



CONSTITUTIONAL COURT OF SOUTH AFRICA

Agnes Sithole and Another v Gideon Sithole and Another

CCT 23/20

Date of hearing: 17 September 2020

Date of Judgment: 14 April 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 14 April 2021 at 10h00, the Constitutional Court handed down judgment in an application for confirmation of an order of constitutional invalidity made by the High Court of South Africa, KwaZulu-Natal Local Division: Durban. The High Court declared section 21(2)(a) of the Matrimonial Property Act 88 of 1984 (the MPA) unconstitutional and invalid to the extent that it maintains and perpetuates the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 (the BAA), in that marriages of black couples, entered into under the BAA before 1988, are automatically out of community of property.

In 1972, Mrs Agnes Sithole married Mr Gideon Sithole. Unbeknown to Mrs Sithole, their marriage was, as a result of the default position created by the MPA out of community of property. Between 1972 and 1985, Mrs Sithole stayed at home and raised their children; she conducted a home-based business, selling clothing. In 1985, she commenced employment as a project manager at an engineering firm but continued operating her clothing business. Her income was used to pay for the education of their children, family and household expenses. In 2000, they purchased their family home and this was registered in Mr Sithole's name. During the past few years, their relationship deteriorated allegedly because Mr Sithole was engaged in extra-marital affairs. At some point Mr Sithole threatened to sell the family home. She disagreed with this, but Mr Sithole persisted with his threat to sell the family home. Mrs Sithole then launched an application for an order interdicting and restraining Mr Sithole from selling their home at the Pinetown Magistrates Court. She learned, during these proceedings that she was married out of community of property and that her husband did not need her consent to sell the property. Mrs Sithole is

a devout member of the Roman Catholic Church and divorce in her church is discouraged and frowned upon.

The applicants, Mrs Sithole and the Commission for Gender Equality jointly brought an application before the High Court to declare section 21(1) and 21(2)(a) of the MPA unconstitutional and invalid. They claimed that women who are unable to divorce their husbands or to change the proprietary regime of their marriage will continue to suffer the discriminatory impact of section 22(6) of the BAA. The applicants contended that section 22(6) of the BAA disadvantaged Black women by providing that except in limited circumstances, their marriage would be out of community of property, it subsequently denied hundreds of thousands of Black women the protection that is afforded by a marriage in community of property. The Marriage and Matrimonial Property Law Amendment Act (the Amendment Act) repealed section 22(6) of the BAA; but did not end the disadvantage suffered by Black women who had married before 1988 as the default position in such marriages is that they are out of community of property.

The High Court found in favour of the applicants. It held that the provision of section 21(2)(a) differentiates between Black spouses who entered into marriage before 1988 and black spouses who entered into marriage after 1988. The High Court held that section 22(6) of the BAA only precluded black couples from having their marriage in community of property and black couples did not enjoy the legal protection afforded by a marriage in community of property that all other South Africans enjoyed. The High Court further held that section 21(2)(a) discriminated against black persons married before 1988. The discrimination, the court stated, hinders the enjoyment of constitutional rights of Black women in South Africa as it denies women the protection which is afforded by a marriage in community of property, this the court stated amounted to indirect unfair discrimination against women on the ground of sex. Such situation renders them dependent on their husbands who generally control the majority of the family's wealth and assets. The High Court then stated that section 21(2)(a) preserves and perpetuates the discrimination created by section 22(6) of the BAA. The High Court accordingly declared section 21(2)(a) of the MPA unconstitutional and declared that all marriages of Black persons concluded out of community of property under section 22(6) of the BAA before 1988 are declared to be marriages in community of property.

In the Constitutional Court, the applicants contended that section 21(2)(a) of the MPA is unconstitutional as it maintains and perpetuates the racial and gender discrimination against Black women which was created by the repealed section 22(6) of the BAA. They contended further that the impugned provisions subsequently infringe on the rights to equality, dignity, right to access to housing and health care services. They submitted that marriage in community of property is advantageous to women. They further contended that the High Court order should be confirmed, and that the declaration of invalidity should have a retrospective effect. Additionally, the applicants submitted that it should be declared that all marriages concluded out of community of property under section 22(6) of the BAA are converted to marriages in community of property.

The first respondent, Mr Sithole, opposed the application for confirmation of the High Court order and submitted that he and the first applicant had elected to enter into a marriage out of community of property. The first respondent submitted that the Constitutional Court should not confirm the order of constitutional invalidity in respect of his marriage with the first applicant.

In a unanimous judgment penned by Tshiqi J concurred in by (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J and Victor AJ), the Constitutional Court pointed out that the only possible explanation for the retention of these remnants of past discriminatory laws in our statutes is that they have been overlooked.

The Constitutional Court held that the dire consequences suffered by Black people as a result of such discriminatory laws make it compelling that such laws should be urgently obliterated from our statutes. It found section 21(2)(a) of the Matrimonial Property Act 88 of 1984 to be unfairly discriminatory and such discrimination was not justifiable under section 36 of the Constitution. The Constitutional Court accordingly confirmed the High Court's order that section 21(2)(a) of the Matrimonial Property Act is unconstitutional and invalid to the extent that it maintains and perpetuates the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 (BAA), in that marriages of Black couples, entered into under the BAA before 1988, are automatically out of community of property.