



**LRC**

Legal Resources Centre

# Equality for African Women in Old Order Marriages

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## **Introduction**

The Constitutional Court has stated that access to land is key to the realisation of all other constitutional rights. This is particularly true when it comes to exercising the right to equality in respect of matrimonial property.

Many women are left in dire financial circumstances when their marriages end by either death or divorce. This publication is aimed at women who entered into African civil marriages before 1988 or customary marriages before 2000.

It highlights the changes brought about to the law to protect such women's rights to matrimonial property.

## **What Was the Problem?**

Colonial and apartheid efforts relegated women to the status of perpetual minors, owing obedience first to their fathers, brothers and then to their husbands and sons. This has had a profound impact on women's right to property and security of tenure.

This, however, is no longer the case following changes to the law brought about through recent legal challenges. Three legal challenges brought by the Legal Resources Centre in the cases *Gumede*, *Ramuhovhi* and *Sithole* challenged the laws which discriminated against a specific class of elderly African married women on the grounds of race, gender and age.



### **THE AFFECTED WOMEN BELONG TO A GENERATION OF AFRICAN WOMEN WHO WERE BORN, RAISED AND MARRIED UNDER APARTHEID**

– a time when laws prevented their access to freedom of movement, education and the right to hold property.

These women often faced intersectional discrimination and were left vulnerable when their civil and customary marriages ended. This impacted their right to dignity, housing and social security. The legal challenges and the RCMA Amendment Act recently passed by parliament reverses this discrimination.

## **New Order Legislation: Recognition of Customary Marriages Act 120 of 1998**

The Recognition of Customary Marriages Act (RCMA) was enacted in 2000 to undo some of the injustices faced by African women in the past. Section 2 of the RCMA recognises a marriage that is a valid marriage in accordance with customary law.

**‘CUSTOMARY LAW’ IS DEFINED AS** “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.”

The RCMA not only confers formal recognition on customary marriages but also entrenches the equal status and capacity of husbands and wives in customary marriages. The RCMA, therefore, ended the marital power of a husband over his wife and pronounced them to have equal dignity and capacity in the marriage.



### **HOWEVER, CERTAIN PROVISIONS OF THE RCMA PERPETUATED DISCRIMINATION — SECTION 7 OF THE RCMA SAID THAT:**

- (1)** The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.
- (2)** A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouse in an antenuptial contract which regulates the matrimonial property system of their marriage.

This meant that in most cases the default position for marriages entered into before the commencement of the RCMA was out of community of property.

Women had to bring a court application to apply for the redistribution of property if the marriage ended. However, the majority of this class of women did not have the financial resources for this process.

## Court Cases to Challenge the Unfair Position

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### **ELIZABETH GUMEDE V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA (2008)**

Mr and Mrs Gumede entered into a customary marriage in 1968 in KwaZulu-Natal. During the marriage, Mrs Gumede was not in formal employment but maintained the family household and was the primary caregiver to the children. Mr Gumede purchased the family property. In 2003, Mr Gumede brought divorce proceedings against Mrs Gumede.

As the Gumede's were married in 1968, prior to the commencement of the RCMA, Mrs Gumede was directly affected by section 7(1) of the RCMA which said that her marriage would be governed by customary law. In KwaZulu-Natal, customary law was codified in the KwaZulu Act and Natal Code.

Section 20 of the KwaZulu Act and section 20 of the Natal Code stated that the family head, the husband, was the owner of all family property, and the wife had no claim to the property during the marriage or if the marriage ended.

Further, section 22 of the Natal Code provided that "Inmates" of a kraal in respect of all family matters were under the control of the family head to whom they all "owe obedience."

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### **THE LRC BROUGHT AN APPLICATION ON BEHALF OF MRS GUMEDE TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 7 OF THE RCMA**

, arguing that Mrs Gumede suffered unfair discrimination by having no access to and control over the family property as it left her vulnerable and homeless in her old age both during and upon the termination of her customary marriage. The application to the High Court was opposed by the government.

