CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 202/24

In the matter between:

VVC Applicant

and

JRM First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

MINISTER OF HOME AFFAIRS Third Respondent

Neutral citation:	*VVC v JRM and Others* [2026] ZACC 2
Coram:	Madlanga ADCJ, Dambuza AJ, Goosen AJ, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J
Judgments:	Majiedt J (majority): [1] to [122] Rogers J (dissenting): [123] to [175]
Heard on:	25 February 2025
Decided on:	21 January 2026
Summary:	Recognition of Customary Marriages Act 120 of 1998 — section 10(2) — confirmation of constitutional invalidity — change of marriage system — matrimonial property regime — antenuptial contract

ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria:

1. The order of constitutional invalidity by the High Court of South Africa, Gauteng Division, of the High Court, Pretoria, which declared section 10(2) of the Recognition of Customary Marriages Act, 120 of 1998, unconstitutional, is not confirmed.
2. There will be no order as to costs.

JUDGMENT

MAJIEDT J (Dambuza AJ, Goosen AJ, Mhlantla J Theron J, and Tshiqi J concurring):

Introduction

[1] This is an application for confirmation of an order of constitutional invalidity by the High Court of South Africa, Gauteng Division, Pretoria (High Court), which declared section 10(2) of the Recognition of Customary Marriages Act[1] (Recognition Act) unconstitutional.[2] In terms of section 167(5) read with section 172(2) of the Constitution, this Court must confirm that declaration of invalidity, so nothing more need be said about jurisdiction.

[2] The matter started out in the High Court as an opposed divorce between the applicant, VVC, and the first respondent, JRM. The second and third respondents are

[1] 120 of 1998.

[2] *JRM v VVC* [2024] ZAGPPHC 547; [2024] 3 All SA 853 (GP).

the Ministers of Justice and Constitutional Development and of Home Affairs respectively, (collectively, the Ministers). The Pretoria Attorneys Association was admitted as amicus curiae (friend of the court) in the High Court, but has not been admitted as amicus curiae before this Court. The application is unopposed. However, at the direction of the Chief Justice, the second and third respondents have filed written submissions and presented oral argument in which they contend for a finding of constitutional validity.

[3] The applicant and the first respondent were married to each other in community of property by way of customary law on 5 August 2011. Eight years later, on 19 February 2019, they decided to conclude a civil marriage and signed an antenuptial contract (ANC) in terms of section 10(2) of the Recognition Act. That contract provided that the civil marriage would be out of community of property and subject to the accrual system. They concluded the civil marriage on 10 June 2021, without dividing the joint estate created by the customary marriage.

[4] During May 2022, the first respondent sought a decree of divorce and enforcement of the ANC against the applicant. In response, the latter pleaded that the ANC was invalid, or in the alternative, if the ANC was held to be valid, then section 10(2) of the Recognition Act (the impugned provision) was unconstitutional. The basis pleaded for the alleged unconstitutionality was that the impugned provision permitted spouses married under customary law to change their matrimonial property regime from in community of property to out of community of property by a mere written agreement and without judicial oversight.

High Court proceedings

[5] Before the High Court, the applicant and first respondent agreed on a written statement of facts as a special case for adjudication, and in terms of rule 33(1) of the Uniform Rules of Court, the High Court separated the question of the constitutionality of the impugned provision from the other issues in the divorce proceedings. The first

respondent did not submit written argument and did not appear when the matter was argued, nor did the Ministers.

[6] It is of the utmost importance to record at the outset how the matter was litigated in the High Court as a special case. The parties agreed in the stated case that the issues to be determined by the High Court were, among others—

(a) whether the parties' ANC is valid and enforceable and whether that ANC caused the marital regime applicable to the marriage between the parties to change from in community of property to out of community of property, with application of the accrual system in terms of Chapter 1 of the Matrimonial Property Act[3] (MPA); and

(b) if the ANC is valid, whether the impugned provision is unconstitutional insofar as it allows for spouses to change their marital property regime after concluding a customary marriage from in community of property to out of community of property, without application to court or notice to creditors.

The constitutional challenge would therefore, on this agreement, arise only in the event that the High Court found the ANC to be valid.

[7] In the High Court, as stated, the first respondent, as plaintiff, did not furnish written submissions and did not put in an appearance when the stated case was argued. There was an appearance on behalf of the applicant and it was argued on her behalf that the purported ANC is invalid and unenforceable and that she was married to the first respondent in community of property. She further contended that should the purported ANC be found to be valid, then the impugned provision is unconstitutional because it allows for the matrimonial property regime applicable to a customary marriage to be changed from community of property to out of community of property by mere written agreement between the parties.

[3] 88 of 1984.

[8] On the second issue in the stated case, the question of constitutional invalidity, the applicant's argument before the High Court in essence was that the impugned provision violates section 25(1) of the Constitution as it permits arbitrary deprivation of property,[4] since it allows spouses married in community of property in a customary marriage to contractually change their property regime to out of community of property without judicial oversight. This would result in assets which had formed part of the

[4] Section 25 of the Constitution, headed "Property", reads:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
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> (2) Property may be expropriated only in terms of law of general application—
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> (a) for a public purpose or in the public interest; and
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> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
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> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
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> (a) the current use of the property;
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> (b) the history of the acquisition and use of the property;
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> (c) the market value of the property;
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> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
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> (e) the purpose of the expropriation.
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> (4) For the purposes of this section—
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> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
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> (b) property is not limited to land.
>
> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
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> (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
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> (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
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> (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
>
> (9) Parliament must enact the legislation referred to in subsection (6)."

joint estate under the customary marriage being recognised as the sole property of the spouse under whose name the assets had been registered, and the other spouse would no longer have a claim to a half-share of those assets. The applicant further argued that the absence of judicial oversight in the impugned provision results in unfair discrimination against financially weaker spouses in customary marriages, the majority of whom are women, thereby constituting discrimination on the grounds listed in section 9(3) of the Constitution.[5]

[9] The High Court upheld the applicant's challenge on the first issue in the stated case, holding that the agreement between the parties concluded under the impugned provision was a postnuptial contract that improperly altered the matrimonial property system, and was invalid due to the absence of judicial oversight as required by section 21 of the MPA. Despite this conclusion, the High Court also decided the second issue, holding that the lack of judicial oversight differentiates between spouses under the different pieces of legislation, as civil marriage spouses were afforded legal protections that customary marriage spouses lacked. According to the High Court, this differentiation would prejudice customary marriage spouses, primarily black women, and the absence of judicial oversight constituted unfair discrimination based on listed grounds under section 9(1) of the Constitution.

[10] The High Court held further that the limitation of rights was not reasonable and justifiable under section 36 of the Constitution.[6] The High Court determined that while

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[5] Section 9(3) reads:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[6] *JRM v VVC*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 25007/2022 (10 June 2024) (High Court judgment) at para 109. See also section 36 which provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;

the impugned provision was a law of general application, the lack of judicial oversight infringed the right to equality, and the existence of a legitimate government purpose was unclear.

[11] The High Court upheld the applicant's further ground and held that the impugned provision allowed for arbitrary deprivation of property. This was because, according to the Court, there was no discernible purpose for depriving the applicant of ownership over assets which formed part of the joint estate under the customary marriage and thus infringed section 25 of the Constitution.

[12] The High Court thus declared the impugned provision unconstitutional on those two bases. It afforded Parliament 12 months to correct the defect, failing which the words "existing" and "customary" would be read into the impugned provision as follows (the underlined words to be inserted):

> "When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an existing antenuptial contract which regulates the matrimonial property system of their customary marriage."

[13] I will return in more detail to the High Court judgment presently.

Issues

[14] The central issues before this Court are:

(a) the validity of the ANC;

(b) the interpretation of the impugned provision;

(c) the constitutional validity of the impugned provision; and

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(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

(d) remedy.

[15] In respect of the validity of the ANC, what requires determination is whether the agreement signed on 19 February 2019 (after the conclusion of the customary marriage), that seeks to regulate the future matrimonial property system, amounts to an ANC or a postnuptial contract that requires judicial oversight. Relating to the second issue, the constitutional validity of the impugned provision, this Court must consider whether:

(a) the impugned provision is unconstitutional insofar as it allows spouses in a monogamous customary marriage, when they later decide to enter a civil marriage with each other, to change their matrimonial property regime from in community of property to out of community of property, without judicial oversight to the prejudice of the economically weaker spouse; and

(b) an agreement to conclude a civil marriage out of community of property after a valid customary marriage was entered, where a default system of community of property is applicable, has the effect of depriving a financially weaker spouse of her ownership in undivided shares of the assets that constitute part of the joint estate created by the customary marriage.

[16] These questions require an interpretation of the impugned provision. That interpretation must of course consider the text in context and have regard to the statute as a whole.[7] As will become apparent, an important consideration regarding the impact of the impugned provision is the fate of the customary marriage and its patrimonial consequences after the conclusion of the civil marriage, an aspect about which the Recognition Act is silent.

[7] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at paras 64-5 and *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

Condonation

[17] There is an application by the applicant for condonation of the late filing of this application, which was filed two days late. The applicant attributes the lateness in lodging the application to the delayed receipt of the draft application from counsel, the general workload of the attorney and the receipt of proof of service only on the date of lodging the application. The applicant contends that the two-day lateness is not a substantial delay. She further submits that the application has good prospects of success and that the effect of the declaration of invalidity of the Recognition Act is of general public importance, particularly to those married in terms of that Act, as it implicates their rights in sections 9(1) and (3) and 25 of the Constitution. The applicant argues that the interests of justice favour the granting of condonation.

[18] The delay is minimal, the explanation for that delay is adequate and there is no prejudice to the respondents. Condonation is granted.

Parties' submissions

[19] The applicant generally supports the High Court's reasoning and order on the basis that the impugned provision is constitutionally invalid, insofar as it permits a change in the matrimonial regime without the intervention or oversight of a court, to the prejudice of the economically weaker spouse and the creditors of the communal estate. Having provided a comprehensive analysis of the historical development of the patrimonial consequences of customary marriages, the applicant emphasises that under the Recognition Act, a civil marriage does not enjoy higher status than a customary marriage. Regarding the interpretation of the impugned provision, the applicant submits that the section contemplates the change of a customary marriage to a civil marriage and that this interpretation is supported by the wording of the section and the need for legal certainty about the proprietary consequences of different marriages. The applicant submits that the customary marriage ceases to exist upon conclusion of the subsequent civil marriage, since it is replaced by the latter.

[20] The applicant further contends that the impugned provision allows spouses in customary marriages to conclude contracts that change their matrimonial property regime without judicial oversight, thereby permitting arbitrary deprivation of property (being the ownership rights over assets forming part of the joint estate created by the customary marriage) in violation of section 25(1) of the Constitution. According to the applicant, the section also breaches the right to equality envisaged in section 9(1) and (3) of the Constitution by depriving spouses in customary marriages of proprietary rights and other rights of protection offered to spouses in civil marriages, and that the persons prejudiced by the absence of this protection are predominantly black women.

[21] With reference to *J v Director-General, Department of Home Affairs*,[8] the applicant submits that the High Court should not have suspended the order. According to her, a reading-in would be more appropriate.

[22] In their written submissions the Ministers initially made wide-ranging submissions on the alleged deficiencies in the formulation of the stated case and its factual substratum as agreed between the parties. However, before us, the Ministers' counsel sensibly abandoned that argument and focused on the merits.

[23] The Ministers emphasise that the Recognition Act places spouses on an equal footing in their customary marriage and that it provides protection to both parties when their marriage is dissolved. They deal extensively with the salient provisions of that Act and submit that, once the parties enter into a civil marriage with an ANC, both their legal status and marriage change. They contend that the customary marriage ceases to exist as it is subsumed into the civil marriage. Since the ANC does not operate retrospectively, so contend the Ministers, the patrimonial benefits which accrued during their customary marriage, by way of assets and liabilities, are shared equally upon

[8] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) BCLR 463 (CC); 2003 (5) SA 621 (CC) at paras 21-2.

dissolution of their customary marriage because, in terms of section 6 of the MPA,[9] a marriage is dissolved either through divorce or death.

[24] According to the Ministers, the impugned provision does not seek to take away any existing rights or benefits that would have accrued to the parties in their customary marriage once they enter into a civil marriage. In respect of the validity of the ANC, the Ministers submit that, as the applicant did not put up sufficient facts to support her contention that the agreement was invalid, there is no dispute regarding the conclusion of the ANC and its validity. On the papers it is plain that both parties agreed to sign the ANC and had the intention of concluding an ANC so they could enter into a civil marriage out of community of property, thus contend the Ministers.

[25] In their written submissions the Ministers argue that the High Court incorrectly found that the impugned provision offends section 9(1) of the Constitution, and that the discrimination cannot be justified in terms of the limitation clause in section 36 of the

[9] Section 6 of the MPA reads:

> "(1) Where a party to an intended marriage does not for the purpose of proof of the net value of his estate at the commencement of his marriage declare that value in the antenuptial contract concerned, he may for such purpose declare that value before the marriage is entered into or within six months thereafter in a statement, which shall be signed by the other party, and cause the statement to be attested by a notary and filed with the copy of the antenuptial contract of the parties in the protocol of the notary before whom the antenuptial contract was executed.
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> (2) A notary attesting such a statement shall furnish the parties with a certified copy thereof on which he shall certify that the original is kept in his protocol together with the copy of the antenuptial contract of the parties or, if he is not the notary before whom the antenuptial contract was executed, he shall send the original statement by registered post to the notary in whose protocol the antenuptial contract is kept, or to the custodian of his protocol, as the case may be, and the last-mentioned notary or that custodian shall keep the original statement together with the copy of the antenuptial contract of the parties in his protocol.
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> (3) An antenuptial contract contemplated in subsection (1) or a certified copy thereof, or a statement signed and attested in terms of subsection (1) or a certified copy thereof contemplated in subsection (2), serves as *prima facie* [(at first sight)] proof of the net value of the estate of the spouse concerned at the commencement of his marriage.
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> (4) The net value of the estate of a spouse at the commencement of his marriage is deemed to be nil if—
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> (a) the liabilities of that spouse exceed his assets at such commencement;
>
> (b) that value was not declared in his antenuptial contract or in a statement in terms of subsection (1) and the contrary is not proved."

Constitution, as that was not the case pleaded by the applicant in her plea and counterclaim. According to the Ministers, the High Court departed from an incorrect premise that the ANC is a postnuptial contract which requires judicial oversight. They submit that the High Court did not give proper consideration to the scheme and purpose of the Recognition Act and considered the constitutionality of the impugned provision in isolation from the other provisions of the Recognition Act and the MPA.

[26] Lastly, regarding remedy, in their written submissions the Ministers contend that the period of suspension should be altered from 12 months to 24 months. They submit that the High Court's reading-in is inappropriate and should be discarded as it impermissibly amounts to rewriting of legislation by the Court, and offends the separation of powers doctrine.

Analysis

The legislative framework

[27] An important starting point is the objectives of the Recognition Act. Its primary aim is to apply and develop customary law of marriage in a manner that is compliant with the Constitution.[10] They are:

> "To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to *provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages.*"[11] (Emphasis added.)

