted that there is no rational to include the unfinalized estate in the order dispute if one considers all the evidence, the delays and the adverse impact an order of retrospectivity will have on the fourth respondent. Fourth respondent on all

the evidence did not act *mala fide*. None of the customary wives took any legal steps until after the death of the deceased, and did not from 2000 onwards, until 2015, take steps to enforce any right on behalf of a joint estate, to prevent the fourth respondent from acquiring property rights as she did.

15.2 Not one of the customary wives, at any stage for the period 2000 to the date of the death of the deceased, took any steps to attack the validity of the marriage or to challenge the matrimonial regime applicable to them. No application was brought by the first customary wife in terms of section 7(4) of the Recognition Act[9] to change the applicable martial regime applicable to them.

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[9] (4) *(a)* Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that-

15.3 The fourth respondent will effectively be expropriated of her property rights, without compensation if the order has retrospective operation as prayed for by the applicants.

15.4 It is submitted that it is impractical and near impossible to attempt to unscramble the scrambled egg that was prepared by the unfortunate

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(i) there are sound reasons for the proposed change;
(ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the *Gazette*; and
(iii) no other person will be prejudiced by the proposed change, order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

(b) In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings.

circumstances that were created by the law as it was and the law how it should have been, having regard to the Constitution.

16.

Not only was the fourth respondent a co-owner of the properties in question, but also jointly involved in the business activities that she engaged with the deceased. This had been the position from shortly after their marriage in 1996 up to the date of the death of the deceased in 2006.

17.

It is submitted that to have any order as to retrospectivity, other than that set in Gumede will create a plethora of parties potentially affected by the order. On behalf of third and fourth respondents, it is submitted that having regard to the substantial delay between the finalization of the Supreme Court of Appeal case deciding the validity of the will and the validity of the marriage, up to the new attack based on polygamous customary marriages and the status thereof, should not cause inequitable adverse consequences for the fourth respondent.

18.

In the premise, it is submitted that the order ought to be confirmed similar as that in Gumede and as granted by the court *a quo*.

19.

In as far as the costs were concerned the court *a quo* ordered that he costs be reserved. It is submitted that, as was found in the Gumede case[10], there ought to be no reason why the two Government respondents should not be ordered to pay the costs involved in this action including the costs in the court *a quo*.

20.

It is submitted that the failure by the legislature to take timeous steps, having been appraised of the decision in Gumede, and the failure to adequately provide for the lacuna that was left by the declaration of constitutional invalidity of section 7(1) of the Recognition Act, renders its manifestly unfair to cause *bona fide* litigants regarding a similar dispute on polygamous marriages, to

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[10] Par 57 of the judgment

bear the brunt of the costs as a result of failure by parliament to enact the legislation in question.

WHEREFORE it is prayed that the Honourable Court confirm the order as ordered by the court *a quo* in line with the Gumede decision.

SIGNED at PRETORIA on this 6th day of APRIL 2017.

GJ SCHEEPERS
COUNSEL FOR THIRD & FOURTH RESPONDENTS

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT: 194/2016

In the matter between:

MATODZI RAMUHOVHI (BORN NETSHITUKA)	First Applicant
THINAMAANO EDSON NETSHITUKA	Second Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	Second Respondent
ESTATE OF LATE MASEWA JOSEPH NETSHITUKA	Third Respondent
MUNYADZIWA JOYCE NETSHITUKA	Fourth Respondent
MASTER OF THE HIGH COURT, THOHOYANDOU	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
WOMEN'S LEGAL CENTRE TRUST Amicus Curiae (Application for intervention not yet granted)	Seventh Respondent

TABLE OF AUTHORITIES

1. LEGISLATION

1.1 Recognition of Customary E Marriages Act 120 of 1998:

1.1.1 Section 7;

1.1.2 Section 4.

1.2 Matrimonial Property Act 88 of 1984:

1.2.1 Section 15.

1.3 Black Administration Act 38 of 1927.

2. AUTHORITIES

2.1 Gumede v President of the Republic of South Africa 2009 (3) SA 152 CC)

2.2 Netshituka v Netshituka and Others 426/10) [2011] ZASCA 120; 2011 (5) SA 453 (SCA); [2011] 4 All SA 63 (SCA) (20 July 2011)

2.3 Ramuhovhi & Another v President of the Republic of

South Africa & Others 2016 (6) SA 181 (LT)

2.4 Nkambula v Linda 1951 (1) SA 377 (A)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 194/2016

LT CASE NO: 412/2015

In the matter between:

MATODZI RAMUHOVHI (born NETSHITUKA)	First Applicant
THINAMAANO EDSON NETSHITUKA	Second Applicant
and	
THE PRESIDENT OF THE RSA	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICE	Second Respondent
ESTATE OF MASEWA JOSEPH NETSHITUKA	Third Respondent
MUNYADZIWA JOYCE NETSHITUKA	Fourth Respondent
THE MASTER, THOHOYANDOU	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
WOMEN'S LEGAL CENTRE TRUST	*Amicus Curiae*

AMICUS CURIAE'S HEADS OF ARGUMENT

WOMEN'S LEGAL CENTRE TRUST

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INTRODUCTION

1. This case concerns the validity of section 7(1) of the Recognition of Customary Marriages Act.[1] Section 7(1) regulates the proprietary consequences of polygynous marriages entered into before the Act came into force on 15 November 2000.

2. The case is a sequel to Gumede.[2] In Gumede the Court declared section 7(1) invalid to the extent that it relates to monogamous marriages.[3] The section provides that the proprietary consequences of such marriages are governed by customary law.[4] It continues to apply to pre-Act polygynous marriages.

3. The Women's Legal Centre Trust participates in the proceedings as *amicus curiae* to advance the interests of the broader class of women affected. The Trust appreciates the opportunity to do so.

4. The women affected are a particularly vulnerable group of women. They are likely to be older women in both rural and urban areas. They are all African and many are probably poor. They are harmed by the section because it imports

[1] 120 of 1998. We refer to this legislation as 'the Act'.
[2] Gumede v President of the RSA 2009(2) SA 152 (CC).
[3] Gumede, order at para 59(d) read with paragraphs 55 and 56. In this sense the Constitutional Court granted a narrower order to the High Court. The High Court order was not limitd to monogamous marriages, at least expressly.
[4] It reads: 'The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law'.

customary law rules that preclude women from owning or holding rights in property and managing and controlling property equally with their husbands.

5. The affected women stand alone under customary law in not receiving effective protection of their constitutional rights to dignity and equality with respect to their marital property regimes. Since 1994, protective marital property regimes have been put in place for women in monogamous customary law marriages, whether concluded before or after the commencement of the Act[5] and for women in polygynous customary law marriages entered into after the Act commenced.[6] Women in pre-Act polygynous marriages remain without effective protection.

6. The Trust participated as *amicus curiae* in the High Court. Its submissions were and remain broadly aligned with the applicant's position. Due to the narrowing of issues between the parties and the content of the High Court judgment and applicant's submissions,[7] these submissions deal only with limited issues relating to the invalidity of section 7(1) and remedy.

[5] The commencement of the Act in 2000 ushered in a protective regime for post-Act monogamous customary marriages which the Constitutional Court extended to pre-Act monogamous marriages in Gumede in 2008.
[6] See Ngwenyama v Mayelane and Another 2012 (4) SA 527 (SCA) at para 38 where Ponnan JA held that in such marriages there is a joint estate (in community) for the first marriage and subsequent marriages would be out of community of property. While this regime confers protection on women in these marriages by recognizing their status to own and manage property, whether this regime confers adequate protection on women in such marriages may be debatable.
[7] The Trust made extensive submissions in the High Court on a range of matters and provided the Court with a bundle of relevant authorities relating to international law and customary law. One issue in dispute at that stage was whether the application raised live issues and whether it was necessary to reach the constitutional issue. The Trust aligns itself with the reasoning of the High Court in respect of the procedural and jurisdictional aspects in paragraph 19 to 43 of the judgment insofar as this Court wishes to reconsider these issues.

INVALIDITY OF SECTION 7(1)

Section 7(1) imports rules of customary law that preclude women from owning, controlling and managing property equally with their husbands

7. Section 7(1) imports the customary law (in this case Venda customary law) and makes it applicable to pre-Act marriages. As the High Court found,[8] there was no dispute between the parties as to the proprietary consequences in polygynous marriages of Venda customary law and its nature and effect.[9] Under the applicable customary law, the husband is the exclusive holder of all rights to property acquired during the subsistence of the marriage.

8. The Trust made submissions in the High Court about the content of the official customary law across South Africa, which find expression in summarised form in the judgment.[10] Accordingly, we refer to the summary. For ease of reference, we also refer to the specific *pages* of the relevant old textbooks cited by the High Court.[11] Mindful of this Court's important injunction to treat old textbooks on customary law with

[8] Judgment, para 18, vol 3 p 143
[9] Founding Affidavit (FA) 10.2 and 10.3 vol 1 p 16, Third and Fourth Respondents' Answering Affidavit (AA) para 6.5 vol 2 p 66 and 54.2 vol 2 p 86-7 and Replying Affidavit 4.3 vol 2 p 103.
[10] See paragraphs 54 to 58 of the judgment, vol 3, p 156-8. The High Court dealt with the issue when dealing with remedy.
[11] JC Bekker, "Seymour's Customary law in Southern Africa", 4ed (1989), 97; T.W. Bennet, "A sourcebook of African customary law for Southern Africa" (1991), 224; AJ Kerr, "The customary law of immovable property and of successions", 2nd ed (1976), 125; South African Law Commission "Report on Customary marriages Project 90", 102; H.W. Warner, "A digest of South African Native civil case law 1894-1957" (1961) , 128-129. Should the Court have difficulty accessing any authorities, these can be supplied.

caution,[12] we point out too that a consideration of more recent legal writing reveals that the official customary law as described in the old textbooks is still cited.[13]

9. A consideration of the authorities shows that generally speaking, the official customary law is similar across different communities within South Africa with the key difference being the ranking system applied, which determines the rank of a house or wife. Some communities use what is termed a 'complex ranking system' and others use what is termed 'a simple system'.[14] However whichever system applies, the husband is the family head of all the houses, property rights ultimately vest in him and he is in control of general (family) and house property subject to duties to his wives and family.[15]

10. In drawing this Court's attention to the official customary law, we are mindful of the remarks of Moseneke DCJ in Gumede when considering the impact of the historical marginalisation of customary law marriages and

[12] See eg Alexkor Ltd and another v Richtersveld Community and others 2004(5) SA 460 (CC) at para 54 and Bhe and others v Magistrate, Khayelitsha, and others (Commission for Gender Equality as amicus curiae 2005 (1) SA 580 (CC) (Bhe) at para 82 to 83.

