CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 364/21

In the matter between:

EB (BORN S)	Applicant
And	
ER (BORN B) N.O.	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
EB (BORN S) N.O.	Third Respondent

Case CCT 158/22

And in the matter between:

KG	Applicant
And	
MINISTER OF HOME AFFAIRS	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
BG	Third Respondent
And	
COMMISSION FOR GENDER EQUALITY	First Amicus Curiae
GAUTENG ATTORNEYS ASSOCIATION	Second Amicus Curiae

Neutral citation: *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* [2023] ZACC 32

Coram: Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ

Judgments: Rogers J (unanimous)

Heard on: 10 May 2023

Decided on: 10 October 2023

Summary: Divorce Act 70 of 1979 — redistribution remedy in section 7(3) — exclusion of remedy where marriage dissolved by death — exclusion of remedy in case of marriages concluded on or after 1 November 1984 — whether such exclusions limit section 9(1) and/or section 9(3) of Constitution – whether such limitations justifiable

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ORDER

Application for confirmation of orders of constitutional invalidity of the High Court of South Africa, Gauteng Division, Pretoria Court:

The following order is made in Case CCT 364/21:

1. The High Court's order of constitutional invalidity is confirmed.
2. Subsection 7(3) of the Divorce Act 70 of 1979 is declared inconsistent with the Constitution and invalid to the extent that it fails to include the dissolution of marriage by death.
3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.

4. Pending any remedial legislation as contemplated in paragraph 3 above, and pursuant to this Court's conclusions in the present case and in Case CCT 158/22 *KG v Minister of Home Affairs and Others*, which has been decided simultaneously with the present case, the Matrimonial Property Act 88 of 1984 is to be read as including, as section 36A, the following provision:

> "(1) Where a marriage out of community of property as contemplated in paragraphs (a), (b) or (c) of subsection 7(3) of the Divorce Act, 1979 (Act 70 of 1979) is dissolved by the death of a party to the marriage, a court may, subject *mutatis mutandis* to the provisions of subsections 7(4), (5) and (6) of the said Divorce Act, and on application by a surviving party to the marriage or by the executor of the estate of a deceased spouse to the marriage as the case may be (hereinafter referred to as the claimant), and in the absence of agreement between the claimant and the other spouse or the executor of the deceased estate of the other spouse (hereinafter referred to as the respondent), order that such assets, or such part of the assets, of the respondent as the court may deem just, be transferred to the claimant.
>
> (2) For purposes of subsection (1), paragraph (a) of subsection 7(3) is to be read as excluding the following words: 'before the commencement of the Matrimonial Property Act, 1984'."

5. The order in paragraph 4 shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has been finally wound up by the date of this order and no claim as contemplated in paragraph 4 may be made by or against the executor of a deceased estate that has been finally wound up by the date of this order.
6. The second respondent must pay the applicant's costs in this Court, excluding the costs of the appearance on 11 August 2022, such costs to include the costs of two counsel.

The following order is made in Case CCT 158/22:

1. The High Court's order of constitutional invalidity is confirmed.
2. Paragraph (a) of subsection 7(3) of the Divorce Act 70 of 1979 (Divorce Act) is declared inconsistent with the Constitution and invalid to the extent that it fails

to include marriages concluded on or after the commencement of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act).

3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
4. Pending any remedial legislation as contemplated in paragraph 3 above, paragraph (a) of subsection 7(3) of the Divorce Act is to be read as excluding the words in strike-out text below:

> "(a) entered into ~~before the commencement of the Matrimonial Property Act, 1984,~~ in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;"

5. The order in paragraph 4 above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to a marriage concluded on or after 1 November 1984.
6. Pending any remedial legislation as contemplated in paragraph 3 above, and pursuant to this Court's conclusions in the present case and in Case CCT 364/21 *EB (Born S) v ER (Born B) N.O. and Others*, which has been decided simultaneously with the present case, the Matrimonial Property Act is to be read as including, as section 36A, the following provision:

> "(1) Where a marriage out of community of property as contemplated in paragraphs (a), (b) or (c) of subsection 7(3) of the Divorce Act, 1979 (Act 70 of 1979) is dissolved by the death of a party to the marriage, a court may, subject *mutatis mutandis* to the provisions of subsections 7(4), (5) and (6) of the said Divorce Act, and on application by a surviving party to the marriage or by the executor of the estate of a deceased spouse to the marriage as the case may be (hereinafter referred to as the claimant), and in the absence of agreement between the claimant and the other spouse or the executor of the deceased estate of the other spouse (hereinafter referred to as the respondent), order that such assets, or such part of the assets, of the respondent as the court may deem just, be transferred to the claimant.

(2) For purposes of subsection (1), paragraph (a) of subsection 7(3) is to be read as excluding the following words: 'before the commencement of the Matrimonial Property Act, 1984'."

7. The order in paragraph 6 shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has been finally wound up by the date of this order and no claim as contemplated in paragraph 6 may be made by or against the executor of a deceased estate that has been finally wound up by the date of this order.
8. The second respondent must pay the applicant's costs in this Court, such costs to include the costs of two counsel.

JUDGMENT

ROGERS J (Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Potterill AJ, Theron J and Van Zyl AJ concurring):

Introduction

[1] These two cases, which were heard together, concern the constitutional validity of section 7(3) of the Divorce Act.[1] I shall quote that section presently. In broad terms, the section provides that, where spouses married out of community of property get divorced, the divorce court may make an equitable order that assets of the one spouse be transferred to the other (redistribution order). For ordinary civil marriages, this remedy is only available where the marriage was entered into before 1 November 1984. Case CCT 364/21, *EB (Born S) v ER (Born B) N.O. and Others*, concerns the absence of a redistribution remedy where the marriage is terminated by death rather than divorce. Case CCT 158/22, *KG v Minister of Home Affairs and Others*, concerns the absence of a redistribution remedy where the marriage is entered into on or after 1 November 1984. For the sake of brevity, I shall refer to these two issues as the "divorce/death issue" and the "before/after issue" respectively.

[2] In each case, the wife who brought the constitutional challenge was the plaintiff in divorce proceedings in the High Court of South Africa, Gauteng Division, Pretoria (High Court). In each case, the High Court made a declaration of constitutional invalidity. Those declarations are now before us for confirmation in terms of section 172(2)(a) of the Constitution.

[1] 70 of 1979.

The legislative provisions

[3] The Matrimonial Property Act[2] (MPA) came into force on 1 November 1984. Chapter I established the accrual system. In terms of section 2, every marriage entered into after the MPA's commencement date in terms of an antenuptial contract by which community of property and community of profit and loss are excluded is subject to the accrual system unless it is expressly excluded by the antenuptial contract. Section 3(1) provides that, upon the dissolution of such a marriage by divorce or death, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse or of the estate of a deceased spouse, acquires a claim against the other spouse or deceased estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses. In terms of section 4(1)(a), the accrual of the estate of the spouse is the amount by which the net value of his or her estate at the dissolution of the marriage exceeds the net value of his or her estate at the commencement of that marriage. The Chapter contains further provisions regulating calculation and enforcement of accrual claims.

[4] Among the general provisions in Chapter IV, section 21(1) provides that spouses, whether married before or after the commencement date, may jointly apply to a court for leave to change the matrimonial property system applicable to their marriage. Section 21(2) made provision for spouses, who were married before the commencement date in terms of an antenuptial contract by which community of property and community of profit and loss were excluded, to make the accrual system applicable to their marriage by the execution and registration of a notarial contract. This had to be done within two years, that is, by 1 November 1986 (window-period).[3]

[2] 88 of 1984.

[3] In terms of the power conferred by section 21(2)(a), the Minister extended the window-period which eventually expired on 31 October 1988.

[5] Section 36 of the MPA added subsections 7(3) to (6) into the Divorce Act. The new subsection 7(3) read:

> "A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the [MPA] in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, may, subject to the provisions of subsection (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party."

[6] In terms of section 22(6) of the Black Administration Act[4] (BAA), a civil marriage between black persons did not by default give rise to community of property. Such a marriage was by default out of community of property. This provision was repealed with effect from 2 December 1988 by the Marriage and Matrimonial Property Law Amendment Act[5] (Amendment Act). At the same time, section 7(3) was amended by adding a further category of marriages in respect of which a divorce court could make a redistribution order, namely marriages concluded out of community of property in terms of the BAA before the commencement of the Amendment Act. Section 21(2) of the MPA was also amended so as to allow persons so married to make the accrual system applicable to their marriage by a notarial contract executed and registered within two years from 2 December 1988.

[7] The most recent amendment of section 7(3) was made in the wake of this Court's judgment in *Holomisa*.[6] The legislative background to *Holomisa* was that, until its repeal with effect from 15 December 2000 by the Recognition of Customary Marriages

[4] 38 of 1927.

[5] 3 of 1988.

[6] *Holomisa v Holomisa* [2018] ZACC 40; 2019 (2) BCLR 247 (CC).

Act[7] (Recognition Act), section 39 of the Transkei Marriage Act[8] had a similar effect to section 22(6) of the BAA, namely that marriages entered into under the Transkei Marriage Act were by default out of community of property. The parties so married did not have the benefit of the accrual system by default and also had no remedy in terms of section 7(3) of the Divorce Act as it then read. This Court in *Holomisa* declared section 7(3) constitutionally invalid for failing to provide such a remedy. The declaration was suspended for 24 months with an interim reading-in which made section 7(3) applicable to such marriages.

[8] Parliament addressed the constitutional defect with effect from 22 October 2020 by way of section 1 of the Judicial Matters Amendment Act.[9] In terms of this provision, section 7(3) was brought into its current form by including, as an additional category of marriages where a redistribution remedy was available, marriages entered into in terms of any law applicable in a former homeland without the conclusion of an antenuptial contract or agreement in terms of such law. Subsections 7(3) to (6) now read:

> "(3) A court granting a decree of divorce in respect of a marriage out of community of property—
>
> (a) entered into before the commencement of the [MPA] in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;
>
> (b) entered into before the commencement of the [Amendment Act] in terms of section 22(6) of the [BAA] as it existed immediately prior to its repeal by the [Amendment Act]; or
>
> (c) entered into in terms of any law applicable in a former homeland, without entering into an antenuptial contract or agreement in terms of such law,
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> may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding

[7] 120 of 1998.

[8] 21 of 1978.

[9] 12 of 2020.

the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.

(4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.

(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account—

(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3)(b) of this section may have in terms of section 22(7) of the [BAA];

(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

(c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and

(d) any other factor which should in the opinion of the court be taken into account.

(6) A court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just."

[9] In what follows, I use the following abbreviated expressions:

(a) ANC – an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;

(b) old marriage – a marriage entered into before the MPA's commencement date, 1 November 1984;

(c) new marriage – a marriage entered into on or after the MPA's commencement date;

(d) old ANC marriage – a marriage as contemplated in section 7(3)(a) of the Divorce Act, that is, an old marriage in terms of an ANC as defined above;

(e) new ANC marriage – a new marriage in terms of an ANC as defined above;

(f) accrual marriage – a new marriage in terms of an antenuptial contract in terms of which the accrual system is not excluded;

(g) BAA marriage – a marriage as contemplated in section 7(3)(b) of the Divorce Act, that is, a marriage out of community of property entered into in terms of the BAA before the Amendment Act's commencement date, 2 December 1988; and

(h) homeland marriage – a marriage as contemplated in section 7(3)(c) of the Divorce Act.[10]

The facts and High Court orders

[10] The facts of the two cases are not relevant to the constitutionality of section 7(3) and may be briefly stated.

Case CCT 364/21: EB (Born S) v ER (Born B) N.O. and Others

[11] In Case CCT 364/21, the applicant in this Court, Mrs B, married her husband, Mr B, in April 1983 in terms of an ANC. This was thus an old ANC marriage. In March 2015, she instituted divorce proceedings against him. She claimed a redistribution order in terms of section 7(3) of the Divorce Act. Mr B died in April 2016, by which date pleadings in the divorce action had closed. Their daughter,

[10] In the case of the Transkei, this would apply to marriages in terms of the Transkei Marriage Act concluded before 15 December 2000. In the case of other homelands, the application of this provision depends on when the relevant homeland legislation was repealed.

Mrs R, was the sole beneficiary in his estate. Mr J C van Eden was appointed as the executor of Mr B's estate.

[12] Mrs B wished to carry on with her claim for a redistribution order. Mr van Eden contended that a redistribution order was no longer possible, because the marriage had been dissolved by death and only a court granting a decree of divorce can make a redistribution order. This raised what I have identified as the divorce/death issue. Mrs B put up two answers to this objection: (a) that because *litis contestatio* (close of pleadings) had been reached before Mr B died, her claim for a redistribution order could be pursued to finality, even if ordinarily section 7(3) does not apply to marital dissolution by death; and (b) that, in any event, section 7(3) was unconstitutional for failing to provide for a redistribution remedy where an old ANC marriage is dissolved by death.

[13] These matters were dealt with as preliminary issues. On 21 June 2019 the High Court (Prinsloo J) delivered judgment.[11] The Court upheld both of Mrs B's responses to the executor's defence. The order, in respect of the unconstitutionality of section 7(3), was as follows:

> "2. It is declared that the absence of a provision in section 7(3) of the Divorce Act, No. 70 of 1979, to the effect that a claim for redistribution of assets in terms of section 7(3) of that Act, in the case of the dissolution of the marriage by the death of one or both of the spouses, is not extinguished by such death, constitutes a *lacuna* which is inconsistent with the Constitution, Act 108 of 1996, which inconsistency is removed by reading-in the following passage after the words 'A court granting a decree of divorce . . .' 'or a court considering an asset redistribution claim based on the provisions of this subsection following the dissolution of the marriage by the death of one or both of the spouses . . .'
>
> 2.1. It is consequently declared that henceforth the first portion of section 7(3) of the [Divorce Act] should be read as follows:

[11] *EB (born S) v Van Eden N.O. and Others*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 20758/2015 (21 June 2019).

> 'A court granting a decree of divorce or a court considering an asset redistribution claim based on the provisions of this subsection following the dissolution of the marriage by the death of one or both of the spouses in respect of a marriage out of community of property—
>
> . . .'

