

## The Constitutional Validity of Section 7(3) of the Divorce Act

In broad terms, section 7(3) of the Divorce Act, Act 79 of 1979 (Read more [HERE](#)) provides that, where spouses married out of community of property get divorced, the divorce court may make an equitable order that assets of the one spouse be transferred to the other (redistribution order). For ordinary civil marriages, this remedy was only available where the marriage was entered into before November 1, 1984 (the date that the Matrimonial Property Act, Act 88 of 1984 [Read more [HERE](#)] came into operation).

On October 10, 2023, the Constitutional Court of South Africa handed down a landmark decision in the matters of *Booyesen v Richardson & Others* (CCT 364/21) (the "Booyesen matter") and *Greyling v Minister of Home Affairs & Others* (CCT 158/22) (the "Greyling matter") which **matters** were heard together.

The Booyesen matter concerns the exclusion of a redistribution remedy where a marriage is terminated by death rather than divorce and the Greyling matter concerns the exclusion of a redistribution remedy where the marriage is entered into on or after November 1, 1984. In these cases, the Constitutional Court ("CC") was tasked with determining the constitutional validity of Section 7(3) of the Divorce Act, together with the question whether such exclusions limit section 9(1) and/or section 9(3) of the Constitution and whether such limitations are justifiable.

The Constitutional Court concluded that the differentiation between individuals who entered into a marriage (and an antenuptial agreement) before and after the commencement of the Matrimonial Property Act, constitutes unjustifiable and indirect discrimination on the grounds of gender.

In the Booyesen matter the CC confirmed the High Court's order of constitutional invalidity and declared that subsection 7(3) of the Divorce Act is inconsistent with the Constitution and invalid to the extent that it fails to include the dissolution of marriage by death. Likewise, the CC in the Greyling matter confirmed the High Court's order of constitutional invalidity and declared that paragraph (a) of subsection 7(3) of the Divorce Act is inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act.

The declaration of invalidity has been suspended for a period of 24 months from the date of the order (until October 10, 2025) to enable Parliament to take steps to cure the constitutional defects identified in this judgment.

This ruling has brought significant changes to South African divorce law and the rights of spouses in marriages out of



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community of property. It provides that individuals married out of community of property without the accrual will now be entitled to claim a redistribution of assets despite the contents of their signed antenuptial contract.

However, it should be kept in mind that a redistribution claim is not an automatic entitlement. A spouse instituting a Section 7(3) claim will still need to prove his/her direct or indirect contributions made towards the estate of the other spouse to be successful. A court hearing the matter will have to consider all the circumstances of the case.

The Court's decision has also sparked debates on the challenges it currently faces in its implementation and some critics argue that it could lead to an increase in divorce rates as spouses may view the redistribution remedy as an incentive to end their marriages. Others have raised concerns about the weight and validity of an antenuptial contract and the potential for abuse, as spouses may attempt to manipulate the system to gain a more significant share of the marital assets.

As the South African legal system continues to adapt to these changes, it remains to be seen how the ruling will shape the future of divorce law in the country.





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## Practice Area News

**Customary Law Marriage - Validity of Marriage Certificate.** *Mgenge v Mokoena and Another* [2023] 2 All SA 513 (GJ) - Requirements of a customary marriage – Marriage certificate provides prima facie proof of the customary marriage against which applicant did not cast doubt, application dismissed with costs. Read more [HERE](#).

**Constitutional Invalidity of S 4 of the Mediation in Certain Divorce Matters Act 24 of 1987.** *Centre for Child Law v TS and Others* [2023] JOL 59835 (CC) – The CC declared section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 to be inconsistent with the Constitution and invalid to the extent that it precludes never-married parents and married parents who are not going through a divorce, and their children, from accessing the services of the Office of the Family Advocate in the same manner as married parents who are divorced or going through a divorce do. Read more [HERE](#).

**Forfeiture.** A husband forfeits the patrimonial benefits of the accrual system after showing no regard for his role as a husband and father and having made no contribution of any kind to the common home, neither financially nor emotionally. *M v M* (GP) (unreported case no 56859/2021; 26859/2021, 21-2-2023) (Swanepoel J). Read more [HERE](#).

**Divorce Amendment Bill (B22 of 2023).** The Amendment Bill - To amend the Divorce Act, 1979, to insert a definition for a Muslim marriage; to provide for the protection and to safeguard the interests of dependent and minor children of a Muslim marriage; to provide for the redistribution of assets on the dissolution of a Muslim marriage; to provide for the forfeiture of patrimonial benefits of a Muslim marriage; and to provide for matters connected therewith. Read more [HERE](#).

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