CONCOURT RULING A POWERFUL STEP FOR BLACK WOMEN IN SOUTH AFRICA: CASE DISCUSSION

In the recent matter of *Agnes Sithole & Another v Gideon Sithole & Another*[1] the South African Constitutional Court confirmed and upheld a High Court ruling that marriages under South Africa's old Black Administration Act be made in community of property by *default.*

Background

The Constitutional Court was approached for confirmation of an order of invalidity originally handed down by the by the High Court (KwaZulu-Natal Local Division in Durban) in terms of section 167(5) of the Constitution. At its core, the case concerned a constitutional challenge against the provisions of section 21(2)(a) of the Matrimonial Property Act (MPA)[2].

Section 21(2)(a) of the MPA permitted couples to make the out of community accrual system (provided for in Chapter I of the MPA) applicable to their marriages and is worded as follows:

"(a) Notwithstanding anything to the contrary in any law or the common law contained, but subject to the provisions of paragraphs (b) and (c), the spouses to a marriage out of community of property –

(ii) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act, 1927 (Act No. 38 of 1927), as it was in force immediately before its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988, may cause the provisions of Chapter I of this Act to apply in respect of their marriage by the execution and registration in a registry within two years after the commencement of this Act or, in the case of a marriage contemplated in subparagraph (ii) of this paragraph, within two years after the commencement of the said Marriage and Matrimonial Property Law Amendment Act, 1988, as the case maybe, or such longer period, but not less than six months, determined by the Minister by notice in the Gazette, of a notarial contract to that effect."

[1] CCT23/20 [2021] ZACC: Agnes Sithole and Another v Gideon Sithole and Another (concourt.org.za)

[2] Act 88 of 1984

The High Court declared section 21(2)(a) of the MPA unconstitutional and invalid to the extent that it maintains and perpetuates unfair discrimination. The Court ruled that this discrimination was created by section 22(6) of the Black Administration Act[3] (the BAA) in that marriages of black couples - entered into under the BAA before 1988 - were *automatically* out of community of property.

In this sense section 22(6) of the BAA provided that -

"A marriage between Natives, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native Commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community."

Salient Facts

Mr and Mrs Sithole were married in December 1972. The marriage was out of community of property by virtue of section 22(6) of the BAA and at the time the application was brought before the Court *a quo* the couple had been married for a period of 47 years. The marriage was further constituted as out of community of property because of section 21(2)(a) of the MPA - which did not automatically change the matrimonial regime. Mrs Sithole was a housewife. During 2000 the couple purchased a house - which was registered in Mr Sithole's name only. Subsequent to this the relationship between the parties soured and Mr Sithole threatened to sell the house.

[3] Act 38 of 1927

Mrs Sithole sought and obtained an order interdicting and restraining Mr Sithole from selling the house or in any manner alienating it pending the finalisation of the application before the High Court and ultimately, the Constitutional Court.

Main Issues

The Court, in a unanimous judgment delivered by Justice Tshiqi, indicated that the main issue to be determined was –

"Whether the order of constitutional invalidity made by the High Court should be confirmed. The outcome of that inquiry is predicated on whether the impugned provisions discriminate unfairly against Black couples whose marriages were concluded in terms of the BAA, including the applicant and other women similarly placed. If they do, the next question would be whether there is a justification that saves the challenged provisions from constitutional inconsistency. Lastly, if unfair discrimination is found and it cannot be justified, this Court must confirm the order of constitutional invalidity and make an order that is just and equitable".[4]

The Court thereafter reiterated the well-established approach to be followed when considering whether discrimination is unfair, and as set out in the matter of *Harksen v Lane*[5]: "Where the equality clause is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the following stages of the enquiry into a violation of section 8 are helpful:

"(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 section 8(1).
Even if it does bear a rational connection, it might nevertheless amount to discrimination.
(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: (i) Firstly, does the differentiation amount to 'discrimination'?

[4] Judgment *ad* paragraph 11
[5] Harksen v Lane N.O. [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

If it is on a specified ground, then discrimination will have been established.

