

**THE DEFAULT MATRIMONIAL PROPERTY SYSTEM THAT APPLIES  
TO CIVIL MARRIAGES CONCLUDED BETWEEN BLACK PERSONS  
IN SOUTH AFRICA: A CONSIDERATION OF THE *SITHOLE*  
JUDGMENT, ITS CONSEQUENCES AND ITS OVERALL  
CONSTITUTIONAL SOUNDNESS**

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## TABLE OF CONTENTS

<b>CHAPTER 1: INTRODUCTION</b> .....	<b>5</b>
1.1. RESEARCH PROBLEM.....	5
1.2. RESEARCH QUESTIONS .....	6
1.3. MOTIVATION .....	6
1.4. RESEARCH METHODOLOGY .....	8
1.5. STRUCTURE OF MINI-DISSERTATION (CHAPTER OUTLINE).....	8
1.6. REFERENCING STYLE AND CUT-OFF DATE FOR AUTHORITIES CONSULTED.....	10
1.7. LITERATURE REVIEW AND HOW RELEVANT LITERATURE WILL FEATURE IN SUBSEQUENT CHAPTERS .....	10
<b>CHAPTER 2: A COMPARISON OF THE SALIENT FEATURES OF MARRIAGES IN AND OUT OF COMMUNITY OF PROPERTY, AND THEIR RESPECTIVE ADVANTAGES AND DISADVANTAGES</b> .....	<b>17</b>
2.1. INTRODUCTION .....	17
2.2. THE MOST IMPORTANT LEGAL PRINCIPLES OF A MARRIAGE IN COMMUNITY OF PROPERTY.....	18
2.3. COMPOSITION OF THE JOINT ESTATE .....	20
2.3.1. ADMINISTRATION OF THE JOINT ESTATE.....	23
2.4. IMPORTANT LEGAL PRINCIPLES THAT UNDERPIN THE MARRIAGE OUT OF COMMUNITY OF PROPERTY .....	37
2.4.1. COMPLETE SEPARATION OF PROPERTY .....	38
2.4.2. THE ACCRUAL SYSTEM .....	46
2.5. THE ADVANTAGES AND DISADVANTAGES OF THE VARIOUS MATRIMONIAL PROPERTY REGIMES.....	47
2.5.1. THE ADVANTAGES AND DISADVANTAGES OF A MARRIAGE IN COMMUNITY OF PROPERTY .....	48



4.2.2.3. Equality and Discrimination: Should the High Court’s order be confirmed?	76
4.2.2.4. Remedy	80
4.2.2.5. Order	80
4.3. EVALUATION OF THE <i>SITHOLE</i> JUDGMENT AND ITS IMPACT	81
4.3.1. IS THE AUTONOMY OF SPOUSES MARRIED IN TERMS OF THE DEFAULT MATRIMONIAL PROPERTY REGIME THAT APPLIED TO CIVIL MARRIAGES OF BLACK PERSONS BEFORE 1988 RESPECTED?	82
4.3.2. OBJECTIVE UNCONSTITUTIONALITY	84
4.3.3. THE COURT’S EQUALITY ANALYSIS AND THE ISSUE OF RETROSPECTIVITY	88
4.3.4. THE FIRST APPLICANT’S “LACK OF KNOWLEDGE” AND HER “CHOICE” TO MARRY ACCORDING TO THE DEFAULT MATRIMONIAL PROPERTY SYSTEM	89
4.3.5. SECTION 21(1) OF THE <i>MATRIMONIAL PROPERTY ACT</i>	92
4.3.6. COMPLICATIONS ARISING FROM THE NEW DEFAULT REGIME CREATED BY <i>SITHOLE</i> : SOME UNINTENDED CONSEQUENCES?	94
4.3.7. COULD IT BE ARGUED THAT THE CONSTITUTIONAL COURT SHOULD HAVE INSTEAD GIVEN THE LEGISLATURE THE OPPORTUNITY TO RECTIFY THIS ISSUE?	100
4.3.8. THE OSTENSIBLE RATIONALE BEHIND THE ENACTMENT OF SECTION 22(6) OF THE <i>BLACK ADMINISTRATION ACT</i> .	103
4.4. PRELIMINARY CONCLUSION	103
CHAPTER 5: CONCLUSION	104
5.1. INTRODUCTION	104
5.2. SUMMARY OF KEY CONCLUSIONS REACHED IN THE PRECEDING CHAPTERS	104
5.3. SOME LESSONS THAT MAY BE LEARNED FROM THE <i>SITHOLE</i> JUDGMENT	110
BIBLIOGRAPHY	113

# CHAPTER 1

## INTRODUCTION

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### 1.1. RESEARCH PROBLEM

This study concerns the consequences arising from the default matrimonial property regime that applies to “Black persons” who entered into a civil marriage in South Africa before the 2<sup>nd</sup> of December 1988, and recent radical changes in this regard as brought about by the Constitutional Court’s judgment in *Sithole and Another v Sithole and Another*<sup>1</sup> (hereafter “*Sithole*”), that involved confirmation proceedings<sup>2</sup> in respect of the judgment of the court *a quo* (reported as *AS v GS*).<sup>3</sup>

As a point of departure, it is trite that the *Constitution of the Republic of South Africa, 1996* (hereafter “the *Constitution*”) provides that everyone is equal before the law and has the right to equal treatment and protection of the law, and not to be unfairly discriminated against.<sup>4</sup> In relation to the impact of the *Constitution* on private law, Nkosi quotes Professor Visser’s opinion – expressed as far back as in 1995 – as follows:

“Private law should brace itself for a type of ‘total onslaught’ on many of its rules and principles. This invasion will mainly be undertaken by judges who are well armed with (a) a vague constitution and (b) endless methods of interpreting it in order to achieve the desired results”.<sup>5</sup>

However, despite the advent of our constitutional democracy almost 30 years ago, Black persons in (civil) marriages at times still suffer from the racial classifications perpetuated by means of pre-democracy legislation. This study will take a closer look at the *Sithole* judgment, as well as its forerunner in the court *a quo*, and the (unintended) consequences of the Constitutional Court’s judgment (in particular) to the extent that it altered this state of affairs. As such, the main research question is to assess the impact of this case regarding the fundamental change that it brought about

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<sup>1</sup> *Sithole and Another v Sithole and Another* 2021 (5) SA 34 (CC).

<sup>2</sup> As required by section 172(2)(a) of the *Constitution of the Republic of South Africa, 1996*.

<sup>3</sup> *AS and Another v GS and Another* 2020 3 SA 365 (KZD).

<sup>4</sup> *Constitution of the Republic of South Africa 1996*: sec 9.

<sup>5</sup> Nkosi 2014:677.

to the default matrimonial property regime that governs civil marriages entered into between Black persons before 2<sup>nd</sup> of December 1988, and to determine whether its overall outcome is constitutionally sound. The study also aims to identify certain valuable lessons that can be learned from the *Sithole* judgment because of its far-reaching nature.

## **1.2. RESEARCH QUESTIONS**

In answering the main research question, the following sub-questions arise:

- 1.2.1. What are the salient legal features of the marriage in community of property versus those of a marriage out community of property in South Africa?
- 1.2.2. What was the default matrimonial property regime that applied to civil marriages involving Black persons by virtue of the *Black Administration Act* 38 of 1927 (hereinafter “the *Black Administration Act*”), and what reasons (if any) were proffered for this default legal position?
- 1.2.3. How was the legal position changed by *Sithole*, what are the consequences of this judgment, and does an in-depth analysis show that it was correctly decided and constitutionally sound? Are there any problematic issues that arise from the judgment and/or any issues that were overlooked by the court?
- 1.2.4. Given the conclusions reached regarding questions 1.2.1 – 1.2.3, what does the *Sithole* judgment have to teach us in terms of the interaction between the judiciary and the legislature regarding old-order (i.e., pre-1994) legislation, and are there any further lessons to be learned when such far-reaching judgments are delivered by the Constitutional Court?

## **1.3. MOTIVATION**

This study seeks to analyse the default matrimonial property regime that applies to Black persons in civil marriages concluded before 2<sup>nd</sup> of December 1988 in terms of section 22(6) of the *Black Administration Act*. This will be done against the backdrop of the recent *Sithole* judgment and an assessment of its impact and overall constitutional soundness.

As a starting point, it may be mentioned that in the *Bhe*<sup>6</sup> case that was decided almost two decades before the same court's judgment in *Sithole*, the Constitutional Court had already expressed the sentiment that the *Black Administration Act* was "a cornerstone of racial oppression, conflict and division that caused suffering to millions of South Africans".<sup>7</sup> This criticism of the regime constructed by the *Black Administration Act* forms a focal point and one of the core motivations behind this study. Nevertheless, in my view, the remarks by the *Bhe* court may have stimulated the legislature to act proactively in eradicating the lasting effects of the *Black Administration Act* before it was necessary for a case such as *Sithole* to go to court. However, as will be seen in Chapter 5,<sup>8</sup> the highly unusual set of facts in *Sithole* may indicate that the legislature is not to blame in this regard.

In order to provide a proper analysis of the *Sithole* judgment and its aftermath, it is first necessary for this study to investigate the most important legal principles, and the advantages and disadvantages, of marriages in community of property versus marriages out of community of property in South Africa. The study will proceed to consider the legal position created by section 22(6) of the *Black Administration Act* and the ostensible reasoning behind this legal position. Even though the *Matrimonial Property Act* 88 of 1984 (hereinafter "*Matrimonial Property Act*") introduced a new statutory framework that today governs much of South African matrimonial property law, it did not change the legal position created by section 22(6) of the *Black Administration Act* in respect of the proprietary consequences of civil marriages of Black persons. The *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988 (hereinafter "*the Marriage and Matrimonial Property Law Amendment Act*") also failed to change this position; as a result, it persisted more than a quarter of a century into our democratic constitutional dispensation. This issue only recently came before our courts in the series of *Sithole* judgments. As such, an in-depth analysis of these ground-breaking judgments will be conducted in this study in order to determine the impact of the apex court's eventual judgment on this issue, and to assess its correctness or otherwise. On the basis of this evaluation, the study will conclude with an opinion as to the interaction between the judiciary and the legislature in respect of

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<sup>6</sup> *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC).

<sup>7</sup> *Bhe and Others v Magistrate, Khayelitsha and Others*: par 61.

<sup>8</sup> See Chapter 5 paragraph 5.3.

old-order constitutionally suspect legislation as revealed by the *Sithole* matter, bearing in mind that it is arguable that the legislature could have played a more proactive role in avoiding matters of this nature arising in our constitutional democracy. It will also be determined whether the *Sithole* case provides any further lessons to be learned when such far-reaching judgments are handed down by the Constitutional Court. As such, this study also aims to comment on whether the judiciary is the appropriate arm of government to occasion legal developments of such a far-reaching nature.

#### **1.4. RESEARCH METHODOLOGY**

This study will follow a desktop doctrinal approach comprising an analysis of South African matrimonial property law. The legal historical method will be applied by tracing the development of this branch of law as it relates to civil marriages between Black persons concluded before the 2<sup>nd</sup> of December 1988. This will be done by referring to case law and legislation, as well as books, journal articles and published investigations conducted by the South African Law (Reform) Commission (hereinafter “SALRC”).

#### **1.5. STRUCTURE OF MINI-DISSERTATION (CHAPTER OUTLINE)**

##### **Chapter 1**

This chapter constitutes the introduction to this study and sets out its nature and scope, as well as the research methodology employed and the objectives that it seeks to achieve.

##### **Chapter 2**

In laying the foundation for later chapters, this chapter will consider the most important features of marriages in and out of community of property. Additionally, this chapter will highlight the advantages and disadvantages of these matrimonial property systems. The chapter will also consider two issues in particular: The first is how section 15 of the *Matrimonial Property Act* applies to spouses affected by the *Sithole* judgment, and how this provision generally protects third parties, possibly at the expense of innocent spouses. Secondly, the chapter will also comment on significant developments regarding the possibility of spouses married with complete separation

of property seeking a redistribution of assets order in terms of section 7(3) of the *Divorce Act* 70 of 1979 (hereinafter “the *Divorce Act*”). Both of these issues are of importance in evaluating *Sithole* and determining its impact, that will occur in chapter 4 of this study.

### **Chapter 3**

This chapter will discuss the default matrimonial property regime that applied to Black persons in civil marriages as created by section 22(6) of the *Black Administration Act* and the possible reasons behind the enactment of this provision. The impact of the *Matrimonial Property Act* and *Marriage and Matrimonial Property Law Amendment Act* on the *Black Administration Act* will also be discussed.

### **Chapter 4**

An in-depth analysis of the *Sithole* judgment will be conducted in this chapter. This will be done by first discussing the facts of *Sithole*. Following this, the impact of this judgment and how it changed the current legal position in relation to matrimonial property matters will be canvassed. Finally, some problematic issues that arise from the judgment, as well as any issues that may have been overlooked by the Constitutional Court will be highlighted and considered, and an opinion will be expressed as to the correctness or otherwise of the judgment.

### **Chapter 5**

Chapter 5 comprises a summary of the findings made in the study in respect of the research questions set out above, as well as a consideration of the interaction between the legislature and the judiciary regarding pre-1994 legislation as illustrated by the *Sithole* judgment and any other lessons that may be learned from it.

## 1.6. REFERENCING STYLE AND CUT-OFF DATE FOR AUTHORITIES CONSULTED

The style guidelines as prescribed for contributions that are published in the *Journal for Juridical Science* will be used throughout this study.<sup>9</sup> This study considers the legal position as it obtained at **31 October 2023**.

## 1.7. LITERATURE REVIEW AND HOW RELEVANT LITERATURE WILL FEATURE IN SUBSEQUENT CHAPTERS

Entering into a marriage brings about a change of status for the spouses that influences their legal position in public law and private law.<sup>10</sup> For example, neither of the spouses who are party to a civil marriage is allowed to enter into a civil marriage, customary marriage or civil union with another person during the subsistence of the marriage.<sup>11</sup>

A few preliminary remarks may be made in respect of the core features of matrimonial property law as it currently exists in South Africa.

Before the coming into existence of the *Matrimonial Property Act*, there were chiefly two matrimonial property regimes in South Africa, namely the marriage in community of property (where the husband also had marital power) and the marriage out of community of property and of profit and loss (i.e., a marriage “with complete separation of property”) where the husband did not have marital power. The option of entering into a marriage out of community of property and out of community of profit and loss with the inclusion of the so-called “accrual system” was introduced by the *Matrimonial Property Act* on the 1<sup>st</sup> of November 1984.<sup>12</sup>

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<sup>9</sup> Available at: <https://journals.ufs.ac.za/index.php/jjs/about>.

<sup>10</sup> See for example *Carter v Carter* 1953 (1) SA 202 (A) at 295B. An example of a private law change in status that is linked to a specific matrimonial property system is that sections 15(1) – (5) and 17(1) of the *Matrimonial Property Act* 88/1984 provide that in the event that a spouse decides to marry in community of property, their capacity to act is to a certain extent restricted. This simply means that a spouse cannot conclude certain transactions without obtaining the necessary consent from the other spouse. Chapter 2 of this study provides a brief discussion on the former. See Chapter 2 paragraph 2.3.1 (c)(ii).

<sup>11</sup> Hahlo 1985:127; Van Heerden *et al* 1999:161 and 170; Heaton & Kruger 2015: 25 and 41. The latter authors cite section 3(2) and 10 of the *Recognition of Customary Marriages Act* 120 of 1998 and section 8(2) of the *Civil Union Act* 17 of 2006.

<sup>12</sup> Heaton & Kruger 2015:61.

The marriage in community of property is considered to be the primary or “default” matrimonial property regime in South Africa. There is therefore a rebuttable presumption that whenever parties are entering into a civil marriage, they are marrying in community of property.<sup>13</sup> The exceptions to this general rule will be mentioned in Chapter 2.

As a general rule, pre- and post-marital assets and liabilities are grouped together in a marriage in community of property. This is because this matrimonial property regime automatically and by operation of law brings to life a “joint estate” where spouses are equal partners in the sense that they concurrently administer the joint estate as a result of the promulgation of the *Matrimonial Property Act*.<sup>14</sup>

The general rule that all assets and liabilities are pooled is however subject to a number of important exceptions. These will be considered in Chapter 2.

With the exception of the legal mechanisms available to enforce the inter-spousal obligation of support, spouses can only claim from each other in relation to property excluded from the joint estate as indicated above, as this is the only property that the spouses do not own in common. Except in terms of the *Matrimonial Property Act*, or in terms of case law,<sup>15</sup> it is impossible for spouses to contract between themselves or to sue each other for delictual damages.<sup>16</sup> At the dissolution of the marriage (or the immediate division of the joint estate by a court order while the parties are still married), a spouse who has been prejudiced because the joint estate has suffered a loss due to a wrongful act committed by the other spouse, or due to a contract improperly entered into without the prejudiced spouse’s consent, is entitled to a right of recourse.<sup>17</sup> This may however only be of limited assistance to such a spouse, as will be explained in Chapter 2. Van Heerden *et al* mention that Hahlo once aptly remarked that the phrase “for better or worse” carries much weight when spouses are married in community of property.<sup>18</sup>

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<sup>13</sup> *Edelstein v Edelstein* 1952 1 SA 220 (A); Hahlo 1985: 187; Heaton & Kruger 2015:61.

<sup>14</sup> *Matrimonial Property Act*: sec.14.

<sup>15</sup> See for example the case of *TG v WC* [2020] ZAGPJHC 229 (28 Sept 2020) discussed in Chapter 2 (at paragraph 2.3).

<sup>16</sup> Van Heerden *et al* 1999:186.

<sup>17</sup> Van Heerden *et al* 1999:187.

<sup>18</sup> Van Heerden *et al* 1999:188.

The concurrent administration of the joint estate referred to above entails that a spouse married in community of property cannot perform certain legal transactions without the oral, written or tacit consent of the other spouse.<sup>19</sup> Section 15 of the *Matrimonial Property Act* seeks to protect an innocent spouse whose consent has not been obtained. However, academics such as Barratt and Van Heerden *et al* argue that section 15 of the *Matrimonial Property Act* does not provide adequate remedies should a non-consenting spouse be disadvantaged in favour of a third party, also does not expressly deal with the consequences of non-compliance, and is silent on available remedies where a contract is entered into by the other spouse with a third party acting in bad faith. Barratt further argues that our courts have had a number of opportunities to deal with these matters, such as in the cases of *Bopape v Moloto*<sup>20</sup> and *Visser v Hull*.<sup>21</sup> However, both judgments failed to mention the reasons for the transactions being invalid and how property relating to these transactions is to be recovered.<sup>22</sup> Section 15 of the *Matrimonial Property Act* and the views of authors on these provisions will be considered in more detail in Chapter 2, and is of relevance to the in-depth analysis of the *Sithole* cases that will be conducted in Chapter 4.

On the other hand, if parties seek to deviate from the default matrimonial property regime, they can do so by entering into an antenuptial contract. An antenuptial contract is used to deviate from certain common law or statutorily-imposed patrimonial consequences of a marriage.<sup>23</sup> Antenuptial contracts are binding on the parties even if they are not reduced to writing or do not comply with the formalities prescribed by the *Deeds Registries Act* 47 of 1937. However, a notary needs to attest the contract, and it must be registered in the Deeds Registry in order for it to be binding on a third party. Nothing that is *contra bonos mores*, impossible or illegal may be included in the antenuptial contract.<sup>24</sup>

Usually, community of property and of profit and loss is excluded by an antenuptial contract, and it may also exclude the applicability of the accrual system (thus leading to a marriage with complete separation of property). This means that spouses do not

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<sup>19</sup> Van Heerden *et al* 1999:189.

<sup>20</sup> *Bopape v Moloto* 2000 1 SA 383 (T).

<sup>21</sup> *Visser v Hull* 2010 1 SA 521 (WCC).

<sup>22</sup> Barratt 2011:272.

<sup>23</sup> Heaton & Kruger 2015:61; 83.

<sup>24</sup> Van Heerden *et al* 1999:195; Heaton & Kruger 2015: 84.

share in each other's estates and are not responsible for each other's debts. However, the reciprocal duty of support still remains between the parties and is enforceable between them if necessary. In such a marriage it is possible for the parties to sue each other in contract or delict even though they are still married to each other.<sup>25</sup>

In the past, such a marriage did not afford women (in particular) the opportunity to secure their financial future, as many of them sacrificed their careers for the marriage, but were married with complete separation of property and therefore had no right to share in their spouses' estates at dissolution of the marriage.<sup>26</sup> The coming into existence of the *Matrimonial Property Act* abolished marital power and also intended to cater for potentially disadvantaged economically inactive spouses by enabling the parties to choose to marry out of community of property with the operation of the accrual system.<sup>27</sup> The accrual system is meant to protect the spouse who is not the main breadwinner from being prejudiced at the dissolution of the marriage in order to avoid finding himself or herself in an unfavourable financial position.<sup>28</sup>

It must be noted that section 7(3) of the *Divorce Act* empowers the court to make a so-called "redistribution order" regarding marriages entered into with complete separation of property prior to the enactment of the *Matrimonial Property Act* (or prior to the *Matrimonial Property Act* becoming applicable to civil marriages between Black persons on the 2<sup>nd</sup> of December 1988),<sup>29</sup> provided that the court is satisfied that the spouse claiming such an order contributed to the maintenance or increase of the other spouse's estate and that, for this reason, it is just and equitable to do so.<sup>30</sup> The court's discretion in this regard is designed to "mitigate the harshness that come with the complete separation of property between the parties".<sup>31</sup> The court's discretion is said to interfere with the freedom of contract and has been criticised.<sup>32</sup> However, there are also those who take the view that such a redistribution competency is essential, and that limiting eligibility for such an order to such "old-order" marriages (i.e. those entered into prior to the *Matrimonial Property Act*) violates constitutional imperatives,

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<sup>25</sup> Van Heerden *et al* 1999:196.

<sup>26</sup> Snyman 1977:278.

<sup>27</sup> Van Heerden *et al* 1999:195.

<sup>28</sup> Heaton & Kruger 2015:91.

<sup>29</sup> It will be seen throughout this study that *Sithole* has altered this position.

<sup>30</sup> Van Heerden *et al* 1999:199.

<sup>31</sup> Van Heerden *et al* 1999:200.

<sup>32</sup> Van Heerden *et al* 1999:200.

especially in view of related developments in respect of customary marriages.<sup>33</sup> This aspect will be returned to in Chapters 2 and 4 of this study.

In conclusion, it should also be noted that Heaton and Kruger make reference to the advantages and disadvantages of marriages in and out of community of property, as well as the advantages and disadvantages of marriages to which the accrual system applies.<sup>34</sup> These will also be considered in Chapters 2 and 4 of this study, to the extent that they are applicable to marriages affected by *Sithole*.

An evaluation of the *Sithole* judgment requires attention to be drawn to the *Black Administration Act* and how the *Matrimonial Property Act* changed matrimonial property law in South Africa. Sinclair and Heaton<sup>35</sup> mention that section 22(6) of the *Black Administration Act* entailed that a marriage in community of property between Black persons would not automatically ensue, since this Roman-Dutch-common-law form of marriage was unknown to them. Additionally, the case of *Molefe v Molefe*<sup>36</sup> interpreted section 22(6) of the *Black Administration Act* to mean that any marriage between Black persons without an antenuptial contract would be out of community of property with the marital power (that still existed at the time) belonging to the husband.<sup>37</sup> Sinclair and Heaton however point out that the main reason for the *Black Administration Act* was actually to strengthen the political and economic control the old *Apartheid* regime had over Black persons.<sup>38</sup> To this may be added that even writers of the day such as Hahlo saw that our matrimonial property law was out of date as it relegated the wife to a lesser status in society by essentially treating her as a minor.<sup>39</sup> The rationale behind the enactment of section 22(6) of the *Black Administration Act* will be investigated in more detail in Chapter 3.

As mentioned earlier, the *Matrimonial Property Act* introduced the accrual system. However, it did not repeal section 22(6) of the *Black Administration Act* and the marital power the husband had over his wife remained intact.<sup>40</sup> Sinclair and Heaton refer to

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<sup>33</sup> Van Heerden *et al* 1999:200.

<sup>34</sup> Heaton & Kruger 2015:102-103.

<sup>35</sup> Sinclair & Heaton 1996: 228.

<sup>36</sup> *Molefe v Molefe* 1946 AD 315.

<sup>37</sup> Sinclair & Heaton 1996:218.

<sup>38</sup> Sinclair & Heaton 1996:217.

<sup>39</sup> Hahlo 1974:390.

<sup>40</sup> Sinclair 1984:14.

how the enactment of the *Marriage and Matrimonial Property Law Amendment Act* brought about several remedial changes in the matrimonial property law of South Africa concerning Black spouses who had entered into a civil marriage. First, the enactment of the *Marriage and Matrimonial Property Law Amendment Act* was responsible for repealing section 22(6) of the *Black Administration Act*. Secondly, it cleared up confusion regarding the applicability of the *Divorce Act* to marriages governed by the *Black Administration Act*, because the *Divorce Act* was amended. And lastly, in order to allow Black couples to introduce the accrual system and the removal of marital power by notarial contract, the *Matrimonial Property Act* was amended.<sup>41</sup> Marital power was finally eradicated by an amendment to the *Matrimonial Property Act* occasioned by the *General Law Fourth Amendment Act* 132 of 1993 (hereafter “the *General Law Fourth Amendment Act*”). This applied to civil marriages concluded before and after the enactment of the *Matrimonial Property Act*.<sup>42</sup>

The foregoing provides the background to the in-depth analysis of the *Sithole* judgment that will occur in Chapter 4. For present purposes it will suffice to say that the High Court held that section 21(2)(a) of the *Matrimonial Property Act* was constitutionally invalid as it perpetuated the unfair discrimination against Black couples caused by section 22(6) of the *Black Administration Act*.<sup>43</sup> I agree with Judge Mandondo when the learned judge made mention of the fact that the recognition and equal worth of Black persons has been due for quite some time and that:

“The discrimination the impugned provisions perpetuate is so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order or by suspending the order of invalidity to allow Parliament to rectify the error.”<sup>44</sup>

The High Court also decided on a number of issues in relation to this matter which will be discussed in this study. The Constitutional Court confirmed the High Court’s order of invalidity and emphasised that section 21(2)(a) had indeed perpetuated the main purpose of the *Black Administration Act* which was to segregate Black spouses and to unfairly discriminate against them. In the result, the court ordered that the marriage in community of property would henceforth be the default matrimonial property regime

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<sup>41</sup> Sinclair & Heaton 1996:229.

<sup>42</sup> Van Heerden 1999 *et al*:163.

<sup>43</sup> *AS and another v GS and another*. par.75.

<sup>44</sup> *AS and another v GS and another*. par.72.

for marriages concluded in terms of section 22(6) of the latter Act.<sup>45</sup> The correctness or otherwise of this finding, as well as its implications and issues that may have been overlooked by the Constitutional Court will be considered in Chapter 4, while Chapter 5 will summarise the findings in this study based on the answers to the research questions posed above, and will conclude with an opinion as to what the *Sithole* judgment has to teach us on the interaction between the judiciary and the legislature regarding pre-1994 legislation that is constitutionally questionable, as well as further lessons that can be learned from the case.

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<sup>45</sup> *Sithole and Another v Sithole and Another*. par.59.