[10] *MN v MM* [2012] ZASCA 94; 2012 (4) SA 527 (SCA); 2012 (10) BCLR 1071 (SCA) at paras 30-1 and Bakker "The Validity of a Customary Marriage Under the Recognition of Customary Marriages Act 120 of 1998 with Reference to Sections 3(l)(b) and 7(6) – Part 1" (2016) 79 *THRHR* 231 at 232 (Bakker 2016).

[11] Preamble to the Recognition Act.

[28] The aspects emphasised above bear closer scrutiny as they play an important role in resolving the central issues in this case, which, as stated, in essence require an interpretation of the impugned provision. The first is the matter of equality between customary and civil marriages enunciated in section 6.[12] That provision makes plain, in no uncertain terms, that in our law there is no hierarchy in status of marriages and that civil marriages are not to be regarded as superior in status and legal effect over customary marriages. To do so would be to undo all the transformative efforts of our new democratic dispensation in this field of the law.

[29] In *Gumede*,[13] this Court held:

> "The Recognition Act was assented to and took effect well within our new constitutional dispensation. It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary 'unions'. . . . Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage."[14]

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[12] Section 6 of the Recognition Act, headed "Equal status and capacity of spouses", reads:

> "A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

[13] *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC).

[14] Id at para 17. The Court cited Nhlapo "African Customary Law in the Interim Constitution" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (Community Law Centre: University of the Western Cape, Cape Town 1995) at 162:

> "[L]egislating these misconstructions of African life had the effect of placing women 'outside the law'. The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the

[30] The Court went on to state:

> "I revert to consider the main and other purposes of the Recognition Act. Without a doubt, the chief purpose of the legislation is to reform customary law in several important ways. The facial extent of the reform is apparent from the extended title of the Recognition Act. The legislation makes provision for recognition of customary marriages. *Most importantly, it seeks to jettison gendered inequality within marriage and the marital power of the husband by providing for the equal status and capacity of spouses. It specifies the essential requirements for a valid customary marriage and regulates the registration of marriages. In this way, it introduces certainty and uniformity to the legal validity of customary marriages throughout the country. The Recognition Act regulates proprietary consequences and the capacity of spouses and governs the dissolution of the marriages, which now must occur under judicial supervision. An additional and significant benefit of this legislative reform is that it seeks to salvage the indigenous law of marriage from the stagnation of official codes and the inscrutable jurisprudence of colonial 'native' divorce and appeal courts*."[15] (Emphasis added.)

[31] It is necessary to examine this Court's jurisprudential development of the patrimonial consequences of customary law marriages, as it lies at the heart of this case. *Gumede* is one of a trilogy of cases from this Court dealing with customary law marriages. Those cases followed this Court's earlier important affirmation in a line of cases regarding the integral nature of customary law in the South African legal system, which held that it must be examined in its own setting rather than through the lens of the common law.[16] In *Gumede*, this Court declared section 7(1) of the Recognition Act,

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> household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became 'outlaws'."

[15] *Gumede* above n 13 at para 24.

[16] *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 148 and *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC); 2004 (5) SA 460 (CC) at para 51.

section 20 of the KwaZulu Act on the Code of Zulu Law[17] and section 22 of the Natal Code of Zulu Law[18] unconstitutional and invalid. Section 7(1) provided that customary marriages prior to the date of the commencement of the Recognition Act (old marriages) were governed by customary law and are out of community of property. Section 7(2) on the other hand provided that customary marriages after the date of commencement of the Recognition Act (new marriages) were marriages in community of property. Pursuant to the judgment in *Gumede*, customary marriages prior to the date of commencement of the Recognition Act are also by default in community of property.

[32] Next came *Ramuhovhi*,[19] where this Court held that the default position of pre-Recognition Act polygamous marriages, namely that they were out of community of property, amounted to unjustified discrimination based on gender. The Court ordered a change to the default position to be in community of property. And then followed the last in the trilogy, *Sithole*,[20] in which this Court declared sections 21(1) and (2)(a) of the MPA unconstitutional and invalid, and held that all marriages concluded out of community of property under section 22(6) of the Black Administration Act[21] are deemed to be marriages in community of property.

[33] The recurring theme in the trilogy of cases is the protection of a vulnerable and systemically disadvantaged group, black women, by making the default position in customary marriages one of in community of property. This must be understood in light of the dreadful historic discrimination against customary marriages under colonialism and apartheid. That history bears closer scrutiny for a better understanding of the important transformative nature of the Recognition Act, which, in turn, impacts on the interpretative exercise in relation to the impugned provision.

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[17] 16 of 1985. *Gumede* above n 13 at para 59.

[18] Proc R151, GG 10966 of 9 October 1987.

[19] *Ramuhovhi v President of the Republic of South Africa* [2017] ZACC 41; 2018 (2) SA 1 (CC); 2018 (2) BCLR 217 (CC).

[20] *Sithole v Sithole* [2021] ZACC 7; 2021 (5) SA 34 (CC); 2021 (6) BCLR 597 (CC).

[21] 38 of 1927.

[34] Customary marriages were not recognised at all.[22] Those marriages were regarded by the courts as contrary to the principles of public policy and natural justice relating to *lobola* and polygamy of the times.[23] The Black Administration Act, the state's central tool in regulating the affairs of black individuals in the country at the time, referred to a marriage in accordance with customary law as a "customary union".[24] There was some gradual development inasmuch as the Legislature and the courts extended *ad hoc* (piecemeal) protection to parties in customary unions for the purposes of tax, maintenance and a dependant's action in the unlawful killing of a breadwinner.[25] Notwithstanding these encouraging developments, they stopped short of recognising customary unions as valid marriages.[26]

[35] Initially the Black Administration Act was silent regarding the ability of partners in a customary union to enter into a civil law marriage with each other (under that law, a man who was in a customary union was not precluded from entering into a civil law marriage with another woman, who was not his partner in the customary union).[27] Section 22 of that Act provided that a man in a customary union who wanted to enter a civil law marriage with somebody other than his customary law partner had to make a

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[22] Maithufi and Moloi "The Current Legal Status of Customary Marriages in South Africa" (2002) *TSAR* 599 at 600-1.

[23] See generally Himonga and Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (Oxford University Press, Cape Town 2014) at 93; Bakker and Heaton "The Co-existence of Customary and Civil Marriages under the Black Administration Act 38 of 1927 and the Recognition of Customary Marriages Act 120 of 1998 – The Supreme Court of Appeal Introduces Polygyny into some Civil Marriages – *Netshituka v Netshituka* 2011 5 SA 453 SCA" (2012) *TSAR* 586 at 586; Herbst and Du Plessis "Customary Law Common Law Marriages: A Hybrid Approach in South Africa" (2008) *EJCL* 105 at 109; Burman "Illegitimacy and the African Family in a Changing South Africa" (1991) *Acta Juridica* 36 at 37; Kaganas and Murray "Law, Women and the Family: The Question of Polygyny in a New South Africa" (1991) *Acta Juridica* 116 at 119-20 and Dlamini "The New Marriage Legislation Affecting Blacks in South Africa" (1989) *TSAR* 408 at 410.

[24] Section 22 of the Black Administration Act. The change in terminology from "customary union" to "customary marriage" occurred with the passing of the Recognition Act. I thus use the terminology accordingly.

[25] De Koker "Proving the Existence of African Customary Marriage" (2001) *TSAR* 257 at 261-2.

[26] Simons "The Status of Customary Unions" (1961) *Acta Juridica* 17 at 17 aptly observed that there was a mere "reluctant tolerance" towards African customary unions. See further Dlamini above n 23 at 408 who refers to a range of cases in which the Appellate Division refused to recognise customary marriages as valid marriages.

[27] Osman "The Million Rand Question: Does a Civil Marriage Automatically Dissolve the Parties' Customary Marriage?" (2019) 22 *PELJ* at 4.

declaration stating the names of all his customary partners and the children born from such unions. Failure to do so was an offence under the Act, but it was silent on the validity of a civil marriage concluded without the declaration.[28]

[36] The courts treated the later civil marriage as valid and as terminating the customary law union.[29] In such instances, the civil law marriage was generally considered to have superseded the customary law union.[30] It was accepted that the customary law union was extinguished and the civil law marriage operated retrospectively to determine the status and rights of the spouses and children.[31] The thinking was that the western form of marriage indicated that the spouses were aligning themselves with that culture. This largely reflected the superior status enjoyed by Christian and civil law marriages at the time.[32]

[37] In 1988 the Black Administration Act was amended to allow partners in a customary union to enter into a civil marriage with each other. The amendment provided that a man and a woman in a customary union could conclude a civil marriage with each other, as long as the man was not also partner to a customary union with another woman.[33] The consequences of the civil marriage for the customary union were not specified, but commentators interpreted the statutory provisions to mean that the customary union was converted into a civil marriage.[34] The generally prevailing view was that the civil marriage superseded or extinguished the customary union – this replicated the position prior to the amendment.[35]

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[28] Burman above n 23 at 37.

[29] *Nkambula v Linda* 1951 (1) SA 377 (A) at 384C-D.

[30] Letsika "The Place of Sesotho Customary Law Marriage within the Modern Lesotho Legal System" (2005) *Botswana Law Journal* 73 at 84; Bekker *Seymour's Customary Law in Southern Africa* (Juta & Co Ltd, Cape Town 1989) at 270; Simons above n 26; and Bakker and Heaton above n 23.

[31] Simons above n 26.

[32] South African Law Commission *The Harmonisation of the Common Law and Indigenous Law: Report on Customary Marriages* (Project 90, August 1998) (SALC Project 90) at 54.

[33] Section 22.

[34] Osman above n 27 at 5.

[35] SALC Project 90 above n 32 at para 6.28.

[38] An important historical fact is that the notion of a dual marriage was foreign to our law.[36] While they were afforded a degree of legal recognition and protection, customary unions were regarded as mere unions and not marriages.[37] Thus the customary union was generally considered to have been terminated if the parties entered into a civil marriage with each other.[38] With this historical context as backdrop, I discuss the most salient provisions of the Recognition Act, with the reminder that we must interpret the Act holistically as we endeavour to properly interpret the impugned provision.

[39] Section 7 of the Recognition Act deals with the proprietary consequences of customary marriages and contractual capacity of spouses. In section 7(5) it is provided that section 21 of the MPA applies to customary marriages concluded after the enactment of the Recognition Act, provided the husband does not have more than one spouse. Section 21 of the MPA reads:

> "Change of matrimonial property system
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> (1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that—
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> (a) there are sound reasons for the proposed change;
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> (b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and
>
> (c) no other person will be prejudiced by the proposed change, order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.

[36] Church "The Dichotomy of Marriage by Customary and by Civil Rites: A Note on a Recent Swaziland Decision" (1978) *CILSA* at 80-2.

[37] Id.

[38] SALC Project 90 above n 32 at para 48.

(2) . . .

(b) The provisions of Chapter I apply in such a case from the date of the conclusion of the marriage of the spouses or from the date of the execution of the notarial contract concerned, as the spouses may declare in that contract.

(c) For the purpose of proof of the net value of the respective estates of the spouses on the date on which the provisions of Chapter I so apply, they may declare that value either in the notarial contract concerned or in a statement as contemplated in section 6, and in the last mentioned case the provisions of the said section 6 apply *mutatis mutandis* [(with the neccesary changes)] in respect of that statement.

(d) For the purposes of section 4(1) the commencement of the marriage concerned is deemed to be the date contemplated in paragraph (b).

(e) The inclusion of an asset in a statement contemplated in section 6 does not serve as proof of any right of any person with regard to that asset or for the purpose of any release contemplated in section 21(1) of the Insolvency Act, 1936 (Act 24 of 1936)."

[40] The present customary marriage therefore falls within the purview of section 21 of the MPA. That section contains comprehensive requirements and steps to change the matrimonial proprietary regime.[39]

[39] "Changing your matrimonial regime from in community of property to out of community of property in South Africa" *Family and Divorce Law in South Africa, A Comprehensive Guide*, available at: https://www.divorcelaws.co.za/changing-your-matrimonial-regime.html. In a section 21 application the following procedure is usually followed:

(a) Notice of the application must be given to the Registrar of Deeds in terms of section 97(1) of the Deeds Registries Act 47 of 1937.

(b) The draft notarial contract which it is proposed to register must be annexed to the application.

(c) Notice of intention to make the application must also be published in the Government Gazette and one English and one Afrikaans newspaper at least two weeks before the date on which the application will be heard.

(d) The date upon which the application will be heard must be specified in the published notice, setting out what steps an objector to the order sought must take and where the application and draft contract can be inspected.

(e) In addition, at least two weeks' prior notice of the application must be given by certified post to all creditors, whether actual or contingent. A list of such creditors, verified by affidavit, shall be included in the application and proof that such notice has been given to them must be provided by an affidavit to which are annexed the relevant certificates of posting.

(f) Sufficient information regarding the assets and liabilities of the couple concerned must be set out in the application to enable the court to judge whether or not there are sound

[41] It bears emphasis, however, that section 21 has less to do with addressing power imbalances between spouses (although it may indirectly address that issue), but is directed at benefitting the parties by enabling them to change their matrimonial proprietary regime whilst safeguarding the interests of creditors of their joint or separate estates. They may, of course, also make a change from out of community of property excluding the accrual system to out of community of property including the accrual system, or from out of community of property to in community of property.

[42] For purposes of the present matter, it is important to note that section 7(5) pertinently provides that parties to a customary marriage concluded after the commencement of the Recognition Act may change their proprietary regime from in community of property to out of community of property and may do so, amongst others, in terms of section 21 of the MPA. *Parties are thus afforded the option of utilising the procedure afforded by section 21 of the MPA.* Moreover, they are compelled to use this provision for any change to their marital property regime to be effectual. This strongly suggests that judicial oversight in such change is critically important.

[43] Section 8(1) of the Recognition Act makes plain that the only manner in which a customary marriage can be dissolved, apart from death, is by way of a decree of divorce on the ground of the irretrievable breakdown of the marriage. The crucial

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reasons for the proposed change and whether or not any other person will be prejudiced by the proposed change.

(g) It should also be stated whether or not either of the applicants has been sequestrated in the past and, if so, when, and in what circumstances. The case number of any rehabilitation application must be furnished.

(h) It should also be stated whether or not there are any pending legal proceedings in which any creditor is seeking to recover payment of any alleged debt due by the couple or either of them.

(i) Care must be taken to motivate fully the proposed change in the existing matrimonial property system. Applicants must explain why no other person will be prejudiced by the proposed change. In any event, the order sought, and the contract which it is proposed to register, shall contain a provision which preserves the rights of pre-existing creditors.

(j) The application must disclose where the parties are domiciled and, if they are not resident there when the application is made, where they are resident. If there has been a recent change in domicile or residence it should be disclosed.

question then is, what happens to the customary marriage when the parties subsequently enter into a civil marriage? It most certainly is not dissolved.

