

SOUTH AFRICA / JUDGMENT

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)

[2016] ZALMPTHC 18

COURT

Limpopo High Court, Thohoyandou

BEFORE

Lamminga

CASE / FILE NUMBER

412/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

Case

No.: 412/2015

Reportable

Of

interest to other judges

In

the matter between:

MATODOZI

RAMUHOVHI(born Netshituka)

1st Applicant

THINAMAANO

EDSON

NETSHITUKA 2nd

Applicant

and

THE

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

1st Respondent

THE

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 2nd

Respondent
ESTATE
OF MASEWE JOSEPH
NETSHITUK
3rd Respondent
MUNYADZIWA
JOYCE
NETSHITUKA
4th Respondent
MASTER
OF THE HIGH COURT THOHOYANDOU
5th Respondent
MINISTER
OF HOME AFFAIRS
6th
Respondent
WOMEN'S
LEGAL
TRUST
Amicus Curiae

JUDGMENT

LAMMINGA AJ

- [1] At the heart of the application before this court is the question of the constitutionality of the provisions of section 7(1) of the Recognition of Customary Marriages Act 20 of 1998 ("the RCMA") which still regulates the proprietary consequences of polygamous customary marriages entered into prior to the commencement of the RCMA on 15 November 2000.[1] For ease of reference in this judgment , polygamous customary marriages entered into before the commencement of the RCMA will be referred to as "old" polygamous customary marriages. Conversely, polygamous customary marriages entered into after the commencement of the RCMA will be referred to as "new" polygamous customary marriages.
- [2] The Applicants approached this court for an order declaring that section 7(1) of the RCMA is inconsistent with the Constitution[2], invalid and that an "old" polygamous customary marriage produces the legal consequences of a marriage in community of property. In subsequence of the aforesaid

orders.

the Applicants apply for

orders

that: (a) the wives who are parties to "old" polygamous customary marriages, would be entitled to a half share of the husband's estate upon his death by virtue of the marriages being in community of property: and, (b) that property which forms the subject of the dispute between them and Fourth Respondent be deemed property of such joint estate.

- [3] The Application is not opposed by the First, Second and Sixth Respondents and the Fifth Respondent filed a notice to abide by the decision of this court.
- [4] The Third and Fourth Respondents oppose the application and initially, in their answering affidavits, raised points in limine of locus standi, non-joinder and that the Constitutional Court had already pronounced on the constitutional issue raised. During argument before this court the Respondents did not persist in these points in limine and conceded that the Constitutional Court did not decide on the constitutional validity of the provisions of section 7(1) of the RCMA in respect of "old" polygamous customary marriages.

FACTUAL BACKGROUND

- [5] Before I move on I deem it necessary to state the factual background of this application, which is common cause, unless otherwise stated.
- [6] The Applicants are the biological children of Masewa Joseph Netshituka ("the Deceased"), who passed away on 4 January 2008. During his lifetime the Deceased entered into polygamous customary marriages with Tshinakaho Netshituka ("Tshinakaho") [3] Masindi Netshituka ("Masindi") [4] and Diana Netshituka ("Diana"). He also entered into civil marriages with Martha Mosele Netshituka ("Martha") and the Fourth Respondent.
- [7] At the time of his passing his marriage to Martha had already been terminated by divorce on 5 July 1984 and his marriage to Masindi had been terminated when she passed away on 16 April 1995. The position in respect of the marriage to Diana is not clear, but it was submitted that she was also deceased by the time this matter was heard. Tshinakaho passed away on 9 November 2011. The civil marriage between the Deceased and the Fourth Respondent, which took place on 17 January 1997, was declared null and void by the Supreme Court of Appeal in *Netshituka v Netshituka and Others* [5] This was due to the fact that the court held that the Deceased was a party to extant customary marriages to Tshinakaho and Diana at the time he entered into the civil marriage with the Fourth Respondent in this case [6]
- [8] When the Deceased passed away he left a last will and testament in terms of which the Fourth Respondent was named as one of the beneficiaries and the executrix of his estate. In his will the Deceased referred to Tshinakaho as his first wife, to Diana as his second wife and to the Fourth Respondent as his third wife. He also indicated that the Fourth Respondent is his wife to whom he is married in community of property.

- [9] The Supreme Court of Appeal ruled on the last will and testament executed by the Deceased and declared it to be valid.[7] In terms of the said will the Deceased bequeathed his "half share of the joint estate" to his respective wives, including the Fourth Respondent, and all his children.
- [10] The First and Second Applicants are children born from the polygamous customary marriages of the Deceased with Tshinakaho and Masindi respectively.
- [11] It was submitted on behalf of the Third and Fourth Respondents that this application is a result of the Applicants' dissatisfaction with the finding of the Supreme Court of Appeal in respect of the validity of the Deceased's will. However, they conceded the unconstitutionality of section 7(1) of the RCMA.
- [12] The Fourth Respondent is the registered owner of an undivided share in the fixed property upon which the Why Not Shopping Centre is situated .The Applicants submitted that the Fourth Respondent was only registered as a co-owner of the said property due to the fact that, at the time of such registration, the Deceased acted under the impression that he was married to the Fourth Respondent in community of property. The Fourth Respondent submitted that without her involvement in the acquisition of the property, and her ability to provide security for the bond in order to facilitate the acquisition, the Deceased would not have been able to acquire the property. This particular property was acquired by the deceased in 1991, sold in 1999 and again acquired by him in 2002.
- [13] By the time this application came before me, all the previous wives of the Deceased and most of his children had passed away.
- [14] In essence, the Applicants submitted that, due to the application of section 7(1) of the RCMA and the applicable Venda customary law, their mothers were excluded from ownership of the estate amassed by the Deceased . This in turn was due to the discriminatory nature of these provisions which caused prejudice to the Deceased's wives and children.
- [15] The Women's Legal Centre Trust ("the Trust") was admitted as amicus curiae and this court is appreciative of the valuable contribution made by them in respect of their extensive research and detailed submissions in this matter. Incidentally, the Trust also made