**THE GOVERNMENT'S PRIMARY ARGUMENT** was that the relief sought was premature because the divorce court has the power, under section 8(4)(a) of the RCMA, to transfer property from one spouse to another if justice and equity require it.

**HOWEVER, THE COURT FOUND THAT THE ABILITY TO ARGUE FOR THE REDISTRIBUTION OF THE PROPERTY UPON DIVORCE DID NOT JUSTIFY THE UNFAIR GENDER DISCRIMINATION,**

both because it did not address the discrimination against women while married, and the woman and man did not start on equal footing, in terms of property, in the divorce court.

It would have meant that every woman in Mrs Gumede's position would have been forced to endure hostile, expensive and long divorce battles to secure property – without enjoying the default benefit of a community of property regime.

The Constitutional Court confirmed that Section 7 of the RCMA is discriminatory on the ground of gender, as only women were subject to unequal proprietary consequences. The consequence of the discrimination was that Mrs Gumede and similarly situated women were considered unfit to hold or manage property and therefore excluded from meaningful economic activity.

The court found that the matrimonial proprietary system of customary law during the subsistence of a marriage as codified in the Natal Code and the KwaZulu Act is not in line with the equality dictates of the Constitution. This patriarchal domination over, and the complete exclusion of the wife in owning or dealing with family property demeans and makes the wife vulnerable.

**THE COURT DECLARED SECTION 7(1) OF THE RCMA INCONSISTENT WITH THE CONSTITUTION** and invalid to the extent that its provisions related to monogamous customary marriages only. It also declared the relevant sections of the KwaZulu Act and the Natal Code of Zulu law inconsistent with the Constitution and invalid.



***RAMUHOVHI AND OTHERS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (2017)***

**In Ramuhovhi, the LRC represented Mrs Thokozani Maphumulo – the intervening applicant who was the second wife in a pre-RCMA polygamous customary marriage.**

Mrs Maphumulo faced eviction from her home upon her husband's death because he had bequeathed his estate to his eldest son with his first wife – this included the home that Ms Maphumulo resided in for many years which was registered in her husband's name.



**The Constitutional Court now declared section 7(1) of the RCMA invalid with the Constitution insofar as it applied to polygamous customary marriages but suspended the declaration of invalidity for 24 months in which time Parliament was given an opportunity to correct the law.**

**DURING THE PERIOD OF SUSPENSION, THE FOLLOWING ORDER WAS MADE:**

**(a)** Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows:

**(i)** in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and

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

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

**IN ORDER TO LIMIT THE IMPACT OF THE ORDER ON THIRD PARTIES**, the order of invalidity did not invalidate the winding up of a deceased estate that has been finalised or the transfer of marital property that has been effected, unless the transferee was aware that the property concerned was subject to a legal challenge.

**MRS MAPHUMULO'S CIRCUMSTANCES WERE BY NO MEANS UNIQUE.**

There are many cases where the husband in a pre-RCMA customary marriage has passed away, and one or more wives are "pushed out" and deprived of benefitting in the estate that they, like Mrs Maphumulo - had contributed towards building alongside their spouse over the years of their marriage. The Constitutional Court and now the RCMA Amendment Act described on page 7 of this publication, seeks to rectify this position.

## **Discrimination in African Civil Marriages**

**African women married before 1988 under civil law also faced discrimination because of apartheid-era legislation, the Black Administration Act 38 of 1927 (BAA).**

This Act stated that the default position for marriages between African couples was out of community of property. Despite the repeal of the BAA, the harsh effect of it on the lives of women endured in the Matrimonial Property Act until Mrs Sithole's challenge finally rectified the position in 2021.



### ***AGNES SITHOLE AND COMMISSION FOR GENDER EQUALITY V GIDEON SITHOLE (2021)***

**In the Sithole case, the LRC represented a 72-year-old housewife, Mrs Sithole who married her husband in 1972 in terms of the Black Administration Act.**

The default position under the BAA was that the marriage would be out of community of property. This position only applied to African couples.

