



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 60/25

In the matter between:

GD

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second Respondent

GJD

Third Respondent

Neutral citation: *GD v Minister of Home Affairs and Others* [2026] ZACC 39

Coram: Mhlantla ADCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J,
Nuku AJ, Rogers J, Savage J and Tshiqi J

Judgments: Dambuza J (unanimous)

Heard on: 26 May 2026

Decided on: 9 October 2026

Summary: Divorce Act 70 of 1979 — constitutionality of section 7(7)(c) —
distribution of assets — pension interest

Section 9(1) and 9(3) of the Constitution — arbitrary
differentiation — discrimination on the basis of gender and sex

ORDER

On application for confirmation of the order of the High Court of South Africa, Eastern Cape Division, Gqeberha:

1. The declaration of constitutional invalidity by the High Court of South Africa, Eastern Cape Division, Gqeberha, is confirmed.
2. Section 7(7)(c) of the Divorce Act 70 of 1979 is declared inconsistent with the Constitution and invalid—
 - (a) to the extent that, in violation of section 9(1) of the Constitution, it differentiates irrationally on the ground of gender; and
 - (b) to the extent that, in violation of section 9(3) of the Constitution, it unfairly discriminates on the ground of gender, by differentiating between women in pre- and post-1984 marriages out of community of property and without accrual.
3. The order in paragraph 2 above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to any marriage concluded on or after 1 November 1984.
4. The first respondent is directed to pay the applicant's costs.

JUDGMENT

DAMBUZA J (Mhlantla ADCJ, Kollapen J, Majiedt J, Mathopo J, Nuku AJ, Rogers J, Savage J and Tshiqi J concurring):

Introduction

[1] This is an application for confirmation of an order of constitutional invalidity made by the High Court of South Africa, Eastern Cape Division, Gqeberha

(High Court), which declared section 7(7)(c) of the Divorce Act¹ (impugned provision) inconsistent with the Constitution and, accordingly, invalid.²

[2] The applicant, GD (Mrs D), brings this application in her personal capacity and on behalf of all spouses who are affected by the impugned provision. The impugned provision excludes pension interest from redistribution during divorce proceedings if a marriage out of community of property and without accrual was concluded after 1 November 1984.³ The first respondent is the Minister of Home Affairs, who is responsible for administering the Divorce Act. The second respondent is the Minister of Justice and Constitutional Development (Minister of Justice), who is joined in the proceedings due to her interest in the remedy this Court may grant should it confirm the declaration of invalidity. The third respondent is GJD (Mr D), Mrs D's husband.

Factual background and litigation history

[3] Mr and Mrs D met in 1999 and started dating in 2001. On 25 April 2004, they entered into a marriage out of community of property and without accrual. When this matter was heard in the High Court, the couple had three minor children. Mrs D alleges that, although she engaged in her own profitable business projects during their marriage, her main focus was managing the family and supporting Mr D in his business and personal endeavours. She states that this materially contributed to the growth and maintenance of Mr D's estate. The marriage irretrievably broke down, leading to Mrs D instituting divorce proceedings on 13 October 2020 (divorce action).

[4] In the divorce action, Mrs D sought, amongst other things, a pension redistribution order in her favour, relying on this Court's judgment in *KG*.⁴ Mr D

¹ 70 of 1979.

² *GD v Minister of Home Affairs* [2025] ZAEQGQBHC 1; 2025 (5) 438 (ECGq) (High Court judgment).

³ For convenience, marriages entered into before that date are referred to as pre-1984 marriages, and those entered into on or after that date as post-1984 marriages.

⁴ This judgment is reported as *EB (born S) v ER (born B)*; *KG v Minister of Home Affairs* [2023] ZACC 32; 2024 (1) BCLR 16 (CC), 2024 (2) SA 1 (CC). The judgment concerned two cases – *EB* and *KG* – both of which dealt with section 7(3) of the Divorce Act. *EB* concerned the differentiation between marriages ended by divorce and

defended the divorce action, arguing that he had not provided maintenance to Mrs D during the marriage and that she did not have any claim to a redistribution of his assets.

