The Legal Implications of *Sithole v Sithole* 2021 5 SA 34 (CC) on African Spouses in Old Civil Marriages

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Abstract

In *Sithole v Sithole* 2021 5 SA 34 (CC) the Constitutional Court held that the differentiation in the default matrimonial property regime between spouses in civil marriages entered into before 2 December 1988 (old civil marriages) by Africans under section 22(6) of the *Black Administration Act* 38 of 1927 (hereafter the *BAA*) and spouses in civil marriages entered into by Africans after 2 December 1988 (new civil marriages) as well as those of other races amounted to unfair discrimination on account of race, gender and age. Under section 22(6) of the *BAA*, old civil marriages were by default out of community of property. New civil marriages were by default in community of property. The court, therefore, confirmed the declaration that sections 21(2)(*a*) and 25(3) of the *Matrimonial Property Act* were unconstitutional and invalid in so far as they perpetuated the discrimination in section 22(6) of the *BAA*. The court held that all old civil marriages were now in community of property, profits and loss. This note is a critical discussion of this judgment in so far as it extended community of property not only to the litigant and similarly placed spouses, but also to non-litigants who may not have desired community of property to apply to their marriages.

Keywords

Marriage in community of property; matrimonial property; *Black Administration Act*; divorce; forfeiture; redistribution.

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1 Introduction

The South African matrimonial property law has undergone constitutional redress in various respects over the past years. These redresses touched on both customary marriages and civil marriages. They touched on all Africans, Whites, Indians and Coloureds. One of the results of these constitutional redresses has been to do away with racially coloured laws. There were numerous examples of racially coloured laws in the context of matrimonial property law. For instance, section 22(6) of the *Black Administration Act*[1] (the *BAA*) provided that civil marriages entered into by Africans were automatically out of community of property, whereas civil marriages entered into by other races under the *Marriage Act*[2] were automatically in community of property. Obviously, this state of affairs was inconsistent with the *Constitution*[3] and had to be redressed.

In *Sithole v Sithole*[4] the Constitutional Court delivered constitutional redress on civil marriages that were entered into by Africans in terms of section 22(6) of the *BAA* (old civil marriages). Although this provision was repealed by section 1(*e*) of the *Marriage and Matrimonial Property Law Amendment Act*[5] (*MMPLAA*), its legacy continued to be felt by those who had been married under it before the repeal and had not amended their matrimonial property regime within two years of the commencement of the *MMPLAA* as required by section 21(2) and section 25(3) of the *Matrimonial Property Act* (*MPA*)[6] – these provisions are discussed further below. The marriages that fell in this category continued to be out of community of property. This position was obviously different from that of those Africans who entered into civil marriages after the commencement of the *MMPLAA* (new civil marriages). Similar to civil marriages entered into by Whites, Indians and Coloured people, the latter category of marriages was by default in community of property. Accordingly the court found that the differentiation in the matrimonial property regime between Africans in old civil marriages and those in new civil marriages as well as other races was unconstitutional on

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1 *Black Administration Act* 38 of 1927 (*BAA*).

2 *Marriage Act* 25 of 1961.

3 *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

4 *Sithole v Sithole* 2021 5 SA 34 (CC) (hereafter *Sithole*).

5 *Marriage and Matrimonial Property Law Amendment Act* 3 of 1988 (*MMPLAA*).

6 The *MMPLAA* commenced on 2 December 1988. The two years would have been up on 2 December 1990.

the grounds of race, gender and age.[7] Therefore, the court held that old civil marriages entered into by Africans were now in community of property, profits and loss.[8]

This case note is a critical discussion of the decision of the court in so far as it held that all old civil marriages by Africans are now in community of property, profits and loss. The case note accepts that the judgment was welcomed by the litigant, Mrs Sithole, as well as other similarly placed spouses – rightfully so; but the same judgment left others to despair. This is because the community of property does not work for everybody. Nonetheless, the court decided that every African spouse in an old civil marriage was now married in community of property, whether or not they desired it. In making this decision the court did not consider the destabilising impact that this decision might have on those who may not desire to exist in community of property, and who were not before the court. The court only ordered that spouses who opted for marriage out of community of property should notify the Director-General (hereafter the DG) of the Department of Home Affairs in writing of their desire to exclude the community of property. This aspect of the judgment is also discussed.[9]

A brief history of constitutional redresses in our matrimonial property law opens up the discussions. The legal position that applied before *Sithole*, which was challenged therein, is set out. Thereafter, the facts and decision of the court follow. The discussion will set out the nature of marriage in community of property and then critically discuss some of the negative aspects of this marital property system. Some of the matrimonial remedies that may be available to spouses who do not desire the community of property, profits and loss are critically considered. Since the respondent in *Sithole*, Mr Sithole, did raise the redistribution of assets as a possible remedy instead of extending the community of property to old civil marriages, the recent development of this remedy in *EB (Born S) v ER (Born B); KG v Minister of Home Affairs*[10] are also discussed.

