CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 194/16

In the matter between:

MATODZI RAMUHOVHI	First Applicant
THINAMAANO EDSON NETSHITUKA	Second Applicant
THOKOZANI THEMBEKILE MAPHUMULO	Intervening Party
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
SIMISO SIPHOSETHU MAPHUMULO	Seventh Respondent
and	
TRUSTEES OF THE WOMEN'S LEGAL CENTRE TRUST	Amicus Curiae

Neutral citation: *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41

Coram: Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

Judgments: Madlanga J (unanimous)

Heard on: 16 May 2017

Decided on: 30 November 2017

ORDER

On application for confirmation of the order of the High Court of South Africa, Limpopo Local Division, Thohoyandou (High Court), the following order is made:

1. Ms Thokozani Thembekile Maphumulo is granted leave to intervene.
2. Condonation is granted for the late filing of the written submissions of the third, fourth and seventh respondents.
3. The declaration of constitutional invalidity of section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 by the High Court of South Africa, Limpopo Local Division, Thohoyandou is confirmed.
4. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.
5. During the period of suspension referred to in paragraph 4, the following regime will apply to polygamous customary marriages concluded before the Act came into operation:
    (a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and

control over, marital property, 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 interests of the family unit constituted by the house concerned; and

(ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(b) Each spouse retains exclusive rights to her or his personal property.

6. In the event that Parliament fails to address the defect referred to in paragraph 4 during the period of suspension, the orders in paragraphs 5(a) and 5(b) will continue to apply after the period of suspension.

7. In terms of section 172(1)(b) of the Constitution, this order does not invalidate a winding up of a deceased estate that has been finalised or the transfer of marital property that has been effected.

8. Paragraph 7 of this order does not apply to any transfer of marital property where, at the time of transfer, the transferee was aware that the property concerned was subject to a legal challenge on the grounds upon which the applicants brought the challenge in this case.

9. Any interested person may approach this Court for a variation of this order in the event that she or he suffers harm not foreseen in this judgment.

10. The second respondent must pay the applicants' costs, including costs of two attorneys.

JUDGMENT

MADLANGA J (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] Section 7(1) of the Recognition of Customary Marriages Act[1] (Recognition Act) provides that "[t]he proprietary consequences of customary marriages entered into before the commencement of this Act continue to be governed by customary law". Although, in some respects, "official" customary law differs from "living" customary law,[2] it cannot be gainsaid that what rights of ownership wives enjoy at customary law are so attenuated as not to amount to much.[3] Unsurprisingly, the parties are agreed that Venda customary law – this being the law at issue here – vests no rights of ownership or control over marital property in wives. The question then is: does that customary law rule comport with our Constitution and the values it espouses?

[1] 120 of 1998.

[2] On these terms, see *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) at para 17 where this Court said:

> "Whilst 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. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage."

It continued at para 20:

> "[D]uring colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practiced it nor were bound by it. Those who were bound by customary law had no power to adapt it."

[3] *Bhe v Khayelitsha Magistrate* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 89; Bennet *Customary Law in South Africa* (Juta & Co Ltd, Cape Town 2004) at 254.

[2] *Gumede* answered that question in the negative. But that was in the context of monogamous customary marriages concluded before the Recognition Act came into effect (pre-Act monogamous customary marriages). This matter concerns polygamous customary marriages entered into before the Recognition Act took effect (pre-Act polygamous customary marriages). Must the answer differ? The High Court of South Africa, Limpopo Local Division, Thohoyandou (High Court) said not and consequently declared section 7(1) constitutionally invalid.[4] Ours is now to decide whether to confirm that declaration.[5]

Background

[3] In a sense this application is a sequel to *Gumede*. In that case, the *amicus curiae* (friend of the court) urged this Court to extend its declaration of invalidity to encompass pre-Act polygamous customary marriages. The Court declined to do so. What it said, instead, was that it would draw the Legislature's attention to what appeared to be a *lacuna*.[6] However, in the almost ten years since *Gumede*, the Legislature has not filled the gap. That explains how section 7(1) continues to govern pre-Act polygamous customary marriages.

[4] Citing as respondents the President, the Minister of Justice and Correctional Services and others about whom I say more later, the applicants approached the

[4] *Ramuhovhi v President of the Republic of South Africa* 2016 (6) SA 210 (LT) (High Court judgment).

[5] Section 172(2) of the Constitution provides:

> "(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
>
> (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
>
> (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
>
> (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[6] The judgment does this at para 56.

High Court to have section 7(1) of the Recognition Act declared inconsistent with the Constitution.[7] In obliging, the High Court held that section 7(1) discriminates unfairly against women in pre-Act polygamous customary marriages on the bases of (a) gender and (b) race, ethnic or social origin.

[5] The applicants are the biological children of Mr Musenwa Joseph Netshituka (the deceased), who died on 4 January 2008. During his lifetime, the deceased entered into polygamous customary marriages with Ms Tshinakaho Netshituka, Ms Masindi Netshituka and Ms Diana Netshituka. The applicants also aver that he entered into civil marriages with Ms Martha Mosele Netshituka and the fourth respondent, Ms Munyadziwa Joyce Netshituka.[8] The first and second applicants were born of Ms Tshinakaho Netshituka and Ms Masindi Netshituka, respectively.