## CHAPTER 2

# A COMPARISON OF THE SALIENT FEATURES OF MARRIAGES IN AND OUT COMMUNITY OF PROPERTY, AND THEIR RESPECTIVE ADVANTAGES AND DISADVANTAGES

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### 2.1. INTRODUCTION

As mentioned in Chapter 1, before the coming into operation of the *Matrimonial Property Act*, there were chiefly two matrimonial property regimes in South Africa, namely the marriage in community of property (where the husband also had marital power), and the marriage out of community of property and of profit and loss (i.e., a marriage “with complete separation of property”) where the husband did not have marital power. The option of entering into a marriage out of community of property and out of community of profit and loss with the inclusion of the so-called “accrual system” was introduced by the *Matrimonial Property Act* as from 1<sup>st</sup> of November 1984.<sup>46</sup>

As mentioned in Chapter 1, Chapter 2 will lay a platform for this study by seeking to highlight the most important legal features of a marriage in community of property versus those of a marriage out of community of property, and the advantages and disadvantages attached to both of these matrimonial property regimes. This chapter will further point out a particular potential shortcoming of a marriage in community property. This is that section 15(9)(a) of the *Matrimonial Property Act* seeks to protect third parties where a spouse’s consent has not been obtained for certain listed transactions.<sup>47</sup> However, legal scholars such as Barratt are of the opinion that this may come at the expense of innocent spouses; she further argues that section 15 does not provide any clear remedies or legal consequences should a non-consenting spouse be disadvantaged due to the protection conferred on a third party by the *Matrimonial Property Act*.<sup>48</sup> The learned author also goes on to mention two cases, namely *Visser v Hull*<sup>49</sup> and *Bopape v Moloto*<sup>50</sup> which will also form part of this discussion. These two

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<sup>46</sup> Heaton & Kruger 2015: 61.

<sup>47</sup> Heaton & Kruger 2015: 75.

<sup>48</sup> Barratt 2011: 272.

<sup>49</sup> *Visser v Hull* 2010 (1) SA 521 (WCC).

<sup>50</sup> *Bopape v Moloto* 2000 (1) SA 838 (T).

cases clearly indicate that our courts have had a number of opportunities to deal with this matter but have failed to do so. Section 15 of the *Matrimonial Property Act* is also of relevance to the in-depth analysis of the *Sithole* cases that will follow in Chapter 4.

## 2.2. THE MOST IMPORTANT LEGAL PRINCIPLES OF A MARRIAGE IN COMMUNITY OF PROPERTY

It was seen in Chapter 1 that entering into a marriage brings about a change of legal status for the spouses that influences their legal position in public law and private law.<sup>51</sup> As far as the marriage in community of property is concerned, a specific example hereof is that the capacity to act and to litigate of the spouses is restricted by the *Matrimonial Property Act*,<sup>52</sup> as will be seen below.

Before the coming into existence of the *Matrimonial Property Act*, a marriage in community of property, at common law, entailed the concept of marital power where a husband had the power to administer the joint estate. This concept came with a number of implications. First, the wife had very limited powers to act because she was in a similar position to that of a minor. Therefore, the husband had full legal capacity to bind the joint estate, and his wife could generally only conclude contracts binding on the joint estate if she had the consent of her husband to do so. Secondly, in relation to matters affecting the joint estate, only the husband could sue or be sued. However, in 1984 the legislature introduced the *Matrimonial Property Act*, one of the purposes of which was to abolish marital power.<sup>53</sup> However, this new legislation had no retrospective effect which meant that in marriages in community of property that were concluded before the 1<sup>st</sup> of November 1984, the husband still had marital power.<sup>54</sup> It is important to note that the *Matrimonial Property Act* only started by abolishing marital power in respect of marriages concluded between Coloureds, Whites and Asians. In 1988, this was extended to marriages concluded between Black persons after the 2<sup>nd</sup> of December of that year. Finally, in an effort to end unfair discrimination against

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<sup>51</sup> See for example *Carter v Carter* 1953 1 SA 202 (A) at 295B.

<sup>52</sup> Heaton & Kruger 2015: 41.

<sup>53</sup> Visser & Potgieter 1998: 106.

<sup>54</sup> Barratt 2011: 273.

women, the concept of marital power was completely eradicated from our law with retrospective effect by section 29 of the *General Law Fourth Amendment Act*.<sup>55</sup>

The abolition of marital power was greeted by writers of the day such as Hahlo in the following somewhat dramatic terms: “Two thousand years of male domination in marriage have come to an end and, for the first time since early Germanic or Celtic tribes roamed the forests of Europe, husband and wife are equal in law”.<sup>56</sup> Spouses in a marriage in community of property now manage the joint estate through a system of equal control. Section 14 of the *Matrimonial Property Act* provides that both husband and wife now have equal powers in the joint estate regarding the disposal of assets, contracting of debts, and management of the joint estate.<sup>57</sup>

Even before the coming into existence of section 14 of the *Matrimonial Property Act*, the case of *Estate Sayle v Commissioner for Inland Revenue*<sup>58</sup> confirmed as early as 1945 that spouses in a joint estate were co-owners of that estate in equal undivided shares. This ownership may be described as “tied co-ownership” in that neither spouse may dispose of his or her share of the joint estate. Furthermore, no asset in the joint estate may be divided, and no rights relating to the joint estate may accrue exclusively to one spouse.<sup>59</sup> In *Ex parte Menzies et Uxor*,<sup>60</sup> the court again confirmed that co-ownership of a joint estate is seen as a species of bounded (or “tied”) co-ownership, and that the half share is also indivisible.

A marriage in community of property is considered to be the primary matrimonial property regime in South Africa, and there is a rebuttable presumption that whenever parties enter into a civil marriage, that they are marrying in community of property.<sup>61</sup> As noted by Heaton and Kruger, certain circumstances need to be proved in order to rebut this presumption. These possibilities are:

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<sup>55</sup> Visser & Potgieter 1998: 106. As mentioned by Visser and Potgieter,<sup>55</sup> the introduction of the *General Law Fourth Amendment Act* demonstrated the legislature’s ability to change law applicable to existing marriages (Visser & Potgieter 1998: 89).

<sup>56</sup> Visser & Potgieter 1998: 116.

<sup>57</sup> *Matrimonial Property Act* sec. 14.

<sup>58</sup> *Estate Sayle v Commissioner for inland Revenue* 1945 AD 388: par. 399.

<sup>59</sup> Robinson 2007: 4.

<sup>60</sup> *Ex parte Menzies et Uxor* 1993 3 SA 799 (CPD): par. 801.

<sup>61</sup> See for example *Edelstein v Edelstein* 1952 3 SA 1 (A).

- a. Where community of property and of profit and loss is excluded by a valid antenuptial contract;
- b. A valid postnuptial contract could also exclude community of property;
- c. A marriage will also be out of community of property if the husband is domiciled in a country where a marriage is automatically out of community of property in the absence of an antenuptial contract that stipulates otherwise; and
- d. Prior to the *Sithole* judgments, community of property would not arise in instances where Black persons concluded a civil marriage in terms of section 22(6) of the *Black Administration Act*. Such marriages concluded before the 2<sup>nd</sup> of December 1988 were by default regarded as being out of community of property, unless the parties made a joint declaration to the contrary before a magistrate, a commissioner or marriage officer within one month before entering into the marriage. This position persisted until the enactment of the *Marriage and Matrimonial Property Law Amendment Act* that repealed section 22(6) of the *Black Administration Act*.<sup>62</sup>

### 2.3. COMPOSITION OF THE JOINT ESTATE

In the past, a marriage in community of property meant that the husband and wife were seen as one, with the husband as the head of the family.<sup>63</sup> This is no longer the case.<sup>64</sup> Furthermore, a marriage (in community of property) does not constitute the combining of legal personalities.<sup>65</sup> It does however have an impact on the spouses' capacity to enter into legal transactions, liability for debts and ownership of assets. As mentioned in Chapter 1, as a general rule all pre- and post-marital assets and liabilities are merged into a "joint estate" that is automatically created by operation of law, and in respect of which the spouses are equal "managing" partners.<sup>66</sup> As for liabilities, pre-marital liabilities form part of the joint estate regardless of their origin. In relation to post-marital liabilities, a distinction is drawn between contractual and delictual

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<sup>62</sup> See also Heaton & Kruger 2015: 61. Hahlo 1985: 457. Sinclair and Heaton (1996: 228) further opine that a marriage that was concluded between a Black woman and a man of another race was governed by common law and not the *Black Administration Act*.

<sup>63</sup> Snyman 1977:278; Hahlo 1985: 133.

<sup>64</sup> Visser & Potgieter 1998: 72.

<sup>65</sup> Hahlo 1985: 130.

<sup>66</sup> Van Heerden *et al* 1999: 185.

liabilities. Contractual liabilities generally form part of the joint estate, so that a creditor can claim from the joint estate where the requisite consent for incurring the debt was obtained, or where inter-spousal consent was not required.<sup>67</sup> With that being said, it is also worth noting that the *Insolvency Act 24* of 1936 (hereinafter the “*Insolvency Act*”) does not show any leniency regarding separate estates in a marriage in community of property and that the assets of a spouse that form part of a separate estate are not protected against creditors in the case of joint debts.<sup>68</sup> On the other hand, the position in relation to delictual liabilities is governed by section 19 of the *Matrimonial Property Act*. This section provides that a creditor must first claim from the separate estate of the “guilty” spouse. In cases where there is no separate estate (or the separate estate is too small), the joint estate will be liable and the innocent spouse will be entitled to a right of recourse at the dissolution of the joint estate.<sup>69</sup>

As mentioned above, the general rule is that all assets and liabilities are pooled together. However, this is subject to a number of important exceptions. Examples are:<sup>70</sup>

- a. Property that is donated or bequeathed by a third party to a spouse and stipulated not to be subject to a community of property between that spouse and the other spouse;
- b. Property excluded by an antenuptial contract; or in which a spouse has a limited or inalienable interest (such as in the case of a *fideicommissum* or usufruct);<sup>71</sup>
- c. Some life insurance policies; and
- d. Damages for non-patrimonial loss awarded to a spouse or, in the specific case of bodily injuries caused to one spouse by the other spouse, compensation awarded for both patrimonial and non-patrimonial loss.<sup>72</sup>

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<sup>67</sup> Heaton & Kruger 2015: 68; Visser & Potgieter 1998: 102, 103.

<sup>68</sup> *Du Plessis v Pienaar* 2003 1 SA 671 (SCA); Robinson 2007: par. 4; Heaton & Kruger 2015: 66.

<sup>69</sup> *Matrimonial Property Act*: sec.19; Robinson 2007:5.

<sup>70</sup> For a comprehensive discussion, see Heaton & Kruger 2015:64 – 66.

<sup>71</sup> Van Heerden *et al* 1999: 185.

<sup>72</sup> Section 18 (a) and (b) of the *Matrimonial Property Act* (as amended); Van Heerden *et al* 1999:186.

At common law, spouses married in community of property could not claim from each other in delict. It was believed that there could be no room for debt where everything was owned in common.<sup>73</sup> In *Tomlin v London & Lancashire Insurance*,<sup>74</sup> the court made mention of the fact that the existence of a joint estate was the main reason spouses married in community of property could not claim from each other as this claim would instantly fall back into the joint estate.<sup>75</sup> As point d. above shows, the legislature managed to create an inroad to the common law position by means of legislation such as the *Matrimonial Property Act*. Section 18(b) of the *Matrimonial Property Act* now provides<sup>76</sup> that in relation to a spouse married in community of property, any amount that a spouse claims as a result of a delict in respect of bodily injury committed against him or her due to the conduct of the other spouse, will fall into a separate estate of the innocent spouse. The same holds true for claims successfully instituted against a third party for non-patrimonial loss.<sup>77</sup> Interestingly, for many years it was believed that spouses (especially if married in community of property) could not institute the *actio iniuriarum* (an action used to claim compensation for damage to an individual's personality rights such as dignity and reputation) against one another, because this would contravene legal policy.<sup>78</sup> However, in the case of *TG v WC*<sup>79</sup>, where the parties in question were married out of community of property with the accrual system, the court held that the denial of any form of redress on behalf of one spouse against the other irrespective of the matrimonial property regime in question will not be tolerated in our constitutional democracy.<sup>80</sup>

With that being said, Van Heerden *et al* point out that responsibility for criminal and civil wrongdoings in relation to post-marital debts conflicts with the principle in terms of which no one should be liable for another person's wrongdoings. Roman-Dutch law resolved this problem by stating that a criminal fine (for example) would eventually be paid out of the guilty spouse's portion of the joint estate. This was facilitated by a right of recourse granted to the innocent spouses at the dissolution of the joint estate, to

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<sup>73</sup> Robinson 2007:5.

<sup>74</sup> *Tomlin v London & Lancashire Insurance* 1962 2 SA 30 (D).

<sup>75</sup> *Tomlin v London & Lancashire Insurance*: par. 30.

<sup>76</sup> This provision was amended in consequence of the judgment in *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC) that is again referred to later in this study.

<sup>77</sup> Robinson 2007: 6.

<sup>78</sup> Visser & Potgieter 1998: 104.

<sup>79</sup> 2020] ZAGPJHC 229 (28 Sept. 2020).

<sup>80</sup> *TG v WC* [2020] ZAGPJHC 229 (28 Sept. 2020): par. 41.

the extent that the latter estate had incurred any liability.<sup>81</sup> However, a more complex issue has been dealing with delictual damages payable by a spouse, which could severely reduce the value of the joint estate, even to the extent of bankrupting it. This problem is statutorily addressed by section 19 of the *Matrimonial Property Act*, which as mentioned above, provides for a right of recourse in instances where the joint estate has been required to pay (a portion of) this debt, due to the fact that the blameworthy spouse had no (or insufficient) separate property. This may however only be of limited assistance, because the innocent spouse would only be fully recompensed if the value of the joint estate permits this.<sup>82</sup> It is worth reiterating Van Heerden *et al*'s conclusion that, as Hahlo once remarked, the phrase “for better or worse” is particularly apt where spouses are married in community of property.<sup>83</sup>

### **2.3.1. ADMINISTRATION OF THE JOINT ESTATE**

Since the promulgation of the *Matrimonial Property Act*, the administration of the joint estate shifted away from the previous common law position in terms of which the husband had marital power to administer the joint estate. Concurrent administration was introduced by the *Matrimonial Property Act*, section 15(1) of which creates the general principle that spouses may perform any juristic act in relation to the joint estate without the written, oral or tacit consent of each other. However, section 15(2) and (3) of the *Matrimonial Property Act* creates certain exceptions to this rule, by listing transactions that a spouse may not enter into without the consent of the other spouse. As such, these restrictions highlight the impact of a marriage in community of property on the spouses' capacity to act.<sup>84</sup> There is also a restriction on the capacity to litigate, that is imposed by section 17(1) of the *Matrimonial Property Act*.

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<sup>81</sup> Van Heerden *et al* 1999: 187.

<sup>82</sup> Van Heerden *et al* 1999: 187 (at footnote 142); Barratt 2011: 275.

<sup>83</sup> Van Heerden *et al* 1999: 187, 188.

<sup>84</sup> Van Heerden *et al* 1999: 188; Heaton & Kruger 2015: 71. In the case of *Strydom v Engen Petroleum Limited* 2013 (2) SA 187 (SCA), the court explained that this restriction is needed to protect “either spouse [who] would be vulnerable to suffering financial loss in the event of their partner making ill-judged or profligate decisions in relation to their financial affairs” (*Strydom v Engen Petroleum Limited*: par. 5). The appellant who was married in community of property engaged in the juristic act of signing as surety for the debts of a company without the consent of his wife. He was also the director of this company. The court however held that it was not decisive that the appellant did not get the required consent from his wife. This was because section 15(6) of the *Matrimonial Property Act* provides that section 15(2)(h) of the *Matrimonial Property Act* does not apply to transactions that fall within the ambit of that particular spouse's trade, profession or business and that his wife's consent was therefore not required. As such,

**(a) Transactions requiring the consent of both spouses**

Section 15(2) of the *Matrimonial Property Act* provides that in relation to certain transactions, a spouse requires the written consent of the other spouse in order to enter into those transactions. In some instances, additional requirements are prescribed. The categories are the following:

- (i) Transactions that only require written consent, namely -
  - (1) Alienating or pledging assets forming part of the joint estate that are held as investments, such as coins, stamps or jewellery;<sup>85</sup>
  - (2) Alienating, ceding or pledging investments that form part of the joint estate relating (for example) to stocks, shares, insurance policies, debenture bonds and mortgage bonds;<sup>86</sup> and
  - (3) Withdrawing money from any banking institution that is held in the name of the other spouse.<sup>87</sup>
- (ii) Certain transactions require, in addition to being in writing, that they must be attested by two competent witnesses. These are -
  - (1) Entering into a contract in order to mortgage or alienate any immovable property or to burden it with servitude or real right;<sup>88</sup>
  - (2) Entering into credit agreements that will affect the joint estate in terms of the *National Credit Act* 34 of 2005;<sup>89</sup> and
  - (3) Entering into contracts as a purchaser of immovable property in terms of the *Alienation of Land Act* 68 of 1981.<sup>90</sup>

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the court dismissed the appeal with costs (*Strydom v Engen Petroleum Limited*: paras. 2;13;26). In the *Strydom* matter, it is quite clear that the court correctly placed the interests of the third-party first and not those of the innocent spouse.

<sup>85</sup> *Matrimonial Property Act*. sec. 15(2)(d).

<sup>86</sup> *Matrimonial Property Act*. sec. 15(2)(c).

<sup>87</sup> *Matrimonial Property Act*. sec. 15(2)(e).

<sup>88</sup> *Matrimonial Property Act*. sec. 15(2)(a).

<sup>89</sup> *Matrimonial Property Act*. sec. 15(2)(f).

<sup>90</sup> *Matrimonial Property Act*. sec. 15(2)(g).

- (iii) In two instances, the *Matrimonial Property Act* prescribes that written and attested consent *must* be obtained *prior* to entering into the transaction. This entails that, while ratification (i.e., consent after the event) is possible in the case of the transactions listed in (i) and (ii) above, the same does not hold true where the transaction involves either -
- (1) The actual mortgaging, alienation, burdening with a servitude or conferring any real right in any immovable property that falls into the joint estate (such as in respect of land, a house or a flat) as contemplated in (ii)(1) above;<sup>91</sup> or
  - (2) entering into transactions where the spouse binds himself or herself as a surety for the debts of another.<sup>92</sup>

On the other hand, section 15(3) of the *Matrimonial Property Act* also requires consent from the other spouse to perform certain transactions, but it need not be in writing. These transactions are -

- i. Pledging, alienating or burdening any furniture or other household effect that forms part of the joint estate;
- ii. donating or alienating an asset to a third party, as long the donation will not affect the other spouse's interests in the joint estate;<sup>93</sup> or
- iii. receiving any money due to the joint estate by way of -
  - (1) remuneration arising out of a spouse's profession, trade or business;
  - (2) damages incurred as a result of loss of income;
  - (3) an inheritance or a legacy left, a donation made, or a bursary or prize awarded to the other spouse or income derived from separate property of the other spouse;
  - (4) the proceeds of an insurance policy or annuity in favour of the other spouse; and

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<sup>91</sup> *Matrimonial Property Act*. sec. 15(2)(a).

<sup>92</sup> *Matrimonial Property Act*. sec. 15(2)(g).

<sup>93</sup> Van Heerden *et al* 1999: 190; Heaton & Kruger 2015: 74.

- (5) interest or dividends received from shares or investments in the name of the other spouse (or their proceeds of such shares or investments).<sup>94</sup>

It is important to note that section 15(6) of the *Matrimonial Property Act* provides an exception to the consent requirements, by stipulating that no spousal consent is required if an act referred to in paragraphs (b), (c), (f), (g) and (h) of section 15(2) is performed by a spouse in the ordinary course of his or her “business, trade or profession”<sup>95</sup> In *Strydom v Engen Petroleum*, the court was indeed correct in dismissing the appeal as section 15(6) found application.<sup>96</sup>

### **(b) Sanctions for non-compliance**

Section 15 of the *Matrimonial Property Act* requires the consent of both spouses in order to avoid any maladministration against the innocent spouse in transactions involving the joint estate.<sup>97</sup> In the cases of *Amalgamated Banks of South Africa Bpk v Lydenburg Passassiersdienste*<sup>98</sup> and *Amalgamated Banks of South Africa Bpk v De Goede*,<sup>99</sup> the court held that failure to obtain consent will result in the transaction being invalid.<sup>100</sup> However, it is worth noting that the force of section 15 of the *Matrimonial Property Act* will depend on the effectiveness of the sanction imposed as a result of non-compliance with the provisions of sections 15(2) and (3). The legislature found itself caught up in a difficult situation of having to choose whether to protect the interests of the spouse whose consent had not been obtained, or to protect the interests of a third party. Van Heerden *et al* opine that the legislature seems to have ended up favouring the protection of the third party in most instances.<sup>101</sup>

Section 15(9)(a) of the *Matrimonial Property Act* therefore protects the interests of a *bona fide* third party by providing that in instances where the third party “does not know and cannot reasonably know” that a transaction was entered into without the prescribed consent, consent will be deemed to have been obtained and the transaction

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<sup>94</sup> Van Heerden *et al* 1999: 190.

<sup>95</sup> *Strydom v Engen Petroleum Limited*: par. 5; *Matrimonial Property Act*: sec. 15(6).

<sup>96</sup> *Strydom v Engen Petroleum Limited*: par. 50. See footnote 89 above.

<sup>97</sup> Barratt 2011: 272.

<sup>98</sup> *Amalgamated Banks of South Africa Bpk v Lydenburg Passassiersdienste BK* 1995 3 SA 314 (T).

<sup>99</sup> *Amalgamated Banks of South Africa Bpk v De Goede* 1997 4 SA 66 (SCA).

<sup>100</sup> Steyn 2002: 253.

<sup>101</sup> Van Heerden *et al* 1999: 191.

will therefore be valid.<sup>102</sup> In this instance, it is quite clear that lack of knowledge on the part of the third party would suffice. Writing in 1999, Van Heerden *et al* pointed out that “cannot reasonably know” could create problems: the learned authors argued that it must be emphasised that the third party has a duty to determine whether the spouse with whom they are contracting has the necessary consent to conclude the transaction. Furthermore, they contended that a third party has an obligation to take the necessary steps to find out whether they are dealing with a married person, and if that is the case, the third party needs to find out whether that spouse has the necessary consent to conclude that transaction. The learned authors further mentioned that the state of mind of the spouse who has acted in violation of the consent requirement is not of relevance.<sup>103</sup>

Van Heerden *et al* also noted that section 15(9)(a) of the *Matrimonial Property Act* fails to detail the consequences of a transaction entered into by a spouse without obtaining the necessary consent of the other spouse with a third party who is *not bona fide*. Since the deeming provision does not apply in this situation, the transaction remains without consent, and in contravention of the prohibition in section 15 in absence of *ex post facto* ratification. The learned authors expanded on this matter by asking several questions. First, they asked whether the prohibition affects capacity and is the result invalidity? Secondly, would a result of invalidity prevent the property in question from being transferred to the third party? And lastly, would it be possible for the innocent spouse to set aside the transaction and recover the property? The *Matrimonial Property Act* does not provide answers to these questions; case law is therefore required to clarify these issues.<sup>104</sup>

In instances where the deeming provision in fact aids a third party by validating the transaction, the non-consenting spouse is only limited to the remedy mentioned in section 15(9)(b) of the *Matrimonial Property Act* against the contracting spouse, which provides that such a spouse will be entitled to an adjustment at the dissolution of the joint estate.<sup>105</sup> This remedy is only available in limited instances, namely where the

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<sup>102</sup> Section 15(9)(a) of the *Matrimonial Property Act*; Van Heerden *et al* 1999: 191; Heaton & Kruger 2015: 75-77.

<sup>103</sup> Van Heerden *et al* 1999: 191.

<sup>104</sup> Van Heerden *et al* 1999: 192.

<sup>105</sup> Section 15(9)(b) of the *Matrimonial Property Act*; Van Heerden *et al* 1999: 192.

contracting spouse knew or should have reasonably known that the other spouse would not have consented to the transaction, and the joint estate suffered a loss.<sup>106</sup>

While authors such as Van Heerden *et al* concede that the protection of a *bona fide* third party by the legislature at the expense of an innocent spouse is seen to be justifiable in the interests of the sanctity of commercial transactions, they insist that section 15(9)(a) of the *Matrimonial Property Act* takes this protection too far as (i) the common law already provides a measure of protection to third parties with an onerous title; and (ii) that it is not necessary to protect *all bona fide* third parties. As an example of the latter, they point out that the provision will protect a *bona fide* donee at the expense of the wronged spouse.<sup>107</sup> As such, they opine that “the scales are loaded against the innocent spouse” and that the legislature should have achieved a better balance between the interests of third parties and that of the innocent spouse.<sup>108</sup> The weak nature of the sanction in section 15 also further undermines the force of the consent provisions.<sup>109</sup>

Barratt echoes these sentiments, by pointing out that many legal scholars have expressed doubt regarding the ability of section 15 of the *Matrimonial Property Act* to provide enough protection for innocent spouses, as this section does not provide any clear remedies that an innocent spouse has against a *mala fide* third party. She goes on to mention that our courts have had a number of opportunities to deal with this matter, such as in the cases of *Bopape v Moloto* and *Visser v Hull*. In these judgments, the court declared transactions that were concluded to be void as spousal consent was lacking. As such, property transferred without the required consent may be recovered. However, both judgments failed to mention the reasons for the transactions being invalid and how these transactions are to be recovered.<sup>110</sup> These cases will now be considered. This will be followed by an overview of the most authoritative case on point – *Marais v Maposa*<sup>111</sup> – that was not only recently referred to with approval by the Supreme Court of Appeal in *Vukeya v Ntshane*.<sup>112</sup>

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<sup>106</sup> Van Heerden *et al* 1999: 193.

<sup>107</sup> Van Heerden *et al* 1999: 193.

<sup>108</sup> Sinclair 1984: 21.

<sup>109</sup> Van Heerden *et al* 1999: 193.

<sup>110</sup> Barratt 2011: 272.

<sup>111</sup> *Marais v Maposa* 2020 5 SA 111 (SCA).

<sup>112</sup> *Vukeya v Ntshane* 2022 2 SA 452 (SCA) par. 10.

**(c) Leading case law on section 15(2); (3) and (9) of the *Matrimonial Property Act***

**(i) *Bopape v Moloto* 2000 1 SA 383 (T)**

In this matter, the first and second plaintiffs were married in community of property in 1974 and had two children. The second plaintiff had been involved in an extramarital relationship with the defendant since 1982, which his wife (second plaintiff) found out about two years later. He undertook to end his extramarital relationship, but he never did. Their relationship continued without any reduction in intensity, while the defendant was aware of his marital status.<sup>113</sup>

The second plaintiff built a house for the defendant in 1996. During this time, he went on a vacation with his sons in Cape Town. The defendant was in Cape Town at that time as well. During the vacation (which was paid for by the second plaintiff) they met with one another, and during this time they were quite bold about their relationship, to such an extent that the second plaintiff's son ended up noticing and told his mother (the first plaintiff) about the relationship. She confronted her husband, but he denied everything. Chief Chris Mothiba, who was a friend of the plaintiffs was asked to intervene by asking the defendant to repay the expenditure on the building of the house to the joint estate, but she refused thus prompting the litigation in question.

The claim by the plaintiffs was proved by 57 cheques which were related to invoices of building materials and services rendered. The amount eventually claimed from the defendant amounted to approximately R200 000. This claim was based on the provisions of section 15 of the *Matrimonial Property Act*, as the first plaintiff had never consented to these transactions.<sup>114</sup> The defence contended that section 15 of the *Matrimonial Property Act* did not afford a right of recourse against the defendant, that these contributions out of the joint estate by the first plaintiff were not donations, and that the claim was not properly proven. The court took into consideration that the building of the house for the defendant came out of the joint estate and rejected the arguments by the defence. As such, the court agreed that this donation was invalid as it was made without the consent of the first plaintiff (in terms of section 15(3)(a)), and

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<sup>113</sup> *Bopape v Moloto*: 384.