[13] Himonga C ed (2015), "African Customary Law in South Africa: Post-Apartheid And Living Law Perspectives" 128; Jansen et al (2006)," Introduction to Legal Pluralism in South Africa", 43, 55; Cronjé DSP and Heaton J (2010), "South African Family Law", 210; Cousins B, "Women's land rights and social change in rural South Africa: the case of Msinga, KwaZulu-Natal", (2013) AJ 73, at 87; Frantz G (2015), "Polygynous marriages and patrimonial consequences, does one size fit all,?" Scientific Cooperations International Journal of Law and Politics 1(1) 23, at 30; Bakker P, "The validity of a customary marriage under the Recognition of Customary Marriages Act 120 of 1998 with reference to sections 3 (1) (b) and 7 (6) - Part 1", 79 (2016) THRHR 231, at 241.

[14] See TW Bennett A Soucebook of African Customary Law for Southern Africa 1991 at p 224. See too SALC Marriages and Customary Unions of Black Persons 1985 working paper.

[15] Cronjé DSP and Heaton J (2010), "South African Family Law", 211.

the failure of official law to display understanding of the value system that animated customary law marriage: '*A prominent feature of the law of customary marriage, as codified, is male domination of the family household and its property arrangements. While patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality which left women and children singularly marginalised and vulnerable.*' In making this comment, Moseneke DJC sought to emphasise that in the pre-colonial past, marriage was always a bond between families with collective and communal substance.[16] While acknowledging these values, the Court emphasised that: '*it must, however, be acknowledged that even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children*.'[17]

11. We are also mindful that in some communities the living customary law may have evolved and adapted to secure equality for women with respect to marital property rights. There is no evidence to that effect before the Court. However, even if there were such evidence available, it would not detract from the invalidity of section 7(1). Rather, we submit that due to the likely ad hoc nature of such adaptations and the anomalies and hardships that will invariably arise due to the ongoing impact of

[16] See para 17 and 18.
[17] See para 19.

enforcement of the official recorded customary law, the section is still invalid. This approach is in line with the Court's reasoning in Bhe.[18] Any rights that may have been conferred by living customary law must however be protected under the Court's remedy as held by the High Court.

Breach of rights: dignity and equality

12. The Trust submits that section 7(1) violates women's right to equality and dignity. To avoid overlapping arguments, we deal with only limited issues germane to the equality analysis. The Court's analysis in Gumede is, if course, of equal application to this case.[19] In short, a marital property system that implies that women are not fit or competent to own and administer property violates their rights to dignity and equality, renders them extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent.

The grounds of discrimination

13. The High Court found that the section 7(1) discriminates unfairly against women in pre-Act polygynous marriages on the basis of gender and, in any event, on race and/or ethnic or social origin.[20]

[18] In Bhe there was evidence that official rules of customary law of primogeniture are not universally observed but the Court – while emphasizing the importance of acknowledging the living customary law - highlighted the ad hoc nature and continuing adherence to official versions of customary law. See paras 81 to 87.
[19] See para 32 to 36
[20] See paragraphs 44 to 46 of the judgment.

14. In Gumede, this Court declined to make any finding that section 7(1) discriminated against parties to pre-Act monogamous marriages on grounds of race. It did so due to difficulties that surface about the reach of customary law, whom it binds and whether people other than African people may be bound by customary law.[21] It is similarly unnecessary for the Court to make any such finding in this case.

15. The Trust submits that the central offending features of section 7(1) are that it discriminates against women in pre-Act polygynous marriages on the intersecting grounds of sex, gender, marital status and, indirectly, age and violates their dignity. However, we submit that the Court can comfortably acknowledged that the women who suffer particular hardship as a result of section 7(1) are likely black women which at least exacerbates the unfairness of the discrimination.

16. That there are *intersecting* grounds of discrimination make the impact all the more harsh. This Court has emphasised that overlapping grounds of discrimination have led to deep patterns of disadvantage.[22] It has done so in cases which raise similar issues to those arising in the present case, such as Bhe[23] and Hassam.[24]

[21] See para 23
[22] Brink v Kitshoff NO 1996(4) SA 197 (CC) at para 44.
[23] See Bhe, para 78 where the court found discrimination on race and gender and considered the 'deeply embedded patriarchy' inherent in the principle of primogeniture which 'reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.'

17. The differentiation is further based on the date on which a woman was married (an unspecified ground) which the court in Gumede considered to be unfair in relation to monogamous customary marriages.[25]

Unfairness, vulnerability of the class and substantive equality

18. In considering the unfairness of discrimination, the Court considers a range of factors including the position of the complainants in society, whether they have suffered in the past from patterns of systemic disadvantage, whether the discrimination is on a specified ground as well as the nature of the provision and the purpose sought to be achieved by it.[26] It also recognizes that unfair discrimination frequently has ongoing negative consequences, the continuation of which are not halted immediately when the initial causes are eliminated and which may continue even indefinitely, unless remedied.[27]

19. As set out above, the women affected by section 7(1) constitute a vulnerable group in society and they have suffered in the past from systematic and intersecting patterns of disadvantage. If not remedied now,

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[24] Hassam v Jacobs No 2009 (5) SA 572 (CC). The Court found, at para 34, 37, that the denial of benefits (under the Intestate Succession Act and the Maintenance of Surviving Spouses Act) discriminated on overlapping grounds of religion, gender and marital status. The Court emphasized that the nature of discrimination must be analysed contextually and that it is an express purpose of our equality provision to avoid significant and material disadvantage, see para 34.

[25] At para 34.

[26] Brink v Kitshoff NO 1996 (4) SA 197 (CC) See O'Regan J's judgment, paras 40-42; President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) at para 38 and Harksen v Lane NO and Others 1998 (1) SA 300 (CC) see para 51, 94-95.

[27] National Coalition For Gay And Lesbian Equality And Another v Minister Of Justice And Others 1999 (1) SA 6 (CC) at para 60.

these will continue into the future as many women will continue to be subjected to a patriarchal and discriminatory marital property regime.

20. The Constitution demands that vulnerability and social realities be at the forefront of adjudication of equality claims.[28] The issue comes to the fore when the Court considers the fairness of any discrimination. It came to the fore in the Court's reasoning in Gumede.[29]

21. In Bhe this Court described African women and children as '*arguably the most vulnerable groups in our society'*.[30] In Daniels[31] this Court remarked: "*The reality has been and still, in large measures, continues to be that, in our patriarchal culture, men find it easier than women to receive income and acquire property.*" This vulnerability and social reality extends to, and is exacerbated by, women's position in marriage, specifically polygamous marriage. Thus, in Hassam this court emphasised (in the context of intestate succession) that women in polygamous Muslim marriages constitute a particularly vulnerable group. [32] The court in Volks

[28] See Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) par 27 ('It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.')
[29] See para 36.
[30] Bhe at para 32.
[31] Daniels v Campbell NO and others 2004(5) SA 331 (CC) at para 22.
[32] 2009 (5) SA 572 (CC) at paras 41, 49.

NO v Robinson held that in the case of the very poor and the illiterate the effects of vulnerability are more pronounced.[33]

22. Women in customary marriages have been historically marginalised. Their disadvantage is said to be compounded due to the intersection of race, class and gender, historically referred to as 'triple oppression'.[34] As mentioned above, women in pre-Act polygynous marriages will tend to be older women in both urban and rural areas, who are all African and many probably poor. In the absence of control over secure rights in property and with limited access to justice, the class of women affected suffer hardship in a multiplicity of ways.[35]

23. It is widely understood that control of property (in this case within a marital regime) is key to social empowerment.[36] Studies have shown that whenever women have been important producers and managers of property, their family decision-making capacity has been comparatively enhanced.[37] It stands to reason that absent control over matrimonial

[33] 2005 (5) BCLR 446 (CC), para 66
[34] Rohrs S and Smythe D (2014)" In search of Equality: Women, law and Society in Africa"90, at 104
[35] Nkosi describes the social reality of black South African rural women as follows. *'The cultural allocation of functions in most black South African rural communities consigns women to menial domestic chores with little or no economic value. Thus, in most rural households the wife or wives are expected to tend to the raising of children, tilling of the soil and the gathering of wood and fetching of water for fuel and domestic use, respectively. Men on the other hand have allocated themselves the pleasurable roles of supervision, acquiring an education and working for real incomes in the western establishments.'* Nkosi G (2000) "The Status of African Women: Has it really changed? Codicillus 41(2): 49. Jansen RM, "The recognition of Customary Marriages Act: many women still left out in the cold" Journal for Juridical Science 2002: 27(2) 115, at 117
[36] SALC Report on Customary Marriages: Project 90 The Harmonization of the Common Law and the Indigenous Law August 1998 at 102.
[37] Akinnusi A 2000 'The consequences of customary marriages in South Africa: Would the Recognition of Customary Marriages Act 1998 make any difference.' (2000) Journal for Juridical Science 25(2): 143 at 147.

property, women are vulnerable to eviction and homelessness,[38] may be left to care for children[39] and remain in a position where finding and advancing in employment and acquiring property is comparatively difficult. These hardships are perhaps obvious but we point out that they are especially harsh for older women who were further disadvantaged by apartheid restrictions on their education and freedom of movement.[40]

24. Worldwide, women are said to constitute the poorest and most vulnerable sector in society. In many countries they constitute the majority of the unemployed, condemned to eke out an existence on the margins of society.[41]

25. The International Centre for Research on Women (ICRW) argues:

"Women's lack of property ownership is important because it contributes to women's low social status and their vulnerability to poverty. It also is increasingly linked to development-related problems, including HIV and AIDS, hunger, urbanization, migration, and domestic violence. Women who do not own property are less likely to take economic risks and realize their full economic potential ... For international development efforts to succeed – be they focused on reducing poverty broadly or empowering

[38] A Claassen 'Women, customary law and discrimination: the impact of the Communal Land Rights Act' Women Law and Discrimination at 48.
[39] See Mothokoa Mamashela 'New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary marriages' (2004) 20 SAJHR 616 at 620.
[40] Bonthuys E 2001, Labours of love: child customary and the division of matrimonial property at divorce THRHR (64) at 211.
[41] Cooper C, "Women and the right to work" 2009 SAJHR 573

women purposely – women need effective land and housing rights as well as access to credit, technical information and other inputs."[42]

26. We point out too that the strategies that have been developed under the auspices of the United Nations to deal with gender equality, and particularly the Beijing Strategies 1995, which proceed from the recognition that the number of women living in poverty has increased disproportionately to the number of men, especially in developing countries, a phenomenon known as the feminisation of poverty.[43] More pertinently it is recognised that a women's poverty is directly related *i.a.* to women's lack of access to land ownership and economic resources.[44] Indeed, the precarious social and economic circumstances under which these women live may contribute to their vulnerability to domestic violence and limit their ability to escape it.[45]

International Obligations And Polygyny

27. The Court is obliged to consider international law when interpreting the Bill of Rights. In the High Court, the Trust made detailed submissions on

[42] As discussed by Walker C, "Elusive equality: Women, property rights and land reform in South Africa", 2009 SAJHR 467 at 470
[43] Par 50 Beijing Strategies.
[44] Par 53 Beijing Strategies. The Report on the 54th session of the UN Commission on the Stats of Women reiterated the importance of land in doing away with the feminization of poverty, and called on states to undertake legislative reforms in order to give women full and equal access to economic resources, including the right to inheritance and to ownership of land. (Resolution 54/4 para 4).
[45] Curran E, "Customary law and domestic violence in rural South African communities", 2005 SAJHR 607, at 610

international law. We do not repeat these in full,[46] and, rather, draw attention to what international law says about polygyny and marital property rights in view of the fact that South Africa, polygyny is a social reality and its validity has not been challenged.[47] In summary, the state is obliged to eliminate all forms of discrimination against women, including inequalities between men and women during and upon dissolution of both polygynous and monogamous marriages, and to protect the property rights of women.