. . .

5. This order shall be referred to the Constitutional Court for confirmation in terms of section 15 of the Superior Courts Act 10 of 2013 and in accordance with rule 16 of the Rules of the Constitutional Court." (Underlining in the original.)

[14] The adjudication of Mrs B's redistribution claim on its merits stood over for later determination. In August 2020, Mrs B, Mr van Eden and Mrs R concluded a settlement agreement in terms of which the estate of Mrs B's late husband was to be divided equally between Mrs B and her daughter. Disputes later arose between Mrs B and her daughter on the one hand and Mr van Eden on the other. Among other things, Mr van Eden took the view that he could not give effect to the settlement agreement unless the High Court's declaration of invalidity was confirmed by this Court. In November 2021, Mrs B thus brought an application in this Court for confirmation. In February 2022, Mr Van Eden was removed as the executor and, in March 2022, Mrs B and her daughter were appointed as the executors. In that capacity, Mrs R and Mrs B feature as the first and third respondents respectively in this Court. The second respondent is the Minister of Justice and Correctional Services (Minister).

Case CCT 158/22: KG v Minister of Home Affairs and Others

[15] The applicant in this Court, Mrs G, married her husband, the third respondent, Mr G, in March 1988. The marriage being in terms of an ANC, this is a new ANC marriage. Mrs G began divorce proceedings against her husband in 2017. Those proceedings are still pending. She wishes to pursue a claim in terms of section 7(3). She alleges that in many, mainly non-financial, ways, she has contributed to the increase in her husband's estate and that he is now very wealthy. To clear the way for such a

claim, in August 2021 she launched an application in the High Court for an order declaring section 7(3)(a) of the Divorce Act unconstitutional for limiting the redistribution remedy to old ANC marriages. Her application raised what I have referred to as the before/after issue.

[16] In the High Court, Mrs G cited the Minister of Home Affairs as the first respondent, the Minister of Justice and Constitutional Development as the second respondent and her husband as the third respondent. Mr G and the Minister initially opposed, but both withdrew their opposition. The Minister filed an explanatory affidavit which was broadly neutral. The Pretoria Attorneys Association (PAA) was granted leave to intervene as an *amicus curiae* (friend of the court), and it made submissions in support of the validity of section 7(3)(a).

[17] The High Court (Van der Schyff J) delivered judgment on 11 May 2022.[12] The Court upheld Mrs KG's application and made the following order:

> "(1) Section 7(3)(a) of the [Divorce Act] is declared inconsistent with the Constitution and invalid to the extent that the provision limits the operation of section 7(3) . . . to marriages out of community of property entered into before the commencement of the [MPA].
>
> (2) The inclusion of the words 'entered into before the commencement of the [MPA]' in section 7(3)(a) of the [Divorce Act] is declared inconsistent with the Constitution and invalid. These words are notionally severed from section 7(3)(a) . . . and section 7(3)(a) . . . is to be read as though the words 'entered into before the commencement of the [MPA]' do not appear in the section.
>
> (3) In terms of section 172(1)(b) of the Constitution, the orders in paragraphs (1) and (2) of this order shall not affect the legal consequences of any act done or omission or fact existing in relation to a marriage out of community of property with the exclusion of the accrual system concluded after 1 November 1984, before this order was made.

[12] *G v Minister of Home Affairs* [2022] ZAGPPHC 311; 2022 (5) SA 478 (GP); [2022] 3 All SA 58 (GP).

> (4) The aforementioned orders, in so far as they declare provisions of an Act of Parliament invalid, are referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution . . . and the Registrar of this Court is directed to comply with rule 16(1)) of the Rules of the Constitutional Court in this regard."

[18] Mrs G has applied to this Court for confirmation, citing the same three parties as respondents. This Court admitted two parties as amici curiae: the Commission for Gender Equality (CGE) and the Gauteng Attorneys Association (GAA).

Case CCT 364/21 – the divorce/death issue

High Court judgment

[19] The High Court's decision on the *litis contestatio* issue is not before us. There has been no appeal against the High Court's judgment. I thus deal only with the High Court's judgment on the constitutional issue, that is the divorce/death issue.

[20] The High Court inferred that subsections 7(3) to (6) were added to the Divorce Act in an attempt to compensate for the fact that old ANC marriages were concluded before the introduction of the accrual system which has become the default regime in marriages out of community of property. This accorded with the explanatory affidavit filed on behalf of the Minister. The High Court considered, however, that when introducing this compensatory remedy, the legislature overlooked the fact that, whereas an accrual claim in a new marriage is conferred when a marriage is dissolved by divorce or death, the redistribution remedy for old ANC marriages was conferred only when a marriage is dissolved by divorce. For the High Court, the question was whether this discrepancy amounted to discrimination in terms of section 9 of the Constitution.

[21] The High Court considered the following considerations to bear indirectly on the enquiry. First, where spouses are married in community of property, a spouse's claim to a half share of the joint estate survives the death of the other spouse. Second, the

Maintenance of Surviving Spouses Act[13] ensures that a spouse's right to claim maintenance survives the death of the other spouse.

[22] In assessing whether section 7(3) limited section 9 of the Constitution, the High Court referred to the analytical framework laid down in *Harksen*.[14] Although *Harksen* dealt with section 8 of the interim Constitution, substantially the same provisions are now to be found in section 9 of the Constitution. Section 9 in relevant part provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> . . .
>
> (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.
>
> . . .
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[23] Transposed to section 9 of the Constitution, the framework laid down in *Harksen* reads thus:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of [section 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
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> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is

[13] 27 of 1990.

[14] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

> discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of [section 9(3)].
>
> (c) If the discrimination is found to be unfair than a determination will have to be made as to whether the provision can be justified under the limitations clause ([section 36] of the [Constitution])."[15]

[24] The High Court held that, by excluding a redistribution remedy where a marriage is terminated by death, section 7(3) differentiated between categories of people and that such differentiation did not bear a rational connection to a legitimate government purpose. Section 9(1) of the Constitution was thus violated.

[25] Section 9(3) was also violated, in the High Court's view, because the differentiation was on the basis of marital status, thus amounting to discrimination; and that such discrimination was presumptively unfair. The Minister had not discharged the onus of showing the discrimination to be fair. The limitation was not justifiable in terms of section 36. The High Court rejected an argument that the differentiation was not on the basis of marital status but merely on the basis of differing marital benefits depending on whether the marriage was dissolved by divorce or death. The High Court seems to have thought that the relevant differentiation was between spouses in old ANC marriages (where the redistribution remedy was not available in the case of marital

[15] Id at para 54.

dissolution by death) and spouses in accrual marriages (where an accrual claim was available in the case of marital dissolution by death).

[26] The High Court quoted extensively from Professor June Sinclair's *The Law of Marriage*.[16] Although the author focused on the before/after issue, the High Court considered that the author's justification for interfering with contractual choice applied as much to the divorce/death issue as the before/after issue. Perhaps through oversight, the legislature had, in the High Court's view, "failed to 'interfere' far enough" when introducing the redistribution remedy.

[27] The High Court considered a submission by Mr van Eden that spouses in old ANC marriages which were terminated by death after 1 November 1984 had no reason to complain because they could have taken advantage of section 21(2) of the MPA by adopting the accrual system during the window-period. The High Court described this contention as unrealistic and unduly harsh. Lay people often did not have access to legal advice and might not anticipate future difficulties in the marriage.

[28] Another of Mr van Eden's submissions which the High Court rejected was the argument that the ostensibly harsh consequences of limiting the redistribution remedy to dissolution by divorce were ameliorated by the spouse's right to maintenance, which in the absence of agreement is regulated by section 7(2) of the Divorce Act[17] and which survives the death of the other spouse. In the High Court's view, this begged the question why the legislature allowed an accrual claim to survive marital dissolution by

[16] Sinclair *The Law of Marriage* (Juta & Co Ltd, Cape Town 1996) vol 1 at 141-6.

[17] Section 7(2) provides as follows:

> "In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur."

death. Pointing to other remedies, which were available to both classes of spouses, did not answer this crucial question.

[29] The High Court also addressed the submission advanced both by Mr van Eden and the Minister that, where a marriage is dissolved by death, the executor of the deceased spouse's estate would find it almost impossible to gainsay evidence put up by the surviving spouse in support of a redistribution claim. This could prejudice creditors and beneficiaries. The High Court regarded the argument as artificial and speculative. One could not assume that an executor would be unable to contest a redistribution claim. And again, the legislature allowed an accrual claim to survive marital dissolution by death, where executors might find themselves in the same disadvantageous position.

[30] After referring to various decisions of this Court, the High Court concluded that the remedy of reading-in was apposite. I have already quoted the High Court's order in that regard.

In this Court

Applicant

[31] Although in her submissions the applicant said that the case was limited to the situation where a spouse died after *litis contestatio*, the High Court's order was not limited in that way nor does the matter seem to have been argued in that way in the High Court.[18] If the applicant and the High Court were right in their submissions and conclusions respectively on *litis contestatio*, marital dissolution by death after *litis contestatio* would not present a lacuna calling for a constitutional remedy.

[32] The applicant's principal submission is that there is an unjustifiable differentiation, and indeed discrimination, between dissolution by death of old ANC marriages and dissolution by death of accrual marriages based purely on the date of marriages. The applicant supports the High Court's conclusion that the

[18] The applicant's counsel in this Court did not appear for her in the High Court.

differentiation is on the basis of marital status for purposes of section 9(3), that it is presumptively unfair, that the presumption has not been rebutted, and that the unfair discrimination has not been justified. The applicant submits that the discrimination impairs the fundamental human dignity of spouses married before 1 November 1984. The impact is serious. The applicant also supports the High Court's reading-in.

Minister

[33] The Minister does not oppose confirmation but has made submissions which, according to the applicant's replying argument, amount in substance to opposition. The Minister says that his submissions have been made in terms of section 15(2) of the Superior Courts Act[19] and in order to explain the policy position of the state on the High Court's declaration of constitutional invalidity.

[34] As historical context, the Minister refers to the South African Law Commission (SALC) Issue Paper 41 of 1990,[20] where it was stated that section 7(3) was only meant to be an outlet valve to alleviate the unfairness in old ANC marriages.[21] The question considered in Issue Paper 41 was whether the redistribution remedy should be extended to new ANC marriages as well. In the Minister's submission, the exclusion of any reference to marital dissolution by death was appropriate, because section 7(3) is part of an enactment dealing only with divorce. If there is any lacuna, it is in the MPA but the applicants directed no constitutional attack at the MPA.

[35] According to the Minister, an accrual claim applies to the dissolution of marriages by divorce or death, because it is a claim having its source in the property regime applicable to the marriage. The redistribution remedy in section 7(3), by contrast, is specifically a divorce remedy. It is not a right conferred by the property

[19] 10 of 2013. Section 15(1) deals with referrals to this Court for confirmation as contemplated in section 172(2)(a) of the Constitution. Section 15(2) reads:

> "If requested by the Chief Justice to do so, the Minister must appoint counsel to present argument to the Constitutional Court in respect of any matter referred to in subsection (1)."

[20] *Report on the Review of the Law of Divorce: Amendment of Section 7(3) of the Divorce Act, 1979* (1990).

[21] Id at paras 1.3.4-5.

regime applicable to the marriage and may have consequences which override the choices the spouses made in their antenuptial contract. For this reason, so the Minister argues, there is no real differentiation for purposes of section 9(1) of the Constitution.

[36] The Minister repeats the argument, rejected by the High Court, that there would be difficulties of adjudication if a redistribution remedy could be raised against the estate of a deceased spouse, particularly where the claimant relies on indirect rather than direct contributions. To allow a redistribution remedy in the case of marital dissolution by death will affect the rights of deceased spouses, who did not contractually commit to such an outcome and who are no longer able to dispute the extent of the claimant's contributions. The Minister also repeats the argument that the differentiation is not on the basis of marital status but on the basis of the way in which the marriage is dissolved.

Mootness

[37] The parties were asked to address mootness for two reasons. First, because there was no appeal against the High Court's conclusion in the applicant's favour on *litis contestatio*, she did not need an order of constitutional invalidity to pursue her claim for a redistribution order. Second, a settlement agreement was later concluded, making it unnecessary for a court to adjudicate the redistribution claim. Contrary to the former executor's contention, the High Court's judgment on *litis contestatio* was a sufficient basis for winding up the estate on the basis of the settlement agreement. It is unclear whether the applicant in the High Court asserted standing on any other basis than her own interest as contemplated in section 38(a) of the Constitution.[22]

[38] Since the applicant had standing in her own interest at the time the constitutional challenge was adjudicated in the High Court, the question is whether, despite possible

[22] Section 38 list the persons who have the right to approach a competent court for relief in respect of an alleged infringement or threatened infringement of a right in the Bill of Rights. The persons in section 38(a) are "anyone acting in their own interest". The applicant could notionally have sought an order of constitutional invalidity by acting "in the interest of a group or class of persons" (section 38 (c)) or by acting "in the public interest" (section 38(d)).

mootness, it is in the interests of justice for us to entertain it.[23] I have no doubt that it is. First, the High Court has made a declaration of constitutional invalidity; it is undesirable to leave it in limbo. Second, while the number of old ANC marriages in which the issue may arise might be dwindling, we cannot say that it is negligible. Third, in cases where death occurs after *litis contestatio*, the question whether a redistribution claim survives the death of the other spouse cannot be regarded as settled,[24] so the constitutional validity of the divorce/death distinction remains important, even in that situation. Fourth, the issue affects not only old ANC marriages but BAA marriages and homeland marriages, where the cut-off dates are later than 1 November 1984. There are thus many spouses who may be affected by the outcome. And, if we find for the applicant in CCT 158/22, a declaration of invalidity on the divorce/death issue would affect all ANC marriages, whenever concluded.

Section 9 analysis

The purpose of section 7(3) and legislative history

[39] I have already quoted the relevant parts of section 9 of the Constitution and the framework for analysis set out in *Harksen*. The first step in the analysis is to determine whether section 7(3) differentiates between people or categories of people and, if so, whether the differentiation bears a rational connection to a legitimate government purpose.