[6] Ms Tshinakaho Netshituka passed away on 9 November 2011, and Ms Masindi Netshituka passed away on 16 April 1995. Although the detail is not altogether clear, it would appear that by the time this matter was heard in the High Court, Ms Diana Netshituka had also died. The deceased's marriage to Ms Martha Netshituka was terminated by divorce on 5 July 1984. In *Netshituka*, the civil marriage between the fourth respondent and the deceased, which took place on 17 January 1997, was declared null and void by the Supreme Court of Appeal in 2011.[9] The basis was that at the time the deceased concluded the civil marriage with Ms Munyadziwa Netshituka, he was a party to extant customary marriages with Ms Tshinakaho Netshituka and Ms Diana Netshituka. The fourth respondent claims she later concluded a customary marriage with the deceased.

[7] The deceased left a will in terms of which the fourth respondent, whom the will refers to as a wife married in community of property, was named executrix of the

[7] The first and second respondents did not resist the application.

[8] The third respondent is the estate of the deceased. The Master of the High Court, the fifth respondent, has been cited nominally.

[9] *Netshituka v Netshituka* [2011] ZASCA 120; 2011 (5) SA 453 (SCA).

estate. She, Ms Tshinakaho Netshituka, Ms Diana Netshituka and all of the deceased's children[10] were to receive certain benefits from the deceased's "half share of the joint estate". Obviously, the reference to a joint estate stemmed from an apparent belief that the deceased's marriage to the fourth respondent was in community of property.

[8] The major asset in the deceased's estate is immovable property upon which a business called the Why Not Shopping Centre is located. Of note, the fourth respondent is the registered owner of an undivided half share in this immovable property. There is a dispute between the applicants and the fourth respondent about the fourth respondent's ownership of the half share. In addition to challenging the constitutional validity of section 7(1) of the Recognition Act, the applicants asked the High Court to declare that the fourth respondent's half share in the immovable property is invalid.

[9] The parties were agreed before the High Court that in Venda customary law the right of ownership and control of marital property is reserved solely for husbands. This led the High Court, following *Gumede*, to the inevitable conclusion that section 7(1) of the Recognition Act is discriminatory on the basis of gender. That Court further held that the section is discriminatory on the bases of race and ethnic or social origin. It then held that, since no justification was proffered for this discrimination, section 7(1) is inconsistent with the Constitution and invalid. This dealt with that part of the section relating to pre-Act polygamous customary marriages left intact by *Gumede*.

[10] In addition to the declaration of constitutional invalidity, the High Court ordered that—

> "[u]ntil such time as Parliament enacts legislation to govern the matrimonial property regimes of persons who are parties to polygamous customary marriages concluded

[10] Most of the deceased's children had died by the time the matter was heard in the High Court.

before the [Recognition Act] 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 as their husbands, and these rights shall be exercised as follows:

(i) In respect of all house property, by the husband and 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, each party shall retain exclusive rights to her or his 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."

[11] The order limited the retrospective effect of the declaration of invalidity and provided for other matters as follows:

"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."[11]

[11] The order also stipulated that "[a]ny interested person may approach the court for a variation of this order in the event of serious administrative or practical difficulties being experienced".

[12] The effect of paragraph 3(a) of this order is that the applicants, whose mothers had died before the order was made, derive no benefit under the order.

[13] For completeness, let me mention that Ms Tshinakaho Netshituka instituted other proceedings in the High Court seeking an order declaring: (a) the civil marriage between Ms Munyadziwa Joyce Netshituka and the deceased null and void; and (b) the last will and testament of the deceased invalid. The High Court dismissed the application. The Supreme Court of Appeal declared the marriage null and void, but declared the will valid.[12]

[14] The intervening applicant, Ms Thokozani Thembekile Maphumulo, became aware of the High Court judgment. She then sought leave to intervene or, in the alternative, to be admitted as an *amicus curiae* in the confirmation proceedings before this Court. She avers that she is the second wife in a pre-Act polygamous customary marriage with Mr Musawenkosi Maphumulo, who died on 28 October 2013. Ms Maphumulo lives with her daughter from a previous relationship and two grandsons in the home she occupied with her late husband. She says they first took over occupation of the home from another person. To achieve that, they each paid R5 000 to the previous occupant. They subsequently received a certificate of occupation from the KwaZulu government.[13] Pursuant to the purchase of the property from that government, a deed of grant was issued in favour of Mr Musawenkosi Maphumulo. Ms Maphumulo avers that she no longer remembers whether she made a financial contribution of R4 236.60 towards the purchase price. The property was registered in her husband's name. According to her, her name was

[12] *Netshituka* above n 9 at paras 18 and 20.

[13] KwaZulu was a so-called homeland which – together with nine other "homelands" – was created by the National Party government in the furtherance of apartheid. In creating the homelands, the apartheid regime sought to divest all African people of their South African citizenship and make them citizens of the "homelands". The "KwaZulu government" referred to in the text was the apartheid governance structure created to run KwaZulu.

not included in the title deed because of only one reason: "discriminatory laws at the time prevented black women from owning property".

[15] After Mr Musawenkosi Maphumulo had died, it came to the attention of Ms Maphumulo that her late husband had a will which, according to her, falsely stated that he was unmarried. In terms of the will, the entire estate was bequeathed to Mr Simiso Siphosethu Maphumulo, the first respondent in the intervention application, who is the eldest son of Mr Musawenkosi Maphumulo by his first wife.[14] That estate includes the home where Ms Maphumulo lives and has lived for many years. Mr Simiso Maphumulo has enlisted the services of attorneys to have her evicted.

