Centre for
CONSTITUTIONAL
RIGHTS

HOLOMISA V HOLOMISA AND ANOTHER* - THE IRRATIONAL LIMITATION OF SECTION 7(3) OF THE *DIVORCE ACT OF 1979

In a constitutional democracy, it is assumed spouses have equal bargaining power on negotiating which matrimonial property regime will govern their marriage. However, the lived reality is that women in South Africa's historical patriarchal system did not necessarily have equal bargaining power and find themselves today vulnerable during divorce proceedings. To address this reality, the *Divorce Act* of 1979 (the Act) provided for judicial intervention in terms of section 7(3). Section 7(3) of the Act makes it possible for a spouse married out of community of property, to apply for a redistribution of assets in divorce proceedings. The Court must determine what would be just and equitable and this provision has been hailed as an important safeguard against the severe consequences of a complete separation of property. This legislative safeguard however was (despite good intentions) not available to many women until the recent Constitutional Court judgment of *Holomisa v Holomisa and Another* (the *Holomisa* matter).

Section 7(3) as of the Act only applied to persons married out of community of property entered into before 1 November 1984. This was before the commencement of the *Matrimonial Property Act* of 1984 and further, married in terms of an ante-nuptial contract, which excluded community of property, profit and loss of accrual. The provision also applied to African civil marriages before 2 December 1988, which was also by default out of community of property in terms of section 22(6) of the *Black Administration Act* of 1927. The provision however made no reference to African people married out of community of property in terms of the *Transkei Marriage Act* of 1978.

The *Holomisa* matter constitutionally challenged section 7(3) of the Act on the basis that it unfairly excluded women married out of community of property in terms of the *Transkei Marriage Act* from the ambit and protection of the law - contrary to the right to equality in section 9(1) of the Constitution.

The constitutional challenge was not complex, as the distinction between women in the former Transkei and those married in the rest of South Africa was not rational. The matter raised more procedural questions on direct access to the Constitutional Court and spoke to the "*tangled nest of post-apartheid legislation*" which, despite being well-intended, failed to protect all South Africans.

The matter must be sketched against the former apartheid homeland system. The applicant, Ms Holomisa, married Mr Holomisa in December 1995 in the Transkei. Prior to the controversial "independence" of Transkei in 1976, civil marriages between black South Africans were regulated in terms of section 22(6) of the *Black Administration Act* of 1927 (the BAA). The default proprietary regime in terms of the BAA was (unlike the common law) out of community of property. After the "independence" of Transkei, the *Transkei Marriage Act* repealed the BAA in Transkei and replaced it with section 39 of the *Transkei Marriage Act*, which also made the default position marriage out of community of property.

The conundrum however is that due to Transkei's "independent" status, progressive legislative developments in the "rest of South Africa", providing equal marital power and safeguards, did not reflect in Transkei. The *Matrimonial Property Act* specifically abolished a husband's marital power over the property of his wife and provided that every marriage out of community of property after the commencement of this Act would be subject to the accrual system. The default proprietary regime also became in community of property for all marriages.

Even after the advent of the Constitution, which provided for one sovereign democratic State, post-apartheid legislative measures extending the operation of the *Divorce* and the *Matrimonial Property Acts* to the former homelands, did not affect the operation of the *Transkei Marriage Act*. Section 39 of the *Transkei Marriage Act* was only expressly repealed with the *Recognition of Customary Marriages Act* of 1998 in November 2000. The problem is that it did not invalidate section 39 of the *Transkei Marriage Act* retrospectively and therefore marriages before 2000, such as the applicant's, would still by default be out of community of property.

The constitutional challenge to section 7(3) of the Act, was only properly pleaded in the Constitutional Court. This presented a procedural challenge, as direct access to the Constitutional Court would only be granted in exceptional circumstances. In the first Court of Law, the Mthatha Regional Court, the Magistrate ruled that the marriage was in community of property, as Ms Holomisa maintained and granted a decree of divorce, which the Mthatha High Court confirmed. The Supreme Court of Appeal (the SCA), on appeal however found that the marriage was out of community of property, as the marriage certificate indicating this fact was not placed before the Regional Court. The SCA's finding on the proprietary regime was not disputed. The difficulty however was, as noted by Justice Froneman, that Ms Holomisa had to constitutionally challenge section 7(3) of the Act, to gain any personal advantage. Justice Froneman however, held that the constitutional issue was not complex, the intersectional discrimination on gender, marital status and location could not be rationally justified and there was no government intention to perpetuate this discrimination but by oversight this conundrum still existed. These facts justified direct access to the Constitutional Court and the Constitutional Court declared section 7(3) unconstitutional on the basis that it infringes on the right to equal protection of the law, as it excluded women married in terms of the *Transkei Marriage Act*.

The constitutional challenge to section 7(3) of the Act was not complex and the illogical differentiation could never be rationally justified. The matter however speaks to the urgent need for the Law Reform Commission and Parliament to investigate former homeland provisions and other apartheid-era laws still in operation, which by oversight might present an equal legislative conundrum. This judgment is an important reminder of this reality, more than two decades after the adoption of the final Constitution. The dignity of especially the most vulnerable in society, as seen in this case, hinges on section 9 of the Constitution's guarantee that the law should benefit and protect everyone equally.