[5] Mrs D argued that the impugned provision is unconstitutional on two grounds. First, in *KG* this Court held that the distinction between pre- and post-1984 marriages in relation to redistribution orders is arbitrary and irrational. Consequently, in terms of that judgment, there is in general no longer any distinction between pre- and post-1984 marriages. However, contrary to section 9(1) of the Constitution, in terms of the impugned provision, the distinction still exists with regard to pension interest. Second, the exclusion of pension interest from redistribution under the impugned provision unfairly discriminates on the basis of gender and sex, contrary to section 9(3) of the Constitution, for the same reasons that the Court invalidated section 7(3) of the Divorce Act in *KG*.

[6] Mrs D's argument was that, as a woman, she is in a vulnerable position due to the gender inequality inherent in society. In support of this argument, she referred to a joint report prepared by Prof Elsje Bonthuys and Dr Azille Coetzee, to which this Court had regard in *KG*.⁵ She also tendered two further expert reports. The first report, by Prof Bonthuys, is centred on the legislative history of the impugned provision, as well as societal and gender factors relating to pension benefits and their treatment upon divorce. The second report, by Mr Willem Hendrik Boshoff, a forensic actuary, sets out the employment earnings and retirement savings of women in South Africa. On the strength of both reports, Mrs D argued that the exclusion of pension interest from redistribution at divorce disproportionately impacts women, as husbands are more likely to have pensions, or to have more value in their pensions, than wives.

[7] The respondents did not oppose the matter in the High Court.

those ended by death with respect to the equitable distribution of the deceased estate. *KG* addressed section 7(3)'s exclusive application to pre-1984 marriages. This Court declared this differentiation to be discriminatory on the basis of gender and sex. Although the cases were decided in a single judgment, I refer to them separately as *EB* and *KG* for clarity.

⁵ *KG* id at paras 121-3.

[8] The High Court held that the distinction in the impugned provision between pre- and post-1984 marriages constitutes arbitrary differentiation contrary to section 9(1) of the Constitution, and is therefore unconstitutional and invalid. It further agreed that the impugned provision unfairly discriminates between women in pre- and post-1984 marriages on the basis of gender and sex, as this Court found in *KG*. It found that the differentiation hinged on Mr and Mrs D's marriage and the implementation of the accrual regime as the default regime for marriages out of community of property. Although a date of marriage is not a listed prohibited ground of discrimination under section 9(3) of the Constitution, the High Court held that, indirectly, the burden created by excluding post-1984 marriages in relation to pension redistribution falls more heavily on women than men. It, therefore, concluded that the impugned provision indirectly discriminates against women on the listed grounds of gender and sex. Relying on *KG*, it further held that withholding pension redistribution from one class of spouses, and particularly women in post-1984 marriages, is not fair discrimination.

[9] The Court also found that the respondents had not discharged the onus of justifying discrimination based on a listed ground in terms of section 36(1) of the Constitution. Furthermore, it held that arbitrary differentiation can never be reasonable or proportional for justification purposes under section 36(1) and, by parity of reasoning, unfair discrimination cannot be justified.

[10] The Court concluded that the whole of the impugned provision is invalid, as it serves no purpose beyond excluding spouses in post-1984 marriages from claiming redistribution of pension interest. It declined to suspend the declaration of invalidity in terms of section 172(1)(b)(ii) of the Constitution, holding that a "simple declaration of invalidity is sufficient". Its order does not have retrospective effect.

*In this Court**Applicant's submissions*

[11] Mrs D repeats the irrational differentiation and unfair discrimination submissions made in the High Court. She stresses that the impugned provision creates an arbitrary distinction contrary to section 9(1) and discriminates against women on the basis of gender and sex contrary to section 9(3), neither of which can be justified under section 36(1) of the Constitution.

[12] She relies on the expert evidence tendered in the High Court to buttress her position, stating that the joint report by Prof Bonthuys and Dr Coetzee demonstrates that women typically enter into marriage poorer and less financially independent than men, and, consequently, have less bargaining power when concluding antenuptial contracts. Women are also less securely employed than men and are concentrated in employment sectors that are not as well-remunerated as those populated by men.⁶ As a result, South Africa has among the highest mean and median gender-income gaps.⁷ Further, women are more likely to perform unremunerated household work than men.⁸ This often confines women to the home, where they perform unpaid care and domestic labour, freeing their husbands to focus on professional development and wealth accumulation.