<sup>114</sup> *Bopape v Moloto*: 385.

that this transaction prejudiced the first applicant. In addition, contrary to the defendant's arguments, the remedies available to a spouse married in community were not confined to the right of recourse set out above, or to an order for the immediate division of the joint estate.<sup>115</sup>

In relation to this case, Barratt mentions that as much as the court gave an order against the defendant for the repayment of the claim, it failed to specify the legal mechanism of recovery.<sup>116</sup>

**(ii) *Visser v Hull* 2010 1 SA 521 (WCC)**

In this matter the applicant and the deceased were married in community of property in 1962, although they had been living apart for the last 30 years of their marriage. A few years before his death, the deceased fraudulently sold immovable property (the home in which the applicant and her children still resided) that formed part of the joint estate without the knowledge or consent of the applicant for an amount of R10 500, while the property's true value was close to R100 000. The deceased sold the immovable property to his blood relatives, who were the respondents. It was contended by the applicant that the respondents knew that she was married to the deceased and that they had two children together. After the property had been transferred into their names, the respondents applied for an order evicting the applicant and her children from the property. It is worth noting that the deceased had tried before to convince her to sign certain documentation apparently related to selling the property, but the applicant had refused and made it clear that the house was not for sale.<sup>117</sup>

This dispute revolved around the provisions of section 15 of the *Matrimonial Property Act*. The court in this matter interpreted section 15 as being intended to protect an innocent spouse against illicit transactions involving the joint estate that were entered into without the consent of the innocent spouse. As mentioned, the property in this case was sold without the knowledge of the applicant. This was in contravention of section 15(2)(b) of the *Matrimonial Property Act*, which provides that immovable property forming part of the joint estate may not be sold without obtaining the written

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<sup>115</sup> *Bopape v Moloto*: paras. 386 and 389.

<sup>116</sup> Barratt 2011: 276.

<sup>117</sup> *Visser v Hull*: paras. 2-4.

consent of the other spouse.<sup>118</sup> The court also held that section 15(3)(c) of the *Matrimonial Property Act* was clearly violated as the deceased failed to obtain consent from the applicant.<sup>119</sup>

It is noteworthy that the *Visser* case specifically referred to Zaal's criticism that the *Matrimonial Property Act* "is flawed and does not provide an innocent spouse with sufficient protection".<sup>120</sup> The court stressed that section 15(6) and 15(9) of the *Matrimonial Property Act* are there to protect the interests of a *third party* in instances where the third party enters into a transaction with a spouse who does not have the necessary consent to enter into such a transaction. The court mentioned that Steyn criticised the court in the case of *Distillers Corporation Ltd v Modise*<sup>121</sup> regarding its formulation of the liability test for third parties. Steyn proposed that it should entail that:

"[T]he third party '*cannot reasonably know*' that the required consent is lacking. The test is not whether the third party would not reasonably have known. The word '*cannot*' in the phrase *cannot reasonably know* implies that a duty cast upon the third party to take reasonable steps to investigate whether, in the circumstances, consent is required and if so, whether it has been obtained. This duty was overlooked by the court in the *Distillers* case".<sup>122</sup>

The court agreed with Steyn's view that the third party *has a duty to make an enquiry or to take reasonable steps* in order to ascertain whether the necessary consent has been obtained by a spouse with whom such third party is contracting before section 15(9)(a) of the *Matrimonial Property Act* can successfully be invoked. In this case, since the respondents were blood relatives of the deceased, the court held that they should have made this enquiry.<sup>123</sup> Furthermore, the court mentioned that the respondents knew that the transaction was concluded against the wishes of the applicant, as they purposefully colluded against the applicant in a manner that would prejudice her.<sup>124</sup> Section 15(9)(b) of the *Matrimonial Property Act* was also mentioned by the court, as it provides that a prejudiced spouse is entitled to an adjustment at the dissolution of the marriage. It was also mentioned that the joint estate suffered a loss as the house was sold for R10 500 even though the municipal value was R98 000.

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<sup>118</sup> *Visser v Hull*: par. 5.

<sup>119</sup> *Visser v Hull*: par. 12.

<sup>120</sup> *Visser v Hull*: par. 6; Zaal 1986:67.

<sup>121</sup> *Distillers Corporation Ltd v Modise* 2001 (4) SA 1071 (O).

<sup>122</sup> *Visser v Hull*: par. 7; Steyn 2002: 256 (emphasis supplied).

<sup>123</sup> *Visser v Hull*: par.8.

<sup>124</sup> *Visser v Hull*: par. 11.

However, section 15(9)(b) of the *Matrimonial Property Act* was not relevant to the matter, because of the deceased's death.<sup>125</sup> (It may also be pointed out that the latter remedy would in any event not be required, as it can only be invoked where the loss to the joint estate arises as result of a transaction that is deemed to be valid in terms of section 15(9)(a)).<sup>126</sup>

As a result, the court found the transaction between the deceased and the respondents to be void and that the registration of the property in the names of the respondents could not stand. The court made an order for the property to revert to the deceased's estate, and also ordered the "purchase price" of R10 500 to be repaid.<sup>127</sup>

In relation to both cases discussed above, Barratt criticised the *Bopape* and *Visser* courts on a number of counts. First, she mentions that consent in both cases could not be "deemed" as provided by section 15(9)(a) of the *Matrimonial Property Act*, because the third parties were *mala fide*.<sup>128</sup> Secondly, she decries the fact that the court in both instances ordered the return of property but did not mention any legal mechanism by which the property is to be recovered.<sup>129</sup>

Barratt makes mention of the following possible common-law remedies that may be available to innocent spouses:

- (1) The first is vindication. She opines that the *rei vindicatio* could be used to reclaim something that was donated in contravention of section 15 of the *Matrimonial Property Act*. As such, it is also worth noting in the *Visser* case that the deceased did not have the consent to conclude an agreement to sell the house, which resulted in the court ordering the re-registration of the property in the deceased's name. As much as the court did not expressly mention this, vindication was at issue.<sup>130</sup> As money cannot be recovered through the *rei vindicatio*, this remedy was also absent in the *Bopape* case.<sup>131</sup>

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<sup>125</sup> *Visser v Hull*: par. 16.

<sup>126</sup> Section 15(9)(a) read with section 15(9)(b); *Visser v Hull*: par. 16.

<sup>127</sup> *Visser v Hull*: par. 21.

<sup>128</sup> Barratt 2011: 276.

<sup>129</sup> Barratt 2011: 278.

<sup>130</sup> Barratt 2011: 278; Van der Walt & Pienaar 2016: 163.

<sup>131</sup> Barratt 2011: 278.

- (2) Secondly, Barratt highlights the issue of unjustified enrichment. She mentions that as much as the spouse donated the property without the consent of consent of the “innocent” spouse, the latter lost ownership of the property. However, in instances of unjustified enrichment, the “innocent” spouse could use the *condictio sine causa specialis* to reclaim the money.<sup>132</sup> In *Bopape*, the investigation into the remaining donee’s (unjustified) enrichment was declined by the court, which resulted in many academics concluding that enrichment as a remedy was not applied by the court.<sup>133</sup> In the case of *Visser*, judge Dlodlo noted the requirements of the *condictio ob turpem vel iniustam causam* (such as when performance is rendered in terms of an illegal agreement), given the fact that the property was transferred under an illegal agreement. However, it does not appear as if the court made use of this remedy, as it without more declared the contract to be invalid.<sup>134</sup>
- (3) Thirdly, in the *Bopape* case, even though the court did not expressly make mention of this, the return of the money was regarded as delictual damages. On the other hand, in the *Visser* case, a delictual claim based on fraud was examined. Barratt mentions that in instances where a third party participates with a spouse in an attempt to defraud the “innocent” spouse, the latter spouse is entitled to a delictual remedy. I tend to agree with Barratt when she suggests that this remedy might not apply in the *Visser* case, as the donee might not meet the requirements of fraudulent misrepresentation as this would require falsehood that would result in the innocent spouse acting to the detriment of herself. The *condictio ex causa furtiva* – which acts as a delictual remedy in our law – is regarded by Barratt as appropriate in this context. In instances where a third party acted *mala fide* to defraud the innocent spouse, delictual remedies might still be effective.<sup>135</sup>
- (4) Finally, in the *Visser* case, the *actio Pauliana utilis* was discussed by the honourable judge. At common law, this remedy was available to a wife whose husband entered into a transaction in order to *purposefully* prejudice her.

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<sup>132</sup> Barratt 2011: 279.

<sup>133</sup> Barratt 2011: 280.

<sup>134</sup> Barratt 2011: 280.

<sup>135</sup> Barratt 2011: 280-281.

Barratt contends that this remedy is still available to an aggrieved spouse who seeks redress. In relation to the *actio Pauliana utilis*, Voet opined that a husband had absolute power in the administration of the joint estate and was permitted to do whatever he wanted with it. However, the only limitation was in instances where he entered into fraudulent transactions which would prejudice his wife.<sup>136</sup> Voet went on to mention that it was possible for a wife to claim compensation from her husband. However, she points out that Van Wyk<sup>137</sup> disagrees with Voet in this regard, as he takes the view that this “crucial misunderstanding” would result in the limitation of the available remedy. By the seventeenth century, the *actio Pauliana utilis* lost its vindicatory character and was understood to be a personal damages action used by the wife or creditors.<sup>138</sup> As much as this remedy was mentioned in *Visser*, it does not appear as if the court applied it.

The most authoritative judgment on section 15(9)(a) of the *Matrimonial Property Act* is the case of *Marais v Maposa*,<sup>139</sup> a case that was decided by the Supreme Court of Appeal in 2020, and which was referred to with approval by the same court in *Mulaudzi v Mudau*,<sup>140</sup> and also more recently in *Vukeya v Ntshane*.<sup>141</sup> The *Marais* case will now be discussed.

### **(iii) *Marais v Maposa* 2020 5 SA 111 (SCA)**

In this matter, Mr and Mrs Broodie were married in community of property in 1967. Included in their joint estate was property amounting to the value of R20 million, that generated an income of R75 000 per month.<sup>142</sup> Ms Ledwaba, whom Ms Broodie believed to be employed by Mr Broodie, had two children with Mr Broodie who were the first and second respondents. In 2013 Mr Broodie showed signs of illness which resulted in him stepping down from handling the day-to-day duties of his business. In 2014, he transferred 75 percent of the joint estate to his “second family”, leaving his “first family” with only 25 per cent. This transaction was completed without Mrs

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<sup>136</sup> Barratt 2011: 281.

<sup>137</sup> Van Wyk 1976: 145.

<sup>138</sup> Barratt 2011: 282.

<sup>139</sup> *Marais v Maposa*.

<sup>140</sup> *Mulaudzi v Mudau* [2020] ZASCA 148: par. 11.

<sup>141</sup> *Vukeya v Ntshane*.

<sup>142</sup> *Marais v Maposa*: par. 13-14.

Broodie’s consent; she only became aware of this transaction a month before Mr Broodie’s death in 2016.<sup>143</sup> Mrs Broodie’s lack of consent was dismissed by the court *a quo* and she was deemed to have consented to it in terms of section 15(9) of the *Matrimonial Property Act*. It also worth noting that Mrs Broodie passed on in 2019 before this judgment was delivered.<sup>144</sup>

In adjudicating on the validity of this “transfer”, the Supreme Court of Appeal commenced by referring to section 14 of the *Matrimonial Property Act*, which provides that a wife has the same power as that of her husband to administer the joint estate. Furthermore, the court proceeded to mention that section 15 of the *Matrimonial Property Act* regulates the relationship between spouses and third parties. Section 15(1) of the *Matrimonial Property Act* provides that a spouse may enter into commercial transactions without the consent of the other spouse, subject to the provisions in subsection 15(2), (3) and (7) of the *Matrimonial Property Act*.<sup>145</sup> Failure to do so results in a transaction that is null and void. (It should be noted that this finding by the Supreme Court of Appeal now removes all doubt as to this particular issue).<sup>146</sup> Section 15(9) – which was central to the issue before the court – provides for the consequences in instances where a transaction is entered into contrary to subsections 15(2) and (3). Section 15(9)(a) provides that a transaction is deemed to have been entered with the required consent if a third party did not know and could not have reasonably known that the required has not been obtained.<sup>147</sup>

Notably, it was held by the court that section 15 of the *Matrimonial Property Act* seeks *to balance* the interest of the *bona fide* third party with those of the non-consenting spouse.<sup>148</sup> It is important to note that the court held that a party seeking to rely on the deeming provision *has a duty to take reasonable steps as objectively determined*, in order to ascertain whether the person with whom they are dealing is married and, if so, whether the applicable matrimonial property regime requires consent to be obtained and if this is the case, whether they have indeed obtained the required

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<sup>143</sup> *Marais v Maposa*: par. 15-18.

<sup>144</sup> *Marias v Maposa*: par. 2-4.

<sup>145</sup> *Marais v Maposa*: par. 19-21.

<sup>146</sup> Barratt 2023: 236..

<sup>147</sup> *Marais v Maposa*: par. 22-25.

<sup>148</sup> *Marais v Maposa*: par. 27.

consent. The court supported the views of academics such as Van Heerden in relation to this matter.<sup>149</sup>

The court then had to determine whether the donation of 75 per cent was in conflict with section 15(3)(c) of the *Matrimonial Property Act*, which as seen above provides that a spouse can donate an asset as long it is not contrary to section 15(2) of the *Matrimonial Property Act*. The donation in the present matter was seen to benefit Ms Ledwaba and her children in a disproportional manner. As such, the court concluded that this donation prejudiced Ms Broodie, as her consent was a requirement.<sup>150</sup> Furthermore, the court held that Ms Ledwaba did not undertake a reasonable enquiry in terms of section 15(9)(a) of the *Matrimonial Property Act* in order to ascertain whether the required consent had been obtained, as she knew that Mr Broodie was party to an existing civil marriage.<sup>151</sup> As a result, the court made an order setting aside the transaction, and also ordered that the assets should be returned to the joint estate of Mr and Ms Broodie.<sup>152</sup>

It is my view that the *Maposa* judgment has achieved the best possible balance between the interests of the non-consenting “innocent” spouse and those of a third party. In this way at least some of the fears expressed by authors like Barratt (in her work published before *Maposa*)<sup>153</sup> have been laid to rest. However, it will be seen in Chapter 4 that this may still not be enough for marriages contemplated in the *Sithole* judgment. For current purposes it will be sufficient to mention that section 15 of the *Matrimonial Property Act* and the case law relevant to it is also of significance in assessing the consequences of the *Sithole* judgments, which will be discussed in Chapter 4.

### **(C) Litigation by or against spouses**

In relation to litigation, a spouse married in community of property may not institute or defend legal proceedings without the written consent of the other spouse in terms of

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<sup>149</sup> *Marais v Maposa*: paras. 30-32.

<sup>150</sup> *Marais v Maposa*: paras. 40-41.

<sup>151</sup> *Marais v Maposa*: par. 42.

<sup>152</sup> *Marais v Maposa*: par. 44.

<sup>153</sup> Barratt 2011: 278.

section 17 of the *Matrimonial Property Act*. However, there are certain exceptions to this rule, in respect of proceedings relating to the separate property of a spouse, proceedings for the recovery of damages other than patrimonial damages committed as a result of a delict against the litigating spouse, and proceedings in relation to the litigating spouse's profession, trade or business.<sup>154</sup>

The fact that the consent requirement was not complied with before the proceedings were instituted or defended, will not in any way render the proceedings invalid.<sup>155</sup> The *Matrimonial Property Act* also provides in section 17(2) that a third party will not be allowed to challenge these proceedings on the ground that the litigating spouse did not obtain the necessary consent.<sup>156</sup> Van Heerden *et al* however highlight that a spouse who has instituted legal proceedings runs the risk of incurring a costs order, particularly in the event of unsuccessful litigation. If these costs cannot be recovered from the separate property of the litigating spouse, they will be recovered from the joint estate. However, the prejudiced spouse will be entitled to an adjustment at the dissolution of the joint estate.<sup>157</sup>

In conclusion, it should be noted that in instances of an application for surrender or sequestration of the joint estate, both spouses need to make the application.<sup>158</sup> The sequestration of a joint estate needs to be ordered against both spouses, unless a creditor could not, despite the taking of reasonable steps, ascertain whether or not the debtor is married in community of property.<sup>159</sup>

#### **2.4. IMPORTANT LEGAL PRINCIPLES THAT UNDERPIN THE MARRIAGE OUT OF COMMUNITY OF PROPERTY**

If parties seek to deviate from the default matrimonial property regime, one of the ways to do so is by entering into an antenuptial contract. An antenuptial contract is mainly used to deviate from certain common law or statutorily imposed consequences of a marriage, such as not being liable for debts incurred by the other spouse.<sup>160</sup> It must

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<sup>154</sup> Section 17(1)(a) - (c) of the *Matrimonial Property Act*; Van Heerden *et al* 1999: 195.

<sup>155</sup> *Matrimonial Property Act*. sec. 17(2); Sinclair 1984: 24.

<sup>156</sup> *Matrimonial Property Act*. sec. 17(2).

<sup>157</sup> Van Heerden *et al* 1999: 194.

<sup>158</sup> Sinclair 1984: 25.

<sup>159</sup> Van Heerden *et al* 1999: 194.

<sup>160</sup> Heaton & Kruger 2015: 61; 83.

be noted that since the enactment of the *Matrimonial Property Act* parties can now choose to marry out of community of property with or without the accrual system applying to their marriage.<sup>161</sup>

As their name suggests, antenuptial contracts are concluded before the conclusion of the marriage, and they are binding between the parties even when they are not reduced to writing. However, a notary needs to attest an antenuptial contract, and the contract must be registered in the deeds' registry in order for it to be binding on a third party.<sup>162</sup> Something that is *contra bonos mores*, impossible or illegal may not be included in the antenuptial contract.<sup>163</sup>

Marriage settlements, such as a donation by one spouse to the other or donation by a third party, may be included in the antenuptial contract. The marriage settlement becomes irreversible once the marriage is concluded and will be enforceable at the dissolution of the marriage or at the time agreed upon.<sup>164</sup>

#### **2.4.1. COMPLETE SEPARATION OF PROPERTY**

Prior to the enactment of the *Matrimonial Property Act*, a marriage with the exclusion of community of property and of profit and loss by an antenuptial contract – i.e., a so-called marriage “with complete separation of property” – was the automatic “standard-form” agreement.<sup>165</sup> However, the *Matrimonial Property Act* now provides that the accrual system automatically applies to such a marriage, unless specifically excluded.<sup>166</sup> Spouses who opt for a complete separation of property retain their individual general capacity and property rights when entering into the marriage. Their estates remain separate, and they do not share in each other's accrual and are not responsible for each other's liabilities. Spouses do however remain jointly and severally liable for contracts pertaining to household necessities and are still financially bound to each other to the extent that the reciprocal duty to support one another is an invariable consequence of marriage. It is furthermore possible for the spouses to sue

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<sup>161</sup> Van Heerden *et al* 1999: 195.

<sup>162</sup> *Deeds Registries Act 47/1937*: sec. 86.

<sup>163</sup> Van Heerden *et al* 1999: 195.

<sup>164</sup> Van Heerden *et al* 1999: 195.

<sup>165</sup> Heaton & Kruger 2015: 90.

<sup>166</sup> *Matrimonial Property Act*: sec. 2; Heaton & Kruger 2015: 90.

each other in contract or delict.<sup>167</sup> Both spouses also have the capacity to litigate independently of one another.<sup>168</sup>

Van Heerden *et al* point out that during the subsistence of the marriage, prescription cannot be completed be it acquisitive or extinctive. Prescription for acquisition or extinction of ownership or of a servitude begins three years after the dissolution of the marriage. Furthermore, a loss of claim by extinctive prescription will not take place until at least one year after the dissolution of the marriage.<sup>169</sup>

Insolvency of one spouse should theoretically not affect the estate of the other spouse. However, section 21(1) of the *Insolvency Act* provides that the property of the solvent spouse vests in the trustee of the insolvent spouse's estate as if it were part of that estate, but may be released in certain circumstances.<sup>170</sup>

It is also to be noted – as Barratt and Van Heerden *et al* point out – that separation of property may under certain circumstances be departed from in the event of a so-called “redistribution order”. As Barratt confirms, section 7(3) of the *Divorce Act* gives the courts the power, on application during divorce proceedings, to transfer property from the estate of one spouse to the other if the marriage complies with the criteria listed in that provision. As such, a redistribution order is available to spouses who entered into a civil marriage with complete separation of property before the dates of enactment of the *Matrimonial Property Act* (1<sup>st</sup> of November 1984) or the *Marriages and Matrimonial Property Law Amendment Act* (2<sup>nd</sup> of December 1988, in the case of Black persons), and where the divorcing spouses have not been able to enter into an agreement on the division of their property.<sup>171</sup> It should be noted that the *Sithole* judgment has had a significant impact on marriages concluded before the latter of these dates, as will be explained in more detail in Chapter 4. It should also be noted that the constitutional validity of the limitation of this order to only marriages concluded before 1 November 1984 was successfully challenged in the High Court in *GKR v Minister of Home Affairs and Others*.<sup>172</sup> This finding was upheld by the Constitutional Court in *EB (born S) v ER*

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<sup>167</sup> Van Heerden *et al* 1999: 196.

<sup>168</sup> Heaton & Kruger 2015: 91.

<sup>169</sup> *Prescription Act* 68 of 1969: sec. 3(1)(b), 8 and 13(1)(c); Van Heerden *et al* 1999: 196.

<sup>170</sup> *Insolvency Act*: sec. 21(2); Van Heerden *et al* 198.

<sup>171</sup> Barratt 2013: 690.

<sup>172</sup> *GKR v Minister of Home Affairs and Others* 2022 5 SA 478 (GP).

(born B) and Others; *KG v Minister of Home Affairs and Others*<sup>173</sup> in a judgment handed down as this study was being finalised. (For this reason, the judgment will not be considered in detail).

The purpose behind the statutory redistribution competence is to mitigate the harsh consequences that may ensue in the event of a marriage with complete separation of property in the case of marriages entered into before the accrual system was introduced as a possible matrimonial property option in 1984. Heaton states that this is because the accrual system does not apply retrospectively.<sup>174</sup>

Long before the *GKR* and *EB* cases mentioned above, Barratt had highlighted Sinclair and Heaton's view that the limitation of the availability to these marriages based on these dates could result in unconstitutionality, as this distinction likely contravened section 9(1) of the *Constitution* which provides that everyone has the right to equal protection and benefit of the law.<sup>175</sup>

Accordingly, Heaton and Kruger opined that using dates as the criterion to decide whether to afford a judicial discretion to redistribute property at the dissolution of a marriage would give rise to constitutional untenability. The application of this criterion clearly means that there might be a large number of spouses (mostly women) who were married with complete separation of property *after* these dates who would, after investing many years in the marriage, leave empty handed. According to the learned authors, making a distinction between spouses married before and after the cut-off dates infringes the right to equality.<sup>176</sup> However, as many spouses voluntarily enter into a marriage with complete separation of property, others argued that this violation of the equality clause is justifiable in this instance because introducing the judicial discretion to all marriages would result in legal uncertainty. However, Heaton and Kruger strongly rejected these submissions as they would rather accept the legal uncertainty than violating the spouses' right to equality in terms of the *Constitution*. This argument was supported by Van der Schyff J in the *GKR* case.<sup>177</sup> The authors

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<sup>173</sup> (CCT 364/21; CCT 158/22) [2023] ZACC 32 (10 October 2023).

<sup>174</sup> Heaton & Kruger 2015: 138; *Divorce Act* sec. 7(3)-(6).

<sup>175</sup> Barratt 2013: 691; *Constitution of the Republic of South Africa*: sec. 9(1).

<sup>176</sup> Heaton & Kruger 2015: 141.

<sup>177</sup> *GKR v Minister of Home Affairs and Others*: par. 62.

also argued that the *Gumede*<sup>178</sup> case, (which will be discussed in the paragraphs that follow) makes it clear that upholding the equality clause at the expense of legal certainty is justifiable.<sup>179</sup>

It is worth noting that efforts of trying to level the playing field in customary marriages by applying the remedy of the redistribution of assets, while the restrictions of section 7(3) of the *Divorce Act* remain intact in civil marriages, also raises the question of the violation of the right to equality. As much as we know that there is a great distinction between civil and customary marriages, this alone does not justify the differentiation, because it is difficult to imagine a rational connection to a legitimate governmental purpose behind such a differentiation. As such, it arguably violates section 9(1) *Constitution* of the equality clause. Also, as customary marriages are concluded mostly by Black persons, this may result in unfair discrimination on the ground of race as this would mean that only Black persons receive the right to request a judicial redistribution of assets at divorce, irrespective of the matrimonial property regime applicable to their marriage.<sup>180</sup> It must be mentioned that these arguments were unfortunately not specifically addressed by the court in the *EB* case, with the court simply remarking that customary marriages “may be a special category”.<sup>181</sup>

To explain this in more detail, in the *Gumede* matter, Mr and Mrs Gumede entered into a customary marriage in 1968, this was the only marriage in which Mr Gumede was involved. During the subsistence of the marriage, Mrs Gumede was never employed as she was the main caregiver of their children.<sup>182</sup> The *Recognition of Customary Marriages Act* 120 of 1998 (“the *RCMA*”) provides that all customary marriages concluded after the commencement of this act are by default in community of property (as is the case with civil marriages). However, no similar provision was made for marriages concluded before the commencement of the *RCMA*, because this Act stipulated that these marriages were still governed by customary law. In KwaZulu-Natal this meant that the *KwaZulu Act on the Code of Zulu Law* 16 of 1985 (“the *KwaZulu Act*”) and the *Natal Code of Zulu Law* (published in Proclamation R151 of 1987) (“the *Natal Code*”) applied, which provided that the husband in a customary

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<sup>178</sup> *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

<sup>179</sup> Heaton & Kruger 2015: 142.

<sup>180</sup> Heaton & Kruger 2015: 142.

<sup>181</sup> *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* par. 146.

<sup>182</sup> *Gumede v President of the Republic of South Africa*: paras.6-7.

marriage was the head of the family and owned all the property.<sup>183</sup> Both the *KwaZulu Act* and *Natal Code* applied to Mr and Mrs Gumede as they were domiciled in KwaZulu-Natal. In this matter, the court confirmed an order of constitutional invalidity of section 7(1) and 7(2) of the *RCMA* (as far as the latter provision distinguished between customary marriages entered into before and after the *RCMA*), section 20 of the *KwaZulu Act*, and sections 20 and 22 of the *Natal Code*.<sup>184</sup> This meant that all monogamous customary marriages concluded before the coming into existence of the *RCMA* would henceforth be governed by section 7(2) and thus would be afforded the right to seek a redistribution order at divorce. This decision has since sparked debate as mentioned above, and the argument that this position is constitutionally unsound is supported.

In the case of *GKR*, the parties entered into a marriage out of community of property without the accrual system in March 1988. The applicant brought an application before the court to seek an order declaring section 7(3) of the *Divorce Act* unconstitutional as this section only applied to marriage concluded before the 1<sup>st</sup> of November 1984. Furthermore, the applicant contended that the differentiation made in terms of dates to marriages concluded before and after the 1<sup>st</sup> of November 1984 raised a question of equality after the advent of constitutional democracy, with section 9(1) of the *Constitution* being infringed by this section.<sup>185</sup> While the court was not prepared to find that section 9(1) had been violated,<sup>186</sup> it did hold that the differentiation fuelled by section 7(3) of the *Divorce Act* constituted unfair discrimination as this time bar discriminated against spouses married with complete separation of property based on their chosen matrimonial property regime.<sup>187</sup> It is quite clear that the court agreed with the arguments of Sinclair in *Van Wyk et al* when she stated that:

“The discrimination takes the form of denying to those people a remedy to relieve injustice that is granted to persons married with an identical system, but earlier....For couples who live on their salaries and do not have the opportunity to amass property the matrimonial property system that governs their marriage turns out to be the panacea for the poverty that will be experienced most acutely by the divorced women [or any economically disadvantaged party]. For the poor, matrimonial property law is as important as an elaborate estate planning exercise.

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<sup>183</sup> *Gumede v President of the Republic of South Africa*: paras. 10-11.

<sup>184</sup> *Gumede v President of the Republic of South Africa*: paras. 49-50.