submissions

in respect of polygamous customary marriages when the constitutionality of section 7(1) of the RCMA came before the Constitutional Court in the case of *Gumede v President of Republic of South Africa and Others*[8]. The

submissions

by the Trust in casu, are to a certain extent aligned with the

submissions

of the Applicants, but are further grounded in the protection of a broader class being a "particularly vulnerable and marginalized class of women"[9] – those women in "old" polygamous customary marriages. The Trust submitted further, with reference to various cases[10], that women in "old" polygamous customary marriages are particularly vulnerable. The following reasons are submitted in support of this: (a) the fact that they enjoy no secure rights in property; (b) they have been disadvantaged by restrictions under apartheid and a lack of access to land ownership and economic resources.[11]

[16] In order to properly consider issues of standing, ripeness and mootness it is prudent to first state the legal framework within

which the application is brought.

LEGAL CONTEXT

[17] In Gumede[12] the Constitutional Court dealt with, inter alia, the question of the constitutionality of section 7(1) of the RCMA and declared it, along with other legislative provisions, to be inconsistent with the Constitution and invalid to the extent that the provisions of that Act relate to monogamous customary marriages. It was further ordered that the words "entered into after the commencement of this Act" in section 7(2) of the RCMA be severed from that section. In terms of the Gumede[13]

judgment

the proprietary consequences of monogamous customary marriages are in community of property and of profit and loss, unless excluded by an anti-nuptial contract, regardless of whether that marriage was entered into before or after the commencement of the RCMA. This left the position in respect of "old" polygamous customary marriages unchanged and still subject to the provisions of section 7(1) of the RCMA, pending a possible intervention by the Legislature. [14]

[18] In the matter in casu the Venda customary law applies, by virtue of the operation of section 7(1) of the RCMA. The parties were in agreement that the proprietary consequences of polygamous customary marriages in terms of Venda customary law did not vest any rights in or control over property in the hands of the wives in such marriages. Therefore the effect of the provisions of section 7(1) of the RCMA on "old" polygamous customary marriages is to exclude the wives in such marriages from certain rights.

PROCEDURAL AND JURISDICTIONAL ASPECTS

[19] The general principle determining whether a court will entertain a matter is that "courts will only act if the right remedy is sought by the right person in the right proceedings and circumstances." [15] This principle extends to Constitutional matters although "the Constitutional Court has recognised that even in cases which are technically moot as

between the parties, the interests of justice may tip the balance in favour of entertaining a particular dispute." [16] These constitute the principles of standing, ripeness and mootness and it is prudent for this court to deal with these

issues

and to determine if the court should indeed entertain this matter as a constitutional issue.

Standing

[20] The issue of standing is provided for in section 38 of the Constitution which reads as follows:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members."

(my emphasis)

[21] The applicants submitted that they bring the application in their own interest and in the public interest.

Acting in their own interest

[22] On the question of standing the court was divided in *Ferreira v Levin NO & Others* [17] In that case the Constitutional Court had to decide on

issues

emanating from the Interim Constitution [18] For purpose of this discussion it serves to mention that section 7 of the Interim Constitution ("the IC") contained exactly the same provisions as section 38 of the Constitution in respect of persons who may approach the court, though in a different order. The approach by Ackermann J, as he then was, to the question of acting in one's own interest in terms of section 7(4)(b)(i) of the IC was that the person acting in his or her own interest can only do so if there is an infringement or threat of infringement of the person's own right. [19] The majority of the Court [20], however concurred in the judgment of Chaskalson P, that, depending on the circumstances and facts, a person's right to challenge the constitutionality in his or her own interest should not be made dependent on a finding that he or she should be the person whose constitutional right is under threat. [21] He qualified this by stating that:

"Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to

issues

that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled"[22]

[23] In *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs*[23] the Constitutional Court had to decide, inter alia, on the issue of standing of foreign partners in same-sex relationships in their own interest in the protection of the constitutional rights of their South African partners. The court held as follows, with reference to the objective theory as stated in *Ferreira*[24] :

"On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person."[25]

[24] From this it is clear that, in certain circumstances, a person who may suffer prejudice due to the infringement of a constitutional

right of another may have standing in his own interest.

Are the Applicants acting in their own interest?

[25] The starting point for the relief the Applicants seek is the question of the constitutionality of the impugned provision in the RCMA. In terms of section 7(1) the customary law applies to "old" polygamous customary marriages. By implication wives in such marriages did not acquire any rights in the management and control of, or in the marital property. These impact negatively on the wives and also their children and thus the Applicants have a direct interest.