7 *Sithole* para 22.
8 *Sithole* para 59.2.
9 *Sithole* para 59.3.
10 *EB (Born S) v ER (Born B); KG v Minister of Home Affairs* 2024 1 BCLR 16 (CC) (hereafter *EB v ER*).

2 A brief history of constitutional redresses in matrimonial property law

The decision in *Gumede v President of the Republic of South Africa*[11] is one of the earliest acts of constitutional redress. In this case the applicant and her husband entered in a monogamous customary marriage in 1968.[12] According to section 20 of the *KwaZulu Act on the Code of Zulu Law*[13] (the *KwaZulu Act*) read with section 20 of the *Natal Code of Zulu Law*[14] (the Code), the head of the family was the owner of all property and enjoyed sole control over family property. Essentially, the wife had no capacity in relation to family property, and sometimes her own property. Although section 6 of the *Recognition of Customary Marriages Act*[15] (*RCMA*) ameliorated this position by conferring full status and capacity on women on the basis of equality with their husbands, this was cold comfort to those women who had entered into customary marriages prior to the *RCMA* (the so-called old customary marriages), such as the applicant. This is so because section 7(1) of the *RCMA* provided that the proprietary consequences of old customary marriages continued to be governed by customary law.[16] Presumably, the customary law envisaged was that espoused in section 20 of the *KwaZulu Act* and the Code.[17] Meanwhile, section 7(2) provides that monogamous customary marriages entered into after the commencement of the *RCMA* (new customary marriages) were in community of property, profit and loss between the spouses.

The applicant in *Gumede* challenged the constitutionality of sections 7(1) and (2), *inter alia*, arguing that they infringed her right to equality in so far as they differentiated between people in old customary marriages and those in new monogamous customary marriages. Her argument was that the differentiation in these provisions, *inter alia*, amounted to unfair discrimination on the ground of gender and race.[18] While the High Court upheld both the grounds, the Constitutional Court confirmed unfair discrimination on the ground of gender,[19] and that such discrimination was

11 *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).
12 *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) para 6.
13 *KwaZulu Act on the Code of Zulu Law* 16 of 1985 (the *KwaZulu Act*).
14 *Natal Code of Zulu Law* Proclamation R151 of 1987 (the Code).
15 *Recognition of Customary Marriages Act* 120 of 1998 (*RCMA*).
16 *Sithole* para 26.
17 *Sithole* para 11.
18 *Sithole* para 2.
19 *Sithole* para 22.

not justifiable.[20] The result of this judgment was to make old monogamous customary marriages in community of property, profits and loss.[21]

As pointed out above, there are several other judgments on matrimonial property matters. For the sake of convenience these will be discussed briefly. The case of *MM v MN*[22] dealt to a certain extent with matrimonial property matters in new polygynous customary marriages. In this case the Constitutional Court held that the proprietary consequences of a new polygynous customary marriage entered into without a court-approved contract as required by section 7(6) of the *RCMA* were that the marriage was out of community of property, profits and loss.[23] This part of the decision was unnecessary because the issue before the court was the validity of a subsequent Xitsonga customary marriage in the absence of the consent of the first wife. Further, the majority of the court decided that, in the absence of the consent of the first wife, the subsequent marriage was invalid,[24] thus rendering the marriage monogamous.

MM v MN only addressed the proprietary consequences of new polygynous customary marriages in the absence of a court-approved contract. The question of constitutional redress still remained with respect to the proprietary consequences of old polygynous customary marriages. According to section 7(1), the proprietary consequences of these marriages continued to be governed by customary law. These were not affected by the decision in *Gumede*, as this decision applies only to old monogamous customary marriages.

The proprietary consequences of old polygynous customary marriages received constitutional redress in *Ramuhovhi v President of the Republic of South Africa*[25] (hereafter *Ramuhovhi*). Madlanga J described the *Ramuhovhi* case as a sequel to *Gumede*[26] in that it challenged the constitutionality of section 7(1) of the *RCMA* in so far as it still provided that the proprietary consequences of old polygynous customary marriages would continue to be governed by customary law, and as already stated

20 *Sithole* para 35.
21 *Sithole* para 59.
22 *MM v MN* 2013 4 SA 415 (CC).
23 See para 41, where the court endorses the decision of the Supreme Court of Appeal (the SCA) in *Ngwenyama v Mayelane* 2012 4 SA 527 (SCA) para 38 – that the marriage will be out of community of property.
24 *MM v MN* 2013 4 SA 415 (CC) para 83.
25 *Ramuhovhi v President of the Republic of South Africa* 2018 2 SA 1 (CC) (hereafter *Ramuhovhi*).
26 *Ramuhovhi* para 3.

above, the customary law position was that the head of the family retained sole ownership and control over the family property.