<sup>185</sup> *GKR v Minister of Home Affairs and Others*: par. 2.

<sup>186</sup> *GKR v Minister of Home Affairs and Others*: par. 52.

<sup>187</sup> *GKR v Minister of Home Affairs and Others*: par. 58.

But for many thousands of people the matrimonial home and a share in pension and other retirement benefits accumulated during marriage make the difference between forced reliance on exiguous welfare and some form of financial security. To these people the sharing of property acquired by joint efforts is crucial. To be denied an equitable remedy on the ground of the date of one's marriage is unacceptable."<sup>188</sup>

The court further held that an appropriate way to remedy this discrimination would be by removing this time bar in subsection 7(3)(a) of the Act and extending the section 7(3) redistribution competency to marriages concluded with complete separation of property after the 1<sup>st</sup> of November 1984.<sup>189</sup> It is interesting to note that the restriction contained in section 7(3)(b) was not dealt with by the court, so that it still applies to marriages contemplated in that provision. In the *EB* case, the Constitutional Court however explained that considering these marriages was unnecessary, because of the repeal of the *Black Administration Act*.<sup>190</sup>

Recent legal developments have also extended the redistribution competency to marriages concluded in the former homelands<sup>191</sup> and to religious marriages concluded by Muslims. In 2015 the *Women's Legal Centre Trust*<sup>192</sup> instituted an urgent application in the High Court against the President, the Minister of Home Affairs, the Minister of Justice, and the Speaker of the National Assembly and that of the National Council of Provinces. In their application, they argued that marriages under Shari'a Law were not recognised by the state, which in turn violated section 7(2) of the *Constitution*.<sup>193</sup> The court held that the state did not bear any obligation to enact legislation to regulate Muslim marriages solely in terms of section 7(2) of the *Constitution*, and that the court could not force it to do so because this would not respect the doctrine of separation of powers. However, the Supreme Court of Appeal in this matter went on to state that the failure by existing legislation such as the *Marriage Act* and the *Divorce Act* to recognise Muslim marriages was inconsistent with the *Constitution*. Furthermore, the latter act's failure to allow such marriages access to redistribution of assets orders and claims for forfeiture of patrimonial benefits at divorce (in terms of sections 7(3) and 9 of the *Divorce Act*) was also found to be

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<sup>188</sup> *GKR v Minister of Home Affairs and Others*: par. 61; Van Wyk *et al* 1994: 548.

<sup>189</sup> *GKR v Minister of Home Affairs and Others*: par. 58.

<sup>190</sup> *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* par. 147.

<sup>191</sup> Section 7(3)(c) of the Divorce Act, as introduced after the judgment in *Holomisa v Holomisa* 2019 2 BCLR 247 (CC).

<sup>192</sup> *President of the Republic of South Africa v Women's Legal Centre Trust* 2021 (2) SA 381 (SCA).

<sup>193</sup> *President of the Republic of South Africa v Women's Legal Centre Trust*: par.7.

unconstitutional. As such, both of these provisions were henceforth ordered to cater for Muslim marriages.<sup>194</sup> It will suffice to say that these findings were confirmed by the Constitutional Court a few months later.<sup>195</sup>

To conclude this discussion, it is submitted by many authors – in my view correctly – that marriages with complete separation of property tend to prejudice women, as many women sacrifice their careers in order to enter into a marriage and assume “mothering” and household responsibilities. The correctness of this argument has now been confirmed by the *EB* court.<sup>196</sup> It is quite clear that personal autonomy prevails where spouses are permitted to enter into antenuptial contracts without any interference by the courts. And, the mere fact that the accrual system is available to marriages entered into after 1984 does not necessarily imply that spouses exercise greater wisdom in selecting their matrimonial property regime,<sup>197</sup> and also does not counter the fact that unequal bargaining positions often exist between men and women in making that selection.<sup>198</sup> Thus, the fact that prior to the *EB* case the courts could not intervene, even if their non-intervention might result in an inequality, was justifiably criticised.<sup>199</sup>

For example, Barratt argues that English law suggests that when the courts are dividing the property, personal autonomy should not be the most important consideration. Furthermore, the courts need to retain a discretion to determine whether the enforcement of an antenuptial contract is fair at the dissolution of the marriage in certain circumstances. In deciding fairness, the courts need to consider what is equitable with no discrimination towards either spouse.<sup>200</sup> As much as judicial interference has been criticised by many writers, it has also been seen as necessary in order to mitigate the harshness that often comes with complete separation of property.<sup>201</sup>

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<sup>194</sup> *President of the Republic of South Africa v Women’s Legal Centre Trust*: par. 51.

<sup>195</sup> *Women’s Legal Centre Trust v President of the Republic of South Africa and Others* 2022 5 SA 323 (CC).

<sup>196</sup> *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* par. 122.

<sup>197</sup> Van Heerden *et al* 1999: 202.

<sup>198</sup> Heaton & Kruger 2015: 141. *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* par. 132.

<sup>199</sup> Barratt 2013: 704.

<sup>200</sup> Barratt 2013: 704.

<sup>201</sup> Van Heerden *et al* 1999: 201.

Barratt further mentions that English scholars have always opined that any antenuptial contract that purports to exclude protection by courts is discriminatory against the economically weaker spouse and that no one should be allowed to perpetuate discrimination on the basis that the other spouse has consented to it. In South Africa, antenuptial contracts tend to impact on the spouse that is in an economically weaker position. Couples should not be allowed to contract outside the principles of equality. Rigid application of these antenuptial contracts without the court being permitted to undertake the necessary investigations could end up unacceptably infringing on women's rights, and this would result in this remedy being in conflict with the *Constitution*.<sup>202</sup>

These arguments largely – and correctly in my view – found favour with the *EB* court, although Barratt was not cited by name.<sup>203</sup>

There is therefore in my mind no doubt that the significant steps that have occurred since the *Gumede* case to provide greater protection to spouses married with complete separation of property by broadening section 7(3) of the *Divorce Act* are to be supported, and it is significant that these developments have occurred by the courts' often relying on scholarship by leading authors on this issue.

In conclusion, it should be noted that, as will be explained in more detail Chapter 4, the *Sithole* judgment generally results in the possibility of a redistribution order being obtained at divorce now being removed from civil marriages involving black persons that were entered into before 2<sup>nd</sup> of December 1988. But, as will be explained in Chapter 4, the Constitutional Court pointed out that the possibility of such an order would in any event not have assisted Mrs Sithole based on the facts of her marriage. This fact must also be borne in mind for the purposes of the conclusions reached in this study.

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<sup>202</sup> Barratt 2013: 704.

<sup>203</sup> *EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others* pars. 130 - 147.

## 2.4.2. THE ACCRUAL SYSTEM

In order to make use of the accrual system, the marriage between the parties needs to be concluded out of community of property and out of community of profit and loss. A marriage to which the accrual system applies has much in common with the marriage with complete separation of property, as the legal relationship between the parties is the same during the subsistence of the marriage. With the exception of household necessities, the spouses are not liable for each other's debts, and they are also able to contract with each other freely.<sup>204</sup> Furthermore, it is possible for these spouses to sue each other in contract or delict, and the same legal principles apply to them in matters relating to life insurance policies and insolvency and prescription. As pointed out above, the judicial discretion to redistribute the property of the spouses at divorce (section 7(3) of the *Divorce Act*), does not apply in this system.<sup>205</sup>

The accrual system does not compel parties to share their property during the subsistence of the marriage.<sup>206</sup> The right to share in the other spouse's accrual does not form part of the insolvent estate of a spouse, and is also not transferable or liable to attachment while the marriage subsists.<sup>207</sup> The true effect of this system is only seen at the dissolution of the marriage and for this reason it has been described as "a deferred community of gains".<sup>208</sup> If the marriage is terminated by death of either or both spouses, the accrual calculation is done before the law of succession comes into play.<sup>209</sup>

Section 3 of the *Matrimonial Property Act* stipulates that the system functions as follows:

"At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses."

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<sup>204</sup> Van Heerden *et al* 1999: 203.

<sup>205</sup> Van Heerden *et al* 1999: 203.

<sup>206</sup> Heaton & Kruger 2015: 93.

<sup>207</sup> *Matrimonial Property Act*. sec. 3(2).

<sup>208</sup> Hahlo 1985: 304.

<sup>209</sup> *Matrimonial Property Act*. sec. 4(2).

In order to assess “accrual”, each spouse’s estate is given a commencement value that is recorded in the antenuptial contract when the marriage is entered into. (If this is not done, the commencement value is deemed to be zero, unless the contrary is proved). This commencement value is adjusted for inflation at the dissolution of the marriage, and is subtracted from the net final value of each spouse’s estate to determine the “growth” or “accrual” of the estate. (Certain items are also excluded from the accrual calculation by sections 4 and 5 of the *Matrimonial Property Act*). If there has not been any growth (for example because the net final value of a spouse’s estate is worth less than it was at the time of entering into the marriage), that spouse’s accrual is regarded as being nil. The calculation referred to in section 3 is then done to determine which spouse’s estate is entitled to the accrual payment.<sup>210</sup>

A spouse may approach the court for an immediate division of the accrual (without terminating the marriage), if the other spouse acts in a fraudulent or negligent manner, and such a court may order that the marriage is henceforth to be regarded as one with complete separation of property. The right to share in the accrual is also a patrimonial benefit that may on application be forfeited at divorce.<sup>211</sup>

## **2.5. THE ADVANTAGES AND DISADVANTAGES OF THE VARIOUS MATRIMONIAL PROPERTY REGIMES**

As mentioned above, before the commencement of the *Matrimonial Property Act* and the *Marriage and Matrimonial Property Law Amendment Act*, our law primarily catered for two matrimonial property regimes, namely a marriage in community of property and a marriage out of community of property.<sup>212</sup> The marriage out of community of property and of profit and loss with the inclusion of the accrual system became a third option as from 1<sup>st</sup> of November 1984. As a point of departure, it is worth noting that each system has its own advantages and disadvantages, and spouses should select their system in accordance with their unique circumstances. Heaton and Kruger make reference to a number of advantages and disadvantages of these matrimonial property

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<sup>210</sup> *Matrimonial Property Act*, sec. 6(4).

<sup>211</sup> Van Heerden *et al* 1999: 205.

<sup>212</sup> Welsh 2000: 1.

regimes. (It must be conceded that the discussion that follows is largely paraphrased from the list that they and other authors provide).<sup>213</sup>

### **2.5.1. THE ADVANTAGES AND DISADVANTAGES OF A MARRIAGE IN COMMUNITY OF PROPERTY**

According to Heaton and Kruger, some of the advantages of a marriage in community of property are as follows -

- a. First, a marriage in community of property does not require any expenses or effort from the prospective spouses as it applies automatically by operation of law;
- b. Secondly, the assets accumulated during the subsistence of the marriage are as a general rule automatically shared between the spouses, as are antenuptial assets; and
- c. Lastly, for the duration of the marriage, the husband and wife have the same credit-worthiness.<sup>214</sup>

On the other hand, the disadvantages of a marriage in community of property are as follows -

- a. First, the fact that neither spouse is protected from the creditors of the other results in the “innocent” spouse being liable for the debts of the other spouse and insolvency affects both spouses;
- b. Secondly, spouses cannot recover delictual damages from each other, with the exception of damages payable because of personal injury and, since the recent judgment of the High Court in *TG v WC*,<sup>215</sup> claims based on the *actio iniuriarum*;
- c. Thirdly, this system of marriage is complicated when it comes to the (joint) administration of the joint estate; and

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<sup>213</sup> Heaton & Kruger 2015: 102-103.

<sup>214</sup> Heaton & Kruger 2015:102.

<sup>215</sup> *TG v WC* [2020] ZAGPJHC 229 (28 Sept. 2020), as discussed under paragraph 2.3 above.

d. Lastly, if the marriage is terminated by death, a liquidity problem might arise.<sup>216</sup>

It is quite clear that this system has its ups and downs, just as any other matrimonial property regime. These advantages and disadvantages of a marriage in community of property clearly illustrate what Hahlo meant by remarking that such a marriage is “for better or worse” in every sense of the phrase.<sup>217</sup>

## **2.5.2. THE ADVANTAGES AND DISADVANTAGES OF A MARRIAGE OUT OF COMMUNITY OF PROPERTY**

In relation to the advantages of a marriage with complete separation of property, legal scholars have remarked as follows -

- a. First, a spouse in a marriage retains his or her power to control his or her estate in any manner they deem to be appropriate; and
- b. Secondly, in such a marriage, spouses cannot be held liable for each other’s debts (barring those related to household necessities).<sup>218</sup>

However, it is worth noting that having a complete separation of property might put the financially weaker spouse in a disadvantaged position when the marriage is terminated, as in most cases it is still an unfortunate reality that women are not as economically active as their husbands. It follows that the husband usually builds his estate with the wife’s (indirect) assistance, who ends up not being automatically entitled to any portion of his estate at the end of the day.<sup>219</sup>

I agree with the learned authors who opine that this system might be a great disadvantage to many wives who have contributed to the running of the household and raising of children, and in this manner to the growth of their husbands’ estates during the subsistence of the marriage. In my view, this reality shows that it is necessary for the redistribution competency envisaged in section 7(3) – (6) of the *Divorce Act* to be broadened to cater for all marriages entered into with complete separation of property, and steps that have thus far occurred are to be supported.

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<sup>216</sup> Heaton & Kruger 2015:102.

<sup>217</sup> Van Heerden *et al* 1999: 188.

<sup>218</sup> Visser & Potgieter 1998: 88.

<sup>219</sup> Heaton & Kruger 2015: 102.

## 2.6. PRELIMINARY CONCLUSION

As pointed out in this chapter, it is quite clear that each matrimonial property regime discussed above comes with its own pros and cons. Of particular relevance, this chapter has shown that the marriage in community of property involves complicated legal principles that apply in administering the joint estate. It has also been seen that the application of section 15(9)(a) of the *Matrimonial Property Act* when a spouse married in community of property does not obtain the necessary consent before entering into a transaction that binds the joint estate with a third party can create difficulties, but that the leading case of *Maposa*<sup>220</sup> has made the legal position more satisfactory. It has also been explained that the range of marriages entered into out of community of property which are now – or may soon become – entitled to a redistribution order has been broadened by our courts. All of these issues must be considered when assessing the impact of the *Sithole* judgment on Black spouses who entered into civil marriages before 2<sup>nd</sup> of December 1988, and also whether this impact is constitutionally sound, as will occur in Chapters 4 and 5.

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<sup>220</sup> *Marais v Maposa* 2020 5 SA 111 (SCA).

# CHAPTER 3

## THE DEFAULT MATRIMONIAL PROPERTY SYSTEM APPLICABLE TO CIVIL MARRIAGES INVOLVING BLACK PERSONS: THE *BLACK ADMINISTRATION ACT 38 OF 1927* AND SUBSEQUENT DEVELOPMENTS

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### 3.1. INTRODUCTION

This chapter will discuss the default matrimonial property system that applied to Black persons who entered into a civil marriage in terms of section 22(6) of the *Black Administration Act*,<sup>221</sup> and how the enactment of the *Matrimonial Property Act*<sup>222</sup> (on the 1<sup>st</sup> of November 1984) and the *Marriage and Matrimonial Property Law Amendment Act*<sup>223</sup> (on the 2<sup>nd</sup> of December 1988) changed matrimonial property law in South Africa. It will also identify the (ostensible) rationale at the time for section 22(6)'s imposition of a different default matrimonial property system for civil marriages involving Black spouses compared to those involving other races.

As a starting point, Sinclair and Heaton mention that section 22(6) of the *Black Administration Act* provided that a marriage in community of property between Black persons would not automatically ensue, since it was unknown to customary law.<sup>224</sup> Additionally, the case of *Ex parte Minister of Native Affairs: In re Molefe v Molefe*<sup>225</sup> interpreted section 22(6) of the *Black Administration Act* to mean that any marriage between Black persons without an antenuptial contract would be out of community of property with the marital power (that still existed at the time) belonging to the husband.<sup>226</sup> Sinclair and Heaton however point out that the main reason for the position created by section 22(6) of the *Black Administration Act* was actually to strengthen "tribal ties" so as to increase the political and economic control the White

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<sup>221</sup> *Black Administration Act 38/1927*. This Act was originally called the "*Native Administration Act*", but was renamed in 1978 – see Sinclair & Heaton 1996: 217.

<sup>222</sup> *Matrimonial Property Act*.

<sup>223</sup> *Marriage and Matrimonial Property Law Amendment Act 3/1988*.

<sup>224</sup> Sinclair & Heaton 1996: 228.

<sup>225</sup> *Ex parte Minister of Native Affairs: In re Molefe v Molefe* 1946 AD 315.

<sup>226</sup> Heaton & Kruger: 218.

minority government (later the *Apartheid* regime) had over Black persons.<sup>227</sup> To this may be added that even writers of the day such as Hahlo realised that our matrimonial property law was out of date as it relegated the wife to a lesser status in society.<sup>228</sup>

As mentioned in Chapter 2, the *Matrimonial Property Act* introduced the accrual system. However, it did not repeal section 22(6) of the *Black Administration Act* and the marital power the husband had over his wife remained intact for marriages already concluded before that date. Sinclair<sup>229</sup> explains that the enactment of the *Marriage and Matrimonial Property Law Amendment Act* brought remedial changes into the matrimonial property law of South Africa. First, the *Marriage and Matrimonial Property Law Amendment Act* repealed section 22(6) of the *Black Administration Act*. Secondly, to clear up confusion regarding the applicability of the *Divorce Act* to marriages governed by the *Black Administrations Act*, the *Divorce Act*<sup>230</sup> was amended in order to provide for redistribution orders in such marriages (section 7(3)(b)). And lastly, in order to allow Black couples to introduce the accrual system and the removal of the marital power by notarial contract, section 21(2)(a) of the *Matrimonial Property Act* was amended.<sup>231</sup> Marital power was finally eradicated by an amendment to the *Matrimonial Property Act* occasioned by the *General Law Fourth Amendment Act*<sup>232</sup> in 1993. This applied to civil marriages concluded before and after the enactment of the *Matrimonial Property Act*,<sup>233</sup> and as such is a relatively rare example of family law legislation that had retrospective effect.<sup>234</sup>

### **3.2. THE LEGAL POSITION CREATED BY SECTION 22(6) OF THE *BLACK ADMINISTRATION ACT***

The enactment of the *Native Administration Act* on the 1<sup>st</sup> of September 1927<sup>235</sup> (as the *Black Administration Act* was then called) brought to the fore a number of

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<sup>227</sup> Sinclair & Heaton 1996: 217.

<sup>228</sup> Hahlo 1974: 390.

<sup>229</sup> Sinclair 1984: 14

<sup>230</sup> *Divorce Act* 70/1979.

<sup>231</sup> Sinclair & Heaton 1996: 229.

<sup>232</sup> *General Law Fourth Amendment Act* 132/1993.

<sup>233</sup> Van Heerden *et al*: 163.

<sup>234</sup> Visser & Potgieter 1998: 89.

<sup>235</sup> Before 1927, there was no uniform framework to govern the administration of civil law between Black persons. The law of the colonies at that time was quite determined on furthering the segregation of Black persons. The "Native administration" was provided in 1910 and the law in the former colonies remained in force. The Governor-General-in-Council was responsible for the administration of matters relating to Black persons. The sole purpose of this was to maintain

consequences for Black persons. A civil marriage between a Black man and a woman of a different race was different from a marriage between a Black woman and a man of another race group. Furthermore, civil marriages concluded between a Black man and a Black woman were also different from those concluded between other races.<sup>236</sup> The Act ostensibly applied only to a marriage between two Black persons.<sup>237</sup>

As mentioned earlier, the Appellate Division (now the Supreme Court of Appeal) in the 1946 case of *Ex parte Minister of Native Affairs: In re Molefe v Molefe* dealt with the interpretation of section 22(6) of the *Black Administration Act*. In this matter, the Minister of Native Affairs approached the court for an order elucidating the true consequences of section 22(6) of the *Black Administration Act*.<sup>238</sup> The Appellate Division concluded by saying that Black persons were subject to a marriage out of community of property if they were married according to civil law and the husband was conferred with the marital power. However, it was possible for Black persons to marry in community of property by way of declaration made a month before the marriage and provided that the husband was not married to another woman in terms of customary law.<sup>239</sup> The court went on to quote section 22(6) of the *Black Administration Act* as follows:

“A marriage between Blacks, contracted after the commencement of this Act, shall not produce the legal consequences of a marriage in community of property between the spouses: provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any other women other than the wife, it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, Commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of

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administrative and political segregation. In 1927, the *Black Administration Act* 38 of 1927 was enacted, this Act was responsible for the creation of the uniform administration of matters relating to Black persons. This Act was also said to be responsible for creating a “government within a government”. It is quite evident that this is one of the Acts that were meant to suppress the Black majority. (South African Law Reform Commission Project 25 of 2004: 2). The consequences of section 22(6) of the *Black Administration Act* applied only to civil marriages concluded after the enactment of this Act (Seymour 1970: 240).

<sup>236</sup> Sinclair & Heaton 1996: 227.

<sup>237</sup> Sinclair & Heaton 1996: 227.

<sup>238</sup> *Ex parte Minister of Native Affairs: In re Molefe v Molefe*: 317. The case of *Ngwenya v Smits NO* 1942 WLD 234 also dealt with the interpretation of section 22(6). In this matter, the plaintiff who was legally married to the deceased in 1931 claimed that she was entitled to claim from her deceased husband’s estate. The court refused this claim and held that a marriage between two Black persons does not result in community of property unless a declaration is made prior to the conclusion of the marriage (*Ngwenya v Smits*: 235-236).

<sup>239</sup> *Ex parte Minister of Native Affairs: In re Molefe v Molefe*: paras. 318-319.

property and of profit and loss shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community”.<sup>240</sup>

Therefore, between the enactment of the *Black Administration Act* and its eventual repeal in 1998, Black persons were subject to the automatic consequence of a marriage out of community of property.<sup>241</sup> According to Dlamini, it is quite clear that the legislature was determined to perpetuate inequality towards Black persons wishing to conclude a civil marriage. Dlamini highlights the inequality perpetuated by the legislature between a customary marriage and a civil marriage. For example, it was possible for a Black person in a customary marriage to convert it into a civil marriage, however, it was impossible to convert from a civil marriage into a customary marriage.<sup>242</sup>

### 3.2.1. THE OSTENSIBLE REASON BEHIND THIS LEGAL POSITION

As a point of departure, it is worth noting that the legislature had passed legislation in 1949 – which was later repealed in 1985 – which prohibited any marriage between White persons and other races.<sup>243</sup> The *Black Administration Act* was one of the myriad of political and exclusionary laws which complicated the lives of Black persons as from its enactment (and later worsened by the *Apartheid* regime).<sup>244</sup> According to Seymour – and as already briefly mentioned above - “the object of section 22(6) of the *Black Administration Act* was to prevent Black persons from being caught unaware by a property regime with which they may not be familiar”,<sup>245</sup> namely “the Roman-Dutch law system of universal community of property.”<sup>246</sup>

However, it is mentioned that another crucial reason which led to the creation of a different dispensation for Black persons, was to protect customary law wives and their children, as marriage in community of property by the husband with another woman

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<sup>240</sup> *Black Administrative Act: sec. 22(6); Ex parte Minister of Native Affairs: In re Molefe v Molefe:* par. 318.

<sup>241</sup> Dlamini 1989: 414.

<sup>242</sup> Dlamini 1989: 412.

<sup>243</sup> The *Prohibition of Mixed Marriages Act* 55 of 1949 provided in section 1(1) that a marriage concluded between a White person and any other person of another race was prohibited. It is submitted that the sole reason for this prohibition was preserve a pure “white race”. However, this Act was subsequently repealed by the *Immorality and Prohibition of Mixed Marriages Act* 75 of 1985.

<sup>244</sup> South African Law Reform Commission Project 25 of 2004: 2.

<sup>245</sup> Seymour 1970: 240. See also Sinclair & Heaton 1996: 228.

<sup>246</sup> Sinclair & Heaton 1996: 228.

meant that the pre-existing customary marriage was terminated and that they were therefore automatically discarded.<sup>247</sup> The consequences would be the same if a Black woman were to enter into a civil marriage with another man during the subsistence of her customary marriage. It is however quite clear that in the latter case the legislature did not seek to protect men, as only polygyny was envisioned by customary law. As a result, in order for section 22(6) of the *Black Administration Act* to have meaning and serve its purpose, Sinclair and Heaton suggest that the differentiation in respect of the patrimonial consequences of a civil marriage needed not only to be between two Black persons, but also a Black man and a woman of another race. It is also worth noting that a marriage between a Black woman and a man of another race fell outside of the wording of section 22(6) of the *Black Administration Act* which meant that common law principles applied to this type of a marriage.<sup>248</sup>

The narrative created by the legislature was not really practically possible to maintain, as people continued marrying outside their races even though the legislation in question proceeded from the assumption that everyone should marry their own kind, for example, that a Black man should marry a Black woman.<sup>249</sup>

### **3.3. THE ENACTMENT OF THE *MATRIMONIAL PROPERTY ACT* 88 OF 1984**

In 1982, the South African Law Commission (as it was then known; it is now the South African Law Reform Commission or “SALRC”) admitted its intention to exclude Black persons from enjoying any protection under the provisions of chapter one, two and three of the envisioned *Matrimonial Property Act*. This meant that the accrual system would not apply to marriages of Black persons that were out of community of property, and also the abolition of marital power in respect of marriages concluded between Black persons would not take place.<sup>250</sup> According to Peart, the reason for this exclusion was to avoid conflict between civil and common law, against customary law.<sup>251</sup> The learned author mentions that this total exclusion would assist the courts when dealing with the already burdensome inconsistencies between civil, common law

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<sup>247</sup> Sinclair & Heaton 1996: 227 (footnote 262). Mqoke mentions that certain safeguards were provided by section 22(1) and (7) of the *Black Administration Act* protecting a customary law wife and her children (Mqoke 1980: 597).

<sup>248</sup> Sinclair & Heaton 1996: 227-228 (footnote 262).

<sup>249</sup> Sinclair & Heaton 1996: 228 (footnote 262).

<sup>250</sup> Sinclair 1984: 62.

<sup>251</sup> Peart 1982: 77.

and customary law.<sup>252</sup> Sinclair disagreed with the reasoning furnished by the SALRC. This was because she believed that “there could be no sound reason put forward to justify the fact that the position of Whites, Coloureds and Asians has been greatly improved, while the position of Black persons, especially black women remain[ed] unchanged”.<sup>253</sup>

Section 2 of the *Matrimonial Property Act* excluded the automatic application of the accrual system to marriages of Black persons that were out of community of property. Only marriages concluded out of community of property by means “of an antenuptial contract” enjoyed the application of the accrual system. As will be seen below, this section was therefore believed by some to exclude pre-existing Black marriages that were out of community of property. In terms of section 21(1) of the *Matrimonial Property Act*, Black persons married before the commencement of this Act had to approach the court in order to change their matrimonial property regime.<sup>254</sup>

As chapter two and three of the *Matrimonial Property Act* did not apply to marriages of Black persons, this meant that the marital power would not be abolished in respect of existing marriages and would also come into effect in respect of marriages concluded after the commencement of the *Matrimonial Property Act*, irrespective of whether these marriages were in or out of community of property.<sup>255</sup> Writing at the time of the enactment of the *Matrimonial Property Act*, Sinclair stated – correctly in my view – that she believed that full recognition of marriages of Black persons and extension of the abolition of marital power to all marriages would not have harmed anyone.<sup>256</sup>

Sinclair’s contentions were further supported by responses to questionnaires distributed by the SALRC in 1985. In its findings, the SALRC found that of the responses (88) that they had received, 96 per cent of Black persons concluded a common-law (i.e., civil) marriage. Furthermore, it was submitted that 95 per cent of the

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<sup>252</sup> Peart 1982: 86. Bennett on the other hand argued that customary law and common were similar as customary law was continually developed to follow common law rules. As such, not much conflict ensued when the court was required to choose which system of law to apply (Bennett 1985: 63).