28. While CEDAW envisages the long-term eradication of polygyny, the CEDAW committee has taken into account the reality that such marriages continue to exist and that women in such marriages continue to experience hardship. The CEDAW committee issued General Recommendation 27 on 19 October 2010, which states:

"28. As stated by the Committee in its general recommendation No. 21 (1994) "[p]olygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited". Nevertheless, polygamy is still practised in many States parties, and many women are in polygamous unions. Older wives are often neglected in polygamous marriages once they are no longer considered to be reproductively or economically active."[48]

[46] The High Court notes at para [35] the relevant treaties and notes the obligations to recognizing the vulnerability of women and protect women's human rights. (Record Vol 3 p 149).
[47] The Constitutional Court has historically conferred rights and protections on women in polygynous marriages without ruling on the constitutional validity of polygyny, which has never been challenged. See Bhe and Hassam.
[48] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 21: on older women and the protection of their rights*, 2010.

29. This is elaborated upon in General Recommendation 29 on 30 October 2013 which introduces obligations upon the states parties in relation to polygynous marriages:

"28. States parties should take all legislative and policy measures needed to abolish polygamous marriages. Nevertheless, as stated by the Committee in its General Recommendation No. 28, "polygamy continues in many States Parties, and there are many women in existing polygamous unions". Accordingly, with regard to women in existing polygamous marriages, States parties should take the necessary measures to ensure the protection of their economic rights.""[49] (emphasis added)

30. Article 6 of the African Protocol on Women's Right (entitled 'Marriage') obliges state parties to enact "*appropriate national legislative measures to guarantee that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected."*[50] Article 7 of the African Protocol on Women's Rights, (entitled 'Separation, Divorce and Annulment of Marriage'), provides: *"State parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in the case of separation, divorce or annulment of marriage. In this regard they shall ensure that …women and men shall have the right to an equitable sharing of the joint property deriving on the marriage".* Viljoen notes that the African Protocol on Women's Rights speaks in a clearer

[49] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 29: General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, 2013.
[50] This Court relied on Article 6 in Hassam at fn 43.

voice about issues of particular concern to African women and locates CEDAW in African reality.[51]

31. Notably, the SADC protocol does not prohibit polygyny, or even expressly encourage monogamy.[52] The SADC protocol creates obligations upon the member State in relation to all marriages (including polygynous marriages). Article 7(b) provides that:

"State parties shall (adopt legislative and other measures) to ensure …equal legal status and capacity in civil law, including, amongst other things, full contractual rights; the rights to acquire and hold rights in property, the rights to equal inheritance, succession and the rights to secure credit".

REMEDY
On retrospectivity

32. In confirmation proceedings, the Court Court is obliged to exercise its remedial discretion in terms of section 172 of the Constitution afresh.[53] It is not limited by the issues framed by any appeal.

33. Section 172 enjoins a Court to consider whether its order should operate retrospectively or whether it is necessary to limit the potentially disruptive

[51] Viljoen notes in relation to polygyny: *'The drafting history of the Protocol testified to the contentious nature of polygamy. Although initial drafts called for its abolition, the Protocol places an obligation on States Parties to encourage monogamy.*':Viljoen *'An Introduction to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa'* 16 Wash. & Lee Journal of Civil Rights and Social Justice 11(2009) p 21.
[52] Viljoen notes that a striking difference between the SADC Protocol and the African Protocol on Women's Rights is that the SADC instrument "*does not enter into the debate about monogamy and polygamy*." Viljoen *'An Introduction to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa'* 16 Wash. & Lee Journal of Civil Rights and Social Justice 11(2009) p 27.
[53] Sibiya and others v Director of Public Prosecutions JHB and others 2005(5) SA 315 (CC) at para 44.

impact of the order in the interests of justice and good government.[54] Potential disruption, uncertainty and inconvenience can arise when transactions, decisions or actions taken under an invalid statute are undone.

34. In Gumede, the retrospective effect of the order was generally not limited with the court highlighting three reasons: [55]

34.1. The need to grant effective relief to women in pre-Act marriages;

34.2. The discrimination is so egregious that is should not be permitted to remain on the statute book by limiting retrospective operation or waiting for parliament to remedy the order.

34.3. The regime that the order permitted (a community of property regime) was one aligned with what parliament had in any event recognised for post-Act marriages.

35. The Court did limit the protection to extant marriages: *"It is important to add that nothing in the order we intend making will affect customary marriages that have been terminated either by death or by divorce before the date of this order."* [56]

[54] See eg South African Municipal Workers' Union v Minister of Co-operative Governance and Traditional Affairs (CCT54/16) [2017] ZACC 7 (9 March 2017) at para 85.
[55] See para 52.
[56] Para 52

36. In relation to the rights of third parties the Court said: *"I am of the view that the interests of third parties, who may be affected by the altered matrimonial regime in relation to pre-recognition customary marriages, may also be preserved by incorporating a provision that allows a party to approach a competent court should there be any adverse consequences arising from the order we have made."*[57]

37. In Hasssam the Court considered retrospectivity in context of intestate succession for women in polygynous Muslim marriages. Emphasising the importance of granting effective relief and remedying the ongoing impact of harm, it limited retrospectivity to estates not yet been finally wound up.[58]

38. The Trust submits that it is in the interests of the broader class of women affected by this case to afford the widest protection that can be afforded in the interests of justice. The women affected by the order are a particularly vulnerable group. They have waited a very long time for their constitutional rights to be vindicated effectively. Parliament has not come to their aid. Despite the lapse of many years, they stand alone in not

[57] Para 53 to 54
[58] Para 51,52 and 55. See the following orders made:
- *The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.*
- *If serious administrative or practical problems arise in implementation of this order, any interested person may approach this Court for a variation of this order.*

receiving effective protection. Although the High Court understandably limited its order of retrospectivity consistently with the precedent set in Gumede, we submit that these factors weigh in favour of this Court adopting a different approach for the class of women affected in line with the approach in Hassam.

39. The Trust submits that the interests of the broader class of women affected by the order will be best served by what the applicant proposes, in other words by making the order applicable to customary marriages save where they have been terminated by divorce or by death, if the estate has been finally wound up before the date of the order. The group of women affected is decreasing as time passes, and it is unlikely that there will be undue disruption should the Court include estates not already wound up.[59]

40. The High Court was concerned not to confer wider protection on children of polygynous customary marriages than children of monogamous customary marriages.[60] In this regard, we point out that that in Gumede the spectre of succession did not arise as it does on the facts of this case and in Hassam. The difference in treatment may be justified in the long delays that those affected have waited, or the Court may signal that courts

[59] Courts already enjoy some jurisdiction based on justice and equity in context of customary law estates subject to intestate succession. See section 5 of the Reform of Customary Law of Succession and regulation of related matters act 11 of 2009.
[60] Record Vol 3 p 163 ll 1-15

may open their doors to children of monogamous marriages similarly situated.[61]

41. The applicant for leave to intervene has made additional proposals regarding further extending the effect of the order.[62] The Trust submits that these proposals would protect the interests of the broader class of women affected in important ways. The Trust does not address these submissions now as they are appropriately addressed by the applicant for leave to intervene.

Interim relief

42. We submit that the High Court correctly found that it was necessary to provide for immediate relief until such time as parliament may legislate and its order seeks to retain core features of customary law. In Gumede the Court could defer to parliament by granting an order making the legislative regime that parliament had chosen for post-Act marriages applicable to pre-Act marriages. It cannot do so here. Rather, as in Bhe, it

[61] This may be achievable in the exercise of a court's discretion in terms of section 5 of the Reform of Customary law of Succession and Regulation of Related Matters Act 11 of 2009.

[62] *The proposals are that the order should not affect the transfer of any property prior to the date of the order, unless: (i) It is established that when such transfer was taken, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought challenges in this case; or (ii) That property was the home of a wife. In that instance, the wife shall be entitled to approach a court to reverse the transfer of her home in accordance with the principles set out in this judgement.*

is appropriate ultimately for parliament to legislate[63] and just and equitable that the Court make an order that protects women in the interim.[64]

43. It is also just and equitable that the Court make an order that gives proper cognisance of rights that may have vested under the living customary law or otherwise.[65] Thus, if under living customary law a woman in a polygynous marriage owns and manages her property, her rights should remain intact.

44. The Trust agrees with the applicant to intervene that it would be desirable to clarify an aspect of the High Court order and more particularly the preamble to order 2. The Trust submits that the preamble might better read: 'The wives who are parties to such marriages shall have joint and equal ownership and other rights to the marital property and joint and equal rights of management and control over the marital property as their husbands ...'

SUSANNAH COWEN
NKHENSANI NTULI
JENNIFER WILLIAMS
12 April 2017

[63] The legislation made was the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.
[64] See Bhe para 115 to 116. The Court emphasized that parliament is in the best position to deal with the situation and make the necessary legal changes but that the court should put in place an order that would operate in the interim and as an interim protective measure.
[65] See for example section 4(1) of the Reform of the Customary Law of Succession and Regulation of Related Matters Act.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

High Court Case No.: 412/2015
CCT: 194/16

In the application of:

THOKOZANI THEMBEKILE MAPHUMULO	**Applicant for Intervention**

and

SIMISO SIPOSETHU MAPHUMULO	**First Intervention Respondent**
SEBENZILE GLADYS MAPHUMULO	**Second Intervention Respondent**
MASTER OF THE HIGH COURT, DURBAN	**Third Intervention Respondent**

In the matter between:

MATODOZI RAMUHOVHI (born Netshituka)	**First Applicant**
THINAMAANO EDSON NETSHITUKA	**Second Applicant**

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Second Respondent**
ESTATE OF MASEWE JOSEPH NETSHITUKA	**Third Respondent**
MUNYADZIWA JOYCE NETSHITUKA	**Fourth Respondent**
MASTER OF THE HIGH COURT THOHOYANDOU	**Fifth Respondent**
MINISTER OF HOME AFFAIRS	**Sixth Respondent**

WRITTEN SUBMISSIONS OF THE APPLICANT FOR INTERVENTION

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I INTRODUCTION

1. In 1992, the Applicant for Intervention (**Ms Maphumulo**), her husband, and her daughter moved into the house at E283 112 Mnyamana Road, KwaMashu (**the Property**). She contributed R5 000 to the initial cost of purchasing it. However, it was registered only in her husband's name. Until shortly before his death, she lived there with her husband. It is still her home today, and the home of her daughter and her grandsons.