[16] The interest advanced by Ms Maphumulo in this matter relates to the question of the retrospectivity of the order of invalidity in the event that we do confirm the High Court's declaration. Left as is, that part of the High Court order that says the order does not affect customary marriages that have been terminated by death has the potential of literally leaving Ms Maphumulo out in the cold. Consequently, she asks us to formulate the curb on retrospectivity differently. She asks us to make an order that protects: estates that have not been wound up; estates that have been wound up, but where the heirs were aware that section 7(1) of the Recognition Act was being challenged; and the home of a wife by permitting her to approach a court to reclaim her home even if transfer has already taken place. Finally, she submits that, based on all this, it is in the interests of justice to grant her leave to intervene.

[17] Crucially, Ms Maphumulo is not asking this Court to determine any factual issues that may arise in connection with the ownership of the property. On the contrary, she avers that those will be resolved in litigation still to be brought before another court.

[14] The first wife is the second respondent in the intervention application. The third respondent in the same application is the Master of the High Court, Durban.

[18] Mr Simiso Maphumulo could not participate in the oral hearing before us. In fact, he had not even filed papers in opposition to the intervention application when we heard the matter. The reason was that he did not have funds to enter the fray. Post-hearing and at our request, the Johannesburg and Durban Bars obliged and came to his assistance. Advocate Mogagabe SC, Advocate Maenetje SC, Advocate Lekoane, Advocate Sibiya, Advocate Mathipa and Advocate Palmer represented him *pro bono*. The Court is indebted to them for their assistance to Mr Simiso Maphumulo and this Court in the resolution of this matter. They filed written submissions, an application for leave to file an answer to the intervention application and an application for condonation of the late filing of the written submissions. Obviously, leave to file an answer must be granted; as I say, Mr Simiso Maphumulo had not responded to the application for intervention. Condonation must also be granted. That is so because the Court's timeframes when issuing directions did not factor the now obvious need for consultation with Mr Simiso Maphumulo in Durban. Initially only Johannesburg Counsel had been appointed. It became necessary for counsel to be appointed in Durban to engage in the consultation there. That is a sufficient explanation of the delay.

[19] Mr Simiso Maphumulo denies the substance of Ms Maphumulo's averments insofar as ownership of the home is concerned. He says the property was previously owned by a Mr Sihlangu Maphumulo, his grand-uncle.[15] Mr Sihlangu Maphumulo had no male issue. When he died, the property was transferred for occupation to Mr Musawenkosi Maphumulo, Mr Simiso Maphumulo's father. To signify this, a new certificate of occupation was issued. At that stage, nothing was paid to take over transfer, and there was no question of Ms Maphumulo and Mr Musawenkosi Maphumulo each paying R5 000 to take over occupation. Later, Mr Musawenkosi Maphumulo – unassisted by Ms Maphumulo – purchased the property from the KwaZulu government. On a number of occasions, Mr Musawenkosi Maphumulo had mentioned that he wanted to leave the property with Mr Simiso Maphumulo for him to

[15] That is, an uncle to his father.

hold it as a home for the entire family. During his lifetime – and to Ms Maphumulo's knowledge – he attempted to have the house transferred to Mr Simiso Maphumulo, but certain bureaucratic snags made that impossible. It was only thereafter that he resorted to bequeathing the property to Mr Simiso Maphumulo by means of a will. He did not want the home – a Maphumulo asset which had been acquired from his paternal uncle – to part ways with the Maphumulo family.

[20] Mr Simiso Maphumulo sets out a number of reasons why it is not in the interests of justice to grant leave to intervene. These are they:

(a) The intervention application was brought at the "tail end" of the confirmation with no explanation for the delay.

(b) The relief sought by Ms Maphumulo is an alternative to the confirmation asked for and is founded on contested facts.

(c) Under the guise of seeking only to assist the Court in crafting an order, Ms Maphumulo is, in fact, introducing an entirely new case concerning whether the transfer of property to him as an heir under a will should be undone.

(d) Ms Maphumulo has not even challenged the validity of the will before the High Court.

(e) Ms Maphumulo either has no direct and substantial interest in the outcome of the confirmation proceedings, or what interest she has is tangential.[16]

(f) Lastly, this Court cannot be expected to be the court of first and last instance on incomplete and inaccurate facts.

[21] Mr Simiso Maphumulo opposes the alternative that Ms Maphumulo be admitted as an *amicus curiae* on the basis that she is plainly a litigant who – in her

[16] In apparent support of this, Mr Simiso Maphumulo emphasises the factual disputes regarding ownership of the property, and then contends that, given the opposing version by him, Ms Maphumulo is doomed to fail in any relief she may seek in future.

personal capacity – is interested in a particular outcome. She is by no means coming in purely to assist the Court.

Issues

[22] The matter raises two principal issues:

(a) whether to confirm the declaration of constitutional invalidity made by the High Court; and

(b) if the declaration is confirmed, what the appropriate remedy should be.

[23] There is also the question whether Ms Maphumulo must be granted leave to intervene in these proceedings. I deal with it first.

Intervention

[24] According to rule 8(1) of the Rules of this Court, "[a]ny 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".