<sup>253</sup> Sinclair 1984: 62.

<sup>254</sup> Sinclair 1984: 63-64.

<sup>255</sup> It is submitted that marital power was not necessary a “corollary” of community of property. Even though it was a rare thing to do, it was possible to leave the marital power intact while excluding community of property. As a result, partial exclusion of marital power was also possible (Hahlo 1975: 153).

<sup>256</sup> Sinclair 1984: 64-65.

respondents who had concluded common-law marriages had also paid *lobola* in respect of their marriages. Significantly, 80 per cent of these common-law marriages were concluded in community of property. In regards to the introduction of the accrual system in Black marriages, 74 per cent of the respondents advocated for the introduction of the accrual system for Black persons as well.<sup>257</sup>

In relation to marital power, 56 per cent of the respondents saw the need to abolish marital power. Many of these respondents understood that many in the Black community would be against this proposed abolition, which is why they also saw the need for educating Black persons on “Western” standards.<sup>258</sup>

Despite the ostensible reasons for originally not making the marriage in community of property the default system for civil marriages between Black persons, by the mid-1980s, the SALRC had found that Black persons entering into a civil marriage in fact preferred to be married in community of property.<sup>259</sup> This was shown by statistics collected from 1980 to 1984, in which many marriages concluded by Black persons were in community of property. It was submitted that many Black persons were of the opinion that a marriage out of community of property tended to create problems for women.<sup>260</sup>

It is quite clear from the submissions made to the SALRC that, already more almost four decades ago, it was evident that change was needed in terms of including Black persons in the provisions of the *Matrimonial Property Act* and applying a uniform default matrimonial property regime for all South Africans. The above discussion also confirms that the reasons for excluding Black persons from the provisions of the *Matrimonial Property Act* did not bear muster, as it is quite evident from the submissions made to the SALRC that the majority of Black persons were aware of the consequences brought about by civil and common-law marriage. I also believe that these findings by the Commission also played an important role in swaying the legislature towards including Black persons who were previously excluded from the

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<sup>257</sup> South African Law Commission Project 51 of 1985: 155.

<sup>258</sup> South African Law Commission 1985: 157.

<sup>259</sup> Sinclair & Heaton 1996: 228.

<sup>260</sup> South African Law Commission 1985: 158.

provisions of the *Matrimonial Property Act*. This was done by the enactment of the *Marriage and Matrimonial Property Law Amendment Act*, which will now be discussed.

### **3.4. THE ENACTMENT OF THE *MARRIAGE AND MATRIMONIAL PROPERTY LAW AMENDMENT ACT 3 OF 1988***

On the 2<sup>nd</sup> of December 1988, the *Marriage and Matrimonial Property Law Amendment Act* was enacted. This development occasioned meaningful changes in the matrimonial law arena in South Africa. As mentioned earlier, significant changes in matrimonial (property) law occurred as a result of the enactment of this Act. These changes were the following:

- i. This Act entailed that all civil marriages concluded between Black persons and between a Black man and a woman of another race after enactment of this Act would be in community of property.<sup>261</sup> To facilitate this, section 22(6) of the *Black Administration Act* was simultaneously repealed. Marital power was also brought to an end by this Act, and both spouses would henceforth enjoy equal concurrent administration of their joint estate by virtue of section 14 of the *Matrimonial Property Act*. A marriage by antenuptial contract would also henceforth result in the marriage being out of community of property for all races, with the default application of the accrual system.<sup>262</sup>
- ii. The *Marriage and Matrimonial Property Law Amendment Act* also unequivocally extended the judicial discretion to redistribute property in terms of section 7(3) of the *Divorce Act* to Black couples who were married out of community of property before the coming into existence of the *Matrimonial Property Act*.<sup>263</sup> (It is worth mentioning that some legal scholars saw the pre-1988 wording of this provision to implicitly exclude the marriages of Black persons and marriages in which the husband was the only Black, because of the requirement that the marriage must have been out of community of property because “of an antenuptial contract”, and not because of legislation such as the *Black Administration Act*. However, the case of

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<sup>261</sup> Sinclair & Heaton 1996: 229.

<sup>262</sup> *Marriage and Matrimonial Property Law Amendment Act*: sec. 1(e).

<sup>263</sup> *Marriage and Matrimonial Property Law Amendment Act*: sec. 2.

*Mathabathe v Mathabathe*<sup>264</sup> provided some – albeit not uniformly accepted<sup>265</sup> – clarification, when the court held that an antenuptial contract in the “wide sense” was contemplated in section 7 of the *Divorce Act*, so that the presence of a formal antenuptial contract was not an essential prerequisite for a redistribution order to be granted in such marriages. Nevertheless, all confusion in this regard was finally removed by the *Marriage and Matrimonial Property Law Amendment Act*).

- iii. Section 22(7) of the *Black Administration Act* prohibited a husband from entering into a civil marriage with another woman during the subsistence of customary law marriage with a customary wife in order to protect the rights of the customary law wife and children.<sup>266</sup>
- iv. Sections 21 and 25 of the *Matrimonial Property Act* altered the common-law principle that the spouses’ chosen matrimonial property regime was fixed at the date of marriage and could not be altered (the so-called “immutability principle”).<sup>267</sup> Section 21(1) of the *Matrimonial Property Act* allows people of all races to jointly approach the court to alter their matrimonial property regimes. However, with the introduction of the accrual system by the *Matrimonial Property Act*, section 21(2) thereof provided that spouses who were already married could elect to introduce the accrual system within a grace period of two years from the commencement date of the latter Act (1 November 1984). Again, this was limited to marriages that were out of community of property by means “of an antenuptial contract”. It was therefore arguable – for the same reasons mentioned above – that this provision

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<sup>264</sup> *Mathabathe v Mathabathe* 1987 3 SA 45 (W).

<sup>265</sup> In this matter divorce proceedings were instituted by the plaintiff against his wife as their marriage had irretrievably broken down. Section 7 of the *Divorce Act* was the cause of action in this matter. As a result, the court held that section 7 of the *Divorce Act* applied to marriages of Black persons and a formal antenuptial contract was declared not to be a requirement. Dlamini mentioned that this case was wrongly decided as he was of the opinion that the legislature never intended to make use of the antenuptial contract in the broad sense as interpreted by the court (Dlamini 1989: 416). Heaton also highlighted how less essential the formal requirement of section 7 was and that section 7 should not only apply to those not married out of community of property as a result of a contract (Heaton 1996: 230). Heaton and Kruger elaborated further into saying that it was possible to use the word “antenuptial contract” in the wider and narrow sense in order to accommodate those excluded in section 7 of the *Divorce Act* (Heaton and Kruger 2015: 83). The decision in *Mathabathe* was also rejected in *Milbourn v Milbourn* 1987 3 SA 62 (W).

<sup>266</sup> *Black Administration Act*: sec. 22(7).

<sup>267</sup> Heaton & Kruger 2015: 105.

excluded the marriages of Black persons that were out of community of property by virtue of the section 22(6) of the *Black Administration Act*. Section 3 of the *Marriage and Matrimonial Property Law Amendment Act* however provided for these marriages, by introducing a similar grace period in terms of which of a notarial contract could be concluded within a period of two years from the commencement date of this Act (the 2<sup>nd</sup> of December 1988) in order to make the accrual system applicable.<sup>268</sup> Sinclair and Heaton mention that the grace period applicable to all marriages other than Black civil marriages (with the possible inclusion of marriages concluded between a Black woman and a man of another race) was extended for a further period of two years in 1986. No similar extension was however provided for in the case of Black civil marriages after 2<sup>nd</sup> of December 1990.<sup>269</sup>

- v. Finally, the *Amendment Act* provided for the abolition of marital power for marriages in community of property and marriages out of community of property, which resulted in the provisions of chapter three of the *Matrimonial Property Act* becoming applicable to civil marriages of Black persons. These are the marriages that were initially excluded by section 25(1) and (2) of the *Matrimonial Property Act*.<sup>270</sup>

As far as the (in)applicability of the *Marriage and Matrimonial Property Law Amendment Act* in former TBVC states is concerned, Sinclair and Heaton state that the *Marriage and Matrimonial Property Law Amendment Act* does not apply in these territories unless specifically enacted into the laws of these states before 27<sup>th</sup> of April 1994.<sup>271</sup> However, it must be noted that her view was expressed before the *Justice Laws Rationalisation Act* 18 of 1996 made the *Matrimonial Property Act* (as amended) applicable to these states as from 12 March 1997.<sup>272</sup>

It should also be noted that Dlamini opines that *lobolo* “plays a social and psychological role in the marriage of a Black person”; and as such, it is practised in the context of

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<sup>268</sup> *Marriage and Matrimonial Property Law Amendment Act*. sec. 3(a).

<sup>269</sup> Sinclair & Heaton 1996: 233.

<sup>270</sup> Sinclair & Heaton 1996: 234.

<sup>271</sup> Sinclair & Heaton 1996: 234. A practical example would be that of Ciskei, as it is submitted that they incorporated the provisions of the *Marriage and Matrimonial Property Act* in their *Matrimonial Property Decree* 7 of 1992.

<sup>272</sup> Van Heerden *et al* 1999: 163 (see footnote 215).

many civil marriages involving Black persons, without it being a requirement for their validity at common law.<sup>273</sup>

As many authors have opined, I also believe that as much as the *Marriage and Matrimonial Property Law Amendment Act* brought remedial changes to matrimonial property law, this Act however also had its shortcomings. One of the most important shortcomings is the fact that marital power was not fully eradicated at first. Marital power was only finally eradicated by an amendment to the *Matrimonial Property Act* occasioned by the *General Law Fourth Amendment Act* in 1993.<sup>274</sup> As a result, this eventually applied to civil marriages concluded before and after the enactment of the *Matrimonial Property Act*.<sup>275</sup>

### 3.5. PRELIMINARY CONCLUSION

The consequences created by section 22(6) of the *Black Administration Act*, along with section 21 of the *Matrimonial Property Act* continued to affect Black persons into our constitutional democracy, until they came to the fore in the *Sithole* judgments, which will be discussed in chapter four.

It was seen in this chapter that the ostensible rationale for not making the marriage in community of property the default regime in the case of Black civil marriages in 1927, was the belief that this concept was foreign to Black persons<sup>276</sup> However, while this sentiment may have carried weight when the *Black Administration Act* was enacted almost a century ago, it was also seen in this chapter that this was no longer the case by the mid-1980s. As such, the initial exclusion of Black persons from the provisions of the *Matrimonial Property Act* was not well received by authors such as Sinclair, who strongly criticised the legislature's decision for this exclusion. The subsequent enactment of the *Marriage and Matrimonial Property Law Amendment Act* therefore made a meaningful contribution to our matrimonial property law by equalising the

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<sup>274</sup> Section 29 of the *General Law Fourth Amendment Act* 3 of 1993 is said to have replaced section 11 of the *Matrimonial Property Act*, subsequently removing marital power. It is worth to note that marital power was not completely removed as it continues to exist in former homeland territories such as the former Transkei and cannot be altered even by way of an antenuptial contract in terms section 37 of the *Marriage Act of the Transkei, Act* 21 of 1978.

<sup>275</sup> Van Heerden *et al* 1999: 163.

<sup>276</sup> It will be seen in Chapter 4 that the Constitutional Court's judgment in *Sithole* did not specifically mention or consider this ostensible rationale. This is a pity, because in my view this would have contributed to the weight of the court's ratio.

default position for all races. However, this legislation was coupled with its own shortcomings, which formed the subject-matter of the *Sithole* judgments that will be discussed in the next chapter.

Before proceeding to the next chapter, it is important to note that the key issue raised in the *Sithole* judgments was the lack of retrospectivity of section 21(2)(a) of the *Matrimonial Property Act* in terms of altering the default matrimonial property system that was created by the *Black Administration Act*. At this point, it deserves to be mentioned that this may be understandable because, as Visser and Potgieter<sup>277</sup> point out, legislation that has retrospective effect is rare in the context of (especially) matrimonial property law. Indeed, in 1998 these authors expressly stated that “[i]t is, however, improbable that the legislature will ever pass legislation which will change all marriages out of community of property to marriages in community of property.”<sup>278</sup> However, as will be seen in the next chapter this is in effect exactly what was achieved by the judiciary in the *Sithole* judgments in the case of civil marriages involving Black persons.

Regarding the potential retrospectivity of legislation as alluded to above, it is important to note that there is a distinction between the application with retrospectivity of legislation in the “weak” and “strong” sense in South Africa. The former is understood as where legislation has a prospective effect on existing matters or transactions, whereas the latter occurs where an Act is deemed to have been promulgated as from a past date, so that the law is “taken to have been that which it was not”.<sup>279</sup>

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<sup>277</sup> Visser & Potgieter 1998: 89.

<sup>278</sup> Visser & Potgieter 1998: 89.

<sup>279</sup> *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise* 1955 4 SA 305 (A); Brink & Brincker 2017. <https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/Tax/tax-alert-9-june-Important-judgment-on-the-constitutionality-of-retrospective-legislation.html>. (accessed on 20 March 2022. See also *Transnet Ltd v Chairman National Transport Commission* 1999 4 SA 1 (SCA). In this matter, a government proclamation published on 1 May 1996 failed to state whether the National Transport Commission still had concurrent jurisdiction with local transportation boards to award road carrier permits and whether pending applications for such permits would be affected by the new proclamation. The Supreme Court of Appeal confirmed the principle that legislation may not be construed to have retrospective effect – to the extent that it impairs rights obtained under pre-existing laws – unless this was the clear intention of the Legislature. In brief, the court rejected the idea of applying legislation with retrospective effect in this matter because the legislation could not be interpreted as having intended this to be the result (*Transnet Ltd v Chairman National Transport Commission*: paras. 1-2; 14; 21 - 24).

According to Botha, in order to prevent any unfair or unreasonable results, the common law (as gleaned from case law) states that the legislature strives to regulate only future matters and not the past. The learned author believes that by following this principle, we will also be able to ensure that legal certainty is achieved.<sup>280</sup>

As stated in *Transnet Ltd v Chairman National Transport Commission*,<sup>281</sup> it is therefore the general presumption in our law that legislation only applies to matters that occurred after that particular legislation has been passed, unless the legislation “expressly or by necessary implication” requires this presumption not to apply.<sup>282</sup> It is further beyond doubt that legislation should not be interpreted in a manner that infringes on existing rights and obligations as that would violate the core values of the *Constitution* namely, fairness and justice.<sup>283</sup>

With reference to the *Sithole* judgment, it is quite clear that neither the *Marriage and Matrimonial Property Law Amendment Act* nor the *Matrimonial Property Act* expressly or by implication retrospectively altered the default legal position created by section 22(6) of the *Black Administration Act*. There could thus have been no option for the *Sithole* court to *interpret* these statutes as having done so. This meant that the constitutional validity of the status quo had to be confronted head-on, as will be explained in the next chapter.

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<sup>280</sup> Botha 2012: 55.

<sup>281</sup> *Transnet Ltd v Chairman National Transport Commission* 1999 4 SA 1 (SCA): par. 12.

<sup>282</sup> Botha 2012: 55.

<sup>283</sup> Botha 2012: 55.

## CHAPTER 4

# THE *SITHOLE* JUDGMENT: AN EVALUATION AND A CONSIDERATION OF ITS IMPACT, CONSTITUTIONAL SOUNDNESS AND (UN)INTENDED CONSEQUENCES

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### 4.1. INTRODUCTION

An in-depth analysis of the *Sithole* judgments will be undertaken in this chapter. This will be done by comparing the judgments of the two respective courts and then drawing attention to certain issues / consequences that emerge from these judgments.

As a point of departure, in *AS v GS*,<sup>284</sup> (as the judgment of the court of first instance, the High Court, was reported) it was held that section 21(2)(a) of the *Matrimonial Property Act* was unconstitutional as it perpetuated section 22(6) of the *Black Administration Act* which discriminated against Black couples.<sup>285</sup> I find myself in agreement with Judge Mandondo as the learned judge made mention of the fact that the recognition and equal worth of Black people has been due for quite some time and that:

“The discrimination that the impugned provisions perpetuate is so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order or by suspending the order of invalidity to allow parliament to rectify the error”.<sup>286</sup>

In terms of section 172(2)(a) of the *Constitution*, the Constitutional Court confirmed the High Court’s order of invalidity and stated that section 21(2)(a) has indeed perpetuated the main purpose of the *Black Administration Act*, which was to unfairly discriminate against Black couples as part of an “orchestrated pattern of racial discrimination and segregation” by introducing a different default matrimonial property regime for them.<sup>287</sup> A full discussion of the judgments of both courts will be provided in the paragraphs that follow.

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<sup>284</sup> *AS v GS*, 2020 3 SA 365 (KZD).

<sup>285</sup> *AS v GS* 2020.

<sup>286</sup> *AS v GS*: par. 72.

<sup>287</sup> *Sithole v Sithole* 2021 (5) SA 34 (CC): par. 44, read with paras. 21-24; 26 and 27; 44 and 59.

## **4.2. THE SITHOLE CASES**

### **4.2.1. IN THE HIGH COURT**

#### **4.2.1.1. Facts**

The first applicant in this matter was a 72-year-old housewife. She had been selling clothes from a home-based business between 1972 (the year in which she was married to the first respondent, who was 74 years of age at the time this matter was heard) and 1985. Profits from her business were used to cover the combined household expenses, such as paying for their children's school fees and household necessities. Property was bought in the year 2000 by the first applicant and the first respondent but was registered only in the latter's name.<sup>288</sup>

The marriage between the first applicant and first respondent had deteriorated in the two years preceding the court proceedings, as the first respondent was suspected to have been engaging in extra-marital relationships. The first respondent threatened the first applicant with selling the house, since it was registered in his name. The first respondent however denied threatening to sell the house without the first applicant's consent. He mentioned that the suggestion of selling the house arose because the house was too big for only the two of them, as the children were now independent and no longer living in the common household. It is also worth mentioning that the relationship between the spouses was reportedly no longer a pleasant one, as the first respondent blamed the fallout between himself and his wife on a lack of respect shown towards him by her.<sup>289</sup>

In a quest for protection, the first applicant initiated legal proceedings in the Pinetown Magistrates' Court. In the course of these proceedings, she discovered that her husband did not require her consent in order to sell the house, as they were married out of community of property. She managed to obtain an interdict preventing the first respondent from selling the house, as the sale of the house would result in her being homeless despite having invested so much in the house(hold). She also hoped to reconcile with her husband as she was a devout member of the Roman-Catholic Church, where divorce is not encouraged. As such, she did not want to divorce her

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<sup>288</sup> AS v GS: par. 12.

<sup>289</sup> AS v GS: par. 12.

husband in order to possibly obtain an equitable redistribution of their property in terms of section 7 of the *Divorce Act*, a remedy for which she qualified as the parties were married with complete separation of property in 1972.<sup>290</sup>

It was submitted on behalf of the first applicant that a marriage in community of property results in the assets falling into a joint estate, whereas in a marriage out of community of property the property fell into the husband's separate estate. (I pause here to mention that this rather general averment was presumably only intended to refer to the house that formed the subject matter of the litigation). This could result in the husband recklessly squandering the family's wealth, which would disadvantage a wife married out of community of property. The first applicant argued that a woman who is unable to divorce would therefore continue to suffer from the injustices of section 22(6) of the *Black Administration Act*. Furthermore, it was submitted that this resulted in a violation of such a woman's constitutional rights to equality and dignity, and also infringed her socio-economic rights.<sup>291</sup>

The first applicant therefore contended that section 21(1) and 21(2)(a) of the *Matrimonial Property Act* continued to perpetuate the injustices of section 22(6) of the *Black Administration Act* by depriving Black persons of an opportunity to enjoy the automatic application of community of property to their marriages. According to the applicants, section 21(1) and 21(2)(a) of the *Matrimonial Property Act* was not consistent with the *Constitution*. It was also argued by the applicants that women require the consent of their husbands to change their matrimonial property system by virtue of a joint application to court in terms of section 21(1) of the *Matrimonial Property Act*.<sup>292</sup>

#### **4.2.1.2. Issue**

As is evident from the foregoing, the main issue raised in this matter was whether section 21(1) and 21(2)(a) of the *Matrimonial Property Act* was consistent with section 9 of the *Constitution*, that guarantees the right to equality. It is important to set out the

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<sup>290</sup> AS v GS: paras. 13-14. See paragraph 2.4.1 in Chapter 2.

<sup>291</sup> AS v GS: paras. 15-16.

<sup>292</sup> AS v GS: par. 17.

general constitutional legal framework provided by Madondo DJP before addressing the application thereof to the matter before him.

#### 4.2.1.3. The judgment

The court *a quo*'s judgment commenced by distinguishing between formal and substantive equality. It pointed out that formal equality does not take actual circumstances (such as social and economic disparities) into account but rather focuses on achieving the treatment of "sameness". Substantive equality, on the other hand, takes circumstance-specific (economic and social) disparities into account in order to ascertain whether equality as an outcome is being achieved in terms of the *Constitution*.<sup>293</sup>

The court went on to mention a number of cases in relation to the interpretation of section 9 of the *Constitution*:

- a. First, it was submitted that the *Hugo* case found that it is impossible to achieve equality through identical treatment, given the past injustices our country has faced.<sup>294</sup>
- b. Secondly, in *National Coalition for Gay and Lesbian Equality*, the court stated that past injustices need to be remedied by an ongoing process of "remedial equality", as it is not sufficient for the *Constitution* to ensure equality merely by applying the Bill of Rights to eradicate discriminatory laws, and to do no more than this.<sup>295</sup>
- c. Lastly, the leading case of *Harksen v Lane* formulated the stages of enquiry to determine whether the equality clause has been violated. Accordingly, the court first needs to establish whether there is a differentiation between people or categories of people. If there is no "rational connection to a legitimate

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<sup>293</sup> Currie & De Waal 2013: 13. For example, Loenen mentions that when all children receive education under the same school curriculum, this equates to formal equality. However, in instances where some children have special needs (such as being deaf) and still undergo the same school programme, this would be an injustice. As such, in order to address the special children's needs it is appropriate to treat them differently from other children in order to ensure that their right to equality is realised (Loenen 1997: 405).

<sup>294</sup> *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC): par. 41.

<sup>295</sup> *National Coalition for Gays and Lesbian Equality and another v Minister of Justice and Others* 1999 (1) SA 6 (CC): paras. 60-61.

government purpose”, the differentiation immediately violates section 9(1) of the *Constitution* that states that “everyone is equal before the law and has the right to equal protection and benefit of the law”. However, even if such a purpose does exist, the differentiation may still amount to discrimination. If so, the court has to establish whether the differentiation amounts to *unfair* discrimination, by conducting a two-stage analysis. This analysis is as follows: First, does the differentiation amount to discrimination? If it is based on a specified ground as listed in section 9(3) of the *Constitution*, discrimination will be present. If not, then it must be proved to constitute discrimination based on conduct that potentially impairs on human dignity of persons or seriously affects them in an adverse manner. If so, it has to be determined whether the discrimination is indeed unfair. Unfairness is presumed if the discrimination is based on a specified ground. The test in this regard “focuses primarily on the impact of the discrimination on complainant and others in his or her situation”, with reference to a number of factors that are discussed below. Following a positive answer to this question, it needs to be established whether the unfair discrimination can be justified under section 36 of the *Constitution*.<sup>296</sup>

Madondo DJP placed emphasis on the fact that the equality clause provided for a “composite right”: if the impugned provision (or conduct) fails the first stage of the *Harksen* test, by violating section 9(1) of the *Constitution*, this would be the end of the matter. By the same token, if section 9(3) or (4) is found to have been violated, there is no need to prove that section 9(1) has also been violated. But this is not the end of the matter, because even unfair discrimination could still be found to be justifiable.

Regarding this possibility, the court pointed out that section 36 of the *Constitution* applies to all the rights contained in the Bill of Rights. In terms of the second stage of the *Harksen* enquiry, the respondent had the onus of proving that the said infringement is justifiable in terms of section 36. This could be done by satisfying the criteria in section 36, thereby showing that the rights have been limited in a justifiable manner by a law of general application for reasons which are considered to be acceptable in an open and democratic society which promotes equality, freedom and human dignity. Again, there had to be a legitimate government purpose behind the limitation, and the

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<sup>296</sup> *Harksen v Lane NO and others* 1998 1 SA 300 (CC): par. 54.

case of *S v K*<sup>297</sup> further confirmed that the discrimination cannot be acceptable in an open and democratic society if it infringes on human dignity.<sup>298</sup>

In terms of assessing the constitutionality or otherwise of section 21(1) and 21(2)(a) of the *Matrimonial Property Act*, Madondo DJP emphasised that Black women married in terms of section 22(6) of the *Black Administration Act* before 1988 were treated differently from women of other races who married before 1988. As stated in the *Walker*<sup>299</sup> case, if there is insufficient evidence justifying discrimination on a racial ground, it is without any doubt unfair.<sup>300</sup>

In the present matter, Madondo DJP held that the discrimination complained of was based on listed grounds such as race, age and marital status. However, he reiterated that it is not simply discrimination that is prohibited by the equality clause, but rather *unfair* discrimination.<sup>301</sup> As alluded to above, *Harksen* made mention of three factors to be taken into consideration when ascertaining whether the discrimination has an unfair impact, namely: the position of the persons in question in society, the nature of the discriminating law and its purpose (such as whether it serves an important societal goal), and the extent to which the rights of the person in question have been impaired.<sup>302</sup> Madondo DJP confirmed that these factors were a vehicle to assist the court in establishing compliance with the constitutional test of unfairness with greater accuracy. Moreover, he confirmed that section 9(5) of the *Constitution* applies to direct and indirect discrimination, with the result that the complainant need not prove that a discriminatory law was *intended* to discriminate.<sup>303</sup>

*In casu*, the court also mentioned that human dignity is one of the foundational pillars of our *Constitution*. The court proceeded to quote Justice O'Regan in *S v Makwanyane*<sup>304</sup> as follows:

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<sup>297</sup> *S v K* 1997 9 BCLR 1283 (C): par. 30.

<sup>298</sup> *AS v GS*: paras. 27-28.

<sup>299</sup> *Pretoria City Council v Walker* 1998 (2) SA 363 (CC): par. 31.

<sup>300</sup> *AS v GS*: paras. 29-31.

<sup>301</sup> *Currie & De Waal* 2013: 223.

<sup>302</sup> *Harksen v Lane NO and others*: par. 52.

<sup>303</sup> *AS v GS*: paras. 35-36.

<sup>304</sup> *S v Makwanyane and another* 1995 3 SA 391 (CC): par. 328.

“Recognising a right to dignity is an acknowledgement of an intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in the Bill of Rights”.

Again, Madondo DJP pointed out that it is possible for a law of general application (i.e., one that applies to all equally and is devoid of arbitrariness) to justifiably limit a right provided that there is a reasonable and causal connection between the law and the purpose that it serves in an open and democratic society.<sup>305</sup>

Against this framework, Madondo DJP commenced the application phase of his judgment by stating that section 22(6) of the *Black Administration Act* denied Black persons the opportunity to automatically marry in community of property, unless they declared before a competent person (such as a Magistrate or Commissioner) that they wished to conclude their marriage in community of property. It was however a pertinent requirement that the husband was not a party to any “customary union” with a different woman when concluding this marriage.<sup>306</sup> In particular, White women and women of other races enjoyed more protection than Black women.<sup>307</sup>

The *Marriage and Matrimonial Property Law Amendment Act* was responsible for the deletion of section 22(6) of the *Black Administration Act*. Section 21(2)(a) of the *Matrimonial Property Act* was substituted and section 25(3) of the *Matrimonial Property Act* was added; this section provided Black persons married under *the Black Administration Act* with an opportunity to change their matrimonial property system within a period of two years as from the 2<sup>nd</sup> of December 1988. As Chapter 2 of the *Matrimonial Property Act* (the chapter dealing with the marriage in community of property) was not automatically applicable to marriages concluded between Black persons, section 25(3)(b) of the *Matrimonial Property Act* now permitted the provisions of Chapter 2 to become applicable to marriages concluded between Black persons if they chose to opt-into this system. As such, section 11 of the *Matrimonial Property Act* (before its amendment in 1993) abolished marital power in respect of marriages entered into after the commencement of the *Marriage and Matrimonial Property Law*

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<sup>305</sup> AS v GS: paras. 37-38 and 41;42 & 44.

