



CONSTITUTIONAL COURT OF SOUTH AFRICA

EB (born S) v ER (born B) and Others; KG v Minister of Home Affairs and Others
[2023]

CCT 364/21 and 158/22
Date of judgement: 10 October 2023

MEDIA SUMMARY

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

On Tuesday, 10 October 2023, the Constitutional Court handed down judgement in two applications for confirmation of orders declaring section 7(3) of the Divorce Act 70 of 1979 (Divorce Act) invalid and unconstitutional.

The applications were brought separately. The first application CCT 364/21 was brought by Mrs B. The respondents in CCT 364/21 were Mrs R in her capacity as executrix (first respondent); the Minister of Justice and Correctional Services (second respondent); and Mrs B in her capacity as executrix (third respondent). The second application CCT 158/22 was brought by Mrs G. The respondents in CCT 158/22 are the Minister of Home Affairs (first respondent), the Minister of Justice and Constitutional Development (second respondent); Mr G (third respondent); the Commission for Gender Equality (CGE) (first amicus curiae); and the Gauteng Attorneys Association (GAA) (second amicus curiae). In both applications, the parties sought confirmation of declarations that section 7(3)(a) of the Divorce Act 70 of 1979 is inconsistent with the Constitution and accordingly invalid. In CCT 364/21, the alleged ground of constitutional invalidity was that the section only applies to marriages dissolved by divorce and not also by death. In CCT 158/22, the alleged ground of constitutional invalidity was that the section only applies to marriages entered into before 1 November 1984 and not also to marriages concluded after that date. The date 1 November 1984 is the commencement of the Matrimonial Property Act, 1984 (MPA).

In CCT 364/21 the case centered on divorce proceedings initiated by Mrs B against her late husband, Mr B. They had been married under an antenuptial contract that excluded community of property. During the divorce process, Mr B passed away, automatically

dissolving the marriage. The legal dispute had two main aspects. First, it questioned the constitutionality of section 7(3) of the Divorce Act, which only applied to marriages ending in divorce and not death. This led to a claim of unfair discrimination by Mrs. B against spouses married before 1 November 1984. She argued that they lacked a claim against each other's estate after one party's death, unlike those married after that date with the accrual system. The High Court found this discrepancy to be unconstitutional, considering it unfair discrimination under section 9 of the Constitution. Second, there was a question about whether Mrs. B's claim for redistribution was preserved due to Mr. B's death occurring after *litis contestatio*. The High Court ordered that section 7(3) of the Divorce Act be amended to include a redistribution remedy for marriages dissolved by death and referred the order for confirmation to the Constitutional Court.

In this Court, the applicant's primary argument centered on the contention that there existed an unjustifiable differentiation and discrimination between the dissolution by death of marriages out of community of property concluded before 1 November 1984 (styled "old ANC marriages" in this Court's judgment) and the dissolution by death of accrual marriages concluded on or after 1 November 1984. This distinction, solely based on the date of the marriages, was argued to constitute unfair discrimination under section 9(3) of the Constitution, with the presumption of unfairness not being rebutted. The Minister, while not opposing the confirmation of the High Court's decision, provided historical context. He also raised concerns about difficulties in adjudication if a redistribution remedy were allowed for marital dissolution by death.

The mootness of the case was considered due to the absence of an appeal against the High Court's *litis contestatio* decision and the subsequent settlement agreement. However, the Court deemed it essential to address the constitutional challenge for various reasons, including the importance of resolving the declared constitutional invalidity and its potential impact on a range of marriages.

In a unanimous judgment authored by Rogers J, the Court, in arriving at its decision, conducted a comprehensive analysis of section 9 of the Constitution, specifically focusing on section 7(3) of the Divorce Act and its historical context. The Court first examined whether section 7(3) created differentiation among individuals or groups and if this differentiation was justified by a legitimate government purpose. It found that the differentiation affected spouses in old ANC marriages, treating those whose marriages ended in divorce differently from those whose marriages ended in death. The Court then scrutinised whether this differentiation had a rational connection to a valid government purpose. Despite arguments that aimed to justify this distinction, such as preventing uncertainty or complications in estate planning, the Court determined that these justifications did not hold up.