[26] To illustrate the affected interest, it is necessary to revisit the facts pertaining to the case. The specific subject matter of the application is a property described as Why Not Shopping Centre Complex ("the Property"). In 1991 the Deceased acquired this property, and since he was deemed the owner at that time, it was registered in his name only. He then sold the Property, which transfer was endorsed on the deed of grant in 1999. The property was then again purchased by him and the transfer endorsed in 2002. By this time he was married to the Fourth Respondent in a civil marriage, in community of property and of profit and loss. His wives in the customary marriages could not acquire any rights in or over the property, due to the provisions of section 7(1) of the RCMA. They had no say or control when the property was sold in 1991 and also not in the acquisition and registration of the property.

Due to the civil marriage, in community of property and profit and loss, between the Deceased and the Fourth Respondent which existed at that time, the property was registered in both her and the Deceased's names. Fourth Respondent would also have shared in the profits, the management and control of the whole estate by virtue of the said marriage. In his will the Deceased bequeathed his half share in the joint estate between him and the Fourth Respondent.

- [27] The Applicants also apply for an order that, subsequent to the court ordering the impugned provisions to be invalid, the "old" polygamous customary marriages should have the consequences of marriages in community of property, with no restriction as to retrospectivity[26]. This, they submitted, would place the "old" polygamous customary marriages on the same footing as all other customary marriages.
- [28] From this would then subsequently follow that the Deceased could not have alienated any part of the Property without complying with section 15 of the Matrimonial Property Act 88 of 1984. This provision restricts the rights of spouses in marriages in community of property in respect of the management and alienation of property of the joint estate, without each other's consent. The Deceased would then not have been able to alienate a share in the Property to the Fourth Respondent, for example. The extent of his share in the joint estate would also be differently constituted, and the portion he would have been able to bequeath in a will would have been substantially reduced.
- [29] The Fourth Respondent also submitted that even though her civil marriage to the Deceased was declared null and void, she and the Deceased had entered into a customary marriage in 1996.[27] Therefore she would be similarly placed to the other customary wives of the Deceased in the application of the impugned provisions, unless the court grants the Applicants the orders for the invalidity and applicability of a community of property regime. She reserved the right to claim validity of her customary marriage pending the decision on the constitutional issue.
- [30] Thus from the facts of this case it is clear that the Applicants have an interest in the protection of the constitutional rights of their mothers, and rely on the objective unconstitutionality of the impugned provisions which also hold prejudice for themselves. As already alluded to above, the impugned provision affects the rights of women and inevitably also the rights of their children in these relationships.

Acting in the public interest

- [31] Standing on the basis of acting in the public interest is a wide concept, but not unqualified. In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [28], Yacoob J, as he then was, agreed in substance with the approach adopted by O'Regan J, as she then was, in her minority judgment in *Ferreira*[29] claim of relief in the public interest. [30] He also pointed out that although it was a minority judgement, it was not inconsistent with anything said in the majority judgment on the issue of standing and that the majority also held that a broader, rather than narrow approach should be adopted to this issue.[31]

Even though the provision in question O'Regan J considered was section 7(4)(v) of the IC, it is basically identical to that contained in section 38 of the Constitution. She stated the approach as follows at par [234]:

"This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as; whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case."

[32] Yacoob J qualifies this approach by stating that the meaning and reach of subsection(d) must be determined against the

background

of the fact that it "connotes an action on behalf of people on a basis wider than the class actions contemplated in" section 38.[32] This is due to the provision in subsection(d) providing public interest standing in addition to subsection(b) and (c), which provides for standing on behalf of other persons and on behalf of a class. He also expands on the approach by the following in par [18]

"The issue is always whether a person or organisation acts genuinely in the public interest. [...]The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."[33]

Are the Applicants acting in the public interest?

[33] "Old" polygamous customary marriages are a reality and many women and children still live in these types of family relationships. The women affected by the impugned provision are women who have been excluded from participating in the management of, and control in the marital property. They are still being excluded simply on the basis that they had entered into their marriages before the RCMA came into operation, and further on the basis that they entered into polygamous marriages as opposed to monogamous marriages. They are particularly vulnerable.[34] Denying these women and children equal protection perpetuates their vulnerability in many respects. Women who have no rights in matrimonial property are vulnerable to eviction and may find acquiring property rights challenging.

- [34] There exist several International and Regional treaties on Human Rights, ratified by the South African Government. [35] Included in these treaties is the recognition of the vulnerability of women and the importance of protecting and providing for women's fundamental human rights.
- [35] The RCMA has been an attempt to "remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country"[36] in accordance with the Constitution and also the principles agreed to in terms of the treaties mentioned.
- [36] The protection in terms of matrimonial property regimes has been extended to women in monogamous customary marriages irrespective of when such marriages were entered into. [37] Women in "new" polygamous customary marriages have also been provided with protection in terms of matrimonial property.[38] Women in "old" polygamous customary marriages remain unprotected.
- [37] It is clear that in the analysis of: (a) the rights in need of protection; (b) the vulnerability of the persons affected; (c) that the remedy could be afforded all persons similarly situated; and, (d) the consequences of the infringement, in the scope of the constitutional imperative, requires this matter to be determined also in the public interest.

Ripeness and mootness

- [38] Ripeness of the litigation refers to the issue that the action is brought prematurely, where alternative remedies have not yet been exhausted or where the matter can be resolved without deciding a constitutional matter. Mootness refers to the matter no longer being justiciable as it "no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law"[39]
- [39] In my view there is no question of mootness in casu as the issues have not been resolved or became non-existent. The essential question to be determined in casu is thus whether there is any other way to resolve the issue between the parties, without resorting to determining the constitutional issue.