[44] It bears repetition that, before the passing of the Recognition Act, our law never recognised dual marriages.[40] There is no basis for finding that it does so now. A peculiar feature of the history of the impugned provision is that one of the preceding Bills expressly provided that the customary marriage is dissolved when spouses conclude a subsequent civil marriage with each other.[41] The impugned provision as enacted, by contrast, is silent about whether the existing customary marriage is terminated when the spouses conclude a civil marriage with each other. Although the Recognition Act does not provide for the termination of a customary marriage in terms of section 10, as stated it does expressly provide in section 8(1) for the termination of a customary marriage by a decree of divorce. It bears repetition that this is the only manner in which a customary marriage can be dissolved. The conundrum resulting from this contradictory feature of the Recognition Act and the preceding first Bill is summed up thus by Bakker:

> "The fact that the Bill provides for the termination of the initial customary marriage when the spouses in a customary marriage enter into a subsequent civil marriage with each other and that the provision was omitted from the Act opened the debate regarding the effect of section 10 on an existing customary marriage between the spouses when they enter into a civil marriage with each other. No clarity exists on the question whether the customary marriage is terminated or continues to exist. Different from clause 10(2) [of the first Bill], section 10(2) [of the Recognition Act] remains silent on the consequences of a change in marriage system."[42]

[40] Church above n 36 at 82; Maithufi and Moloi above n 22 at 600-1.

[41] Clause 10(2) of the first Recognition of Customary Marriages Bill, B 110-98. It was later replaced by an amended Bill under the same name, B 110 B-98, which was accepted into law as the Recognition Act.

[42] Bakker "Patrimonial Consequences of the Conversion of a South African Customary Marriage to a Civil Marriage" in Rautenbach *In the Shade of an African Baobab: Tom Bennett's Legacy* (Juta & Co Ltd, Cape Town 2018) at 68 (Bakker 2018).

[45] It must be accepted that the later civil marriage subsumes the customary marriage.[43] However, this does not mean that, factually, the customary and traditional way of life that the parties had, ceases to exist. This must be distinguished from the legal consequences that flow. The civil marriage must be interpreted to replace the customary marriage as a dual marriage is a legal impossibility.[44] But it is important to emphasise that this does not mean that the customary marriage is terminated as some commentators appear to suggest.[45] It can, in terms of section 8(1) of the Recognition Act, only be terminated through a decree of divorce.

[46] This has important patrimonial consequences, an aspect to be addressed presently. The contrary interpretation would entrench the historical discriminatory position and would be in conflict with the constitutional recognition and status of customary law.[46] The interpretation favoured here is not only sound, but also circumvents the challenging and intricate legal issues that arise with dual marriages, such as which marriage takes priority in the case of a conflict and what the relevant property regime would be.[47] The legal consequences which flow from a customary marriage as opposed to a civil marriage are largely the same. An obvious difference is the prohibition of polygamy in civil marriages. Civil marriages are more firmly regulated in a sense as it is easier to prove the existence of a civil marriage.

[47] That brings me to the question concerning the patrimonial consequences of a civil marriage. The impugned provision does not say anything about the consequences of a change in marriage system. One would have expected the Recognition Act to provide for this where the spouses are able to change their matrimonial property system

[43] Cronjé and Heaton *South African Family Law* 3 ed (LexisNexis, 2010) at 226-7; Osman above n 27; Van Schalkwyk "Kommentaar op die Wet op Erkenning van Gebruiklike Huwelike 120 van 1998" (2000) 63 *THRHR* 479 at 494.

[44] Cronjé and Heaton id.

[45] Van Schalkwyk above n 43.

[46] Osman above n 27 at 11.

[47] Id at 14.

from a marriage in community of property to one out of community of property. But it does not and this lack of clarity gives rise to the divergent approaches to the impugned provision in the two judgments.

[48] Generally speaking, matrimonial property can be divided only when the marriage is terminated, unless there is an explicit provision to the contrary.[48] Such an explicit provision is contained in section 7(6) of the Recognition Act, which authorises the division of the matrimonial property by the court when a man, married in terms of customary law, enters into a new polygamous customary marriage after that Act came into operation.[49] A man in an existing customary marriage is required to approach the court to approve a contract regulating his future matrimonial property before he can conclude a further customary marriage. If the first customary marriage is in community of property, section 7(6) authorises the court to terminate the joint estate and divide the joint property when approving the new matrimonial property system as provided for in the contract.

[49] Parties in a monogamous customary marriage concluded after the promulgation of the Recognition Act can, by virtue of section 7(5), approach the court to amend their matrimonial property system in terms of section 21 of the MPA. However, the same relief is not available to spouses in a polygamous customary marriage. The only matrimonial property system available to spouses in a polygamous customary marriage is the complete separation of property.[50] There is no clarity provided in section 10 of the Recognition Act regarding the prevailing joint estate under the customary marriage where the parties later enter into a civil marriage.

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[48] Sonnekus "Onderhandse wysiging van huweliksvoorwaardekontak onaanvaarbaar" (1992) *TSAR* 683.

[49] Section 7(6) of the Recognition Act reads:

> "A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages."

[50] Bakker 2016 above n 10 at 244.

[50] The default position for matrimonial property in our country is universal community of property.[51] Parties who wish to deviate from that norm must enter into an ANC prior to their marriage, or must fulfil the requirements and follow the procedure outlined in section 21 of the MPA. As stated, section 7(5) of the Recognition Act makes section 21 applicable to customary marriages concluded after the enactment of the Recognition Act, provided that the husband does not have more than one spouse. In terms of section 21, spouses may jointly apply to court for authorisation to execute a postnuptial notarial contract, which after its execution has the effect of regulating the future proprietary consequences of the marriage. Under the common law, ANCs are immutable. This strict principle was relaxed by the MPA. Any extra-judicial agreement entered into by parties that effectively alters the spouses' matrimonial property system will be invalid.[52] Self-evidently, an ANC can only be concluded prior to a marriage – this is one of the *essentialia* (essential terms) of the contract.[53] Parties can only change their matrimonial property regime by approaching a court in an application under section 21 of the MPA. A court order pursuant to section 21 would be the only instance where the Registrar of Deeds will register a change to the matrimonial property system.

[51] As Bakker points out:

> "A further practical consideration is that spouses who want to change their matrimonial property system under section 10 of the [Recognition Act] by concluding a new antenuptial contract during the subsistence of a customary marriage will not be able to execute their antenuptial contract."[54]

[52] He correctly states that:

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[51] Hahlo *The South African Law of Husband and Wife* 5 ed (Juta & Co Ltd, Cape Town 1985) at 257.

[52] *Honey v Honey* 1992 (3) SA 609 (W) at para 614H; *JW v CW* 2012 (2) SA 529 (NC) at para 29; *EA v EC* [2012] ZAGPHJC 219 at paras 10-11; and *RD v TD* 2014 (4) SA 200 (GP) at para 204B-C.

[53] Hahlo above n 51.

[54] Bakker 2018 above n 42 at 77.

> "The registrar of deeds will not be prepared to register a second antenuptial contract concluded between the same spouses unless an application in terms of section 21 of the [MPA] together with the proposed notarial deed is served on the registrar of deeds."[55]

[53] Section 7(4) of the Recognition Act provides for the amendment of the spouses' matrimonial property system.[56] Spouses who concluded a customary marriage prior to 15 November 2000 (the commencement date of the Recognition Act) may jointly apply to the court for leave to change their matrimonial property system where there are sound reasons for the change and provided that sufficient notice is given to creditors and there is no prejudice to another person. And, under section 7(5), parties may use section 21 of the MPA to postnuptially register a notarial contract which will then have the effect of regulating the future proprietary consequences of the marriage. What bears consideration next is the crux of the case, the interpretation of the impugned provision.

What does the impugned provision mean?

Legislative history of the impugned provision

[54] I have already referred to the legislative history of the Recognition Act. It is useful to have regard to how the impugned provision became law. As can be seen in

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[55] Id.

[56] Section 7(4) provides:

> "(a) Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that—
>
> (i) there are sound reasons for the proposed change;
>
> (ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and
>
> (iii) no other person will be prejudiced by the proposed change,
>
> order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorise the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.
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> (b) In the case of a husband who is a spouse in more than one customary marriage, all persons having a sufficient interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings."

the first iteration of the draft Bill, clause 10 as a whole was absent from the Bill. At some point between August 1998 and 10 November 1998, clause 10 was added to the draft Bill. It is uncertain when or why this was done. However, it is clear from the hearings on the Bill that the entirety of clause 10(2) was changed in response to the discomfort around the idea of a customary marriage being "dissolved". It is uncertain why clause 10(2)(b) was removed. On the understanding that the legislative intent is for civil law to apply to customary marriages, it would be antithetical to permit an interpretation of a section of the Recognition Act which would be contrary to civil law rules regarding ANCs.[57]

[55] As the South African Law Commission (SALC) noted in its initial report on customary marriages in October 1986, "a marriage at common law and a customary marriage cannot co-exist". At the time, this was because a customary marriage was not legally recognised as a marriage, which is why parties to a customary union could enter into a civil marriage. However, that changed with the Recognition Act, when customary marriages received legal recognition and protection.

[56] It is important to reflect on the purpose of the Recognition Act as a whole. During the preparatory period, it was evident that the two purposes of the Recognition Act were to bring customary marriages under the same legal legitimacy as civil marriages and to protect women. One can see the significance afforded to protecting women by considering, for example, the SALC's change of position from customary marriages by default originally being *out of* community of property to being *in* community of property. In the original 1997 discussion paper, customary marriages were to be out of community of property, though this could be changed by an ANC. However, due to extensive representations advocating for stronger protection of

[57] As an example – during discussions regarding the Bill, on 19 October 1998, the Chairperson of the Justice Portfolio Committee stated that "the Bill makes customary marriages valid according to civil law, and as such civil law applies to those marriages and to the dissolution of those marriages".

women, given financial imbalances between spouses, the SALC decided to recommend that community of property be the default regime.[58]

[57] While it is true that clause 10(2)(a) of the original Bill was omitted from the Recognition Act as a result of strong resistance, it is not insignificant that clause 10(2)(b) of the original Bill was also not adopted into the Act.[59] The impugned provision in fact underwent a holistic revision, so that an ANC in respect of the civil marriage, as referenced in clause 10(2)(b) of the Bill, is only sensible in light of the deemed divorce referred to in clause 10(2)(a) of the Bill.

Interpretation of the impugned provision

[58] Reverting to the central issue before us – what is the status of the former customary marriage (assuming it to have been in community of property), and the subsisting joint estate of that marriage, upon the conclusion of the subsequent civil marriage? The answer to those questions will provide guidance on the interpretation of the impugned provision and in the determination of the validity of the ANC concluded between the parties in this case. It bears repetition that it is plain that an ANC is immutable and that parties cannot execute such a contract postnuptially, save under section 21 of the MPA.

[59] Section 10 of the Recognition Act reads:

"Change of marriage system

[58] SALC Project 90 above n 32 at para 6.3.4.13.

[59] Clauses 10(2)(a) and (b) of the Bill read:

"(2) If a marriage is contracted as contemplated in subsection (1)—

(a) the customary marriage between the spouses is deemed to have been dissolved when the spouses conclude the marriage under the Marriage Act, 1961; and

(b) the matrimonial property system of the marriage must be regulated by a matrimonial property contract entered into by the spouses and attested by a notary; failing such contract the marriage must be in community of property and the provisions of Chapter III and sections 18, 19 and 20 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), must apply to the marriage."

(1) A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 1961 (Act No. 25 of 1961) if neither of them is a spouse in a subsisting customary marriage with any other person.

(2) When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an antenuptial contract which regulates the matrimonial property system of their marriage.

(3) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), apply in respect of any marriage which is in community of property as contemplated in subsection (2).

(4) Despite subsection (1), no spouse of a marriage entered into under the Marriage Act, 1961, is, during the subsistence of such marriage, competent to enter into any other marriage."

[60] The impugned provision is not a model of clarity and can be interpreted in at least two different ways. Other than in the heading, the language used in the section does not expressly provide that the customary marriage changes into a civil marriage, co-exists with the civil marriage or terminates when the civil marriage is concluded. This leads to further uncertainty regarding the applicable matrimonial property system of the subsequent civil marriage. There is no clarity as to whether the parties can conclude a new ANC to change the matrimonial property regime applicable to their marriage, or whether their existing matrimonial property regime will prevail. A further difficulty is the meaning of the phrase "their marriage" in the latter part of the impugned provision. The ambiguity arises due to the use of the words "of their marriage" without explicit reference to the customary marriage. Plainly, the first part of the subsection relates to the civil marriage, because it pertinently refers to "a marriage concluded as contemplated in subsection (1)".

[61] The impugned provision is capable of at least these two meanings, namely:

(a) First: upon conclusion of the civil marriage, the customary marriage dissolves. In essence, the parties "remarry" each other. Their civil marriage is one in community of property, save where the parties elect to

conclude an ANC under the impugned provision and section 87 of the Deeds Registries Act.[60] In this case, the words "an antenuptial contract" and "their marriage" under the impugned provision refer to the (new) civil marriage.

(b) Second: spouses in a customary marriage may convert their marriage system from customary to civil law. At this point, the spouses are locked in a matrimonial property system. They may have already been married for a number of months or years. They may be married either in or out of community of property in accordance with section 7(2) of the Recognition Act. The conversion in marriage system does not result in a dissolution of the customary marriage. Therefore, the spouses would not be able to execute a valid and binding ANC and any notarial contract concluded by the spouses at this stage would result in a change of the proprietary consequences of their extant marriage. If they should do so, it would be a postnuptial contract which can only validly be concluded under judicial supervision, that is, through section 21 of the MPA. Thus understood, the words "an antenuptial contract" and "their marriage" under section 10(2) can logically then only be in reference to the extant customary marriage. Any contrary interpretation would mean that the section covertly authorises the execution of a postnuptial contract without judicial supervision, an unconstitutional state of affairs.

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[60] Section 87, headed "Manner and time of registration of antenuptial contracts", reads:

"(1) An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.

(2) An antenuptial contract executed outside the Republic shall be attested by a notary or otherwise be entered into in accordance with the law of the place of its execution, and shall be registered in a deeds registry within six months after the date of its execution or within such extended period as the court may on application allow.

(3) Registration of an antenuptial contract in any one deeds registry in the manner prescribed in this section shall be effective as registration for the whole Republic: Provided that if any transaction in connection with which evidence of such contract is necessary takes place in a deeds registry other than that in which such contract has been registered, a copy of such contract certified by the registrar of the place of registration or a notary public shall be recorded and filed in such first-mentioned deeds registry."

[62] The first interpretation under (a), while admittedly possible on a plain reading of the words, leads to the following insensible results:

(a) It presupposes a dissolution of the customary marriage which is replaced by the civil marriage. This is contrary to section 8 of the Recognition Act. Under this interpretation, "existing spouses" (under the customary marriage) revert to "intended spouses" (under the civil marriage) who are permitted to conclude and register an ANC.

(b) Spouses who were married in terms of customary law with an ANC who wish to continue being married out of community of property under the civil regime are required to incur further attorneys' fees to conclude an agreement cancelling the existing ANC and registering a new one.

[63] It is difficult to accept that this is what the Legislature sought to do. And there is a further complication. Section 10 does not envisage termination of the marriage relationship between parties to a customary marriage. The section only regulates the change of the legal system which governs the marriage system. The Recognition Act does not make provision for spouses who concluded a customary marriage in community of property, and who now wish to conclude an ANC prior to commencement of the civil marriage, to divide their joint estate. The question then is, what happens to the assets and liabilities that fell under the customary law marriage's joint estate? This self-evidently introduces great uncertainty and may cause prejudice to both spouses and creditors. This problem does not arise when the impugned provision is read as not permitting a change in marital proprietary consequences.