Additionally, the Court explored the complaint of unfair discrimination, concluding that the differentiation was not based on marital status, as initially argued, but rather on the method of dissolution. This differentiation did not significantly impact the fundamental human dignity of individuals, as it was not tied to inherent attributes or characteristics of spouses.

The Court also discussed the applicability of section 36 of the Constitution, which addresses justifiability. It questioned whether statutory differentiation that lacked a rational link to a valid government purpose could ever be justified. In this case, the Court found that the proposed justifications for differentiation did not meet the threshold for legitimate government purposes. In terms of remedies, the Court held that an interim reading-in of an analogous provision into the MPA would be appropriate as an immediate solution while allowing Parliament 24 months to address the issue more comprehensively. It also highlighted the need for specific legal provisions concerning customary and Muslim marriages. Lastly, the Court ordered the Minister to pay the applicant's costs.

In CCT 158/22, Mrs G initiated legal proceedings after her 30-year marriage broke down. She sought a redistribution order under section 7(3) of the Divorce Act, but was disqualified from its provisions because this section only applied to marriages out of community of property concluded before 1 November 1984. Mrs G argued that this limitation was unconstitutional, as it arbitrarily discriminated against spouses married before and after 1 November 1984 without a valid government purpose. Her application was unopposed, but the Minister and the Pretoria Attorneys Association (PAA) made submissions.

The Minister chose not to oppose the application but mentioned ongoing discussions by the South African Law Research Commission regarding the extension of the judicial discretion conferred by section 7(3)(a). The PAA raised objections to declaring the cut-off date of 1 November 1984 unconstitutional, including concerns about a potential flood of claims, the sanctity of contracts (*pacta sunt servanda*), and the interference of courts in contractual matters. They argued that antenuptial contracts should be upheld unless against public policy.

The High Court ruled that the limitation in section 7(3) of the Divorce Act was rationally connected to a legitimate government purpose. It cited the importance of honouring contractual agreements. The High Court concluded that section 7(3) did not violate the Constitution's section 9(1). Regarding section 9(3) of the Constitution, the High Court found that spouses who married out of community of property with no accrual after 1 November 1984 were treated differently from those who married out of community of property prior to that date. This differentiation, solely based on the marriage date, was considered discriminatory and unfair, as the harm addressed by section 7(3) affected both groups of spouses.

In this court, the applicant persisted with a challenge against section 7(3), contending that it violates the Constitution. She argued that the section discriminates unfairly between spouses in different types of marriages, particularly marriages concluded after 1 November 1984 by terms of an antenuptial contract excluding both community of property and the accrual regime. In its judgment, this Court referred to such marriages as "new ANC marriages". The applicant asserted that this differentiation is irrational and infringes section 9(1) and 9(3) of the Constitution, alleging discrimination based on gender, sex, race, religion, and marital status. She also rejected the idea that spouses in

new ANC marriages had a genuine choice in the matter, emphasising the unequal bargaining power often present in such contracts.

The CGE supported the applicant's challenge, citing South Africa's international obligations under CEDAW and the African Union's Maputo Protocol. It argued that these international instruments oblige South Africa to extend protection against unjust antenuptial contracts to all marriages. The CGE also conducted a comparative analysis with other countries, suggesting that South Africa would not be out of step if it extended the scope of section 7(3). It emphasised that matrimonial agreements are different from commercial contracts and should be motivated by factors other than property. The CGE also suggested the need for clearer guidance to courts on exercising their discretion under section 7(3).

While not opposing the challenge, the Minister explained the original purpose of section 7(3) as providing a remedy for spouses in old ANC marriages who did not adopt the accrual regime during a specific window period. The Minister proposed a suspension of the declaration of invalidity for 24 to 36 months to allow for further law reform by the South African Law Reform Commission, which is currently reviewing matrimonial property law.