The applicants were the daughters of the deceased customary wives of the deceased Mr Netshituka.[27] The facts of this case are protracted, and in any event it is not necessary for the purposes of this paper to state the full facts. It suffices to point to the decision of the court on the challenge to section 7(1). The court held that section 7(1) perpetuated inequality between husband and wife in so far as it continued to provide that the proprietary consequences in old customary marriages continue to be governed by customary law.[28] It also found that in so far as the provision differentiated between old and new polygynous customary marriages, it discriminated on the ground of marital status,[29] and this was automatically unfair.[30] In this decision the constitutional court emphasised the distinction between house property, family property and personal property. It held that all the spouses in old polygynous customary marriages must share equally in the ownership, management and control of family property.[31] The husband and the wife of the house concerned must share equally in the ownership, management and control of the house property.[32] Each spouse would retain exclusive ownership of personal property.[33]

The legislature did not amend the *RCMA* following the decision in *Gumede*. The necessary amendments were carried out only after the decision in *Ramuhovhi*. The *Recognition of Customary Marriages Amendment Act*[34] was enacted to amend the relevant provisions of the *RCMA*, particularly section 7(1), to provide for family property, house property and personal property, as mentioned above.

As stated above, the latest instalment of constitutional redress to our matrimonial property law occurred in *EB (Born S) v ER (Born B); KG v Minister of Home Affairs*. This decision is discussed briefly below.

27 *Ramuhovhi* para 5.
28 *Ramuhovhi* para 35.
29 *Ramuhovhi* para 37.
30 *Ramuhovhi* para 39.
31 *Ramuhovhi* para 51.
32 *Ramuhovhi* para 63.
33 *Ramuhovhi* para 63.
34 *Recognition of Customary Marriages Amendment Act* 1 of 2021.

3 The legal position before *Sithole*

Perhaps a great starting point is the law as it was when the Sitholes entered into a civil marriage on 16 December 1972.[35] At that time laws were often racially coloured in that different laws applied to different people of different races. Such was the case with marriage laws. Although Africans did have the choice of a civil or a customary marriage, the latter type of marriage was not fully recognised.**[36]** Where Africans entered into a civil marriage, more probably than not their marriage would be a marriage in terms of section 22(6) of the *BAA*. whereas civil marriages of the other races were in terms of the *Marriage Act.*

As will be seen below, civil marriages under the *Marriage Act* were by default in community of property. However, the position was different with respect to civil marriages in terms of section 22(6) of the *BAA*. Section 22(6) of the *BAA* provided:

> A marriage between Natives, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses : Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, native commissioner or marriage officer (who is hereby authorized to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community.

Essentially, civil marriages between Africans entered into under section 22(6) of the *BAA* did not result in a community of property, profits and loss. If the spouses desired the community of property, they were required to make a declaration to this effect within one month of the marriage. Such a declaration could be made before any magistrate, native commissioner or marriage officer.

There is something to be said about section 22(6). In *Sithole* the court acknowledged that many people who were married in terms of this provision were not aware that their marriages were under the *BAA*. A handful of them thought that they were married in community of property.[37] It is also

35 *Sithole* para 6.

36 Horn and Janse van Rensburg 2002 *JJS* 54 55. Dlamini 1989 *CILSA* 330 points out that any form of recognition was for specific purposes. Sometimes the marriages were recognised only in special or inferior courts.

37 *Sithole* para 37.

conceivable that, as a result of a lack of awareness about their rights, they were not even aware that they could make a declaration to include the community of property within a month of the marriage.[38] Indeed the apartheid government did not regard informing people of their rights as important.[39]

While it is true that the democratic government has dedicated a significant portion of its resources to informing people of their rights, the focus has been on basic human rights. Some basic rights have received more attention than others; for instance, the right to vote receives unprecedented attention in each election year. There is very little, if any, public awareness of matrimonial property rights. Because of this, it may be said that the lack of awareness is not unique to people who were married in terms of section 22(6).

When the *MMPLAA* was passed it amended both the *BAA* and the *MPA*. Section 22(6) of the *BAA* was repealed.[40] The result of this was that new civil marriages (civil marriages entered into after the commencement of the *MMPLAA*) entered into by Africans were now under the *Marriage Act*, and they were now in community of property, profits and loss, by default. This brought civil marriages of Africans on a par with those of Whites, Indians and Coloured people.