(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, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 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 (section 33 of the interim Constitution [now section 36 of the Constitution])".

The Court's Findings

Justice Tshiqi indicated that the provisions perpetuate the existence of a special matrimonial regime for Black couples who concluded their marriages before 1988. This meant that there was indeed 'differentiation' in that marriages of Black people were different from those of other races.

Justice Tshiqi continued that –

"The discrimination complained about is on the listed grounds of race, gender and age in section 9(3) of the Constitution. In terms of this section, the state may not unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in the section. In terms of section 9(5) of the Constitution, discrimination on one or more of the grounds listed in section 9(3) is presumed to be unfair unless proven otherwise.

The discriminatory effect of the provisions can be traced back to the provisions of the BAA. The differentiation under the BAA was on a racial basis in that it created a special dispensation for Black couples. Section 22(6) of the BAA had the effect that unless Black couples expressed a desire to enter into a marriage in community of property their marriage was automatically out of community of property. This was different to what pertained in respect of other racial groups whose marriages were automatically in community of property. Section 21(2)(a) of the MPA did not have the effect of automatically converting the default position of marriages of Black people so that they were automatically in community of property like those of other races. Instead, it required all spouses in marriages out of community of property, entered into

before the commencement of the MPA either (i) in terms of an antenuptial contract; or (ii) in terms of section 22(6) of the BAA, to cause the provisions of Chapter I of the MPA (the accrual system) to apply for the conversion of their marriages, within two years after the commencement of the MPA. Thus, although the amendment brought by section 21(2)(a) formally rectified the discriminatory provisions of the BAA, it failed to address the lasting discriminatory effects of these provisions. Instead, it imposed a duty on Black couples who wanted their matrimonial regimes to be similar to those of the other racial groups, to embark on certain laborious, complicated steps to enjoy equality with other races".[6]

The learned Justice also made it very clear that in the Court's view the challenged provisions have indirect *unfair* discriminatory consequences for women. In the Court's view - and flowing from evidence led *a quo* in the High Court - Black women are hard hit by the impugned provisions *disproportionately* to their husbands and the challenged provisions have far reaching intersectional effects on Black women's rights compared to their *male* counterparts.[7]

Applying herself to the final requirement as enunciated in the *Lane*-case Justice Tshiqi ruled that –

"The unfair discrimination is not saved by section 36(1) of the Constitution and that he provisions of section 21(2)(a) of the MPA are inconsistent with the Constitution and invalid and the High Court order to this effect should be confirmed".[8]

The Court's Order

The Court consequently ordered that -

"1. The provisions of section 21(2)(a) of the Matrimonial Property Act 88 of 1984 ('the MPA') are declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), and thereby maintaining the default position of marriages of black couples, entered into

[6] Judgment *ad* paragraph 22 - 24
[7] Judgment *ad* paragraph 27
[8] Judgment *ad* paragraph 47

under the Black Administration Act before the 1988 amendment, that such marriages are automatically out of community of property;

2. All marriages of black persons that are out of community of property (and concluded under section 22(6) of the Black Administration Act before the 1988 amendment) are, save for those couples who opt for a marriage out of community of property, hereby declared to be marriages in community of property;

3. Spouses who have opted for marriage out of community of property shall, in writing, notify the Director-General of the Department of Home Affairs accordingly; and

4. In the event of disagreement, either spouse in a marriage which becomes a marriage in community of property in terms of the declaration in paragraph 2, may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding that declaration."[9]

Conclusion

The practical implications going forward is that effective from 14 April 2021 that the default position is that all marriages which, in terms of the BAA, were automatically *out of community of property* are *in community of property* - unless the affected couple has opted out.

The judgment and practical implications thereof are to be welcomed and presents an excellent illustration of the way our Courts approach unfair discrimination and how it is determined.

The judgment must also be seen as a sterling example of how the South African Constitution and Bill of Rights can be utilized and implemented to effect real and positive change for all South Africans - in this case particularly, Black women, who continued to suffer disenfranchisement as a result of the effects of marriages concluded in terms of the old Black Administration Act.

[9] Judgment *ad* paragraph 59