<sup>306</sup> *Black Administration Act*: sec. 22(6).

<sup>307</sup> AS v GS: par 46.

*Amendment Act* in 1988. This provision was again amended by the *General Law Fourth Amendment Act* for all marriages concluded before and after 1988.<sup>308</sup>

Section 7 of the *Divorce Act* was amended in order to cater for the marriages governed by section 22(6) of the *Black Administration Act*. Section 21(1) of the *Matrimonial Property Act* allows couples to change their matrimonial property system provided that they both consent to doing so and bring a joint application to court. The applicants contended that section 21(1) of the *Matrimonial Property Act* did not remedy section 22(6) of the *Black Administration Act*, as a woman still required the consent of her husband to change the default marriage out of community of property. As a result, the applicants believed that the perpetuation of section 22(6) of the *Black Administration Act* by section 21(1) of the *Matrimonial Property Act* violated the *Constitution*.

Madondo DJP held that it was “common cause” that section 22(6) of the *Black Administration Act* denied many Black women the protection that was by default conferred on other women who were married in community of property. This, rendered them vulnerable and dependent on the “goodwill” of their husbands because, for example, a marriage out of community of property could result in such a woman being forced out of her house as the house was not registered in her name.<sup>309</sup>

Furthermore, reference was made to the fact that section 7(3) of the *Divorce Act* is not of aid to women who cannot divorce due to religious reasons (as in the case of the first applicant), or for social or financial reasons. As such, the remedy provided by section 7(3) – (6) of the *Divorce Act* was held not to be of assistance to these women. Moreover, the application of section 7(3) of the *Divorce Act* depends entirely on the court’s discretion at the dissolution of the marriage and is not in any way guaranteed by operation of law. The court agreed that the combined effect hereof was that these women would continue to suffer from the injustices of section 22(6) of the *Black Administration Act* as they would neither be able to change their matrimonial property regime, nor to divorce their husbands in order to access the protection (potentially) conferred by section 7(3) of the *Divorce Act*. The fact that a wife had to divorce her husband and to rely on the discretion of the court before her right of equality could be realised by the *Constitution* did not sit well with the court. The court agreed with

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<sup>308</sup> AS v GS: paras. 46-49.

<sup>309</sup> AS v GS: paras. 50-54.

counsel for the first applicant's argument that in most cases women were unable to secure the required consent in order to change their matrimonial property regime and, moreover, that some of them were not even aware of the existence of this right. They would furthermore require financial and/or legal assistance to avail themselves of this protection. In a bid to promote equality, the court was therefore of the opinion that the roles needed to be reversed and that a marriage in community of property should also automatically apply to Black persons.<sup>310</sup>

Madondo DJP confirmed that our *Constitution* militated against the maltreatment and impairment of the dignity of Blacks persons, as occurred in the past, as the protection of human dignity is one of the fundamental pillars of our constitutional democracy. The court in this matter referred to the Canadian case of *Egan*<sup>311</sup> on the question of the interrelationship between equality and dignity as follows:

“Equality means that our society cannot tolerate legislative distinctions that classify certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity”.

It was quite clear that Black spouses married before 1988 suffered as result of section 21(2)(a), as this provision impaired their inherent human dignity. The court considered the differentiation meted out to spouses married before 1988 to be “of a comparably serious nature”, as their interests were not taken into consideration and their right to equality was not realised. The court reiterated that the impact of the discrimination is what determines whether or not it is unfair. Section 21(2)(a) of the *Matrimonial Property Act* was held to further a “systemic disadvantage” towards Black persons. Moreover, no legitimate reason had been furnished for creating this differentiation, which was certainly not a measure aimed at achieving substantive or restitutionary equality. In particular, “[n]o members of a racial group should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than others who belong to other racial groups.” The fact that Black spouses married after 1988 were protected, while those married before 1988 were not, strengthened this conclusion.<sup>312</sup>

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<sup>310</sup> AS v GS: paras. 55-56.

<sup>311</sup> *Egan v Canada* [1995] 29 CRR (2d) 79: par. 105.

<sup>312</sup> AS v GS: paras. 57-62.

Furthermore, in order to constitute a justifiable limitation of a right contained in the Bill of Rights, the first requirement is that the impugned law must be general in its application and not be arbitrary. This means that the law should not be aimed at particular group in its application and must apply in a uniform manner throughout South Africa. Section 21(2)(a) was clearly arbitrary and unequal in its application as it did not apply to all citizens but was limited to Black persons married under section 22(6) of the *Black Administration Act*. Section 21(2)(a) therefore unfairly discriminated on the grounds of marital status, race, gender and age. This infringement did not serve any legitimate government purpose.<sup>313</sup>

Regarding section 21(1), the court opined that, properly interpreted, the provisions of section 21(1) apply equally to all South Africans and as such it could be said to be a law of general application. Furthermore, the court held that these provisions were applicable across all matrimonial property regimes and simply stipulated the procedure to be followed in order for spouses to alter their matrimonial property system. As this provision was applicable to all South Africans, it could not be said to discriminate against Black persons who concluded their marriages before 1988, nor to perpetuate the default position created by section 22(6) of the *Black Administration Act*. Furthermore, Madondo DJP held, in reality the section required the consent of both spouses, and there was therefore no distinction between the position of a husband versus that of a wife who wished to change the matrimonial property system. As such, the court opined that the applicants did not do enough to prove that section 21(1) of the *Matrimonial Property Act* was in violation of the *Constitution*.<sup>314</sup>

In terms of the appropriate remedy, the court made mention of the fact that South African law generally recognises three constitutional remedies, namely “the declaration of invalidity, prohibitory and mandatory interdicts, and awards of constitutional damages”. In terms of section 172(1) of the *Constitution*, a court “must” declare any legislation that is inconsistent with the *Constitution* to be invalid, and may in this regard make any order that is “just and equitable”. In the case of *Fose*,<sup>315</sup> the Constitutional Court had mentioned that “appropriate relief” must be granted; this is relief that is aimed at protecting the rights enshrined in the *Constitution*. It is

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<sup>313</sup> AS v GS: paras. 63-64.

<sup>314</sup> AS v GS: par. 65.

<sup>315</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC): par 19.

understood that the court needs to consider the impact of the order of invalidity on society at large – and not only on the litigants – in deciding what form of relief is appropriate. Furthermore, it is important to make an order that would deter any future infringements of constitutional rights. Madondo DJP confirmed that it was “possible to regulate the impact of an order of invalidity by severing the unconstitutional provisions in a statute from the constitutional ones, by controlling the retrospective effects of a declaration of invalidity and by temporarily suspending a declaration of invalidity.”<sup>316</sup>

In this regard, the court held that the discrimination that was being furthered by section 21(2)(a) was “so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order or by suspending the order of invalidity to allow Parliament to rectify the error”. The court also emphasised the fact that the equal worth and dignity of Black persons in matrimonial law was well overdue and that there was no need to delay it any further. As such, the court came to the conclusion that the effect of its order had to be that *all* civil marriages were henceforth to be regarded as being in community of property. However, the court held that this finding would not affect marriages terminated by death or divorce before the granting of its order. In addition, wherever any person had been prejudiced by the retrospective effect of the order, he or she would be able to approach a competent court for relief.<sup>317</sup>

#### **4.2.2. CONFIRMATION PROCEEDINGS IN THE CONSTITUTIONAL COURT: *SITHOLE V SITHOLE* 2021 5 SA 34 (CC)**

##### **4.2.2.1. Facts and core issue**

The only material change to the factual scenario as it emerged during the confirmation proceedings of the High Court’s order discussed above, was that the first respondent had passed away by the time that judgment was delivered.<sup>318</sup> The crisp issue before the court was whether or not the High Court’s order – to the effect that section 21(2)(a) of the *Matrimonial Property Act* was constitutionally invalid – should be confirmed.

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<sup>316</sup> AS v GS: par. 70

<sup>317</sup> AS v GS: par. 72.

<sup>318</sup> *Sithole v Sithole*: par. 5.

#### 4.2.2.2. Legislative framework governing civil marriages between black persons

The Constitutional Court (per Tshiqi J, in a unanimous judgment) commenced by summarising the statutory framework that regulated marriages such as those of the first applicant. In this regard she quoted section 22(6) of the *Black Administration Act* as follows:

“A marriage between [Black persons], contracted after the commencement of the *Black Administration Act*, shall not produce the legal consequences of marriages in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native Commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community”.<sup>319</sup>

It is quite clear that this section created a default position for civil marriages entered into between two Black persons that could be deviated from only if the declarations referred to in the emphasised portions above were made. The Constitutional Court also noted that section 22(6) of the *Black Administration Act* had subsequently been repealed (in 1988) which resulted in section 21(2)(a) being amended and section 25(3) being inserted into the *Matrimonial Property Act*.<sup>320</sup> Section 21(2)(a) of the *Matrimonial Property Act* provided that Black persons married out of community of property as a result of section 22(6) of the *Black Administration Act* had an opportunity to change their matrimonial property system within a grace period of two years from the date of the commencement of the 1998 *Amendment Act*, which included the possibility of making the accrual system applicable to their marriage that was by default out of community of property.<sup>321</sup>

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<sup>319</sup> *Black Administration Act*: sec. 22(6) (emphasis supplied).

<sup>320</sup> *Sithole v Sithole*: par. 13.

<sup>321</sup> *Matrimonial Property Act*: sec. 21(2)(a).

In terms of section 25(3)(b) of the *Matrimonial Property Act*, Black spouses whose marriages were subject to the default regime created by section 22(6) of the *Black Administration Act* and involving wives who were subject to the marital power could convert their marriage to one that was in community of property.<sup>322</sup> (It must be borne in mind as mentioned above, the marital power was fully and retrospectively abolished for all civil marriages a few years later).<sup>323</sup> Section 36(b) of the *Matrimonial Property Act* amended the *Divorce Act* in order to create the possibility of a redistribution order (in terms of section 7(3) of the *Divorce Act*) in marriages that were subject to the default regime created by the *Black Administration Act*. Finally, the court noted, section 21(1) allowed spouses to change their matrimonial property system by means of a joint application to the High Court.<sup>324</sup>

#### **4.2.2.3. Equality and Discrimination: Should the High Court's order be confirmed?**

Tshiqi J commenced her answer to this question by stating the inevitable reality that differentiation formed part of equality jurisprudence, and that only differentiation which led to unfair discrimination was proscribed by the *Constitution*. As such, government could treat people differently for a valid reason. However, it was clear to the court that the first leg of the *Harksen* test (described in 4.2.1.3 above) showed that the creation of a separate default matrimonial property system for Black persons could not be linked to a rational and legitimate government purpose.<sup>325</sup>

The second leg of the *Harksen* enquiry then came to the fore. In this regard Tshiqi J stated that it was clear that the separate regime for Black spouses discriminated on the listed grounds of race, gender and age, thus triggering the presumption of unfairness in section 9(5) of the *Constitution*, and accordingly requiring the respondents to rebut this presumption.

In this regard, the court emphasised that the separate treatment of Black spouses along racial lines was not remedied by section 21(2)(a) of the Act, because this provision merely created *the possibility* of the default matrimonial property regime that

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<sup>322</sup> *Matrimonial Property Act*: sec. 25(3)(b).

<sup>323</sup> *General Law Fourth Amendment Act*: sec. 29.

<sup>324</sup> *Matrimonial Property Act*: sec. 21(1).

<sup>325</sup> *Sithole v Sithole*: pars. 19-22.

already applied to them being amended, instead of changing the law retrospectively. In addition, doing so required “laborious, complicated steps” before equality could be realised. Relying on the *National Coalition for Gay and Lesbian Equality*<sup>326</sup> case and its imprimatur to advance substantive as opposed to formal equality, the court noted that while the impugned provision may have provided for formal equality, the fact that it imposed a duty on Black persons to act proactively before their marriages would be treated similarly to all other civil marriages did not create substantive equality, because the lasting effects of this discrimination were not removed.<sup>327</sup>

Moreover, the court noted that both direct and indirect discrimination is prohibited by section 9(3) of the *Constitution*. The latter occurred where a provision had “a disproportionate impact on that group”. Accordingly, the true issue was not whether spouses in the position of the first respondent had *the opportunity* to change their default matrimonial property system, but rather that it had “fail[ed] to level the playing field [by not placing] marriages of Black people under the same umbrella as marriages of couples of other racial groups.” Furthermore, the impact hereof on women was disproportionate to the impact on their husbands.<sup>328</sup>

The honourable court proceeded to elaborate on the concept of “intersectionality”. Again, relying on the *National Coalition for Gay and Lesbian Equality* case, the court held that it was certainly possible for grounds of unfair discrimination to intersect, for example, in respect of Black widows, who have suffered as Black people generally, as African women, as women and often as older people. In the *Van Heerden* case,<sup>329</sup> the court had also stated that the *Constitution* created a duty to prevent and break down different forms of social and systemic differentiation, and to prevent new forms of discrimination from emerging. This is why the courts are required to scrutinise each equality claim to ensure adherence to the values of our *Constitution*.<sup>330</sup> In the case of *Mahlangu*<sup>331</sup> reference was made to Crenshaw – a Black feminist writing on women studies – who wrote on the intersectional nature of discrimination, and who showed that categories such as gender and race discrimination tend to impact certain people

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<sup>326</sup> *National Coalition for Gays and Lesbian Equality and another v Minister of Justice and others.*

<sup>327</sup> *Sithole v Sithole*: paras. 23-24.

<sup>328</sup> *Sithole v Sithole*: paras. 25-27.

<sup>329</sup> *Minister of finance v Van Heerden* 2004 6 SA 121 (CC).

<sup>330</sup> *Minister of finance v Van Heerden*: par. 27.

<sup>331</sup> *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC).

(Black women in particular) and institutions, often having a mutually reinforcing and compounded effect on them.<sup>332</sup>

According to Tshiqi J, many factors contribute to the intersectional consequences of the challenged provisions on Black women, including patriarchy and gender stereotyping, leading (inter alia) to power imbalances, disparate earning capacities and diminished access to financial resources (including the ability to acquire property). The first applicant was a case in point: She was one of many women who had assumed the primary responsibility for taking care of the household, and she had contributed the little money that she earned to her family. Yet despite this, her husband had threatened to deprive her of her home, because she had no control over the family property. Had she not obtained an interdict, she would have been evicted. Women of other races who were married at the same time as the first applicant did not suffer the same prejudice, as their default matrimonial property system was a marriage in community of property, which meant that both spouses were co-owners of the joint estate.<sup>333</sup>

Furthermore, as many women were not aware of their ability to opt-in to a marriage in community of property in terms of section 21(2)(a) of the *Matrimonial Property Act*, their matrimonial property systems had remained unchanged. This state of affairs was to a large extent the result of South Africa's racially unequal past, with many Black women living in rural areas and townships and remaining uninformed of their legal rights due to this not being prioritised by the *Apartheid* regime. As such, the mechanisms created by section 21(2)(a) of the *Matrimonial Property Act* were in fact a dead letter.

Even though the High Court held section 21(1) of the *Matrimonial Property Act* to pass constitutional muster, it was beyond doubt that it is difficult for many women to obtain the necessary consent from their husbands, as converting to a marriage in community of property would likely benefit the wife. Evidence was also submitted which showed that men prefer to be the primary decision-makers and would not readily agree to such a shift of power. Even so, the very ability to utilise section 21(1) of the *Matrimonial Property Act* depended upon knowledge of this possibility and access to legal

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<sup>332</sup> *Mahlangu v Minister of Labour*. par. 85; Crenshaw 1989: 149.

<sup>333</sup> *Sithole v Sithole*: pars. 32-35.

resources which again was not the case for many women married in terms of the *Black Administration Act*.<sup>334</sup>

Regarding section 7(3) – (5) of the *Divorce Act*, Tshiqi J pointed out the crucial fact that this remedy (a redistribution order) was of no aid to women facing the same situation as the first applicant, because they were unable to divorce their husbands for religious or social reasons. The possibility of obtaining such an order therefore did not remedy the injustices that existed *during* the marriage, and it was furthermore not constitutionally acceptable to require a divorce order – and the exercising of a discretionary judicial power – to recognise such women’s right to equality.<sup>335</sup>

The court proceeded to note that the evidence of intersectional effects of the challenged provisions on women was neither challenged, nor justified, by the second respondent. This bolstered the court’s conclusion that they amounted to unfair discrimination on the bases of both race and gender.<sup>336</sup>

Regarding the final leg of the *Harksen* enquiry – namely whether this unfair discrimination could be justified under section 36 of the *Constitution* – Tshiqi J agreed that the enactment of the provisions resulted from a deliberate, unjust, and unfair process of racial discrimination and segregation that regarded Black persons as inferior. The provisions therefore also infringed upon such persons’ constitutional right to dignity<sup>337</sup> by not acknowledging their “intrinsic worth as human beings”, thus rendering them incapable of being justified under the limitation clause. According to Justice Tshiqi, the only reason why these provisions still existed was presumably because they had been overlooked by the legislature. In sum, they were clearly unacceptable in our constitutional democracy, could not be rescued by the *Constitution*’s limitation clause, and needed to be eradicated with urgency.<sup>338</sup> As a result, the court declared section 21(2)(a) of the *Matrimonial Property Act* to be unconstitutional and confirmed the order of invalidity made by the High Court. All marriages concluded out of community of property as a result of the *Black Administration Act* were thus declared to be in community of property. Affected parties

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<sup>334</sup> *Sithole v Sithole*: paras. 36-39.

<sup>335</sup> *Sithole v Sithole*: par. 40.

<sup>336</sup> *Sithole v Sithole*: par. 42.

<sup>337</sup> *Constitution*: sec. 10.

<sup>338</sup> *Sithole v Sithole*: paras. 41-44.

were however to be given the opportunity to opt-out of the effect of this order so as to permit their marriages to remain out of community of property, as is the case with all other races.<sup>339</sup>

#### **4.2.2.4. Remedy**

It is noteworthy that the second respondent asked the court to limit the retrospective effect of this order. However, the court held that it would be an injustice to Black persons married before 1988 if the retrospective effect of this order were to be limited. Since parliament had created a prospective regime for all marriages solemnised after 1988, a retrospective order would accord with the existing prospective regime that applied to spouses of other races. However, the court made mention of the fact that “this order should not in any way affect the legal consequences of an act or omission pertaining to a marriage that existed before this order was made”. Transactions already completed involving ownership transfer to third parties would also not be affected. However, a person claiming prejudice as a result of the retrospectivity of the court’s order would be given a right to approach a competent court for relief.<sup>340</sup>

#### **4.2.2.5. Order**

In view of the above, the court made the following order:

- “1. The provisions of section 21(2)(a) of the *Matrimonial Property Act* are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the *Black Administration Act*, and thereby maintain the default position of marriages of Black couples, entered into under the *Black Administration Act* before the 1988 amendment, that such marriages are automatically out of community of property.
2. All marriages of Black persons that are out of community of property and were concluded under section 22(6) of the *Black Administration Act* before 1988 amendment are, save for those couples who opt for a marriage out of community of property, hereby declared to be marriages in community of property.
3. Spouses who have opted for marriage out of community of property shall, in writing, notify the Director-General of the Department of Home Affairs accordingly.

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<sup>339</sup> *Sithole v Sithole*: paras. 45-47.

<sup>340</sup> *Sithole v Sithole*: paras. 48-50.

4. In the event of disagreement, either spouse in a marriage which becomes a marriage in community of property in terms of the declaration in paragraph 2, may apply to the High Court for an order that the marriage shall be out of community of property, notwithstanding that declaration.<sup>341</sup>
5. In terms of section 172(1)(b) of the *Constitution*, the orders in paragraph 1 and 2 shall not affect the legal consequences of any act done or omission in relation to a marriage before this order was made.
6. From the date of this order, Chapter 3 of the *Matrimonial Property Act* will apply in respect of all marriages that have been converted to marriages in community of property, unless the affected couple has opted out in accordance with the procedure in paragraph 3 above.
7. Any person with a material interest who is adversely affected by this order, may approach the High Court for appropriate relief.
8. The second respondent is ordered to pay the costs of this application and such costs included the costs of two counsel, where so employed.
9. It is ordered that the first respondent's attorney, Mr Dlamini, should forfeit his legal fees in respect of this application".<sup>342</sup>

#### **4.3. EVALUATION OF THE *SITHOLE* JUDGMENT AND ITS IMPACT**

Under the headings that follow, I will attempt to assess whether the Constitutional Court's finding of unconstitutionality of section 21(2)(a) of the *Matrimonial Property Act*, and its order that this finding would apply retrospectively, were correct. I will do so by considering the following issues:

- a. the autonomy of spouses who are still married in terms of section 22(6) of the *Black Administration Act*;
- b. the doctrine of objective unconstitutionality;
- c. the court's equality analysis;
- d. the first applicant's apparent lack of knowledge of her matrimonial property regime;

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<sup>341</sup> It is interesting to note that this specific paragraph of the order was not alluded to in the judgment itself.

<sup>342</sup> *Sithole v Sithole*: par. 59.

- e. the constitutionality of section 21(1) of the *Matrimonial Property Act*;
- f. complications arising from the new default regime created by *Sithole*;
- g. whether the Constitutional Court should have given the legislature the opportunity to rectify this issue; and
- h. the ostensible rationale behind the enactment of section 22(6) of the *Black Administration Act*

#### **4.3.1. IS THE AUTONOMY OF SPOUSES MARRIED IN TERMS OF THE DEFAULT MATRIMONIAL PROPERTY REGIME THAT APPLIED TO CIVIL MARRIAGES OF BLACK PERSONS BEFORE 1988 RESPECTED?**

The first question that arises is whether holding all existing marriages entered into in terms of section 22(6) of the *Black Administration Act* to be in community of property violates the autonomy of such spouses. In this regard, the point of departure is that a person has control over his or her own life. However, this control comprises different dimensions, which may be described as being “internal” and “external” in nature. In simple terms, we can differentiate between the two as follows: External interference with an individual’s personal autonomy would for example be, as Pendlebury opines, an instance where the government enforces laws that aim to prohibit certain rights of an individual, such as prohibiting abortion. On the other hand, internal interference with an individual’s personal autonomy may stem from an individual’s inability to account for certain actions due to lack of certain skills or intelligence. Pendlebury argues that it is impossible for human beings to fully develop human potential without autonomy, as autonomy is seen as an essential of life. The learned author also states that the achievement of autonomy requires the elimination of past injustices, such as racism. Protecting and developing autonomy might also necessitate the government making meaningful interventions in the lives of its citizens. And lastly, given the injustices suffered by Black persons in the past, in order for personal autonomy to fully develop, it is clear that autonomy itself will suffer some legitimate constraints.<sup>343</sup>

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<sup>343</sup> Pendlebury 1995: 485-491.

In my view it is clear that the Constitutional Court – as an arm of government – needed to step in to ensure that Black persons do not continue to suffer from the enduring consequences of section 22(6) of the *Black Administration Act*, even if this had the drastic effect of intruding on their autonomy by converting such marriages to marriages in community of property. According to Currie and De Waal (quoting the authors Doyal and Gough):

“The concept of autonomy encourages us to consider both relational and cognitive dimensions of well-being. It draws our attention not only to the relationships that people have, but also, in cognitive terms, to take into account of how people perceive their ability to participate in society.”<sup>344</sup>

In the case of *AB v Minister of Social Development*,<sup>345</sup> in addressing the issue of autonomy the court opined that “the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them” stems from section 1 of the *Constitution*.<sup>346</sup> Furthermore, it was submitted that autonomy “is a necessary, but socially embedded, part of the value of freedom.”<sup>347</sup> The court ultimately circumscribed the concept of autonomy as follows:

“What animates the value of freedom is the recognition of each person’s distinctive *aptitude to understand and act on their own desires and beliefs*. The value recognises the inherent worth of our capacity *to assess our own socially-rooted situations, and make decisions on this basis*. By exercising this capacity, we define our natures, give meaning and coherence to our lives, and take responsibility for the kind of people that we are. This in turn, enriches our community and contributes to healing the divisions of the past. Our *Constitution* actively seeks to free the potential of each person; a goal which can only be achieved through a deep respect for the choices each of us makes.”<sup>348</sup>

In the case of *Napier v Barkhuizen*,<sup>349</sup> in illustrating self-autonomy (albeit in the context of the law of contract) the court stated that:

“Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely

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<sup>344</sup> Currie & De Waal 2013: 520.

<sup>345</sup> *AB v Minister of Social Development* 2017 3 SA 570 (CC) (29 November 2016).

<sup>346</sup> *AB v Minister of Social Development*: par. 50.

<sup>347</sup> *AB v Minister of Social Development*: par. 50.

<sup>347</sup> *AB v Minister of Social Development*: par. 51.

<sup>348</sup> *AB v Minister of Social Development*: par. 52 (emphasis supplied).

<sup>349</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC).

and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress."<sup>350</sup>

It is quite clear from the submissions made by the court in the *Barkhuizen* case that self-autonomy is linked to the concept of public policy that is rooted in constitutional values and rights.<sup>351</sup> I would argue that if the application of these constitutional values (such as equality and dignity) is found to require a fundamental shift in the law as objectively applied to a specific group of persons (as was the case in *Sithole* regarding Black spouses married prior to 1988), doing so may come at the expense of the self-autonomy of individuals forming part of that group. In addition, the *Sithole* judgment still respects the personal autonomy of such spouses to the extent that it permits any spouses aggrieved by the radical change in the law to opt out of it.<sup>352</sup> It is clear that in providing a default matrimonial property regime for Black spouses that differed from other races before 1988, the law in fact undermined the autonomy of such spouses. This is because some of the elements of autonomy pointed out in the quote from the *AB* judgment indicate that such spouses' ability "to understand and act on their own desires and beliefs" was restricted, and any self-assessment of their "socially-rooted situations" at that time was informed by segregation and oppression.<sup>353</sup> This must also have influenced their perception of their "ability to participate in society", as quoted from Doyal and Gough in *Currie and De Waal*.<sup>354</sup>

This argument is further bolstered by what is stated under the next heading with regards to objective unconstitutionality.

#### **4.3.2. OBJECTIVE UNCONSTITUTIONALITY**

This notion usually presents itself in the sense that all unconstitutional law in force in South Africa at the advent of democracy on 27 April 1994 was immediately invalidated

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<sup>350</sup> *Napier v Barkhuizen*: par.57.

<sup>351</sup> *Napier v Barkhuizen*: par.28.

<sup>352</sup> *Sithole v Sithole*: par.47

<sup>353</sup> *AB v Minister of Social Development*: par. 52.

<sup>354</sup> *Currie & De Waal* 2013: 520

on that date.<sup>355</sup> Currie and De Waal<sup>356</sup> make the following remarks to contextualise this state of affairs:

“But this does not mean that *acts performed and things done* under such (unconstitutional) laws before the *Constitution* came into force are also invalid. Since the *Constitution* does not operate retrospectively, they remain valid and an applicant who complains about such actions will not be allowed to challenge the constitutionality of the enabling laws. The constitutional validity of the enabling law becomes irrelevant since the conduct authorised by the law remains valid.”

The case law that follows illustrates what was meant by these learned authors.

