

Short notes on:

## Are the future of Antenuptial Contracts in the Balance?

### **Introduction**

On the 11th of May 2022, the High Court of Pretoria declared Section 7(3)(a) of the Divorce Act, 70 of 1979, inconsistent with the Constitution.

Section 7(3)(a) of the Divorce Act reads:

*(3) 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, 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... 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.*

With this ruling, the court made strong mention of the wording "*entered into before the commencement of the Matrimonial Property Act, 1984,*" stating that this phrase was inconsistent with the Constitution and therefore invalid.

### **What does this mean?**

Individuals who are married out of community of property, without accrual, regardless of the content of a signed antenuptial contract, will now be able to ask the court for a redistribution of assets. However, such an application is not an outright right.

The onus will be on the individual spouse to prove that they directly or indirectly contributed to the other spouse's estate when instituting Section 7(3). For example, they looked after the kids and the home while the other spouse's estate grew, being the only breadwinner.

And when a court hears such an application, a court will need to consider whether the spouse is entitled to a claim and, secondly, to what extent the claim may be held.

Those who previously divorced with a similar contract entered into when they got married will now also be allowed to approach the court for relief. Still, again this will be dependent on many other factors.

Nevertheless, this will be a massive relief for those who "walked away" from their marriages with nothing. This judgement also creates a balance for unfair marriage contracts, where people enter into marriages not knowing the unfair discrimination presented to them. The judgment also focused on the discrimination towards those coming from an economic disadvantage, especially women. We should also note that this will not affect any marriages entered into community of property.

### **Conclusion**

This will significantly impact marriages entered into with the Accrual system, especially once the Constitutional Court confirms this judgment.

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