In 1988 the Matrimonial Property Act repealed this section of the BAA and inserted a separate section that dealt with African marriages. It allowed for African couples who were married out of community of property an opportunity to change their matrimonial regime within a period of two years from 1988.

They had to do this by registering a notarial contract by at least 1990. Many women were not aware that they could change their matrimonial regime, or if they were, there were various barriers that prevented them from doing so. For all other race groups, the default position was a marriage automatically in community of property.

**IN MRS SITHOLE'S CASE**, she raised her family and used her income from selling clothing to pay for her children's education. Her husband purchased the family home, and it was registered in his name.

Mrs Sithole like many other women did not change her marital regime after 1988, so it remained out of community of property. When the marriage broke down, her husband threatened to sell the family home. Mrs Sithole faced homelessness in her old age if the court did not intervene.

**THE CONSTITUTIONAL COURT DECLARED SECTION 21(2)(A) OF THE MATRIMONIAL PROPERTY ACT TO BE UNCONSTITUTIONAL** and invalid as it perpetuated the discrimination created by the BAA. The court ordered that all marriages of African couples out of community property before the 1988 amendment are automatically declared to be marriages in community of property.

It is estimated that there are approximately **400 000 WOMEN IN A SIMILAR POSITION** as Mrs Sithole.

## **Amendment of the RCMA**

During May 2021, the Recognition of Customary Marriages Amendment Act came into force which gives effect to the Gumedde and Ramuhovhi orders.

### **THE ACT AMENDS SECTION 7 OF THE RCMA AS FOLLOWS:**

- (a)** The proprietary consequences of a customary marriage in which a person is a spouse in more than one customary marriage, and which was entered into before the commencement of this Act are that the spouses in such a marriage have joint and equal
  - (i)** Ownership and other rights; and
  - (ii)** Rights of management and control, over marital property.
- (b)** The rights contemplated in paragraph (a) must be exercised
  - (i)** in respect of all house property, by the husband and wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and
  - (ii)** in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.
- (c)** Each spouse retains exclusive rights over his or her personal property.
- (d)** For purposes of this subsection the terms “marital property”, “house property”, “family property” and “personal property” have the meaning ascribed to them in customary law.



**THE ACT ALSO REMOVES THE WORDS “ENTERED INTO AFTER THE COMMENCEMENT OF THIS ACT” IN SECTION 7(2) OF THE RCMA SO THAT IT WILL NOW READ AS FOLLOWS:**

*A customary marriage in which a spouse is not a partner in any other existing customary marriage is a marriage in community of property and of profit and loss between the spouses unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.*

**THE ABOVE PROVISIONS DO NOT INVALIDATE** the winding up of a deceased estate that was finalised or the transfer of marital property that had taken place before the commencement of the Amendment Act (as long as the person to whom marital property was to be transferred was not aware that the marital property was subject to a legal challenge).

## **What Do These Cases Mean?**

In South Africa, the intersection of race, gender, class and apartheid results in differential access to property, assets and security. A community of property marital regime presents the opportunity for remedial and substantive equality for women.

Access to land and property are essential to securing financial freedom, individual agency and the power of self-determination.

These three cases together have secured a community of property regime for African women, strengthening their right to security of tenure and financial freedom by ensuring that a husband and his wife/wives in old order monogamous and polygamous marriages equally share the right of ownership and other rights to family property and house property.

# Frequently Asked Questions

## 01

**I was married before 1988 in terms of the Black Administration Act and did not apply to change my marital regime. What will happen to our home if my husband and I divorce or he dies?**

Since 2021, marriages under the BAA are regarded as in community of property, which means that you and your husband each own 50% of your home, as well as any other property. This includes cars, household items, and even pension money. If you and your husband get divorced, you will be able to get 50%, or half, of the home, as well as all the other property that you both own.