[25] Interests of justice are determinative of the question whether to allow an intervention in a case involving the constitutional validity of a statute. In *Gory*, Van Heerden AJ articulated this thus:

> "In every case this Court must ultimately decide whether or not to allow intervention by considering whether it is in the interests of justice to grant leave to intervene. Thus, in cases involving the constitutionality of a statute, while a direct and substantial interest in the validity or invalidity of the statute in question will ordinarily be a necessary requirement to be met by an applicant for intervention, it will not always be sufficient for the granting of leave to intervene. Even if the applicant is able to show a direct and substantial interest, the Court has an overriding power to grant or to refuse intervention in the interests of justice."[17]

[17] *Gory v Kolver N.O.* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 13.

[26] This approach applies equally to where intervention is sought only on remedy. Ms Maphumulo is not asking us to determine the hotly contested question of ownership of the home. She says that issue is best left for determination in litigation that is still to be instituted. All that the facts she brings to the fore do is to highlight the risk that wives in pre-Act customary marriages may be exposed to if the deaths of their husbands before the date of the order is to be the curb on retrospectivity. That is an objective fact not having a bearing only on her and Mr Simiso Maphumulo's particular circumstances.

[27] Of importance, the submissions on behalf of Ms Maphumulo are a useful contribution towards the resolution of the issues. They do not focus only on that part of the curb on retrospectivity that affects wives in Ms Maphumulo's position, but – in an attempt to assist the Court – address relief generally and extensively.

[28] In addition, she does have a direct and substantial interest in the outcome of this matter. She is hit by the curb because Mr Musawenkosi Maphumulo is long dead. Should we confirm the declaration of invalidity with the curb on retrospectivity continuing to be pegged on the death of one of the spouses, she has no chance of attempting to retain her home. There cannot be a more direct and substantial interest in the outcome. If it be relevant at all in the determination of the proceedings that Ms Maphumulo intends instituting later, the fact that she has not challenged the validity of the will is something Mr Simiso Maphumulo may raise to resist those proceedings. It should not detain us here. Likewise, the question whether there is a factual basis to undo the transfer of the property to Mr Simiso Maphumulo is best left for determination in the proposed proceedings.

[29] It is in the interests of justice to grant Ms Maphumulo leave to intervene. Mr Simiso Maphumulo will be the seventh respondent in this matter.

Constitutional invalidity

[30] Upfront, I must state that on this I need not reinvent the wheel; I will borrow copiously from *Gumede*, which has previously traversed similar ground.

[31] Before I deal with this question, I think it necessary to render a synopsis of the proprietary regimes applicable to customary marriages. This is it:

(a) In the case of a new monogamous customary marriage, the default regime is that the marriage is in community of property and of profit and loss. The spouses may exclude these consequences by means of an antenuptial contract which will then regulate the matrimonial property system of their marriage.[18]

(b) The effect of *Gumede* is that – as with new monogamous customary marriages – pre-Act monogamous customary marriages are automatically in community of property and of profit and loss.[19]

(c) A husband in a customary marriage wishing to enter into a further customary marriage after the coming into effect of the Recognition Act must apply to court for the approval of a written contract that will govern the future matrimonial property system of the marriages.[20] According to *Ngwenyama*, failure to do so does not nullify the further customary marriage. Here is why and what the applicable regime is:

> "I . . . cannot endorse the conclusion of the court below that non-compliance with the requirements of section 7(6) results without more in the second customary marriage being void *ab initio*. I hold instead that the consequence of such non-compliance is that the subsequent marriage would be valid but that it would be one out of community of property. It plainly cannot be a marriage in

[18] Section 7(2).

[19] *Gumede* above n 2 at para 49.

[20] Section 7(6).

> community of property as that would imply the existence of two joint estates, which it is clear cannot co-exist."[21]

This was confirmed on appeal by this Court.[22]

(d) The *Gumede* innovation effectively also means that section 7(1) now provides that the proprietary consequences of a pre-Act polygamous customary marriage are governed by customary law. As I stated at the outset, at customary law the rights of ownership and control of marital property vest in the husband. However, in terms of section 7(4), spouses to a pre-Act customary marriage may apply to court jointly for leave to change the matrimonial property system applicable to the marriage.

[32] It is to the disparity between the proprietary regimes applicable to pre-Act and new polygamous customary marriages that the ensuing debate relates. To highlight the disparity, let me refer to section 6:

> "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to rights and powers that she might have at customary law."

[33] In *Gumede*, Moseneke DCJ stated:

> "Without a doubt, the chief purpose of the [Recognition Act] is to reform customary law in several important ways. The facial extent of the reform is apparent from the extended title of the Recognition Act. The legislation makes provision for recognition of customary marriages. Most importantly, it seeks to jettison gendered

[21] *Ngwenyama v Mayelane* [2012] ZASCA 94; 2012 (4) SA 527 (SCA) at para 38.

[22] *Mayelane v Ngwenyama* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) at para 41.

> inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses."[23]

[34] No sooner is this equality of wives and husbands in customary marriages ushered in by section 6 than it is denied – in section 7(1) – to wives in pre-Act customary marriages. Of course, *Gumede* rescued wives in pre-Act monogamous customary marriages from this disquieting situation.