[40] The High Court considered that subsections 7(3) to (6) of the Divorce Act were introduced as a remedy for old ANC marriages to compensate for the fact that spouses to such marriages did not have access to the accrual regime as a default regime in the case of antenuptial contracts. This view is justified when one considers that the redistribution remedy was created simultaneously with the accrual regime; that

[23] On the test, see *Bwanya v Master of the High Court, Cape Town* [2021] ZACC 51; 2022 (3) SA 250 (CC); 2022 (4) BCLR 410 (CC) (*Bwanya*) at paras 14-6.

[24] In reaching its finding on *litis contestatio*, the High Court in the present case disapproved the contrary decision in *YG v Executor, Estate Late CGM* [2012] ZAWCHC 51; 2013 (4) SA 387 (WCC). There is no authority on the point in the Supreme Court of Appeal or this Court. In his submissions in the present case, the Minister questioned the High Court's conclusion.

Chapter I of the MPA would only be of potential application to new ANC marriages; and that the redistribution remedy was expressly confined to old ANC marriages.

[41] This view is also consistent with the legislative history to the introduction of the MPA. In 1982 the SALC issued a report on matrimonial property law.[25] The majority report identified the problem with the existing situation as being that most marriages by antenuptial contract created a complete economic separation. Statistics showed that in practice most antenuptial contracts were concluded in a standard form which excluded community of property, community of profit and loss and the husband's marital power.[26] The majority proposed the introduction of not only the accrual system but also a discretionary judicial power to order equitable redistribution. The latter remedy would apply to old and new marriages and upon marital dissolution by divorce and death.[27]

[42] The inclusion of a general discretionary remedy did not find favour with the Government, and the Bill as introduced into Parliament limited the redistribution remedy to old ANC marriages and only upon divorce. The contributions by the Minister of Justice and other speakers during the parliamentary and committee debates[28] reveal the thinking behind this limitation to have been that the solutions to the problem identified by the SALC should interfere as little as possible with spousal decision-making. In respect of new marriages, couples marrying by antenuptial contract would have the choice to exclude the accrual system. To grant an overriding judicial redistribution remedy for future marriages was decidedly unacceptable in the development of the country's matrimonial property law. In respect of old ANC marriages, where the default accrual regime did not exist, couples would have the choice

[25] *Report pertaining to the Matrimonial Property Law with Special Reference to the Matrimonial Affairs Act 1953, the Status of the Married Woman, and the Law of Succession in so far as it Affects the Spouses* (Pretoria 1982). This comprised a majority report and two minority reports.

[26] One of the reasons for this was thought to be that notaries were familiar with the standard form and its legal consequences and were reluctant to introduce special provisions.

[27] This was rejected in the first minority report, which was even against the introduction of the accrual system. The second minority report supported the majority report and responded to criticisms in the first minority report.

[28] Republic of South Africa *Debates of the House of Assembly (Hansard)* Fourth Session—Seventh Parliament, 27 January to 12 July 1984. The record of the second reading is at 8572-8624 and 8754-8770; the record of the committee stage at 8908-9007 and the record of the third reading at 9007-9046.

to adopt the accrual system during the window-period. However, a spouse might be unable to persuade the other to do so. Given the hardship which such a spouse might face upon the dissolution of the marriage, it was desirable to amend the Divorce Act to make provision for a redistribution remedy. Despite the uncertainties inherent in such a remedy, this should be tolerated in order to address this specific problem.

[43] As to confining the judicial remedy to marital dissolution by divorce, the considerations which emerge from the Minister's speech and the debates included that: the existence of such a remedy upon death would be inconsistent with the basic principle of our law that courts do not intervene in the administration of estates; the remedy was uncertain and unpredictable; it would complicate estate planning; it could aggravate dependants' financial problems during the administration of estates; in the case of divorce many cases would be settled out of court, whereas upon death an equitable distribution would require litigation; and the deceased spouse would not be alive to defend the claim.

[44] The possibility of extending a redistribution remedy to new ANC marriages was debated again in 1990. The SALC was against this. Its report stated that section 7(3) "was only meant to be an outlet valve to alleviate the unfairness in existing marriages that had been made subject to the rigid predetermined matrimonial property systems".[29]

Differentiation

[45] The first step in the section 9 analysis is to determine whether there is differentiation between people or groups of people. Although the High Court and the applicant contrasted the positions of surviving spouses in old ANC marriages dissolved by death and accrual marriages dissolved by death, I do not regard this as the relevant differentiation. The redistribution remedy and the accrual regime are decidedly different phenomena. The former is a judicial remedy applicable upon dissolution of the marriage; the latter is an elective marital property regime applicable from the

[29] South African Law Commission *Project 12, Review of the Law of Divorce, Amendment of section 7(3) of the Divorce Act, 1979* (July 1990) at 23.

commencement of the marriage. Spouses in old ANC marriages and spouses in accrual marriages are not similarly circumstanced to a sufficient degree to make them a sensible subject of differentiation analysis.

[46] In my view, the relevant differentiation is confined to spouses in old ANC marriages. Within that group, spouses whose marriages terminate by divorce are treated differently from those whose marriages terminate by death, because the former class has the benefit of the redistribution remedy whereas the latter class does not.

Rational relationship to legitimate governmental purpose

[47] Does this differentiation bear a rational connection to a legitimate government purpose? If it does, it is "mere differentiation" as opposed to a "naked preference". A naked preference is one where the state regulates in an arbitrary way.[30] In *Prinsloo* this Court said the following in that regard:

> "The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification."[31]

[48] What legitimate government purpose is served by confining the redistribution remedy to old ANC marriages dissolved by divorce? The lawmaker, by introducing the redistribution remedy, was seeking to ameliorate the hardship which might be suffered by spouses to old ANC marriages who, for whatever reason, did not adopt the accrual regime during the window-period and who would be left without recognition for their contributions to the increase in the estate of the other spouse. This hardship could arise regardless of the way in which the marriage is dissolved. The redistribution remedy

[30] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) (*Prinsloo*) at para 25.

[31] Id.

was to compensate spouses in old ANC marriages who had got married at a time when the statutory accrual regime did not exist. The accrual regime, for which the redistribution remedy was conceived as compensation in old ANC marriages, was a regime which benefited spouses whose marriages were terminated by divorce or death.

[49] The underlying justification for introducing the remedy therefore applied equally to marital dissolution by divorce and death. Was there nevertheless a legitimate government purpose in excluding dissolution by death? The concern that a discretionary judicial remedy would create uncertainty cannot justify the distinction, because that uncertainty was tolerated in the case of marriages dissolved by divorce. The so-called principle that courts do not intervene in the administration of estates is hard to understand. If a person has a claim against a deceased estate, the courts have to deal with it unless the executor concedes the claim. The same is true of the concern that extending the remedy to marital dissolution by death would complicate estate planning. A spouse planning his or her financial affairs would have to take account of the fact that he or she might undergo divorce and that a redistribution remedy might then be claimed by the other spouse. There is no reason why such a spouse should not also take that possibility into account in the case where the marriage is dissolved by death.

[50] Another justification offered, when the legislation was introduced, was that redistribution claims upon divorce would often be settled out of court whereas such claims upon death would need to be litigated. It was suggested that, because of the need for litigation, a redistribution remedy upon death would be of little value to the people who needed it most, because they could not afford to litigate. This justification, like the others, lacks legitimacy. There is no reason why an executor could not settle a reasonable redistribution claim. Conversely, redistribution claims upon divorce are often contested. In the case of both divorce and death, an indigent surviving spouse might not be able to afford to litigate.

[51] Finally, there is the supposed justification considered and rejected by the High Court, namely that the deceased spouse is no longer alive to contest the claim.

This could prejudice creditors and beneficiaries in the estate. Similar thinking probably underlies statutory provisions which confine claims for forfeiture of benefits to divorce.[32] This comes closest to offering a legitimate government purpose for the differentiation at issue, but in my view it does not quite meet the constitutional standard, particularly when one takes into account the pressing justification which was thought to justify the adoption of such a remedy in the case of divorcing spouses.

[52] First, it is by no means inevitable that an executor of a deceased spouse's estate would not have evidence at his or her disposal. Children, relatives and friends of the deceased might be able to give relevant evidence and there might also be relevant documentation. Second, it is not unusual that the only witness who could have testified on one side of a case is deceased. In such circumstances, our courts assess the evidence of the other side "with a very cautious eye".[33] Such litigation might occur in other marital settings, for example in relation to accrual and community estates.

[53] For these reasons, the exclusion of the redistribution remedy in the case of the dissolution of old ANC marriages by death is a differentiation which does not meet a legitimate government purpose. This differentiation thus limits section 9(1) of the Constitution. As a postscript to this conclusion, I mention that the United Kingdom's Supreme Court recently associated itself with a trial judge's description of a matrimonial statute which drew a similar divorce/death distinction as "illogical, arbitrary and capable of meting out great injustice".[34]

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[32] See section 9(1) of the Divorce Act and section 9 of the MPA. Section 9(2) of the Divorce Act provides that, in the case of a divorce granted on the grounds of mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of benefits shall be made against the defendant.

[33] *Wood v Estate Thompson* 1949 (1) SA 607 (D) at 614, cited with approval in *Borcherds v Estate Naidoo* 1955 (3) SA 78 (A) at 79C-F. On this cautionary rule, see also *Zwart and Mansell NNO. v Snobberie Cape (Pty) Ltd* [1984] ZASCA 18 at 20 and *Christelis N.O. v Meyer N.O.* [2014] ZASCA 53 at para 35.

[34] *Unger & Anor v Ul-Hasan (deceased) & Anor* [2023] UKSC 22 at para 109, approving this description in *Hasan v Ul-Hasan (deceased) & Anor* [2021] EWHC 1791 (Fam) at para 68. The statutory provision was section 12(1) of the Matrimonial and Family Proceedings Act 1984. In terms of this provision, a spouse to a former marriage dissolved by the decree of a foreign court could bring proceedings in England for financial relief akin to a redistribution order. The former wife in such a marriage brought a claim in terms of section 12(1). The former husband died a few weeks before the application was to be heard. The Supreme Court held that a section 12(1)

Unfair discrimination

[54] Before considering whether the limitation of section 9(1) is justifiable under section 36, I address the case for unfair discrimination. The case advanced by the applicant and upheld by the High Court was one of differentiation on the basis of marital status, which is one of the grounds of presumptively unfair discrimination listed in section 9(3) of the Constitution. The scope of the expression "marital status" in section 9(3) was considered by this Court in *Van der Merwe*.[35] At issue was the constitutional validity of section 18(b) of the MPA. Section 18 dealt with spouses married in community of property. Section 18(a) provided that delictual damages recovered by a spouse, other than damages for patrimonial loss, did not fall into the joint estate but became the separate property of that spouse. Section 18(b) provided that a spouse in a community marriage could recover from the other spouse "damages, other than damages for patrimonial loss, in respect of bodily injury suffered by [the spouse] and attributable either wholly or in part to the fault of [the other spouse]".

[55] The parties in *Van der Merwe* argued that section 18(b) breached section 9(1) of the Constitution because it did not further a legitimate government purpose and breached section 9(3) because it was presumptively unfair discrimination on the basis of marital status. This Court accepted the first contention but was unimpressed by the second. Although the point was not finally decided, Moseneke DCJ, writing for a unanimous Court, said this about the contention that there was differentiation on the basis of "marital status":

> "To me it seems plain that the differentiation made by section 18(b) is not about a protectable interest or burden that attaches to married people but is denied unmarried people. The distinction created by section 18(b) is in essence between the different

claim did not survive the death of the former husband. Unlike the courts in this country, the courts in England could not remedy the injustice by declaring the statute invalid.

[35] *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) (*Van der Merwe*).

> proprietary consequences of marriages in and out of community of property. This is not a case where the law withholds from unmarried people a protection or right which it grants to married people. This is a case in which the law denies one class of married people a protection that another class enjoys.
>
> The equality jurisprudence of this Court on the specified ground of 'marital status' so far relates to protectable interests or disabilities of being married or not being married.[36] . . . The challenged measure merely regulates and distinguishes rights and duties that attach to different property regimes within marriage.
>
> The applicant urged upon us to adopt a generous and expansive meaning of 'marital status' as required when giving effect to a right in the Bill of Rights. For this proposition applicant referred to the dictionary meaning of 'marital' and 'status'. None appear to support the meaning contended for. Be that as it may, it is open to doubt whether the specified ground of marital status is engaged by the impugned legislative differentiation. If that were so, it would imply that any difference in proprietary consequences of marital regimes prescribed by the common law or legislation is presumptively discriminatory and unfair unless shown not to be. In my view, such a generous and far-reaching understanding of 'marital status' in section 9(3) of the Constitution may well be untenable. However, given the conclusion I have come to on the rationality requirement of equality under section 9(1) of the Constitution, I need not, in this case, reach a final conclusion on whether the differentiation is on the specified ground of marital status."[37]

[56] On the divorce/death issue, the relevant differentiation is between spouses in old ANC marriages whose marriages are terminated by divorce and by death respectively. The latter are treated less favourably. Even if "marital status" in section 9(3) went

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[36] At this point in his judgment, Moseneke DCJ by way of fn 58 cited the following authorities: *Volks N.O. v Robinson* [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (*Volks N.O.*), *Satchwell v President of the Republic of South Africa* [2003] ZACC 2; 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC), *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC), *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC), *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC), *Fraser v Children's Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) and *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC). He added: "For a discussion of the ground of marital status as a form of discrimination see also Currie and De Waal *The Bill of Rights Handbook* 5 ed (Juta, Lansdowne 2005) at 254-6." (The reference to *Satchwell* is omitted in the published law reports.) To these cases may now be added *Bwanya* above n 23, *VJV v Minister of Social Development* [2023] ZACC 21 (*VJV*) and *Centre for Child Law v T.S.* [2023] ZACC 22.

[37] *Van der Merwe* above n 35 at paras 45-7.

beyond a distinction between being married and not being married, in the present case the marital status of the spouses in question is identical: they are all spouses in old ANC marriages. The basis of differentiation is not their marital status but the way in which identical marriages terminate.