[64] While not conclusive, a factor to be considered in interpreting a legislative provision is the heading of a section.[61] Section 10 of the Recognition Act bears the heading "Change of marriage *system*" (emphasis added). The heading points one to what the section seeks to regulate. Section 10 seeks to regulate, not a change in

[61] De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 157 and *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 24.

matrimonial proprietary regime, but a change in marriage system from a customary to a civil marriage (the opposite route is not available, change from a civil to a customary marriage – see section 10(4)). What is changed by the impugned provision is the marriage system and not the matrimonial property system. There is nothing in that provision that envisages a change of a matrimonial property system. It would lead to an absurdity to assume that there would be a change in the matrimonial property system, or without the parties concluding a postnuptial contract with judicial oversight as envisaged in section 21 of the MPA.

[65] The ambiguity in section 10(2) arises from the use of the words "of their marriage" at the end of the subsection without explicit reference to the customary marriage. As stated, on its plain wording the first part of the subsection relates to the civil law marriage, because it pertinently refers to "a marriage concluded as contemplated in subsection (1)". But the latter part, "of their marriage", must mean the parties' customary marriage. That is so because it is only prior to the customary marriage that an ANC could be concluded. This flows from the nomenclature itself but, importantly, also from the relevant provisions of the Deeds Registries Act.[62]

[66] Those provisions are unequivocal:

(a) Section 86 clearly states that ANCs not registered in accordance with section 87 will have no force or effect against persons not party to the contract.

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[62] Section 86, headed "Antenuptial contracts to be registered", reads:

> "An antenuptial contract executed before and not registered at the commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section 87, and unless so registered shall be of no force or effect as against any person who is not a party thereto."

Section 87 cited at n 60 above; and

Section 88, headed "Postnuptial execution of antenuptial agreement", reads:

> "Notwithstanding the provisions of sections 86 and 87 the court may, subject to such conditions as it may deem desirable, authorise postnuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and may order the registration, within a specified period, of any contract so executed."

(b) Section 87 stipulates that ANCs must (i) be attested by a notary and (ii) be registered in the Deeds Registry within 3 months of its execution. Section 87 therefore contains the legislative requirements for a valid ANC.

[67] In light of these provisions, it is inconceivable that parties' intentions must be favoured over the statutory regime applicable when parties understand that the consequence of getting married without an ANC is that the marriage will be in community of property with profit and loss. To the extent that they were indeed unaware of this, section 21 of the MPA is available to afford them flexibility to change their regime. Moreover, sections 86 and 87 refer to an "*ante*" nuptial contract, which means that the agreement must be concluded *before* the nuptials. For these reasons, to interpret the phrase otherwise would result in an absurdity.

[68] If the parties had concluded an ANC prior to their customary marriage, that marriage would, in terms of that agreement, be out of community of property. On a proper construction of section 10(2) the subsequent civil marriage would then also be out of community of property. The contrary interpretation would mean that the ANC concluded to regulate the customary marriage would have to be re-executed to apply to the civil marriage.

[69] According to the judgment of my Colleague Rogers J (second judgment), when the parties convert their marriage system under section 10 of the Recognition Act, they also inevitably effect a change in their matrimonial property regime. This means that spouses who were married out of community of property under customary law will be married in community of property if they do not execute a new ANC, or amend their existing ANC, prior to the conversion.

[70] The second judgment's interpretation of the impugned provision thus means that, prior to the section 10 conversion, the parties will have to either register a new ANC, or amend the one executed at the time when the customary marriage was concluded,

should they wish to continue being married out of community of property. That interpretation is untenable. As I see the matter, the first ANC would simply continue to apply to the civil marriage.

[71] Section 7(2) of the Recognition Act deals with the proprietary consequences of customary marriages and contractual capacity of spouses. The provision deals with only one marriage (a customary marriage) and therefore the words "their marriage" can only mean their customary marriage. Section 10, on the other hand, speaks to the change in the parties' marriage system. Its aim is to ensure that from a proprietary perspective the civil marriage is in all respects equal in status to the customary marriage. Plainly, if the customary marriage is out of community of property, with an ANC, the civil marriage will not be in community of property. It will be out of community of property in accordance with the ANC which regulates the parties' marriage. The converse is also true – if the customary marriage is in community of property, then the civil marriage is in community of property.

[72] Sections 7(2) and 10(2) deal with different aspects of customary marriages, hence the change in meaning to similar wording. The interpretation that I propound is the result of a holistic reading of the Recognition Act, as we must do in the process of interpretation. Doing so, the words "their marriage" and "customary marriage" are used interchangeably. The impugned provision, by design, must make reference to two different marriage systems.

[73] It is also important to note the change in language in section 10(2): the introductory part of the section refers to "the marriage" which is an unequivocal reference to the civil marriage. The latter part of the section refers to "their marriage", which connotes, through the change in language, a change in the type of marriage being referenced. It is noteworthy that in the first Bill, the words "the marriage" are used consistently in section 10(2)(b). If one accepts, as I do, that the marriage relationship does not terminate in the course of the section 10(2) change, then one must also accept that the couple only has one marriage which came into being when the couple concluded

a customary marriage. Therefore, the words "their marriage" can only be in reference to the customary marriage. If the words "the marriage" had been used instead, it would have followed sequentially that the marriage being referred to in the latter half of section 10(2) would have been the civil marriage. As I have said, any contrary interpretation would mean that the section surreptitiously enables the execution of a postnuptial contract without judicial supervision. That would amount to an unconstitutional state of affairs.

[74] The impugned provision must be interpreted purposively, within the context of the Recognition Act as a whole and with regard to other sections, in particular section 7(5) which bears upon its contextual interpretation. Support for the interpretation that I advance can be found in the contextual interpretation of the section with the Recognition Act as a whole. This is because the proprietary consequences of the customary marriage, upon conversion, continue into the civil marriage. To interpret it otherwise will undermine the purpose of section 7(5) and the principle of judicial oversight in marital property schemes. That interpretation favours constitutionality and is to be preferred.[63]

[75] Properly interpreted, the impugned provision does not permit the execution of an ANC prior to the change in marriage system, and does not provide for another means to bring about a marital property regime change, save of course by way of section 21 of the MPA. That course of action is always available to parties. The interpretation that is propounded in this judgment limits parties effecting a change to their matrimonial property regime as a result of the change in marriage system under section 10 of the Recognition Act (without following a section 21 procedure). This preferred

[63] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 23; *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) at para 45. See also *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 20 where this Court held:

> "Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution."

interpretation does not disturb the rights that the parties have to change their matrimonial property system in the ordinary course, pursuant to section 7(5) of the Recognition Act.

[76] If, as I see it, there is one continuous marriage between the parties, they can prior to their marriage properly execute only one ANC; the rest being postnuptial contracts. This they would do either in anticipation of a change to the legal system applicable to their marriage or for any other reason. Thus, the interpretation that I propound leaves room for an interpretation that the reference to "antenuptial contract" in section 10(2) does not exclude the right of parties to a marriage to approach a court as provided for in section 21 of the MPA seeking to register a postnuptial contract to change their matrimonial property system.

[77] The compelling conclusion based on my interpretation of the impugned provision is that the ANC concluded between the parties is invalid, because of their failure to observe the provisions of section 21 of the MPA. That conclusion is reached on the basis enunciated here, and not on the basis that the impugned provision is unconstitutional because it allows for a postnuptial change of the marital property system. Properly interpreted, the impugned provision does not permit the execution of an "antenuptial" contract in an extant customary marriage prior to a later civil marriage, and does not provide for another means to change a matrimonial property regime, outside an application in terms of section 21 of the MPA.

[78] I support the approach of Bakker who concludes thus:

> "[T]he only viable interpretation of section 10 of the Customary Marriages Act is to regard the change of marriage system as an option for spouses in a monogamous customary marriage to move from a more open-ended legal system protecting group rights more than the individual – the customary law – to a stricter legal system promoting the rights of the individual – the common law. The effect of the conversion would then change the legal system applicable to their marriage but would not bring their marriage relationship to an end. When concluding a civil marriage under the

> Marriage Act, the spouses would change the consequences of their marriage by opting for the common law to be applicable to their marriage instead of customary law. Spouses are also allowed to conclude an antenuptial contract only prior to their marriage and not during the subsistence of the marriage. Their marriage never terminates during the change, and there is consequently no opportunity to draft a new antenuptial contract. To alter the matrimonial property system, the spouses must apply in terms of section 21 of the Matrimonial Property Act for permission to change their matrimonial property system."[64]

The second judgment

[79] I have read the judgment of my Colleague, Rogers J. It holds that a post-customary, pre-civil marriage ANC can validly regulate the civil marriage, but it cannot retroactively affect the customary marriage, which, by operation of law under section 7(2) of the Recognition Act, is already in community of property unless an ANC was signed before the customary marriage. It must be noted that the second judgment deals with an early version of the Bill which concerned a dissolution of the customary marriage prior to the change in system.[65] Even though the second judgment acknowledges the amendments from the Bill to the Recognition Act, it nonetheless adopts an interpretation that is only sensible when one considers the spouses divorced. Universally, an ANC is understood as a contract entered into by people who are either entering into a marriage for the first time, or remarrying after death or a divorce. An ANC that begins with a reference to a joint estate or any other existing matrimonial property can no longer accurately be called an "*antenuptial* contract". It can only ever be a postnuptial contract and must be termed thus. To call a notarial contract concluded postnuptially "an ANC" is an utter misnomer. The position would of course be different if the spouses are divorced, but this is not what the second judgment postulates.

[80] The second judgment fails to lay sufficient emphasis on the meaning of "antenuptial" in this section. If we are to accept, as the second judgment suggests, that

[64] Bakker 2018 above n 42 at 77-8.

[65] See the second judgment at [134].

parties who are already married under customary law may still enter into an ANC before changing their marriage system to a civil marriage, then this implication will follow. This assumption implies the legal existence of *two distinct marriage systems* between the same parties – one customary and the other civil. As stated, this is not legally tenable. That much is plain from the extensive deliberations and comments on the Bill that preceded the enactment of the Recognition Act.

[81] The second judgment opines that my criticism of that judgment provides no answer to the point made there that "[t]here are no circumstances in which section 10(2) affects the matrimonial property regime already existing between the spouses by virtue of section 7(2)".[66] This observation misses the point, which is this. The objective of section 10(2) of the Recognition Act is to provide clarity regarding the matrimonial property system that applies when the marriage is converted pursuant to section 10(1). Section 7(2) does not contemplate a conversion, so without section 10(2), it would be unclear which matrimonial property system applies post conversion. It seems to me then, with respect, that my Colleague misconceives the interplay between sections 7(2) and 10(2). For that reason, the second judgment is wrong where it opines that, on my interpretation of the impugned provision, section 10(2) does no work because section 7(2) already dictates that the proprietary outcome of the marriage is in community of property.

[82] The second judgment also states that if, after the civil marriage, there is no longer a customary marriage, the proprietary consequences of the civil marriage cannot be sought in section 7(2), as my judgment seeks to do. According to my Colleague, that is so because the customary marriage no longer exists, as it has been "subsumed" and "replaced" by the civil marriage. Again, this is a flawed understanding of my position.[67] The marriage continues to exist factually; it started as a customary marriage which was concluded first in time. It bears emphasis that replacement of the marriage system does

[66] Id at [131].

[67] That position appears in [61(b)], [69] and [79] above.

not eradicate the marriage relationship. Moreover, this judgment holds that section 10(2) clarifies the proprietary consequences that will apply to the new civil marriage. The consequences of the civil marriage (which flows from the customary marriage) are not to be found in section 7(2) but in section 10(2), interpreted by reading the Recognition Act holistically.

[83] The second question that arises is this, if there is no dual marriage, what happens to the customary marriage? The second judgment rightly raises concerns about the consequences of a civil marriage concluded between spouses who are already married under customary law.[68] Importantly, the Recognition Act was enacted to bring full legal recognition and dignity to customary marriages, in line with constitutional values of equality and cultural pluralism. As I see it, the scenario postulated in the second judgment of one marriage with a dual character is not envisioned within the legislative scheme. The second judgment wrongly emphasises the civil dimension as being the more "formal" layer of recognition. Historically, that was indeed the case, but the Recognition Act is a statute meant to correct this historical imbalance and diminution in status of customary marriages. The approach of the second judgment will have the effect of preserving this highly unsatisfactory and discriminatory relic.

[84] The second judgment cites the judgment in *RM v TM* as support for its observation that our courts have accepted ANCs of the type we have here.[69] The reliance on this case is misconceived. In that case the Court held that "[t]he aim of section 10, in my view, is intended to mean that the conclusion of a civil marriage extinguishes the customary marriage by the operation of law and brings an end to the proprietary consequences of the customary marriage".[70] And in the next paragraph, the Court continued with the theme of divorce or termination, stating that—

[68] See the second judgment at [137].

[69] Id at [136] citing *RM v TM* [2018] ZALMPPHC 22 (*RM v TM*)..

[70] *RM v TM* id at para 20.

> "[t]he legal position of the parties to the customary marriage who elected to conclude a civil marriage is similar to parties married in community of property who *divorced and subsequently remarry out of community of property in terms of an antenuptial contrac*t with the exclusion of the accrual system as contemplated by the Matrimonial Act".[71] (Emphasis added.)

[85] These pronouncements go against the plain and unequivocal legislative intention to achieve the equal treatment of civil and customary marriages and that the change to a civil marriage system is not preceded by termination of the marriage between the parties. That judgment therefore appears to proceed from a flawed view of the effect of the conversion. Moreover, and to exacerbate matters, it is clearly at variance with the finding in the second judgment which holds that the customary marriage is not dissolved by the civil marriage.

[86] I find untenable the notion that through such an interpretation we must perpetuate the very thing that we are trying to correct – the belief that customary marriages are less formal or structured. The Recognition Act envisions continuity of the marriage and replacement of the governing legal system. The change in system to a civil marriage is declaratory, not constitutive – it confirms the pre-existing marriage rather than creating a new one. For these reasons, the interpretation propounded by the second judgment is inherently at odds with its suggestion that an ANC can be concluded after the customary marriage but prior to the civil marriage.

[87] It seems peculiar and inexplicable that, on the interpretation adopted in the second judgment, the only spouses who are able to vary their matrimonial property system without judicial oversight are those who are concluding a change in marriage system under section 10. This is the effect of the interpretation adopted in the second judgment. In essence it assumes and sanctions a loophole ("pejorative" or not, this is exactly what it means on the second judgment's approach) in the legislative scheme

[71] Id at para 21.

regulating the proprietary consequences of marriages. No reasons have been provided for this approach save for the fact that the "lawmaker seems to have fudged, namely the effect of the civil marriage on the customary marriage".[72]

[88] If it is accepted, as I think it must be, that judicial oversight is key to the legislative purpose of the enactment, then it is difficult to follow how the "dual character" of the marriage negates the proprietary consequences of having first entered into a customary marriage without an ANC, to the extent that it is accepted that the customary marriage "continues" on into the civil and/or hybrid marriage. The important point is that, because it is a *single* marriage, the "beginning" of the marriage would have to be the beginning of the initial marriage (i.e. the customary marriage), even if there is a civil marriage concluded later, otherwise we will end up having an ostensible "dual" marriage. The only possible solution to this conundrum is the proposition that an ANC can be executed prior to the civil marriage only if it is agreed that the customary marriage is terminated. But, as stated, this has dire constitutional challenges.