The *MMPLAA* also amended the *MPA*. Section 3 of the *MMPLAA* amended the *MPA* by inserting section 21(2) into the *Act*. Section 21(2)(*a*)(ii) made it possible for spouses in old civil marriages to amend their matrimonial property system by including the accrual system. However, this had to be done within two years of the commencement of the *MMPLAA* or such longer period determined by the Minister by notice in the *Gazette*. As stated above in note 6, the *MMPLAA* commenced on 2 December 1988, so the two years were up on 2 December 1990. The change could be affected by the registration of an antenuptial contract with the registrar of deeds.[41] The marriages of those spouses who did not amend their matrimonial property systems within the two years remained out of community of property, without the accrual.

Section 4(*c*) of the *MMPLAA* inserted section 25(3) into the *MPA*. Section 25(3)(*b*) of the *MPA* made it possible for spouses in old civil marriages to amend their matrimonial property system by converting their marriages into

38 *Sithole* para 36.
39 *Sithole* para 36.
40 Section 1(*e*) of the *MMPLAA*.
41 Section 21(2)(*a*) of the *Matrimonial Property Act* 88 of 1984 (*MPA*).

marriages in community of property. This had to be done within two years of the commencement of the *MMPLAA* or such longer period determined by the minister by notice in the *Gazette*. A simplified procedure was prescribed. The parties simply needed to register an antenuptial contract with the register of deeds.[42] The marriages of those spouses who did not amend their matrimonial property systems within the two years remained out of community of property.

In *Sithole* the Constitutional Court pointed out that a lot of people were not aware of the changes that occurred in 1988, and because of this, they had not taken the opportunity to amend their matrimonial property system. Therefore their marriages remained out of community of property.[43] As will be seen below, Mrs Sithole was among those people who had not become aware of the changes that occurred in 1988, and as a result she and her husband had not amended their matrimonial property system.

4 The facts and decision in *Sithole*

Important facts have already been mentioned above in numerous instances. Therefore, this part of the case note will be tersely written. The applicant (Mrs Sithole) and the deceased (Mr Sithole) entered into a civil marriage on 16 December 1972.[44] Their marriage was under section 22(6) of the *BAA*, and therefore out of community of property by default, unless the parties declared that they wanted the community of property to apply to their marriage within the stipulated one month. It was common cause that the Sitholes had not made a declaration.[45]

During the marriage Mrs Sithole was a self-employed housewife devoted to raising her family. She also ran a business of selling clothes from her house. In 2000 the Sitholes bought a house.[46] Although both of them contributed to the purchase of the house; it was registered in Mr Sithole's name only. After a while their marriage relationship became sour and Mr Sithole threatened to sell the house.[47] Mrs Sithole then successfully approached the court for an order interdicting her husband from selling the house.[48] In the meantime she instituted an application against the validity of sections 21(2)(*a*) and 25(3)(*b*) of the *MPA, a*mongst others, in so far as they determined that civil

42 Section 25(3)(*b*) of the *MPA*.
43 *Sithole* para 1.
44 *Sithole* para 6.
45 *Sithole* para 6.
46 *Sithole* para 7.
47 *Sithole* para 7.
48 *Sithole* para 8.

marriages entered in terms of section 22(6) of the *BAA* (that is, old civil marriages entered into before the *MMPLAA*) continued to be out of community of property and thus perpetuated the discrimination meted out by section 22(6) of the *BAA*.

The argument before the High Court in Durban, KwaZulu-Natal, was that the said provisions were unconstitutional in that they differentiated between Africans in old civil marriages and those in new civil marriages, as well as between Africans and Whites, Indians and Coloured people.[49] The High Court agreed that the differentiation was automatically unfair because it was based on marital status, race, gender and age, and declared the said provisions unconstitutional.[50] The Constitutional Court confirmed that the differentiation in the said provisions amounted to unfair discrimination on the grounds of race, gender and age.[51]

The constitutionality argument is not the crux of this note and it will not be carried any further. For the purpose of this note it must be stated that after confirming that the said provisions were constitutionally invalid the Constitutional Court declared that all old civil marriages that remained out of community of property were now in community of property, profits and loss.[52] It is important to point out that the court also indicated that parties who opted for marriage out of community of property were to notify the DG of the Department of Home Affairs.[53]

5 The discussions

It must be emphasised that this note is a critical discussion of the decision of the court in so far as it declared that all old civil marriages that had been entered into under section 22(6) of the *BAA* were now in community of property. This note appreciates that the decision was a welcome change to the applicant as well as to others similarly placed. However, it is quite conceivable that the impact of this part of the decision will be felt differently by different people – including those who had become accustomed to some of the benefits of marriage out of community of property.

This note observes that the decision of the court may be construed as presupposing that marriage in community of property is an ideal marital property regime in South Africa. It is hereby argued that this is not so. The

49 The decision of the High Court is reported as *AS v GS* 2020 3 SA 365 (KZD).
50 *AS v GS* 2020 3 SA 365 (KZD) paras 33 and 63.
51 *Sithole* para 22.
52 *Sithole* para 59.2.
53 *Sithole* para 59.3.

discussions hereunder expose the nature of marriage in community of property. They also focus on some of the negative aspects of marriage in community of property. It is observed that people who did not litigate will now be impacted by some of the negative aspects of marriage in community of property.

