

Distribution of assets: Section of Divorce Act deemed unconstitutional

By [Natasha Truysens](#)

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The Pretoria High Court has declared that Section 7(3)(a) of the Divorce Act is inconsistent with the Constitution and invalid to the extent that it results in unfair discrimination in respect of 'out of community of property' marriages.



Image source: zimmytwos – [123RF.com](#)

The Constitutional Court will soon have to consider whether an order granted in the Pretoria High Court should be confirmed or not.

On 11 May 2022, the Pretoria High Court delivered a judgment which declared that Section 7(3)(a) of the Divorce Act 70 of 1979 is inconsistent with the Constitution and invalid to the extent that the provision limits the operation of Section 7(3) of the Divorce Act to marriages out of community of property entered into before the commencement of the Matrimonial Property Act 88 of 1984 on 1 November 1984.

The Honourable Justice Van der Schyff took issue with the wording, “entered into before the commencement of the Matrimonial Property Act, 1984,” saying its phrasing was inconsistent with the Constitution and therefore invalid.



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Section 7(3)(a) of the Divorce Act is read without the inclusion of those words.

“ 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; or ... 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 assets, of the other party as the Court may deem just to be transferred to the first-mentioned party. ”

The practical implication of the judgment would mean that any person who entered into an antenuptial contract without accrual, after the commencement of the Matrimonial Property Act may now ask a Court for a redistribution of assets – overriding the content of their signed antenuptial contract – if the Court deems it appropriate and just. The factors which the Court would have to consider, other than any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party, would include the existing means and obligations of the parties, any donation made by one party to the other during the subsistence of the marriage, and any other factor which should in the opinion of the Court be taken into account.



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The Court had to consider whether, by the standards of the Constitution, Section 7(3) of the Divorce Act amounted to discrimination against a person. In the judgment, the Court said that, "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 s 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."

Should the Constitutional Court confirm the order, it will have a significant and compelling effect on many marriages in South Africa.

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