2. On 28 October 2013, Ms Maphumulo's husband passed away after an illness. He left a will that was made under suspicious circumstances. The will did not leave the Property to Ms Maphumulo, but to the son of his first wife (**Simiso**), who was also named the executor of the estate. Without her knowledge, the Property has been transferred into Simiso's name. Simiso's attorneys have sent her a letter indicating that he intends to evict her.

3. The underlying reason that the Property could be transferred to Simiso, and that Ms Maphumulo stands at the precipice of homelessness, is that the customary law precluded Ms Maphumulo from owning property in the marriage, and the Recognition of Customary Marriages Act[1] (**RCMA**) preserved that discriminatory law for marriages concluded before it came into force. In *Gumede v President of the Republic of South Africa*,[2] this Court held that those laws were unconstitutional and invalid insofar as they related to monogamous marriages. The High Court in the **Ramuhovhi** application found that conclusion applies to polygamous marriages. That decision is now before this Court for confirmation.

4. The question is whether Ms Maphumulo should benefit if this Court confirms the High Court's order. Should she be entitled to assert some right to the home she has lived in for 25 years? Or should she risk losing that home because her husband died before this Court could redress the unconstitutionality? That is the stark choice.

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[1] Act 120 of 1998.

[2] *Gumede (born Shange) v President of the Republic of South Africa and Others* [2008] ZACC 23; 2009 (3) SA 152 (CC).

5. We submit this Court can, and should, come to Ms Maphumulo's aid. It can limit the retrospective effect of its order judiciously so that it only covers a narrow class of cases where an estate has not been finally wound up, or the right to housing is at stake. It can achieve that result without departing from any its previous precedents, but by adapting their underlying rationales to meet the facts before it.

6. The remainder of these submissions are structured as follows:

   6.1. **Part II** discusses the application for leave to intervene in the main proceedings;

   6.2. **Part III** contains our submissions on retrospectivity; and

   6.3. **Part IV** concerns the substantive regulation of assets in polygamous marriages.

7. We do not make submissions on the merits of the constitutional challenge. But Ms Maphumulo endorses the submissions of the Applicants and the Women's Legal Centre.

II APPLICATION TO INTERVENE

8. Ms Maphumulo seeks leave to intervene as a party in terms of Rule 8(1). In the alternative, she seeks leave to be admitted as an *amicus curiae*. We address each application in turn.

INTERVENTION

9. The intervention of parties in proceedings in this Court is regulated by rule 8(1).[3] It provides: *"Any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party."* The rule does not expressly prescribe what standard an interested party must meet in order to be joined as an intervening party. The generally accepted consideration as to whether a party ought to be granted leave to intervene is whether such a party has a direct and substantial interest in the

[3] Rules of the Constitutional Court, Regulation 1675 of 2003.

subject matter of the litigation.[4]

10. In *Gory v Kolver*, this Court held that the ordinary rules regarding intervention are not appropriate to constitutional attacks on legislation.[5] As Van Heerden AJ explained, the Court "*would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity.*"[6] In cases such as the present, a direct and substantial interest is a necessary condition for intervention, but it is not a sufficient ground. The ultimate test is whether it is in the interest of justice for a party to be joined in pending proceedings.[7]

11. Accordingly, Ms Maphumulo must establish both a direct and substantial interest, and that it is in the interests of justice to permit her to intervene.

Direct and substantial interest

12. The determination of whether a party has a direct and substantial interest in the subject matter will depend on whether the order adversely affects their rights or interests or had the potential to affect their rights or interests.[8]

13. The facts in *Gory v Kolver NO* are substantially similar to the present. They demonstrate that Ms Maphumulo has a direct and substantial interest. The Appellants in *Gory* challenged the

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[4] See generally *United Watch and Diamond Company (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 416; *Independent Newspapers (Pty) Ltd v Minister for the Intelligence Services: In re Masethla v President of the Republic of SA* [2008] ZACC 6; 2008 (5) SA 31 (CC) at para 19.

[5] *Gory v Kolver NO and Others (Starke and Others Intervening)* [2006] ZACC 20; 2007 (4) SA 97 (CC) at para 12.

[6] Ibid.

[7] Ibid at para 13

[8] *Zulu and Others v Ethekwini Municipality and Others* 2014 (4) SA 590 (CC) at para 16. For more recent authority, see *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC at para 9 ("*a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.*"); *Snyders and Others v De Jager (Joinder)* [2016] ZACC 54 at para 9 ("*If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard.*)

constitutionality of the Intestate Succession Act[9] on the basis that it did not provide for succession by same-sex life partners. Four sisters (**the Starke Sisters**), whose brother had recently died, applied for leave to intervene because the retrospective effect of the order granted by the High Court could prevent them from inheriting from their brothers' estate. They argued for a more limited retrospective order. They also indicated that, even if the order would apply to their situation, they intended to contest that their brother was in a same-sex life partnership. Their brother's partner (**Mr Bell**) also sought conditional leave to intervene to oppose their submissions on retrospectivity.

14. This Court held that the Starke Sisters had the necessary direct and substantial interest. When Mr Starke died, there was no confirmed order of invalidity extending the Intestate Succession Act to apply to same-sex life partners. The rights to inherit from his estate therefore vested in the Starke Sisters. As this Court pointed out, if it confirmed the High Court's order, and it was established that Mr Bell was in a same-sex life partnership with Mr Starke, "*[t]hey will cease to have these rights*".[10]

15. This matter is, in some sense, the mirror image of *Gory*. Because of the discriminatory laws in place, Ms Maphumulo had no claim to the estate of her husband. If this Court confirms the High Court's order, that will remain the case. However, if this Court limits the retrospectivity of its order in the way that Ms Maphumulo proposes, she will have a claim against the estate. Those rights will include rights to her home of 25 years. The outcome of this application will therefore directly affect Ms Maphumulo's legal rights.

16. It is not only Ms Maphumulo's rights in the Property that will be affected. The confirmation of the High Court's order will also affect:

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[9] Act 81 of 1987.
[10] *Gory* (n 5) at para 16.

16.1. Her right of access to housing, guaranteed by s 26(1) of the Constitution. If the transfer to Simiso stands, it is likely she will be evicted from the Property and will be rendered homeless.[11]

16.2. Her rights to equality and dignity, which will not be vindicated if the order does not apply to her.

17. For all these reasons, Ms Maphumulo has a direct and substantial interest.

Interests of justice

18. Ms Maphumulo's direct and substantial interest test is not enough for entitle her to intervene; she must also show her intervention would be in the interests of justice. Drawing from *Gory*[12] and *International Trade Administration Commission v SCAW South Africa (Pty) Limited,*[13] there are several considerations to be taken into account in the interests of justice enquiry:

18.1. The stage at which the application for joinder is made, and whether there is an adequate explanation for any delay. Ms Maphumulo explained the timing of her application in detail.[14] She only received legal assistance from the Legal Resources Centre (**LRC**) in 2015. Due to turnovers and capacity constraints, the LRC was only able to gather the necessary documents to assist her in July 2016. Counsel's opinion was obtained in October 2016. At that point this Court was seized with the application for confirmation. On 30 January 2017 this Court issued directions setting the matter down for hearing. Ms Maphumulo's attorneys became aware of the directions on 13 February 2017, at which point the application to intervene was already being prepared. The application to intervene was signed on 28 February 2017. While

[11] Intervening FA at para 71; Intervention Record p 35.
[12] *Gory* (n 5) at para 13.
[13] *International Trade Administration Commission v SCAW South Africa (Pty) Limited* 2012 (4) SA 618 (CC) at para 12.
[14] Intervening FA at paras 77-81; Intervention Record pp 37-38.

there have been delays in Ms Maphumulo's asserting her interest, she has given a full explanation. Moreover, that delay will not prejudice any of the other parties, who have had a fully opportunity to oppose both her intervention and her submissions on the appropriate remedy.

18.2. Whether the intervening party raises substantially new contentions that may assist the Court. Ms Maphumulo raises substantially different arguments concerning how this Court should regulate the retrospective effect of its order, and the proper regulation of polygamous customary marriages. While there is some overlap with the submissions advanced by the Applicants[15] and the Women's Legal Centre,[16] Ms Maphumulo's submissions are materially different. Indeed, the Women's Legal Centre has specifically deferred to Ms Maphumulo to address certain substantive issues.[17]

18.3. The attitude of the parties, and whether intervention would cause prejudice. The Third and Fourth Respondents (Mr Netshituka's Estate and its Executrix) have indicated that they abide by this Court's decision on Ms Maphumulo's intervention,[18] but have raised certain concerns. However, those concerns misconstrue the purpose and effect of Ms Maphumulo's intervention:

18.3.1. The primary complaint is that Ms Maphumulo relies on facts concerning her personal circumstances that are different from those before Lamminga AJ. Moreover, resolving factual disputes with the Intervention Respondents will delay the finalisation of the matter.[19]

18.3.2. Ms Maphumulo does not ask this Court to determine any facts concerning her

[15] Applicants' Written Submissions at paras 9-10.
[16] WLC's Written Submissions at paras 32-44.
[17] WLC's Written Submissions at paras 41 and 44.
[18] Intervening AA at para 9; Intervention Record p 130.
[19] Intervening AA at paras 2.4, 3, 5 and 7; Intervention Record pp 128-130.

personal circumstances. Those facts are put up solely to demonstrate her direct and substantial interest, and to explain why she seeks an amendment to the High Court's order. Nor does she seek any relief that relates directly to her circumstances. Whatever order this Court grants will have of course consequences for Ms Maphumulo and the Intervention Respondents. But their disputes will be resolved subsequently in separate litigation before an appropriate court. They are irrelevant to the determination of these confirmation proceedings. As a result, they will in no way delay the finalisation of the confirmation proceedings, or the resolution of the dispute between the main parties.

18.3.3. This is the same situation as was present in *Gory*, where there was an underlying factual dispute about whether or not Mr Bell was in a same-sex life partnership with Mr Starke. The existence of that factual dispute was no bar to the Starke Sisters' intervention. As Van Heerden AJ held: "*This factual dispute will obviously have to be addressed in proceedings before the relevant High Court, should Mr Gory's application for confirmation be successful.*"[20]

18.3.4. The Estate and Executrix also suggest that it is not necessary to permit Ms Maphumulo to intervene because Lamminga AJ's order makes provision for those affected by the order to approach a court later to vary its order.[21] This is no reason to deny intervention. Indeed, it would only cause additional confusion and costs to require Ms Maphumulo to bring an application after this Court had given its order. Moreover, the "savings provision" in the remedy is

[20] *Gory* (n 5) at para 8.
[21] Intervention AA at para 6: Intervention Record p 129.

primarily directed at parties who are negatively affected by retrospectivity, not by its limitation.[22]

19. In addition, to the above factors, there is a further concern that is relevant to the interests of justice. Ms Maphumulo's situation is not unique. There are undoubtedly many women who are in a similar position to hers, who will lose their homes or other vital assets if this Court does not alter the High Court's approach to retrospectivity. It is far more likely that a women's home will be at risk, rather than their claim to a shopping centre. Ms Maphumulo's intervention will allow this Court to directly assess how its order will affect the lives of poor, African women who have been in polygamous marriages. The High Court's order has the unfortunate effect of perpetuating a discriminatory patriarchal system that this Court has repeatedly held is unconstitutional. Ms Maphumulo's intervention seeks to ensure a remedy, for those who have suffered as a result of that system, where this is possible.