- [40] In this

analysis

it is important to keep in mind that in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others*[40] the Constitutional Court stressed that "the constitutional issue sought to be raised must arise on the facts of the case before the court." [41]

- [41] In the case before this court the constitutional issue is raised by the Applicants in that they submit that the operation of the impugned provisions formed the basis of the consequences that their mothers and they were excluded from rights in the marital property. The relief

they seek is for the court to order the impugned provisions invalid and to also make an order to apply the community of property regime. This would then enable them, and persons similarly situated, to obtain the ultimate relief of resolution of the dispute in respect of the Property. In my view, the constitutional issue in casu is inextricably intertwined with the relief they seek in respect of the Property.

- [42] The principles of ripeness and mootness were re-stated in cases such as *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC) at Par (11) :

"[...]II is already settled jurisprudence of this Court that a Court should not ordinarily

decide a constitutional issues unless it is necessary to do so. Nor should it ordinarily decide a constitutional issue which is moot. The decision as to whether a Court should decide a constitutional matter remains one governed by the Constitution and ifs imperatives" (footnotes excluded)

- [43] The public interest or interest of just ice has been deemed by the Constitutional Court to be an important consideration in determining the question of whether to hear a matter as a constitutional matter.[42] Even on a premise that ripeness is questionable, the public interest and the interest of justice requires this matter to be considered.[43]

UNCONSTITUTIONALITY AND JUSTIFICATION

- [44] Having found that the Applicants do have the required standing to bring this application and that this court should indeed consider it as a constitutional issue, I proceed to address the constitutionality of section 7(1) of the RCMA. Section 9(3) and 9(5) of the Constitution provide as follows:

"9(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.

[...]

9(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

- [45] The provisions of section 7(1) have already been found to be discriminatory on the basis of gender.[44] It could be argued that this finding in *Gumede* is based on the interaction between the provisions of section 7(1) of the RCMA and provisions of section 20 of the Natal Code of Zulu Law of 1891 and section 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985, which would differentiate it from the case in casu.

- [46] In my view the provision in section 7(1) is also discriminatory on the basis of race and or ethnic or social origin insofar as women in "old" polygamous customary marriages are excluded from the protection afforded to women in monogamous marriages. It further

differentiates between women in "old" polygamous marriages and women in "new" polygamous customary marriages, by providing protection only for the latter. Since the discrimination is based on one or more of the grounds listed in section 9(3) of the Constitution, such discrimination is unfair unless justified. No justification has been raised by any of the respondents and thus it follows that the provisions of section 7(1) of the RCMA is inconsistent with the Constitution and invalid in respect of polygamous marriages.

REMEDY

[47] Having found that the impugned provision is inconsistent with the Constitution the provisions of sections 172(1)(a) and (b) of the Constitution apply. It reads as follows:

""(

- 1) When deciding a constitutional matter within its power, a court -
 - (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 an 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."

[48] In *Bhe and Others v Magistrate, Khayelitsha, and Others* (Commission for Gender Equality as Amicus Curiae) [45] the Constitutional Court identified the following options available for consideration in order to determine an appropriate remedy:

"[...] They are: (a) Whether the Court should simply strike the impugned provisions down and leave it to the Legislature to deal with the gap that would result as it sees fit; (b) whether to suspend the declaration of invalidity of the impugned provisions for a specified period; (c) whether the customary-law rules of succession should be developed in accordance with the 'spirit, purport and objects of the Bill of Rights', or

- (d) whether to replace the impugned provisions with a modified s 1 of the Intestate Succession Act or with some other order."

[49] I have given due consideration to the provisions of section 172(1) of the Constitution. The options available are discussed herein below:

Developing the customary law

[50] In *Gumede* the court did not find a need to develop the customary law as the version of customary law, which formed the subject of that case is codified by legislation

- [46] Therefore the court's powers were limited to interpreting the said legislation, "in a manner that promotes the objects of the Constitution or to hold, where appropriate, that it is inconsistent with the Constitution and for that reason invalid" [47] • Furthermore the Constitutional Court held that a finding that a monogamous customary marriage entered into after the said Act came into operation, should be in community of property, is in harmony with the communal ethos that underpins customary law.[48]
- [51] The Constitutional Court has not only recognised the status of customary law, but has also acknowledged its nature as being a dynamic, evolving system of values, inherently flexible, and which is practised in a specific community. Therefore, it is of great importance for the courts to determine and consider the so-called "living" customary law as opposed to "the potentially stultified version contained in past legislation and court precedent." [49]. It is now widely accepted that the advent of colonial administration [50] and apartheid legislation [51] had a detrimental, even devastating effect on the development of customary law. For generations the ignorant interpretation of the customary law gave rise to "formal" customary law, which does not embody the living practices of the respective communities. [52]
- [52] Therefore, in order to develop the customary law in this particular case the court would have to call for evidence in respect of the content of the living customary law. In my view this course of action would be inappropriate for two reasons; Firstly, the Constitutional Court has not engaged in "incremental development of customary law" [53] and; Secondly, the impugned provision affects a class of vulnerable persons across various ethnic groups in significantly similar fashion making piecemeal remedy on a case by case basis undesirable due to the inevitable protraction, unpredictability and legal uncertainty which would result. [54] I consider the reasoning in *Bhe* to be applicable in *casu* in that in order to ensure constitutional protection of the rights of women in polygamous marriages entered into before the commencement of the RCMA, (and ultimately their children) a direct approach is required instead of a piecemeal, slow development of customary law. This direct approach, which also retains any positive developments in the "living" customary law conferring rights on or providing protection to women in polygamous customary marriages, is preferred.
- To struck down the impugned provisions for the Legislature to deal with as it sees fit or within a specific time frame
- [53] In *Gumede* the Constitutional Court drew the attention of the legislature to the possible challenge in respect of polygamous marriages.[55] This was seven years ago and the situation has yet to be addressed appropriately. Even more alarming is the fact that as far back as 1998 the South African Law Commission,[56] in evaluating the proprietary consequences of polygamous customary marriages, determined that the situation and possible solutions need further investigation - this was almost eighteen years ago. This coupled with the following factors convinces me that it would be a matter of necessity for this court to make an order which provides an appropriate interim remedy, pending the required legislative processes:[57] (a) the strong probability that the impugned provision