[89] In the High Court, this lack of judicial oversight in a change of matrimonial property system for transitioning customary marriage spouses was held to be unconstitutional. But the second judgment appears not to find the exclusion unconstitutional, and provides no reasons for that finding. Its dismissal of the concerns raised in the High Court regarding the potential prejudice to be suffered by women in customary marriages if the joint estate were to be obliterated by the subsequent execution of an ANC and the conclusion of the civil marriage, is disconcerting. According to the second judgment, on its approach the fate of the joint estate can be regulated in the ANC and if "proper interpretation of the ANC does not allow one to determine the fate of the joint estate, it will continue to exist alongside the separate estates acquired by the spouses as from the date of the civil marriage".[73]

[72] See the second judgment at [137].

[73] Id at [149].

[90] I do not see how allowing the parties to deal with the joint estate in the type of "ANC" postulated in the second judgment would cure the mischief, which was highlighted in the High Court, that one of the spouses could appropriate the property falling within the joint estate, leaving the other spouse with nothing. There could of course be no objection if the parties had intended the matrimonial property to be divided in this way, however, the complaint in this case is that one spouse has been arbitrarily deprived of matrimonial property. Allowing parties to deal with matrimonial property contractually, outside of the oversight of the courts, perpetuates the problem. Given the entrenchment of the *caveat subscriptor* (beware what you sign) and *pacta sunt servanda* (contracts must be honoured) principles, a party in a position similar to that of the applicant in this case would find it difficult, if not impossible, to extricate herself out of an "ANC" that unfairly allocates matrimonial property to the other spouse.

[91] The second judgment proceeds with a lengthy criticism of mine insofar as the effect of the civil marriage on the customary marriage is concerned.[74] I do not propose engaging in a point-by-point sparring with the second judgment. I will only say this. The factual existence of the customary marriage, as the marriage that was concluded first in time, is not eradicated by the coming into effect of the civil marriage. This is made clear by the omission of clause 10(2)(a) of the Bill, which envisaged dissolution of the customary marriage, from the Recognition Act. Replacement of a marriage system under section 10(2) is different from termination of an existing marriage, which unwinds the customary marriage and brings about the legal consequences of termination.

[92] My Colleague and I are in agreement, and it cannot be gainsaid, that termination is not contemplated by the conversion. That must be the point of departure when interpreting the impugned provision. The second judgment appears to be in some doubt about this, or at least be in two minds about that fact, and that may well be the reason it regards the interpretation it adopts as constitutional. However, if that is indeed the case,

[74] Id at [140] to [145].

that is at odds with the rationale behind the adoption of the Recognition Act, namely to place civil and customary marriages on par with one another.

[93] It bears emphasis that in the present scenario, the parties are not divorced. The origins of their marriage in customary law cannot be placed in any doubt. I emphatically made the point earlier on that, when the parties subsequently enter into a civil marriage, the earlier marriage relationship is most certainly not dissolved. The second judgment views replacement as tantamount to termination, a view with which I take issue.[75] My judgment envisages continuity of the marriage relationship, not discord and termination. This is made plain earlier. It envisages a "change of guard", as it were, in a single, continuous marriage relationship governed by different legal systems at different times. It does not envision the termination of the customary marriage; which can only be brought about through section 8(1) of the Recognition Act or death.

[94] The second judgment regards my emphasis on the prefix "ante" in "antenuptial" (contracts) as mere semantics and describes it as misconceived.[76] Again, with respect, this misses the point altogether. Notarial contracts are specialised contracts. The use of the prefixes "ante" and "post" is no trivial matter and they must be given a meaning. They cannot simply be treated as mere verbal surplusage with no role to play at all in understanding what the words "antenuptial" and "postnuptial" actually mean. If not, why are they even there? The superfluity of those prefixes implied by the second judgment is insensible. Their use in the words affects the manner in which the contracts are treated legally. Axiomatically, ANCs are entered into by intended spouses, that is, those who are yet to conclude a marriage. There are legally prescribed timelines for the registration of ANCs. The same does not apply for postnuptial contracts, which must be entered into with leave from a court and can be concluded by existing spouses. The prefixes "ante" and "post", thus dictate legal treatment of these specialised contracts.

[75] Id at [141].

[76] Id at [145] and [146].

Courts must take care not to conflate or confuse these terms or reduce them to mere labels. That is exactly what the second judgment does.

[95] The view is expressed in the second judgment that "something can [clearly] happen after the customary marriage but before the civil marriage".[77] This is not clear to me at all from a plain reading of the impugned provision – on this score the second judgment appears to draw assumptions which escape me. The second judgment further holds that "[t]he 'antenuptial contract' in section 10(2) is a contract concluded before the civil marriage – it is 'ante' that particular 'nuptial'". This is indeed a linguistic manoeuvre, because it only holds true if one considers the customary spouses to be marrying anew, post-dissolution of their customary marriage. On that approach, the customary marriage is thus terminated, something which, as I have shown, can statutorily only occur by way of divorce.

[96] In summary, in response to the second judgment's approach, to the extent that the ANC is not concluded before the beginning of the customary marriage, the contract cannot constitute an ANC. If anything, it may constitute a postnuptial contract. Section 89 of the Deeds Registries Act permits the execution of the postnuptial agreement, however, this kind of agreement is only recognised pursuant to a court order. Thus, even if we were to be "generous" in our interpretation, the threshold requirement for a postnuptial contract is not met and we cannot treat the agreement as such. There is thus a fundamental difficulty in a finding that an agreement which functions as an ANC and was concluded after a marriage may be valid and binding as this would circumvent section 89 entirely. For all the reasons set out earlier, the present ANC was invalid.

[97] There is a further aspect of concern in the second judgment. It fails to deal with the position where spouses are married customarily with an ANC, and therefore, out of community of property, and wish to continue to be so married after a change in system

[77] Id at [145].

under section 10(2). Will those couples (even if rare in the estimation of the second judgment) be required to conclude a new ANC prior to entering into the civil marriage? If so, the new ANC *cannot undo* the property regime of the earlier customary marriage. Section 7(2) of the Recognition Act provides that the matrimonial property regime of a customary marriage is determined at the time of its conclusion. If no ANC is signed prior to the customary marriage, it is automatically in community of property. A later ANC, even if executed before a civil marriage, cannot retrospectively alter the patrimonial consequences of the already existing customary marriage.

[98] This concern raises the question – what happens to the joint estate? Based on its finding that an ANC is possible at this stage, before the civil marriage and after the customary marriage, the second judgment envisages a hybrid system, with two estates forming at these two points in time. My difficulty with this interpretation is that neither the Recognition Act nor the Marriage Act gives any contextual indication that this may be the case, or that this was what is intended. It can conceivably bring about various legal difficulties.

[99] On the other hand, a simple reading of the text of the impugned provision, read within the context of the entire statute, does not postulate a hybrid joint estate that splits in time, but rather a single estate that continues uninterrupted as the spouses decided it would be at the time they got married. This accords with the structure and objects of both the Recognition Act and the Marriage Act. It is legally uncomplicated and gives effect to what spouses would want the proprietary consequences of their marriage to be. It bears repetition that the only way to change the proprietary system, at *any* stage in the marriage, is with judicial oversight, either under section 7(4) of the Recognition Act or in terms of section 21 of the MPA.

[100] Unlike the second judgment, I cannot see how two separate marital estates can conceivably co-exist. If I understand my Colleague correctly, his reasoning assumes that parties entering into customary marriages generally do not execute ANCs, viewing such contracts as a practice more common to civil marriages. It is plain, though, that

where a customary marriage is in community of property, the civil marriage that follows under section 10(2) must also be in community of property. The dearth of ANCs in customary marriages must be viewed within the context of the history of customary marriages in this country, particularly the deliberate non-recognition thereof as valid matrimonies of equal status as civil marriages. The slow assimilation of the universal matrimonial property regime for all marriages brought about through the Recognition Act is therefore understandable. But even if ANCs are a rarity in customary marriages as the second judgment appears to suggest (there is no evidence that it is so), where a customary marriage is governed by an ANC, that same ANC continues to regulate the patrimonial consequences of the marriage, even after its formalisation as a civil marriage. If spouses wish to change their matrimonial property system upon entering a civil marriage, they must do so via a joint application under section 21 of the MPA.

[101] It is stated in the second judgment that, contrary to the view expressed here, the law has always countenanced the existence of two separate marital estates.[78] The motivation advanced is ill-conceived. Properly construed, these are not two separate marital estates. There is a division between personal property, which falls outside of the joint estate and is owned by the respective spouses in their individual names, and matrimonial property which is owned jointly in undivided shares.[79] This is settled, uncontroversial law.[80] To construe this position, personal versus marital property, as "two separate marital estates" that are "countenanced by the law" seems to me to be an inaccurate articulation of our law.

[102] My Colleague says that a new ANC executed after the customary marriage cannot retrospectively alter its patrimonial regime. In my view, however, it is not possible at all to conclude an ANC (in the true meaning of the concept, that is, a

[78] See the second judgment at [148].

[79] *Du Plessis v Pienaar N.O.* [2002] ZASCA 163; [2002] 4 All SA 311 (SCA); 2003 (1) SA 671 (SCA) at paras 1, 5 and 7.

[80] *Erasmus v Erasmus* 1942 AD 265 and *Cuming v Cuming* 1945 AD 201.

matrimonial property agreement concluded *ante* (*before*) nuptials) at that stage. I find it inscrutable that there can be two separate marital estates, because that would inescapably imply the existence of two distinct marriages. It would in turn contradict the legal and conceptual framework of a single, continuous marriage recognised by section 10(2).

[103] On the approach of the second judgment, a new ANC would always be required – regardless of whether a valid ANC was executed at the time of the customary marriage – because the civil marriage is treated as a "new legal event". This elevates a civil marriage over a customary marriage, creating a troubling constitutional inconsistency by undermining the equal recognition of customary marriages, something which the Recognition Act unequivocally and stridently seeks to dispel. If we were to adopt that approach, it would render section 10(2) unconstitutional, as it would contradict the very central objective of the Recognition Act, which is to affirm the equal status of customary and civil marriages under South African law. That brings me to the further troubling feature of the second judgment.

[104] The second judgment purports to interpret the impugned provision in a manner which promotes the spirit, purport and objects of the Bill of Rights. It seems to accept the position that a financially stronger spouse will in all likelihood seek to find ways to exploit the weaker spouse, and that it is futile to adopt legal interpretations that may thwart this abuse of power because the stronger party will invariably attempt to find a way around these protections. However, this is not what section 39(2) of the Constitution enjoins courts to do. It requires courts to adopt interpretations that are aimed at the protection and vindication of rights. It does not say that courts must only adopt these interpretations when there is a guarantee that the rights they are aiming to protect cannot or will not be undermined in other ways. The interpretation that I propound not only promotes equality in treatment between spouses married under civil law, but, importantly, also those married in terms of customary law. It ensures that spouses are not able to amend their matrimonial property regime in an unsupervised and unstructured way without the oversight of a court.

[105] My Colleague opines that "the Recognition Act is not aimed at granting redress for the weaker bargaining position of women in customary marriages".[81] I disagree. The approach of the second judgment is contrary to the purpose behind the passing of the Recognition Act, and it is no trivial matter that regard must be had to the purpose of the Recognition Act as a whole. Repeatedly during the preparatory period of the Bills leading up to that Act, it is evident that the two purposes of the Recognition Act were to bring customary marriages to the same legal standing as civil marriages and to protect women. This can be seen in the importance of affording protection to women by considering, for example, the SALC's change of position from customary marriages originally being out of community of property to in community of property. In the original 1997 discussion paper, customary marriages were to be out of community of property, though this could be changed by an ANC. However, in response to immense pushback from provincial workshops as well as the Rural Women's Movement, the Commission on Gender Equality, the Gender Research Project, the Women's Lobby and other groups, the SALC decided to recommend that community of property be the automatic regime.[82]

[106] In addition, section 6 of the Recognition Act ensures that wives in customary marriages have full status and capacity in ways that were previously unavailable to them under customary law – for example, in the Transkei Marriage Act, wives in customary marriages were regarded as minors under the guardianship of their husbands. When the Bill was considered before the National Council of Provinces, the Minister of Justice commented by saying that "the major objective of this Bill is to create real equality for the women of our country".[83]

[81] My Colleague, Rogers J, accepts that women in customary marriages are often in a weaker bargaining position than their husbands. See the second judgment at [150].

[82] SALC Project 90 above n 32 at para 6.3.4.13.

[83] Bronstein "Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998" (2000) 16 *SAJHR* 558 at 564.

[107] The second judgment renders judicial oversight nugatory for spouses who are changing marriage systems and allows them to deal with their matrimonial property as if they had been granted a divorce. However, unlike divorcing spouses, who must secure a court order, these spouses are given free rein to change their matrimonial property system privately and outside of judicial oversight. The second judgment thus speaks of the spouses being free, "by way of their ANC, to *unwind* the joint estate in any other way they wished".[84] This "constructive divorce" and non-judicial "unwinding" introduced in the second judgment does not strike me as sensible at all.

[108] The second judgment draws further parallels between a change in system under section 10(2) and the proprietary consequences of a divorce.[85] This heightens the concern that the second judgment is creating a constructive divorce in respect of couples married under customary law who make a transition under section 10(2). It leaves the impression that there are some parts of customary marriages that can escape formal regulation and supervision by the courts. This leads to different and unexplained treatment of customary and civil marriages which is contrary to the legislative goal to harmonise customary and civil marriages as far as is possible.

[109] There is one final troubling aspect. The second judgment holds:

> "Where a civil marriage follows upon a customary marriage, an ANC concluded before the customary marriage will inevitably also have been concluded before the civil marriage, and the terms of the ANC may be such as to make it clear that it is intended to regulate the consequences not only of their customary marriage but also of their subsequent civil marriage."[86]

[110] I see it differently – that is in fact what the impugned section intends to achieve. It simply confirms that a civil marriage will be in community of property, unless there is an ANC which already regulates the spouses' matrimonial property system. Again,

[84] See the second judgment at [146] (emphasis added).

[85] Id at [156] to [157].

[86] Id at [160].

that could only be done prior to the customary marriage if one accepts, as we ineluctably must, that there is only one time at which a marriage union is being formed. It bears repetition that the civil marriage is declaratory, not constitutive – it confirms the pre-existing marriage rather than creating a new one.

[111] Judicial oversight when changing matrimonial property regimes is not a mere formality and is no trivial matter at all. It is a structured process which must be fully motivated – the section requires that there must be sound reasons for the change – and must be considered by a judge. That process may give the parties an opportunity to pause and reflect on the change being effected. This may give a weaker spouse time to obtain sound legal advice or think carefully about the effect that the proposed change may have on her financial position. The second judgment's criticism of this observation loses sight of the fact that a reason the weaker spouse may be more careful may be because at the time of the change in matrimonial property regime, the weaker spouse may, through the marriage, have acquired some assets and wealth with which she does not wish to part. This is different from when the parties first marry and are in an impecunious position. There may also be children involved whose interests they may wish to protect.

[112] Therefore, the section 21 application does not only serve to protect the interests of creditors. This may be the direct purpose of the section, but there are plainly benefits for the parties as well, even if only indirectly. A party may well sign a contract blindly, hence the caution of *caveat subscriptor*, but it is difficult to imagine a party being passive throughout a lengthy and detailed section 21 court process. Through the process, a weaker party may become better apprised of the change being effected and may be in a better position to recognise prejudice and object to it. The section 21 court process introduces formality and an impartial umpire to the change in the property system, which is necessary at all times when spouses are effecting a fundamental change to the way in which they will deal with their matrimonial property.