[57] The fact that the law attaches different consequences to the termination of old ANC marriage by divorce on the one hand and death on the other is not a differentiation based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious way. *Prinsloo* tells us that the relevant "attributes and characteristics" are those attaching to people.[38] In *Harksen*, this Court cautioned against understanding "attributes and characteristics" narrowly, adding:

> "What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features."[39]

[58] Even on the broadest view of "attributes and characteristics", however, differentiation based on whether the marriage ends by divorce or death has nothing to do with the attributes and characteristics of the spouses. It follows that the High Court erred in finding unfair discrimination on the basis of marital status.

[59] The applicant did not advance a case of indirect discrimination based on gender. I shall be considering that question in the context of Case CCT 158/22. Arguably, a

[38] *Prinsloo* above n 30 at para 31.

[39] *Harksen* above n 14 at para 50.

conclusion favourable to the applicant on this issue in Case CCT 158/22 might justify a similar conclusion on the divorce/death issue. However, and particularly in view of my conclusion of a section 9(1) infringement, it is unnecessary to delve further into the possibility of indirect discrimination.

Section 36 of the Constitution – justification

[60] Is the limitation on the equality right in section 9(1) of the Constitution justifiable in terms of section 36 of the Constitution? I have some difficulty in seeing how statutory differentiation which bears no rational relationship to a legitimate government purpose could ever be justified under section 36. The test for this component of equality seems to be such as to rule out justification once a statutory provision has failed the test. This is because justifiability will already have been determined in assessing the legitimacy of the government purpose. However, it is enough for present purposes to say that the only factors put up as a possible justification for the differentiation are those I have already rejected as legitimate government purposes, and they must also fail as grounds of justification under section 36.

[61] Where a marriage is dissolved by death rather than divorce, the spousal relationship may have been harmonious at the time of dissolution. The deceased spouse may have made ample provision for the survivor in his or her will or the survivor may inherit a substantial amount on intestacy.[40] This is not, however, a justification for withholding a redistribution remedy where marriages are dissolved by death. In terms of section 7(5)(a) of the Divorce Act, the court assessing a redistribution claim must have regard to the existing means and obligations of the parties; and in terms of section 7(5)(d), the court must take into account any other factor which in its opinion should be taken into account. The fact that a surviving spouse stands to inherit would undoubtedly be a very significant factor to be taken into account if the redistribution remedy were extended to marital dissolution by death. It may be that, almost as a matter

[40] See section 1(1) of the Intestate Succession Act 81 of 1987.

of course, the amount of the inheritance should be deducted from the amount that would otherwise have been awarded to the survivor as a redistribution remedy.[41] Going forward, of course, the interplay between inheritance and a redistribution claim could be the subject of express provisions in spouses' wills.

[62] Although the surviving spouse's redistribution claim would be an ordinary concurrent claim against the estate, this ought not to prejudice the creditors of the deceased estate at the date of his or her death. The court making a redistribution claim must take into account the means and obligations of both parties. Furthermore, a redistribution claim only arises if the claimant has contributed directly or indirectly to the maintenance or increase in the other spouse's estate. If the deceased spouse dies insolvent, it is difficult to envisage circumstances in which it could be said that the deceased's estate was maintained or increased, and in any event the pre-existing obligations of the deceased spouse's creditors have to be taken into account. And if the deceased estate is not insolvent, it seems unlikely that a court could ever justifiably award a surviving spouse more than the remaining net value of the estate, since the remaining net value would represent the full value of the deceased spouse's estate to the maintenance or increase of which the surviving spouse contributed.

[63] A court considering a redistribution claim may order the transfer of specific assets or an amount of money.[42] If the remedy is extended to dissolution by death, a court might well conclude that a monetary award is more appropriate than the transfer

[41] The surviving spouse's claim in the proposed remedy would be an ordinary concurrent claim against the deceased estate. Assume that a deceased husband has a gross estate of R1 million and ordinary creditors of R100 000 and has bequeathed the residue of his estate equally to his wife and two children. Ignoring a possible redistribution claim by the surviving wife, she and the two children would each receive an inheritance of R300 000. If, disregarding her inheritance, her redistribution claim would be valued at R200 000, one would expect a court adjudicating the redistribution claim to make no award, since without an award she in any event receives more than R200 000 from her late husband's estate. Conversely, if, disregarding her inheritance, her redistribution claim would be valued at R400 000, a court adjudicating the claim could make an award that would ensure that overall she receives no more than R400 000. On my example, this could be achieved by making a redistribution order in her favour of R150 000. This would leave a net amount of R750 000 in the deceased estate, of which the surviving wife's share on inheritance would be R250 000.

[42] *Bezuidenhout v Bezuidenhout* [2004] ZASCA 127; 2005 (2) SA 187 (SCA) is an example of a case where the Court made a monetary award.

of specific assets, at least in cases where a monetary award can be made without disturbing the deceased spouse's testamentary disposition of specific assets. The broad discretion which a court is given and the wide range of factors it may take into account should be sufficient to address this and other issues which might be peculiar to the case of a redistribution claim against a deceased estate.

Remedy

[64] The Minister submitted that section 7(3) of the Divorce Act was the wrong target for the constitutional attack since one would not expect to find, in the Divorce Act, a provision regulating the consequences of the termination of marriages by death. Technically, that is right. However, it is the existence of section 7(3), coupled with the absence in any other legislation of a similar remedy for marital dissolution by death, that gives rise to the differentiation. It is understandable, therefore, that section 7(3) was the target of the attack. That the remedy might more appropriately be a reading-in of an analogous provision into the MPA is not fatal to the confirmation proceedings.

[65] The High Court ordered a reading-in, without any suggestion that the order should be suspended. Although neither side made submissions on the subject of suspension, it would in my view be appropriate to afford Parliament 24 months within which to remedy the defect. However, there is no reason why in the meantime there should not be immediate effective relief in the form of an interim reading-in. The obvious place for this would be immediately after section 36 of the MPA, which introduced the redistribution remedy in the case of divorce. Although the natural focus of attention has been on the case of a surviving spouse wishing to make a redistribution claim against the estate of a deceased spouse, the High Court's reading-in covered the converse situation as well, and there is no reason why this should not be so. The High Court's reading-in was made in the introductory part of section 7(3), and thus applied to old ANC marriages, BAA marriages and homeland marriages. Once again, there is no reason not to follow suit.

[66] I flag two matters, relating to customary and Muslim marriages respectively. In terms of section 2 of the Recognition Act, valid customary marriages are recognised for all purposes as marriages. Section 8(1) provides that a customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage. In terms of section 8(4)(a), "[a] court granting a decree for the dissolution of a customary marriage" has the powers contemplated in, among others, section 7 of the Divorce Act. This includes the power to make a redistribution order. However, the Recognition Act gives a court the power to make a redistribution order only when it is granting a decree for the dissolution of a customary marriage.

[67] In regard to Muslim marriages, this Court in *Women's Legal Centre Trust*[43] declared the Marriage Act[44] and Divorce Act to be inconsistent with sections 9, 10, 28 and 34 of the Constitution for failing to recognise Muslim marriages (that is, marriages solemnised in accordance with *Sharia* law), which have not been registered as civil marriages, as valid marriages for all purposes in South Africa and to regulate the consequences of such recognition.[45] This Court also declared various sections of the Divorce Act to be inconsistent with those provisions of the Constitution. Among others, section 7(3) was found to be inconsistent with the Constitution for failing to provide for a redistribution of assets on the dissolution of a Muslim marriage when such redistribution would be just.[46] The declarations of invalidity were suspended for 24 months. Various forms of interim relief were granted, one of which was the following:

> "Pending the coming into force of legislation or amendments to existing legislation referred to in paragraph 1.6, it is declared that Muslim marriages subsisting at 15 December 2014, being the date when this action was instituted in the High Court, or which had been terminated in terms of *Sharia* law as at 15 December 2014, but in

[43] *Women's Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23; 2022 (5) SA 323 (CC); 2023 (1) BCLR 80 (CC) (*Women's Legal Centre Trust*).

[44] 25 of 1961.

[45] *Women's Legal Centre Trust* above n 43 at para 1.1 of the order.

[46] Id at para 1.3 of the order.

respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows:

(a) all the provisions of the Divorce Act shall be applicable, save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and

(b) the provisions of section 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded.

(c) in the case of a husband who is a spouse in more than one Muslim marriage, the court:

(i) shall take into consideration all relevant factors, including any contract or agreement between the relevant spouses, and must make any equitable order that it deems just; and

(ii) may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings."[47]

As with customary marriages, the above order in respect of Muslim marriages appears to confine the applicability of section 7(3) to dissolution upon divorce. These are matters which could usefully receive Parliament's attention.

[68] In regard to costs, the Minister submitted that, since he has not opposed confirmation but merely complied with his duty to place the state's policy position before the Court, he should not be ordered to pay costs. Despite the absence of opposition, it is appropriate in my view to order the Minister to pay the applicant's costs, as we did in similar circumstances in *VJV*.[48] To this there is one qualification. This case was initially argued on 11 August 2022. We later raised with the parties the desirability of having this case re-argued together with CCT 158/22. There being no objection, this course was followed, and the two cases were heard together on

[47] Id at para 1.7 of the order.

[48] *VJV* above n 36 at paras 92-6.

10 May 2023. Since the jettisoning of the first hearing was not due to the fault of either side, our costs award will not include the costs of the appearance on 11 August 2022.

Case CCT 158/22 – the before/after issue

High Court judgment

[69] In her High Court application, the applicant adduced expert evidence in the form of reports by a clinical psychologist, Ms Judith Ancer, and a joint report by Prof Elsje Bonthuys, a professor of law at the University of the Witwatersrand, and Dr Azille Coetzee, a postdoctoral fellow at the South African Research Chair in Gender Politics at Stellenbosch University. The High Court referred to and relied on parts of this expert evidence.

[70] The High Court observed that, where both spouses are economically active and support each other to more or less the same degree in their endeavours, an ANC marriage has no real disadvantages for them. Such a system is, however, disadvantageous when one of the spouses is or becomes economically inactive[49] during the marriage. Historically it was the wife who sacrificed her career. Although occurrences of men becoming homemakers are increasing, women are still predominantly the economically disadvantaged spouses. This is an international

[49] The expressions "economically active" and "economically inactive" were used by the High Court. However, I should make clear (as indeed, I am sure, the Judge in the High Court was aware) that the endeavours of a spouse who does not earn money through employment or commercial activity but who, for example, spends his or her days looking after the couple's children and managing their home have economic value. Whether and how this should be recognised in measuring gross domestic product (GDP) has been the subject of growing debate. See, for example, Stiglitz, Sen and Fitoussi *Report by the Commission on the Measurement of Economic Performance and Social Progress* (2009) at para 63:

> "There have been major changes in how households and society function. For example, many of the services people received from other family members in the past are now purchased on the market. This shift translates into a rise in income as measured in the national accounts and may give a false impression of a change in living standards, while it merely reflects a shift from non-market to market provision of services. Many services that households produce for themselves are not recognised in official income and production measures, yet they constitute an important aspect of economic activity. While their exclusion from official measures reflects uncertainty about data more than it does conceptual dissent, more and more systematic work in this area should be undertaken."

A 2016 United Nations report estimated the value of unpaid care and domestic work at between 10% and 39% of global GDP: *Women's Economic Empowerment in the Changing World of Work* Report of the Secretary-General, E/CN.6/2017/3 (30 December 2016) at para 25.

phenomenon. Section 7(3) was introduced in an effort to address the obvious disadvantage suffered by the economically inactive spouse. This remedy differs, however, from the accrual regime, in that there is no automatic sharing in the economic fruits of the marriage; the claimant-spouse must, among other things, prove a contribution to the maintenance or increase of the other spouse's estate.

[71] In regard to section 9(1) of the Constitution, the High Court held that limiting the redistribution remedy to old ANC marriages was not irrational. In respect of new marriages, parties had the option of excluding the accrual system. Such an exclusion occurred as a deliberate choice in an antenuptial contract executed before a notary. The redistribution remedy was a legislative innovation to address the plight of economically disadvantaged spouses who did not have the same opportunity. By restricting the remedy to old ANC marriages, the lawmaker was honouring the principles of freedom of contract and *pacta sunt servanda* (agreements must be complied with). This legislative choice, the High Court said, was not without merit.

[72] The High Court held, however, that the differentiation was unfair discrimination in terms of section 9(3). The High Court referred to the fact that spouses in old ANC marriages had the choice, during the window-period, to adopt the accrual regime. Although this was not relevant, in the High Court's view, to the section 9(1) challenge, it was relevant to the section 9(3) enquiry. This was because spouses in old ANC marriages, like spouses in new ANC marriages, had the option to adopt or reject the accrual regime, yet only spouses in old ANC marriages were given the redistribution remedy. Economically disadvantaged spouses in new ANC marriages were deprived of a benefit given to economically disadvantaged spouses in old ANC marriages, based solely on the date of marriage.

[73] The High Court was asked to find that there was discrimination on the grounds of gender because choice for many women, so the argument went, is illusory and because the absence of a redistribution remedy in the case of new ANC marriages in practice disadvantages women more often than men. There was also an argument of

discrimination on the grounds of race, because the absence of a redistribution remedy was said to have a greater prejudicial effect on black women than other women. The High Court found it unnecessary to determine whether this was so, although it observed that "[o]nly those who go blindfolded through life can deny that gender equality has not yet been achieved in South Africa". The equality issue in the present case, so the High Court considered, was "not solely attributable to race or gender or religion, but also to economic inequity". The grounds of discrimination listed in section 9(3) are not exhaustive.