The GAA defended the constitutionality of the date differentiation in section 7(3). It argued that this provision was introduced for a limited purpose and serves to assist specific categories of spouses, particularly those in old ANC marriages. The GAA opposed extending the redistribution remedy to new ANC marriages, asserting that this would unjustifiably deprive individuals of property and create legal uncertainty. It argued that existing contractual principles are sufficient to safeguard spouses' rights and raised concerns about the impact on creditors.

This Court recognised the primary differentiation in this case as the distinction between old and new ANC marriages, a differentiation based on the date of the respective marriages. However, it considered that the core basis for the differentiation was the presence or absence of the accrual regime as the default property regime. The Court then assessed the rationality of this differentiation under section 9(1) of the Constitution. It found that the purpose behind the differentiation was legitimate. The redistribution remedy aimed to provide relief to spouses in marriages without the accrual system as the default regime, while respecting spousal choice in the case of marriages where the spouses expressly excluded the accrual system. The Court noted that respecting contracts and choice in matrimonial property matters was consistent with constitutional values such as freedom and dignity. While acknowledging the distinction between commercial contracts and matrimonial agreements, the Court held that it was not irrational to encourage level-headed decision-making in matrimonial property choices. Further, the Court noted that different viewpoints even existed within the judiciary regarding the significance of choice in domestic matters. It also referred to the fact that various democratic countries allowed differing levels of judicial interference in matrimonial property choices. The Court thus found that the differentiation, primarily based on the

availability of the accrual regime, was rational and served the legitimate government purpose of respecting spousal choice in matrimonial property matters.

The Court then examined whether the differentiation between spouses in old and new ANC marriages constituted unfair discrimination. While the direct distinction (the date of marriage) was not based on listed grounds in the Constitution, the Court accepted the argument that it indirectly discriminated against women, as they were disproportionately affected by the absence of a redistribution remedy. The state's justification, citing the choice to marry with or without the accrual system, was deemed insufficient, as it did not fairly account for factors like the voluntariness of decisions, middle-ground solutions, international law obligations, and the impact on affected parties. Consequently, the Court found that there was indirect discrimination based on gender and that the discrimination was unfair and unconstitutional, emphasising the need to rectify gender-based disparities. In terms of the remedy, the Court decided to suspend the declaration of invalidity for 24 months, with an interim severance of the offending differentiation in section 7(3)(a), ensuring immediate effective relief. The Minister was ordered to pay the applicant's costs in this Court.

In CCT 364/21, the Court upheld the High Court's decision of constitutional invalidity. Specifically, subsection 7(3) of the Divorce Act 70 of 1979 was deemed inconsistent with the Constitution and invalid due to its omission of provisions for the dissolution of marriage by death. However, the declaration of invalidity is temporarily suspended for 24 months to allow Parliament the opportunity to address the constitutional shortcomings. During this period, the Matrimonial Property Act 88 of 1984 is to be read as including a new provision, section 36A, allowing for a redistribution remedy (modelled on section 7(3) of the Divorce Act) in the case of marriages dissolved by death. Certain conditions are attached to this order, including its non-impact on the validity of acts related to the administration of deceased estates that were finalised before the order date. Additionally, the second respondent is obligated to cover the applicant's costs in this Court.

Similarly, in CCT 158/22, the Court confirmed the High Court's ruling of constitutional invalidity. Specifically, paragraph (a) of subsection 7(3) of the Divorce Act 70 of 1979 was found inconsistent with the Constitution and invalid for excluding marriages entered into on or after after the commencement of the MPA. Like CCT 364/21, the declaration of invalidity is suspended for 24 months to allow parliamentary intervention. Pending legislative changes, paragraph (a) of subsection 7(3) of the Divorce Act is to be read without certain exclusionary words. The order does not affect the legal consequences of matters finalised before the date of this Court's order. Lastly, the second respondent is directed to cover the applicant's costs in this Court.