[35] The effect of section 7(1) is to perpetuate inequality between husbands and wives in the case of pre-Act polygamous customary marriages, something that has been brought to an end by sections 6 and 7(6). For completeness in this regard, let me recapitulate. Section 6 introduces equality in status between husbands and wives, grants full legal capacity to wives and affords them an entitlement to acquire and dispose of assets. In terms of section 7(6), wives in new polygamous customary marriages contract on an equal footing with the husband with regard to the future proprietary system that is to regulate the marriages, and the husband then has to seek the court's sanction of the contract. As we have seen from *Ngwenyama*, if the husband has failed to make the approach to court, the applicable regime is one of out of community of property and of profit and loss.

[36] This perpetuation of inequality is analogous to that which section 7(1), read with section 7(2), perpetuated in the case of pre-Act monogamous customary marriages. In respect of pre-Act monogamous customary marriages, *Gumede* held this to be "self-evidently discriminatory on at least one listed ground: gender".[24] This and the Court's reasoning apply equally to the continued disparate treatment of pre-Act polygamous customary marriages. The Court reasoned that "[o]nly women in a customary marriage are subject to these unequal proprietary consequences. This discrimination is on a listed ground and is therefore unfair unless it is established that

[23] *Gumede* above n 2 at para 23.

[24] *Gumede* above n 2 at para 34.

it is fair."[25] It is section 9(5) of the Constitution that decrees that discrimination on any of the grounds listed in section 9(3) is unfair unless shown to be fair.[26] In the instant matter, the government respondents did not enter the fray and thus made no attempt to prove fairness. Likewise, the third and fourth respondents' resistance to the application before the High Court and of the confirmation proceedings before us does not relate to the question of fairness.

[37] There is also discrimination on the ground of marital status. How exactly does that discrimination arise? The situation of wives in pre-Act polygamous customary marriages is one of lack of ownership and control of property within the marriage. In new polygamous customary marriages, the proprietary regime is either: governed by a court-sanctioned contract in the conclusion of which wives participate as equal partners with the husband;[27] or out of community of property and of profit and loss.[28] Here is how *Gumede* offers an explanation on the existence of this form of discrimination:

> "[W]ithin the class of women married under customary law, the [Recognition Act] differentiates between a woman who is a party to an 'old' or pre-recognition customary marriage as against a woman who is a party to a 'new' or post-recognition customary marriage. This differentiation is unfairly discriminatory."[29]

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[25] Id.

[26] Section 9(3) of the Constitution provides:

> "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."

And section 9(5) then stipulates:

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

[27] Section 7(6) of the Recognition Act.

[28] *Mayelane* above n 22 at para 78.

[29] *Gumede* above n 2 at para 34.

[38] This discrimination limits the right to human dignity[30] of wives in pre-Act polygamous customary marriages. I again call in aid *Gumede*:

> "[T]he affected wives in customary marriages are considered incapable or unfit to hold or manage property. They are expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property. In this regard, in *Bhe*, Langa DCJ had the following to say, albeit in the context of the male primogeniture rule of customary law:
>
> > 'At a time when the patriarchal features of Roman-Dutch law were progressively being removed by legislation, customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner.'
>
> Langa DCJ proceeded to hold that a rule of customary law that implies that women are not fit or competent to own and administer property violated their right to dignity and equality."[31]

[39] This discrimination on the ground of marital status is also on a listed ground. On it as well, there is nothing to counter the presumed unfairness. The discrimination is thus conclusively unfair.

[40] Another ground of discrimination found by the High Court is race. Having held as I have just done, I do not think it necessary to take a view one way or the other on this.

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[30] Section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected".

[31] *Gumede* above n 2 at para 35. The *Bhe* referred to is *Bhe* above n 3 at para 90.

[41] Earlier, I referred to section 7(4), which entitles spouses to a pre-Act customary marriage to apply to court jointly for leave to change the matrimonial property system applicable to the marriage. Is section 7(1) saved from constitutional invalidity by interpreting it in the light of section 7(4)? No. The change to the proprietary regime under section 7(4) depends on the consent of both parties. The primacy of the Bill of Rights and, particularly, the primacy of equality and human dignity, both of which are amongst the foundational values of our Constitution,[32] dictate that ordinarily a law may not validly create a default position that these rights do not prevail automatically. It is fundamentally contrary to the spirit of the Constitution that rights to equality and human dignity must prevail only if the very person from whose position of advantage the inequality and indignity stem gives consent.

[42] In any event, the provisions of section 7(4) are cold comfort, if not pie-in-the-sky, for most wives in pre-Act polygamous customary marriages. Absent agreement, this is out of reach, and wives remain subjected to the default matrimonial property regime imposed by section 7(1). The fact of not owning or having control over marital property renders wives in pre-Act polygamous marriages particularly vulnerable and at the mercy of husbands. They cannot be in an equal-bargaining footing for purposes of reaching agreement to make an approach to court in terms of section 7(4). In fact, some may even be cowed not to raise the issue at all. To ask rhetorically, how many husbands would readily give up their position of dominance? Worst of all, it does not require rocket science to realise that some – if not most – wives in these marriages may not even be aware of the existence of the provisions of

[32] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

section 7(4). Thus I think preponderantly wives have not managed to extricate themselves from their pre-Recognition Act woeful situation.

[43] In sum, section 7(1) limits the right to human dignity and the right not to be discriminated against unfairly. The High Court found that no justification was proffered for the limitation.[33] I, too, see nothing that supports justification. Thus the section is constitutionally invalid. The High Court's declaration to this effect must be confirmed.