[13] Mrs D contends that this means that the exclusion of post-1984 marriages from redistribution under section 7(3) impacts women more than men. She highlights that as stated in the joint report:

“The lack of a mechanism whereby the courts can ensure an equitable division of assets after the dissolution of marriage on account of one spouse’s informal and unacknowledged contribution to the other’s estate means that the legal rules fail to

⁶ Id at para 121.

⁷ Id.

⁸ Id at para 122.

correct the exploitation of women's care and domestic labour, to the direct and structural advantage of men.”⁹

[14] Additionally, Mrs D contends that the conclusions in Prof Bonthuys' report demonstrate the existence of a gendered pensions gap that directly contributes to the poverty of women. She maintains that the report shows that a large number of women rely on their partners' retirement investments rather than contributing independently to their own, due to women's income often being absorbed by household expenses, whilst men, who earn more on average, are more likely to invest in retirement schemes. As a result, women frequently make indirect contributions to the growth of their male partners' estates, including pensions, on the assumption that these will be shared in later life.

[15] Mrs D does not ask this Court to make any finding regarding the redistribution application. However, she submits that her efforts during their marriage allowed Mr D to accumulate a considerable estate, including pension interest that has far more value than her estate. As such, she argues that she is entitled to a just and equitable redistribution of Mr D's assets in terms of section 7(3), 7(4) and 7(5) of the Divorce Act. At present, if the redistribution were to be granted, it would necessarily exclude Mr D's pension interest as their marriage was concluded after 1 November 1984. It is for these reasons that she launched a constitutional challenge to the impugned provision in parallel to the divorce proceedings, she explains.

[16] Mrs D highlights that the final report, compiled by Mr Boshoff, evinces that retirement savings constitute a significant component of individual estates. On average, women are expected to retire with approximately 71% of the wealth accumulated relative to men, and receive only 74% of the retirement income relative to men. Men are more likely to have pensions, with 45% of them in possession of pension savings, compared to 43.4% in relation to women. The argument is that these statistics reflect

⁹ Id at para 123.

historical and ongoing employment and wage gaps. Additionally, due to the greater historical income gap, older women are likely to have accumulated even less wealth and pension interest relative to men than the average statistics indicate.

[17] To further emphasise her arbitrary differentiation argument, Mrs D relies on *KG* and *EB* to demonstrate that no legitimate purpose exists to permit pension interest to be redistributed in pre-1984 marriages but excluded from consideration for distribution in post-1984 marriages. Furthermore, there is also no rational reason to allow a full redistribution of all assets when spouses have no pension interest, but to permit only a partial redistribution when one or both spouses have pension interest.

[18] On unfair discrimination, she argues that, as this Court held in *KG*, it is more often women than men who are prejudiced by the absence of a redistribution remedy. There is no basis on which such discrimination can be held to be fair. In any event, no respondent has sought to discharge the onus to demonstrate that the discrimination resulting from the exclusion under consideration is fair, as required in terms of section 9(5) of the Constitution.¹⁰ Further, if it is accepted that the discrimination is irrational, it cannot be argued to be fair, she asserts. The exclusion does not serve the purpose of protecting spousal choice canvassed in *KG*.¹¹ As section 7(3) now applies

¹⁰ Section 9 of the Constitution provides:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) 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.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

¹¹ See discussion in *KG* above n 4 at paras 133-7.

to all marriages, pension interest is the only remaining exclusion. No spouse could plausibly have chosen a matrimonial regime based on section 7(7)(c) only. Even if they had, the reasons advanced in *KG* for rejecting choice as a justification apply with greater force here. Finally, Mrs D avers that the international law considered in *KG* makes no exception for pension interest. It requires redistribution in all marriages, without the exclusion of any asset type.

[19] On remedy and costs, Mrs D advances five grounds for consideration should this Court agree with the High Court's conclusion of invalidity. This Court only deals with four of the five grounds. First, as per the findings and recommendation made by the High Court, the impugned provision should be declared invalid in its entirety. Second, the conclusion by the High Court that the order of invalidity should not be suspended must be confirmed, consistent with this Court's order in *KG* – meaning that an interim reading-in should be provided, pending the enactment of remedial legislation. An immediate declaration of invalidity will simply reinforce redistribution under section 7(3) of the Divorce Act in relation to all assets, including pensions. Third, the declaration should apply prospectively so as not to disturb divorces that are finalised or marital estates that are wound up and distributed. Fourth, Mrs D argues that the High Court was correct in ordering costs against the Minister of Home Affairs and, should she be successful in this application, a similar costs order would be appropriate in this Court.