AMICUS CURIAE

20. Ms Maphumulo's primary argument is that it is in the interests of justice to permit her to intervene as a party. However, if this Court finds against her on that count, she applies in the alternative to be admitted as an *amicus curiae*.

21. In terms of rule 10, the requirements for admission as an *amicus curiae* are threefold: (a) an interest in the matter; (b) relevant and novel submissions; and (c) compliance with the procedural requirements for admission.[23] She has met those requirements:

22.1. For the reasons already set out above, Ms Maphumulo has an interest in this matter

[22] *Gumede* (n 2) at para 58.4(iii).
[23] *Institute for the Security Studies;* In re *S v Basson* 2006 (6) SA 195 (CC) at para 10.

within the meaning of rule 10, under which the test is less demanding. Even if her interest is not the "*direct and substantial interest*" required for intervention, it is sufficient to admit her as an *amicus curiae*.

22.2. As we hope appears from these submissions, Ms Maphumulo's submissions on the appropriate remedy are both different from those of the parties, and useful to this Court.

22.3. Because of the manner and circumstances under which this application was brought, Ms Maphumulo has not complied with the ordinary procedures in rule 10. In particular, she did not write to the parties to seek their consent to her admission as an *amicus curiae*.[24] She has therefore included a prayer for condonation her non-compliance with Rule 10. We submit that, in these circumstances, condonation should be granted. It is particularly relevant that no party has objected to her admission as an *amicus curiae*. Even the Estate and the Executrix, who raised concerns about her intervention as a party, do not oppose her intervening as an *amicus curiae*.

23. We submit that it would be just and equitable for this Court to exercise its discretion to admit Ms Maphumulo.

24. We now set out Ms Maphumulo's submissions as to the order this Court should make.

III SUBMISSIONS ON REMEDY

25. The key question is this: If this Court confirms the High Court's order of invalidity, how should it regulate the retrospective effect of that order? The High Court closely followed this Court's order in *Gumede*. That approach states in broad terms that the order "*shall not affect the legal consequences of any act done or omission or fact existing in relation to a customary marriage*

[24] Intervention FA at para 87: Intervention Record p 40.

before this order was made." That would include the transfer of the Property to Simiso.

26. Ms Maphumulo submits that approach is overly restrictive of constitutional rights. It fails to take into account the real hardship faced by women in her position as a result of discriminatory laws and customs. There are better ways to regulate the retrospective effect of the order, that better balance the concerns of certainty with those of justice. These methods are all sourced directly in this Court's earlier decisions related both to succession and to housing.

27. In short, Ms Maphumulo proposes that:

    27.1. The order should apply retrospectively to ensure protection for women in extant polygamous marriages;

    27.2. Generally it should not affect completed transactions;

    27.3. But it should apply to three categories of completed transactions:

        27.3.1. Those made to bad faith transferees;

        27.3.2. Those made in estates that have not been finally wound up; and

        27.3.3. Those that remove a woman's access to housing.

DEFAULT RETROSPECTIVITY

28. When legislation is struck down, the ordinary rule is that it is retrospectively invalid, from the moment it was promulgated, or the moment the Constitution came into force. This Court recently re-iterated that principle in *Cross-Border Transport Agency*: "*the consequences that ordinarily flow from a declaration of constitutional invalidity include that the law will be invalid from the moment it was promulgated. That is, the order will have immediate retrospective effect. This is the default*

position."[25]

29. Section 172(1)(b)(i) empowers a court, where it is just and equitable, to limit the retrospective effect of the declaration of invalidity.[26] That requires a balancing of two competing concerns:

    29.1. On the one hand, where a litigant establishes that her right has been infringed, "*she should as far as possible be given effective relief so that the right in question is properly vindicated.*"[27] Courts will be slow to limit the retrospective effect of an order in a manner that denies a litigant, or other persons similarly situated, effective relief.

    29.2. On the other hand, full retrospective effect often has severely disruptive effects. It can affect the rights of third parties,[28] impose costs on the public purse,[29] or create administrative burdens to undo years of constitutional wrongs.[30]

30. The approach of this Court is that "*the disruptive effect of an order of retrospective invalidity must be balanced against the need to give effective relief to the applicant and similarly situated people*".[31]

31. As a general rule, the onus is on the party seeking to limit retrospective effect (normally the state) to place evidence before the Court to justify that restriction.[32] However, that sensible rule must be tempered by two common-sense concerns:

    31.1. The harm that will be caused by retrospectivity will often be obvious and need not be expressly proved by evidence. To require the state to lead evidence to prove the

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[25] *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12; 2015 (5) SA 370 (CC) at para 20.
[26] The section reads: "*When deciding a constitutional matter within its power, a court … (b) may make any order that is just and equitable, including - (i) an order limiting the retrospective effect of the declaration of invalidity*".
[27] *Gory* (n 5) at para 40.
[28] See, for example, the decisions on succession discussed below.
[29] See, for example, *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC)(limiting the retrospective effect of an order that would create a financial burden on the Road Accident Fund to cases not yet finalised).
[30] See, for example, *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC)(limiting retrospectivity to avoid undoing finalised criminal cases where conviction may have been obtained based on an unconstitutional reverse onus provision).
[31] Ian Currie & Johan De Waal *The Bill of Rights Handbook* 6th ed (2013) at 190.
[32] *Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC) at para 33.

obvious places form above substance and may result in unjust orders. In *Gumede*, the Government did not ask the Court to limit the retrospective effect of the order, and provided no "*evidence or other cogent material in support of such an order.*"[33] Nonetheless, this Court partially limited the retrospective effect of its order because of the obvious risks of full retrospectivity.

31.2. Over time, this Court has developed ways of dealing with the retrospective effect of orders in similar types of cases. For example, if it strikes down a law that violates fair trial rights, it will not undo all convictions that were obtained as a result of that unconstitutional law, but only those that have not yet been finally determined on appeal.[34] And in cases concerning financial claims against the state, it limits retrospectivity to cases that have not been finally determined.[35] As we discuss below, this Court has developed similar rules of thumb in cases involving marriage and succession, and in cases that threaten people's access to housing.

32. However, the assessment of what retrospective effect an order should have must be made on a case-by-case basis. And it must be responsive to the arguments and evidence before the Court. While prior precedent is a vital guide, ultimately this Court must grant an order that is "*just and equitable*" in the particular circumstances before it.

ADMINISTRATION OF ESTATES

33. In order to contextualise our submissions, it is necessary to briefly set out some basic principles relating to the administration of estates.

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[33] *Gumede* (n 2) at para 50.
[34] See, for example, *Bhulwana* (n 30); *S v Mbatha*1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) at para 31; *S v Julies* 1996 (4) SA 313 (CC) at para 4; *Scagell & Others v Attorney-General, Western Cape & Others* 1997 (2) SA 368 (CC) at paras 35–36.
[35] See, for example, *Engelbrecht* (n 29); *Mvumvu and Others v Minister of Transport and Another* [2011] ZACC 1; 2011 (2) SA 473 (CC); *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC).

34. First, heirs and legatees of an estate are paid only once the debts against an estate have been satisfied. Those include the debts owed to a spouse.

35. Second, the rights that heirs and legatees obtain on the death of the deceased are not real rights. They merely obtain a personal right against the executor that is enforceable only once the liquidation and distribution account is confirmed by the Master.[36]

36. Third, s 50(b) of the Administration of Estates Act confers on an executor who incorrectly transfers property, the right to recover that property.[37] This would include if the executor had transferred the property to the incorrect person. The right exists until the executor is discharged. Accordingly, until the estate is finally wound up, any person who receives property from an estate does so with the knowledge that the transfer may be reversed if it turns out she was not entitled to receive the property.

37. Fourth, this Court has employed the phrase "*when an estate is finally wound up*".[38] It is important to be clear about when that occurs. It occurs when the Master discharges the executor in terms of s 56 of the Administration of Estates Act.[39] It is only at this stage that the executor becomes exempt from legal proceedings,[40] and that the two-year period for him or her to destroy his records begins to run.[41] Up until that point, the executor remains in position, remains liable to be sued as the representative of the estate, and remains able to exercise his or her right to recover in terms of s 50(b).

38. Fifth, there is an important difference in the sequences of the winding up of a deceased estate, the dissolution of a marriage by divorce. In the case of an estate, the process of

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[36] F Du Bois (ed) *Wille's Principles of South African Law* (9 ed, 2007) at 673.

[37] The provision reads: "*Any executor who makes a distribution otherwise than in accordance with the provisions of section thirty-four or thirty-five, as the case may be, shall- … (b) be entitled to recover from any person any amount paid or any property delivered or transferred to him in the course of the distribution which would not have been paid, delivered or transferred to him if a distribution in accordance with the said provisions had been made: Provided that no costs incurred under this paragraph shall be paid out of the estate.*"

[38] See, for example, *Hassam v Jacobs NO and Others* [2009] ZACC 19; 2009 (5) SA 572 (CC) at para 55.

[39] Act 66 of 1965.

[40] Administration of Estates Act s 56(2).

[41] Administration of Estates Act s 56(3).

liquidating and distributing the assets happens after the marriage is terminated by death. In the case of a divorce, the debate about who is entitled to what is determined before the divorce is granted and the marriage is terminated, although the actual disposal of assets may only happen after the divorce order. It may fairly be said that the finalisation of the patrimonial consequences of a marriage occurs when the divorce order is granted. That is not however the case with a deceased estate: it does not happen on the death of the deceased.

MARRIAGE, SUCCESSION AND RETROSPECTIVITY

39. The just and equitable order in this case must have due regard to the way this Court has previously dealt with similar situations. The most analogous situation is, naturally, *Gumede*. However, this Court has also considered how to deal with retrospectivity when the Constitution demands a change to the entitlement to inherit in at least four previous cases dealing with Muslim marriages, same-sex marriages, and customary law. Those cases provide powerful guidance for how this Court should act in this matter.

40. In this section, we first consider those four earlier cases – *Daniels*, *Bhe*, *Gory*, and *Hassam*. We then discuss *Gumede* and the decision of the High Court. Lastly we argue why, in light of those cases and the facts in this matter (including Ms Maphumulo's position), this Court should not confirm the High Court's order on retrospectivity. It should, instead, adopt a retrospectivity regime that will protect both the Applicants and Ms Maphumulo, without unfairly prejudicing third parties, or creating administrative chaos.