5.1 The nature of marriage in community of property

Marriage in community of property originally entailed that the husband retained sole control of all the property – including the wife's possessions. The husband could do as he pleased with the assets.[54] However, under Roman-Dutch law there was a slight change; marriage entailed a universal community of property, with both parties as partners; albeit with the woman being the junior partner.[55] Nonetheless, the wife still owned half of the joint estate.[56] Unfortunately this co-ownership was nullified by the fact that the husband retained marital power over the wife and her assets.[57] Briefly, such marital power refers to a system where the husband had absolute decision-making powers in relation to all property – including the property of the wife.[58]

In its modern form, marriage in community of property entails the merging of the estates of the two spouses to form a joint estate[59] and there is a rebuttable presumption that all marriages are in community of property, profits and loss in South Africa.[60] The joint estate comes into existence immediately after the marriage is solemnised.[61] Subject to a few exceptions, all assets and liabilities acquired and incurred before and during the

54 Hahlo 1959 *Acta Juridica* 47, 48.

55 Hahlo 1959 *Acta Juridica* 48. The parties could execute an antenuptial contract excluding the community of property and the marital power of the husband. This meant that the wife could keep her assets free of her husband's control.

56 Barratt *et al Law of Persons and the Family* 294.

57 Hahlo 1959 *Acta Juridica* 48.

58 Starosta 2019 *Stell LR* 155. Also see Mavundla, Strode and Dlamini 2020 *PELJ* 1-4, who also point out that at common law the husband had the right to rule over his wife and defend her. This in turn gave him the right to administer her goods and dispose of them at his will. Some scholars opine that marital power had three elements to it; the husband's power as the head of the family, the husband's power over the person of his wife, and the husband's power over the property of his wife – see Van Zyl 1990 *CILSA* 228.

59 Hahlo *South African Law of Husband and Wife* 5th ed 158.

60 Heaton *Law of Divorce* 59-60. This presumption may be rebutted by proving the existence of an antenuptial contract excluding the community of property, an amendment of the matrimonial property system in terms of s 21 of the *MPA,* or if marriage out of community of property is the default system in the *lex loci domicilii* of the husband.

61 Hahlo *South African Law of Husband and Wife* 5th ed 157.

subsistence of the marriage are part of the joint estate.[62] The parties become tied co-owners and co-debtors of the assets and liabilities in the joint estate in undivided and indivisible half-shares.[63]

As noted above, the general rule that all property acquired before and during the marriage will form part of the joint estate is subject to a few exceptions. It is possible for a spouse in a marriage in community of property to accumulate a separate estate. In our law certain assets are excluded from the joint estate. A full discussion of these exclusions is beyond the scope of this paper, and they are, therefore, simply mentioned. Some of the exclusions are: assets excluded by antenuptial contract, assets excluded in a will or deed of donation, delictual damages from third parties for non-patrimonial loss, delictual damages compensating for bodily injury inflicted by the other spouse,[64] small engagement gifts, property subject to a *fideicommissum* or usufruct,[65] and personal assets belonging to a customary wife in a polygynous customary marriage.[66] This list of exclusion is not exhaustive.

The joint estate subsists until the marriage is dissolved through either death or divorce.[67] During the subsistence of the marriage, both the parties have the right to participate in the management of the joint estate. No longer is the husband free to do as he pleases.[68] In terms of section 15 of the *MPA*, spouses require each other's consent to enter into transactions that bind the joint estate. Section 15 draws a distinction between written consent and general consent. Written consent is required for the more serious transactions such as the sale of immovable property of the joint estate.[69] The alienation of some movable assets and donations that will not prejudice the interest of the other spouse in the joint estate requires general consent.[70]

62 Evans and Abrie 2006 *Stell LR* 105, 106.
63 *Estate Sayle v Commissioner of Inland Revenue* 1945 AD 388; *Zulu v Zulu* 2008 4 SA 12 (D) 15E-G.
64 Barratt *et al Law of Persons and the Family* 287-288.
65 Van Heerden, Skelton, Du Toit *Family Law in South Africa* 87-91.
66 This exclusion came as a result of the Constitutional Court's decision in *Ramuhovhi*. See Van Heerden, Skelton, Du Toit *Family Law in South Africa* 88 for a brief discussion of how this exclusion came about.
67 Heaton and Kruger *South African Family Law* 62.
68 Section 14 of the *MPA* makes it clear that the wife has equal powers in relation to the joint estate. She may incur debts in the process of managing the joint estate.
69 Section 15(2)(*a*) of the *MPA*.
70 Section 15(3) of the *MPA*.