## 02

**I was in a customary marriage, but it was not registered. Do I still have a right to the property registered in my husband's name if we divorce?**

Yes, unregistered customary marriages are recognised in law. If you were married in accordance with customary law your marriage is regarded as automatically in community of property unless you have entered into an antenuptial contract that excludes community of property. This means that you are still entitled to half of the marital property, even if it is registered in your husband's name.

## 03

**My husband's children from a previous marriage are attempting to evict me from my home, what can I do?**

No one may be evicted without a court order. If you were one of several wives in a polygamous customary marriage and lived in a separate house with your husband and your family, you are entitled to half your family home, and you may not be evicted. House property must be used for the best interests of the family unit. Seek legal advice if you receive any court documents threatening to evict you from your home.

## Useful Contacts

If you fall into any of the categories above, and you believe you are being treated unfairly, **below are some contacts you can approach for assistance.**

MASTER OF THE HIGH COURT					
PROVINCIAL OFFICE	MASTER	CONTACT NUMBER	EMAIL ADDRESS	PHYSICAL ADDRESS	POSTAL ADDRESS
<b>FREE STATE</b>	Mr Jan Du Plessis	051 411 5500	MasterBloemfontein@justice.gov.za  jduplessis@justice.gov.za	Old Southern Life Building, c/o Charlotte Maxeke (Maitland) and Aliwal Streets, Bloemfontein, 9301	Private Bag X20584, Bloemfontein, 9300
<b>EASTERN CAPE (Bisho)</b>	Ms Khulula Baneti	040 608 6600  and/or  040 639 2087/2079	KBaneti@justice.gov.za	1st Floor, SITA Building, Cnr Phalo- & Rharhabe Avenues, Bisho	Private Bag X 0002, Bisho, 5605
<b>EASTERN CAPE (Grahamstown)</b>	Ms Euphemia Daniels	046 603 4000	MasterGrahamstown@justice.gov.za	5 Bathurst Street, Grahamstown, 6139	Private Bag X1010, Grahamstown, 6140
<b>EASTERN CAPE (Mthatha)</b>	Mr Simon C Jozana	047 531 2120  or  047 532 3432/3564	SJozana@justice.gov.za	Holy Cross Building, No 7 Craister Street, Mthatha, 5099	Private Bag X6057, Mthatha, 5099
<b>EASTERN CAPE (Port Elizabeth)</b>	Ms Euphemia Daniels	041 403 5100	EuDaniels@justice.gov.za	523 Govan Mbeki Avenue (Cnr Crawford & Govan Mbeki Avenue), North End, Port Elizabeth	Private Bag X 2, Port Elizabeth, 6000

<b>WESTERN CAPE (Cape Town)</b>	Ms Zureena Aguilhas	021 832 3000	MasterCape-Town@justice.gov.za	Dullah Omar Building, 45 Castle Street, Cape Town	Private Bag X9018, Cape Town, 8000
<b>KWAZULU-NATAL (Durban)</b>	Mr Edric Pascoe	031 327 0600/0601	MasterDurban@justice.gov.za	2 Devonshire Place (Off Anton Lembede Street/Smith Street), 2nd Floor, Durban, 4001	Private Bag x 54325, Durban, 4000
<b>KWAZULU-NATAL (Pietermaritzburg)</b>	Mr Edric Pascoe	033 264 7007	MasterPietermaritzbu@justice.gov.za  EPascoe@justice.gov.za	241 Church Street, Colonial Building situated, Pietermaritzburg	Private Bag X9010, Pietermaritzburg, 3200
<b>GAUTENG (Johannesburg)</b>	Mr Leonard Pule	011 429 8000/8001/8002/8003	LPule@justice.gov.za	No 66 Marshall Street, Hollard Building, cnr Sauer & Marshall streets, JHB	Private Bag X5, Marshalltown, 2107
<b>GAUTENG (Pretoria)</b>	Ms Penny Roberts	012 339 3333/7700/7807	PRoberts@justice.gov.za	SALU Building, 316 Thabo Sehume Street, Pretoria	Private Bag X60, Pretoria, 0001
<b>NORTHERN CAPE (Kimberley)</b>	Mr Craig Davids	053 831 1942	MasterKimberley@justice.gov.za	Civic Centre, Sol Plaatjie Drive, Kimberley, 8300	Private Bag X5015, Kimberley, 8300
<b>NORTH WEST (Mahikeng)</b>	Mr William Sekete	018 381 1131 018 381 0725	WSekete@justice.gov.za	Ms Euphemia Daniels	Ms Euphemia Daniels
<b>MPUMALANGA (Nelspruit)</b>		013 101 3721		Justice Chambers, 44 Shippard Street, Mahikeng, 2745	Private Bag X42, Mmabatho, 2735
<b>LIMPOPO (Polokwane)</b>	Ms Willicah Seopa	015 230 6000	WSeopa@justice.gov.za  SMaponya@justice.gov.za	Polokwane High Court Building, 4th Floor, Block B, cnr Bodenstein and Biccard Street, Polokwane, 0700	Private Bag X9670, Polokwane, 0700
<b>LIMPOPO (Thohoyandou)</b>		015 962 1032	MasterThohoyandou@justice.gov.za	Venda Government Building Complex, Thohoyandou, Venda, 0950	Private Bag X5015, Thohoyandou, Venda, 0950