Respondents' submissions

Second respondent

[20] The Minister of Justice filed an explanatory affidavit and a notice to abide this Court's decision. As there was a delay in the filing of the affidavit and written submissions, the Minister applied for condonation. She agrees that the impugned provision has become vulnerable to a constitutional challenge based on irrational differentiation and discrimination subsequent to this Court's ruling in *EB* and *KG*. The

purpose of the affidavit filed by the Minister of Justice is to assist this Court in reaching a just and equitable remedy should it confirm the declaration of invalidity.

[21] According to the Minister of Justice, this matter has no implications on the Pension Funds Act,¹² which regulates the administration, preservation and payment of pension benefits. The outcome sought by Mrs D would not introduce any new administrative burden on pension funds, as they already implement redistribution orders pursuant to section 7(8) of the Divorce Act. She further highlights that pension interest would not be automatically divisible if the declaration is confirmed; it would continue to form part of the asset pool that a court would consider for redistribution under section 7(3), subject to structured judicial discretion and the just and equitable standard.

[22] The Minister of Justice emphasises that the appropriate remedy must be context-sensitive and must account for practical consequences, institutional competence and systemic stability. Any order granted should apply prospectively so as not to disturb completed divorces and wound-up marital estates. Given the intricate policy considerations reflected in the legislative scheme governing divorce, Parliament is best suited to resolve any defect found in the impugned provision. She notes that in *EB* and *KG*, this Court confirmed the declarations of invalidity but suspended them for 24 months to allow Parliament to pass legislation to cure the identified defects, while granting interim relief by way of a reading-in. If this Court confirms the declaration in this matter, the Minister of Justice requests a similar remedy, being a suspension of the order of invalidity for 24 to 36 months to allow Parliament to appropriately remedy the legislative defect in the impugned provision, along with interim relief providing that section 7(7) applies without paragraph (c).

[23] The Minister submits that the suspension will allow Parliament to cure the constitutional defect and reform the matrimonial statutory regime in a manner that conforms with the prescripts of the Constitution. Furthermore, such a remedy would be

¹² 24 of 1956.

consistent with this Court's past orders in relation to legislative challenges. It will not disrupt settlement negotiations and divorce proceedings that have reached advanced stages and are structured around the existing statutory framework.

[24] Finally, the Minister of Justice draws attention to the ongoing legislative reform within the matrimonial property regime being undertaken by the South African Law Reform Commission. This particularly concerns amending section 7 of the Divorce Act in a manner that accounts for contractual autonomy, general equality and creditor protection. She argues that a limited suspension coupled with interim relief would ensure that the statutory scheme is amended coherently.

First and third respondents

[25] Despite repeated requests, the Minister of Home Affairs declined to participate in the proceedings before this Court. Mr D also made no submissions in this Court, and did not participate in the proceedings before the High Court. However, in light of the contents of the affidavits filed by Mrs D and the Minister of Justice, and the submissions made by them, this Court is sufficiently seized with the issues to proceed without submissions from the Minister of Home Affairs or Mr D.

Issues

[26] Because these are confirmation proceedings brought in terms of section 172(2)(a) and (d) of the Constitution, the jurisdiction of this Court is inherently engaged. The only issues for determination by this Court are—

- (a) whether condonation should be granted for the Minister of Justice's late filing of the explanatory affidavit and written submissions;
- (b) the suspended order of invalidity in *EB* and *KG*;
- (c) whether the order of constitutional invalidity should be confirmed by this Court; and
- (d) if necessary, the appropriate remedy.

Condonation

[27] The applicant brought this application on 19 March 2025. This Court directed the applicant and the respondents to file written submissions by 15 December 2025 and 16 January 2026, respectively. The Minister of Justice filed an explanatory affidavit in this Court on 21 April 2026, over a year after the applicant filed this application. The Minister of Justice's written submissions were filed on 21 May 2026, five days before the hearing, which took place on 26 May 2026. The Minister of Justice now applies for condonation for the late filing of the explanatory affidavit and written submissions.