On dissolution of the marriage, the joint estate becomes divisible.[71] The general rule with respect to the community of property, profits and loss is that the spouses will share equally in the nett after all debts have been paid.[72] This is the case regardless of who contributed the most or the least. A spouse cannot argue for a form of forfeiture against the other spouse solely on the ground that the latter contributed the least, unless the lack of contribution can be attributed to some form of marital misconduct.

5.2 Some negative aspects of marriage in community of property

Although marriage in community of property does come with some advantages for the least contributing spouse, it does have it disadvantages. Some of these disadvantages are discussed below.

5.2.1 Insolvency

The joint estate is a debtor for the purposes of insolvency.[73] Therefore, both spouses must approach the court if they wish to voluntary surrender the joint estate to be sequestrated.[74] A creditor wishing to sequestrate the joint estate must bring the application against both the spouses, unless the creditor can show that despite having taken reasonable steps, he had been unable to establish if the debtor was married or not. Under the circumstances the court may entertain the application.[75] Notwithstanding this, if the sequestration order is granted by the court it is effective against both the spouses. The spouses will be divested of their control of the estate and it will vest in the trustee of the insolvent estate.[76] All assets, including the separate assets of a spouse formed though the excluded assets,[77] and assets acquired during the sequestration process fall into the insolvent estate.[78]

5.2.2 Joint management of the joint estate

As indicated above, in terms of section 14 of the *MPA* both spouses have equal powers and rights in the joint estate. This was a significant move as is removed matrimonial property from the marital power of the husband. Perhaps joint management is easier when the parties were married in

71 Heaton and Kruger *South African Family Law* 63.
72 Denson 2021 *Obiter* 352, 355.
73 Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 5.
74 Section 17(4)(*a*) of the *MPA.*
75 Section 17(4)(*b*) of the *MPA.*
76 Section 20(1)(*a*) of the *Insolvency Act* 24 of 1936 (the *Insolvency Act*).
77 Section 20(2)(*a*) of the *Insolvency Act*.
78 Section 20(2)(*b*) of the *Insolvency Act*.

community of property rights from the start. In cases such as *Gumede* and *Sithole*, where the community of property, profits and loss comes about as a result of a court order long after the parties were married out of community of property, joint management can present a serious challenge for some.

For instance, spouses who may not be on speaking terms will not require each other's consent and cooperation in the management of what they thought was their own estate. While the spirit of *Gumede* and *Sithole* was meant to empower those women who were in the same situation as the litigants in these cases, the opposite was achieved in the case of those women who did not desire community of property as a result of their personal circumstances. Women who are in a weaker bargaining position may not obtain the consent or cooperation of their husbands. This is a blow to those women who were used to managing their own affairs without the intervention of their husband as a result of the exclusion of the community of property.

It must be conceded that the bulk of the people who were married in terms of section 22(6) of the *BAA* were not even aware that their marriage was out of community of property. Perhaps one of the reasons that they were never aware pf the situation is the ease of the sole management of their estates. But some of them will certainly feel the change when their freedom of contract is severely curtailed. This will be felt by third parties as it may bring into question the validity of some of the transactions entered into by a spouse without the consent of the other.[79] Before *Sithole*, the consent of the other spouse was not legally required; but after *Sithole* it will be required.

5.2.3 Temporary loss of control of the joint estate on the death of the first dying

Quite ironically, death is the most desired way of ending a marriage. Unlike a divorce, there is little or no stigma associated with the dissolution of marriage by death. Nonetheless, death does have its negative impact on a marriage in community of property. The surviving spouse will be temporarily divested of control of the joint estate on the death of the first dying.[80] The executor assumes control of the joint estate, collects all debts due to it and

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79 The legal position is that transactions entered into by a spouse without the required consent may be invalid – s 15(9) of the *MPA*. Also see *Govender v Maitin* 2008 6 SA 64 (D), where the court held that the sale of immovable property by a spouse without the consent of the other spouse was invalid.

80 Heaton and Kruger *South African Family Law* 115-116. The surviving spouse may deal with the assets only in order to preserve them, maintain them, pay funeral expenses and maintenance of him or herself as well as any dependents of the deceased.

pays all debts owed by it.[81] It is only once this has been done that the executor delivers half of the nett to the surviving spouse.[82]

Heaton and Kruger carefully highlight some of the disadvantages of this system. Some or all the assets in the joint estate may have to be sold in order to pay what is owed to creditors. This includes the immovable property. The interests of the heirs of the deceased may compete with the needs of the surviving spouse.[83]

5.2.4 Tax implications on marriage in community of property

Without saying much about it in the *Income Tax Act*[84] (*ITA*) marriage in community of property has tax implications on the spouses. Section 7 of the *ITA* deems some income as having accrued to both spouses and it is taxed in the hands of both the spouses.