## LEGAL AID BOARD

PROVINCE	CONTACT NUMBER	EMAIL ADDRESS	PHYSICAL ADDRESS	POSTAL ADDRESS
<b>NATIONAL OFFICE</b>	011 877 2000 Advice Line (Toll-free): 0800 110 110 Ethics Hotline: 0800 153 728 Please-Call-Me number: 079 835 7179	communications2 @legal-aid.co.za	Legal Aid House, 29 De Beer Street, Braamfontein, Johannesburg, 2017	Private Bag X76, Braamfontein, 2017
<b>WESTERN CAPE/ NORTHERN CAPE</b>	021 861 3000	BoitumeloB @legal-aid.co.za	Shiraz House (2nd Floor), Trumali Road, Brandwacht Office Park, Stellenbosch, 7600	
<b>FREE STATE/ NORTH WEST</b>	051 412 8040 or 051 412 8043		Hydro Park Building, 100 Kellner Street, Westdene, Bloemfontein, 9301	PO Box 12798, Brandwag, Bloemfontein, 9300
<b>LIMPOPO/ MPUMALANGA</b>	015 296 0117		Number 3 Cormar Park, Rhodes Drift Avenue, Bendor, Polokwane, 0700	PO Box 11237, Bendor Park, 0713
<b>KWAZULU-NATAL</b>	031 717 8450		7th Floor Charter House, Cnr Crompton & Union Street, Pinetown, 3600	PO Box 2489, Pinetown, 3600
<b>GAUTENG</b>	012 664 2921	RaymondN@ legal-aid.co.za	144 Cantonment Street, Selborne Centre, Lyttelton, PRETORIA	P O Box 16237, Lyttelton, 0157
<b>EASTERN CAPE</b>	041 363 8863		5 Mangold Street, Newtown Park, Port Elizabeth, 6001	PO Box 63799, Greenacres, Port Elizabeth, 6056

## LEGAL RESOURCES CENTRE

CITY	CONTACT NUMBER	EMAIL ADDRESS	PHYSICAL ADDRESS
<b>JOHANNESBURG</b>	011 038 9709	info@lrc.org.za	2nd Floor, West Wing, Women's Jail, Constitutional Hill, 1 Kotze Street, Braamfontein, Johannesburg
<b>DURBAN</b>	031 301 7572	info@lrc.org.za	11th Floor, Aquasky Towers, 275 Anton Lembede Street, Durban, 4001
<b>MAKHANDA</b>	046 622 9230	info@lrc.org.za	116 High Street, Makhanda, 6139
<b>CAPE TOWN</b>	021 879 2398	info@lrc.org.za	Aintree Office Park, Block D, Ground Floor, Corner Doncaster Road and Loch Road, Kenilworth, Cape Town, 7708