[28] The question is whether it is in the interests of justice to grant condonation.¹³ This Court requires a full explanation of the entire length of delay,¹⁴ with the length of the delay and the reasonableness of the explanation conditioning the decision to grant condonation.¹⁵ The Minister of Justice explains that the cause of the delay between March 2026, when the affidavit was prepared, and April 2026, when it was filed in this Court, is administrative and institutional. She contends that the delay was not deliberate and will not prejudice the applicant. However, the Minister of Justice does not set out in detail the events that led to the delay, which spans just over a year in the case of the explanatory affidavit and over four months in the case of the written submissions.

[29] Even if this Court were to accept that the delay was not deliberate—a conclusion difficult to reach without a proper explanation—the delay was unquestionably negligent, unreasonable, and impertinent. The inadequacy of the explanation is lamentable. Notwithstanding the inordinate delay, it is in the interests of justice that it be overlooked. The input of the Minister of Justice to the main issue under consideration is critical, particularly in the absence of opposition to the relief sought by Mrs D. The Minister of Justice is the official political and administrative custodian

¹³ *S v Mercer* [2003] ZACC 22; 2004 (1) SACR 1 (CC); 2004 (2) BCLR 109 (CC); 2004 (2) SA 598 at para 4.

¹⁴ *Van Wyk v Unitas Hospital (Open Democratic Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472; 2008 (4) BCLR 442 (CC) at para 20.

¹⁵ *Id* at para 22.

responsible for the Divorce Act. In addition, the applicant has not been prejudiced by the late filings. Condonation is therefore granted.

Extension of suspension of invalidity

[30] On 19 September 2025, the Minister of Justice applied to this Court for a 12-month extension of the 24-month suspension order granted in *EB* and *KG*, which was due to expire on 10 October 2025.¹⁶ The Minister of Justice submitted that, although a draft General (Family) Laws Amendment Bill (Amendment Bill)¹⁷ addressing the constitutional defects identified in *EB* and *KG* was in progress, Parliament would not be able to pass the impending legislation before 10 October 2025. She cited several supervening circumstances, including the 2024 national elections and the ensuing appointment of a new Cabinet. As a result, the Amendment Bill still has to undergo public participation and adoption in both the National Assembly and the National Council of Provinces. The application was unopposed by the applicants in *EB* and *KG*, and the *amici curiae* (friends of the court) in that matter equally did not make submissions.

[31] This Court extended the period of suspension by 18 months to accommodate any further delays that might occur. The suspension period will expire on 10 April 2027. The interim reading-in granted by this Court in *EB* and *KG* remains operative. The extended suspension and interim order will therefore have a bearing on the content of the just and equitable remedy granted by this Court.

Confirmation of the order of invalidity

[32] As emphasised throughout Mrs D's submissions, much of this Court's reasoning in *EB* and *KG* with regard to section 7(3) of the Divorce Act, as it then stood, applies equally to the impugned provision in this matter. Prior to *EB* and *KG*, section 7(3) read, in relevant part:

¹⁶ *KG* above n 4 at para 150.

¹⁷ B 20 of 2025

“A court granting a decree of divorce in respect of a marriage out of community of property—

- (a) entered into *before the commencement of the Matrimonial Property Act, 1984*, [on 1 November 1984] in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded;

...

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.” (Emphasis added.)

[33] Section 7(7) of the Divorce Act reads, in relevant part:

- “(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

...

- (c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into *on or after 1 November 1984* in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.” (Emphasis added.)

For clarity, the Matrimonial Property Act,¹⁸ which introduced the provisions impugned in *KG* and in this matter, came into force on 1 November 1984.

[34] In *EB* and *KG*, this Court held that the exclusion under section 7(3) of post--1984 marriages was not irrational for purposes of section 9(1) of the Constitution, as there was a legitimate distinction between pre- and post-1984 marriages under the scheme of

¹⁸ 88 of 1984.

the Divorce Act which the exclusion of post-1984 marriages addressed.¹⁹ However, this Court determined that the distinction unfairly discriminated against women in post-1984 marriages per section 9(3),²⁰ which could not be justified under section 36(1) of the Constitution.²¹ It thus struck down the exclusion of post-1984 marriages in section 7(3) of the Divorce Act. As the impugned provision in this matter was not challenged in *EB* and *KG*, its constitutionality was not addressed by this Court.