[113] The last aspect in the second judgment on which I comment is its finding that the impugned provision passes constitutional muster. At the outset, for clarification, the point I seek to make about arbitrary deprivation of property is this. On the second judgment's approach there is an important distinction between spouses married in terms of civil law and those married in terms of customary law. The former can only change their matrimonial property regime pursuant to a section 21 application, while, on the second judgment's interpretation, spouses married in terms of customary law are free to effect this change extra-judicially. That strikes me as constitutionally untenable and would, in addition, importantly render section 21 of the MPA nugatory.

[114] A second important related aspect is the widely recognised power imbalance between spouses in a marriage. I can do no better than to refer to my Colleague's lucid articulation in *EB*,[87] where he was writing for a unanimous court in a case which dealt with redistribution orders under the Divorce Act:

> "The High Court referred to expert opinion that antenuptial contracts usually favour wealthier spouses and that, as a result of gender discrimination, women tend to be poorer than men. Their stereotypical roles of childcaring and housework negatively affect their earning capacity. And in this context, black women are the 'marginalised of the marginalised'. . . . A 2016 study reported that South African women are significantly more likely to be 'multidimensionally poor' (that is, lacking adequate access to nutrition, health, education and basic services) than men; with this burden of poverty falling more heavily on black women than white women. Women in South Africa are typically less securely employed than men, and employed women are concentrated in sectors which are typically less advantageous when it comes to remuneration and terms of employment – retail, catering and accommodation. South Africa has among the highest mean and median gender income gaps, and the disparity increases with age. *The result, say these experts, is that women typically enter into marriage poorer and more dependent than men, and therefore have less bargaining power*. During the marriage, cultural understandings and practices often

[87] *EB v ER N.O.* [2023] ZACC 32; 2024 (1) BCLR 16 (CC); 2024 (2) SA 1 (CC). See also *Bwanya v Master of the High Court, Cape Town* [2021] ZACC 51; 2022 (3) SA 250 (CC); 2022 (4) BCLR 410 (CC) at paras 124 and 129.

> exploit and deepen the inequalities by supporting an unequal division of care and household labour." (Emphasis added.)

[115] Rogers J continued:

> "Women have in the past suffered from patterns of disadvantage. . . . [T]here are degrees of voluntariness when it comes to contractual choice. For this reason, Parliament has intervened in other spheres of relations, such as employment, consumer law and the granting of credit. *Some prospective spouses may be commercially savvy or have the benefit of independent advice, but for many others this is not the case*. . . . *The danger of imprudent decision-making is ever-present in this setting*".[88] (Emphasis added.)

[116] To this compelling explication of the power relations in marriages can be added Professor Bonthuys' observations:

> "[A]s a general proposition, antenuptial contracts usually favour wealthier spouses by excluding the common law system of property sharing with poorer spouses. As a consequence of gender discrimination, women tend to be poorer than men and to earn less in the marketplace. Stereotypical gender roles also entail that women tend to devote more time and effort to childcare and housework, which further impacts on their earning capacity. Contracts which govern the sharing or lack of sharing of material resources at the end of the marriage would therefore generally have a gendered impact."[89]

[117] A further point to be made in relation to arbitrary deprivation of property is the finding by my Colleague that matters in the civil marriage "will either be regulated by a contract concluded by the spouses (the ANC executed before the civil marriage), or each spouse will retain his or her half share in the joint estate as it existed just before the civil marriage".[90] This approach is of deep concern, since it draws parallels between the conversion under section 10(2) and the effects of divorce. Reduced to its essentials,

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[88] Id at paras 130 and 132.

[89] Bonthuys "Public Policy and the Enforcement of Antenuptial Contracts: *W v H*" (2018) 135 *SALJ* 237, 241.

[90] See the second judgment at [162].

the second judgment treats a conversion as not dissolving the customary marriage, but adopts many of the effects of a divorce when crafting the effects of a conversion.

[118] Then there is the position of the creditors. Assuming for the moment that my Colleague is correct in his assertion that creditors will not lose their rights, the question arises whether provision should not be made for them to receive notice of the change. After all, this is what section 21(1)(b) of the MPA requires of couples married under civil law, that "sufficient notice of the proposed change has been given to all the creditors of the spouses". One wonders why this is not required here. It is quite possible that creditors will not be comfortable to continue lending to individuals who can amend their matrimonial property regime at will without any judicial oversight and without giving reasonable notice of the contemplated change. What happens if a creditor wants to call up their security because of the change? Should they not be given that opportunity if they consider the change to be material and prejudicial to their interests?

[119] The following scenario illustrates the difficulty facing a creditor on the approach espoused by the second judgment. Where the creditor had taken a long term view of the spouses as people married in community of property and had taken into account their joint earning power in the risk assessment it is quite plausible that the creditor would want to know that these spouses are now contemplating a change in their matrimonial property regime. While creditors may not theoretically lose their rights, problems may arise when spouses effect a change contractually without notice to creditors and then proceed to deal with the encumbered assets individually, without the creditors' knowledge and consent. The second judgment tellingly opines that "the purpose of section 21 is to safeguard creditors, not weaker spouses".[91] That being the case, it fortifies my view that notification to creditors is essential, so that they may take the necessary steps to safeguard themselves and to conduct revised risk assessments to ascertain what the effect of the change in the matrimonial property system will be on the finances of each spouse.

[91] Id at [164].

[120] The procedure proposed in the second judgment will conceivably impact the way in which couples married under customary law are viewed by potential creditors. They may well be regarded as unstable and high risk, thus stigmatising these couples. Not only is the focus in the second judgment erroneously placed solely on creditors, but it also troublingly downplays the importance of reasonable notice to creditors. What is required instead, is a concerted effort to ensure that the work done through the long, arduous legislative process to bring customary marriages on par with civil marriages is not impeded, either directly or indirectly.

Conclusion

[121] In the present instance, section 21 of the MPA was not followed and for that reason the purported ANC executed before the conclusion of the civil marriage is invalid. The effect of the High Court's order of invalidity is that the parties were and remain married in community of property. This conclusion means that the conditional constitutional challenge falls away. The High Court erred in venturing into the terrain of the constitutional challenge – the question of constitutionality was only open if the High Court were to have found that the ANC was indeed valid. Consequently, this Court cannot confirm the High Court's order of constitutional invalidity. The applicant did not seek costs if the matter is unopposed. In any event, the applicant has not, technically speaking, met with any success in this application as she has not obtained confirmation of the declaration of invalidity in this Court.

Order

[122] It is ordered:

1. The order of constitutional invalidity by the High Court of South Africa, Gauteng Division, Pretoria, which declared section 10(2) of the Recognition of Customary Marriages Act, 120 of 1998, unconstitutional, is not confirmed.
2. There will be no order as to costs.

ROGERS J (Madlanga ADCJ and Opperman AJ concurring):

[123] I have had the pleasure of reading the judgment of my Colleague, Majiedt J (first judgment). I adopt the abbreviations he uses. I am unable to agree with the first judgment's interpretation of section 10(2) of the Recognition Act.

The interpretation of section 10(2) of the Recognition Act

Can there be a post-customary marriage but pre-civil marriage ANC?

[124] We are concerned in this case with spouses who, not being parties to an existing customary marriage, marry each other first in terms of customary law and later in terms of civil law. As to the customary marriage, section 7(2) of the Recognition Act states (I underline the repeated word "marriage" for ease of reference):

> "A customary marriage in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an [ANC] which regulates the matrimonial property system of their marriage."

[125] Where "marriage" is mentioned for the second and third times in the above subsection, it is in each case the reference to the "customary marriage" mentioned at the beginning of the subsection. The present case is a typical one in which the customary marriage was not preceded by an ANC, so the marriage was, by virtue of section 7(2), in community of property.

[126] In terms of section 7(3) of the Recognition Act, Chapter III of the MPA (sections 14 to 17), as well as sections 18, 19, 20 and 24 of Chapter IV of the MPA, apply to a customary marriage which is in community of property as contemplated in section 7(2). In terms of section 7(5) of the Recognition Act, section 21 of the MPA

likewise applies to a customary marriage. Section 21 of the MPA permits spouses to apply to court for leave to change their matrimonial property system. Section 21 of the MPA would, among other permutations, permit spouses who are married in community of property to apply to court to change their marriage to one out of community of property, with or without the accrual system.

[127] Section 10, headed "Change of marriage system", begins by stating, in subsection (1), that spouses between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act (I shall call this a civil marriage), if neither of them is a spouse in a subsisting customary marriage with any other person. Subsection (2) then states (again I underline the repeated word "marriage"):

> "When a marriage is concluded as contemplated in subsection (1) the marriage is in community of property and of profit and loss unless such consequences are specifically excluded in an [ANC] which regulates the matrimonial property system of their marriage."

[128] The wording of section 10(2) mirrors, for purposes relevant to the present enquiry, the language of section 7(2). The "marriage" mentioned at the beginning of the subsection is the civil marriage contemplated in section 10(1). Following the pattern of section 7(2), one would expect the word "marriage", where it appears for the second and third times, to be a reference to the first-mentioned marriage, namely the civil marriage.

[129] This is also the natural reading of section 10(2). The subsection is dealing with the consequences of a particular marriage, namely the civil marriage. The second reference to "marriage" is preceded by the definite article "the". The expression "the marriage" can only be a reference to the marriage just mentioned, namely the civil marriage referenced at the beginning of the subsection. This, in turn, must mean that "their marriage" at the end of the subsection is also the civil marriage, because the provision is dealing with two possible property regimes applicable to a single

"marriage" – in community of property or regulated by an ANC – and the single "marriage" is the civil marriage.

[130] This view is fortified when one considers section 10(2) in the broader context of section 10 and the rest of the Recognition Act. The competing interpretation, the one espoused in the first judgment, is that the last-mentioned "marriage" in the expression "their marriage" is a reference to the existing customary marriage. On that interpretation, a précis of section 10(2) would be that the civil marriage is in community of property unless those consequences are excluded by an ANC which regulates the matrimonial property system of their customary marriage.

[131] Apart from the jarring nature of this reformulation, the competing interpretation renders section 10(2) redundant. According to the first judgment, if the civil marriage is in community of property, this is because no ANC excluding community of property was concluded before the customary marriage was entered into. If that is so, it is unnecessary for section 10(2) to declare the marriage to be in community of property; section 7(2) already dictates this result. And according to the first judgment, if the civil marriage is out of community of property, this is because an ANC excluding community of property was concluded before the customary marriage was entered into. If that is so, this consequence is brought about by section 7(2), not by section 10(2). In short, on the first judgment's interpretation, section 10(2) does no work. There are no circumstances in which section 10(2) affects the matrimonial property regime already existing between the spouses by virtue of section 7(2).[92] The first judgment's criticism of my judgment offers no answer on this point.

[92] This point is made in Büchner-Eveleigh "Vermoënsregtelike gevolge by die verandering van die huwelikstelsel" (2013) 46 *De Jure* 888 at 899 in criticising the view expressed in West "Change of Customary Marriage System into a Civil Marriage System" *Praktykskennisgewing 75 van 2012 Aktes-opleiding* 1-4 (West's article can also be found on the website of MacRobert Attorneys Inc at https://www.macrobert.co.za/insights/posts/marriage). The strong weight of academic opinion is that an ANC concluded before the civil marriage governs the civil marriage as from that date. In support of this view, Büchner-Eveleigh at 895-7 cites and discusses Cronjé and Heaton above n 43 at 226 (the same view is contained in the later edition of this work, which I quote in footnote 112 below), Van Schalkwyk above n 43 at 493-4 and Jansen "Gewoonteregtelike Familiereg" in Rautenbach et al *Inleiding tot Regspluralisme* 3 ed (LexisNexis, 2010) at 75. Büchner-Eveleigh herself agrees with these writers.

[132] Section 10(3) provides that Chapter III of the MPA and sections 18, 19, 20 and 24 of Chapter IV of the MPA apply "in respect of any marriage which is in community of property as contemplated in subsection (2)". The provisions thus made applicable correspond exactly with those mentioned in section 7(3), so section 10(3) must do some work that is not done by section 7(3). Section 10(3) refers to a marriage that is in community of property "as contemplated in subsection (2)". This plainly conveys that it is by operation of section 10(2), not section 7(2), that the marriage is in community of property.

[133] I cannot agree with the significance accorded by the first judgment to the heading of section 10, "Change of marriage system". The change in a "marriage system" is, if anything, more fundamental than a mere change in the matrimonial property regime. The latter is a component of, and therefore comprehended within, the former. The heading shows that the lawmaker saw itself as enacting provisions that would have real consequences if the parties to a customary marriage chose thereafter to enter into a civil marriage. The explanation may, though, be more prosaic. The heading "Change of marriage system" was used in an early version of the Recognition of Customary Marriages Bill, at a time when clause 10(2) provided that the civil marriage dissolved the customary marriage. The dissolution provision did not survive into the Recognition Act but the heading, perhaps through oversight, went unchanged.

[134] In the early version of the Bill just mentioned, subclauses 7(2) and (3) were practically identical to the final subsections 7(2) and (3). So too was clause 10(1) identical to the final section 10(1). But clause 10(2) read thus:

> "(2) If a marriage is contracted as contemplated in subsection (1)—
>
> (a) the customary marriage between the spouses is deemed to have been dissolved when the spouses conclude the marriage under the Marriage Act, 1961; and
>
> (b) the matrimonial property system of the marriage must be regulated by a matrimonial property contract entered into by the spouses and attested by a notary; failing such contract the marriage must be in

> community of property and the provisions of Chapter III and sections 18, 19 and 20 of Chapter IV of the [MPA] must apply to the marriage."

[135] It is perfectly clear that the matrimonial property contract contemplated in clause 10(2)(b) was a contract concluded before the civil marriage, not before the customary marriage, which was to be dissolved by virtue of clause 10(2)(a). Section 10(2) as enacted omitted any reference to dissolution, but in substance the content of clause 10(2)(b) remained, now being contained in subsections 10(2) (the patrimonial consequences of the civil marriage) and 10(3) (the applicability of provisions of the MPA). There is no reason to think that section 10(2) in its final form changed the intended effect of clause 10(2)(b), namely that the civil marriage would be in community of property unless before the civil marriage the parties concluded an ANC that excluded community of property.

[136] One gains the impression that the issue of the effect of a civil marriage on a prior customary marriage was a prickly pear that the lawmaker in the final analysis was unwilling to grasp and clearly regulate. It has been left to the courts to sort out. It is this that has given rise to the controversies in the present case. However, in my view section 10(2) is not reasonably capable of any interpretation other than that the matrimonial consequences of the civil marriage are determined by whether or not an ANC is concluded before the civil marriage is entered into. And in that regard the lawmaker can be presumed to have been aware that ANCs were historically a feature of civil marriages but not customary marriages,[93] and that many couples who conclude

[93] See SALC Project 90 above n 32 at para 6.3.3.1:

> "It has always been assumed, without any particular reason, that only partners to civil or Christian marriages could conclude antenuptial contracts. Although the House of Traditional Leaders (Eastern Cape) said that this institution was foreign to customary law, Africans like everyone else in South Africa have freedom to contract. The spouses of customary marriages should therefore be entitled to enter into an antenuptial contract."