affects the rights of older persons; (b) the importance of these rights; (c) the fact that the persons in need of protection has been for a long time and continues to be extremely vulnerable; and, (d) have a right to have the burden of unfairness and discrimination lifted sooner rather than later.

Interim remedy

- [54] In order to determine a just and equitable remedy to be implemented in the interim, it is appropriate to pause and consider the nature of the principles underpinning polygamous customary marriages and the essential general principles of customary law applicable to such marriages. It has already been stated that the court should determine the "living" customary law in order to be properly informed as to how to deal with the question of expanding or developing customary law. The intention with the interim remedy is not to develop customary law as such, but to put a remedy in place which would ensure that the rights already provided for in the RCMA[58] and the Matrimonial Property Act[59] can indeed find application and are not merely "paper- rights". This must be done, while also ensuring that rights and protection provided for in terms of the living customary law, are applied and that the rights and duties conferred and exercised by the parties to "old" polygamous customary marriages are exercised for the benefit of the family unit.
- [55] In considering what would constitute a just and equitable order it is also necessary to understand the basic principles applicable to "old" polygamous customary marriages. What follows is a condensed summary of the principles applicable to these marriages in terms of the so-called "formal" customary law as derived from various sources.[60]
- [56] As already stated earlier in this judgment, the wives in "old" polygamous customary marriages are excluded from the control and management of the communal property. The nature of the polygamous customary marriage is such that when the husband marries the first wife, a separate family unit or "Kraal" is formed, with the husband traditionally being the head of the family unit. When the husband marries a second wife, a new house is established within that family unit, which will then consist of two houses, one for each wife. There is no restriction on how many wives a husband may marry, but for each new wife a new house is established within the family unit. The status or ranking of the different houses is determined in accordance with divergent rules in different communities and is generally classified as either a simple or complex system of polygyny.
- [57] Traditionally property consists of family property, house property and personal property . [61] House property consists generally of allotments made to the house by the family head and anything obtained by or through a member of that house. Family property generally consists of acquisitions by the family head, inherited property and property not allotted to a house. Personal property is property of a personal nature such as clothing and household utensils, which belongs to the person who acquired it The husband, as family head is in control of the family property and the house property. He is responsible for the social and economic wellbeing of all the members of the family, who are all subject to his authority. In

some communities the house property would be administered by the wife of that house, but mostly the family head has the final say and could even utilize house property as he pleases, subject to him having to exercise his administration of the communal property for the benefit of the family unit. House property is primarily used for the benefit of the house to which it belongs. Upon the death of the family head, the house property, as separate "estates", devolve upon the heir of that house, which heir, traditionally was determined by the principle of primogeniture[62]. Women obtain property only in personal property.

- [58] Traditionally, the family property, which had to provide for the sustainability of 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"[63]
- [59] In order for the interim relief to be effective the nature of the distinction between different types of property and the purpose of that classification, should be retained in order to provide effective protection.
- [60] In trying to identify a possible interim remedy I have also considered the finding in *MM v MN*[64] in that, in respect of "new" polygamous customary marriages, the first customary marriage would be deemed to be in community of property and subsequent marriages would be deemed to be out of community of property. This does not find any application in "old" polygamous customary marriages, due to the fact that the RCMA requires the parties to agree on a proprietary system to be approved by the court to protect the parties' interests, before the additional marriage is entered into[65]

It would not be effective to apply this retrospectively, as it would result in hardship and prejudice. For example, it would be nearly impossible to determine what constituted the joint estate of the first wife and the husband at the time the subsequent marriage was concluded, whether assets of the joint estate was indeed and could indeed have been transferred to the subsequent house etc. The significance of this judgment is that it applies to "new" polygamous customary marriages where there was a failure to comply with the provisions of section 7(6) of the RCMA. It is debateable whether the judgment that the second and subsequent marriages should be deemed out of community of property, sufficiently takes into consideration the nature and purpose of family property. However, that is a debate for another day.

- [61] The submission by the Applicants that all "old" polygamous customary marriages should be considered to be in community of property is also not that simple. The first question that arises is whether the subsequent wife would only share in the husband's half of the initial joint estate, and the third wife then only share in half of that, or should the wives and the husband all share equally in the entire estate. In terms of the finding in *MM v MN* there can be only one joint estate. All of this seems like an effort to put a square block in a round hole - trying to force foreign concepts of individual ownership and matrimonial property regimes,

onto a traditional system which operates on a basis of communal rights, subject to the welfare of the members of the family unit and administered by the family head.