First, in the case of *Ferreira v Levin NO and Others*,<sup>357</sup> the court was faced with deciding on whether the applicants had legal standing to challenge section 417(2) of the *Companies Act* 61 of 1973 which was said to contravene section 7(4) of the interim *Constitution Act* 200 of 1993 which corresponds with section 38 of the current *Constitution* (legal standing).<sup>358</sup> The court held that denying the applicants in question from challenging section 417(2) of the *Companies Act* would be “highly technical” as section 417(2) was also seen to be objectively contravening section 25(3) of the interim *Constitution* (dealing with the rights or detained, arrested and accused persons) so that there was sufficient interest.<sup>359</sup> The honourable court went on to explain that in terms of our *Constitution* every statute is either constitutionally valid or invalid and that the fact that this invalidity is disputed in later years does not have an impact on the objective nature on the declaration of invalidity of that particular legislation.<sup>360</sup>

Secondly, in the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,<sup>361</sup> the court was asked to confirm a declaration of invalidity made by the High Court in regards to the inclusion of sodomy as a criminal offence in terms of the common law, Schedule 1 of the *Criminal Procedure Act* 51 of 1977, section 20A of the *Sexual Offences Act* 57 of 1957 and the *Security Officers Act*

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<sup>355</sup> Currie & De Waal 2013: 51.

<sup>356</sup> Currie & De Waal 2013: 54.

<sup>357</sup> *Ferreira v Levin NO and Others* 1996 SA 1 984 (CC).

<sup>358</sup> *Ferreira v Levin NO and Others*: par. 233.

<sup>359</sup> *Ferreira v Levin NO and Others*: par. 163

<sup>360</sup> *Ferreira v Levin NO and Others*: par. 27.

<sup>361</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*.

92 of 1987.<sup>362</sup> The court found the legislation above to unfairly discriminate against gay men in terms of section 9(3) of the *Constitution* (on the ground of sexual orientation) as it criminalised intimate relations between them.<sup>363</sup> The court also mentioned that “a pre-existing law which is inconsistent with the *Constitution* becomes invalid the moment the relevant provisions of the *Constitution* come into effect”.<sup>364</sup> Furthermore, the court stated that the limit provided by section 172(1)(b)(i) of the *Constitution* interpreted against the principles of objective unconstitutionality adopted in *Ferreira v Levin*, implied automatic retrospective unconstitutionality unless the court limited the retrospective application of its order.

And lastly, in the case of *Ramuhovhi and Others v President of the Republic of South Africa and Others*,<sup>365</sup> the court was also requested to confirm a declaration of invalidity in terms of section 172(2)(a) of the *Constitution*, regarding section 7(1) of the *Recognition of Customary Marriages Act* 120 of 1998 (“RCMA”), which was alleged to discriminate against women who concluded customary marriages before the coming into existence of the RCMA on the grounds of race, social origin and gender.<sup>366</sup> The court confirmed that section 7(1) the RCMA discriminated against the parties as held by the High Court and that there was no justification for this limitation.<sup>367</sup> Furthermore, the Constitutional Court held that it was important for it to make an order that would not have its retrospectivity limited in accordance with the doctrine of objective unconstitutionality.<sup>368</sup>

What is interesting about the *Sithole* case, is that the “enabling law” in question, namely section 22(6) of the *Black Administration Act*, was repealed well before 27 April 1994. Nevertheless, its deleterious effects were perpetuated by section 21(2)(a) of the *Matrimonial Property Act*. Although I have argued above that the court correctly found the latter provision to be unconstitutional (and also that this finding would apply with

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<sup>362</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par.1.

<sup>363</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par.56.

<sup>364</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*: par.60.

<sup>365</sup> *Ramuhovhi and Others v President of the Republic of South Africa and Others* 2018 (2) SA 1 (CC) (30 November 2017).

<sup>366</sup> *Ramuhovhi and Others v President of the Republic of South Africa and Others*: par. 4.

<sup>367</sup> *Ramuhovhi and Others v President of the Republic of South Africa and Others*: par. 43.

<sup>368</sup> *Ramuhovhi and Others v President of the Republic of South Africa and Others*: par. 44.

retrospective effect), it is a pity that the *Sithole* court did not clearly express itself on the issue of the objective unconstitutionality of (the lasting effects of) a *repealed* law per se, because I believe that this may have added to the richness of our constitutional jurisprudence.

On the basis of the above, and also on the basis of my opinion on autonomy in 4.3.1 above, I believe that the court was correct in declaring marriages that were concluded in terms of section 22(6) of the *Black Administration Act* automatically to be in community of property, unless the spouses specifically opt for this “new” regime *not* to apply to them. In my view, this step was a justifiable limitation of the autonomy of such spouses, and I do not think justice would have been served had the court made an opposite finding, by instead requiring spouses married in terms of the *Black Administration Act* to *opt-into* a marriage in community of property. The latter option would not have been effective, because constitutional protection would then have depended upon the co-operation or consent of both spouses to change their matrimonial property regime which, as the *Sithole* court mentioned regarding section 21(1) of the *Matrimonial Property Act*, would be unlikely due to the power dynamics involved. And, as stated in *Ferreira v Levin NO*<sup>369</sup> “laws are objectively valid or invalid depending on whether they are or are not inconsistent with the *Constitution*”. This aspect of the notion of objective constitutional invalidity implies that one cannot expect persons to “opt-into” constitutional protection if the law in question is in fact constitutionally wanting from an objective point of view. Also, as Meyersfeld<sup>370</sup> has observed, “legal protection in our constitutional order has never required the consent of the individuals before bestowing rights.” To this may be added that evidence placed before the court also supported the conclusion that many such spouses in any event believed that their marriages are already in community of property.<sup>371</sup> This is not to say, however that complexities and uncertainties do not result from the judgment. The latter issue is dealt with in 4.3.6 below.

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<sup>369</sup> *Ferreira v Levin NO*: par.27.

<sup>370</sup> Meyersfeld 2010: 283.

<sup>371</sup> *Sithole v Sithole*: paras.23, 37.

#### 4.3.3. THE COURT'S EQUALITY ANALYSIS AND THE ISSUE OF RETROSPECTIVITY

On the basis of the conclusions reached under the two preceding headings, I agree with both courts' findings (in the High Court and in the confirmation proceedings) with regards to section 21(2)(a) of the *Matrimonial Property Act*. Both judgments acknowledged that this provision perpetuates the default position of a marriage out of community of property created by section 22(6) of the *Black Administration Act*. Furthermore, the courts mentioned that this section was arbitrary in its application and did not apply equally to everyone. In the case of *S v Makwanyane*, the court stated that arbitrariness cannot lead to sound reasoning for treating people in a similarly placed position differently.<sup>372</sup> Additionally, I also find myself in total agreement with the Constitutional Court when it held that section 21(2)(a) of the *Matrimonial Property Act* provided for formal equality and not substantive equality.<sup>373</sup> As the first applicant did not want to divorce her husband for religious reasons, both courts also correctly held that section 7(3) of the *Divorce Act* did not assist women in her position and that they could not be expected to have to get divorced and only then to rely on the court's discretion in order to have their constitutional right to equality vindicated.<sup>374</sup>

Looking at the retrospective applicability of the Constitutional Court's judgment, it should be noted that Fourie and Swart state that as much as our *Constitution* seems to be in favour of retrospectivity, our courts on the other hand have shown reluctance towards this possibility, as it can result in the disruption of the administration of justice.<sup>375</sup> As an example, Currie and De Waal state that all sentences given in respect of a criminal statute would be invalid when it is declared unconstitutional with retrospective effect.<sup>376</sup> This example shows why the courts tend to be reluctant. It is further worth noting that the court takes into account a number of factors before limiting the retrospective effect of an order; this is done by balancing the disruptive effects against the need for relief. In order to avoid an order having disruptive effects, the court usually reads words into the defective provision or makes a prospective order in

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<sup>372</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC): par. 156.

<sup>373</sup> *Sithole v Sithole*: par. 26.

<sup>374</sup> *AS v GS*: par. 55.

<sup>375</sup> Fourie & Swart 2019: 208.

<sup>376</sup> Currie & De Waal 2013: 190.

order to invalidate the statute.<sup>377</sup> In the *Sithole* matter, finding the order to have retrospective effect was crucial, given the fact that it had taken almost three decades into our constitutional democracy to detect the discriminatory nature of the impugned provision.<sup>378</sup>

I therefore agree in principle with both courts' findings in respect of unconstitutionality and retrospectivity. Nevertheless, what is interesting to me is that both courts found it necessary to test for unfair discrimination while – to my mind – this was in fact not required. This is because it was clear that the impugned provision (section 21(2)(a)) failed at the first leg of the *Harksen* enquiry: The provision clearly violated section 9(1) of the *Constitution* by violating the first applicant's right to equality before the law and to equal protection and benefit of the law, without having a rational governmental reason for doing so.<sup>379</sup> As such, the case before both courts was similar to the case of *Van der Merwe v Road Accident Fund*,<sup>380</sup> in which section 18(b) of the *Matrimonial Property Act* was declared to be invalid for withholding protection from spouses married in community of property in comparison to spouses married out of community of property.<sup>381</sup> In that case, the Constitutional Court found it unnecessary to test for unfair discrimination, and my suggestion is that the *Sithole* court could have done the same.

#### **4.3.4. THE FIRST APPLICANT'S "LACK OF KNOWLEDGE" AND HER "CHOICE" TO MARRY ACCORDING TO THE DEFAULT MATRIMONIAL PROPERTY SYSTEM**

The first applicant was accepted as being one of those spouses who did not know that their marriages were out community of property; she apparently only found out about this after she sought legal advice that eventually led to the Constitutional Court's judgment.<sup>382</sup> The lack of knowledge of her matrimonial property regime comes as no surprise as many black women married under section 22(6) of the *Black*

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<sup>377</sup> Currie & De Waal 2013: 190-191.

<sup>378</sup> *AS v GS*: par. 72.

<sup>379</sup> *Sithole v Sithole*: par. 21.

<sup>380</sup> *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC).

<sup>381</sup> Prior to this judgment, section 18(a) entailed that a spouse married in community of property was not entitled to claim patrimonial damages from his or her spouse where the latter had caused bodily injury to him or her.

<sup>382</sup> *Sithole v Sithole*: par. 2.

*Administrations Act* lacked the capacity to appreciate such, due to various socio-economic issues such as lack of education.<sup>383</sup> In simple terms, “[these] women remained married out of community of property because they did not know that they could opt out of their matrimonial property regime”.<sup>384</sup> In the Constitutional Court, the second applicant also stated that women in general are ignorant of their matrimonial property regimes. The second applicant went on to state that:

“It is not a rare occurrence for persons married under the [*Black Administration Act*] to wrongly assume that their marriage is in community of property. For such persons, the 1988 amendment of the [*Matrimonial Property Act*], creating the right to change the matrimonial property regime by registering a notarial contract, was a dead letter”.<sup>385</sup>

When the Constitutional Court stated in paragraph 10 of its judgment that the question of whether Mr and Mrs Sithole in fact specifically elected to marry out of community of property in 1972 was not before the court, this at first blush appears to be problematic. This is because, had an in-depth investigation revealed that Mrs Sithole in fact was aware that she was entering into a marriage out of community of property, this would have raised the issue as to whether this choice had to remain respected. For example, in *Bezuidenhout v Bezuidenhout*, the Supreme Court of Appeal had to decide how the spouse’s assets were to be redistributed in terms of section 7(3) of the *Divorce Act*. The parties in question had voluntarily married out of community of property without the application of the accrual system by way of an antenuptial contract in 1975.<sup>386</sup> At the dissolution of their marriage, the appellant contested the court *a quo*’s decision of equally dividing the assets in terms of section 7(3) of the *Divorce Act*.<sup>387</sup> One of the major issues before the Supreme Court of Appeal was that the court *a quo* had relied mainly on English law and the right to equality as contained in the *Constitution* to adopt the stance that our courts should approach redistribution claims from the starting point that an equal division should be granted unless there was a good reason not to do so. The Supreme Court of Appeal rejected this approach, pointing out that the legislature had specifically given the courts a wide discretion that was not to be constrained by any form of starting point. In addition, Brand JA held that:

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<sup>383</sup> *Sithole v Sithole*: par. 4.

<sup>384</sup> *Sithole v Sithole*: par. 4.

<sup>385</sup> *Sithole v Sithole*: par. 37.

<sup>386</sup> *Bezuidenhout v Bezuidenhout* 2005 2 SA 187 (SCA): par. 1.

<sup>387</sup> *Bezuidenhout v Bezuidenhout*: par.3.

“[I]t is a well-known fact that our common law provides for marriages in community of property as the norm while the English system does not. The result is that, unlike in England, a marriage can in our law be concluded out of community of property *only if the parties consciously elect to do so in terms of an antenuptial agreement executed before a notary public*. Of course, we know that these contracts often led to great inequity and unfairness, particularly towards wives who performed their traditional role. This, after all, was the *raison d’être* for the enactment of s 7(3). Nevertheless, its formulation reflects a deliberate choice on the part of the Legislature *to limit the courts’ discretion in interfering with the contractual election - good or bad - made by the parties when they entered into their marriage.*”

As a result, the court held that the assets should rather be divided on a 60:40 ratio in favour of the appellant.<sup>388</sup>

Could it be argued that Mrs Sithole should also have been held to the “election” made by her when she was married? In my view, the matter of *Sithole* was different. This is because the facts showed that Mrs Sithole had never made a similar “election” because she was ignorant of the matrimonial property regime that applied to her marriage. In addition, the court’s finding regarding the irrelevance of whether the parties had deliberately chosen to marry in terms of the default position was correct, because this indicates that the court understood the degrading nature of the legal position that was perpetuated by section 22(6) of the *Black Administration Act*. As such, the court was more interested in the impact of this provision on Black persons in general who concluded their marriages before 1988, rather than focusing on whether the first applicant and her husband chose to marry out of community of property. In any event, unlike the spouses in the case of *Bezuidenhout v Bezuidenhout*<sup>389</sup> (who had specifically chosen to marry out of community of property), the evidence adduced by her husband did not show that Mrs Sithole had also made such a deliberate choice. She was in a far more difficult situation than the spouses in *Bezuidenhout*, which stemmed from “the legacy of section 22(6) of the *Black Administration Act* in terms of which black couples who concluded civil marriages were married out of community of property by default”, and this led to her likely assuming that she was in a stronger legal position than she truly was.<sup>390</sup> Most women in Mrs Sithole’s position assumed that their marriages were in community of property as

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<sup>388</sup> *Bezuidenhout v Bezuidenhout*: par. 36.

<sup>389</sup> *Bezuidenhout v Bezuidenhout*: par. 1.

<sup>390</sup> *Sithole v Sithole*: par. 13; *Black Administration Act*: sec. 22(6).

submitted to the Constitutional Court by Ms Budlender.<sup>391</sup> In addition, Black persons needed to follow “certain laborious, complicated steps to enjoy equality with other races”, which was not the case for a spouse in the position of Mrs Bezuidenhout. I am therefore of the opinion that the Constitutional Court was correct in the present matter by not adopting the same rationale adopted by the Supreme Court of Appeal in the *Bezuidenhout* case.

#### **4.3.5. SECTION 21(1) OF THE *MATRIMONIAL PROPERTY ACT***

Both the High Court and the Constitutional Court found section 21(1) of the *Matrimonial Property Act* to be constitutionally sound. At first glance, it is tempting to question this finding, as the argument that section 21(1) applies equally to all persons is questionable. Given the fact that Black persons have historically suffered gross violations of human rights through legislation, this section has the potential to impact on Black persons – and particularly Black women – more than on other races. However, it is clear that section 21(1) of the *Matrimonial Property Act* is a law of general application. This becomes especially clear when the provision is viewed in an undistorted light as result of the finding of unconstitutionality of section 21(2)(a) of the *Matrimonial Property Act*. However – and although this issue was not before the court – what the *Sithole* judgment does highlight is that there are no remedies available under section 21(1) of the *Matrimonial Property Act* for (especially women) who are unable to obtain the consent and co-operation of their spouses to in order to change their matrimonial property regime. This much is evident from paragraph 38 of the Constitutional Court’s judgment which reads as follows:

“Although section 21(1) was held to pass constitutional muster by the High Court, it is important to highlight that to the extent that it envisages consensus between the parties in order to vary the matrimonial regime, it is not disputed that many women are unable to obtain their husband’s consent to alter their matrimonial regime. This is because a marriage in community of property would generally benefit the wife as the man would be compelled to share the estate with the wife. Ms Budlender, in her affidavit says that research showed that many men believe that they should be the primary decision-makers rather than make decisions through discussion and consensus. Such men are unlikely to agree to change their matrimonial property system, specifically when such a change would shift a significant portion of the decision-making power

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<sup>391</sup> *Sithole v Sithole*: par. 37.

to their wives. For women in this position, the protective measures under section 21(1) and 21(2)(a) were thus not available”.

For such spouses, the only alternative is to request an immediate division of the joint estate (or of the accrual, if this system applies to their marriages) in terms of, respectively, sections 20 and 8 of the *Matrimonial Property Act*. But what, for example, of spouses married with complete separation of property, where one of them later wishes to make the accrual system applicable to their marriage, but the other does not? In this regard, it must be noted that the SALRC has investigated the need for reforming our matrimonial property law. Discussion Paper 160 was therefore circulated in 2023, with a closing date for comments on 30<sup>th</sup> of September of that year. Interestingly, the Discussion Paper proposes several options which seek to simplify the changing of a matrimonial property regime between spouses during the subsistence of a marriage, which are as follows:

(a). First, by concluding a postnuptial agreement which shall be notarised and registered with the Deed Registry office. However, such postnuptial agreement shall only be enforceable between the spouses and not third parties, unless spouses can prove that the third party knew of the existence of the agreement.<sup>392</sup>

(b). Secondly, by concluding a postnuptial agreement which shall be notarised, registered in the Deeds Registry Office or digitally registered. However, in this instance, the spouses must send by registered mail their intention and proposed terms to conclude a postnuptial agreement to their creditors, who in turn have the discretion to notify the notary in question of any objections to the proposed antenuptial contract.<sup>393</sup>

(c). Thirdly, by concluding a notarially registered amendment to their antenuptial contract which shall be registered digitally at the Deeds Registry Office.<sup>394</sup>

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<sup>392</sup> South African Law Reform Commission 2023: xviii.

<sup>393</sup> South African Law Reform Commission 2023: xviii.

<sup>394</sup> South African Law Reform Commission 2023: xviii.

(d). Lastly, the SALRC envisions that the current system contained in section 21 of the *Matrimonial Property Act* responsible for the changing of the matrimonial property system regime might be kept as is in our statute books.<sup>395</sup>

In my view, the Constitutional Court's remarks regarding the problems posed by section 21(1) in the *Sithole* judgment have not been addressed by the SALRC's proposals, because although they may simplify the process, all of the mentioned options nevertheless require consensus / co-operation between the spouses. In my view, this issue therefore requires further investigation.

#### **4.3.6. COMPLICATIONS ARISING FROM THE NEW DEFAULT REGIME CREATED BY *SITHOLE*: SOME UNINTENDED CONSEQUENCES?**

As seen above, the *Sithole* court expressly stated that all marriages that were concluded between Black persons before 1988 under section 22(6) of the *Black Administration Act* were converted to marriages in community of property as from the date of the court's order (i.e., 14<sup>th</sup> of April 2021). However, the court further held that spouses affected by this judgment could approach the Director-General of the Department of Home Affairs to opt-out of this change. Also, where spouses are in disagreement regarding these changes, they could approach the court for appropriate relief, as may "any person with a material interest who is adversely affected by this order".<sup>396</sup> While the preceding discussion has shown my support for these findings, they also create some complications, as alluded to in Chapter 2. The question to be answered is whether the *Sithole* court fully appreciated the implications of imposing the marriage in community of property on spouses who had been married with complete separation of property for many years. In essence, the argument can be made that while Mrs Sithole's personal situation was remedied, this may not necessarily mean that other spouses who were married in terms of section 22(6) of the *Black Administration Act* are now adequately protected just because they are married in community of property. This issue will now be considered in more detail by looking at examples of where the *Sithole* case may have problematic and perhaps unintended consequences.

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<sup>395</sup> South African Law Reform Commission 2023: xviii.  
<sup>396</sup> *Sithole v Sithole*: par. 59.

**(i) Problematic aspect 1: The consent requirements posed by the *Matrimonial Property Act***

As a point of departure, it may be mentioned that the conversion to marriages in community of property brings to the fore the advantages and disadvantages of this matrimonial property regime as discussed in Chapter 2. In this regard, as seen in that chapter, Heaton and Kruger<sup>397</sup> point out that administering the joint estate is complicated. Indeed, spouses who have been married with complete separation for more than 30 years and managed their estates independently suddenly have to deal with a newly created joint estate, that entails joint management and the need to obtain the other spouse's consent for transactions binding this estate. In Chapter 2 a list of transactions was provided that may only be concluded with the other spouse's written consent in terms of section 15(2) of the *Matrimonial Property Act*. On the other hand, section 15(3) of the *Matrimonial Property Act* provides that a spouse may enter into certain transactions without the other spouse's written consent as discussed in chapter 2.<sup>398</sup> However, section 15(6) of the *Matrimonial Property Act* provides an exception to the requirements posed by certain paragraphs of section 15(2) of the *Matrimonial Property Act*, if a specific act falls within the ambit of a spouse's profession, trade or business. In such instances both spouses' consent is not a requirement. Section 15(9)(a) further provides that if a third-party "does not know and cannot reasonably know" that consent was required in terms of section 15(2) or (3) of the *Matrimonial Property Act* in order to conclude a certain transaction, the transaction in question will be deemed to have been entered into with the required consent.<sup>399</sup>

As seen in Chapter 2, Van Heerden *et al* argue that section 15 of the *Matrimonial Property Act* seeks to balance the rights of non-consenting spouses with those of third parties, but in most instances confers more protection on third parties.<sup>400</sup> Section 15(9)(a) is a good example hereof. However, this provision may cause problems for spouses and third parties affected by the *Sithole* judgment.

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<sup>397</sup> Heaton and Kruger 2015: 102.

<sup>398</sup> *Matrimonial Property Act*. sec. 15(2) -(3).

<sup>399</sup> *Matrimonial Property Act*. sec.15(6); 15(9).

<sup>400</sup> Van Heerden *et al* 1999: 191.

To explain, it was seen in Chapter 2 that the leading case on this provision, namely *Marais v Maposa*,<sup>401</sup> has arguably created the best possible balance between protecting the rights of third parties and those of non-contracting spouses, by placing a duty on third parties to act in an objectively reasonable manner before they could successfully rely on the deeming provision in section 15(9)(a) of the *Matrimonial Property Act*.<sup>402</sup> However, this may still not be enough for “innocent” spouses in the marriages contemplated in the *Sithole* judgment. This is because spouses contracting with third parties in these marriages may simply be unaware of the fact that *Sithole* converted their marriages to the community of property regime overnight. This means that such a spouse will invariably be unaware that a transaction that he or she was for decades free to perform in respect of his or her personal property, is now governed by section 15(2) of the *Matrimonial Property Act* and as such relates to the newly created joint estate and requires the other spouse’s consent. In my view, in these circumstances a third party’s enquiries to that spouse could very easily comply with the objectively-reasonable-standard set by the *Maposa* court, because such a third party could not be expected to make any further enquiries than those prescribed in *Maposa*. (For example, even if the contracting spouse supplied the date on which he or she was married, it would not be fair to expect the ordinary “reasonable” third party to be aware of the changes brought about by the *Sithole* case). This would imply that even the more stringent duties imposed on such a third party by *Maposa* in order to rely on section 15(9)(a) would no longer achieve an adequate balance between the interests of the non-consenting spouse and those of the third party. This could prejudice the newly created joint estate, and hence disadvantage the other spouse whose previous private estate now also forms part of this new joint estate. While such a spouse would have the section 15(9)(b) of the *Matrimonial Property Act* right of recourse available to him or her, it must be remembered that, as is the case with the right of recourse provided for in section 19 of the *Matrimonial Property Act*, such a spouse would only be fully recompensed if the value of the joint estate permits this.<sup>403</sup>

A further important consideration in this regard is the role of the rule *ignorantia juris non excusat* (“ignorance of the law excuses not”). Could this rule further strengthen a

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<sup>401</sup> *Marais v Maposa* 2020 5 SA 111 (SCA).

<sup>402</sup> See Chapter 2 at paragraph 2.3.1.

<sup>403</sup> Van Heerden *et al* 1999: 187 (at footnote 89); Barratt 2011: 275.

third party's position regarding section 15(9)(a)? In the leading case of *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*<sup>404</sup> Hefer JA, after a thorough consideration of relevant case law, concluded that "[t]hese cases are thus a clear indication that the *ignorantia juris* rule has for quite a considerable period of time *not been of general application in South African civil law.*"<sup>405</sup> Furthermore, I believe that the application of this rule would not be in line with our democratic constitutional values, especially in view of the extraordinary circumstances created by *Sithole*. Therefore, it might be possible for spouses who are ignorant of the effect of the *Sithole* case on their matrimonial property regime to contend that their ignorance of the new legal position should not be held against them, or at least that it should not benefit a third party at the expense of the non-contracting spouse whose consent is required according to section 15(2) of the *Matrimonial Property Act*. (Such litigation could arise from paragraph 7 of the *Sithole* court's order that "any [aggrieved] person with a material interest" may approach the High Court for relief, which probably also includes a spouse). A court would therefore have to balance these conflicting interests in attempting to solve this problem, which will certainly be a difficult task. This underscores my argument, as will appear in Chapter 5, that more should be done to ensure that persons affected by the judgment are aware of this important change to their legal position.

Another possible problem occurs within the context of suretyship, particularly where a spouse married out of community in terms of the *Black Administration Act* had bound himself or herself as a surety for the debts of someone else before the *Sithole* judgment. In paragraph 5 of its order, the *Sithole* court made it clear that its order would not affect "the legal consequences of any act done or omission in relation to a marriage before this order was made". (This is in line with Currie and De Waal's opinion regarding objective constitutional validity as quoted in 4.3.2 above). However, how will this suretyship be enforced? Even if it is accepted that the surety agreement remains valid according to the legal position as it was prior to *Sithole* because of paragraph 5 of the order, the problem is that the spouse who signed as surety likely no longer has a separate private estate, because everything has been merged into the joint estate. If the suretyship were to be enforceable against the joint estate, this would violate the rule "that a person cannot stand surety for his own obligation; and that if he

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<sup>404</sup> *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A).

<sup>405</sup> *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*: 221E – 223E (emphasis supplied).

purports to do so the resulting transaction is a nullity” as laid down in *Nedbank Ltd v Van Zyl*.<sup>406</sup> The latter case also confirmed that where a spouse is married in community of property, an undertaking to stand surety for the other spouse’s debts violates this rule because there would then be “a complete identity of surety and principal debtor”. The suretyship would then be unenforceable as from the date that it was entered into.<sup>407</sup> How this principle would be applied in the wake of the *Sithole* judgment is uncertain, but it is arguable that the non-retrospectivity rule in that case means that the suretyship became unenforceable on the date of the judgment (14 April 2021). It goes without saying that this could adversely affect the position of a third party seeking to enforce the suretyship originally signed while the spouses were still married according to section 22(6) of the *Black Administration Act*. On the other hand, could the third party be protected by section 15(9)(a) of the *Matrimonial Property Act* to the detriment of the spouse who did not sign the original suretyship agreement? These are further contentious aspects of the *Sithole* judgment. Again, paragraph 7 of the court’s order may entitle such an aggrieved spouse (or the person who seeks to enforce the surety agreement) to approach the High Court for relief. However, resolving such a dispute may be very difficult.

In view of the above, the complications posed by the consent requirements of section 15 of the *Matrimonial Property Act* may be regarded as a problematic consequence of *Sithole*.

## **(ii) Problematic aspect 2: Redistribution orders and “opting out” of *Sithole***

From the discussion of the *Sithole* case in 4.2.2 above, as well as the discussion of redistribution orders in Chapter 2,<sup>408</sup> it should be clear that the conversion of marriages concluded in terms of section 22(6) of the *Black Administration Act* to marriages in community of property means that these spouses are no longer entitled to a redistribution order in terms of section 7(3)-(6) of the *Divorce Act*. The only exception would be where the spouses choose to opt out of this conversion by notifying the

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<sup>406</sup> 1990 2 SA 469 (A) 473F and 475D-I.

