

## SIGNIFICANT CHANGES AHEAD FOR DIVORCING COUPLES MARRIED OUT OF COMMUNITY OF PROPERTY

A landmark ruling by the Gauteng High Court in Pretoria has delivered some good news for couples married out of community of property and without the accrual system. The ruling stipulates that neither party will walk away empty-handed when they get divorced.

On 11 May 2022, the Pretoria High Court declared that Section 7(3)(a) of the Divorce Act (70 of 1979) is inconsistent with the Constitution and invalid to the extent that it limits the operation of Section 7(3) of the Act as applicable to marriages out of community of property that were entered into before the Matrimonial Property Act that came into effect on 1 November 1984.

This ruling led to the Pretoria High Court asking the Constitutional Court to confirm an order that will have significant implications on how assets are distributed when couples who are married out of community of property get divorced.

The judgement followed an application that was brought by a woman who got married out of community of property in March 1988, excluding the accrual system. The respondents in the case were the Minister of Home Affairs, the Minister of Justice and Constitutional Development, and the woman's husband. The application was unopposed.

The wife maintained that the "limited and exclusionary" application of Section 7(3)(a) of the Divorce Act constitutes unfair discrimination, prohibited by Section 9(3) of the Constitution. It also imposed a limitation on the right to equality.

Shani van Niekerk, a Senior Associate at Adams & Adams Attorneys, appeared on behalf of the Pretoria Attorneys Association and was admitted to the proceedings as a friend of the court. She maintained that the ruling means that individuals married out of community of property without accrual will be entitled to claim a redistribution of assets despite what their signed antenuptial contract may prescribe.

Such a redistribution claim would, however, not be an automatic entitlement: To be successful, a spouse

instituting a Section 7(3) claim would still have to prove their direct or indirect contributions made toward the estate of their spouse. Each claim will differ as the court would not only have to decide whether the spouse was entitled to a claim, but also the extent of the claim.

Senior Associate and Family-law Attorney at Barnard Incorporated, Natasha Truyens, noted that, should the Constitutional Court confirm the order, this will have a significant and compelling effect on many marriages in South Africa.

Section 7(3)(a) of the Divorce Act states that: "A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, 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 subsection (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."

Judge Elmarie van der Schyff took issue with the words "entered into before the commencement of the Matrimonial Property Act, 1984," saying that the phrasing was inconsistent with the Constitution and, therefore, invalid.

She further stated that Section 7(3)(a) separated the two parties solely on the date of the commencement of the Matrimonial Property Act where:

- + The parties could incorporate the accrual system into their marital property regime but, for one or other reason, failed or refrained from doing so; or
- + The parties decided to exclude the accrual system.

Judge Van der Schyff said: "The only difference between these groups is speculative in that it can be argued that there might be members in the first

group who did not know that they could incorporate the accrual system post the commencement of the Matrimonial Property Act, while a deliberate choice underpinned the position of the second group.”

“Speculation aside, these groups are par excellence in a similar situation, and yet the one group is denied the benefit of Section 7(3)(a) only on the basis of the date on which their marriage was concluded.”

“The differentiation amounts to discrimination based on the date on which a marriage was concluded, because economically-disadvantaged parties’ human dignity is impaired if they cannot approach the court to exercise the discretion provided for in Section 7(3) of the Divorce Act.”

“Unlike their counterparts whose marriages were concluded before 1 November 1984, economically-disadvantaged parties who contributed to their spouses’ maintenance or the growth of their estates are vulnerable parties whose only recourse is to approach the court for maintenance. The unequal power relationship implicit to any maintenance claim, and the extent to which it renders an economically-disadvantaged party vulnerable in these circumstances, speaks for itself.”

**Source:**

<https://www.moonstone.co.za/court-ruling-has-major-implications-for-divorcing-couples-married-out-of-community-of-property/>

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