

## **SECTION 7(3) OF THE DIVORCE ACT AND ITS CONSTITUTIONAL INVALIDITY**

Civil marriage is defined as a legally recognised lifelong voluntary union between a man and woman to the exclusion of others (*Heaton, J., Kruger, H. South African Family Law. 4th ed. LexisNexis, 13*).

To understand how our laws relate to marriage, you need to understand the different marital regimes themselves. In South Africa, we have marriages in community of property and out of community of property. Marriages out of community of property can be further subcategorized as marriages with the inclusion or exclusion of the accrual system.

A marriage in community of property means that both assets and liabilities are brought into one joint estate and upon death or divorce the estate will be divided equally between the parties. This was mainly known as the default marriage, and, although it has its pros there are cons that are to be carefully considered such as the lack of protection against your spouse's creditors.

A marriage out of community of property, however, allows couples to have an estate separate from each other. This, in theory, allowed couples to have a choice whether they wanted to be married with the inclusion or without the inclusion of accrual. The inclusion of accrual means that upon death or divorce the financial growth of the estates is measured and that growth is divided equally between the spouses. The spouse with the biggest growth will have to share 50% of their growth in their estate to equalise the marital contribution. The exclusion of accrual means that the estates are left separate.

Before the 1<sup>st</sup> of November 1984, when the *Matrimonial Property Act 88 of 1984*, (hereinafter referred to as the Matrimonial Act) came into effect, marriages were either in or out of community of property. This changed when the Matrimonial Property Act came into effect and introduced the accrual system where couples had a choice to enter into an agreement which would include a profit and loss component as discussed above.

This created issues for spouses who did not have the option to enter into the accrual system before the Matrimonial Property Act was passed. These spouses, mainly women, were left in unfair positions where they were in an out of community of property marriage with the exclusion of the accrual system and at the date of divorce, they could not claim from their husband's estate. This was seen to be unfair especially when the wife had directly contributed to the husband's estate whether it be from bearing and caring for his children, cooking and cleaning or doing whatever was necessary to be a homemaker in his home.

Accordingly, section 7(3) of the *Divorce Act 70 of 1979*, (hereinafter referred to as the Divorce Act) was enacted. This allowed the court to grant a redistribution order of assets or cash in terms of marriages out of community of property with the exclusion of the accrual system entered into before the Matrimonial Property Act was enacted. However, what about the marriages out of community of property with the exclusion of accrual that were entered into after the Matrimonial Property Act?

In the ground-breaking case of *KRG V MINISTER OF HOME AFFAIRS [2022] 40023-21(GP)*, the abovementioned question was posed and the constitutionality of S7(3) of the Divorce Act was challenged. The husband and wife in this particular case were married out of community of property with the exclusion of accrual in 1988 and the wife, therefore, was not entitled to rely on Section 7(3) of the Divorce Act.

The wife based her claim of constitutional invalidity on the fact that it was unfair discrimination based on sex, gender and marital status which led to the entrapment of women in harmful and toxic relationships as they lacked the financial means to survive independently.

During this case, the court relied on various differing opinions from various experts who submitted reports for the court's consideration. Many of the opinions were in favour of the wife's claim that the societal expectations of that time were that a woman was to be a homemaker for her husband. More importantly up until about 1993, the typical patriarchal system where a man was head of his family and had full rights to control his wife was still in place, some nine years after the Matrimonial Property Act had come into effect.

Justice van der Schyff took the abovementioned opinions into account and in summary, his judgement was as follows:

- In terms of Section 9 of the Divorce Act, redistribution is limited in that it cannot include a spouse's separate assets therefore this section could not serve a spouse in this position;
- To have a spouse claim maintenance instead of a redistribution would essentially force them to continue to be dependent on their more successful ex-spouse after the divorce;
- The courts should view the law in a light that is just and equitable to all of the people who fall under such laws;
- Section 7(3) of the Divorce Act creates uncertainty, and that uncertainty creates prejudice and inequality.

Therefore, Justice van der Schyff ordered the following:

1. That Section 7(3)(a) be declared inconsistent with the Constitution as it limits relief to only marriages out of community of property with the exclusion of accrual entered into before 1<sup>st</sup> November 1984;
2. The words "entered into before the commencement of the Matrimonial Property Act, 1984" are found to be inconsistent and invalid and should be severed from Section 7(3)(a) of the Divorce Act;
3. This case is to be referred to the Constitutional Court for confirmation as it is based on constitutional invalidity.

In conclusion, although this case has not been confirmed by the Constitutional Court, it is setting a precedent for equality of women who felt that they had no right to choose but spent years of their lives taking the position of a homemaker and silently contributing to their husband's estate.