[74] The High Court referred to expert opinion that antenuptial contracts usually favour wealthier spouses and that, as a result of gender discrimination, women tend to be poorer than men. Their stereotypical roles of childcaring and housework negatively affect their earning capacity. And in this context, black women are the "marginalised of the marginalised". In the High Court's opinion, however, the constitutional validity of section 7(3) should not be considered solely from the perspective of spouses when they conclude their antenuptial contract, because there could be many legitimate reasons for spouses to exclude the accrual system despite wealth disparities. The important inequality occurred during the course of the marriage: "a distortion is caused by the fact that one spouse contributes directly or indirectly to the other's maintenance or the increase of the other's estate without any quid pro quo". This economic disparity is revealed when the marriage is dissolved. For old ANC marriages, section 7(3) allows the court to address the inequity, irrespective of the gender or race of the economically disadvantaged spouse.

[75] The differentiation, in the High Court's view, was based solely on the date of the commencement of the MPA. In regard to economic disadvantage, the only difference between old and new ANC marriages was the speculative argument that spouses in old ANC marriages might have been unaware of their right to adopt the accrual system during the window-period:

> "Speculation aside, these groups are *par excellence* in a similar situation, and yet the one group is denied the benefit of section 7(3)(a) only on the basis of the date on which their marriage was concluded. The differentiation amounts to discrimination based on the date on which a marriage was concluded because economically disadvantaged parties' human dignity is impaired if they cannot approach the court to exercise the discretion provided for in section 7(3) of the Divorce Act. Unlike their counterparts whose marriages were concluded before 1 November 1984, economically disadvantaged parties who contributed to their spouses' maintenance or the growth of their estates, are vulnerable parties whose only recourse is to approach the court for maintenance. The unequal power relationship implicit to any maintenance claim, and the extent to which it renders an economically disadvantaged party vulnerable, in the circumstances speaks for itself."

[76] In regard to the principle that contracts must be honoured, the High Court referred to *Van der Merwe*,[50] where it was stated that the constitutional validity of legislation is a matter of objective assessment and that a spouse's choice of a matrimonial property regime cannot confer validity on a law that otherwise lacks a legitimate purpose.[51] The fact that the spouses chose a particular property regime was simply one of many factors a court would take into account when asked to make a redistribution order. In other marital contexts, the lawmaker has permitted courts to override spousal choice, for example, orders for the forfeiture of patrimonial benefits,[52] for pre-dissolution division of accrual and termination of the accrual regime,[53] and for pre-dissolution division of community estates and termination of the community regime.[54]

[77] The High Court rejected an argument from the amicus that the existence of a maintenance claim negated the need for a redistribution remedy. A party receiving maintenance remains dependent on the other. This is unjustifiable in the case of a

[50] *Van der Merwe* above n 35.

[51] Id at para 61.

[52] Section 9(1) of the Divorce Act.

[53] Section 8 of the MPA.

[54] Section 20 of the MPA.

spouse who contributed to the growth of the other spouse's estate. Section 7(3) recognises the economic value of services performed in the domestic sphere, thereby respecting and protecting the dignity of that spouse.

[78] The High Court also addressed the argument that a discretionary judicial remedy is inherently uncertain. Tension between legal certainty and fairness is not novel. Uncertainty in the outcome of a redistribution claim is preferable to the irremediable harshness that might flow from denying such a remedy. The same was true of the amicus' concern that the remedy could prejudice creditors of the spouse against whom a redistribution claim is made. Such prejudice had not deterred Parliament from granting a redistribution remedy for old ANC marriages or from empowering courts to make orders for the forfeiture of benefits and for the pre-dissolution division and termination of accrual and community estates.

[79] The High Court concluded that differentiation based solely on the date of marriage did not withstand constitutional scrutiny and violated section 9(3). As to remedy, the High Court, citing *Gumede*,[55] held that there was no reason to suspend the declaration of invalidity. An appropriate remedy was simply to strike out the offending words from section 7(3)(a); this would not leave any lacuna. As to retrospectivity, the order should not affect new ANC marriages that were terminated by death or divorce before the date of the High Court's order. I have already quoted the High Court's order.

Submissions in this Court

The applicant

[80] The applicant persists with the section 9(1) challenge which the High Court rejected. And although the applicant supports the High Court's conclusion of unfair discrimination in violation of section 9(3), the applicant argues that the discrimination is on listed grounds: sex, gender, marital status, culture, race and religion.

[55] *Gumede (born Shange) v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) (*Gumede*).

[81] The applicant argues that section 7(3) differentiates between spouses to new ANC marriages on the one hand, who do not have access to the redistribution remedy, and the following classes of spouses who do have such access: spouses in old ANC marriages, BAA marriages, homeland marriages, customary marriages and Muslim marriages. The purpose of section 7(3), according to the applicant, is to counteract the inequity and injustice inflicted on spouses who contribute to the maintenance or increase of their partner's estate during marriage but have no recourse upon divorce.[56] A spouse in a new ANC marriage can suffer exactly the same inequity and injustice when the marriage is dissolved. The differentiation, so the applicant contends, is irrational.

[82] In response to the argument that spouses to new ANC marriages could have chosen not to exclude the accrual regime and thus only have themselves to blame, the applicant argues that this Court in *Bwanya*[57] rejected an argument based on freedom of choice. The applicant also finds support for such rejection in the evidence of her experts, who opined that women typically enter into marriage poorer and more dependent than men and tend to have less bargaining power. Given stereotypical roles during marriage, an ANC marriage generally favours men. The absence of a redistribution remedy for new ANC marriages fails "to correct the exploitation of women's care and domestic labour, to the direct and structural advantage of men".[58]

[83] Furthermore, so the applicant's argument goes, section 7(3) itself debunks the freedom of choice argument: its very purpose is to protect people who "chose" to marry out of community of property rather than in community of property. The applicant also cites the examples given by the High Court – orders for forfeiture of benefits and the pre-dissolution division and termination of accrual and community regimes. The choice of a property regime in an antenuptial contract is not a commercial bargain – it is imbued

[56] The applicant refers in this regard to *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 987G.

[57] *Bwanya* above n 23.

[58] This is the view expressed in the joint report by Prof Bonthuys and Dr Coetzee.

with emotional and social dimensions and is intended to last for life or at least for a long time.

[84] The redistribution remedy is only available, the applicant emphasises, in the case of divorce, that is, when marriages do not turn out as expected. (This point falls away in the light of my conclusion in Case CCT 364/21.) The remedy is under judicial control and can only be granted if certain conditions are met and in order to avoid inequity and injustice.

[85] The differentiation offends section 9(1), according to the applicant. If the lawmaker differentiated because of the different choices available to spouses to old and new ANC marriages respectively, the differentiation does not make sense. The redistribution remedy is available to spouses in old ANC marriages despite their choice to exclude community of property, but is not available to spouses in new ANC marriages because of their choice to exclude the accrual system. People who "choose" to marry out of community of property are equally deserving of protection, whether or not they also "choose" to exclude the accrual system.

[86] The differentiation also offends section 9(3) on various listed grounds. In this regard, the applicant distinguishes between the different types of marriages which enjoy access to the redistribution remedy:

(a) As between new and old ANC marriages, there is differentiation on the basis of gender and sex, because the absence of the remedy has a more severe impact on women than men. According to the joint report of the applicant's experts, marriage statistically enhances men's financial prospects while negatively affecting women's. This means that men and women are often not similarly situated when marriages end. The absence of an equitable judicial remedy typically disadvantages women. Women may also be trapped in abusive marriages because they do not have the means to support themselves if the marriage were to be dissolved.

(b) As between new ANC marriages and BAA marriages, there is discrimination on the grounds of race. This is so, argues the applicant, because spouses in BAA marriages, who would all be black persons, have the benefit of the redistribution remedy whereas spouses in new ANC marriages do not.

(c) As between new ANC marriages on the one hand, and homeland and customary marriages on the other, there is, according to the applicant, differentiation on the basis of marital status. Spouses married under South African civil law only enjoy the remedy if they got married before 1 November 1984 whereas spouses married under homeland or customary law enjoy the remedy regardless of when they got married. This is also irrational, according to the applicant, and thus an infringement of section 9(1).

(d) As between new ANC marriages and Muslim marriages, there is, so the applicant argues, differentiation on the basis not only of marital status but also of religion and culture.

The CGE

[87] Since the CGE unequivocally supports confirmation, I take its submissions next. The CGE argues, first, that South Africa has relevant obligations under international law. It is a party to the Convention on the Elimination of All Forms of Discrimination against Women[59] (CEDAW). In terms of Article 16(1), State Parties must take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and must, among other things, ensure, "on a basis of equality of men and women . . . [t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property".[60]

[59] Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (ratified by South Africa on 15 December 1995).

[60] Id at Article 16(1)(h).

[88] The CGE also refers to the commentary on Article 16 in several General Recommendations issued by the CEDAW Committee.[61] According to the Committee, financial and non-financial contributions in a marriage should be accorded equal weight.[62] Where antenuptial contracts are permitted, State Parties must ensure that women are not, due to unequal bargaining power, left with less protection than they would have under the default property regime.[63] As a general principle, the economic advantages and disadvantages of a marriage should be shared equally when it is dissolved.[64]

[89] The CGE also cites Article 7(d) of the African Union's Maputo Protocol,[65] which requires an equitable sharing of joint property upon dissolution of marriage. In a General Comment on this provision,[66] the African Commission has said that State Parties must, in recognition of women's unequal position, implement special measures

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[61] The Committee on the Elimination of Discrimination against Women. This Committee is a body of independent experts that monitors implementation of CEDAW. It consists of 23 experts on women's rights from around the world.

[62] CEDAW Committee, General Recommendation No. 21: Equality in Marriage and Family Relations, 1994 (General Recommendation No. 21) at para 32, which reads:

> "In some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight."

[63] CEDAW Committee, General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women: Economic Consequences of Marriage, Family Relations and their Dissolution, 2013 (General Recommendation on Article 16) at para 34.

[64] Id at para 45. See also para 46 which states:

> "State parties are obligated to provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage. States parties should recognise the value of indirect, including non-financial, contributions with regard to the acquisition of property acquired during the marriage."

[65] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 (Maputo Protocol) (ratified by South Africa on 17 December 2004).

[66] African Commission on Human and Peoples' Rights, General Comment No. 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: The Right to Property during Separation, Divorce or Annulment of Marriage (Article 7(d)), 2020.

aimed at ensuring their property rights upon divorce, with an emphasis on substantive equality. This may require apportioning more than half of the property to the wife.[67]

[90] The CGE submits that these international instruments not only permit but oblige South Africa to allow departure from unjust antenuptial contracts in all marriages. Section 7(3) is said to be inconsistent with this international obligation.

[91] The CGE then turns to a comparative analysis, which it acknowledges is not exhaustive. In its submission, South Africa would not be out of step with comparable democracies if it extended the scope of section 7(3). The CGE identifies four countries that have similar constitutional values to ours and where a redistribution remedy is available despite the terms of an antenuptial contract:

(a) In Kenya, the court may set aside an antenuptial contract that is "manifestly unjust".[68]

(b) In England and Wales, an antenuptial contract is not legally binding but a court may have regard to it when granting financial remedies, the weight depending on the circumstances.[69]

(c) In Canada, four provinces are said to permit departures from antenuptial contracts to ensure fairness and justice.[70] CGE also refers to *RS v PR*,[71] a

[67] Id at paras 40-3.

[68] Section 6(4) of the Matrimonial Property Act 2013.

[69] Sections 24 and 25 of the Matrimonial Causes Act 1973. In regard to antenuptial contracts, the CGE cites the seminal apex decision in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42; [2011] 1 AC 534; [2011] 1 All ER 373 (*Radmacher*).

[70] According to the CGE, these are: British Columbia (section 93(3) and (5) of the Family Law Act 2011); Ontario (section 56(4) of the Family Law Act 1990); New Brunswick (section 41 of the Marital Property Act 1980); and Nova Scotia (section 29 of the Matrimonial Property Act 1989). Three of these examples might, however, be questionable. In Ontario, a domestic contract may only be set aside for non-disclosure or if the spouse did not understand the nature and consequences of the contract or "otherwise in accordance with the law of contract". In New Brunswick, the 1980 Act has been replaced by the Marital Property Act 2012. Section 43(b) of the latter Act, which is similar to section 41 of the 1980 Act, only permits a court to disregard a domestic contract on grounds of inequity if a spouse concluded it "without receiving legal advice from a person independent of any legal adviser of the other spouse". In the case of Nova Scotia, section 29 only permits a court to vary the terms of an antenuptial contract if the terms are "unconscionable, unduly harsh on one party or fraudulent". For a discussion of the regimes prevailing in the various provinces as of 2004, see *Hartshorne v Hartshorne* 2004 SCC 22 (CanLII), [2004] 1 SCR 550 (*Hartshorne*) at paras 74-5.

[71] *R.S. v P.R.* 2019 SCC 49 (CanLII), [2019] 3 SCR 643.

decision of the Supreme Court of Canada, where Abella J in a concurring judgment spoke of "consensus about spousal equality in the context of marriage dissolution in various international instruments".[72]

(d) In New Zealand, the default position is equal division of property upon dissolution.[73] Although spouses can opt out,[74] a court may set aside an opt-out agreement if giving effect to it would cause serious injustice.[75] "Serious injustice" has, however, been said to be a "high threshold".[76]

[92] The CGE also seeks to buttress the applicant's response on the choice argument. It contends that the primary justification in the constitutional era for holding parties to contracts is a "utilitarian commercial one". This rationale does not hold for matrimonial agreements, which are not commercial bargains. Marriage should be motivated by love, not property. Moreover, in other contexts our courts have refused to enforce contracts that are contrary to public policy. Antenuptial contracts often involve unequal bargaining power and to enforce them routinely can have severe consequences for a spouse. Expanding the scope of judicial intervention would not be a radical departure from existing law.

[93] Finally, the CGE submits that sections 7(3) to (6) of the Divorce Act should give clearer guidance to courts on how to exercise their discretion, with an equal division of assets being the starting point. The CGE does not ask us to make findings on this but merely to recognise that in its current form section 7(3) is not a panacea and that further law reform may be needed to give full protection to women's rights.

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[72] Id at para 126. The question in that case was whether a wife's divorce proceedings in Québec should be stayed pending the outcome of divorce proceedings brought by the husband in Belgium. The husband had exercised a right, conferred by Belgian law, to revoke gifts to his wife. The approach in Canada was that if the law of Québec would not recognise this revocation, the stay of the Canadian proceedings should be refused.