Remedy

[44] We must now decide on an order that is just and equitable. That may include an order: (a) that is prospective; (b) whose retrospectivity is not limited and is thus – in accordance with the principle of objective invalidity[34] – retrospective to the date the Constitution, in the case of pre-Constitution legislation, or the legislation in issue, in the case of post-Constitution legislation, came into effect; (c) that limits the retrospective effect of the declaration of invalidity; or (d) that suspends the declaration of invalidity – with or without interim relief during the period of suspension – to afford the Legislature an opportunity to remedy the defect.[35] This is by no means

[33] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[34] In terms of this principle, if a statute is unconstitutional, it has been unconstitutional since the adoption of the Constitution or, if the statute was enacted after the Constitution's adoption, since the date of the statute's enactment.

[35] Section 172(1) of the Constitution empowers us to make a just and equitable order. It reads:

> "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

exhaustive, as it is well-nigh impossible to determine parameters for the notion of a just and equitable order.

[45] The discrimination at issue here is so odious that it would be a failure of justice if the declaration of invalidity were to be prospective. Wives in pre-Act polygamous customary marriages would continue being subjected to the indignity and repugnant unfair discrimination of being unable to own and control marital property and being at the mercy of their husbands. This, despite the avowed purpose of the Recognition Act which is, *inter alia*, to bring about equality between husbands and wives in customary marriages.[36] *Gumede* said of the provisions that were under challenge in that case:

> "The discrimination they spawn is so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order we are to make, or even by suspending the order of invalidity to allow Parliament to rectify the error."[37]

[46] This was said in the context of pre-Act monogamous customary marriages. That situation was simpler than the present one. The retrospective regime the order introduced was—

> "properly aligned to the prospective regime created by Parliament in the Recognition Act in relation to post-recognition [monogamous customary] marriages. The effect of the order we are to make is that all [monogamous] customary marriages would become marriages in community of property."[38]

(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."

[36] See the long title of the Recognition Act.

[37] *Gumede* above n 2 at para 51.

[38] Id.

[47] What was said in *Gumede*, though, is still a strong indication that, in this matter as well, we must grant relief that significantly improves the situation of wives in pre-Act polygamous customary marriages. Their rights have been denied for far too long. There is an urgent need for effective redress. What must that redress be?

[48] Unlike *Gumede*, I am unable to say comfortably that there is "proper alignment" here. Although *Ngwenyama* held that the marriage is automatically out of community of property where there has been no court application by a husband in terms of section 7(6),[39] it does not appear to be obvious that the declaration of invalidity must result in all pre-Act polygamous customary marriages being out of community of property. In any event, in most pre-Act polygamous customary marriages, in particular the older ones, the *Ngwenyama* default position would be empty equality. That, because husbands would have had a head start afforded them by the patriarchal and discriminatory customary law rule of ownership of marital property by them. Upon the out of community of property and of profit and loss regime taking effect, the husband would continue to own everything, and the wife would start acquiring assets of her own from that point onwards.

[49] The Legislature appears to have a preference for the proprietary regime of polygamous customary marriages being regulated by a court-sanctioned agreement: "[A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act *must* make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages".[40] (Emphasis added). The *Ngwenyama* default position kicks in only when – for whatever reason – the court application has not been made.

[39] *Ngwenyama* above n 21 at para 38.

[40] Section 6 of the Recognition Act.

[50] I think it best to leave it to Parliament to finally decide how to regulate the proprietary regime of pre-Act polygamous customary marriages. I consider appropriate relief to be a suspension of the declaration of invalidity accompanied by interim relief.[41] This twin-relief has the effect of granting immediate succour to the vulnerable group of wives in pre-Act customary marriages whilst also giving due deference to Parliament. In the event that Parliament finds the interim relief unacceptable, it is at liberty to undo it as soon as practically possible. Should Parliament fail to do anything during the period of suspension, the interim relief must continue to apply until changed by Parliament.

Interim relief

[51] The interim relief that I propose making is one that best accords with the equality of spouses. It is that, pending the remedying of the legislative defect: a husband and his wives in pre-Act polygamous customary marriages must share equally in the right of ownership of, and other rights attaching to, family property, including the right of management and control of family property; and a husband and each of his wives in each of the marriages constituting the pre-Act polygamous customary marriages must have similar rights in respect of house property. This is a significant departure from the High Court's interim relief in terms of which the rights shared by wives with their husbands were only rights of management and control – not ownership – in respect of marital property.

Retrospectivity

[52] The interim relief addresses the situation of wives in extant pre-Act polygamous customary marriages. It says nothing about the proprietary rights of: (a) wives whose pre-Act polygamous customary marriages were terminated before the

[41] In appropriate cases, this Court has granted interim relief in the context of suspended declarations of constitutional invalidity: see *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) and *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development, Executive Council of KwaZulu-Natal v President of the Republic of South Africa* [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC).

proposed order; or (b) people who fall under the various houses constituted by these wives.[42] These rights are best addressed by the extent to which the proposed order is to apply retrospectively.

[53] The High Court stated that its order "[shall] not affect the consequences of any act done or omission or fact existing in relation to a polygynous customary marriage before this order was made". In effect, the High Court opted for an approach in line with that adopted in *Gumede*, on the basis that it allowed for the minimum possible disruption to the practical application of the remedy proposed to the identified constitutional deficiency.