Incidentally the SALC did recommend in par 6.3.4.22 of their report that "the spouses of customary marriages should be deemed to be married in community of property' ', but in my view this recommendation was subject to the Commission's submission that it is necessary that the options in respect of the patrimonial consequences of polygamous customary marriages should be further investigated. [66]

[62] The amicus made

submissions

as to what the interim relief should be and to a large extent I hold the same view of what essentially would ensure better protection for the persons in need of protection in this case. Their submissions in this regard are also that an order similar in certain respects to the order in Gumede would be appropriate.[67]

[63] The principles underpinning the interim relief are summarized as follows from what has been said before:

[63.1] The wives who are parties to "old" polygamous customary marriages should enjoy equal rights in the matrimonial property as between each other and as between each of them and the husband.

[63.2] In the exercise of their rights in respect of the different types of property that exist in such a family unit, their rights should be qualified to ensure that the differentiation is retained and the character of the custom is acknowledged.

[63.3] Due to the nature and purpose of family property, the parties to such marriages should exercise their rights in such a manner to ensure the best

interest of the family unit is served.

[63.4] The parties should be able to approach the courts in the event of disputes arising from this order.

[63.5] Vested rights emanating from the living customary law must be retained.

RETROSPECTIVITY

[64] In order to determine what would constitute a just and equitable order, the court has to also consider whether or not to limit the retrospective operation of the order of invalidity.

[65] The Applicants submitted that the order should operate without any limitation to its retrospective application, as was ordered in Gumede[68]. They further submitted that the retrospective application of the order should include those polygamous customary marriages already terminated by death, if the estate of the deceased has not yet been finalized. In support of this argument they relied on the decision in *Mvumvu and Others v Minister for Transport and Another*[69] where the Constitutional Court held that:

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

[66] The Respondents resisted the retrospective operation to extant marriages and argued that the Deceased passed away even before the Gumede

judgment.

In the order in Gumede the Constitutional Court excluded retrospectivity in respect of monogamous customary marriages terminated by death and divorce before the date of the order. It was further submitted by the Respondents that to now make an order as sought by the Applicants in respect of retrospectivity, would have a ripple effect and would impact on estates or assets already disposed of as well as on new estates that have already formed[70]

The uncertainty of what assets would now have to be redistributed due to the order would not be just and equitable.

[67] The amicus initially aligned with the submissions of the Respondents. However, they did submit that there might be good reason not to exclude polygamous customary marriages already terminated by death, if the estate of the deceased has not yet been finalized, as it would provide the widest protection possible.

[68] In Gumede the Constitutional Court considered the issue of retrospectivity and stated that, regardless of the fact that the court was not asked to limit retrospectivity and nothing was placed before it to justify such limitation, there were good reasons not to limit retrospectivity.[71] In summary the

reasons

highlighted by the Constitutional court were that: (a) a prospective order would not grant any, or effective, relief to wives in marriages concluded before the RCMA came into operation; (b) the discrimination perpetuated by leaving the impugned provisions on the statute books offends so severely that it does not justify retaining them by limiting retrospectivity of the order; and, (c) that the retrospective regime would simply be aligned with the prospective regimen.[72]

[69] I agree with the reasoning in Gumede as stated above. I find that in casu nothing was placed before this court to justify limitation of retrospectivity of the order.

I further find that a prospective order would deny the relief to the persons it is meant to afford protection to, that the impugned

provision should not be allowed to remain on our statute books, and that:

"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. [73]

[70] The next issue in respect of retrospectivity I have to consider is whether the Applicants' submission that the retrospective application of the order should include polygamous customary marriages already terminated by death, but where the estate of the deceased has not yet been finalized. This, they submit, should follow as they are entitled to the relief they seek.

[71] In *Mvumvu*[74] the Constitutional Court did not make an unqualified finding that once the applicant "established that the impugned provisions violate their rights entrenched in the Bill of Rights, they are entitled to a remedy that will effectively vindicate those rights." The Constitutional court stated two qualifications clearly at par (46) and [49]:

"Unless the interests of justice and good government dictate otherwise, the applicants are entitled to the remedy they seek because they were successful. Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, they are entitled to a remedy that will effectively vindicate those rights. The court may decline to grant it only if there are compelling reasons for withholding the requested remedy. Indeed, the discretion conferred on the courts by s 172(1) must be exercised judiciously. [...] However, 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. These competing interests need to be carefully weighed. " (my emphasis)

[72] The court should thus consider all the circumstances of the case, the interests of the parties whose rights have been violated, the interests of justice and good governance. [75] Various factors militate against an order which would include those polygamous 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 retrospectivity 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" polygamous 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(000000">1) of the RCMA. It follows thus that such an order would not be in the interest of justice.

[73] Finally, it is also imperative to consider the effect of the order of invalidity on completed transactions and the interests of third parties. I again agree with the findings in Gumede regarding the protection of the rights of third parties, which is equally applicable and relevant in casu. These findings are stated in par [52] to [54] of the Gumede judgment as follows:

" [...] 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 proprietary regime of customary marriages entered into before the Recognition 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."

[74] For obvious

reasons

it would be undesirable to interfere with completed transactions concluded before this order. It would impact negatively on vested rights, legal certainty and would likely cause a plethora of litigation and consequently would not be just and equitable.[77] I find that orders in this regard, similar to those made by the Constitutional Court in Gumede would be effective.