5.2.5 Compensation for non-patrimonial loss not always excluded

Section 18(a) of the *MPA* decreed that compensation received by a spouse as a result of non-patrimonial loss was excluded from the joint estate. However, in the light of the recent decision of the Supreme Court of Appeal (the SCA) in *LH v ZH*,[85] only compensation for non-patrimonial loss as a result of a delict committed during the marriage is excluded from the joint estate.

In *LH v ZH* the SCA dealt with a matter where the wife (respondent) had been compensated for non-patrimonial loss before the marriage. She invested some of the compensation.[86] Thereafter she married the appellant. On divorce the appellant argued that the money received for non-patrimonial loss was not excluded from the division of the joint estate. The respondent on the other hand argued that compensation for non-patrimonial loss was personal in nature and ought to be excluded from the joint estate.[87]

The SCA disagreed with the respondent. It held that the protection in section 18(*a*) applied only to damages for non-patrimonial loss recovered during the course of the marriage in community of property. The court went on to point out that section 18(*a*) did not apply in relation to damages for non-

81 Heaton and Kruger *South African Family Law* 115.
82 Heaton and Kruger *South African Family Law* 115.
83 Heaton and Kruger *South African Family Law* 116.
84 *Income Tax Act* 58 of 1962.
85 *LH v ZH* 2022 1 SA 384 (SCA).
86 *LH v ZH* 2022 1 SA 384 (SCA) para 1.
87 *LH v ZH* 2022 1 SA 384 (SCA) para 4.

patrimonial loss recovered before the marriages.[88] Those damages would fall into the joint estate unless excluded by an antenuptial contract.[89] Monareng criticises this decision of the SCA in so far as it requires spouses to enter into antenuptial contract if they wish to protect payments for non-patrimonial loss received before the marriage.[90] The author further argues that the differentiation between spouses whose non-patrimonial loss was awarded before marriage and those who received them after marriage amounts to discrimination in terms of section 9 of the *Constitution* and it cannot be justified in terms of section 36 of the *Constitution*.[91]

5.3 Remedies available to those people who do not desire community of property

This part of the case note now focusses on some of the remedies that are available to spouses who are married in community of property as a result of *Sithole*.

5.3.1 Notifying the DG of the Department of Home Affairs in writing

In *Sithole* the court also ordered those spouses who have opted for marriage out of community of property to notify the DG of the Department of Home Affairs in writing of same.[92] This part of the court order raises more questions than it supplies answers. For instance, did the court create a process that circumvented section 21(1) of the *MPA*, which provides for the amendment of a matrimonial property regime? If so, is it a requirement that the DG should acknowledge the receipt of a notification or respond to it in order for it to be of force and effect? What if the DG neither confirms the receipt of the notification nor responds to it? Should both spouses write to the DG jointly? Does the postal acceptance rule apply? Finally, what is the meaning of "writing"? It should be emphasised that under section 12 of the *Electronic Communications and Transactions Act*,[93] writing includes data messages that are "accessible in a manner usable for subsequent reference."[94] This means that dropping an email to the DG will qualify – which is a very simplistic way of amending something as serious as a matrimonial property regime.

88 *LH v ZH* 2022 1 SA 384 (SCA) para 10.
89 *LH v ZH* 2022 1 SA 384 (SCA) para 11.
90 Monareng 2023 *De Jure* 77, 83.
91 Monareng 2023 *De Jure* 84.
92 *Sithole* para 59.3.
93 *Electronic Communications and Transactions Act* 25 of 2002.
94 Section 12(*a*) and (*b*) of the *Electronic Communications and Transactions Act* 25 of 2002.

5.3.2 Amendment of matrimonial property regime

Spouses who find themselves married in community of property as a result of the judgment in *Sithole* have the option of approaching the court for leave to amend their matrimonial property regimes. As already pointed out above, section 21(1) of the *MPA* provides for the procedure to amend a matrimonial property regime. Accordingly, spouses may approach the court for leave to amend their matrimonial property regimes at any time. They must satisfy the court that (a) there are sound reasons for the proposed change,[95] (b) that sufficient notice of the proposed change has been given to all creditors of the parties[96] and (c) that no other person will be prejudiced as a result of the proposed change.[97] If the court is satisfied that these requirements have been met, it may order that the matrimonial property regime between the parties shall no longer apply and authorise them to execute an antenuptial contract that will regulate their future matrimonial property regime.

The above does seem like a simple process at first glance; however, there are inherent challenges. The fact that the spouses must make a joint application may present a challenge for a spouse, especially the wife, who will need to persuade the other to cooperate with the process. The cooperation envisaged is not only cooperating in the application, but also being forthcoming with necessary information such as details of the couple's creditors. The application itself may not be affordable to some spouses.