Daniels, Bhe, Gory* and *Hassam

41. These cases all primarily involved challenges to the Intestate Succession Act (**ISA**).[42] The focus of the Court's attention was therefore on how to deal with retrospectivity in the context of succession. We discuss the cases in chronological order, and then draw some common principles from them.

42. *Daniels v Campbell*[43] was a challenge to the constitutionality of the ISA on the grounds that it excluded spouses in monogamous Muslim marriages that had not been formally recognised. The High Court held that the word "*spouse*" did not include spouses in monogamous Muslim marriage and declared the provisions unconstitutional. It limited the order of retrospectivity with regard to the Intestate Succession Act to estates that had not been finally wound up.[44] It did not limit its declaration of invalidity with regard to the Maintenance Act.

43. In this Court, the majority held that the word "*spouse*" could be interpreted to apply to wives in unrecognised Muslim marriages. It expressly avoided determining the retrospective effect of it decision.[45] But the logical implication is that the interpretation was always the correct interpretation of the word "*spouse*", and therefore had full retrospective effect. The minority – per Moseneke DCJ – held that "*spouse*" could not be interpreted to avoid unconstitutionality and would have declared the provision invalid. He disagreed with the High Court's approach to retrospectivity:

> "*[I]n practice the period within which deceased estates are finalised varies considerably. The factors that determine how speedily a deceased estate is finalised are often not within the control of heirs and other interested parties. A cut off date as proposed may, in some cases, work a hardship. Should problems related to retrospectivity arise, they may be resolved on a case-by-case*

[42] Act 81 of 1987.
[43] *Daniels v Campbell and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC).
[44] *Daniels v Campbell N.O and Others* [2003] ZAWCHC 25; [2003] 3 All SA 139 (C) (The relevant part of the order reads: "*The orders in paragraphs 1 and 2 above shall have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by the date of this order.*"
[45] *Daniels* (n 43) at para 38.

basis."[46]

44. He therefore would have given his order full retrospective effect, subject only to the possibility for variation on a case-by-case basis.

45. *Bhe and Others v Khayelitsha Magistrate and Others*[47] addressed the constitutionality of customary laws of primogeniture, and the failure of the ISA to provide for a non-discriminatory form of succession. This Court found the law of primogeniture unconstitutional. It then had to decide how that would affect estates that had already been distributed according to that rule. Langa DCJ (as he then was) reasoned as follows:

    45.1. The invalidated laws were "*so egregious that an order that renders the declaration fully prospective cannot be justified*";[48]

    45.2. Full retrospectivity was also unjustified because it would mean "*all transfers of ownership that have taken place over a considerably long time*" would be open to question;[49]

    45.3. Exempting all completed transfers was not a satisfactory solution because it would not deal with heirs who knew about the challenge to primogeniture and hastened the transfer. This was done specifically to grant relief to the applicant in the *Shibi* matter,[50] which was one of three applications heard together in *Bhe*. It is helpful to consider what occurred in *Shibi*. The Magistrate[51] had suspended the distribution of the estate pending a separate High Court challenge to primogeniture. When that challenge failed, the Magistrate simply appointed the male relative as the representative of the estate. Following complaints by members of the family, he was replaced with an attorney. He then distributed the estate according to the rule of primogeniture, and was discharged.

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[46] Ibid at para 110 (our emphasis).
[47] [2004] ZACC 17; 2005 (1) SA 580 (CC).
[48] Ibid at para 126.
[49] Ibid.
[50] Ibid.
[51] At that time, the estates of African people were still overseen by Magistrates, and not by the Master.

The estate was, at that point, finally wound up.[52] It was only after that occurred that Ms Shibi approached the High Court for relief. An order that was limited to estates that had not been wound up would not have assisted her.

45.4. The appropriate order was therefore "*to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is bona fide in the sense of not being aware that the constitutional validity of the provision in question was being challenged.*"[53] The relevant part of the order provided that the declarations of invalidity

> "*shall not invalidate the transfer of ownership prior to the date of this order of any property pursuant to the distribution of an estate … unless it is established that when such transfer was taken, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicants brought challenges in this case.*"[54]

46. The issue in *Gory*[55] was the exclusion of same-sex life partners from inheriting under the ISA. The High Court had, like the High Court in *Daniels*, limited the order to estates that had not yet been finally wound up. As Hartzenberg J explained the effect of his order: "*Finalised estates will not be affected. The applicant will get relief. In the case of pending estates, executors will have to take notice of the order.*"[56]

47. In this Court, Van Heerden AJ (as she then was) held that "*a limiting order framed in these terms goes too far.*"[57] She endorsed the reasoning adopted in *Bhe* and granted a substantially identical order allowing the order to apply retrospectively to those heirs who knew about a

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[52] *Bhe* (n 47) at paras 22-24.
[53] Ibid at para 127.
[54] Ibid at para 136. It is interesting to note the shift between the Court's discussion of retrospectivity in the judgment, and the way that it framed its order. In his judgment, Langa DCJ did not describe a general order of non-retrospectivity and then carve out a set of transfers to which retrospectivity would apply; he contemplated a general order of retrospectivity and identified out a class of transfers that would be exempt. The order has the reverse structure.
[55] *Gory* (n 5).
[56] *Gory v Kolver NO and Others* 2006 (5) SA 145 (T) at para 23. The relevant part of the order read: "*The orders in paras 1 and 2 above shall have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by date of this order.*"
[57] *Gory* (n 5) at para 41.

legal challenge, even if the estate had been wound up.[58] It is not clear whether the concern that the High Court went "*too far*" was a concern that there was too much retrospectivity, or not enough.

48. Lastly, in *Hassam v Jacobs NO*,[59] the Court addressed the issue left open in *Daniels* – whether women in polygamous Muslim marriages were entitled to inherit under the ISA. It upheld the order of the High Court[60] that their exclusion was unconstitutional. Nkabinde J, in endorsing and adopting the same approach as in *Bhe* and *Gory*, held: "*The appropriate remedy is to grant an order, the retrospective effect of which should be limited to estates that have not yet been finally wound up.*"[61] That was not, however, the order this Court issued. It granted an order in virtually identical terms to the order in *Bhe* and *Gory*.[62]

49. We submit that this Court can draw the following important lessons from this quartet of cases:

    49.1. The applicant in each case was always granted relief. Indeed, in *Bhe* the retrospective effect of the order was specifically extended to assist Ms Shibi.

    49.2. This Court has referred to the winding-up of the estate as a key point for determining retrospective effect. Although it has not employed it in its orders:

        49.2.1. *Bhe* and *Gory* seem to have been concerned that applying the order to all retrospective estates would not go far enough because it would still exempt

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[58] Ibid at para 66. The one difference is that it refers to the transfer of property "*pursuant to the distribution of the residue of an estate*". The order in *Bhe* did not mention the residue, but referred simply to the distribution of the estate. In the context of intestate succession, this makes little difference. Moreover, as the *Gory* Court did not mention the distinction, it can be assumed it was not meant to have a different effect.

[59] *Hassam* (n 38).

[60] *Hassam v Jacobs NO and Others* [2008] ZAWCHC 37; [2008] 4 All SA 350 (C). The High Court did not deal with retrospectivity.

[61] *Hassam* (n 38) at para 55.

[62] Ibid at para 57, which reads: "*The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of this order of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.*"

bad faith heirs. There is no evidence as to which approach (unfinalized estates, or bad faith heirs) would affect more estates and more transactions. Certainly, the reasoning in *Bhe* and *Gory* was not based on the premise that there are fewer bad faith heirs than unfinalized estates, but on the need to assist Ms Shibi and others like her.

49.2.2. In *Hassam*, this Court did endorse the winding up of estates as an appropriate limiting mechanism in its judgment, although not in its order.

49.3. All four cases recognised that it was not possible to fairly resolve all the problems caused by retrospective application in general terms. Some case-by-case analysis would be necessary. That is expressly stated in *Daniels*, and the reason that the orders in *Bhe*, *Gory* and *Hassam* provide for interested parties to approach the court for variation.

Gumede* and *Ramuhovhi

50. The most relevant decision to determine the appropriate retrospective order in this case is, obviously, *Gumede*. We first discuss *Gumede*, then how it was applied by the High Court in *Ramuhovhi*.

Gumede

51. This Court in *Gumede* found section 7(1) of the RCMA to be invalid in that it unfairly discriminated between women in marriages entered into before the commencement of the RCMA and marriages entered into after the commencement of the RCMA. We highlight three important aspects.

52. First, Moseneke DCJ gave three reasons why it would not be just and equitable to limit the retrospective effect of the order: (a) a prospective order would not grant any relief to women in old customary marriages; (b) the discrimination "spawn[ed]" by the various legislative provisions was "*so egregious that it should not be permitted to remain on our statute books by*

limiting the retrospective operation of the order"; and (c) the effect of retrospectivity would align with the prospective application of the RCMA.[63] The Deputy Chief Justice then concluded: "*The recognition of the equal worth and capacity of all partners in customary marriages is well overdue and no case has been made out as to why it should be delayed any further.*"[64]

53. Second, having just found that the order should have retrospective effect, Moseneke DCJ then wrote in the next paragraph:

> "*It is important to add that nothing in the order we intend making will affect customary marriages that have been terminated either by death or by divorce before the date of this order. Also any exercise of marital power before the date of the order we will make, will not be undone only as a result of this order.*"[65]

54. He then stressed the need to protect third parties, and referred to s 11(4) of the Matrimonial Property Act. That section provided that the abolition of the marital power in common law would not "*affect the legal consequences of any act done or omission or fact existing before such abolition.*" Moseneke DCJ held that a similar provision in the Court's order would protect third parties.

55. Third, Moseneke DCJ summarised his approach to retrospectivity as follows:

> "*(d) The order should—*
>
> *(i) not limit its retrospective effect on parties to existing marriages; …*
>
> *(iii) if necessary, have a saving provision in favour of third parties or a generic order permitting a party claiming specific prejudice arising from the retrospective change of the matrimonial regime to approach a court for appropriate relief. …*
>
> *(f) The order we are to make should not affect customary marriages that have been terminated by death or divorce before this order is made.*
>
> *(g) Any exercise of marital power that is made before the date of the order should not be undone only as a result of this order.*"

56. Ultimately, the order the Court granted to limit retrospectivity read: "*In terms of section 172(1)(b) of the Constitution the orders [of invalidity] shall not affect the legal consequences of any act done*

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[63] *Gumede* (n 2) at para 51.
[64] Ibid.
[65] Ibid at para 52.

or omission or fact existing in relation to a customary marriage before this order was made." In addition, para (j) of the order entitled any interested person to "*approach this Court for a variation of this order*" if it caused "*serious administrative or practical problems*".

