



Commission for Gender Equality
A society free from gender oppression and inequality



MEDIA STATEMENT

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COMMISSION FOR GENDER EQUALITY AND LEGAL RESOURCES CENTRE WELCOME VICTORY FOR WOMEN IN ANTENUPTIAL CONTRACT MARRIAGES, AS SECTION 7(3) OF THE DIVORCE ACT IS CONFIRMED TO BE UNCONSTITUTIONAL

The Commission for Gender Equality (CGE) and Legal Resources Centre (LRC) welcome the judgment handed down today in the Constitutional Court in the case *KG v Minister of Home Affairs*. The case dealt with a constitutional challenge to section 7(3) of the Divorce Act. The court confirmed the constitutional invalidity of the section on the basis that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act of 1984. Section 7(3) of the Divorce Act provides that where spouses married out of community of property get divorced, the court may make an equitable order that assets of one spouse be redistributed to the other. However, the remedy was only available to civil marriages entered into before 1 November 1984. The reason being, that for marriages entered into after this date, the default position was that such marriages would be automatically subject to accrual unless this was expressly excluded by the antenuptial contract.

The applicant in this case married her husband in 1988 in terms of an antenuptial contract (ANC) which excluded accrual. She contributed to the increase in her husband's estate through non-financial contributions to the family home, with the result being that her husband became very wealthy. She was prevented from pursuing a claim in terms of section 7(3) of the Divorce Act on the basis that her marriage was entered into after 1984. She then challenged the constitutionality of the section on the basis that it limited the redistribution remedy to old ANC marriages. The High Court declared the section unconstitutional, and the matter was referred to the CC for confirmation.

The LRC represented the Commission for Gender Equality as *amicus curiae* in the matter. We argued that South Africa has international obligations in terms of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) General Recommendations which states that financial and non-financial contributions in a marriage should be accorded equal weight. Where ANC's are permitted, state parties must ensure that women are not, due to unequal bargaining power, left with less protection than they would have under the default property regime. We also referred to the African Union's Maputo Protocol which requires an equitable sharing of joint property upon dissolution of marriage. We further directed the court to a comparative analysis of other countries with similar constitutional values to South Africa where a redistribution remedy is available despite the terms of an antenuptial contract. We also advanced the argument that 'certainty' in contracts should not outweigh the need to ensure fairness and justice in patrimonial relations between spouses.

The Constitutional Court recognised that indirectly, the burden of the exclusion of new ANC marriages in section 7(3) falls more heavily on women. The Court referred to research showing that South African women are more likely to be multidimensionally poor than men, with the burden of poverty falling more heavily on black women. South Africa has among the highest mean and median gender income gaps, with the result being that women enter into marriage more poorer and more dependent than men, therefore having less bargaining power. During marriage, cultural understandings and practices often exploit and deepen the inequalities by supporting an unequal division of care and household labour.

The practical effect of the differentiation between old ANC marriages and new ones is to prejudice women and benefit men disproportionately. Therefore, the court found that section 7(3) indirectly discriminates against spouses on the basis of gender. A women's fundamental human dignity is impaired when no recognition is given to the contribution she has made to the increase in her husband's estate. The Court noted that the value of 'choice' is not sufficient to render discrimination fair. The Court found that allowing a redistribution remedy does not need to be a binary choice, and that in terms of section 7(5) of the Divorce Act a court can take into account any factor when considering a redistribution claim, this includes the fact that parties concluded an antenuptial contract. This is a certain victory for women and gender equality, and we welcome the Court's progressive judgment.

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