CONCLUSION

[75] For the sake of clarity and I deem it necessary to summarize the core findings I have made:

1. The provisions of section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 discriminates unjustifiably against women in polygamous customary marriages on the basis of gender, race and ethnic or social origin, is thus inconsistent with the Constitution and must be declared invalid.
2. In order to ensure effective protection of the rights of women in polygamous customary marriages a direct approach is required instead of a piecemeal, slow development of customary law, but this direct approach should retain

any positive developments in the "living" customary law.

3. The persons in need of protection should not have to suffer the burden of unfairness and discrimination any longer and an interim

remedy is necessary

in order to extend protection to them pending the required legislative processes.

4. The interim remedy should ensure that the rights already provided for in terms of the Bill of Rights, the RCMA, the Matrimonial Property Act and any other

legislation can indeed find application and can be exercised.

5 The parties to "old" polygamous customary marriages should enjoy equal rights in and over the matrimonial property.

6. Any rights and protection of women in "old" polygamous customary marriages, provided for in terms of "living"

customary law should not be removed, but applied.

7. The core nature of polygyny should be retained, in that the rights of the parties to "old" polygamous customary marriages should be qualified to ensure that the rights are exercised for the benefit of the family unit.
8. The differentiation between family property, house property and personal property should be retained to promote the sustainability of the family unit.
9. The parties to "old" polygamous customary marriages, affected by this order, should be enabled to approach the court in the event of disputes arising from this order, for an order to regulate the matrimonial property regime on a just and equitable basis.
10. There is no justification to limit retrospectivity of the order of invalidity, except to the extent that the order should not affect the polygamous customary marriages which have been terminated by death or divorce.
11. The order should not interfere with completed transactions and provide protection for the interests of third parties.

ORDER

[76] Therefore the following order is made:

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 polygamous

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 polygamous 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 polygamous 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.

A LAMMINGA

ACTING JUDGE OF THE HIGH COURT

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- [1] The relevant section reads as follows: "7(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law."
 - [2] The Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution")
 - [3] On 1 December 1956
 - [4] Dates of marriage with Masindi and Diana are unknown, but seem to pre-date the marriage with Martha.
 - [5] *Netshituka v Netshituka and Others* 201 1(5) SA 453 (S A) ("*Netshituka*")
 - [6] *Id* at par [13]
 - [7] *Id* at par (17)
 - [8] *Gumede v President of Republic of South Africa and Others* 2009 (3) SA 152 (CC) ("*Gumede*")
 - [9] Par 8,9 and 16 of the Heads of Argument of the Trust
 - [10] *Minister of Finance v van Heerden* 2004 { 6} SA 121 (CC) at par [27 1. *Bhe and Others v Magistrate, Khayelitsha and Others* (Commission for Gender Equality as *amicus curiae*) 2005 (1) SA 580 (CC) ("*Bhe*") at par 132], *Nzimande v Nzimande and Another* 2005 (1) SA 83 (W) at par [63], *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004
 - (5) SA 331 (CC) at par. [22], *Hassam v Jacobs NO and Others* 2009 (5) 572 (CC)
 - [11] Par 20 and 21 of the Heads of Argument of the Trust
 - [12] Above n8
 - [13] *Id*
 - [14] *Id* at par [55] -[56]
 - [15] M Chaskalson, G Marcus & M Bishop "Constitutional Litigation" in 5 Woolman & M Bishop (eds) "Constitutional Law of South Africa" (2nd Ed R56 updated to April 2014) Ch 3 p16 and J T Publishing (Pty) Ltd and *Another v Minister of Safety and Security and Others* 1997
 - (3) SA 514 (CC) at par [15] which dictum has been applied in numerous cases such as *Islamic Unity Convention v Independent Broadcasting Authority and Others*
 - [2002] ZACC 3; 2002 (4) SA 294 (CC) at Par [11]; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*
 - [2006] ZACC 9; 2007
 - (1) SA 343 (CC) at par [27] and *Mazibuko NO v Sisulu and Others* NNO 2013 (6) SA 249 (CC) at [133]
 - [16] *Id*

- [17] Ferreira v Levin NO & Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) ("Ferreira")
- [18] The Constitution of the Republic of South Africa Act 2QO of 1993
- [19] Above n 17 t par [38] to [39]
- [20] Mahomed DP, Didcott J, Langa J, Madafa J, Mokgoro J and Trengrove AJ (as they then were)
- [21] Above n 19 at par [163] – [164]
- [22] Id at par [165]
- [23] National Coalition for Gay & Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) ("National Coalition")
- [24] Above n 22 at par (26) -(28)
- [25] Above n 23 at par [29]
- [26] At least not in respect of such marriages which were already terminated by death but where the deceased estate(s) have not yet been final ized.
- [27] This is disputed by the Applicants
- [28] Lawyers for Human Right and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC) ("Lawyers for Human Rights") at par [16]
- [29] Above n 25
- [30] Chaskalson CJ, Langa DCJ ,Ackermann J, Goldstone J, Mokgoro J, Ngcobo J, O'Regan J and Sachs J, as they then were, concurred in the

judgment

of Yacoob J.