57. Vitally, the *Gumede* Court never directly considered whether and how its order should impact on wives whose husbands had recently passed away. It was not necessary for them to do so, because the issue did not arise on the facts before them. Ms Gumede was in an extant marriage, albeit one where divorce proceedings were pending. None of the parties expressly addressed this issue in written argument.[66] That is why there is no order similar to the one granted in *Bhe*, *Gory*, and *Hassam*. It is not because this Court decided to depart from its prior practice.

58. It is therefore important to be hesitant about relying too heavily on *Gumede*, which was decided based on very different facts, and in the light of different legal arguments.

<u>*Ramuhovhi*</u>

59. Unlike *Gumede*, this case directly raised the retrospective impact of the order on marriages that had already been terminated by death. The Applicants claim rights based on the retrospective application to an estate where the deceased died before *Gumede* was even decided.[67] The High Court's reasoning is therefore, with respect, somewhat puzzling.

60. Unlike in *Gumede*, the Applicants and the *amicus curiae* expressly argued that the order should apply to deceased estates that had not yet been finalized. In rejecting that contention, the High Court relied solely on the reasoning in *Gumede*. Lamminga AJ held that:

    60.1. The order should generally apply retrospectively.[68]

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[66] Only the Applicant directly addressed the issue of retrospectivity. Her counsel's submissions were limited to two propositions: (a) that the order should apply to existing marriages; and (b) that the order should not undo past exercises of the marital power. Applicant's Written Argument in *Gumede* at paras 92-107, available at http://www.constitutionalcourt.org.za/Archimages/12851.PDF.

[67] The deceased passed away on 4 January 2008. *Gumede* was decided by this Court on 8 December 2008.

[68] HC Judgment at para 69.

60.2. The order should not apply to marriages that had been ended by death or divorce. The "*most significant*" reason was that the *Gumede* Court had excluded such marriages. As a result, such an order would grant the wives and children of polygynous marriages greater rights than those of monogamous marriages.[69]

60.3. The order should not apply to completed transactions. Again, the only reason offered was that this Court had held so in *Gumede*.[70]

61. The High Court's reasoning must be treated with care. It did not advance substantively new reasons to exclude unfinalized deceased estates from the reach of its order. Indeed, its order is parasitic on *Gumede*, which itself did not need to directly address the issue.

RETROSPECTIVITY IN THIS CASE

62. This case is an unusual hybrid of the succession cases, and *Gumede*. It does not directly challenge succession laws, but rather the application of discriminatory matrimonial property rules. But the entire reason the case was brought was to influence the distribution of a testate deceased estate. It rests on the inevitable link between how assets are controlled before death, and how they are distributed after death.

63. It is often at the dissolution of a marriage – whether by death or divorce – that women in customary marriages are most vulnerable to the discriminatory impact of the existing matrimonial property regime. During the marriage, their husbands may – as customary law envisages – treat them fairly and provide for their needs, even if they are denied ownership rights. But when the marriage breaks down, or the husband dies, that protection ends. The customary law comes face-to-face with formalised systems of western law. The wife is

[69] HC Judgment at para 72.
[70] HC Judgment at paras 73-4.

forced to compete in a zero-sum game with others for the assets of the marriage: in the case of a divorce, with her husband; and in the case of death with his other wives and relatives.

64. Because of this very important difference, we submit that this Court should not rely uncritically on its judgment in *Gumede*. It ought to evaluate, based on the facts before it in this case, whether it should limit the ordinary retrospective impact of its order to deny protection to the Applicants, and to Ms Maphumulo. In that light, Ms Maphumulo submits that this Court should adopt two limiting mechanisms.

65. First, it should adopt the limit repeatedly endorsed by this Court to allow the reversal of transactions made to **bad faith transferees**. As Langa DCJ pointed out, there is no reason of justice to permit those who knew that the receipt of property may be unlawful to benefit because they happened to complete the transfer by an arbitrary date. Importantly, we submit the order should apply to all transferees, not only to heirs. This is necessary in order to deal with transfers made from the estate to other wives based on their matrimonial property rights, rather than their rights as heirs.

66. We stress that Ms Maphumulo does not ask this Court to determine whether Simiso was aware of the decision in *Gumede* or of any other risk to his receipt of the Property when he took transfer. That is an issue that will have to be determined in another forum.

67. Second, this Court should not exempt estates that have not been **finally wound up**. We realise this is not the path this Court previously took. But we submit it is justified in this instance for the following reasons:

    67.1. The High Court has previously adopted it, and this Court appeared to endorse it in its most recent decision in *Hassam*. Moreover, the reason it was not adopted in *Bhe* was because it would not cure the specific problem arising from the facts in *Shibi*, not because it would create too much retrospectivity.

67.2. Not excluding the default retrospective effect of its order to apply to unfinalized estates is necessary to provide relief to the parties before this Court – both the Applicants and Ms Maphumulo. This Court has never previously been confronted with a situation where the only way to afford effective relief to a party in fact before it was to adopt this particular limiting mechanism. Now that it is in that situation, it must consider the issue, effectively, for the first time.

67.3. It is just to follow this approach because, as pointed out earlier, until the estate is finalised the executor has an absolute power to reverse a transfer made to the incorrect beneficiary. All heirs must know that their rights are subject to reversal until finalisation.

67.4. The order is likely to cause extremely limited disruption. It will only apply to marriages concluded prior to coming into force of the RCMA on 15 November 2000. The number of such marriages that have been ended by death, but where the husband's estate has not yet been wound up, is finite, and decreasing every day. While there is no evidence on precisely how many such marriages there are, there is also no evidence that there are so many affected marriages that it will cause an unbearable administrative burden for the courts or the state to undo some of the transactions made in distributing those estates.

67.5. This Court can manage any unforeseen complications by allowing any interested party to approach this Court to address practical problems that arise in implementing the order.

67.6. As the Women's Legal Centre notes, women like Ms Maphumulo are in a particularly vulnerable position, more so even than those like Ms Gumede who were in

monogamous marriages.[71] They have to contend not only with discriminatory laws, but with additional competing claims for limited resources. Many of them are, like Ms Maphumulo, elderly women with limited financial means. They are the some of the most vulnerable people in our society.

67.7. Despite calls from the SA Law Reform Commission and this Court in *Gumede* eight years ago, the Legislature has not taken the necessary steps to protect them. That history justifies additional protection to what was afforded in *Gumede*.

67.8. If an estate has been finalised, then the equities change. There are exponentially more such estates, and an order applying to them will cause massive disruption and will reach back many years and decades into the past, and disrupt untold numbers of transactions. Moreover, in those instances the transferee is entitled to fully rely on the strength of his title.

67.9. This fits with the manner in which this Court has resolved cases involving criminal convictions and financial claims against the state. In both instances, the Court limits the retrospective effect of its order to cases that have not been finalised.[72] While there is inevitably some arbitrariness in any cut-off line, finalisation is a sensible, clearly discernible, and regularly used basis to limit the retrospective of this Court's orders.

68. For all these reasons, we submit it would be just and equitable to limit the retrospective impact of the order in the manner suggested in paragraph 3 of the application for intervention.[73] However, there is an additional class of cases where justice and equity requires particular care in limiting retrospectivity: access to housing.

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[71] Amicus Curiae's Written Submissions at para 38.
[72] See the cases in ffn 34 and 35 above.
[73] Notice of Motion at para 3: Intervention Record pp 2-4.

RETROSPECTIVITY AND THE RIGHT TO HOUSING

69. This Court has repeatedly stressed the importance of the right of access to housing in s 26 of the Constitution. As former Chief Justice Chaskalson once said, *"[there] can be no human dignity, in a life lived without access to housing*". In *Jaftha v Schoeman and Others*, Mokgoro J dealt with provisions of the Magistrates Court Act[74] that allowed a person's home to be sold in execution without judicial oversight, finding them to be unconstitutional and invalid.[75] She explained the impact as follows:

> "*In the present matter access to adequate housing already exists. Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity.*"[76]

70. To address the terrible indignity of homelessness, this Court has developed a practice for dealing with retrospectivity in cases where people are at risk of losing their homes. In *Jaftha*, the Court did not limit the retrospective effect of its order in any way. The SCA confirmed that *Jaftha* had full retrospective effect, but that those affected by retrospectively invalid sales in execution still had to approach the courts for relief.[77]

71. Seven years later, in *Gundwana v Steko Development CC and Others*, this Court issued a similar order with regard to the provisions governing execution in the High Court.[78] Again, it did not limit the retrospective effect of its order of invalidity. Froneman J explained that a limitation on retrospectivity was not necessary because "*the mere constitutional invalidity of the*

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[74] Act 32 of 1944.
[75] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC).
[76] Ibid at para 39
[77] See *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA). See also *Campbell v Botha and Others* [2008] ZASCA 126; 2009 (1) SA 238 (SCA).
[78] [2011] ZACC 14; 2011 (3) SA 608 (CC).

rule under which the property was declared executable is not sufficient to undo everything that followed".[79] A debtor would have to approach a court to have the original decision rescinded, convince a court that the original order should not have been granted, and deal with the problem of subsequent sales. As Froneman J accepted, *"in many cases those aggrieved may find these requirements difficult to fulfil*".[80]

72. The approach taken in *Jaftha* and *Gundwana* allows an appropriate level of flexibility. It does not try to predict in advance all the individual circumstances where retrospective application of an order might be justified, or limit itself to the peculiar facts before the Court. Instead, it leaves it to the lower courts to determine, effectively on a case-by-case basis, whether the order of invalidity should apply retrospectively. This approach has clear echoes in the reasoning of both the majority and the minority in *Daniels* that difficulties with retrospectivity should be resolved on a case-by-case basis.

73. We submit that the same approach should apply to homes that are affected by the order of invalidity in this case. While the constitutional violation is very different, the effect is the same. A person's home may be sold even though it is unconstitutional to do so. It was that serious consequence that prompted the fully retrospective orders in *Jaftha* and *Gundwana*.

74. While such an order may at first glance appear far-reaching, its effect is significantly limited:

    74.1. It will apply only to the transfer or someone's **home**, not to the transfer of other property. In *Jaftha*, Mokgoro J made it clear that the execution process was only invalid "*to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure.*"[81] And in *Gundwana* Froneman J made it clear in his order that the relevant rule was invalid only "*to the extent that this permits the sale in execution of the home of*

[79] Ibid at para 58.
[80] Ibid.
[81] *Jaftha* (n 75) at para 52. This limitation does not appear expressly in the order.

a person".[82] A similar limitation is entirely appropriate here – the ordinary retrospective effect of the order will be limited so that it only applies to transfers of a person's home. This part of the relief would not, therefore, assist the Applicants, but it will apply to Ms Maphumulo.