<sup>407</sup> *Nedbank Ltd v Van Zyl*: 476B-H.

<sup>408</sup> See Chapter 2 paragraph 2.4.1.

Director-General of Home Affairs of this decision. It was also seen in Chapter 2<sup>409</sup> that the range of marriages entitled to such an order has been greatly increased in our constitutional democracy, and stands to be broadened even more in view of the *GKR* judgment.<sup>410</sup> (However, it must be remembered that the *GKR* case only declared section 7(3)(a) of the *Divorce Act* to be constitutionally invalid. This means that spouses contemplated in section 7(3)(b) will still have access to this order, but only if they have opted out of the *Sithole* judgment). It may also be mentioned that in its Discussion Paper 160 (Project 100E), which was produced after the *GKR* judgment was handed down, the SALRC has also highlighted the problems created by the fact that several dates are used to determine whether the judicial discretion to redistribute the property at the dissolution of the marriage is available to spouses married with complete separation of property.<sup>411</sup>

The question that arises is whether the fact that spouses contemplated in *Sithole* have lost access to redistribution orders is problematic. In my view, this is not a problematic matter, because the *Sithole* court made it clear that the redistribution option would not have assisted Mrs Sithole in any event. Further, as the court made clear, a spouse should not have to wait until divorce to *possibly* have his or her constitutional rights properly recognised. As a result, at the dissolution of a marriage contemplated in *Sithole*, the joint estate will simply be divided in equal shares as the assets of the joint estate now belong to both spouses.<sup>412</sup> This immediately entails a 50% share for each spouse, while as seen above<sup>413</sup> a redistribution order does not necessarily have the same outcome.

As mentioned above, spouses who wish to opt-out of the new regime created by the *Sithole* judgment have the opportunity to approach the Director-General of Home Affairs to make the necessary changes. In my view, this possibility respects the autonomy of the spouses, and I therefore support it. However, the fact that in many cases the regime of community of property may suit one spouse and not the other may cause complications. For example, this new regime might be an advantage for a spouse who did not have any assets of value in their name before having their

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<sup>409</sup> See Chapter 2 paragraphs 2.4.1 and 2.6.

<sup>410</sup> *GKR v Minister of Home Affairs and Others* 2022 5 SA 478 (GP).

<sup>411</sup> South African Law Reform Commission 2023: 65.

<sup>412</sup> Heaton & Kruger 2015: 102.

<sup>413</sup> See paragraph 4.3.2 above.

matrimonial property regime altered by the *Sithole* judgment. The other spouse may prefer to take his or her chances with a potential redistribution order at divorce, rather than an automatic splitting of the “new” joint estate on a 50:50 basis. As stated in the *Sithole* judgment, spouses who find themselves in disagreement regarding the newly imposed matrimonial property regime have the opportunity to approach the High Court for an order declaring their marriage to remain out of community of property.<sup>414</sup> Again, it is my view that this possibility protects the autonomy of spouses. However, a court having to adjudicate this issue will have to weigh the competing interests of the spouses very carefully. Also, it is possible that the rights of third parties could be involved, and that such third parties could form part of the litigation as “aggrieved persons” provided for in paragraph 7 of the *Sithole* court’s order. A court would therefore have to balance the rights of all persons involved, which may be challenging. Nevertheless, in my view the compelling arguments of the *Sithole* court regarding the constitutional rights of the spouse who wishes to convert to a marriage in community of property may sway the court in that spouse’s favour. In my view, this would be an acceptable outcome given my overall conclusions regarding the *Sithole* judgment.

Another issue that could complicate matters is where a divorcing spouse alleges that he or she did not fully understand the implications of opting out of *Sithole*. Such a spouse may have a case for arguing that the spouses’ combined separate estates should in fact be split equally by way of a redistribution order, because the parties would have had a joint estate if they had *not* opted out of *Sithole*. It will be interesting to see how a court deals with this issue.

The preceding discussion shows that while the *Sithole* case’s removal of spouses’ access to a redistribution order may not necessarily be problematic, the position of spouses who wish to opt-out of *Sithole* may very well be.

#### **4.3.7. COULD IT BE ARGUED THAT THE CONSTITUTIONAL COURT SHOULD HAVE INSTEAD GIVEN THE LEGISLATURE THE OPPORTUNITY TO RECTIFY THIS ISSUE?**

Regarding this issue, the Constitutional Court made it clear that we cannot allow legislation of such an “egregious” nature to remain on our statute books, and that any

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<sup>414</sup> *Sithole v Sithole*: par. 59.

delay in remedying the position of spouses such as Mrs Sithole would further perpetuate the unequal treatment to which Black persons have been subjected over the years.<sup>415</sup> As seen in 4.2.1.3 above, in *Harksen v Lane*<sup>416</sup> the stages of enquiry in regards to the violation of the equality clause were tabulated, and this test was thoroughly (if perhaps unnecessarily in view of what is stated in paragraph 4.3.3 above) applied. The inevitable conclusion was that it was quite clear that section 21(2)(a) of the *Matrimonial Property Act* resulted in unfair discrimination that could not be justified in terms of section 36 of the *Constitution*. As much as, I agree with the Constitutional Court in confirming that section 21(2)(a) does not pass constitutional muster, the court could however also have considered the approach it has taken to appropriate remedies in the past, specifically regarding the issue of respecting the separation of powers between the legislature, the judiciary and the executive. In this regard it is interesting to note that although the court mentioned the possibility of allowing the legislature to correct a defect as a recognised constitutional remedy, the court did not consider this possibility any further.<sup>417</sup>

A good example hereof is *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* (hereafter “*Fourie*”).<sup>418</sup> In this case, two women who were in an intimate relationship decided to take the next step in their relationship by marrying each other. However, the fact that they were both women was an impediment, because the common-law definition of marriage only provided for monogamous marriages between persons of the opposite sex.<sup>419</sup> An appeal was brought to the Constitutional Court after the matter had been adjudicated in the High Court and the Supreme Court of Appeal. As a result, the Constitutional Court declared the common-law definition of marriage as well as section 30(1) of the *Marriage Act* 25 of 1961 (hereinafter the “*Marriage Act*”) – that did not provide a gender-neutral default marriage formula - to be unconstitutional and invalid for violating the constitutional rights to equality and dignity of same-sex couples who wished to marry one another. However, the court, after considering what

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<sup>415</sup> *Sithole v Sithole*: paras. 49-50.

<sup>416</sup> *Harksen v Lane* 1998 1 SA 300 (CC).

<sup>417</sup> *Sithole v Sithole*: par. 49.

<sup>418</sup> *Minister of Home Affairs v Fourie and Others; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).

<sup>419</sup> *Minister of Home Affairs v Fourie and Others*: par. 1.

would be “just and equitable [in view of] all the circumstances”<sup>420</sup> suspended its declaration of invalidity for a period of twelve months in order to give the legislature an opportunity to remedy the defect. This was done so as to ensure that “enduring and stable legislative appreciation” of the position of same-sex couples took place, and also so as to respect the doctrine of separation of powers.<sup>421</sup> The court further held that failure by the legislature to remedy this defect within twelve months would result in the common law being adapted and the words “or spouse” being read into section 30(1) of the *Marriage Act*.<sup>422</sup>

It is quite clear that unlike the *Fourie* case, the *Sithole* case took matters into its own hands as it did not place an obligation on the legislature to remedy the legacy of the *Black Administration Act*. In my view however, the situation in *Fourie* may be differentiated from the *Sithole* matter. This is because the *Fourie* court was faced with a remedy that needed to ensure that “same-sex couples were brought in from the legal cold” as part “of an extended search for emancipation of a section of society that has known protracted and bitter oppression”.<sup>423</sup> This process of “emancipation” in *Fourie* therefore involved a question of legal status, and included tangible and intangible factors associated with the ability of same-sex couples to marry in the first place.<sup>424</sup> On the other hand, the *Sithole* court – although also dealing with “a section of society that has known protracted and bitter oppression” – was not required to deal with conferring *the status* of being married on Black spouses in order to emancipate this section of the community, because such couples already had access to this status. Instead, the court was simply tasked with levelling the playing fields regarding the default proprietary consequences of such a marriage. In my opinion this could have (and was) properly achieved without having to refer the matter to the legislature. In addition, it is clear that postponing resolution of the matter until the legislature reacted to the judgment would not have provided the urgent relief that Mrs Sithole required.

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<sup>420</sup> *Minister of Home Affairs v Fourie and Others*: par. 132.

<sup>421</sup> *Minister of Home Affairs v Fourie and Others*: paras. 136 and 139.

<sup>422</sup> *Minister of Home Affairs v Fourie and Others*: paras. 160- 162.

<sup>423</sup> *Minister of Home Affairs v Fourie and Others*: paras. 136 and 138.

<sup>424</sup> *Minister of Home Affairs v Fourie and Others*: paras. 153 and 154.

#### **4.3.8. THE OSTENSIBLE RATIONALE BEHIND THE ENACTMENT OF SECTION 22(6) OF THE *BLACK ADMINISTRATION ACT***

In Chapter 3 it was mentioned that authors such as Sinclair and Heaton<sup>425</sup> and Seymour<sup>426</sup> describe the ostensible rationale behind the original enactment of section 22(6) *Black Administration Act* in 1927 and the different default matrimonial property regime that it prescribed for Black civil marriages as being that “the Roman-Dutch system of universal community of property was considered to be an alien concept for Blacks”. It is interesting to note that when the *Sithole* court dealt with the question as to whether there was any justification for this different legal position because of a “government purpose” for doing so, this ostensible rationale was neither raised by any of the litigants nor considered by the court. This can be regarded as a shortcoming of the judgment, because a consideration of the validity of this rationale would have added to the depth of the judgment’s justification analysis.

#### **4.4. PRELIMINARY CONCLUSION**

In this chapter it has been established that the Constitutional Court needed to act swiftly in order to prevent any further discrimination flowing from the legacy of the *Black Administration Act* and that the Constitutional Court as an arm of government needed to take action, and rightly did so. While the overall outcome of the judgment is supported for being constitutionally sound, the chapter has nevertheless highlighted certain problematic issues of the judgment, that arise particularly in the context of the consent requirements set by section 15 of the *Matrimonial Property Act* and the court’s finding that permits spouses to opt-out of the new default matrimonial property system that applies to spouses married in terms of section 22(6) of the *Black Administration Act*. The main conclusions reached in this chapter will be returned to in the concluding chapter that follows.

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<sup>425</sup> Sinclair & Heaton 1996: 228.

<sup>426</sup> Seymour 1970: 240.

## CHAPTER 5

### CONCLUSION

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#### 5.1. INTRODUCTION

The major aims of this chapter are to summarise the conclusions reached in the previous chapters, to comment on the interaction between the legislature and the judiciary regarding pre-1994 legislation (as illustrated by the *Sithole* judgment), and to draw attention to any other lessons that may be learned from the judgment based on its far-reaching effect.

#### 5.2. SUMMARY OF KEY CONCLUSIONS REACHED IN THE PRECEDING CHAPTERS

In Chapter 2 the legal nature of the various matrimonial property systems was investigated. Specific focus was placed on the marriage in community of property and its advantages and disadvantages because, by virtue of the *Sithole* case, this is now the new default matrimonial property system for Black spouses married in terms of section 22(6) of the *Black Administration Act*.<sup>427</sup> In laying the platform for the in-depth analysis of *Sithole* in Chapter 4, attention was drawn to the complicated system of administration that applies to such marriages that is also linked to the consent requirements that apply to these marriages in terms of section 15 of the *Matrimonial Property Act*<sup>428</sup> and the exceptions thereto. Case law regarding these exceptions, in particular the leading case of *Marais v Maposa*,<sup>429</sup> was discussed. The conclusion was reached that this case achieves the best possible balance between the rights of non-consenting spouses and third parties, by placing a duty on third parties to act in an objectively reasonable manner before they can rely on section 15(9)(a) of the *Matrimonial Property Act*. The chapter also considered the availability of redistribution orders in marriages with complete separation of property and highlighted important recent developments that have made these orders possible in marriages other than those originally contemplated when section 7(3) of the *Divorce Act* was first enacted on 1<sup>st</sup> of November 1984. It was explained that the *Sithole* judgment removes the

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<sup>427</sup> *Black Administration Act* 38/1927.

<sup>428</sup> *Matrimonial Property Act* 88/1984.

<sup>429</sup> *Marais v Maposa* 2020 5 SA 111 (SCA).

possibility of such an order for spouses whose marriages are converted into marriages in community of property.

Chapter 3 considered the default matrimonial property regime that was imposed on Black spouses who entered into a civil marriage by virtue of section 22(6) of the *Black Administration Act*, as well as subsequent changes that occurred as from 1988 when the *Marriage and Matrimonial Property Law Amendment Act*<sup>430</sup> was enacted on 2<sup>nd</sup> of December of that year. A key conclusion reached was that the ostensible rationale behind the enactment of section 22(6) of the *Black Administration Act* was “to prevent Black persons from being caught unaware by a property regime with which they may not be familiar”,<sup>431</sup> namely “the Roman-Dutch law system of universal community of property.”<sup>432</sup> However, the chapter also pointed out that the true rationale may have been an attempt to use the *Black Administration Act* to “strengthen tribal ties” in order to perpetuate the aims of segregation and control of the Black population by minority white rule, that was later taken further by the *Apartheid* government.<sup>433</sup> Furthermore, it was pointed out that by the mid-1980s, the South African Law Commission (as it was then known) had found that Black persons entering into a civil marriage preferred to be married in community of property, as evidenced by statistics collected from 1980 to 1984.<sup>434</sup> The subsequent enactment of the *Marriage and Matrimonial Property Law Amendment Act* in 1988 made a meaningful contribution to South African matrimonial property law by equalising the default position for all races. However, this legislation neither expressly nor by implication changed the default position with retrospective effect. The same was also true of section 21(2)(a) of the *Matrimonial Property Act*. Therefore, when this issue came before the *Sithole* court, the principles of statutory interpretation showed that there was no option for the court *to interpret* these statutes as applying with retrospective effect. Therefore, the constitutional validity of the law as it existed had to be confronted directly by the court.

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<sup>430</sup> *Marriage and Matrimonial Property Law Amendment Act*.

<sup>431</sup> Seymour 1970: 240.

<sup>432</sup> Sinclair & Heaton 1996: 228.

<sup>433</sup> See for example Sinclair & Heaton 1996: 217; 228.

<sup>434</sup> Sinclair & Heaton 1996: 228.

Chapter 4 consisted of an in-depth analysis of the *Sithole* judgments in both the High Court and the Constitutional Court. The following key issues arising from the latter judgment were investigated:

- a. The autonomy of the spouses. On this issue it was concluded that in order to fully eradicate the consequences and the legacy of the section 22(6) of the *Black Administration Act* toward Black persons, the Constitutional Court had to step in even though the court's intervention was intruding on their personal autonomy by converting such marriages into marriages in community of property.<sup>435</sup>
- b. The notion of "objective constitutional invalidity". In this regard it was concluded that had the court made mention of this principle in the context of a discriminatory statutory provision contained in a statute repealed well before 27 April 1994, this would have added to the richness of our constitutional democracy.<sup>436</sup> It was also concluded that because "laws are objectively valid or invalid depending on whether they are or are not inconsistent with the *Constitution*",<sup>437</sup> spouses could not have been expected to "opt-into" constitutional protection if the law in question is in fact constitutionally wanting in an objective sense. The *Sithole* court therefore correctly created the possibility for spouses who do not wish the new regime to apply to them to opt *out* of this protection of their own volition.
- c. The court's equality analysis and the issue of retrospectivity. Regarding the right to equality, it was found that section 21(2)(a) of the *Matrimonial Property Act* was arbitrary in its application and that it provided for formal equality as opposed to substantive equality. The court further held that women in Mrs Sithole's position could not be assisted by section 7(3) of the *Divorce Act* and could in any event not be expected to rely on the court's discretion in order to enjoy a constitutional right such as equality. It was also concluded that the court was justified in applying its judgment retrospectively, considering the perpetuation of the unfair discrimination suffered by Black spouses despite South Africa being a constitutional democracy since 1994 and the fact that it took almost three

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<sup>435</sup> In *Sithole v Sithole*: par. 50, the court further provided that "there is no basis to delay and thus perpetuate the unjustified unequal treatment" of Black persons.

<sup>436</sup> Michealman explains objective unconstitutionality as a principle where a decision on the constitutionality of the law in question cannot be postponed (Michealman 2007:57.)

<sup>437</sup> *Ferreira v Levin NO*: par.27.

decades for the unfair legacy of section 22(6) of the *Black Administration Act* to come before our courts and for it to be eradicated completely. Finally, it was also suggested that because it was clear that section 21(2)(a) failed the first leg of the *Harsken* enquiry (in that this section violated the applicant's right to equal protection and benefit of the law in terms of section 9(1) of the *Constitution*), it was not necessary for the court to proceed beyond this point to test for unfair discrimination.

- d. The first applicant's "lack of knowledge" and her "choice" to marry according to the default matrimonial property regime. On this issue it was concluded that Mr and Mrs Sithole did not specifically elect to marry out of community of property and that their matrimonial property regime was a result of legislation that was based on racial classification. The court was also correct in not following the approach taken by the Supreme Court of Appeal in the *Bezuidenhout* case,<sup>438</sup> because of the important differences between the factual and legal positions of the spouses in the two cases. A spouse such as Mrs Bezuidenhout was not burdened to a similar extent as Black spouses in Mrs Sithole's position who had to follow complicated steps in order for them to enjoy equality.
- e. The (un)constitutionality of section 21(1) of the *Matrimonial Property Act*. In this respect it was concluded that the court correctly found this provision to be constitutionally valid. However, an issue that was identified was that section 21(1) of the *Matrimonial Property Act*. does not provide for the procedure to be followed by spouses in Mrs Sithole's position who are unable to obtain the necessary consent from their spouses (usually their husbands) in order to change their respective matrimonial property regimes. As such, specific investigation by the SALRC is required in order to find a solution for spouses who encounter such consent issues. (It was seen that the SALRC has proffered potential solutions *to simplify* the process in this regard, but these still do not address the fundamental problem that consensus between the spouses is still required, which the *Sithole* case<sup>439</sup> specifically flagged as a problematic feature thereof).

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<sup>438</sup> *Bezuidenhout v Bezuidenhout* 2005 2 SA 187 (SCA).N  
<sup>439</sup> *Sithole*: par.38.

- f. Complications or unintended consequences arising from *Sithole*. Under heading 4.3.6 of Chapter 4, two problematic issues were identified.

The first relates to the consent requirements posed by section 15 of the *Matrimonial Property Act*. In this regard it was concluded that even the improvement on the legal position in terms of section 15(9)(a) of the Act created by *Marais v Maposa*<sup>440</sup> (that places a more emphasis on the reasonableness of a third party's conduct) may still not be enough for "innocent" spouses in the marriages contemplated in the *Sithole* judgment. In addition, the role of the rule *ignorantia juris non excusat* ("ignorance of the law excuses not") is also uncertain. The aforementioned permits me to conclude that the radical change to the matrimonial property regime of spouses affected by the *Sithole* judgment means that more needs to be done in terms of spreading awareness of the impact of these changes on such spouses. Problems could also arise in the context of suretyship as result of the *Sithole* judgment. This is due to the fact that a spouse who had signed as a surety before the judgment will no longer have a separate estate. This presumably means that the suretyship now becomes enforceable against the "new" joint estate, which will negatively impact on the other spouse. Litigation based on this state of affairs (by the latter spouse or by a third party who seeks to enforce the surety agreement) will pose challenges for our courts.

The second problematic issue relates to redistribution orders catered for in section 7(3) of the *Divorce Act*. It was seen in Chapter 4 that the removal of this possibility for spouses in Mrs Sithole's position will not necessary be problematic, because such an order would not have assisted them. In any event, the court in *Sithole* made mention of the fact that a spouse in Mrs Sithole's position should have to rely on the courts discretion in order to enjoy his or her constitutional right to equality. Where the spouses choose to opt-out of *Sithole*, the possibility of a redistribution order will remain because of section 7(3)(b) of the *Divorce Act*. However, the position where one spouse wishes to opt-out of *Sithole* while the other one doesn't could be more complicated, and this may indirectly be affected by the possibility (or otherwise) of a redistribution order. This is because it may

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<sup>440</sup> *Marais v Maposa* 2020 5 SA 111 (SCA).

suit one spouse to remain married with complete separation of property and take his or her chances with a potential redistribution order at divorce (where an equal division is by no means guaranteed),<sup>441</sup> while the other prefers the change occasioned by *Sithole*. This could lead to litigation, as contemplated by the *Sithole* court in its final order, that will require a careful balancing up of the interests of the spouses, and possibly even third parties who may be affected by the possible creation of a joint estate as “aggrieved persons” Finally, it was also seen in chapter 4 that the situation could be complicated where a divorcing spouse seeks a redistribution order and insists on a 50:50 division of the combined separate estates of the spouses on the basis that he or she did not fully understand the consequences of opting out of *Sithole*.

- g. Should the *Sithole* court have referred the matter to the legislature? In answering this question, it was concluded in Chapter 4 that the eradication of the legacy of legislation such as the *Black Administration Act* was inevitable because it could not be allowed to remain in our statute books any longer. While courts have in the past given the legislature a deadline within which to remedy a defect in legislation (such as in the *Fourie* case)<sup>442</sup> this was not an option in the *Sithole* case, because the court suspending its declaration of invalidity to allow the legislature to remedy the defect would have denied the urgent relief required by Mrs Sithole.
- h. The ostensible rationale behind the enactment of section 22(6) of the *Black Administration Act*. Regarding this issue, it was pointed out in Chapter 4 that the *Sithole* court did not deal with the rationale mentioned by authors such as Sinclair and Heaton<sup>443</sup> (namely that the marriage out of community of property was prescribed as the default system for Black spouses because the marriage in community of property as derived from Roman-Dutch law was unknown to them) in any way. In my view this is an issue that was overlooked by the court because although it would probably not have affected the outcome of the judgment (because it was shown in Chapter 3 that this rationale was already irrelevant by

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<sup>441</sup> *Bezuidenhout v Bezuidenhout* pars. 20 - 30.

<sup>442</sup> *Minister of Home Affairs v Fourie and Others; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC).

<sup>443</sup> Sinclair & Heaton 1996: 228.

the mid-1980s), specifically dealing with it would have added depth to the court's equality and justification analysis.

Chapter 4 therefore concluded that although the *Sithole* judgment was constitutionally sound, there were a few shortcomings or problematic issues that may need to be addressed by future courts. These relate to the consent requirements prescribed by section 15 of the *Matrimonial Property Act* and the court's finding that permits spouses to opt-out of the default matrimonial property system that now applies to spouses married in terms of section 22(6) of the *Black Administration Act*.

### **5.3. SOME LESSONS THAT MAY BE LEARNED FROM THE SITHOLE JUDGMENT**

Although the overall outcome of the *Sithole* judgment may be regarded as constitutionally sound, the judgment provides some important lessons. The first of these relates to the interaction between the judiciary and the legislature regarding old-order (i.e., pre-1994) legislation.

As pointed out in Chapter 1,<sup>444</sup> the *Sithole* case is an example of a situation where the legislature could perhaps have played a more proactive role in making sure that legislation that continues to unfairly discriminate against persons who were disadvantaged before 1994 is amended in time, so that persons such as Mrs Sithole don't need to approach the courts.

As a general rule our courts have often held that the responsibility for law-making rests primarily on the legislature and not the courts<sup>445</sup> The SAL[R]C's research in the mid-1980s already showed Black persons' preference for marriage in community of property, and that this was in fact taken seriously by the legislature (albeit only from 1988).

It must be noted that *Sithole* involved an unusual set of facts which the pre- and post-1994 legislature could likely not have envisioned, because the assumption may have been that a redistribution order would have adequately catered for property disputes

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<sup>444</sup> See Chapter 1 paragraph 1.3.

<sup>445</sup> See for example *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 5 SA 247 (CC) par. 76 and the authority referred to in footnote 184 of that judgment.

at divorce. *Sithole* raised the unexpected issue as to what would happen if a spouse did not wish to divorce the other spouse, so that the possibility of a redistribution order would in any event not have assisted that spouse.<sup>446</sup> Before *Sithole*, there does not appear to have been any "lobbying" (pre- or post-1994) for the position created by section 22(6) of the *Black Administration Act* to have been changed. In fact, the *Sithole* case seems to have been the first instance in which this problematic feature of the (then) *status quo* ever featured prominently. Therefore, the peculiar facts of *Sithole* may indicate that the legislature could not really have been blamed for the oversight of not stepping in to address the legacy of section 22(6) of the *Black Administration Act*.

Therefore, in answering the question posed in Chapter 1 regarding whether the judiciary is the appropriate arm of government to occasion such far-reaching legal developments as those in *Sithole*, the answer is in the affirmative, *given the unique context of the case*. This unique context however shows that this cannot be an absolute rule.

However, what *Sithole* does indicate is that there is a need for the entire legal fraternity (legal academics, legal professionals and NGOs) to alert the Minister of Justice and Constitutional Development to old-order legislation that is constitutionally suspect and to lobby the Minister (as the relevant Minister to whom the SALRC reports) to instruct the SALRC to investigate and review such legislation that will hopefully lead to legislative changes that will pre-empt the need for the courts to adjudicate such matters. This could lead to a better interaction between the judiciary and the legislature, because there is less chance of the doctrine of separation of powers not being adhered to.

A final lesson that may be learned from *Sithole* is the crucial need for South African citizens to be informed of judgments that may affect them. Our *Constitution* provides for a right of access to information, specifically where that information relates to exercising or protecting a certain right.<sup>447</sup> In the *Sithole* case, Ms Budlender, a researcher on social policy who filed an affidavit in support of Mrs Sithole's application,

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<sup>446</sup> *Sithole v Sithole*: par. 8.

<sup>447</sup> *Constitution*: sec. 32(1)(a).

contended that more than 400 000 women could be in Mrs Sithole's position.<sup>448</sup> She also submitted that many Black persons live in rural areas and townships and were not aware of their rights in the past, as the *Apartheid* regime did not place much emphasis in informing them of the same, as opposed to the current government.<sup>449</sup> However, the question arises: Are these 400 000 women (and their husbands) aware of the changes brought about by *Sithole*? If it is accepted that many of these people still live in rural areas and townships, it is likely that they may not be. I am therefore of the opinion that the *Sithole* court could have done more to ensure that the effect of the judgment was communicated more widely. Although all judgments of the Constitutional Court are available on the court's official website<sup>450</sup> and other databases (such as SAFLII)<sup>451</sup> our government makes use of the Government Gazette as an official way of communicating with the general public. However, important changes to the law resulting from Constitutional Court judgments are not communicated therein, and I would suggest that they should be, especially where they amend legislation or bring about such far-reaching changes that affect as many persons as those affected by *Sithole*. I am further of the opinion that mere publication in the Government Gazette is not enough; platforms such as television, radio and social media should also be used to inform members of the public on such drastic changes. I would therefore recommend that in such instances the Constitutional Court should include an order that requires the relevant Minister concerned (such as the Minister of Home Affairs in the *Sithole* case) to issue a formal and concise statement on state-owned media platforms that informs the public of such important changes and where to find further information if needed. Finally, it is my view that practising legal practitioners and candidate legal practitioners (such as myself) should, as part of their community service obligations prescribed by section 29 of the *Legal Practice Act 28 of 2014*, be compelled to participate in programmes or initiatives that are aimed at educating members of the general public as to their legal rights and important changes to the law.

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<sup>448</sup> *Sithole v Sithole*: par. 4.

<sup>449</sup> *Sithole v Sithole*: par. 36.

<sup>450</sup> <https://www.concourt.org.za>.

<sup>451</sup> <http://www.saflii.org>.

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