- [31] Above n 28 at par [17] and see Ferreira above n 29 at par [165]
- [32] Above n 28 at par [15]
- [33] See also for example Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another [2006] ZACC 5; 2006 (6) SA 103 (CC) at par [20]-[22]
- [34] Above n 12 at par (36).See also above n 10

- [35] CEDAW and its Optional Protocol; The ICCPR; Convention against Torture and Other Cruel Inhuman and Degrading Treatment; Commitments made in respect of the Beijing Declaration and Platform of Action; Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa; Solemn Declaration on Gender Equality in Africa and Southern African Development Addendum to the Declaration on Gender and Development
- [36] Above n 12 Gumede at par [16]
- [37] Gumede and RCMA
- [38] RCMA s7{6) and s7{7)
- [39] National Coalition above at n 25 at Par [21] ;see also IT Publishing (Pty} Ltd and Another v Minister of Safety and Security and Others 1997 {3) SA 514 (CC), where the court refused to make an order as the issues had become merely academic.
- [40] Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others 2009
- (2) SACR 130 (CC)
- [40] Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others
- 2009
- (2) SACR 130 (CC)
- [41] Id at par [43];In that case the constitutional issues were raised by the High Court mero motu but the fact remains that the constitutional issue should arise from and exist in the case before the court.
- [42] Above n31Lawyers for Human Rights at
- [18] "It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public i nterest to bring proceedings even if there is no live case.". See also Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another 2006
- (6) SA103 (CC) at par [23] and the judgment of O'Regan in Ferreira at par [236].
- [43] See par [33] to [37] of this

judgment

- [44] Above n 36 Gumede at par [34]
- [45] Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)

[2004] ZACC 17; 2005

(1) SA 580 (CC) ("Bhe") at par [105]

[45] Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)

[2004] ZACC 17; 2005

(1) SA 580 (CC) ("Bhe") at par [105]

[46] In the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law published in Proclamation R151 of 1987, GG No. 10966

[47] Above n44 Gumede at par (29)

[48] Id Gumede at par [30]

[49] MM v MN and Another 2013 (4) SA 415 (CC) at par (43) See also for example Alexkor Ltd and Another v Richtersveld Community and Others 2003 (12) at par (51), Bhe above at n 45 at par 143) and 187)

[50] Natal Code of Zulu Law of 1891

[51] For example the Native Land Act 27 of 1913 and the Black Administration Act 38 of 1927

[52] Alexkor n 49 at par 1541 ; Gumede above at n 48 at par (20)

[53] Above n 49 see MM v MN at par [43]

[54] Above n49 see Bhe at par [111]- [112]

[55] Above n52 Gumede par [56]

[56] SALC Report on Customary Marriages: Project 90 The Harmonisation of the Common Law and Indigenous Law (August 1998) - Chapter 6, par 6.3.4.17

[57] Above n54 Bhe par [107]- [108]

[58] RCMA s6

[59] Act 88 of 1984 s15 for example

[60] JC Bekker "Seymour's Customary Law in South Africa" 4th ed (1989); T W Bennet "A Sourcebook of African Customary Law for Southern Africa" (1991); A J Kerr "The Customary Law of Immoveable Property and of Succession" 2nd ed (1979); C Rautenbach et al "Introduction to Legal Pluralism in South Africa" 3rd ed (updated 2010); Brigitte Clark "Family Law Service" (Last updated October 2015); SALC Report on Customary Marriages: Project 90 The Harmonisation of the Common Law and Indigenous Law (August 1998); H W Warner "A Digest of South African Native Case Law 1894 -1957" (1961)

- [61] Maithufi 'the Law of Property' in Bekker, Labuschagne and Vorster 'Introduction to Legal Plurism in South Africa (2003) 54
- [62] A system abolished in Bhe
- [63] T Nhlapo as quoted in Bhe at par [89]
- [64] Above n 53
- [65] Section 7(6) RCMA
- [66] SALC Report on Customary Marriages: Project 90 The Harmonisation of the Common Law and Indigenous Law (August 1998)
- [67] The relevant parts of the order read as follows at par [59] : "(a) [...] (d) Section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 is declared inconsistent with the Constitution and invalid to the extent that its provisions relate to monogamous customary marriages. (e) [...] (i) In terms of s 172(1)(b) of the Constitution the orders in paras (c), (d), (e), (/),
- (g) and (h) of this order shall not affect the legal consequences of any act done or omission or fact existing in E relation to a customary marriage before this order was made. (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."
- [67] The relevant parts of the order read as follows at par [59] :
- "(a) [...]
- (d) Section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 is declared inconsistent with the Constitution and invalid to the extent that its provisions relate to monogamous customary marriages.
- (e) [...]
- (i) In terms of s 172(1)(b) of the Constitution the orders in paras (c), (d), (e), (/),
- (g) and (h) of this order shall not affect the legal consequences of any act done or omission or fact existing in E relation to a customary marriage before this order was made.
- (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."
- [68] Above n55 Gumede at par [50] – [52]
- [69] Mvumvu and Others v Minister for Transport and Another 2011 (2) SA 473 (CC) ("Mvumvu") at par [46]

- [70] In casu all three wives he married before the void marriage with the Fourth Respondent and most of his children have already passed away
- [71] Above n68Gumede par [50]
- [72] Id par [51]
- [73] Id Gumede at par [51]
- [74] Above n 69
- [75] See also Bulwana at par [32]
- [76] Above n 73 Gumede at par [52]
- [77] For considerations in this regard see above n 57 She at Par 126
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Prepared on 10 October 2026 · Esheria