

Gumede v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23 (8 December 2008)

In the judgment Gumede v President of the Republic of South Africa and Others (CCT 50/08) [2008] ZACC 23 (8 December 2008) the Constitutional Court made an order changing the status of spouses in customary marriages which were concluded *before* 15 November 2000. The judgment will have an immediate impact on all matters where such spouses are involved, especially in conveyancing, divorce and estate practices.

Up until 7 December 2008, the position was as follows:

- The Recognition of Customary Unions Act (120/1998) ('The Recognition Act') determined that marriages of spouses who entered into a valid monogamous customary marriage after 15 November 2000, are regarded as marriages in community of property, unless the parties agreed otherwise in an antenuptial contract. The proprietary consequences of such marriages are determined by the provisions of the Matrimonial Property Act.
- Customary marriages concluded before 15 November 2000 are governed by customary law. (Since the parties in this matter resided in KwaZulu-Natal, the customary law that applied was those customary laws that were codified in certain KwaZulu-Natal provincial legislation which essentially retains marital power by providing that the male spouse in a marriage is the head of the house and owner of all assets.)

On Monday (8 December) the Constitutional Court held that the *distinction between customary marriages concluded before 15 November 2000 and those concluded thereafter, is discriminatory* and not justifiable in terms of our Constitution. Accordingly the court held that the relevant provisions must be struck down. The court also struck down certain provisions of Kwazulu-Natal provincial legislation which made the husband the manager over and owner of all assets.

Note that:

- The provisions are struck down with **retrospective effect**, with regards to **monogamous customary marriages**. Accordingly the default position is now that *all valid monogamous customary marriages are regarded as marriages in community of property no matter the date that the marriage was concluded*. (Of course, if the parties entered into an antenuptial agreement, their marriage is out of community.)
- However, the order does **NOT affect customary marriages that have been terminated death or divorce BEFORE this order is made**, i.e. before 8 December 2008. Accordingly where a party to a customary marriage passed away before this date, the marriage will still be regarded as a customary union with the specific rules that would apply on administration on of such deceased estates.
- To protect the interests of third parties, the court included in its order that any exercise of marital power that was made before the date of the order, should not be undone only as a result of the order.
- (There are specific provisions relating to polygamous customary marriages in the Recognition Act, and the Court indicated that the matter before it did not require a finding on these marriages.)

The judgment can be downloaded [here](#).