[35] Notwithstanding this Court's reasoning in *KG*, that decision renders the impugned provision susceptible to a section 9(1) challenge. The broader legislative scheme in which pre- and post-1984 marriages were addressed differently no longer exists. Both Mrs D and the Minister of Justice provided extensive written submissions addressing the purpose of excluding pension interest from redistribution in relation to post-1984 marriages. Both parties concur that the exclusion was inherently related to the pre-*KG* legislative scheme. There is no longer a legitimate purpose for differentiating between pre- and post-1984 marriages in relation to the redistribution of pension interest.

[36] The scheme of the Divorce Act, as it now stands, explicitly contemplates the redistribution of assets for all marriages out of community of property and without accrual in appropriate circumstances,²² and the inclusion of pension interest in the assets subject to redistribution upon divorce.²³ In light of the judgment in *KG*, marital assets are subject to redistribution regardless of when the marriage in question was concluded. The exclusion of post-1984 marriages from the redistribution of pension interest, unlike any other asset, is vestigial. The distinction it creates is no longer connected to any rational purpose and cannot be sustained.

¹⁹ *KG* above n 4 at paras 112-3. This distinction was aimed at compensating spouses in pre-1984 marriages for the absence of a right to share assets through the marital accrual scheme introduced by the Matrimonial Property Act.

²⁰ *Id* at para 137.

²¹ *Id* at paras 138-43.

²² See section 7(3).

²³ See section 7(7)(a).

[37] As Mrs D argues, there is no justification for the limitation of the section 9(1) and (3) equality rights by the impugned provision for the reasons that have been accepted by the High Court. In light of this conclusion, little more need be said in relation to the section 9(3) challenge of discrimination based on gender and sex. This Court's reasoning in *KG* applies equally to this matter. The evidence placed before this Court in the expert reports of Prof Bonthuys and Mr Boshoff demonstrates that the pernicious wealth gap between men and women identified in *KG* exists equally in relation to pension interest. The High Court correctly noted that the exclusion of pension interest from redistribution would thus disproportionately impact women in divorce proceedings, who are less likely to have pension interest of their own or would likely have lower pensions than their partners in the event that they do.²⁴

[38] Unpaid domestic labour and domestic expenses are disproportionately borne by married women, to the benefit of their husbands, who are more likely to devote more time to their career advancement and greater financial resources to their pensions. Such direct and indirect contributions to a couple's assets may be competently examined by a court during divorce proceedings with a view to a just and equitable division of assets.²⁵ Courts may, in pursuit of a just and equitable distribution of assets upon divorce, also consider the freedom of couples to choose their marital arrangements, as well as the disparities in bargaining power that often characterise these arrangements. The impugned provision cannot be argued to protect the "illusory freedom of choice"²⁶ canvassed in *KG*. In light of this discretion afforded to the courts in divorce proceedings, the explicit exclusion of post-1984 marriages could not be justified under section 36(1) of the Constitution, even if the distinction were rational in the post-*KG* scheme of the Divorce Act. As it stands, the distinction is not rational and an irrational distinction cannot, by definition, be justified under section 36(1). The High Court was

²⁴ High Court judgment above n 2 at para 49.

²⁵ See section 7(4) and (5) of the Divorce Act.

²⁶ High Court judgment above n 2 at para 49.3.3.

thus correct in determining that the impugned provision is inconsistent with the Constitution and must be confirmed as invalid by this Court.

Remedy

[39] On remedy, the parties agree that the declaration of invalidity must be prospective, leaving concluded divorce proceedings and wound-up marital estates undisturbed. However, they disagree on whether the declaration of invalidity should be given immediate effect. The Minister of Justice submits that the overall scheme of matrimonial legislation in South Africa is replete with policy considerations that Parliament is best suited to address. As such, it would be preferable to suspend the declaration of invalidity, as this Court did in *EB* and *KG*, to allow Parliament to remedy the defect in a coherent manner. This may help to prevent any unforeseen gaps in the overall legislative scheme and provide certainty for courts and administrators involved in divorce proceedings.

[40] This Court's approach in *EB* and *KG* is indeed instructive. This Court suspended the declaration of invalidity for a period of 24 months and granted interim reading-in relief, thus balancing the vindication of constitutional rights with the need to ensure legislative coherence and consistency.