[73] Section 1C(3) of the Property (Relationships) Act 1976.

[74] Id at sections 21-21F.

[75] Id at section 21J.

[76] *White v Kay* [2017] NZHC 1643 at para 59. In the same paragraph, Ellis J stated that "generally speaking, mere inequality or disparity between the parties, in terms of the division of property effected by an agreement is unlikely to be decisive in determining whether that threshold is met". In *White* the Court held that this high threshold was met. In *Winders v Winders* [2018] NZHC 860, by contrast, the claim failed.

The Minister

[94] The Minister makes submissions in accordance with what he conceives to be his duty where the constitutional validity of a statute is an issue. In that regard, and although he does not oppose confirmation, he explains the purpose of section 7(3) as being to provide a remedy for spouses in old ANC marriages who, for whatever reason, did not avail themselves of the opportunity to adopt the accrual regime during the window-period.

[95] In regard to remedy, he submits that the declaration of invalidity, if confirmed, should be suspended for 24 to 36 months. He says that in 2018 the South African Law Reform Commission[77] (SALRC) began a review of our matrimonial property law. Several Issue Papers were published, which raised among other things an extension of the redistribution remedy. The arguments made in comments against the extension included that: an extension would not respect spouses' right to contract; an aggrieved spouse has remedies in law; the extension would perpetuate and encourage ignorance of the law; the redistribution remedy had only been granted for a specific and limited purpose; the extension would increase the cost and time spent on litigation; and it would create uncertainty. Those in favour of the extension said that it would prevent women from "contracting themselves into poverty" and would ensure a balance of power. These competing arguments are currently being considered by the SALRC. They are said to "[touch] deep on public and private issues". It is a complex terrain where Parliament must be allowed to take the lead.

The GAA

[96] The GAA submits that the before/after differentiation is rational. The redistribution remedy was introduced for a limited purpose – to alleviate the plight of women who never had the choice to marry according to the accrual regime and whose

[77] The name of the Commission was changed from the South African Law Commission to the South African Law Reform Commission with effect from 17 January 2003.

only way of escaping the husband's marital power was by way of an antenuptial contract excluding community of property. The remedy will fall into disuse over time as the number of old ANC marriages dwindle.

[97] As to discrimination, the GAA disputes that the differentiation between spouses in new ANC marriages and Muslim marriages is differentiation based on religion. This Court in *Women's Legal Centre Trust* could only remedy the harm suffered by wives in Muslim marriages by taking advantage of the existing statutory remedy in section 7(3). The Court was not legislating. The GAA also disputes that the differentiation between spouses in new ANC marriages on the one hand, and customary marriages, homeland marriages and BAA marriages on the other, is differentiation based on race or culture. The position of the latter class of spouses is much the same as that of spouses in old ANC marriages. Even if there is discrimination on the basis of religion, race or culture, it is fair.

[98] While allowing the redistribution remedy for old ANC marriages is constitutionally justified, to extend it to new ANC marriages would, the GAA argues, be an unjustifiable arbitrary deprivation of property infringing section 25(1) of the Constitution. Section 7(3) is wide enough to include assets acquired by a spouse before the marriage, even though the claimant-spouse made no contribution to the acquisition of those assets.

[99] The GAA submits that extending the redistribution remedy will result in uncertainty in the law of contract, which is inimical to the rule of law. The GAA, citing *Beadica*,[78] submits that the principle that contracts must be honoured gives effect to the "central constitutional values of freedom and dignity". The GAA also references the statement by Cameron JA in *Brisley*[79] that contractual autonomy is part of freedom and informs the constitutional value of dignity. The GAA submits that no evidence has been

[78] *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 83 (*Beadica*).

[79] *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at para 93.

adduced to show that women are generally in a weaker bargaining position than men when getting married, adding that such an argument also ignores the position of same-sex spouses. At any rate, according to the GAA, the argument based on weaker bargaining position is not true for *all* women. A woman who finds herself in an imprudent community or accrual marriage has no remedy to evade its consequences. Why should it be different in an imprudent ANC marriage? Existing contractual principles, including those based on public policy, are a sufficient safeguard.

[100] The GAA criticises the applicant for failing to address the position of creditors, which was a concern raised with the SALRC by the Clearing Bankers Association of South Africa. Section 21 of the MPA requires notice to creditors when spouses change their matrimonial property regime, which reflects the lawmaker's appreciation of the impact which a change of property regime can have on creditors. When lending to spouses in new ANC marriages, creditors were entitled to rely on the complete economic separation of the spouses.

[101] Finally, the GAA submits that, if the declaration of invalidity is confirmed, it should not apply to marriages entered into before the date of the order.

Section 9 analysis

Differentiation

[102] The High Court identified the relevant differentiation as being the date differentiation between old and new ANC marriages. The applicant, on the other hand, sets up multiple differentiations: spouses in new ANC marriages on the one hand, and spouses in old ANC marriages, BAA marriages, homeland marriages, customary marriages and Muslim marriages on the other.

[103] All these differentiations exist, but what lies at their heart is not the date of the marriages or the legal or religious systems under which they were concluded as such, but the presence or absence of the accrual regime as the default regime for marriages

out of community of property. The default accrual regime did not exist for old ANC marriages, which was the first class of marriage to be accorded the redistribution remedy. BAA marriages, added in 1988, were, by default, out of community of property and without the accrual system. They thus stood on the same footing as old ANC marriages. The same is true of homeland marriages, which was the third class of marriage added to section 7(3). In the case of Muslim marriages, section 7(3) is currently made applicable by virtue of this Court's order in *Women's Legal Centre Trust* rather than by an enactment of Parliament. Although this Court did not explain its thinking, section 7(3) must have been made applicable on the basis that Muslim marriages involve no form of community of property or accrual.[80] The only class of marriage which may not fit this pattern are customary marriages. If that is so, there may be particular reasons to justify a different regime, as appears from this Court's judgment in *Gumede*.[81]

Rational relationship to legitimate government purpose

[104] With the exception of customary marriages, the purpose of the differentiation is the one I identified earlier. The lawmaker made the redistribution remedy available to those spouses who got married out of community of property under a marital regime where accrual was not the default regime. The lawmaker's thinking was that if the accrual regime was applicable by default but the spouses chose to exclude it, the redistribution remedy should not be available. In general, the legislative philosophy was that parties should be bound by their choices. The uncertainties inherent in a judicial remedy should be confined to cases of complete economic separation where there was no choice to adopt or exclude the accrual system.

[80] See the High Court's judgment in that matter, *Women's Legal Centre Trust v President of the Republic of South Africa; Faro v Bingham N.O.; Esau v Esau* [2018] ZAWCHC 109; 2018 (6) SA 598 (WCC); [2018] 4 All SA 551 WCC) at para 222: "It seems to be common cause that Islamic law does not recognise the concept of communal property, and division of property." See also *Daniels v Campbell N.O.* [2003] ZAWCHC 25; [2003] JOL 11190 (C); [2003] 3 All SA 139 (C) at para 59 and Breslaw "Muslim spouses: Are they 'Equally' Married?" 2013 (December) *De Rebus* 30.

[81] *Gumede* above n 55 at paras 42-4.

[105] In principle, a government purpose of respecting and enforcing spousal choice is legitimate. The principle that contracts must be honoured is consistent with constitutional values. In *Barkhuizen*,[82] Ngcobo J, writing for the majority, said:

> "*Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But, the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy. As indicated above, courts have recognised this and our Constitution re-enforces it. Furthermore, the application of *pacta sunt servanda* often raises the question whether a purported agreement or pact is indeed a real one, in other words whether true consensus was reached. Therefore the relevance of power imbalances between contracting parties and the question whether true consensus could for that matter ever be reached, have often been emphasised."[83]

[106] In *Beadica*,[84] Theron J in her majority judgment referenced the above statement.[85] She also said:

> "The public policy imperative to enforce contractual obligations that have been voluntarily undertaken recognises the autonomy of the contracting parties and, in so doing, gives effect to the central constitutional values of freedom and dignity. This imperative provides the requisite legal certainty to allow persons to arrange their affairs in reliance on the undertakings of the other parties to a contract, and to coordinate their conduct for their mutual benefit."[86]

[107] While there may be much to be said for a matrimonial property system in terms of which the division of property upon divorce depends on a judicial determination of what is fair, and in which an antenuptial contract is at most a non-binding factor among many other circumstances, the rationality hurdle imposed by section 9(1) cannot be used

[82] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[83] Id at para 87.

[84] *Beadica* above n 78.

[85] Id at para 35.

[86] Id at para 92.

by courts to impose their preferences. Holding spouses to their contractual choices is not an illegitimate government purpose. In the language of *Prinsloo*,[87] it is "a defensible vision of the public good", even if it is not the only or the best vision. The lawmaker could legitimately take into account that there are threshold requirements for contractual capacity; there are contractual remedies if a contract is concluded as a result of mistake, misrepresentation, duress or undue influence or where its enforcement would be contrary to public policy; and the right to maintenance would shield a former spouse in a new ANC marriage from destitution.

[108] South Africa still has a matrimonial property system in which agreement and choice are central. Subject to ordinary contractual remedies, the exclusion of community of property by way of an antenuptial contract or the adoption of the accrual regime through its non-exclusion in the antenuptial contract are final choices.[88] The same is true of promises made in an antenuptial contract for giving gifts and the like. Even in the case of old ANC marriages, section 7(3)(a) confines the redistribution remedy to cases where the antenuptial contract excludes community of property, community of profit and loss and accrual sharing "in any form". This implies that if some allowance is made in the antenuptial contract for community or accrual, even though it falls short of a full community or full accrual regime, the parties are bound by their choice. Although, as the CGE has pointed out in its submissions, there are democratic countries which allow significant judicial interference in matrimonial

[87] *Prinsloo* above n 30 at para 25.

[88] Although section 9 of the Divorce Act has codified the common law jurisdiction which allows a divorce court to make an order of forfeiture of benefits in the case of community marriages and although section 9 of the MPA has extended this jurisdiction to the case of accrual marriages, the circumstances in which this can occur are quite different from those at play in a redistribution remedy. A court may make a forfeiture claim if it is satisfied that, but for a forfeiture order, the one party would be unduly benefited in relation to the other. The court must take into account the duration of the marriage, the circumstances which gave rise to the breakdown "and any substantial misconduct on the part of either of the parties". In marriages which have lasted for a lengthy time, substantial misconduct will usually be the important consideration. Forfeiture is of no advantage to an economically disadvantaged spouse who contributed less to the joint estate or to the total accrual than the other spouse. It is not a mechanism for redistributing assets on the basis of what is fair and just: see Heaton "The Proprietary Consequences of Marriage" in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta & Co Ltd, Cape Town 2014) at 91-4 and Church "Proprietary Consequences of Marriage" in *LAWSA* 2 ed (2006) vol 16 at para 90.

property choices, it is equally true that there are democratic countries where the scope for judicial interference is more limited.[89]

[109] It may be justifiable to treat spouses on the threshold of marriage differently from other contracting parties, but it cannot be said to be rationally imperative to do so. I accept that an antenuptial contract is not an ordinary commercial transaction. There may be emotional or cultural reasons why prospective spouses do not press for their own commercial advantage in antenuptial contracts. The applicant's expert, Ms Ancer, adds that there are biological and physiological factors that may cause people who are strongly in love or still young to make unwise contractual choices. But is it irrational for the lawmaker to follow a policy which encourages prospective spouses to be level-headed when making important decisions about their long-term futures?

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[89] In Canada, the grounds of interference in Ontario and New Brunswick appear to be very limited: see n 70 above.

In Australia, judicial interference is limited to cases where one of the spouses was guilty of "unconscionable" conduct at the time the antenuptial contract was concluded. Hardship when the contract is enforced at divorce is not a statutory ground of interference. Antenuptial contracts are governed by sections 90B to 90K of the Family Law Act, 1975. "Unconscionable" conduct in the statutory sense might often overlap with conduct which the common law would address by defences such as undue influence, duress, misrepresentation and non-disclosure. See, for example, *Thorne v Kennedy* [2017] HCA 49; (2017) 350 ALR 1, where the majority found that the antenuptial contract was vitiated both by common law undue influence and by statutory unconscionable conduct (at paras 54-62 and 63-5), while Nettle J thought that the case might have been capable of being disposed of on the basis of duress (at paras 70-3).

In the United States of America, a number of states likewise focus only on unconscionable conduct at the time the antenuptial contract is concluded. The Uniform Premarital and Marital Agreements Act, 2012, drafted by the National Conference of Commissioners on Uniform State Laws, has been adopted with modifications by many states. Section 9 deals with the enforcement of premarital agreements. Section 9(f)(i) empowers a court to refuse to enforce terms of a premarital agreement if, in the context of the agreement taken as a whole, the term was unconscionable at the time of signing. There is an optional section 9(f)(2), which some states have adopted, allowing the court also to do so if enforcement would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed. See Debele and Rhode "Prenuptial Agreements in the United States", available on the website of the International Academy of Family Lawyers: https://www.iafl.com/media/1169/prenuptial_agreements_in_the_us.pdf.

In Australia and the United States, the enforceability of prenuptial agreements depends on whether the spouse seeking to escape its terms obtained or had access to independent legal advice. In South Africa, where an antenuptial contract has to be executed before a notary, it is the notary's duty to make sure that the prospective spouses fully understand the proprietary consequences of marriage and how these consequences can be changed by contract: Lowe et al *Elliott: The South African Notary* 6 ed (Juta & Co Ltd, Cape Town 1987) at 46 and 61-2.

In continental Europe, antenuptial contracts involving the waiver of spousal support are generally looked at askance. In Germany, antenuptial contracts are dealt with in accordance with ordinary contractual principles, although the German courts appear to have developed those principles so as to provide some measure of protection for an economically disadvantaged spouse.