74.2. The affected person will have to **approach a court** and convince it not only that she is covered by the retrospective order, but that: (a) she has a reason for only seeking to undo the transfer now; and (b) undoing it at that time is just and equitable in the circumstances. If, for example, the claimant no longer lives in the property, it was transferred twenty years ago, has subsequently been transferred several times, is the current owner's only access to housing, and the applicant has other access to housing, it is unlikely that a court will undo the transfer. But Ms Maphumulo's situation is very different. She has lived in the Property for nearly 25 years and currently lives there with her daughter and her two grandsons.[83] The transfer of the Property to Simiso happened recently on 11 December 2015, and this fact was only discovered by Ms Maphumulo's attorneys in July 2016. Other than the cancellation of the transfer, Simiso will suffer little or no prejudice. While this Court need not determine the question, there are good prospects that the appropriate court will conclude that the transfer of the Property to Simiso should be set aside.

75. It is important to stress that this issue was not raised in *Bhe*, *Daniels*, *Gory*, *Hassam* or *Gumede*, because in none of those cases had a person's home (and their only access to housing) been sold. The closest equivalent is *Bhe*, where the deceased's father intended to sell Ms Bhe's

[82] *Gundwana* (n 78) at para 65.2.
[83] Intervening FA at para 45: Intervening Record p 25.

home "*to defray expenses incurred in connection with the funeral of the deceased.*"[84] In the words of Langa DCJ, the father did not appear to give "*any thought to the dire consequences which would follow the sale of the immovable property.*"[85] It was precisely because Ms Bhe and her minor children feared that they would be "*rendered homeless*" that they approached the High Court to prevent the sale of the house.[86] That was not possible in this case. But the underlying equitable justifications that motivated this Court in *Jaftha* and *Gundwana* must lead to the same outcome.

IV REGULATING POLYGYNOUS MARRIAGES

76. In *Gumede* the consequence of the declaration of invalidity for old, monogamous customary marriages was simple. They would be governed in the same way as monogamous customary marriage concluded after the RCMA came into force – in community of property.

77. The position for polygamous marriages is more complicated. The RCMA envisages that the patrimonial consequences of second and subsequent marriages should be regulated by a court order.[87] Where that does not occur, the first marriage is in community of property, and the subsequent marriages are out of community of property.[88] Applying that regime to existing customary marriages would clearly be unworkable.

78. According to Lamminga J, in order to find a just and equitable remedy to be implemented in the interim, the court must have regard to '*the nature of the principles underpinning polygamous customary marriages and the essential general principles of customary law applicable to such marriages*', which distinguishes between various types of traditional property.[89] Therefore, in order for

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[84] *Bhe* (n 47) at para 17.
[85] Ibid.
[86] Ibid.
[87] RCMA s 7(6).
[88] *Ngwenyama v Mayelane and Another* [2012] ZASCA 94; 2012 (4) SA 527 (SCA) at para 38.
[89] *Ramuhovhi* para 54. The court found that tradition property in polygamous marragies consisted of family property, house property and personal property. 'Traditionally, the family property, which had to provide for the sustainability of

interim relief to be effective, it must take into account and acknowledge the distinction between the different types of traditional property and the purpose of the classification in order to provide effective protection.[90] It is on that premise that the court held that it was just and equitable to grant an interim remedy regulating the rights of women in polygynous marriages. In terms of the interim relief in *Ramuhovhi*, "*wives who are parties to such polygamous marriages shall have joint and equal rights of management and control over and in the marital property to their husbands*".[91]

79. Ms Maphumulo supports the High Court's interim order, save for one caveat. The interim order in *Ramuhovhi* affords wives joint rights of "*management and control*" over the marital property. We submit that should be amended to expressly refer to joint *ownership* rights to the marital property. Without that addition, there could be confusion about whether the husband and wife are joint owners, or merely joint managers, with ownership still being determined according to customary law. That would defeat the purpose of declaring s 7(1) of the RCMA invalid.

80. Although it is not necessary or appropriate for this Court to determine the question, Ms Maphumulo will argue in the appropriate forum that the Property constituted "house property" and was jointly owned by her and her husband.

81. This part of the High Court's order has been misleadingly referred to as "*interim relief*". It is not. It is a final determination of how the marital property regime of polygynous customary marriages will be determined unless and until Parliament provides for a different regime. It is also a statement of the law that will apply retrospectively, to the extent this Court makes

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the family unit, did not belong to the family head. He just administered it for the benefit of the family. In pre-colonial times women did attain rights in property but the customary law was distorted by "the identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of women to security and tenure" para 58.

[90] *Ramuhovhi* para 59.

[91] Ibid para 76.

its order retrospective.

GEOFF BUDLENDER SC
MICHAEL BISHOP
PHUMZILE MDAKANE (pupil)

Counsel for Ms Maphumulo
28 April 2017

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

High Court Case no: 412/015
CCT: 194/16

In the matter between:

THOKOZANI THEMBEKILE MAPHUMULO	Applicant for Intervention

and

SIMISO SIPOSETHU MAPHUMULO	First Intervention Respondent
SEBENZILE GLADYS MPHUMULO	Second Intervention Respondent
MASTER OF THE HIGH COURT, DURBAN	Third Intervention Respondent

In the matter between:

MATODOZI RAMUHOVHI (born NETSHITUKA)	First Applicant
THINAMAANO EDSON NETSHITUKA	Second Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
ESTATE OF MASEWE JOSEPH NETSHITUKA	Third Respondent
MYNYADZIWA JOYCE NETSHITUKA	Fourth Respondent
MASTER OF THE HIGH COURT, THOHOYANDOU	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent

THIRD AND FOURTH RESPONDENTS' HEADS OF ARGUMENT ON THE APPLICATION FOR INTERVENTION

1.

The applicant brought an application for intervention based on her particular circumstances in that the house that she occupied during the existence of the customary marriage was transferred to the first customary wife in terms of her late husband's will. The relief sought (which appears to be disputed) is that the order of unconstitutionality have retrospective operation in that her estate has not been finalized and the fact that she will loose her right to occupy the second marital home and as a consequence be exposed to eviction.

2.

At the time of preparing the heads of argument no documentation was served on behalf of the first and second intervening respondents.

3.

The applicant seeks to have an order made regarding a situation where the factual averments have not been ventilated in the court *a quo*.

4.

Although the applicant has an interest in whether the order is made with limited retrospective operation, it is submitted that in the absence of a properly ventilated case in a court *a quo*, it would not be proper to allow leave to intervene in the main application having regard to the circumstances.

5.

<u>The provision in Gumede for an affected party to approach the court</u>

It is submitted that the decision in Gumede[1] protects the rights of an interested person, such as the applicant for intervention and allow them to approach a court for exclusion from the limited retrospective operation of the order of unconstitutionality.

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[1] Gumede v President of the Republic of South Africa and Others 2009 (3) SA 152 CC at p 177, par j of the order:

(j) Any interested person may approach this court for a variation of this order in the event of serious administrative or practical problems being experienced as a result of this order.

6.

It is therefore submitted that there is an avenue available for the applicant for intervention to set out her specific circumstances and have a court of first instance determine the circumstances, that in her submission, warrants a deviation from the limited retrospective operation of the order.

7.

It is therefore submitted, although the application is not formally opposed, that the application for intervention ought not to succeed.

8.

The application to be allowed as an *amicus curiae*

The application to make submissions as an *amicus curiae* is advancing the same facts and arguments that the applicant whished the court to find upon in the application for intervention.

9.

It is submitted that the submissions made on behalf of the applicant do not to take account the option created by the decision in Gumede to approach a court where there is administrative or practical problems in dealing with the limited retrospective operation as ordered in Gumede as well as in the court *a quo* in the main application.

10.

It is submitted that the arguments advanced on behalf of the third and fourth respondents, namely that the limited retrospective operation is the only viable and practical way to address the situation that arose from the facts in the main application. It is submitted that retrospectivity as suggested in the court *a quo* is the just and equitable order to be made when the Honourable Court considers all the facts in the main application.

11.

In as far as the submission to have the applicant admitted as an *amicus curiae* is concerned, the third and fourth respondents abide by the ruling of this Honourable Court.

12.

The main submissions to be made by the applicant for intervention, alternatively admission as an *amicus curiae* argue that deceased estates, not finally wound up, should be included together with transfers of properties made to people who were aware of the legal challenge and protection of applicant's rights to continue to occupy her martial home.

13.

The submissions made on behalf of the first applicant for intervention is based on the vulnerability created by the loss of her home as a result of the absence of retrospective operation. It is submitted, as already alluded earlier herein, that it is open to Ms Maphumulo to approach the court on the premiss provided for in Gumede which provided for a standard order of limited retrospectivity. It is submitted that this Honourable Court, in Gumede, provided for circumstances which would justify a different order as to retrospectivity, which could prevent third parties from being adversely affected by the limited retrospective order in that an applicant may approach a court based on her circumstances, which may entitle her to a different dispensation in as far as retrospectivity is concerned.

14.

It is submitted that based on the submissions, that the main aim is the protection of vulnerable women in polygamous marriages. As a general rule she submits that it should not affect a completed transaction. The retrospective application to completed transactions is limited to those made to bad faith transfers, those made in estates that have not been finally wound up and those that remove a woman's right to and access to housing.

15.

On behalf of the third and fourth respondents it is submitted that there is no evidence of any bad faith transfers that took place in as far as the fourth respondent in the main application is concerned. The issue at hand does not affect the applicant in the main applicant's access to and right to housing. In as far as the estate has not been wound up, the submissions were made in the main heads of argument on behalf of third and fourth respondent that the delays in finalizing the estate were caused by the continuous litigation and the fact that the constitutional point now raised was only raised in 2016, some 8 years after the death of Mr. Netsthituka.

16.

If one considers the argument raised in the heads of argument that it is based on the recent passing of the applicant's husband, it is submitted that her facts are not similar to the ones in existence in the main application. In the main application, it is not the loss of a house that is in dispute but whether fourth respondent could acquire joint ownership in a commercial immovable property with the deceased whilst he was at the time, married out of community of property.

17.

It is furthermore submitted that none of the wives, whether it be customary, civil or no marital status (such as the fourth respondent),

are not provided for as far as houses are concerned. The deceased provided for all the wives and children therein and did not leave any of the parties exposed or vulnerable to eviction. It is submitted that the main asset in the main application, namely the shopping centre, forms the crux of the dispute and is not about vulnerability but about the monetary value that attaches to that asset. The real dispute is whether it should form part of a joint estate (with the first customary wife) or remain an asset jointly owned by Mr Netsthituka (the deceased) and the fourth respondent.

18.

Fourth respondent partook in the sale of the property and again when it was purchased. She continued to work in that business. There is in humble submission no similarity to the facts in the main application and the fact set out by the applicant for intervention.

19.

It is therefore submitted that in as far as the main application is concerned, that the retrospectivity should be limited as was done by the High Court and that the assets of Mr Netsthituka (the deceased) should not form part of any community of property between him and his customary wives.

SIGNED at PRETORIA on this 2nd day of MAY 2017.

GJ SCHEEPERS
COUNSEL FOR THIRD AND FOURTH RESPONDENTS