[54] A number of parties took issue with the High Court's approach in the present context. The applicants and Ms Maphumulo argue that the High Court, in excluding from protection marriages which were dissolved before the date of its order, failed to afford adequate protection to the affected wives. The applicants are asking that the declaration of invalidity apply to: (a) estates that have not yet been wound up; and (b) estates that have been wound up but where – prior to the winding up – the heirs were aware that the constitutional validity of section 7(1) was being challenged.

[55] The Women's Legal Centre Trust, which we admitted as an *amicus curiae*,[43] agrees. It submits that the particular vulnerability of women and the long time over which many have been victims of the deprivation of rights justify the widest possible protection that can be afforded in the interests of justice.

[56] Ms Maphumulo additionally seeks an order that will protect the homes of wives by permitting a wife to approach a court to reclaim her home even if transfer has already taken place.

[42] I say more on the creation of a house by a wife shortly.

[43] Even in the High Court it was admitted as an *amicus curiae*.

[57] To reiterate, a declaration of invalidity invalidates the impugned legislation and any action taken pursuant to that legislation from the moment such legislation or the Constitution came into force. This Court is, therefore, empowered under section 172(1) of the Constitution to make an order limiting retrospectivity. One of the relevant factors on limiting retrospectivity is the disruptive effect that unlimited or minimally limited retrospectivity would have.[44] Limiting retrospectivity helps "avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute".[45] Currie and de Waal state that the disruptive effects of an order of retrospective invalidity must be balanced against the need to give effective relief to the applicant and similarly placed people.[46]

[58] Obviously, since the coming into operation of the Recognition Act, countless deceased estates have been wound up and properties transferred either as part of the winding-up process, or as a result of other legally cognisable bases. In this case, the basis for limiting retrospectivity is the disruption which would surely come about from seeking to undo all that. This is not an unfounded concern given the long time that has elapsed and the number of polygamous customary marriages involved. We must balance this against the need to provide adequate relief to the litigants before us and similarly placed people.

[59] With that in mind, the dissolution of pre-Act polygamous customary marriages does not appear to be an appropriate cut-off point. It does not provide adequate protection. It seems just and equitable, therefore, that the retrospective effect of the declaration of invalidity must be as extensive as possible but not affect estates that have been wound up or transfers that have taken effect. Regarding transfer, I must follow what *Bhe* held. Here it is:

[44] Compare *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 43.

[45] Id.

[46] Currie and de Waal *The Bill of Rights Handbook* 6ed (Juta & Co Ltd, Cape Town 2013) at 190.

> "[I]t seems to me that unqualified retrospectivity would be unfair because it could result in all transfers of ownership that have taken place over a considerably long time being reconsidered. However, an order which exempts all completed transfers from the provisions of the Constitution would also not accord with justice or equity. It would make it impossible to re-open a transaction even where the heir who received transfer knew at the time that the provisions which purport to benefit him or her were to be challenged in a court.
>
> To limit the order of retrospectivity 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. What will accordingly be just and equitable is 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. It is fair and just that all transfers of ownership obtained by an heir who was on notice ought not to be exempted."[47]

[60] There is yet another reason why the dissolution of pre-Act polygamous customary marriages cannot be an appropriate cut-off point on retrospectivity. That reason has everything to do with context, in particular the implications of the dissolution of customary marriages. The termination of a customary marriage by whatever means has unique consequences insofar as marital property is concerned. As appears from Bekker, whom I will quote shortly, a house does not necessarily come to an end just because the wife whose marriage brought it into existence has died or has had her marriage terminated. A house is made up not just by the wife, but also by the children who are born into it.[48] This must mean that, first, as a unit – and distinctly from other houses that, together with it, make up a polygamous relationship – that house has certain proprietary rights and interests. Needless to say, the most important asset that each house has is the home that its members occupy. Second, house property that accrued after the house had come into existence continues to exist and to attach to that house. Third, only members of that house have an

[47] *Bhe* above n 3 at paras 126-7.

[48] Bekker *Seymour's Customary Law in Southern Africa* 5ed (Juta & Co Ltd, Cape Town 1989) at 198.

entitlement to enjoy benefits that flow from the existence of the house property, including rights of inheritance to the house property. That must mean, for example, the family head cannot lawfully divest a house of its home and purport to bequeath it as an inheritance to members of another house. Now the promised quote; Bekker states:

> "Where a wife has borne children, the dissolution of the customary marriage does not affect the existence and status of the house constituted by the customary marriage; her husband is entitled to replace her by marrying a substitute wife and placing the latter in the house, but even if he does not do this the children keep the house extant."[49]

[61] That being the case, there is no need to limit the retrospectivity of this Court's order in respect of house property to marriages not yet dissolved. No disruption would arise purely from the fact of dissolution.

[62] With regard to family property, the family head[50] does not only enjoy the right of ownership and control of family property, he has a corresponding obligation to use the family property for the benefit of each house and its members.[51] Each of the houses constituted by the marriages of the various wives thus has an entitlement to the family property. This endures even if there is no longer a wife in a given house; that is, post-dissolution.

[63] The High Court's order excluded personal property from the shared management and control[52] of property by husbands and wives. Personal property comprises items of a purely personal nature, such as clothing.[53] Based on the nature of this property, each party to a pre-Act polygamous customary marriage is entitled to retain her or his sole ownership and control of personal property.