[41] At the time of writing, approximately three years have elapsed since the decision in *EB* and *KG*. The interim relief granted in that decision remains operative in relation to section 7(3) of the Divorce Act. If, as the Minister of Justice avers, Parliament is already considering amendments to address the defects identified in *EB* and *KG* and in this matter through the Amendment Bill, it seems unnecessary to suspend the declaration of invalidity in this matter beyond the timeframe already established by *EB* and *KG*.

[42] It is further unclear how a suspension and grant of interim relief in the form of reading-in would be appropriate in these circumstances. In *KG*, the exclusion of post-1984 marriages formed a component of section 7(3), warranting an interim

reading-in to vindicate constitutional rights without disturbing the broader function of the provision. This preserved the overall coherence of the legislative scheme while vindicating the rights violated by the impugned provisions in that matter.

[43] The impugned provision in this matter is distinct in one key respect. As the High Court correctly noted, section 7(7)(c) functions solely to exclude post-1984 marriages from the redistribution of pension assets.²⁷ It serves no constitutionally compliant function and has no additional impact on the overall coherence of the legislative scheme. There is thus no latitude for this Court to grant an interim remedy similar to *EB* and *KG*. Were this Court to do so, it would fail to firmly vindicate, as it must, the very rights violated by the impugned provision.

[44] I note only for the sake of emphasis that the proposed Amendment Bill would make permanent the interim relief granted in *KG* in respect of section 7(3) of the Divorce Act, and would remove section 7(7)(c) entirely. It hardly seems just or equitable to suspend the declaration of invalidity in relation to section 7(7)(c) for 24 to 36 months, well beyond the already generous timeframe this Court afforded Parliament in relation to *EB* and *KG*, when the legislative remedy proposed is identical to the remedy available immediately before this Court.

[45] The Amendment Bill would, inter alia, remove the impugned provision in its entirety from the Divorce Act. As Mrs D stresses, there is no guarantee that Parliament will adopt the Amendment Bill or that it will be signed into law by the President. Furthermore, as this Court held in *Mazibuko*,²⁸ there is no merit in delaying a challenge to the constitutional validity of a statute on the basis of a purported imminence of reforming legislation.²⁹ However, as Mrs D also accepts, if the Amendment Bill is enacted prior to this Court ruling in this matter, the application will become moot.

²⁷ Id.

²⁸ *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC).

²⁹ Id at para 70. See also *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) at para 122.

[46] Were this Court to grant the declaration of invalidity with immediate effect, pension interest would simply be dealt with as part of the assets subject to redistribution under section 7(3) and (8) of the Divorce Act. It would thus fall within the ambit of the suspension and interim remedy provided by this Court in *EB* and *KG*. This would have no retrospective effect, and thus would not affect finalised divorce proceedings or wound-up matrimonial estates. This would ensure certainty and consistency in the overall legislative scheme regarding divorce proceedings, while vindicating the rights impacted by the impugned provision. As such, I see no reason why the High Court's declaration of invalidity should not be confirmed with immediate effect.

Costs

[47] Mrs D seeks costs in this application against the Minister of Home Affairs. Such costs were awarded in the proceedings before the High Court and by this Court in *KG*. I note that the challenge entails legislation of some complexity, and that the parties have raised no opposition to a costs order in Mrs D's favour. Costs will generally follow the result, and I see no reason to depart from this well-established principle. The Minister of Home Affairs must cover Mrs D's costs in this application.

Order

[48] The following order is made:

1. The declaration of constitutional invalidity by the High Court of South Africa, Eastern Cape Division, Gqeberha, is confirmed.
2. Section 7(7)(c) of the Divorce Act 70 of 1979 is declared inconsistent with the Constitution and invalid—
 - (a) to the extent that, in violation of section 9(1) of the Constitution, it differentiates irrationally on the ground of gender; and
 - (b) to the extent that, in violation of section 9(3) of the Constitution, it unfairly discriminates on the ground of gender, by differentiating

between women in pre- and post-1984 marriages out of community of property and without accrual.

3. The order in paragraph 2 above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to any marriage concluded on or after 1 November 1984.
4. The first respondent is directed to pay the applicant's costs.

For the Applicant:

M Bishop and S Webb instructed by
Catto Neethling Wiid Incorporated

For the Second Respondent:

M Mphaga SC and M D Sekwakweng
instructed by the Office of the State
Attorney, Pretoria