

# ConCourt ruling - reversing unjust property laws imposed on black marriages

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The High Court recently held that South Africa's Matrimonial Property Act essentially rendered black women powerless as it perpetuated the discrimination created by the Black Administration Act of 1927.



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On 17 April 2021 in a unanimous decision in the matter of *Sithole and Another V Sithole and Another* (Sithole), the Constitutional Court confirmed and upheld a High Court ruling declaring Section 21(2)(a) of the Matrimonial Property Act 88 of 1984 (the MPA) unconstitutional and invalid in so far as it maintained the discrimination created by Section 22(6) of the Black Administration Act 38 of 1927 (the BAA) which maintained the default position of black marriages.

## Background

Historically, marriages between black people were specifically regulated by the BAA. In terms of Section 22(6) of the BAA, all marriages of black couples were automatically out of community of property, save where certain conditions allowing for a different marital regime other than the default were fulfilled. Section 22(6) of the BAA provided that:

*“A Marriage between Natives 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 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 authorised to attest to such declaration) that 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 shall be excluded from such community.”*

Section 22(6) was repealed by the Matrimonial Property Law Amendment Act 3 of 1988 (the Amendment Act) which

deleted Section 22(6) of the BAA and inserted Sections 21(2)(a) and 25(3) into the MPA thereby affording persons married out of community of property in terms of Section 22(6) of the BAA the opportunity to change their marital regime within two years post the commencement date of the MPA, being 2 December 1988. Those married couples who opted to change their marital regime were required to do so by executing and registering a notarial contract to that effect.



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### Salient facts

Agnes Sithole and her husband Mr Sithole were married in December 1972. By virtue of Section 22(6) of the BAA, the marriage was out of community of property. At the time that the Application was brought before the High Court, Mr and Mrs Sithole had been married for 47 years. The marriage was further constituted out of community of property due to Section 21(2)(a) of the MPA, which did not automatically change the marital regime of black spouses.

Mrs Sithole was a home executive who attended to the needs of the household. During 2000, the couple purchased a matrimonial home which was registered in the name of Mr Sithole. Subsequent to the irretrievable breakdown of the marriage, Mr Sithole threatened to sell the home. Mrs Sithole sought and obtained a declaratory order interdicting and restraining Mr Sithole from selling the matrimonial home or alienating the property in any manner pending the finalisation of the matter before the High Court and ultimately, the Constitutional Court.

### The High Court ruling

The High Court ruled in favour of Mrs Sithole declaring that Section 21(2)(a) of the MPA was unconstitutional and invalid in so far as it maintained and perpetuated the discrimination created by Section 22(6) of the BAA. The Court held that Section 21(2)(a) sought to differentiate between marriages of black spouses concluded prior to 1988 and those entered into post the commencement of the MPA. It further held that Section 22(6) of the BAA not only precluded black spouses from having their marriages in community of property but also deprived them from the legal protection accompanied by a marriage in community of property.

The Court highlighted that Section 21(2)(a) was discriminatory in that it impinged on the rights of black women in South Africa as it denied them the protection afforded by marriages in community of property. This essentially rendered black women completely dependent on their husbands, who in all likelihood controlled the wealth of the family.

The High Court ultimately ordered that all marriages of black people concluded in terms of 22(6) of the BAA were to be declared marriages in community of property and this was to be effective from the date of the order. Those spouses who wished to opt out of the marital regime could do so by executing and registering a notarial contract. The High Court's

decision was referred to the Constitutional court for confirmation in terms of Section 172(2)(a) of the Constitution.

## The Constitutional Court

The Constitutional Court, in a unanimous judgment delivered by Judge Tshiqi, indicated that the main issues before the court was whether the order of constitutional invalidity made by the High Court should be confirmed. The outcome of the inquiry would be dependent on whether the impugned provisions did unfairly discriminate against black spouses whose marriages were concluded in terms of the BAA. If the impugned provisions did in fact discriminate against black spouses, whether such discrimination was justifiable in an open and democratic society and lastly, if such discrimination was not justifiable, the court would be obliged to confirm the order of constitutional invalidity and accordingly make an order which was just and equitable.

The Constitutional Court held that the dire consequences suffered by black people as a result of such discriminatory laws made it compelling that such laws be urgently eradicated from our statutes. It found that Section 21(2)(a) of the MPA to be unfairly discriminatory on the grounds of race, gender and age as cited in Section 9(3) of the Constitution and furthermore that such discrimination was not justifiable under Section 36 of our Constitution.



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The Constitutional Court highlighted that the discriminatory effect could be traced back to the provisions of the BAA. The differentiation under the BAA was on a racial basis in that it created a separate and distinct dispensation for black marriages. Section 22(6) of the BAA had the effect that, unless black couples expressed their desire to enter into marriage in community of property, the marriage would automatically be out of community of property. This was different to what was applicable to other racial groups whose marriages were automatically in community of property.

Moreover, Section 21(2)(a) of the MPA did not have an automatic effect of converting the default position of black marriages so that they were in community of property like those of other races but rather, it placed an onerous responsibility on black spouses to convert their marital regime in the event that they wanted their marriage to be in community of property.

The Constitutional Court accordingly confirmed the Order of the High Court that Section 21(2)(a) of the MPA was unconstitutional in so far as it maintained and perpetuated the discrimination created by Section 22(6) of the BAA.

The practical implications of the Sithole judgment is that effective from 14 April 2021, the default position for all marriages which, in terms of the BAA were automatically out of community of property, shall be in community of property - save instances where the affected couple elects to opt out. In the event that couples wish to opt out, they can do so by notifying the Director-General of Home Affairs in writing.

## Conclusion

The Sithole judgment is an exemplary illustration of how the South African Constitution can and should be utilised as a tool for progressive transformation particularly in instances where black women are continuously subjected to dual oppression and who continue to suffer disenfranchisement as a result of the effects of marriages concluded under the BAA.

We are yet to see the benefits of the Sithole judgment but attorneys are enjoined to be mindful of the practical implication raised by this judgment when advising clients.

## ABOUT THE AUTHOR

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