In footnote 124 to this passage, the SALC observed:

> "In practice, of course, the observation by the Gender Research Project (CALS) is correct: that antenuptial contracts (which originated in affluent societies to protect the assets of wealthy men) will do little to benefit the poor."

customary marriages intend afterwards to conclude a civil marriage with an ANC. That is what section 10(2) authorises them to do. Countless ANCs of this kind, such as the one in the present case, have no doubt been notarised and registered. And until the present case, so far as I can ascertain, such ANCs have been accepted by our courts as valid.[94]

What happens to the customary marriage?

[137] As to the question that the lawmaker seems to have fudged, namely the effect of the civil marriage on the customary marriage, it would not in my view be consistent with the purposes of the Recognition Act to regard the customary marriage as dissolved by the civil marriage. Such a provision was expressly removed in the final version of the Bill. To treat the civil marriage as dissolving the customary marriage might be viewed as according less dignity and value to the customary marriage.[95]

[138] This does not lead to the conclusion that the civil marriage results in the existence of two marriages. Rather, it results in a marriage that has been solemnised in accordance with two different legal regimes and with a dual character. There is no reason why the legal incidents of a customary and civil marriage should not coexist. A customary marriage has communal and familial consequences that a civil marriage lacks. Spouses to a customary marriage who afterwards conclude a civil marriage almost certainly do

[94] See, for example, *RM v TM* above n 69 at paras 20-3 and *NP v LP* [2024] ZALMPPHC 208 at paras 13-14.

[95] Compare Osman above n 27. Commenting on academic opinion that the civil marriage dissolves the customary marriage, the learned author says (at 11):

> "Perhaps the strongest counter argument to a civil marriage's terminating the customary marriage, as alluded to above, is the re-enforcement of the historical superiority civil marriages enjoyed over customary law marriages. The Recognition Act was meant to address the historical non-recognition of customary marriages. An interpretation that entrenches the historical position is problematic and arguably conflicts with the constitutional recognition and status of customary law. The constitutional obligation on courts to interpret legislation to give effect to the object, purport and spirit of the Bill of Rights, and the indirect obligation on the state to recognise customary law marriages arguably militates against such an interpretation." (Footnote omitted.)

not expect those communal and familial consequences to disappear, nor should we suppose that the lawmaker intended by way of section 10 to obliterate them.[96]

[139] If any particular incident of a customary marriage were found to be irreconcilable with an incident of a civil marriage, or vice versa, a proper interpretation of the legislation must determine which incident enjoys priority. This might be dealt with expressly, as in the case of section 10(4), which states that no spouse to a civil marriage is competent to enter into any other marriage. So a party to a customary marriage on which a civil marriage has been superimposed pursuant to section 10 may not thereafter conclude a second customary marriage, even if polygamy were permitted by customary law. If the matter in question were not expressly regulated, it might be a question of necessary implication. I should add, though, that argument in the present case has not pointed to any obvious points of irreconcilable difference.

[140] The first judgment is not altogether clear, at least not to me, about the effect of the civil marriage on the customary marriage. The first judgment holds that the civil marriage "subsumes" and "replace[s]" the customary marriage, because a "dual marriage is a legal impossibility".[97] The first judgment immediately adds that this does not mean that the customary marriage is "terminated", since that can only be achieved by divorce.[98] Later, in criticising my judgment, the first judgment says that the Recognition Act "envisions continuity of the marriage and replacement of the

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[96] I thus agree with the following "potential solution" offered by Professor Elsje Bonthuys in Bonthuys "Legal Pluralism in South Africa: The Implications of Coexisting Customary and Civil Marriages" (2025) 57 *Legal Pluralism and Critical Social Analysis* 51 at 53:

> "One potential solution is to regard the two marriages as a single hybrid legal entity – a monogamous marriage which contains both customary and civil elements. This would not be constitutionally objectionable and would, moreover, accord with the beliefs held by spouses in co-existing marriages, that they are in a single marriage which is neither exclusively customary nor civil, but which contains elements of both."

As shall presently appear, however, I do not agree with her further view that the spouses' matrimonial property regime cannot be changed by an ANC executed after the customary marriage but before the civil marriage.

[97] See the first judgment at [45].

[98] Id.

governing legal system".[99] This is followed by a statement that the civil marriage "confirms the pre-existing marriage rather than creating a new one", a statement the import of which I struggle to grasp.[100] The customary marriage needs no confirmation.

[141] It is unclear to me how the civil marriage can "replace" the customary marriage without terminating it. I understand the first judgment to mean that, as from the date of the civil marriage, there is only a civil marriage, and the parties are no longer in a customary marriage. There may be a continuing marital relationship, but it morphs from an exclusively customary marriage into an exclusively civil marriage. That must mean that the civil marriage has terminated the customary marriage. And if that is so, there is no difficulty – even on the first judgment's approach – with an antenuptial contract concluded after the customary marriage but before the civil marriage. Furthermore, the proprietary consequences of a customary marriage specified in section 7(2) are expressly consequences of the "customary marriage". If, after the civil marriage, there is no longer a customary marriage, the proprietary consequences of the civil marriage cannot be sought in section 7(2), as the first judgment seeks to do. That is so because the customary marriage no longer exists, as it has been "subsumed" and "replaced" by the civil marriage.

[142] If the first judgment holds that there cannot be a single marriage with a dual character – customary and civil – I disagree. The first judgment states that the legal consequences that flow from a customary marriage are largely the same as a civil marriage. Given the family and community dimensions of customary marriage, I regard that proposition as untenable. What is true is that the incidents of a customary marriage are not irreconcilable with, and can live alongside, those of a civil marriage. That is why a single marriage with both customary and civil consequences can exist.

[99] Id at [86].

[100] Id.

[143] This being so, the statement in the first judgment that my approach "implies the legal existence of two distinct marriages"[101] is a misstatement of my position; my approach is quite the opposite. So too is the criticism that my judgment "wrongly emphasises the civil dimension as being the more 'formal' layer of recognition"[102] and treats a customary marriage as "less formal or structured".[103] My judgment says nothing of the kind.[104] The immediately following criticisms – that my approach thwarts the correcting of the "historical imbalance and the diminution in status of customary marriages" and preserves a "highly unsatisfactory and discriminatory relic"[105] – are thus unfounded. It is the first judgment that falls foul of the lawmaker's intent. According to the first judgment, the effect of the civil marriage is that henceforth the parties are no longer married by customary law; the civil marriage "trumps" the customary marriage. So far from "confirming" the customary marriage, the civil marriage supersedes it, so the first judgment inevitably holds.

[144] The first judgment emphasises the prefix "ante" in the expression "antenuptial contract" in section 10(2).[106] This is used to mount the following criticism of my interpretation. If, as I hold, the customary marriage is not dissolved by the civil marriage, and if after the civil marriage there is still only one marriage but now with a

[101] Id at [80]. The first judgment continues by asserting that the legal existence of two distinct marriages between the same parties is "not legally tenable", something which is said to be plain "from the extensive deliberations and comments on the Bill that preceded the enactment of the Recognition Act". The passage of the Bill was in fact expedited, as appears from the second reading debate, where three separate Bills were read dealing respectively with maintenance, domestic violence and the recognition of customary marriages: see *Hansard* 2 November 1998 at 7190-245. Ms Camerer of the New National Party, while supporting the Bills, said that they were being "rushed through Parliament at the eleventh hour during this last session of the year which was not even meant to be", something she attributed to the urgency created by South Africa's unqualified ratification of the Convention on the Elimination of All Forms of Discrimination against Women (at 7190). Mr Mzizi for the Inkatha Freedom Party, which opposed the Recognition Bill, said that it was being "hastily passed before the elections, without sufficient debate, especially from traditional communities and their leaders". The result was that only one of the nine houses of traditional leaders made a submission (at 7194). Clause 10 of the Recognition Bill received no attention from any of the speakers in the debate.

[102] Id at [83].

[103] Id at [86].

[104] By contrast, the first judgment states, at [46], that civil marriages "are more firmly regulated in a sense as it is easier to prove the existence of a civil marriage".

[105] Id at [83].

[106] Id at [79] and [94].

dual character, a contract concluded after the customary marriage but before the civil marriage would be a "postnuptial" contract, not an "antenuptial" one.

[145] This semantic argument is, in my respectful view, misconceived. Section 10(1) states in terms that the parties to a customary marriage may conclude a civil marriage. Clearly, then, something can happen after the customary marriage but before the civil marriage. The "antenuptial contract" in section 10(2) is a contract concluded before the civil marriage – it is "ante" that particular "nuptial". This involves no linguistic gymnastics. Moreover, the latter part of the word "antenuptial", namely "nuptial", means "of or relating to marriage or weddings".[107] So "antenuptial" aptly refers to something done before the matrimonial ceremony. In the context of section 10(2), that is the solemnising of the civil marriage.

What happens to the joint estate?

As between the spouses

[146] This leaves unresolved the status of the joint estate where spouses who are parties to a customary marriage in community of property conclude a civil marriage preceded by an ANC that excludes community of property. As between the spouses themselves, the premise is that they will have executed an ANC before concluding the civil marriage. The fate of the joint estate should thus depend on a proper interpretation of the ANC. The spouses may always have intended to be married out of community of property and their ANC may thus seek to create, as between themselves, the same position as if their marriage had been out of community of property from the very beginning (that is, from the time they concluded the customary marriage). Alternatively, the spouses would be free, by way of their ANC, to unwind the joint estate in any other way they wished, including by treating each spouse as currently owning (that is, at the time of the civil marriage) assets equivalent to a half share, or some other agreed share, of the former joint estate.

[107] The English word "nuptial" has its source in the Latin verb *nubo* and its past participle *nuptus, -a, -um*, the original meaning of which is to cover or veil oneself, particularly of a bride. The Latin plural *nuptiae* is the equivalent of the English "nuptials" and means "a marriage or wedding".

[147] Going forward, that is certainly what spouses could and should do in this situation if the law were clarified in line with my judgment. Whether, in respect of past cases, it would be possible in all instances to resolve the matter by a proper interpretation of the ANC cannot be stated with confidence. If the proper interpretation of a particular ANC does not solve the problem, the spouses would continue to be the owners in equal undivided half shares of the joint estate existing immediately before the conclusion of the civil marriage, with separate estates in respect of future assets as from the date of the civil marriage.[108]

[148] While this may add a layer of complexity in some matrimonial disputes, it is not unknown for there to be assets falling outside a joint estate. Section 18 of the MPA excludes non-patrimonial damages recovered by a spouse from the joint estate. It is not unusual for a testator to provide in a will that a bequest to a person married in community of property shall not form part of the joint estate, and this is valid. The parties may by ANC create a partial community of property by excluding certain assets from the joint estate. Rights under fideicommissa and usufructs fall outside the joint

[108] This is the view expressed in Heaton and Kruger *South African Family Law* 4 ed (LexisNexis, 2015) at 237. Dealing with the case of spouses who conclude a customary marriage without executing an ANC and then enter into a civil marriage in terms of an ANC that excludes community of property but adopts (expressly or by default) the accrual regime, the learned authors say:

> "It is submitted that careful reading of the wording of section 10(2) reveals that, in the above example, community of property operates until the date of the civil marriage and that section 10(2) applies as from that date. This is so for the following reason: section 10(2) prescribes the matrimonial property consequences in 'the marriage' '[w]hen a marriage is concluded as contemplated in subsection (1)'. Section 10(1) governs the capacity of spouses who are married at customary law to 'contract a marriage with each other under the Marriage Act', that is, their capacity to conclude a civil marriage. Section 10(2) therefore only deals with the consequences of the civil marriage. Thus, in the above example, all assets acquired before the civil marriage are governed by the rules regarding community of property, while all assets acquired as from the date of the civil marriage are the spouses' separate assets subject to accrual sharing upon dissolution of the civil marriage."

Adopting the same reasoning in respect of the other consequences of the civil marriage, the authors conclude that the rules regulating the customary marriage and its consequences operate only until the civil marriage is entered into, and that the consequences of the customary marriage terminate at the date of the civil marriage. As will be apparent, I disagree with that view, and in my opinion it does not follow from the authors' analysis of the proprietary consequences of the civil marriage and the related ANC.

estate.[109] And so, contrary to what the first judgment says, the law has always countenanced the existence of "two separate marital estates".[110] In relatively simple estates, where for example the only material asset just before the conclusion of the civil marriage is a house, the continued co-ownership of the house in a joint estate should not present any difficulty.

[149] In the present case, some emphasis was laid in the affidavits and written submissions on the prejudice which women in customary marriages might suffer if the joint estate were to be obliterated by the subsequent execution of an ANC and the conclusion of the civil marriage. However, on the approach I have outlined, the fate of the joint estate can be regulated in the ANC. If a proper interpretation of the ANC does not allow one to determine the fate of the joint estate, it will continue to exist alongside the separate estates acquired by the spouses as from the date of the civil marriage.

[150] It is true that women in customary marriages are often in a weaker bargaining position than their husbands and could be browbeaten into surrendering their share of the joint estate by way of an ANC executed shortly before the conclusion of the civil marriage. However, the Recognition Act is not aimed at granting redress for the weaker bargaining position of women in customary marriages. If the interpretation favoured in the first judgment were adopted, the supposed superior bargaining position of the husband would simply be exercised at a different time or in a different way. Either the husband would ensure that an ANC was concluded before the customary marriage or he would persuade his wife to join him in bringing an application in terms of section 21(1) of the MPA.

[151] Regardless, therefore, of the interpretation adopted, there will be a point in time where the husband's superior bargaining position could be exercised if he was inclined to exploit it. To the extent that the first judgment supports its interpretation of

[109] On these and other exclusions, see Clark "Marriage" in *LAWSA* 3 ed (2020) vol 28(2) (*LAWSA*) at para 71.

[110] See the first judgment at [100] and [101].

section 10(2) as protecting women in customary marriages, it seems to lose sight of the reality that the customary regime may itself have been informed by the unequal bargaining positions of the spouses. This being so, section 10(2) cannot possibly have been meant to address the question of unequal bargaining positions.

[152] In relation to the Recognition Act's purpose of improving the lot of women in customary marriages,[111] it is important not to elide two distinct matters. Customary marriage as an institution was widely thought to place all women at an institutional disadvantage. This was because of the legal consequences of such marriages under customary law. The statutory recognition and regulation of customary marriage has remedied this for all women. My interpretation in no way detracts from this important outcome.

[153] This remedial consequence has nothing to do with counterbalancing the superior bargaining position of men. The Recognition Act discloses no purpose of addressing this phenomenon. Bargaining power might be relevant when an ANC is concluded or when an application is brought in terms of section 21(1) of the MPA. In that respect, the Recognition Act contains no provisions to protect women in customary marriages from men's superior bargaining power. Women in customary marriages are in that respect in exactly the same position as women in civil marriages, and the Recognition Act has brought about no change.[112]

[111] Id at [56] and [104] to [105].