[110] Different views have been expressed in this Court on the significance to be attached to choice in the domestic sphere, as is apparent from the majority and minority judgments in *Volks N.O.*[90] and *Bwanya*.[91] Those cases were concerned with choice in the context of justifying section 9(3) discrimination on the basis of marital status. At this stage I am concerned with a rationality enquiry under section 9(1). What the judgments in *Volks N.O.* and *Bwanya* show is that Judges, even those in the apex Court, may hold different views as to the significance to be attached to domestic choices. It would be difficult, in those circumstances, to conclude that differentiation based on the choices available to spouses is not a defensible vision of the public good.

[111] In the context of section 9(3), the High Court attached significance to the fact that spouses in old ANC marriages had the choice, during the window-period, to adopt the accrual regime. Since the point may be relevant to the section 9(1) analysis, I deal with it here. The High Court seems to have equated the conversion choice available to spouses in old ANC marriages with the choice available to spouses in new marriages to exclude or retain the accrual system. There are, however, two important differences:

(a) First, prospective spouses in new marriages by antenuptial contract will be concluding a contract and appearing before a notary who will advise them of the default position and of their right to exclude the accrual system. Spouses in old ANC marriages would already have concluded an antenuptial contract by the time the MPA came into force. They may have been unaware that the MPA gave them a window-period during which they could adopt the accrual system.

(b) Second, and perhaps more importantly, in the case of new marriages both prospective spouses have an individual pre-marital choice. If the one prospective spouse says she wants the accrual system, she cannot be forced to get married without it. Her wish to have the accrual system might at that stage be acceptable to her future husband. He might even

[90] *Volks N.O.* above n 36.

[91] *Bwanya* above n 23.

> feel sheepish to say that he is not willing to share the fruits of the pending marriage. Things were quite different for spouses in old ANC marriages when the MPA came into force on 1 November 1984. Unless they both agreed to adopt the accrual system, their ANC would continue to apply. By that stage, the relationship might have been less happy than it once was. Any leverage which one party might have had before marriage no longer existed.

[112] The applicant's rationality argument on choice is different. The applicant contends that prospective spouses to old ANC marriages also had a choice before marrying, namely whether to marry in or out of community of property. Despite the fact that they chose to marry out of community of property, the lawmaker gave them a redistribution remedy. Again, I do not think the comparison is just. The statistical evidence in 1984 showed that most marriages out of community of property were concluded on the basis of a standard antenuptial contract which excluded community of property, community of profit and loss and the marital power. It was an all-or-nothing choice. There was no realistic regime for merely sharing in the financial fruits of the marriage, while keeping other property separate and excluding marital power. The accrual regime was introduced to give spouses a legally certain and predictable middle course. The redistribution remedy did not compensate spouses in old ANC marriages for the exclusion of community of property; it compensated them for the absence of right to share in marital accrual.

[113] I thus conclude that the differentiation in the before/after issue does not infringe section 9(1) of the Constitution.

Unfair discrimination

Old and new ANC marriages

[114] I shall start the unfair discrimination analysis by considering the differentiation between spouses in old and new ANC marriages. The High Court did not find that the

differentiation was based on a ground listed in section 9(3) but said that the list is not exhaustive. My difficulty with the High Court's subsequent reasoning, however, is that the High Court did not find that the differentiation was based on human attributes or characteristics. The sole basis of differentiation, according to the High Court, was the date of marriage. That, however, is not an attribute or characteristic of the kind contemplated in *Harksen*. The non-availability of a redistribution remedy might impair a divorcing spouse's dignity by not financially rewarding her contribution to the marriage and by leaving her dependent on her former spouse for maintenance. However, differential treatment may have consequences of this kind without being based on human attributes and characteristics.

[115] The applicant argues that the basis of differentiation is indeed on listed grounds: gender and sex.[92] This is on the strength of expert evidence that when marriages fail it is more often women than men who are prejudiced by the absence of a redistribution remedy. This disparity exists only in heterosexual marriages, and its precise extent is difficult to know. Nowadays it is not unusual for both spouses to work, leaving children in the day-care of extended family or an employee. And as the High Court pointed out, stereotypical roles are sometimes reversed.

[116] I nevertheless accept that this disparate effect is a present-day reality. It is borne out by the expert evidence put up by the applicant and accords anecdotally with what we all observe in society and, in the case of Judges, with the matrimonial cases that serve before them.

[117] But is the differential treatment based on gender? Section 9(3) provides that the state may not unfairly discriminate, "directly or indirectly", against any person on one or more of the listed grounds. In *Walker*,[93] this Court stated that the inclusion of both

[92] In what follows, I shall refer only to gender, because in the context of the present case sex does not seem to add a further dimension to the analysis.

[93] *City Council of Pretoria v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

direct and indirect discrimination "evinces a concern for the consequences rather than the form of conduct" and "recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination".[94] On this basis, the municipality in *Walker* was found to have been guilty of indirect discrimination on the basis of race by charging its residents differentially for electricity: residents of "old Pretoria" were charged for actual consumption while residents of Mamelodi and Atteridgeville were charged a flat rate. Although the direct basis of differentiation was geographic (not a listed ground), indirectly the differentiation was based on race, because the majority of residents of old Pretoria were white and the majority of residents in Mamelodi and Atteridgeville were black.

[118] Indirect discrimination also featured in *Mahlangu*.[95] That case concerned the definition of "employee" in the Compensation for Occupational Injuries and Diseases Act.[96] The definition listed a number of express inclusions and exclusions. One of the exclusions was "a domestic employee employed as such in a private household". This Court found that the differentiation in this respect was indirect discrimination on the basis of race, sex and gender. Although superficially the differentiation was merely between types of employees (not a listed ground), there was indirect discrimination on the basis of race, sex and gender, because domestic workers in South Africa were overwhelmingly black women.[97]

[119] Most recently, this Court in *VJV*[98] used indirect discrimination as one of the grounds for declaring section 40 of the Children's Act[99] constitutionally invalid. This provision allows spouses to have parental rights and responsibilities where a child is born through artificial fertilisation by using the gamete or gametes of one of the spouses.

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[94] Id at para 31.

[95] *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC) (*Mahlangu*).

[96] 130 of 1993.

[97] *Mahlangu* above n 95 at paras 73 and 92-3.

[98] *VJV* above n 26.

[99] 38 of 2005.

On its face, the section included all heterosexual and same-sex spouses and excluded all heterosexual and same-sex permanent life partners, so that there was no direct discrimination on the basis of sexual orientation. In reality, however, only the relatively small percentage of heterosexual permanent life partners suffering from infertility would need to have recourse to artificial fertilisation if they wanted their own biological child whereas all same-sex permanent life partners would have to use artificial fertilisation for that purpose. There was thus indirect discrimination on the basis of sexual orientation.[100]

[120] To return to the present case, the direct differentiation is based on date of marriage which is in turn based on the absence or availability of the accrual regime as a default regime for marriages out of community of property. These are not listed grounds nor are they grounds based on the characteristics and attributes of the spouses in question. Indirectly, though, the burden of the exclusion of new ANC marriages in section 7(3) falls more heavily on women than men.

[121] Prof Bonthuys and Dr Coetzee in their joint report make some trenchant points in this regard. They say that there is a large body of scholarship showing that apartheid not only institutionalised racial discrimination but also hinged on and entrenched gender inequality.[101] A 2016 study reported that South African women are significantly more likely to be "multidimensionally poor" (that is, lacking adequate access to nutrition, health, education and basic services) than men,[102] with this burden of poverty falling more heavily on black women than white women.[103] Women in South Africa are typically less securely employed than men, and employed women are concentrated in

[100] *VJV* above n 36 at paras 48-59.

[101] Seidman "Gendered Citizenship: South Africa's Democratic Transition and the Construction of a Gendered State" (1999) 13 *Gender and Society* 287 at 291. (The citations here and in the other footnotes to my discussion of the joint report by Prof Bonthuys and Dr Coetzee are those given by them in their expert report.)

[102] Rogan "Gender and Multidimensional Poverty in South Africa: Applying the Global Multidimensional Poverty Index (MPI)" (2016) 126 *Social Indicators Research* 987 at 995.

[103] Burger, Von Fintel and Van der Watt "Household Social Mobility for Paid Domestic Workers and Other Low-Skilled Women Employed in South Africa" (2018) *Feminist Economics* 1 at 2.

sectors which are typically less advantageous when it comes to remuneration and terms of employment – retail, catering and accommodation. South Africa has among the highest mean and median gender income gaps,[104] and the disparity increases with age.[105]

[122] The result, say these experts, is that women typically enter into marriage poorer and more dependent than men, and therefore have less bargaining power. During the marriage, cultural understandings and practices often exploit and deepen the inequalities by supporting an unequal division of care and household labour. Women in South Africa are least likely to be employed if they are married and most likely to be employed if they are divorced or have never been married.[106] The devaluation of women's unpaid domestic work affects public perceptions about the kinds of work for which they are suited and the low economic value placed on such work. This contributes to "vertical segregation of the workplace, in which women tend to occupy certain low-paying jobs which are associated with unpaid household labour". The effects of gender inequality in marriage are exacerbated by high levels of physical, sexual and other forms of violence which characterise intimate relationships. Women with no hope of attaining a share of marital property on divorce may be trapped in violent relationships.

[123] Prof Bonthuys and Dr Coetzee conclude:

> "The lack of a mechanism whereby the courts can ensure an equitable division of assets after the dissolution of marriage on account of one spouse's informal and unacknowledged contribution to the other's estate means that the legal rules fail to

[104] "Mean" refers to the average wages for women and men, while "median" refers to the middle of female and male pay distributions. According to a 2018-19 report, the mean and median female wages were 20% and 26% respectively lower than those of men. The gap is higher when the comparison is limited to monthly wages – 28.6% and 30.8%. When the remuneration of men and women with the same educational qualifications, experience and responsibilities are compared (a so-called "factor-weighted" comparison), South Africa's pay gap remains among the highest of high middle income countries: International Labour Organisation *Global Wage Report 2018/19* at pages xiv and 6 and figures 3.1, 13-15, 19-22 and 35.

[105] While mean male earnings increase in each age group, mean female wages remain stagnant and even decrease with age: Statistics South Africa *Labour Market Dynamics in South Africa, 2017* table 4.12. (The joint experts refer to figure 4.12, but that seems to be an error.)

[106] Janse van Rensburg, Claassen and Fourie "The Relationship between Marital Status and Employment in South Africa" (2019) 12 *Journal of Economic and Financial Sciences* 1 at 5 and table 6.

> correct the exploitation of women's care and domestic labour, to the direct and structural advantage of men.
>
> …
>
> [M]en and women are often not similarly situated when marriages end, with women typically being financially worse off than their male partners. When the law binds couples to the terms of their marriage contracts without offering courts the discretion to make adjustments when it is just and equitable to do so, it is typically women who are unfairly disadvantaged. In such cases the law works to maintain a system that devalues care labour and keeps women financially dependent on, and in the service of, their husbands. At the same time, the law protects the interests of (mostly male) wealthier spouses, by not requiring them to share with their spouses."[107]

[124] Sometimes indirect discrimination may take the form of a measure which lays down different rules for different classes of persons (*Walker*). Or the measure may expressly exclude a particular class (*Mahlangu*). Or the measure, by being under-inclusive, carries with it an implicit exclusion (*VJV*). Section 7(3) can be said to be of the latter class – by conferring the redistribution remedy on spouses in old ANC marriages, the lawmaker has implicitly excluded spouses in new ANC marriages.

[125] This Court's judgment in *Gumede* is instructive, even though the Court did not expressly invoke indirect discrimination. Section 7(1) and (2) of the Recognition Act in its original form provided that the proprietary consequences of a customary marriage entered into before the commencement of the Act (15 November 2000) continued to be governed by customary law, whereas a customary marriage entered into after the commencement was in community of property and of profit and loss unless those consequences were specifically excluded in an antenuptial contract. The Gumedes entered into a customary marriage many years before the commencement date. In terms of the applicable customary law as codified in the Natal Code of Zulu Law,[108] the husband was the head of the family and the owner of all family property and the wife,

[107] Joint report by Prof Bonthuys and Dr Coetzee at paras 3.25 and 3.28.

[108] The Natal Code of Zulu Law published in Proc R151 of 1987, *GG* No 10966, in particular sections 20 and 22 thereof, given the force of law by section 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985.

upon dissolution, had no claim to any family property. This Court found that the combined effect of section 7(1) and (2) and the Natal Code violated section 9(3):

> "These impugned provisions are self-evidently discriminatory on at least one listed ground: gender. The provisions are discriminatory as between wife and husband. Only 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 it is fair. And within the class of women married under customary law, the legislation 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."

[126] The first part of the above passage refers to the discrimination brought about by the Natal Code. The second part deals with the distinction drawn in section 7(1) and (2) of the Recognition Act. Although, viewed in isolation, the differentiation drawn in the Recognition Act was between two classes of women, and was thus not itself – so it seems to me – discrimination based on gender, it was rendered such when account as taken of the unequal treatment between men and women in the Natal Code.

[127] In the present case, women in old ANC marriages are treated differently from women in new ANC marriages. While this differentiation is not directly a differentiation based on gender, its practical effect in the case of new ANC marriages is to prejudice women and benefit men disproportionately. Unlike *Gumede*, where this impact was brought about by a second piece of legislation (the Natal Code), here the impact is brought about, as it was in *Mahlangu*, by social realities.

[128] I thus conclude that section 7(3) indirectly discriminates against spouses on grounds of gender. This is presumptively unfair, so the next question is whether the presumption has been rebutted. The Minister, as the state's representative, did not put up an affirmative case for fairness, but we must still consider the question, having regard to what is known about the purpose of the differentiation and the submissions advanced by the GAA.

[129] It is not in dispute that when a new ANC marriage terminates a woman may suffer the same hardship that moved the lawmaker to introduce the redistribution remedy for spouses in old ANC marriages. The facts of the present case are not relevant to the objective validity of section 7(3) but they are likely not to be atypical. Mr and Mrs G were 25 and 21 respectively when they signed a standard antenuptial contract excluding the accrual system. According to Mrs G, she was "young, naïve and in love". She also felt that unless she signed it the marriage would not go ahead. Some 29 years later, she instituted divorce proceedings. In the intervening three decades she had, according to her, contributed in manifold ways to make her husband a wealthy and successful farmer. Without a redistribution remedy, she is – like many wives in old ANC marriages would have been but for section 7(3) – confined to claiming maintenance.