It has been pointed out above that the court in *Sithole* held that spouses who opted out of community of property could notify the DG of their decisions. It is unclear from the judgment whether notifying the DG is an additional process to that required by section 21(1) of the *MPA*, or a circumvention of the process that is available only to those spouses whose civil marriages were under section 22(6) of the *BAA*. If the order of the court envisages a simplified process that is available only to spouses whose civil marriages were under section 22(6) of the *BAA*, then this may bring into question the constitutionality of a court order in so far as it differentiates between spouses in civil marriages that were under section 22(6) of the *BAA* and other spouses.

95 Section 21(1)(*a*) of the *MPA.*
96 Section 21(1)(*b*) of the *MPA*.
97 Section 21(1)(*c*) of the *MPA*.

5.3.3 Forfeiture of patrimonial benefits

Section 9 of the *Divorce Act*[98] (the *DA*) provides for the forfeiture of patrimonial benefits (hereafter forfeiture). The purpose behind the forfeiture is to prevent a spouse from benefitting from a marriage that he or she has destroyed,[99] or one that has lasted only a short duration.[100] Put differently, although forfeiture usually follows some form of blameworthiness, it may also follow a fault-neutral ground such as the short duration of a marriage. In *T v R*[101] the court ordered forfeiture on the ground that the marriage had lasted less than two years.[102]

Forfeiture is available to a spouse who is now married in community of property as a result of *Sithole*. However, the problem with this remedy is that it is a divorce remedy. Only a divorce court has jurisdiction over forfeiture matters.[103] Spouses may not approach a court for a stand-alone divorce order.[104] This remedy is also not available where the marriage is dissolved through the death of the first dying spouse.[105] The fact that forfeiture is a divorce remedy presents a serious challenge to those who do not wish to get a divorce.

5.3.4 The redistribution of assets remedy

When the marriage in *Sithole* was out of community of property, Mrs Sithole could ask the court for a redistribution of assets order in terms of section 7(3)-(6) of the *DA*. However, this did not assist Mrs Sithole, as a redistribution of assets is only a divorce remedy. Mrs Sithole did not wish to obtain a divorce.[106] Although section 7(3) of the *DA* is no longer applicable to the marriage, the recent developments in this area of matrimonial property law warrant a brief discussion.

Recently, in *EB (Born S) v ER (Born B); KG v Minister of Home Affairs*, the Constitutional Court declared section 7(3) of the *DA* unconstitutional and invalid to the extent that it failed to include the dissolution of marriage by death.[107] In the above case the Constitutional Court held that section 7(3) differentiated between spouses based on the way in which identical

98 *Divorce Act* 70 of 1979 (the *DA*).
99 Hahlo *South African Law of Husband and Wife* 2nd ed 418.
100 *Singh v Singh* 1983 1 SA 781 (C) 788F-G.
101 *T v R* 2017 1 SA 97 (GP).
102 *T v R* 2017 1 SA 97 (GP) para 20.18.
103 *Vergottini v Vergottini* 1951 2 SA 484 (W) 485B.
104 Hahlo *South African Law of Husband and Wife* 2nd ed 419.
105 *Monyepao v Ledwaba* (1368/18) [2020] ZASCA 54 (27 May 2020).
106 *Sithole* para 40.
107 *EB v ER* para 149.2.

marriages terminate[108] and this was not justifiable under section 36 of the *Constitution*.[109]

6 Conclusion

There is no doubt that the decision in *Sithole* was welcome to the litigant, Mrs Sithole, and other similarly placed spouses. However, this case note has shown that the same decision was not a reason to rejoice for those spouses who had become accustomed to the ease that came with their marriages being out of community. The transition to marriage in community of property will have a destabilising impact while they adjust to the changes by re-planning the disposition of their finances.

It has been shown that there are remedies available for those spouses who do not desire the community of property to regulate their marriage; however, these remedies are not without their challenges. Most of them are divorce remedies and they are not available if a spouse does not wish to obtain a divorce. Although the redistribution of assets remedy is no longer available only on divorce, this is of no use to a person who does not wish to wait for the death of his or her spouse.

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108 *EB v ER* para 56.
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List of Abbreviations

BAA	Black Administration Act 38 of 1927
CILSA	Comparative and International Law Journal of Southern Africa
DA	Divorce Act 70 of 1979
DG	Director-General
ITA	Income Tax Act 58 of 1962
JJS	Journal for Juridical Science
MMPLAA	Marriage and Matrimonial Property Law Amendment Act 3 of 1988
MPA	Matrimonial Property Act 88 of 1984
PELJ	Potchefstroom Electronic Law Journal
RCMA	Recognition of Customary Marriages Act 120 of 1998
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review