[112] The first judgment suggests, at [111], that a section 21(1) application gives the "weaker spouse" time to "obtain sound legal advice or think carefully about the effect that the proposed change may have on her financial position". This, with respect, strikes me as fanciful, perhaps even patronising. Why should a "weaker spouse" think more carefully about the matter in relation to a section 21(1) application than when getting married in the first place or when concluding (on my interpretation) a pre-civil marriage ANC? And why is it supposed that the attorney instructed to bring the section 21(1) application would give the "weaker spouse" independent advice at all, let alone advice of a kind different from that which a notary would give the parties if they were instead able simply to conclude an ANC before the civil marriage? Both spouses must appear before the notary but both spouses do not have to consult with the attorney instructed to bring the section 21(1) application. (On the duties of a notary in relation to an ANC, see *Ex parte Moodley; Ex parte Iroabuchi* 2004 (1) SA 109 (W).) If the stronger spouse were able to dragoon the "weaker spouse" into concluding an unfavourable pre-civil marriage ANC, the stronger spouse could do the same in the section 21(1) application which would follow immediately thereafter. All that would be needed from the "weaker spouse" would be a short confirmatory affidavit.

As regards creditors

[154] What I have said thus far addresses the position of the spouses between themselves. But what of creditors? This is not a problem. Whatever proprietary arrangements the spouses may make as between themselves in the ANC executed before the civil marriage, this would not change the fact that from the date of the customary marriage until the date of the civil marriage the parties were married in community of property. Any debts incurred before conclusion of the civil marriage would be a joint and several liability of the spouses.

[155] A joint estate is dissolved by a decree of divorce. Unless a liquidator is appointed, it is left to the spouses to settle creditors and divide the assets. The liability of the spouses does not vanish. The creditor in respect of a debt incurred while the community of property existed may sue each ex-spouse. Current case law holds that the creditor may recover the full amount from the spouse who contracted the debt and may, after excussing that spouse, recover half the debt from the other ex-spouse.[113] The creditor is not confined to satisfying the debt out of assets that once formed part of the joint estate; it is the ex-spouses who are liable, not the joint estate as such.[114] It is unnecessary, however, to express a definite legal conclusion on this. The point is that our law safeguards the position of the creditor.

[156] The position that prevails when the joint estate is dissolved pursuant to a divorce must apply with even greater force in the context of section 10(2) of the Recognition Act, since the conclusion of the civil marriage does not result in the dissolution of the customary marriage. Creditors may continue to look to the spouses for payment of debts incurred during the existence of the community marriage, and it

[113] *LAWSA* above n 109 at para 90 read with para 88. See also *Nedbank Ltd v Van Zyl* [1990] ZASCA 12; 1990 (2) SA 469 (A); [1990] 4 All SA 637 (AD) at 476B-477D; *Du Plessis v Pienaar N.O.* [2002] ZASCA 163; [2002] 4 All SA 311 (SCA); 2003 (1) SA 671 (SCA) (*Du Plessis*) at paras 4-5; *BP Southern Africa (Pty) Ltd v Viljoen* 2002 (5) SA 630 (O) at 637E; *Els v Agri Korporasie Beperk* [2005] ZAGPHC 244 at para 52; and *M M v Rescue Rod (Pty) Ltd; Rescue Rod (Pty) Ltd v M M* [2018] ZAGPJHC 563 at paras 24-5.

[114] *Du Plessis* id at paras 4-5.

matters not for that purpose in which spouse's hands the assets of the former joint estate now vest. This approach does not imply, as the first judgment claims, that a "constructive divorce" has occurred.[115] The situation upon divorce merely illustrates that the law already has mechanisms to deal with the situation where a joint estate is unwound.

Concluding observations on the interpretation of section 10(2)

[157] I said earlier[116] that the language of section 10(2), in particular the concluding words "their marriage", is not reasonably capable of an interpretation other than the one I have given it. However, and even if "their marriage" could reasonably be interpreted as a reference to the already existing customary marriage, the analysis of my interpretation's effect on the customary marriage and on the joint estate does not reveal any undesirable features which we should strain to avoid. The joint estate does not disappear retrospectively by operation of law. The spouses' contractual autonomy is respected. If they wish, they may before their civil marriage conclude an ANC that regulates the fate of the assets in the joint estate. If their ANC does not deal with the joint estate, their rights in respect of the assets forming part of the joint estate immediately prior to the civil marriage are preserved. The rights of creditors are not prejudiced.

[158] The first judgment's interpretation, by contrast, sets at nought the spouses' wishes as expressed in an ANC executed and registered after the customary marriage but before the civil marriage. Their contractual intentions are thwarted. Many years after concluding the civil marriage they may be told by a court that for all these years they have, contrary to their belief and intention, been married in community of property. The validity of transactions concluded in the belief that the spouses were married out of community of property may be called into question for non-compliance with

[115] See the first judgment at [107] to [108].

[116] Id at [125] to [133] and [137].

provisions that regulate transactions concluded by parties married in community of property.[117] A spouse who believes they are married out of community of property may be shocked to be sequestrated along with the other spouse for debts run up by the latter, on the basis that there is in truth a community marriage and a joint estate.[118]

[159] The first judgment's interpretation entails that spouses married in community of property pursuant to a customary marriage will have to bring an application in terms of section 21(1) of the MPA in order to have a civil marriage out of community of property. My interpretation permits spouses in that position simply to conclude an ANC before the civil marriage, whereas the first judgment's interpretation will put the spouses to the cost not only of concluding a notarial contract but also of court proceedings.[119]

[160] The first judgment states that if the spouses concluded an ANC before the customary marriage, they would be put to the expense of concluding another ANC before the civil marriage. This scenario was probably not at the forefront of the lawmaker's mind, given that there was no tradition of ANCs in relation to customary marriages. But if spouses do indeed execute an ANC before their customary marriage, it does not necessarily follow that they will have to re-execute it before their civil

[117] See *LAWSA* above n 109 at para 74.

[118] Id at para 84.

[119] I note that in a recent discussion paper, the South African Law Reform Commission reported "widespread agreement" that the current formalities associated with changing the matrimonial property regime during a marriage were "unaffordable and too strict" and should be supplemented or replaced with less stringent measures which nevertheless protect the interests of third parties: see South African Law Reform Commission *Discussion Project 100E: Review of Aspects of Matrimonial Property Law* (discussion paper 160, June 2023), available at https://www.justice.gov.za/salrc/dpapers/dp160-prj100E-ReviewMatrimonialPropertyLaw.pdf at para 4.191. In para 4.193 the Commission proposed several solutions, both of which involve alteration by way of a postnuptial contract without an application to court. In para 4.194, the Commission expressed a preference for a notarially executed postnuptial contract registered in the deeds office, valid as between the spouses but not affecting the rights of creditors unless the creditor in question was aware of the postnuptial contract and its essential terms.

In relation specifically to a change in property regime when a customary marriage is followed by a civil marriage, the Commission recommended in para 5.47 that the property regime of the customary marriage remains the property regime of the subsequent civil marriage unless the parties change it. Various options for changing the regime were set out. Although a section 21(1) application was one of the listed options, that option – unsurprisingly, in the light of para 4.191 – was not recommended by the Commission. Instead the Commission preferred the option contained in para 4.194. (In the context of para 5.47 it is unclear what difference if any the Commission saw between a "postnuptial" and "antenuptial" contract.)

marriage. Where a civil marriage follows upon a customary marriage, an ANC concluded before the customary marriage will inevitably also have been concluded before the civil marriage, and the terms of the ANC may be such as to make it clear that it is intended to regulate the consequences not only of their customary marriage but also of their subsequent civil marriage.

[161] However, if the spouses are indeed required to re-execute the ANC, this will not be a very great expense, and will probably feature in only a small minority of cases. It dwindles into insignificance by comparison with the disruption which the first judgment's interpretation is likely to bring about. And the first judgment readily tolerates the significantly greater expense of insisting that spouses who concluded their customary marriage without an ANC and then wish to execute an ANC before their civil marriage (probably the most common scenario) must incur the cost not only of a notarial contract but also of a court application.

Is section 10(2) unconstitutional?

[162] This being the interpretation and effect of section 10(2), is the section unconstitutional, as the High Court found? The answer is no. In regard to spouses, neither of them is arbitrarily deprived of their share of the joint estate or treated unequally. The matter will either be regulated by a contract concluded by the spouses (the ANC executed before the civil marriage), or each spouse will retain their half share in the joint estate as it existed just before the civil marriage.

[163] As to creditors, they are safeguarded by the same rules that apply when a community of property is dissolved by a decree of divorce. They do not lose their rights, and any reallocation of property by the spouses pursuant to their ANC does not diminish the assets from which the creditors' claims may be satisfied.

[164] The High Court was concerned, from a constitutional perspective, about a lack of judicial oversight over the changing matrimonial property regime, in other words, that there can be a change without an application to the High Court in terms of

section 21 of the MPA.[120] There are several answers to this. First, the purpose of section 21 is to safeguard creditors, not weaker spouses. As stated in my immediately preceding paragraph, creditors are not prejudiced by the interpretation I adopt. They may well, however, be prejudiced on the first judgment's interpretation, because they may have concluded transactions on the basis of ANCs notarised and registered after the customary marriage but before the civil marriage.

[165] Second, there is a difference between the circumstances in which section 21 of the MPA and section 10(2) of the Recognition Act operate. In the case of section 21, the change of property regime occurs during the subsistence of a marriage of a single character, whether it be customary or civil. In the case of section 10 of the Recognition Act, by contrast, there is a further marriage, and this provides the justification for the regulation of the spouses' future matrimonial property regime by a system chosen by them for that purpose. After all, there is no judicial oversight when parties marry for the first time, and yet their choices at that time may have a material impact on their respective patrimonies. In the case of a marriage in community of property, the wealthier spouse forthwith and without judicial oversight loses a part of their assets. Yet nobody would describe this as a "loophole" – the pejorative expression used in the first judgment.[121]

[166] The first judgment acknowledges that there could be no objection (from a constitutional perspective) if, by way of an ANC concluded before the civil marriage, the spouses intended to divide their existing matrimonial property in a particular way, for example, so as to replicate the situation that would have pertained had they entered into their customary marriage out of community of property. But the complaint in the present case, says the first judgment, is that one spouse has been "arbitrarily deprived of matrimonial property".[122]

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[120] High Court judgment above n 6 at paras 103, 106 and 109. Of course, and as the first judgment points out, on the High Court's approach to the interpretation of section 10 the question of constitutionality did not arise for decision at all.

[121] See the first judgment at [87].

[122] Id at [90].

[167] However, the first judgment's acknowledgement, together with my interpretation of section 10, means that there simply cannot be an arbitrary deprivation of property. If the ANC regulates the existing matrimonial property, such regulation is in accordance with the contractual intention of the parties and respects their autonomy. It is precisely the same autonomy as is respected, without judicial oversight, when parties get married for the first time. Conversely, if the ANC does not regulate the existing matrimonial property, neither spouse is deprived of any matrimonial property.

The outcome of the present case

[168] As to the disposition of this particular case, and leaving aside procedural considerations, the result would be that the ANC concluded by the spouses in February 2019 was valid and that the declaration that section 10(2) is inconsistent with the Constitution should not have been made. Whether, on a proper interpretation, this particular ANC created, as between the spouses themselves, the same position as if they had never been married in community of property, or whether the parties continued to be equal owners of the joint estate as it existed immediately before the civil marriage, would be a matter for the trial court to decide.

[169] However, the present first respondent (the plaintiff in the divorce action) did not appeal against the High Court's declaration, in paragraph 1 of its order, that the ANC is invalid and unenforceable. Notwithstanding the formulation of the present applicant's (the defendant's) notice of motion in this Court, that declaration is not subject to confirmation by this Court. The declaration was made on the basis of an interpretation of section 10(2) with which I disagree. But in the absence of an appeal by the first respondent, this Court does not have jurisdiction to set aside the declaration. Accordingly, the divorce trial will have to proceed on the basis that the ANC is invalid and unenforceable.

[170] Nevertheless, a comment on the High Court's reasoning is appropriate. The High Court evidently thought that the ANC in this case, if valid, would have deprived

the applicant of the benefit of the assets forming part of the community estate. That may not be so. The parties expressly adopted the accrual regime, declared for that purpose that the net values of their respective estates were nil, and did not exclude any assets from the accrual. If the line of cases recently approved by the Supreme Court of Appeal in *D.C.M v C.C.M*[123] is correct (a point on which I express no opinion), the husband would be bound by the declared nil value and would not be permitted to take advantage of section 6(3) in order to prove a different value. Assuming, therefore, that upon divorce the applicant had no relevant assets in her own name, she would have been entitled upon divorce to half of the value of the assets owned by the first respondent at the date of the divorce, including those he already owned at the date of the civil marriage. If, after the conclusion of the civil marriage, the first respondent had acted in a way which seriously prejudiced the applicant's right to share in the accrual, she would have been entitled in terms of section 8 of the MPA[124] to approach a court for an early division of the accrual, just as she would have been entitled to do under section 20[125] if the community estate had continued to exist.

[171] In regard to paragraphs 2 and 3 of the High Court's order, the declarations that section 10(2) is inconsistent with the Constitution and invalid should not be confirmed,

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[123] *D.C.M v C.C.M* [2025] ZASCA 55; [2025] 3 All SA 291 (SCA).

[124] Section 8(1) reads:

> "A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just."

Section 8(2) provides that a court making such an order may order that the accrual system "be replaced by a matrimonial property system in terms of which accrual sharing as well as community of property and community of profit and loss are excluded".

[125] Section 20(1) reads:

> "A court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just."

Section 20(2) provides that a court making such an order may order that the community of property "be replaced by another matrimonial property system, subject to such conditions as it may deem fit".

and the consequential orders in paragraphs 4 and 5 fall away. The procedural directions in paragraphs 6 and 7, relating to the referral to this Court, do not require attention; a referral to this Court was indeed required by virtue of the declarations in paragraphs 2 and 3 of the order.

[172] In paragraph 8 of its order, the High Court directed the present first respondent to pay the applicant's costs, notwithstanding that he did not appear in the High Court to oppose the relief sought by the applicant in the special case. The High Court said that, notwithstanding such non-appearance, the first respondent had put up a version that contradicted that of the applicant, who had been placed in a position where she had to litigate to safeguard her proprietary rights. Since part of the applicant's success in the High Court was on the unconstitutionality of section 10(2), the confirmation proceedings in this Court inevitably include a consideration of the costs incurred in the High Court on that issue.

[173] In my view, therefore, and notwithstanding the absence of an appeal by the first respondent, this Court is at large to reconsider the costs order. Since the applicant should not have succeeded in obtaining a declaration that the ANC was invalid, and since the declarations regarding the unconstitutionality of section 10(2) were incorrectly made, the appropriate order would be for the parties to bear their own costs in the High Court.

[174] In this Court, none of the respondents opposed the application, although the second and third respondents filed written submissions in response to directions from the Chief Justice and appeared at the hearing where they made oral submissions. Even if the second and third respondents had opposed confirmation, the applicant would have enjoyed *Biowatch*[126] protection. The parties must thus bear their own costs in this Court.

[175] I would thus make the following order:

[126] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

1. No order is made on paragraph 1 of the High Court's order, since that order is not subject to confirmation by this Court and there has been no appeal against it.
2. The declarations of constitutional invalidity in paragraphs 2 and 3 of the High Court's order are not confirmed.
3. The parties must bear their own costs in the High Court relating to the adjudication of the special case.
4. The parties must bear their own costs in this Court.

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For the Second and Third Respondents:	W R Mokhare SC, T H Skosana and M X Mfeka instructed by the Office of the State Attorney, Pretoria