[130] The primary focus, in assessing whether discrimination is unfair, is its impact on those discriminated against.[109] The hardship for women in new ANC marriages on divorce can be very great. Women have in the past suffered from patterns of disadvantage. A woman's fundamental human dignity is impaired when no recognition is given to the contribution she has made to the increase in her husband's estate. In its 1982 report, the SALC said that the objection to a system of complete economic separation was not the risk of a wife being left destitute (maintenance might be sufficient to avoid that risk); it was that she could not claim, as of right, a share of that which was achieved with her assistance. It was mainly for this reason that the majority report of the SALC recommended that the redistribution remedy be made available for both old and new ANC marriages.

[131] If differentiation on a listed ground is aimed at achieving a "worthy and important societal goal" rather than impairing the interests of the complainant-class, a

[109] *Harksen* above n 14 at para 54(b)(ii).

court might find that the discrimination is fair.[110] The lawmaker's primary reason for withholding a redistribution remedy from spouses in new ANC marriages is the choice that was open to them to marry with the accrual system. Although I have concluded that the valuing of choice may serve as a legitimate government object for purposes of section 9(1), it is not necessarily sufficient to render discrimination on the basis of gender fair. For several reasons, the lawmaker's emphasis on choice cannot be decisive in the fairness enquiry.

[132] First, there are degrees of voluntariness when it comes to contractual choice. For this reason, Parliament has intervened in other spheres of relations, such as employment, consumer law and the granting of credit. Some prospective spouses may be commercially savvy or have the benefit of independent advice, but for many others this is not the case. Prospective spouses are often young, in love and looking forward to a long relationship. A prospective spouse may readily succumb to pressure to sign a standard antenuptial contract excluding the accrual regime. The pending marriage may have been announced and organised by the time the prospective spouses come to consider an antenuptial contract. The danger of imprudent decision-making is ever-present in this setting.

[133] Second, valuing spousal choice and allowing a redistribution remedy does not have to be a binary choice. In terms of section 7(5)(d) of the Divorce Act, a court considering a redistribution claim can take into account "any other factor which should in the opinion of the court be taken into account". This is as wide as can be. The fact that the parties concluded an antenuptial contract excluding the accrual regime could be taken into account. The weight this factor should receive would depend on the circumstances.

[110] Id at para 52(b).

[134] Other jurisdictions have adopted this approach. In England, the leading case is *Radmacher*,[111] where the range of relevant circumstances was discussed at length,[112] the fundamental test being encapsulated thus:

> "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement".[113]

[135] In Canada, as the CGE has pointed out, judicial intervention in domestic contracts is allowed in differing circumstances. The greatest freedom of intervention appears to be in British Columbia. *Hartshorne*,[114] which was concerned with the British Columbia legislation, reflects how various factors are taken into account in assessing the weight to be attached to a marriage agreement. The majority concluded its judgment as follows:

> "Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfil the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the [Family Relations Act] permits a court, upon application, to find that an agreement or the statutory regime is unfair and to re-apportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must take into account what was within the realistic contemplation of the parties, what

[111] *Radmacher* above n 69.

[112] Id at paras 68-83.

[113] Id at para 75.

[114] *Hartshorne* above n 70.

> attention they gave to changes in circumstances or unrealised implications, then what are their true circumstances, and whether the discrepancy is such, given the section 65 factors, that a different apportionment should be made."[115]

[136] Another relevant factor, in assessing the constitutional standard of fairness in section 9, are this country's international law obligations, to which I made reference in summarising the CGE's submissions. The international instruments by which South Africa is bound on the international plane militate against accepting, as fair, a form of discrimination which continues in the main to prejudice women.

[137] The remedy accorded by section 7(3) can only be granted if the court deems it "equitable and just", having regard to the claimant's contribution and other relevant factors, factors which would include – if the remedy were available to new ANC marriages – the choice made by the spouses to exclude the accrual system. So one may ask rhetorically: How can it be a fair form of discrimination to withhold, from one class of spouses and in particular women in that class, a fair judicial remedy of which they may have as much need as other spouses and the fairness of which will take into account the choice the spouses made when concluding their antenuptial contract? In my view, this question cannot be plausibly answered. The discrimination is unfair.

Section 36 of the Constitution – justification

[138] The burden rests on the state to justify the unfair discrimination which I have found to exist. This may require not only legal argument but the adducing of factual material, data and policy considerations.[116] Once again, the Minister has not set out to discharge this burden, save for pointing to the policy underlying the differentiation, in

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[115] Id at para 67. The factors listed in section 65 of the British Columbia legislation are: the duration of the marriage; the duration of the period during which the spouses have lived separate and apart; the date when property was acquired or disposed of; the extent to which property was acquired by one spouse through inheritance or gift; the needs of each spouse to become or remain economically independent and self-sufficient; or any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the property or the capacity or liabilities of a spouse.

[116] *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) at para 19. See also *Gumede* above n 55 at para 37.

other words the choice argument based on the availability of the accrual regime as from 1 November 1984. I have already dealt with that in the context of the fairness enquiry, and it fails as a ground of justification for the same reason.

[139] I will touch briefly on other justifications mentioned in the submissions. The argument that a redistribution remedy for new ANC marriages would amount to an arbitrary deprivation of property contrary to section 25(1) of the Constitution is without merit. It is anything but arbitrary to recognise, by way of a financial remedy, the contribution which one spouse has made to the increase of the other spouse's estate. The requirements that the award should be just and equitable, that the claimant should in fact have contributed directly or indirectly to the maintenance or increase in the other spouse's estate, and that the award should take into account the factors specified in section 7(5) mean that the court is not granted an arbitrary discretion.

[140] To the extent that the remedy can be regarded as creating uncertainty, this has already been tolerated by the lawmaker in respect of old ANC marriages, BAA marriages, homeland marriages and customary marriages and by this Court in respect of Muslim marriages. Just and equitable remedies, which carry with them an inherent element of uncertainty, are not unusual in modern legislation.

[141] The argument that existing contractual remedies suffice is not a justification for depriving only one class of spouses the more efficacious redistribution remedy. It is not easy to discharge the burden of proving that the conclusion or enforcement of a contract was or would be contrary to public policy. There is no case of which I am aware in which a standard antenuptial contract has been found to offend public policy. Unlike a challenge based on public policy, the redistribution remedy is explicitly focused on recognising a spouse's contribution to the maintenance or increase in the other spouse's estate. It is unnecessary, in the case of a redistribution remedy, to find that the conclusion or enforcement of the antenuptial contract would offend public policy. Indeed, the terms of the antenuptial contract, even in an old ANC marriage, may

be a relevant factor in assessing a redistribution claim.[117] Public policy, while a necessary tool in the law of contract, is a blunt instrument in terms of which the impugned contract either stands or falls. And if courts began to impeach antenuptial contracts on the basis of public policy, the judicial assessment of public policy would, as with the redistribution remedy, bring with it an element of uncertainty; public policy cannot be said to be a more predictable basis of intervention than the redistribution remedy.

[142] As to the interests of creditors, this has not deterred the lawmaker or this Court from allowing a redistribution remedy for the other classes of marriages I have mentioned. In terms of section 7(5)(a), a court must take into account the existing means and obligations of the parties. This includes the obligations which the spouse against whom the claim is made has towards his or her creditors.

[143] I thus conclude that the differentiation between old and new ANC marriages constitutes unjustifiable indirect discrimination on the grounds of gender.

New ANC marriages and other classes of marriages

[144] The conclusion I have reached thus far makes it unnecessary to spend time on the further grounds of discrimination alleged to exist in relation to other classes of marriage. All of them appear to me to boil down to the same indirect discrimination based on gender, because in all those other classes of marriage women have the benefit of the redistribution remedy whereas women in new ANC marriages are disproportionately prejudiced as against men by the absence of the same remedy.

[145] I am doubtful whether race, religion, culture or marital status are implicated as direct or indirect grounds of discrimination in these other cases. Although, for example, the spouses in BAA marriages would be black persons, the lawmaker's reason for

[117] Among other things, section 7(5)(b) requires the court to take into account any donation owing and enforceable in terms of the antenuptial contract.

granting them the redistribution remedy and withholding it from new ANC marriages was not the race of the spouses but the absence or availability of the accrual regime. Many black persons are spouses in new ANC marriages. If there is indirect discrimination, it is that black wives in new ANC marriages are disproportionately prejudiced as against black husbands by the absence of the redistribution remedy. This is indirect discrimination on the basis of gender rather than race.

[146] Customary marriages, as I have said, may be a special category, having regard to the wide interpretation given by this Court in *Gumede* to section 8(4)(a) of the Recognition Act. This Court gave particular reasons why a wider approach might be appropriate for customary marriages. This is not the occasion to assess whether the withholding of that wider approach for other types of marriage offends section 9(1) or (3) of the Constitution.

Remedy

[147] As in CCT 364/21, it would be appropriate to suspend the declaration of invalidity for 24 months with an interim severance of the offending differentiation in section 7(3)(a) so as to grant immediate effective relief. And because of the remedy to be granted in CCT 364/21, the interim relief will need to cover dissolution by both divorce and death. For the avoidance of doubt, I should mention that section 7(3)(a) is the only class of marriage where the date differentiation needs to be eliminated. In the case of section 7(3)(b) and (c), there is no "after" scenario: BAA and homeland marriages ceased to be possible when the relevant legislation governing such marriages was repealed. As in CCT 364/21, the Minister should pay the applicant's costs in this Court in CCT 158/22.

[148] It would not be appropriate for this Court to offer a view on the CGE's contention that subsections 7(3) to (6) should provide clearer guidance and that equal sharing should be the starting point. The CGE will be at liberty to press its position when Parliament ponders its response to this judgment.

Order

[149] The following order is made in Case CCT 364/21:

1. The High Court's order of constitutional invalidity is confirmed.
2. Subsection 7(3) of the Divorce Act 70 of 1979 is declared inconsistent with the Constitution and invalid to the extent that it fails to include the dissolution of marriage by death.
3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
4. Pending any remedial legislation as contemplated in paragraph 3 above, and pursuant to this Court's conclusions in the present case and in Case CCT 158/22 *KG v Minister of Home Affairs and Others*, which has been decided simultaneously with the present case, the Matrimonial Property Act 88 of 1984 is to be read as including, as section 36A, the following provision:

   "(1) Where a marriage out of community of property as contemplated in paragraphs (a), (b) or (c) of subsection 7(3) of the Divorce Act, 1979 (Act 70 of 1979) is dissolved by the death of a party to the marriage, a court may, subject *mutatis mutandis* to the provisions of subsections 7(4), (5) and (6) of the said Divorce Act, and on application by a surviving party to the marriage or by the executor of the estate of a deceased spouse to the marriage as the case may be (hereinafter referred to as the claimant), and in the absence of agreement between the claimant and the other spouse or the executor of the deceased estate of the other spouse (hereinafter referred to as the respondent), order that such assets, or such part of the assets, of the respondent as the court may deem just, be transferred to the claimant.

   (2) For purposes of subsection (1), paragraph (a) of subsection 7(3) is to be read as excluding the following words: 'before the commencement of the Matrimonial Property Act, 1984'."
5. The order in paragraph 4 shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has been finally wound up by the date of this order and no claim as contemplated in

paragraph 4 may be made by or against the executor of a deceased estate that has been finally wound up by the date of this order.

6. The second respondent must pay the applicant's costs in this Court, excluding the costs of the appearance on 11 August 2022, such costs to include the costs of two counsel.

[150] The following order is made in Case CCT 158/22:

1. The High Court's order of constitutional invalidity is confirmed.
2. Paragraph (a) of subsection 7(3) of the Divorce Act 70 of 1979 (Divorce Act) is declared inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act).
3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
4. Pending any remedial legislation as contemplated in paragraph 3 above, paragraph (a) of subsection 7(3) of the Divorce Act is to be read as excluding the words in strike-out text below:

> "(a) entered into ~~before the commencement of the Matrimonial Property Act, 1984,~~ in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;"

5. The order in paragraph 4 above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to a marriage concluded on or after 1 November 1984.
6. Pending any remedial legislation as contemplated in paragraph 3 above, and pursuant to this Court's conclusions in the present case and in Case CCT 364/21 *EB (Born S) v ER (Born B) N.O. and Others*, which has been decided simultaneously with the present case, the Matrimonial Property Act is to be read as including, as section 36A, the following provision:

> "(1) Where a marriage out of community of property as contemplated in paragraphs (a), (b) or (c) of subsection 7(3) of the Divorce Act, 1979

(Act 70 of 1979) is dissolved by the death of a party to the marriage, a court may, subject *mutatis mutandis* to the provisions of subsections 7(4), (5) and (6) of the said Divorce Act, and on application by a surviving party to the marriage or by the executor of the estate of a deceased spouse to the marriage as the case may be (hereinafter referred to as the claimant), and in the absence of agreement between the claimant and the other spouse or the executor of the deceased estate of the other spouse (hereinafter referred to as the respondent), order that such assets, or such part of the assets, of the respondent as the court may deem just, be transferred to the claimant.

(2) For purposes of subsection (1), paragraph (a) of subsection 7(3) is to be read as excluding the following words: 'before the commencement of the Matrimonial Property Act, 1984'."

7. The order in paragraph 6 shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has been finally wound up by the date of this order and no claim as contemplated in paragraph 6 may be made by or against the executor of a deceased estate that has been finally wound up by the date of this order.
8. The second respondent must pay the applicant's costs in this Court, such costs to include the costs of two counsel.

Case CCT 364/21

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For the Second Respondent:	MPD Chabedi Instructed by State Attorney, Pretoria

Case 158/22

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For the Second Respondent:	M Mphaga SC, D Mtsweni and D Sekwakweng Instructed by State Attorney, Pretoria
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For the Second Amicus Curiae:	LC Haupt SC, S Mentz, A Thompson and SM Stadler Instructed by Adams & Adams, Pretoria