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[49] Id.

[50] That is the husband, if he is still alive.

[51] *Bhe* above n 3 at para 167. See also *Gory* above n 17 at para 41.

[52] As I indicated earlier, the High Court's order said nothing about ownership of marital property.

[53] Bennet above n 3 at 259.

[64] Ms Maphumulo has made a plea that wives should be able to approach a court where their rights to housing have been affected even if the homes concerned have already been transferred. The idea appears to be to ensure that – even in the face of the transfer to Mr Simiso Maphumulo that has already taken place – she does get effective relief. Beyond clarifying the obvious – which I have done above – that the home of members of a specific house in a polygamous customary marriage relationship is the asset of members of that house, I am loath that we should determine Ms Maphumulo's plea as a court of first and last instance.

[65] The proposed relief traverses terrain that is fraught with imponderables. I cannot discount the possibility that – despite the effort that has been made – someone may suffer harm not foreseen in this judgment. For that reason, it is necessary to make it possible for an interested person to approach this Court for a variation of the order.[54]

Third and fourth respondents' condonation

[66] The third and fourth respondents seek condonation for the late filing of their written submissions. They submit that their correspondent attorney did not forward this Court's directions on the filing of written submissions. The written submissions were filed just over a week late. The explanation is satisfactory, and the delay is not inordinate. Condonation must be granted.

Costs

[67] The applicants are entitled to the payment of their costs by the Minister of Justice and Correctional Services, the second respondent.

[68] Mr Ravele, an attorney who, together with Ms Khosa, another attorney, appeared on behalf of the applicants, asked this Court to award costs of two attorneys.

[54] Compare *Bhe* above n 3 at para 132.

There is judicial authority that has previously placed attorneys and advocates on par. In *Promine Agentskap*, Van Dijkhorst J held that the same work done by attorneys and advocates of equal seniority, experience and ability must be equally compensated.[55] In a more recent decision of the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, that Court held:

> "An attorney with the right of appearance in the [High] Court who appears in court in preference to an advocate cannot be expected to be treated any differently from an advocate as regards his or her fees for an appearance. When an attorney appears in the High Court, [she or] he is entitled to charge as though he were an advocate."[56]

[69] This is a matter where – had they been represented by two advocates – the applicants would have been entitled to the costs of two counsel. The matter is of sufficient complexity to warrant the utilisation of two legal practitioners. Unsurprisingly, the third and fourth respondents, Ms Maphumulo, Mr Simiso Maphumulo and the *amicus curiae* were each represented by more than one counsel. Why then should the applicants not be entitled to the costs of their two attorneys? I see no reason at all. Treating the applicants' attorneys differently from how advocates would have been treated if they had appeared for the applicants is indefensible. Thus justice and fairness dictate that costs of two attorneys be allowed.

[70] Ms Maphumulo asked us to award costs against any party opposing her intervention application. There has been opposition by Mr Simiso Maphumulo. Having considered all that is before us, including this opposition, which was reasonable, I conclude that there should be no order of costs as between Ms Maphumulo and Mr Simiso Maphumulo.

Order

[71] The following order is made:

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[55] *Promine Agentskap en Konsultante Bk (At) v Du Plessis* [1998] JOL 3912 (T) (*Promine Agentskap*) at 9.

[56] *Stevens N.O. v Maloyi* [2012] JDR 2548 (ECP) at para 19.

1. Ms Thokozani Thembekile Maphumulo is granted leave to intervene.
2. Condonation is granted for the late filing of the written submissions of the third, fourth and seventh respondents.
3. The declaration of constitutional invalidity of section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 by the High Court of South Africa, Limpopo Local Division, Thohoyandou is confirmed.
4. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.
5. During the period of suspension referred to in paragraph 4, the following regime will apply to polygamous customary marriages concluded before the Act came into operation:
   (a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, 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 interests of the family unit constituted by the house concerned; and
      (ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
   (b) Each spouse retains exclusive rights to her or his personal property.
6. In the event that Parliament fails to address the defect referred to in paragraph 4 during the period of suspension, the orders in paragraphs 5(a) and 5(b) will continue to apply after the period of suspension.

7. In terms of section 172(1)(b) of the Constitution, this order does not invalidate a winding up of a deceased estate that has been finalised or the transfer of marital property that has been effected.

8. Paragraph 7 of this order does not apply to any transfer of marital property where, at the time of transfer, the transferee was aware that the property concerned was subject to a legal challenge on the grounds upon which the applicants brought the challenge in this case.

9. Any interested person may approach this Court for a variation of this order in the event that she or he suffers harm not foreseen in this judgment.

10. The second respondent must pay the applicants' costs, including costs of two attorneys.

For the Applicants:	S Ravele and I Khosa of SO Ravele Attorneys
For the Third and Fourth Respondents:	G J Scheepers and C J S Kock instructed by Booyens Du Preez & Boshoff Inc
For the Intervening Applicant:	G Budlender SC, M Bishop and P Mdakane instructed by Legal Resources Centre
For the Seventh Respondent	J R Mogagabe SC, N H Maenetje SC, M Lekoane, C S Sibiya, M K Mathipa and T R Palmer
For the Amicus Curiae:	S Cowen and N Ntuli instructed by Women's Legal Centre Trust